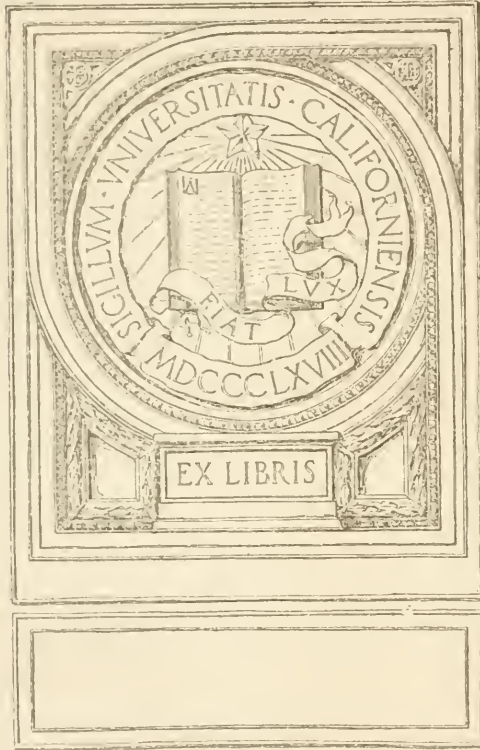






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# LAWS RELATING TO THE NAVY ANNOTATED

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INCLUDING THE CONSTITUTION OF THE  
UNITED STATES, THE REVISED STATUTES  
OF THE UNITED STATES, AND THE UNITED  
STATES STATUTES AT LARGE

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IN FORCE MARCH 4, 1921

COMPILED BY  
GEORGE MELLING



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DEPARTMENT OF THE NAVY,  
OFFICE OF THE JUDGE ADVOCATE GENERAL,  
*Washington, June 28, 1922.*

From: The Judge Advocate General of the Navy.

To: The Secretary of the Navy.

1. There is transmitted herewith a compilation of the laws relating to the Navy, Navy Department, and Marine Corps, annotated, which has been prepared by Mr. George Melling, attorney in this office, by authority of the Secretary of the Navy, pursuant to the following resolution of the United States Senate, adopted March 30, 1914:

*Resolved*, That the Secretary of the Navy be requested to prepare and submit to the Senate at its next regular session, or as soon thereafter as practicable, a compilation, with complete index, of existing laws relating to the Navy, Navy Department, and Marine Corps, with annotations showing how such laws have been construed and applied by the Navy Department, the Comptroller of the Treasury, the Attorney General, or the courts, the cost of said compilation, not to exceed \$3,000, to be covered by appropriations to be reported by the Committee on Appropriations.

2. It is recommended that this compilation be published for the information of the naval service, with the understanding that no inference of departmental construction is to be drawn from the arrangement of the laws and cross references embodied therein, or from the inclusion or omission of a particular enactment, and that no added weight is given to any decision or opinion by reason of its inclusion.

J. L. LATIMER.

Approved, June 28, 1922.

THEODORE ROOSEVELT,  
*Acting Secretary of the Navy.*

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## PREFACE.

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This compilation is divided into three parts, in addition to an introduction briefly explaining the sources of the law governing the Navy and certain elementary rules for the interpretation of statutes.

Part 1 contains the full text of the Constitution of the United States and all amendments thereto, with digested decisions and opinions of especial interest to the Navy, and an analytical index reproduced from official documents.

Part 2 consists of the sections of the Revised Statutes of the United States relating to the Navy, Navy Department, and Marine Corps, numerically arranged, as published in the second edition of the Revised Statutes<sup>1</sup> and subsequent amendments to and including March 4, 1921. The annotations to these sections contain references to related statutes, as well as digests of decisions and opinions on the same subject.

Part 3 embodies acts and resolutions of Congress in force March 4, 1921, which are not contained in the Revised Statutes, and which have been reprinted from the United States Statutes at Large.<sup>2</sup> Many of these laws are quoted or summarized in Part 2, in connection with sections of the Revised Statutes to which they relate; but they have nevertheless been placed in their chronological order in Part 3, except where they expressly amend or reenact particular sections of the Revised Statutes or subsequent enactments, in which case they have in general been reproduced in the place of the provision for which substituted, without needless duplication. In Part 3 the annotations consist principally of cross references to sections of the Revised Statutes and other enactments on the same subject which have been more fully annotated.

This arrangement of the compilation will make it possible for those using it most frequently to turn to a particular section of the Revised Statutes or to an act or resolution of a particular date, with which they are familiar, without the necessity of consulting the index on every occasion; while related statutes may also be readily located, from the cross references, without recourse to the index. Furthermore, the sections of the Revised Statutes are grouped, as in the official publication, under descriptive titles<sup>3</sup> and chapter headings which will also facilitate the use of the compilation without constant reference to the index. At the same time, no effort has been spared to make the index as complete as possible.

It was naturally impracticable to annotate fully every provision of law contained in the compilation, as that would have produced a work so voluminous as to defeat its purpose. In this situation, certain sections have been annotated copiously, and others more briefly or not at all, to the end that the compila-

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<sup>1</sup> See Introduction, p. 2.

<sup>2</sup> See Introduction, p. 5.

<sup>3</sup> See Introduction, p. 3.

tion might embody the material which, in the light of past experience, was believed to be of greatest value.

In not a few instances conflicting opinions have been rendered as to the interpretation of some statutory provision concerning which there has been no final adjudication. In such cases the various opinions expressed on the subject have been digested without regard to their effect, so that all precedents might be available for consideration should the question again arise.

In order that the compilation might be found useful by those not trained in the law or not having access to the decisions cited therein, the digests have been stripped of technical language wherever possible, and made as full as space would permit, even to the point, in some instances, of reproducing nearly the entire decision, contrary to the usual practice in works of this character. Other decisions which were not of general interest, or which were merely cumulative, have been cited without any digest of the particular case.

It has been found necessary to include in the compilation some few statutory provisions which were possibly not in force on March 4, 1921, but which had not been expressly repealed and as to the existence of which there was such doubt that their omission would have been unwarranted in the absence of a definite ruling on the subject. Other provisions which were expressly repealed or plainly superseded by later enactments have been omitted or, when of possible historical value, have been included with explanatory notes.

An incomplete advance copy of the compilation, which was issued in pamphlet form in 1915, has been revised and embodied in the finished work.

Certain abbreviations used in citations throughout the compilation are explained in the Introduction.<sup>4</sup> Other citations which may require explanation are the following: "R. S." refers to the Revised Statutes of the United States, second edition; "Stat." refers to the United States Statutes at Large; "Comp. Dec." refers to decisions of the Comptroller of the Treasury; "Op. Atty. Gen." refers to opinions of the Attorneys General; "C. M. O." refers to court-martial orders published by the Navy Department; "S. and A. Memo." refers to memoranda published monthly by the Bureau of Supplies and Accounts of the Navy Department; "Naval Dig." refers to a digest published by the Navy Department in 1916; file numbers refer to papers on file in the office of the Secretary of the Navy.

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<sup>4</sup> See Introduction, p. 6.

## INTRODUCTION.

- I. THE CONSTITUTION.
  - II. THE REVISED STATUTES.
  - III. THE STATUTES AT LARGE.
  - IV. DECISIONS OF COURTS, OPINIONS OF LAW OFFICERS OF THE GOVERNMENT,  
REGULATIONS, ETC.
  - V. CLASSIFICATION OF STATUTES.
  - VI. THE INTERPRETATION AND CONSTRUCTION OF STATUTES.
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The law governing the Navy is contained principally in the Constitution of the United States, the Revised Statutes of the United States, and the United States Statutes at Large. In addition there is a large mass of naval law to be found in the decisions of courts, opinions of law officers of the Government, regulations issued with the express or implied approval of the President, and customs and usages of the Navy.

### I. THE CONSTITUTION.

**The Constitution consists of** seven original articles, drafted in 1787, and nineteen articles in amendment thereof which have since been adopted. It is provided by the original Constitution (Art. VI) that "this Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

Congress is authorized by the Constitution "to provide and maintain a Navy," and "to make rules for the government and regulation of the land and naval forces" (Art. I, sec. 8). These clauses of the Constitution are the authority for most of the statutory enactments relating to the Navy, although other less explicit clauses of the Constitution impliedly authorize legislation either directly or indirectly governing the Navy.



## II. THE REVISED STATUTES.

The Revised Statutes “embrace the statutes of the United States general and permanent in their nature, in force on the 1st day of December, 1873, as revised and consolidated by commissioners appointed under an act of Congress.”<sup>1</sup>

The “Revised Statutes” is one act of Congress, over a thousand pages in length, entitled “An act to revise and consolidate the statutes of the United States, in force on the first day of December, anno Domini one thousand eight hundred and seventy-three”; it commences with the usual clause, “*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*” contains 5,601 sections, bears the approval of the President dated June 22, 1874, and provides that it “shall be designated and cited, as The Revised Statutes of the United States.”<sup>1</sup>

The main object of the revision was to incorporate all the existing statutes in a single volume, that all persons desiring to know the written law upon any subject might learn it by an examination of that volume without the necessity of referring to prior statutes upon the subject.<sup>2</sup> Accordingly it was provided by the Revised Statutes that “all acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision, having been repealed or superseded by subsequent acts, or not being general and permanent in their nature.”<sup>3</sup> However, it is further provided by the Revised Statutes that “all acts of Congress passed prior to said last-named day [December 1, 1873] no part of which are embraced in said revision, shall not be affected or changed by its enactment”;<sup>3</sup> and it is permissible, when necessary, to refer to the original statutes as an aid to the interpretation of sections of the Revised Statutes where the meaning of the latter is not plain.

The first edition of the Revised Statutes was published in 1874, pursuant to an act of Congress approved June 20th of that year;<sup>4</sup> it is a transcript of the original Revised Statutes as enacted by Congress and approved by the President, and which is preserved in the Department of State.<sup>5</sup> A great many errors and omissions were discovered in the Revised Statutes after the publication of the first edition, and several hundreds of such errors were corrected in subsequent acts of Congress.<sup>6</sup>

A second edition of the Revised Statutes was published in 1878, having been prepared by a commissioner appointed under authority of an act of Congress approved March 2, 1877.<sup>7</sup> This second edition “is not in any proper sense a new revision of the statutes of the United States. The commis-

<sup>1</sup> Section 5595, R. S.

<sup>2</sup> *Hamilton v. Rathbone* (175 U. S., 421); *Murdock v. Memphis* (20 Wall., 590, 617).

<sup>3</sup> Section 5596, R. S.

<sup>4</sup> 18 Stat., 113.

<sup>5</sup> *Wright v. U. S.* (15 Ct. Cls., 80).

<sup>6</sup> Act Feb. 18, 1875, 18 Stat., 316, entitled “An act to correct errors and to supply omissions in the Revised Statutes of the United States”; act Feb. 27, 1877 (19 Stat., 268), entitled “An act to perfect the revision of the statutes of the United States and of the statutes relating to the District of Columbia.”

<sup>7</sup> 19 Stat., 268.



sioner was not clothed with power to change the substance or to alter the language of the existing edition of the Revised Statutes, nor could he correct any errors or supply any omissions therein except as authorized by the several statutes of amendment. Of specific amendments there are, however, several hundred, which have been incorporated with the text. The portions of the statutes repealed are printed in italics and included in brackets, and the new matter introduced is printed in the ordinary roman letter and also included in brackets."<sup>1</sup> This form has been followed in the present compilation, which is based on the second edition of the Revised Statutes, being the edition now in general use. (See, for example, sec. 284 of the Revised Statutes, as printed herein.)

This second edition of the Revised Statutes is only a new publication; a compilation containing the original Revised Statutes with specific amendments afterwards made by Congress and incorporated therein according to the judgment of the editor.<sup>2</sup>

By direction of Congress there was published, as part of the second edition, the Articles of Confederation, the Declaration of Independence, the Ordinance of 1787 for the Government of the Northwestern Territory, the Constitution of the United States with footnotes referring to decisions of the Federal courts thereon, the "act to provide for the revision and consolidation of the statute laws of the United States," approved June 27, 1866, the "act providing for publication of the Revised Statutes and the laws of the United States," approved June 20, 1874, and the "act to provide for the preparation and publication of a new edition of the Revised Statutes of the United States," approved March 2, 1877. There is also published an act amending the act last cited, approved March 9, 1878.

**"Titles" in the Revised Statutes.**—The Revised Statutes is divided into 74 "titles," which titles when of sufficient length are subdivided into "chapters." Title I, which is in two chapters, contains "General Provisions," dealing with "definitions," and "form of statutes and effect of repeals"; continuing, the various titles cover "The Congress" (Title II); "The President" (Title III); the "Executive Departments," collectively and separately (Titles IV to XII); "The Judiciary" (Title XIII); "The Army" (Title XIV); "The Navy" (Title XV); "The Militia" (Title XVI); and so on to Title LXXIV, which contains "Repeal Provisions."

It is provided by the Revised Statutes that "the arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the Title under which any particular section is placed."<sup>3</sup> Thus, for example, section 1428 of the Revised Statutes, which appears under Title XV, "The Navy," provides that "the officers of vessels of the United States shall in all cases be citizens of the United States." The law from which this section is taken did not relate to the Navy, and no inference of a "*legislative construction*" could be drawn by reason of this clause being placed in the revision under the

<sup>1</sup> Extract from preface to second edition of the Revised Statutes.

<sup>2</sup> Section 5600, R. S.

<sup>3</sup> *Wright v. U. S.* (15 Ct. Cls., 80).

title mentioned. That is to say, the mere fact that this section is placed under the title relating to the Navy is not to be taken to mean that Congress regarded this law as applicable to the Navy, and intended it to be so construed. However, upon other considerations this section has been held to require that officers of vessels of the Navy must be citizens of the United States the same as officers of private vessels of the United States.<sup>1</sup> (The same provision is repeated in section 4131, Revised Statutes, under the title, "Regulation of Commerce and Navigation.")

**Marginal notes.**<sup>2</sup>—The first edition of the Revised Statutes, by direction of Congress contained marginal notes referring to the statutes from which each section was compiled. Thus, under Title X, "The Department of the Navy," will be found section 415 which provides that "there shall be at the seat of Government an Executive Department, to be known as the Department of the Navy, and a Secretary of the Navy, who shall be the head thereof." After this section appears the following note: "30 April, 1798, c. 35, s. 1, v. 1, p. 553." This note means that section 415 was based on the act of Congress approved April 30, 1798, chapter 35, section 1, which act is published in volume 1 of the Statutes at Large, page 553. By reference to the volume and page cited will be found the original law establishing the Department of the Navy.

Many sections of the Revised Statutes were compiled from several acts of Congress, in which cases the marginal notes are more copious; as, for example, section 161, concerning "Departmental regulations, property, and records," the notes to which section refer to nine acts of Congress, all of which must be examined if it is desired to trace the history of the section.

These marginal notes can not in all cases be accepted as correct, as in some instances erroneous references are given. Thus, the note to section 285 of the Revised Statutes cites volume 19, instead of volume 9, of the Statutes at Large for the original law upon which this section of the revision was based. Nor do the marginal notes in all cases furnish a complete history of the legislation, as for example, section 1422 of the Revised Statutes, which cites an act passed in 1862 as its earliest authority, whereas a similar statute was enacted March 2, 1837. (5 Stat., 153.)

In the second edition of the Revised Statutes the original marginal references are preserved, with additional notes incorporated pursuant to instructions given by Congress and referring to acts passed subsequent to the period covered by the revision, which either expressly amend same or which, in the opinion of the commissioner, "may in any manner affect or modify any of the provisions of the said Revised Statutes or any of the amendments thereto." References to statutes of this kind were expressly directed by Congress to be indicated in the marginal notes by a difference in type. Thus, referring again to section 161, the last act cited in the marginal notes thereto is "*15 Aug., 1876, c. 287, s. 3, v. 18, p. 169,*" italics being used to distinguish this reference from those contained in the marginal notes which appeared in the first edition under the same section and which are repeated in the second edition in roman letters.

<sup>1</sup> See note to section 1428, Revised Statutes.

<sup>2</sup> In this compilation (pt. 2) the marginal notes are reprinted from the second edition of the Revised Statutes, but appear in parentheses immediately following the text, instead of in the margin.

The marginal notes are not only of historical value, but frequently are important in interpreting sections of the Revised Statutes, where it becomes necessary to refer to the original law in order to ascertain the meaning of ambiguous language occurring in the revision.<sup>1</sup>

### III. THE STATUTES AT LARGE.

**The Statutes at Large** consist at this writing of 41 volumes, extending from March 4, 1789, to March 4, 1921. The laws contained in the first 17 volumes are practically superseded by the Revised Statutes, and occasions for reference to said volumes will ordinarily be infrequent. The remaining volumes, however, commencing with December 1, 1873, must always be consulted in connection with the Revised Statutes in order to ascertain whether any particular section of the revision has been repealed, superseded, amended, or otherwise affected by subsequent enactments. More than a thousand sections of the revision have thus been modified by various later statutes, in addition to which a "Criminal Code" and a "Judicial Code" have been enacted, revising and superseding the sections of the Revised Statutes as well as subsequent laws on those subjects.

An "**Index Analysis of the Federal Statutes**," from 1789 to 1907, was published by authority of Congress in 1908, and this will be found invaluable in locating the sections of the Revised Statutes on any subject and amendatory acts contained in volumes 18 to 34 of the Statutes at Large. For later enactments reference must be had to the official index contained in each volume of the Statutes at Large, with the assistance where available of unofficial publications, such as the "United States Compiled Statutes," the "Federal Statutes Annotated," the "United States Statute Citer-Digest," etc., to which publications supplements are issued periodically, keeping the various works practically up to date.

### IV. DECISIONS OF COURTS, OPINIONS OF LAW OFFICERS OF THE GOVERNMENT, REGULATIONS, ETC.

**Authoritative decisions and opinions of the Federal courts and law officers** expounding the law contained in the Revised Statutes and the Statutes at Large become, in effect, a part of the various laws which have been the subject of such decisions and must be carefully consulted if it is desired to know definitely what the law is on any given subject. Thus, let it be supposed that the question is, What law authorizes the retirement of warrant officers of the Navy for physical disability? An examination of the Revised Statutes and Statutes at Large will not disclose any law specifically covering the point at issue. Turning, then, to the decisions of the courts, we find that the question was considered by the United States Supreme Court in the case of *Brown v. United States*,<sup>2</sup> and that it was there held to be doubtful whether the retirement of warrant officers for physical disability was authorized by law, but that the court decided to adopt the decision of the Navy Department that warrant officers, the same as commissioned officers, should be

<sup>1</sup> See below, VI, D, 2, "Marginal Notes in Revised Statutes."

<sup>2</sup> 113 U. S., 571.



retired under sections 1448 to 1455, Revised Statutes. The result of this decision is that the sections cited include warrant officers the same as if they had been specifically mentioned therein by Congress.

**Decisions of the United States Supreme Court** of course rank first among the Federal authorities, and these are published officially in what are known as the United States Reports, although the earlier volumes are known and commonly cited by the names of the official reporters, viz, Dallas, Cranch, Wheaton, Peters, Howard, Black, Wallace, and Otto. Thus, "1 Pct., 100," would mean volume 1 of Peters's reports of the decisions of the United States Supreme Court, page 100. The official publications of later decisions of the Supreme Court are cited simply as "U. S." Thus "200 U. S., 100," would mean volume 200 of the decisions of the United States Supreme Court, page 100.

**Decisions of Inferior Federal courts** come next, and these may be found in the Federal Cases, cited as "Fed. Cas.," and extending from 1789 to 1880; and the Federal Reporter, cited as "Fed. Rep." or "Fed.," and extending from 1880 to date; both of which reports, although unofficial publications, are generally consulted and cited by lawyers and courts, the official publications of the same decisions being of more limited circulation. These reports, however, do not include the decisions of the Court of Claims, which are published officially in what are known as the Court of Claims Reports, cited as "Ct. Cls." or "C. Cls.," and contain a particularly large number of decisions of importance to the Army and Navy.<sup>1</sup>

**The Attorney General** being the chief law officer of the Government, his official opinions, which are published by authority of Congress, come next in order after decisions of the Federal courts in the interpretation of Federal statutes and the application of judicial decisions relating thereto. Other opinions and decisions are published by different departments of the Government, such as the Decisions of the Comptroller of the Treasury, Decisions of the Department of the Interior, Decisions of the Interstate Commerce Commission, etc.

**Decisions of State courts** also contain many cases relating to naval law, which, while not controlling upon the Federal Government, are usually regarded as instructive and accorded more or less weight, in the consideration of similar questions, where not in conflict with any Federal authority.

**Short-cuts to these decisions** are to be found in the digests and indexes published in connection therewith, and in legal encyclopedias, text-books, and unofficial indexes and digests. Among the latter the most important is the "American Digest," which contains in accessible form a complete digest of all reported decisions of American courts, commencing with the year 1658 and kept practically up to date by new editions and supplements. Of value in this connection are the unofficial reports of leading cases, published with notes, in which are collected important decisions bearing upon the points discussed, such as the "Lawyers Reports Annotated," cited as "L. R. A.," the "American and English Annotated Cases," cited as "Ann. Cas.," etc. Also should be mentioned what are known as "Shepard's Citations," which enable the lawyer to trace the decisions in which a particular case has been cited, affirmed, fol-

<sup>1</sup> For brief explanation of the judicial system of the United States, see note to the Constitution, Article I, section 8, clause 9.

lowed, distinguished, reversed, etc. Of these, "Shepard's United States Citations," and "Shepard's Federal Citations" are the ones to be consulted in connection with decisions of the Federal courts.

**Regulations and customs and usages of the Navy**, where approved by Congress, or not in conflict with any statutory enactment, have the force of law and are so regarded by the courts. For reference to the authorities relating to this subject, and bearing particularly upon the force and effect of Navy Regulations, Naval Instructions, usages of the Navy, etc., see notes to sections 161 and 1547 of the Revised Statutes, published in this compilation.

## V. CLASSIFICATION OF STATUTES.

A great many classifications of statutes have been adopted and are of importance in connection with rules to be applied to their interpretation. Of the different classes the following may be mentioned and briefly explained:

**A declaratory statute** is one which merely declares or affirms what is already the existing law by established custom or by constitutional or statutory provision. Thus, by section 1458 of the Revised Statutes, under the title "The Navy," it was provided that "the next officer in rank shall be promoted to the place of a retired officer, *according to the established rules of the service*;" by various laws referring to different classes of officers of the Navy it is required that they pass prescribed examinations prior to promotion, although a general requirement to the same effect is contained in sections 1493 and 1496 of the Revised Statutes; by act of August 22, 1912,<sup>1</sup> it is provided that the President may mitigate or remit disabilities imposed by law upon convicted deserters from the Navy, a power which he already possessed and exercised under the Constitution; and by sections 177 to 182 of the Revised Statutes the President is empowered to make temporary designation of an officer to perform the duties of the head of a department or bureau in case of the death, resignation, absence or sickness of the incumbent, although prior to the enactment of the law now contained in those sections it had been held by the Attorney General that this power was possessed and properly exercised by the President under the Constitution. In that case, however, the Attorney General said that "a general provision of law is desirable to remove all doubt on the subject,"<sup>2</sup> and this is the principal value of all such declaratory statutes.

**Public and private acts.**—Of "public" and "private" statutes it has been said that "the former embrace the whole community; the latter only certain individuals or associations. The only important distinction is that courts take notice of the former without special reference, but not of the latter. It is usual, however, to do away with this distinction, by inserting in private statutes a special clause declaring that they shall be treated as public."<sup>3</sup>

Special or private acts are rather exceptions than rules; being those which operate only upon particular persons and private concerns, the judges are not bound to take notice unless they be formally shown and pleaded.<sup>4</sup>

<sup>1</sup> 37 Stat., 356.

<sup>2</sup> See notes to sections 177 and 181, Revised Statutes.

<sup>3</sup> Walker's American Law, section 17. See also *Unity v. Burrage* (103 U. S., 447, 454, 456); *Beaty v. Knowler* (4 Pet. 152); *Railroad Co. v. Richmond* (96 U. S., 521, 529); *U. S. v. St. Anthony R. Co.* (192 U. S., 524); *Young v. Bark* (4 Cranch, 384, 388); *Gardner v. Collector* (6 Wall., 499, 508).

<sup>4</sup> 11 Enc. U. S. Rep., 71; *Unity v. Burrage* (103 U. S., 447, 454); *People v. Wright* (70 Ill., 388, 398).

"In this country the disposition has been, on the whole, to enlarge the limits of the class of public acts, and to bring within it all enactments of a general character, or which in any way affect the community at large."<sup>1</sup>

Congress has provided that "the term 'private bill' shall be construed to mean all bills for the relief of private parties, bills granting pensions, bills removing political disabilities, and bills for the survey of rivers and harbors."<sup>2</sup>

**A penal statute**, as the name implies, is one which imposes a penalty. This class embraces all such statutes as provide for the punishment of offenses against the State and which are within the pardoning power of the Executive.<sup>3</sup> In a broader sense the term includes acts which are penal in their nature, although not enforceable by a criminal prosecution.<sup>4</sup> A statute providing that no officer or enlisted man of the Army shall receive pay for time absent from duty on account of misconduct is in the nature of a penal statute and must be construed strictly;<sup>5</sup> but one requiring that officers of the Navy who are found unfit for promotion from causes arising from their own misconduct shall be discharged with not more than one year's pay, is not a penal statute,<sup>6</sup> as it was not intended for the punishment of such officers, but primarily to promote the efficiency of the service.

**A remedial statute** is one which is beneficial in its nature, intended to redress some existing grievance, to introduce some new regulation or proceeding conducive to the public good, or to supply defects of the law arising from mistake, change of circumstances, etc.<sup>7</sup> Thus a law providing for the reappointment and retirement of a former officer of the Navy is remedial,<sup>8</sup> as are laws providing for the removal of the charge of desertion standing on the records of the Army or Navy against certain classes of persons who served in the Civil War,<sup>9</sup> laws authorizing the issuance of discharge certificates in true name to persons who enlisted under assumed names, etc.; also a statute providing for extensions of enlistments by men in the Navy.<sup>10</sup>

**A mandatory statute** is one which absolutely requires strict compliance with its terms, so that official acts not done in the manner it prescribes are null and void.<sup>11</sup>

**A directory statute** is one intended merely "for the guide of officers in the conduct of business devolved upon them, which" does "not limit their power or render its exercise in disregard of the [statutory] requisitions ineffectual. Such generally are [statutory] regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested can not be injuriously affected."<sup>12</sup>

<sup>1</sup> *Unity v. Burrage* (103 U. S., 447, 455); *Ketchum v. St. Louis* (101 U. S., 315).

<sup>2</sup> Public printing and binding act, Jan. 12, 1895, section 55 (28 Stat., 609), as amended by act Jan. 20, 1905, section 2 (33 Stat., 611).

<sup>3</sup> *U. S. v. Chouteau* (102 U. S., 603, 611); *Huntington v. Attrill* (146 U. S., 657, 667).

<sup>4</sup> *Huntington v. Attrill* (146 U. S., 657, 660, 667).

<sup>5</sup> 20 Comp. Dec., 69.

<sup>6</sup> See note to act Aug. 5, 1882 (22 Stat., 286); file 26260-1392, June 29, 1911; see also *Street v. U. S.* (133 U. S., 300); and see note to section 1441, Revised Statutes.

<sup>7</sup> See *Baylies v. Curry* (30 Ill. App., 105, 109); *Van Hook v. Whitlock* (N. Y.), 2 Edw. Ch., 304, 310; *O'Connor v. State* (71 S. W. (Tex.), 409, 411); *In re Lauritsen* (99 Minn. 520, 109 N. W. 404, 408); *Buckmaster v. McElroy* (20 Nebr., 557, 564, 31 N. W., 76, 80); *Western Trav. Acc. Assn. v. Taylor* (87 N. W., 950, 953, 62 Nebr., 783); *Montpelier v. Senter* (72 Vt., 112, 47 Atl., 392, 393).

<sup>8</sup> *Quackenbush v. U. S.* (177 U. S., 20, 27).

<sup>9</sup> File 26539-551, Mar. 17, 1913; 19 Op. Atty. Gen., 222; *Cole v. U. S.* (34 Ct. Cls., 454).

<sup>10</sup> 20 Comp. Dec., 380.

<sup>11</sup> 36 Cyc., 1157; *Bond v. Baltimore* (118 Md., 159, 84 Atl., 258, 260); *French v. Edwards* (13 Wall., 506); *Hubbert v. Campbellsville Lumber Co.* (191 U. S., 76, 77).

<sup>12</sup> *French v. Edwards* (13 Wall., 511).



A **prospective statute** is one which applies to future cases and conditions.

A **retrospective statute** is one which applies to and operates upon a past state of facts. A retrospective statute affecting and changing vested rights is very generally considered in this country as founded on unconstitutional principles and consequently inoperative and void.<sup>1</sup>

A **curative statute** is a retrospective law ordinarily passed to validate irregularities in legal proceedings, or to give effect to contracts which might otherwise fall for failure to comply with technical legal requirements.<sup>2</sup> Curative acts may also be embraced in the remedial class.

"The power which can direct what proceedings shall be had can approve and make valid any proceedings which are actually taken. The power which can give authority to act can ratify any act that is taken, and generally legislative recognition of an act or a corporation validates the act or the corporation, although neither one nor the other may have had full prior legal authority."<sup>3</sup>

## VI. THE INTERPRETATION AND CONSTRUCTION OF STATUTES.

### A. GENERAL CONSIDERATIONS.

#### B. THE LEGISLATIVE INTENT TO BE GIVEN EFFECT.

#### C. HOW LEGISLATIVE INTENT IS TO BE ASCERTAINED.

#### D. AIDS TO INTERPRETATION OF AMBIGUOUS STATUTES.

#### E. CONSTRUCTION OF PARTICULAR STATUTES.

### A. GENERAL CONSIDERATIONS.

A distinction has been drawn between the words "interpretation" and "construction," the former being held to mean the reading of a statute according to its letter, while the latter is defined to be the reading of a statute according to its spirit and intent;<sup>4</sup> it being said that "the very essence of construction is the extension of the meaning of a statute beyond its letter."<sup>5</sup> In practice, however, this distinction is not always observed, the terms frequently being used interchangeably.

"On the abstract principles which govern courts in construing legislative acts, no difference of opinion can exist. It is only in the application of those principles that the difference discovers itself."<sup>6</sup> It has been said that "there are many rules of interpretation, but they are of little use; common sense is the best guide."<sup>7</sup> It has also been said that "it is perfectly possible to make almost anything out of a tariff act by construction without violating rules for the interpretation of statutes,"<sup>8</sup> and that "when justices of the United States

<sup>1</sup> *Heinzen v. U. S.* (42 Ct. Cls., 58). See also *Hubbert v. Campbellsville Lumber Co.* (191 U. S., 76, 77); *Bond v. Baltimore* (118 Md., 159, 84 Atl. 253, 260); 36 Cyc., 1157; Compare *Schenck v. Peay*, 21 Fed. Cas. No. 12451.

<sup>2</sup> *Schamblin v. Means* (6 Cal. App., 261, 91 Pac., 1020, 1022); *McSurely v. McGrew* (140 Iowa, 163, 118 N. W., 415, 419); *Meigs v. Roberts* (162 N. Y., 371, 56 N. E. 838, 840).

<sup>3</sup> *Street v. U. S.* (133 U. S., 307); see also 13 Comp. Dec., 417.

<sup>4</sup> *U. S. v. Farenholt* (206 U. S., 226); *Felton v. U. S.* (96 U. S. 699, 702).

<sup>5</sup> *Williams v. Gaylord* (186 U. S., 157, 163).

<sup>6</sup> *U. S. v. Fisher* (2 Cranch, 358, 386).

<sup>7</sup> Walker's Am. L., sec. 17.

<sup>8</sup> *Clay v. Erhardt* (48 Fed. Rep., 294).

Supreme Court (or of any other court) divide on a question of statutory construction, the minority rarely have difficulty in finding well-settled rules of interpretation to support their dissent."<sup>1</sup> However, the rules by which courts are guided in construing statutes are sanctioned by wisdom and experience,<sup>2</sup> of which they are the outgrowth; an examination of these rules will show that "common sense" is generally their foundation; and in cases where different rules, if applied, would lead to opposite results in construing a statute, ordinarily little difficulty will be experienced in determining which of the rules must yield in the particular case, resort being had under such circumstances to the many aids to interpretation sanctioned by precedent. In involved cases, where several statutes are passed at different times relating to the same subject, the provisions of which to the uninitiated may appear to be hopelessly at variance, application of established principles of construction will generally serve to evolve a systematic and harmonious legislative scheme from the whole.

However, regardless of individual opinions as to the value of rules of construction, it is certain that a knowledge of the fundamental principles and their application is necessary if it is desired to construe a law with reasonable assurance that the result reached will likely be sustained by a court, if later called upon judicially to construe the same statute; for if the construction placed upon a law can not be sustained by any established canon of statutory construction, it is apparent that such construction will have difficulty in prevailing against established rules if attacked in a court by which such rules will certainly be applied.

The principles stated in the following pages are well established. Generally, illustrative cases have been mentioned or cited, but the decisions in which the different rules of construction have been applied are so numerous and the circumstances so varied that to attempt more than a bare outline would be beyond the scope of this introduction.

## B. THE LEGISLATIVE INTENT TO BE GIVEN EFFECT.

The first rule to be observed in construing statutes is that if possible an act is to be so construed as to effectuate the legislative intent. This has been called "the cardinal rule of construction."<sup>3</sup>

1. **What is the legislative intent.**—The "legislative intent" does not mean the intention of the person who drafted the law, nor the intention of the individual member who introduced it in the legislative body, but the intention of the legislature as a whole. The purpose of the majority who voted for the passage of the law may have been entirely different from that of the particular individuals who proposed it or who may have been interested in securing its enactment. Accordingly it is established by the authorities that the intention of the individual by whom a statute was framed can not be considered in determining the meaning of such statute.<sup>4</sup>

<sup>1</sup> 1 Fed. Stat. Ann. (2d ed.), 25.

<sup>2</sup> See *The Paulina's Cargo* (7 Cranch, 52, 60); *Cary v. Curtis* (3 How., 236, 239); *The Mary Ann* (8 Wheat., 380, 387).

<sup>3</sup> *Postmaster General v. Early* (12 Wheat., 136, 152); see also 9 Op. Atty. Gen., 472, in which it was stated: "It was unnecessary to quote a judicial decision for the purpose of proving that all written laws are to be construed according to the intention of the legislature, for that is a fundamental principle which nobody denies."

<sup>4</sup> File 24482-34, May 1, 1911; see below, VI, D, 5, "Legislative History."

2. The courts always presume that the legislature acts advisedly and with full knowledge of the situation.<sup>1</sup> "We must assume that the members by whose vote the act became a law fully weighed its meaning and intended what it expressed."<sup>2</sup> Thus, in prohibiting heads of departments, other than the Attorney General, from employing attorneys or counsel at the expense of the United States, Congress is presumed to have contemplated, inasmuch as ships of war are constantly on the high seas and in foreign ports, that questions of law would arise in respect to them in the administration of the Navy Department, and accordingly intended to include the employment of counsel in foreign countries within the prohibition of the statute.<sup>3</sup> And in construing a statute providing for the distribution of prize money and authorizing payment of a specified bounty where the enemy's vessel was "of equal or superior force," it was held that the court could not suppose that Congress overlooked the fact that an enemy's vessel might be supported by land batteries, mines, and torpedoes, and accordingly that "the enemy's vessel" did not mean the enemy's vessel and the land batteries, mines, and torpedoes by which it was supported.<sup>4</sup>

3. It is the intent of the legislature, as expressed in the law itself and apparent upon its face, that must govern its construction if that intent can reasonably be gathered from its terms.<sup>5</sup>

4. Where the language of the statute is plain and unambiguous, "the legislature should be intended to mean what they have plainly expressed," and there is no need to resort to rules of construction to get at the intent and meaning of the law.<sup>6</sup> "Legislative enactments, where the language is unambiguous, can not be changed by construction, nor can the language be divested of its plain and obvious meaning."<sup>7</sup>

5. It is the province of courts to construe laws and not to make them; accordingly, considerations of injustice, inconvenience, and absurdity which may result from interpreting a statute according to its letter, where clear and unambiguous, must be addressed to the legislature.<sup>8</sup> Where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed.<sup>9</sup> It is only where the proper construction is otherwise doubtful that arguments based on the inconvenience, injustice, or prejudice to the public interests resulting from a proposed construction may be considered.<sup>10</sup> "It is, however, an adamant rule of interpretation that the intention of the legislature is to be gathered from the words of the statute; and where the phrase-

<sup>1</sup> *Chesapeake, etc., Tel. Co. v. Manning* (186 U. S., 238, 245); *Field v. Clark* (143 U. S., 649, 672); 28 Op. Att'y. Gen., 87; 19 Op. Att'y. Gen., 591.

<sup>2</sup> *Slidell v. Grandjean* (111 U. S., 412, 437).

<sup>3</sup> 21 Op. Att'y. Gen., 195; see section 189, Revised Statutes, and note.

<sup>4</sup> *Dewey v. U. S.* (178 U. S., 510). [Prize money is not now allowed by law.]

<sup>5</sup> File 26253-200:1, Feb. 17, 1912; see also file 26253-114, Aug. 19, 1910, page 14.

<sup>6</sup> *Lake Co. v. Rollins* (130 U. S., 670); *Dewey v. U. S.* (178 U. S., 521); 27 Op. Att'y. Gen., 431, 432.

<sup>7</sup> *State Tonnage Tax Cases* (12 Wall., 204, 217); *Rodger's case* (36 Ct. Cls., 266); *Clark's case* (37 Ct. Cls., 60); 26 Op. Att'y. Gen., 537.

<sup>8</sup> 11 Enc. U. S. Rep., 151; *Donn v. Harndon* (1 Paine 61, 9 Fed. Cas. No. 4819, reversed, 1 Wheat., 300); 20 Op. Att'y. Gen., 736; *Thornley v. U. S.* (113 U. S., 310, 315); *U. S. v. Chase* (135 U. S., 255, 262); *U. S. v. Alger* (152 U. S., 384, 397); *Plessy v. Ferguson* (163 U. S., 537, 558); *Hawaii v. Mankiehi* (190 U. S., 197, 247); *Citizens' Bank v. Parker* (192 U. S., 73, 80); *New Jersey v. Anderson* (203 U. S., 483, 490); *Texas, etc., R. Co. v. Abilene Cotton Oil Co.* (204 U. S., 426); *The Garden City* (26 Fed. Rep., 766); *In re Howard* (63 Fed. Rep., 265).

<sup>9</sup> *U. S. v. Fisher* (2 Cranch, 358, 386).

<sup>10</sup> File 26521-30, Jan. 25, 1912; 26 Op. Att'y. Gen., 537.



ology admits of no doubt, the definitely expressed meaning must be recognized, notwithstanding the statute as thus construed may be deemed irrational legislation."<sup>1</sup> The province of a court "is to declare what the law is, and not, under the guise of interpretation, or under the influence of what may be surmised to be the policy of the Government, so to depart from sound rules of construction as in effect to adjudge that to be law which Congress has not enacted as such."<sup>2</sup>

6. The spirit and purpose of the act are not to be lost sight of in a strict adherence to its letter;<sup>3</sup> for "a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers."<sup>4</sup> The classical precedent commonly cited by courts on this point is the case in which a statute prohibiting the drawing of blood in the streets of Bologna was held not to apply to a surgeon who drew blood in treating a patient suddenly taken ill in the street, although literally construed he was subject to its penalties. Similarly a statute providing that a prisoner who broke prison should be held guilty of a felony would not be applied by the court to a prisoner who broke out of prison when it was on fire; "for he is not to be hanged because he would not stay to be burnt." These cases were quoted by the Supreme Court of the United States in holding that a police officer who arrested a mail carrier upon a charge of murder, while the mail carrier was on duty, was not guilty of a crime in delaying the mails although he thereby violated the letter of a Federal statute.<sup>5</sup>

A leading case on this point is *Holy Trinity Church v. United States*.<sup>6</sup> The statute prohibited the importation of aliens under a contract to perform labor in this country. Certain classes of persons, such as actors, artists, lecturers, etc., were expressly excepted from the prohibition of the statute, but ministers were not so excepted. It was nevertheless held by the court that the intent of the law was not to include ministers in its prohibition, and accordingly that the bringing of a minister to this country under contract was not prohibited by the statute, although within its letter. "The operation of such a statute must be restrained within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it."<sup>7</sup>

So also the meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed; the limitation of the rule being that to extend the meaning to any case not included within the words, the case must be shown to come within the same reason upon which the lawmaker proceeded, and not merely a like reason.<sup>8</sup> Thus the words "assistant surgeons," as used in the Navy personnel act of March 3,

<sup>1</sup> 1 Fed. Stat. Ann. (2d. ed.), 99; see also 9 Op. Atty. Gen., 50; 13 Op. Atty. Gen., 460.

<sup>2</sup> *Dewey v. U. S.* (178 U. S., 521); *White v. U. S.* (37 Ct. Cls., 378; 191 U. S., 545, 551).

<sup>3</sup> *Felton v. U. S.* (96 U. S., 699, 702).

<sup>4</sup> 26 Op. Atty. Gen., 356, 362; *U. S. v. Freeman* (3 How., 565); *Raymond v. Thomas* (91 U. S., 715); 11 Enc. U. S. Rep. 113, 114.

<sup>5</sup> *U. S. v. Kirby* (7 Wall., 482).

<sup>6</sup> 143 U. S., 457.

<sup>7</sup> *U. S. v. American Bell Tel. Co.* (159 U. S., 548, 549); see also *Brewer v. Blougher* (14 Pet., 198).

<sup>8</sup> *U. S. v. Freeman* (3 How., 556).

1899, were construed to include passed assistant surgeons, in order to effectuate the intent of the law.<sup>1</sup>

These principles must be cautiously applied, and can not be extended to the point where, under the guise of construction, the power of legislation is attempted to be exercised. The cases in which the letter of the statute is not deemed controlling "are few and exceptional, and only arise where there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."<sup>2</sup> "It is not for the courts to tamper with the words of a statute, or by a strained construction of legislative enactments, the language of which is clear and explicit, to accomplish results not contemplated by Congress."<sup>3</sup> Where a provision is omitted from a statute, either by design, mistake, or oversight of the legislature, the courts have no power to supply it where the language used is clear and unambiguous.<sup>4</sup> "It is better to submit to a temporary inconvenience than to set the laws all afloat by laying down a canon of construction which leaves the plain words and seeks to spell out, or guess at, the supposed intent of the legislature, contrary or supplementary to that which is clearly embodied in the words it has used."<sup>5</sup> The principle that a thing may be within the intent of the law, though without the letter, does not warrant including a thing which has been omitted by Congress, because of the conjecture that, had the case been foreseen, Congress would have embraced it within the intent.<sup>6</sup> Accordingly, where the law empowered the Secretary of the Navy to remit or mitigate the sentence imposed by any *naval* court-martial, although the statute was plainly intended to confer upon the Secretary authority over all sentences imposed by courts-martial upon persons in the naval service under his jurisdiction, it was decided that he was without authority to remit or mitigate the sentence imposed by an *Army* court-martial upon an enlisted man of the Marine Corps while serving with the Army but restored to naval jurisdiction prior to execution of the sentence; and that action of the President in such case was necessary.<sup>7</sup>

With reference to criminal cases, it has been held that "it would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity or of kindred character with those which are enumerated."<sup>8</sup>

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<sup>1</sup> U. S. v. Fahrenholt (206 U. S., 226).

<sup>2</sup> U. S. v. Goldenburg (168 U. S., 103).

<sup>3</sup> Bate Refrigerating Co. v. Sulzberger (157 U. S., 37).

<sup>4</sup> Folsom v. U. S. (160 U. S., 127); Hobbs v. McLean (117 U. S., 567, 579); Leavenworth, etc., R. Co. v. U. S. (92 U. S., 733, 751); Kennedy v. Gibson (8 Wall., 498, 506); U. S. v. Union Pac. R. Co. (91 U. S., 72, 85); 26 Op. Atty. Gen., 537; see also 9 Op. Atty. Gen., 50; 13 Op. Atty. Gen., 460.

<sup>5</sup> Merritt v. Welsh (104 U. S., 702).

<sup>6</sup> 27 Op. Atty. Gen., 136.

<sup>7</sup> File 26267—127, Nov. 10, 1914.

<sup>8</sup> U. S. v. Wiltberger (5 Wheat., 76, 96).

## C. HOW LEGISLATIVE INTENT IS TO BE ASCERTAINED.

As already stated, the legislative intent is to be ascertained from the law itself, where the language is clear and unambiguous. In cases where the language used is ambiguous, and only in such cases, resort may be had to extrinsic aids to interpretation, which will be briefly considered below, under Section VI, D, "Aids to interpretation of ambiguous statutes." First as to the principles which govern in ascertaining the legislative intent from the law itself:

**1. Law must be construed as a whole.**—"In the exposition of statutes the established rule is that the intention of the lawmaker is to be deduced from a view of the whole statute, and every material part of the same."<sup>1</sup> "The whole statute must be examined. Single sentences and single provisions are not to be selected and construed by themselves, but the whole must be taken together."<sup>2</sup> "Every part of a statute must be construed in connection with the whole, so as to make all the parts harmonious if possible, and to give meaning to each."<sup>3</sup> It may be necessary to consider every part of an act in its effect upon other parts in order to arrive at a construction that will be effective.<sup>4</sup> In case of repugnancy between two provisions in a statute, the one general and the other specific, the latter will prevail, unless a contrary intent is plain.<sup>5</sup>

**2. Effect to be given to every word.**—Every word used in a statute is presumed to have a separate and independent meaning of its own.<sup>6</sup> Congress is not to be presumed to have used words for no purpose.<sup>7</sup> Accordingly words can not be construed as redundant and rejected as surplusage where it is possible to give them full effect,<sup>8</sup> but may be rejected when they can not be given effect.<sup>9</sup> And this rule requires that effect be given to every word of a penal statute.<sup>10</sup> "It is a cardinal rule of statutory construction that significance and effect shall if possible be accorded to every word."<sup>11</sup> But where, from excess of caution or in accordance with custom, several words of similar import have been used in the same connection in a statute, as is frequently the case, it is not required that some new meaning be given to the superfluous words, the general rule being inapplicable under such circumstances.<sup>12</sup> And it is not necessary to give every word its exact signification as an independent word, if that signification be inconsistent with other words and other parts of the statute, the first and controlling rule being to ascertain what the legislature intended, as indicated by all the provisions on the same subject matter, harmoniously construed as far as possible; and accordingly single words must sometimes yield their restricted meaning to a more general signification and greater comprehensiveness, if necessary to carry out the manifest will of the lawmaking power.<sup>13</sup>

**3. Words presumed to have been used in their ordinary sense.**—Where the language of a statute is free from ambiguity, words must be given their usually accepted meaning.<sup>14</sup> "The popular or received import of words

<sup>1</sup> *Kohlsaat v. Murphy* (96 U. S., 153, 159).

<sup>2</sup> *Pollard v. Bailey* (20 Wall., 520, 525).

<sup>3</sup> *Washington Market Co. v. Hoffman* (101 U. S., 112, 115).

<sup>4</sup> *File 11130-26*, page 5, July 31, 1909.

<sup>5</sup> 36 Cyc., 1130.

<sup>6</sup> *Murphy v. Utter* (186 U. S., 95, 111).

<sup>7</sup> *Platt v. Union Pac. R. Co.* (99 U. S., 48, 58)

<sup>8</sup> *Stephens v. Cherokee Nation* (174 U. S., 445).

<sup>9</sup> 21 Op. Atty. Gen., 286, 288.

<sup>10</sup> U. S. v. Gooding (12 Wheat., 460, 477).

<sup>11</sup> *Washington Market Co. v. Hoffman* (101 U. S., 115).

<sup>12</sup> U. S. v. Bassett (2 Story, 404; 24 Fed. Cas. No. 14539).

<sup>13</sup> *Farden v. U. S.* (13 Ct. Cls., 347).

<sup>14</sup> *Merchants Nat. Bank v. U. S.* (42 Ct. Cls., 6).



furnishes the general rule for the interpretation of public laws as well as of private and social transactions.”<sup>1</sup> When a statute uses a technical term which is known and its meaning clearly ascertained by the common or civil law, from whichever it is taken, it is proper to refer to that law for its meaning.<sup>2</sup> The term “beyond seas” in a statute must receive the legal interpretation usually given to it, unless there be an indication to the contrary;<sup>3</sup> and the word “enlistment,” where used in its technical significance in an act relating to the Army, does not apply to a cadet, who is not an enlisted man.<sup>4</sup> Where the legislature makes use of a word having a well-defined technical meaning, it is presumed to use the word in its technical sense in the absence of an indication to the contrary in the statute.<sup>4</sup> The general rule is that the same word is used with the same meaning wherever it occurs in an act;<sup>5</sup> but where necessary to harmonize the different provisions of a statute, a different meaning may be given to the same word in different parts of a statute.<sup>6</sup> The same words as used in different statutes may have different meanings; but the presumption is otherwise.<sup>7</sup> “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”<sup>8</sup>

**4. General words may be restricted by context.**—“There is no mode by which the meaning affixed to any word or sentence, by a deliberative body, can be so well ascertained as by comparing it with the words and sentences with which it stands connected.”<sup>9</sup> This principle is known as “*noscitur a sociis*,” which means the interpretation of a word or phrase by reference to other words with which it is associated.<sup>10</sup>

The most common application of this principle occurs where several classes of persons or things are specifically enumerated in a statute, and immediately following and classed with such enumeration the clause embraces “other” persons or things, as is done, for example, throughout the Articles for the Government of the Navy.<sup>11</sup> In such cases the particular application of this principle is known as the “*ejusdem generis*” rule, in accordance with which the word “other” will generally be read as “other such like,” and persons and things therein comprised thus restricted to the same genus or class as those specifically enumerated instead of being extended to include such as are of a superior or different quality or class.<sup>12</sup> Thus, in an early case, it was held by the Supreme Court that the words “other place” appearing in the phrase “any other place or district of country, under the sole and exclusive jurisdiction of the United States,” did not include a vessel of the Navy, which was not of similar character with the places previously enumerated which were “objects

<sup>1</sup> *Maillard v. Lawrence* (16 How., 251, 261).

<sup>2</sup> *Irwin v. U. S.* (38 Ct. Cls., 87).

<sup>3</sup> *Babbitt's case* (16 Ct. Cls., 202); and see 15 Op. Atty. Gen., 645; 28 Op. Atty. Gen., 87.

<sup>4</sup> *Hawley v. Diller* (178 U. S., 476, 488).

<sup>5</sup> *In re Jackson* (40 Fed. Rep., 374); *Babbitt's case* (16 Ct. Cls., 212).

<sup>6</sup> *Cherokee Nation v. Georgia* (5 Pet., 1, 19; compare *U. S. v. St. Anthony R. Co.*, 192 U. S., 524).

<sup>7</sup> *File 9736-18*, page 2, “Addenda”; *Greenleaf v. Goodrich* (101 U. S., 278, 281).

<sup>8</sup> *Towne v. Eisner*, 245 U. S., 418, 425; 31 Op. Atty. Gen., 279; *Lamar v. U. S.*, 240 U. S., 60, 65; see also *Hendee v. U. S.*, 124 U. S., 309, and *U. S. v. Mouat*, 124 U. S., 303.

<sup>9</sup> *Wheaton v. Peters* (8 Pet., 591, 661).

<sup>10</sup> *Virginia v. Tennessee* (148 U. S., 503, 519); *U. S. v. Rodgers* (150 U. S., 249, 278); *Stoutenburgh v. Hennick* (129 U. S., 141, 147); *Hollender v. Magone* (149 U. S., 586); *American Fur Co. v. U. S.* (2 Pet., 358, 367); 21 Op. Atty. Gen., 124.

<sup>11</sup> Section 1624, Revised Statutes; see C. M. O. No. 21, 1910, p. 10.

<sup>12</sup> *File 24432-34*, May 1, 1911, page 14; *United States v. United Verde Copper Co.* (196 U. S., 207); *Merchants Nat. Bank v. U. S.* (42 Ct. Cls., 6).

in their nature fixed and territorial"; and accordingly, that under the statutes then in force a Federal court did not have jurisdiction to punish the crime of murder committed on board a war vessel of the United States in Boston harbor.<sup>1</sup>

This principle, like all others relating to the interpretation and construction of statutes, is not inflexible; its purpose is to assist in arriving at the legislative intent, and where the application of the principle would fail to accomplish this purpose it is rejected, and general words may be given a more comprehensive effect than specific where such appears to be the intention of the legislature.<sup>2</sup>

**5. Interpretation of miscellaneous words.**—The Revised Statutes contains definitions of various words which may be applied in interpreting the provisions of Federal statutes. For example, it is provided that the word "person" may include partnerships and corporations; that the plural number may include the singular, and vice versa; that the masculine gender may include females; that reference to any officer may include any person authorized by law to perform the duties of such office, etc.<sup>3</sup>

In addition, under judicial decisions the word "or" may be construed as "and";<sup>4</sup> and the word "and" may be construed as "or";<sup>5</sup> and even in a penal statute, the words "fine or imprisonment" may under certain circumstances be read "fine *and* imprisonment."<sup>6</sup> But these words are not to be construed otherwise than according to their ordinary and well-understood meaning except where it is necessary to effectuate the plain intent of the law.<sup>7</sup>

As to the interpretation of the words "may" and "shall," see below (VI, E, 5), "Mandatory and directory statutes."

**6. The expression of one thing is the exclusion of another.**—Another rule of value in interpreting statutes is that where certain classes of persons or things are specifically included or specifically excepted in a statute, this is to be understood as meaning that the legislature did not intend to include or except any class of persons or things not specifically mentioned. The rule is known in law as "*expressio unius est exclusio alterius*," which means that "the expression of one thing is the exclusion of another." This rule is also subject to the paramount consideration of effectuating the legislative intent, and was accordingly not applied in the case of the Holy Trinity Church already noted.<sup>8</sup>

**7. A prospective operation is to be given to a statute unless the legislative intent to the contrary is expressed in unambiguous terms or is clearly implied.**<sup>9</sup> Thus a statute intended, as indicated by its title, "to reorganize and increase the efficiency of the personnel of the Navy," should not be con-

<sup>1</sup> U. S. v. Bevens (3 Wheat., 336, 390)

<sup>2</sup> Cutler v. Kouns (110 U. S., 720, 728); U. S. v. Briggs (9 How., 351); Faw v. Marsteller (2 Cranch, 10); Stevens v. U. S. (41 Ct. Cls. 344), noted under section 284, Revised Statutes; see also 30 Op. Atty. Gen., 294, 295, and authorities there cited.

<sup>3</sup> See sections 1 to 6, Revised Statutes.

<sup>4</sup> Union Ins. Co. v. U. S. (6 Wall., 763); Converse v. U. S. (26 Ct. Cls., 6).

<sup>5</sup> 18 Op. Atty. Gen., 540; Long v. Palmer (16 Pet., 69).

<sup>6</sup> Carter v. McClaughry (183 U. S., 392, 393); see also U. S. v. Shawls (2 Paine 166, 28 Fed. Cas. No. 16448); Rice v. U. S. (53 Fed. Rep., 912).

<sup>7</sup> U. S. v. Haun (26 Fed. Cas. No. 15329); 18 Op. Atty. Gen., 540; Rice v. U. S. (53 Fed. Rep., 912).

<sup>8</sup> See above, section VI, B, 6.

<sup>9</sup> Jasper v. U. S. (43 Ct. Cls., 368, 371, citing U. S. v. Heth, 3 Cranch, 399, 413; Chew Heong v. U. S., 112 U. S., 536, 559; White v. U. S., 191 U. S., 545; see also Reynolds v. McArthur, 2 Pet. 434; 19 Comp. Dec., 487; U. S. v. Burr., 159 U. S., 82, Warren v. Etna Ins. Co., 29 Fed. Cas. No. 17206; Auffm'ordt v. Rasin, 102 U. S., 622; 15 Op. Atty. Gen., 222, 259; 9 Op. Atty. Gen., 437).

strued so as to give a gratuity to certain officers for past services.<sup>1</sup> "Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms."<sup>2</sup>

#### 8. Controlling purpose of statute prevails in its construction.—

A secondary purpose, which from the nature of things would defeat the controlling purpose of a statute, will not be ascribed to Congress, especially when it rests on mere implication.<sup>3</sup> The specific intent of the legislature is to be found in the leading provisions of a statute.<sup>4</sup> Where the principal purpose of a statute is to provide compensation to a person damaged by the wrongful act of another, and not to punish the wrongdoer, it is not to be construed as penal.<sup>5</sup> Similarly, where a statute was intended primarily to increase the efficiency of the Navy, and incidentally to rid the service of officers unable to qualify for promotion because of their own misconduct by providing that such officers should be discharged with not more than one year's pay, the controlling purpose of the law should not be defeated by giving it a strict construction against the Government and in favor of a particular officer.<sup>6</sup>

#### D. AIDS TO INTERPRETATION OF AMBIGUOUS STATUTES.

Where the language of a statute is ambiguous or susceptible of two meanings, certain established rules may be availed of in endeavoring to arrive at the legislative intent. But in connection with the application of all such rules it must be borne in mind that their purpose is to solve real and not fanciful ambiguities, and that they may not be invoked as a means of escape from the plain language of a statute or for the purpose of raising a doubt where none in fact exists.

1. The title of a statute, although not properly a part of the law, may be resorted to in case of doubt as a source of information in interpreting language used in the act. Thus the word "military" in a broad sense may refer both to the land and naval forces; but where a statute provided for the arrest of deserters from the military service, the Attorney General held that it could not be construed to include deserters from the Navy, because the title of the act showed plainly that the law was intended to apply only to the Army, and hence that the word "military" was used in its more restricted sense.<sup>7</sup> Similarly the title of the Navy personnel act of March 3, 1899, was referred to by the courts as indicating that certain provisions contained in the act were intended to operate prospectively only and not to give a gratuity to certain officers for past services.<sup>8</sup> But where the language of an act is plain, it may be applied to cases not comprehended by its title; as, for example, an act

<sup>1</sup> White's case (37 Ct. Cls., 365; 191 U. S., 545; see also 17 Op. Atty. Gen., 557); U. S. v. Moore (95 U. S., 762).

<sup>2</sup> Twenty Per Cent cases (20 Wall., 179, 187); see also file 8627-189, May 12, 1915; but see 7 Comp. Dec., 844, noted under section 1407, Revised Statutes.

<sup>3</sup> Denver Pac. R. Co. v. U. S. (12 Ct. Cls., 237, 259, 681).

<sup>4</sup> The Paquete Habana (175 U. S., 677, 681).

<sup>5</sup> Brady v. Daly (175 U. S., 148); Johnson v. Southern Pac. Co. (196 U. S., 1).

<sup>6</sup> See note to act Aug. 5, 1882, 22 Stat., 286; file 26260-1392, June 29, 1911; see also Street v. U. S. (133 U. S., 300).

<sup>7</sup> File 5621, Nov. 17, 1906. [The arrest of deserters from the naval service is now specifically provided for by act Feb. 16, 1909, sec. 15, 35 Stat., 622.] As to interpretation of the word "military," see file 26509-201:1, May 26, 1917; 24 Comp. Dec., 788.

<sup>8</sup> White's case (37 Ct. Cls., 365, affirmed, 191 U. S., 550); see also Holy Trinity Church v. U. S. (143 U. S., 457); Robinson v. U. S. (42 Ct. Cls., 52); 19 Op. Atty. Gen., 616.



which by its title applied to "American seamen," but which was nevertheless held to extend to foreigners.<sup>1</sup> And even when the meaning of a statute is doubtful it has been said that the title has little weight in its construction.<sup>2</sup>

**2. Marginal notes in Revised Statutes.**—As already explained, marginal notes are incorporated in the Revised Statutes in accordance with instructions of Congress, indicating the laws from which the different sections of the revision were compiled. It has been held that, in case of ambiguity in the language of the revision, these notes may be consulted as an aid to construction, and that resort may be had to the original statutes to which they refer.<sup>3</sup>

**3. Conditions existing at the time the law was enacted.**—In cases of doubtful construction it is safe guidance for a court to look into the conditions surrounding the subject matter of the legislation at the time the act was passed and the situation as it existed and as it was pressed upon the attention of Congress.<sup>4</sup> The court should endeavor to place itself as far as possible in the light that the legislature enjoyed, to look at things as they appeared to it, and to discover the purpose of the law from the language used in connection with attending circumstances.<sup>5</sup> "The general rule is that laws speak from the date of their enactment,"<sup>6</sup> and they should accordingly be construed as of the time of their enactment.<sup>7</sup> Thus where Congress authorized the appointment, from the Navy Dental Reserve Corps, of "dental corps officers of permanent tenure," the language quoted was construed to mean that such appointments were to be made to the grade of acting assistant dental surgeon, which was the only grade in the regular Dental Corps at the time the law was passed, as the grade of assistant dental surgeon was not to come into existence until more than two years later.<sup>8</sup>

**4. Reasons for the enactment of the law.**—The evil or mischief which the law was designed to remedy is also a proper subject for consideration in arriving at the legislative intent in case of doubtful language.<sup>9</sup> It is one of the oldest and best recognized principles of construction that "the preexisting law and the reason and purpose of the new enactment are considerations of great weight."<sup>10</sup> "There is no better way of discovering its true meaning when expressions in it are rendered ambiguous by their connection with other clauses than by considering the necessity for it and the causes which induced its enactment."<sup>11</sup>

**5. Legislative history.**—In arriving at the meaning of a statute where the proper construction is doubtful, it is always proper to consider the history of the statute and the different steps taken in the enactment of the law as dis-

<sup>1</sup> *Patterson v. Bark Eudora* (190 U. S., 169, 172, 173).

<sup>2</sup> *Hadden v. The Collector* (5 Wall., 107).

<sup>3</sup> *Barrett v. U. S.* (169 U. S., 218, 227, 228); *U. S. v. Averill* (130 U. S., 335, 338); *U. S. v. Lacher* (134 U. S., 626, 627); *U. S. v. Hirsch* (100 U. S., 33); *Hamilton v. Rathbone* (175 U. S., 414, 420); *Merchants Nat. Bank v. U. S.* (42 Ct. Cls., 6); see also VI, E, 1, "Revised Statutes," below.

<sup>4</sup> *Clark's case* (37 Ct. Cls., 60); *U. S. v. Smith* (197 U. S., 386); *Holy Trinity Church v. U. S.* (143 U. S., 457).

<sup>5</sup> File 26260-1392, June 29, 1911, p. 5; 27 Op. Atty. Gen., 78; *Platt v. Union Pac. R. Co.* (99 U. S., 48, 63); *Dewey v. U. S.* (178 U. S., 510, 520); *Hamilton v. Rathbone* (175 U. S., 414); *Holy Trinity Church v. U. S.* (143 U. S., 457).

<sup>6</sup> 25 Op. Atty. Gen., 299; file 13707-38:9.

<sup>7</sup> *Irwin v. U. S.* (38 Ct. Cls., 87).

<sup>8</sup> File 13707-38:9.

<sup>9</sup> *Holy Trinity Church v. U. S.* (143 U. S., 457); *Wilson v. Mason* (58 Fed. Rep., 768); 29 Op. Atty. Gen., 344; 19 Comp. Dec., 847; file 26260-1392, June 29, 1911; C. M. O., 4-1913, pp. 6, 8.

<sup>10</sup> 27 Op. Atty. Gen., 78; *Hamilton v. Rathbone* (175 U. S., 419); *Merchants Nat. Bank v. U. S.* (42 Ct. Cls., 6).

<sup>11</sup> *Heydenfeldt v. Daney, etc., Co.* (93 U. S., 634, 638).

closed by the legislative records.<sup>1</sup> This includes the reports of committees<sup>2</sup> and the introduction of amendments;<sup>3</sup> but the opinion of the draftsman of the law can not be considered,<sup>4</sup> except as it indicates the existing conditions and purpose of the law as it was pressed upon the attention of Congress.<sup>5</sup>

**6. Debates in Congress.**—The views expressed by individual Members of Congress in the course of debates “are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body”;<sup>6</sup> the law as it passed being the will of the majority of both Houses.<sup>7</sup> “It is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other.”<sup>8</sup> Frequently the arguments of individual members can hardly be considered even as the deliberate views of the persons who made them;<sup>9</sup> “nor have there been wanting illustrious instances of great minds which, after they had, as legislator or commentators, reposed upon a short and hasty opinion, have deliberately withdrawn from their first impressions when they came upon the judgment seat to reexamine the statute or law in its full bearings.”<sup>10</sup>

But it has been held that “the statements of those who had charge of the law, made to the legislative body passing it, as to its meaning and purpose, are always competent.”<sup>11</sup> And debates may be referred to for information as to the existing conditions and the evil or mischief which the law was intended to remedy,<sup>12</sup> or to confirm a construction otherwise arrived at by the court.<sup>13</sup>

**7. Prior enactments on the same subject** may be consulted in cases of doubt in an effort to ascertain the legislative intent. Where the subject of a prior act is identical with, and not merely similar to, the law under consideration, the two acts are said to be “*in pari materia*”<sup>14</sup> and should be construed together unless the language of the act to be construed is plain and free of all uncertainty.<sup>15</sup>

Several statutes on the same general subject, passed at different times by successive legislatures, without express repeal of former provisions, should be so construed that all parts of each shall retain their force and effect, except where it is apparent that by the later acts substantial changes were intended.

<sup>1</sup> *U. S. v. Burr* (159 U. S., 78, 85); *Blake v. Banks* (23 Wall., 307); but see *Andrews v. Hovey* (124 U. S., 716).

<sup>2</sup> *Austin v. U. S.* (25 Ct. Cls., 454); *Holy Trinity Church v. U. S.* (143 U. S., 457, 464); *Bate Refrigerating Co. v. Sulzberger* (157 U. S., 1, 42); *Chesapeake, etc., Tel. Co. v. Manning* (186 U. S., 238, 246); *Binns v. U. S.* (194 U. S., 486, 495); *Dubuque, etc., R. Co. v. Litchfield* (23 How., 87).

<sup>3</sup> 27 Op. Atty. Gen., 437; file 26260-1392, June 29, 1911; *Blake v. National Banks* (23 Wall., 307).

<sup>4</sup> File 24482-34, May 1, 1911.

<sup>5</sup> 19 Comp. Dec., 847; *Jennison v. Kirk* (98 U. S., 460).

<sup>6</sup> *U. S. v. Freight Assn.* (166 U. S., 318); 27 Op. Atty. Gen., 78; 9 Op. Atty. Gen., 472; compare 9 Op. Atty. Gen., 438; 8 Op. Atty. Gen., 230.

<sup>7</sup> *Aldridge v. Williams* (3 How., 23).

<sup>8</sup> *U. S. v. Trans-Missouri Freight Assn.* (166 U. S., 290, 318).

<sup>9</sup> *Downes v. Bidwell* (182 U. S., 244, 254).

<sup>10</sup> *Mitchell v. Great Works Milling, etc., Co.* (2 Story, 653; 17 Fed. Cas. No. 9662).

<sup>11</sup> *Ex parte Farley* (40 Fed. Rep., 69); 27 Op. Atty. Gen., 78; 26 Op. Atty. Gen., 254.

<sup>12</sup> *Holy Trinity Church v. U. S.* (143 U. S., 465); *American Net & Twine Co. v. Worthington* (141 U. S., 473); *U. S. v. Wilson* (58 Fed. Rep., 768).

<sup>13</sup> *Hepburn v. Griswold* (8 Wall., 610); *Untermeyer v. Freund*, (50 Fed. Rep., 80); *Northern Pac. R. Co. v. U. S.* (36 Fed. Rep., 285); *U. S. v. Union Pac. R. Co.*, (37 Fed. Rep., 554); *In re Secy. of Treasury* (71 Fed. Rep., 513); *In re Musser* (49 Fed. Rep., 832); *Wilson v. Spaulding* (19 Fed. Rep., 307); *Walton v. U. S.* (24 Ct. Cls., 380); 16 Op. Atty. Gen., 379.

<sup>14</sup> *Louisiana v. Mississippi* (202 U. S., 1, 41); *United Soc. v. Eagle Bank* (7 Conn., 456, 469); see also *U. S. v. Freeman* (3 How., 556).

<sup>15</sup> *Barnes v. Philadelphia, etc., R. Co.* (17 Wall., 302).

Incidental changes will not be imputed unless clearly intended by the legislators and within the scope of the particular matters considered by them. What is to be determined is the will of the legislature, and that will as expressed in the latest enactment is paramount; but on all matters in which the will of the latest legislature has not been clearly manifested, that of all former legislatures must stand.<sup>1</sup>

Prior enactments on the same subject may be consulted in order to ascertain the legislative intent, even though such prior acts have been repealed.<sup>2</sup>

**8. Implied repeals never favored.**—"It is a fundamental and familiar rule that a repeal by implication is never held to take place unless there is an irreconcilable repugnancy between the earlier and later acts, and that if, by any permissible construction, both may stand and be enforced, there is no such repeal."<sup>3</sup> Every doubt should be resolved against a construction which would work an implied repeal, and it is not to be admitted unless the implication is so clear as to be equivalent to an explicit declaration.<sup>4</sup> "It must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute;"<sup>5</sup> or "unless its provisions are so clearly repugnant as to imply a negative."<sup>6</sup> "Statutes which apparently conflict with each other are to be reconciled, as far as may be on any fair hypothesis;"<sup>7</sup> "if both can exist, the repeal by implication will not be adjudged."<sup>8</sup>

"The general presumption is that if a repeal was intended it would have been expressly declared; and such is the usual practice of legislation."<sup>9</sup>

Where two acts are in apparent conflict, and one of the acts is general and the other special, the rule is that the special act will be construed as an exception to the provisions of the general, and both acts thus given effect even though the special act be earlier in date.<sup>10</sup>

**9. Statutes not operative against the Government.**—It is "the settled rule of construction that the sovereign authority of the country is not bound by the words of a statute, unless named therein, if the statute tends to restrain or diminish the powers, rights, or interests of the sovereign;"<sup>11</sup> "unless its language requires that such meaning shall be given to it."<sup>12</sup> Thus a statute prohibiting the transportation of merchandise from one port in the United States to another port in the United States in foreign vessels was held not to apply to the transportation of coal belonging to the Government and needed

<sup>1</sup> *Wilcox v. U. S.* (12 Ct. Cls., 495, 502); *Mills v. Scott* (99 U. S., 25, 28); file 13707-38-9.

<sup>2</sup> *Bank v. Collector* (3 Wall., 495, 513); *Ex parte Crow Dog* (109 U. S., 556, 561); *In re Hohorst* (150 U. S., 653, 660); *Knowlton v. Moore* (178 U. S., 41).

<sup>3</sup> 29 Op. Atty. Gen., 110; see also 24 Op. Atty. Gen., 562; 25 Op. Atty. Gen., 113; 23 Op. Atty. Gen., 411.

<sup>4</sup> *Osborn v. Nicholson* (13 Wall., 654, 662).

<sup>5</sup> *Frost v. Wenne* (157 U. S., 46, 58).

<sup>6</sup> *Welch v. Cook* (97 U. S., 541, 543); *U. S. v. Gillis* (95 U. S., 407, 416).

<sup>7</sup> *Beals v. Hale* (4 How., 37, 51); and see 15 Op. Atty. Gen., 639, where it is said that this rule must be applied so as to prevent any unnecessary disturbance of regulations by subsequent statutes.

<sup>8</sup> *Johnson v. Browne* (205 U. S., 309, 321); compare *Eckloff v. D. C.* (135 U. S., 242); file 13707-36, Sept. 30, 1913. But, "to so legislate as to prevent the application of previous legislation is to repeal the previous legislation by implication" (22 Op. Atty. Gen., 255, 257; compare 32 Op. Atty. Gen., 476).

<sup>9</sup> *U. S. v. Cloths* (Crabbe, 370, 28 Fed. Cas. No. 16563); 9 Op. Atty. Gen., 47.

<sup>10</sup> 36 Cyc., 1151; *Rodgers v. U. S.* (185 U. S., 83); *Petri v. Creelman Lumber Co.* (199 U. S., 497); *U. S. v. Nix* (189 U. S., 205).

<sup>11</sup> *U. S. v. Herron* (20 Wall., 251, 255); see also *U. S. v. Knight* (14 Pet., 301); 26 Op. Atty. Gen., 415; see also *Cook County Nat. Bank v. U. S.* (107 U. S., 451).

<sup>12</sup> 26 Op. Atty. Gen., 417.



for the use of the Navy.<sup>1</sup> But a tariff act requiring the payment of duty on imports was held to apply to the importation of coal by the Government for the use of the Navy, notwithstanding that the payment of duty by the Government to itself would amount in effect merely to a bookkeeping transaction; the practice of Congress having been to except the Government specifically from the operation of tariff laws, where such was the intention, and the policy of the law being to encourage American industries.<sup>2</sup>

"Where the Government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the Government itself was in contemplation of the legislature before a court of law would be authorized to put such an interpretation upon any statute."<sup>3</sup>

**10. Objectionable results to be avoided.**—The rule is that an act of Congress must be construed as within the powers conferred upon Congress unless in the judgment of the court it is plainly and palpably inconsistent with the Constitution.<sup>4</sup>

Also, where the language used is susceptible of two meanings, it should be so interpreted as to avoid absurd results, inconvenience, injustice, unreasonableness, or hardship. But it is only in the case of doubt that such considerations may be taken into account.<sup>5</sup>

"All laws which derogate from the constitutional authority of the executive or judiciary, and all laws giving special or unusual powers to individuals, must be construed strictly and according to the narrowest sense of their words. No intention must in such cases be imputed to the lawgiver beyond what is clearly expressed in terms too plain to be misunderstood."<sup>6</sup>

**11. Construction adopted by Congress.**—Congress is presumed to have known what construction has been placed upon language used by it in a statute, and when the same language is used again, in a subsequent statute on the same subject, without any indication of a contrary intent, it should be given the same construction as it received in the former act.<sup>7</sup> This rule applies to language which has been construed in decisions of the Supreme Court and Court of Claims,<sup>8</sup> and also to the construction placed upon a law in practice by the proper administrative officers,<sup>9</sup> unless the circumstances are such that Congress could not be presumed to have knowledge of the departmental construction.<sup>10</sup>

**12. Contemporaneous construction by executive departments.**—The contemporaneous construction placed upon a law by the officers charged with its administration, where uniform and long continued, will be given great weight by the courts in passing upon a statute so construed, and in case of

<sup>1</sup> 26 Op. Atty. Gen., 415.

<sup>2</sup> 26 Op. Atty. Gen., 466.

<sup>3</sup> U. S. v. Hoar (2 Mason, 314; 26 Fed. Cas. No. 15373); 16 Comp. Dec., 696.

<sup>4</sup> Boske v. Comingore (177 U. S., 459); see also Butler v. White (83 Fed. Rep., 581); U. S. v. Mackenzie (30 Fed. Cas. No. 18313).

<sup>5</sup> See above, Section VI, B, 5.

<sup>6</sup> 9 Op. Atty. Gen., 472.

<sup>7</sup> Sewing Machine Co.'s case (18 Wall., 553, 584).

<sup>8</sup> U. S. v. Gillis (95 U. S., 416); File 26254-50, July 1, 1908; 25 Op. Atty. Gen., 309; but see 15 Comp. Dec., 47.

<sup>9</sup> 21 Op. Atty. Gen., 410; 21 Op. Atty. Gen., 339; 21 Op. Atty. Gen., 352; 15 Op. Atty. Gen., 646; 28 Op. Atty. Gen., 87; Valk v. U. S. (28 Ct. Cls., 241); Jonas v. U. S. (50 Ct. Cls., 281); U. S. v. Hermanos (209 U. S., 337); U. S. v. Falk (204 U. S., 143); Op. Atty. Gen., Apr. 11, 1918, file 26510-1022:12; Schuetze v. U. S. (24 Ct. Cls., 299); 29 Op. Atty. Gen., 436; 17 Op. Atty. Gen., 60; 20 Op. Atty. Gen., 433.

<sup>10</sup> Dollar Sav. Bank v. U. S. (19 Wall., 237).



doubt will be controlling.<sup>1</sup> Especially will the courts look with disfavor upon any sudden change whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced.<sup>2</sup> Where such construction of the law has received the tacit if not express approval of Congress, the court will not feel at liberty to disregard it although the correctness of such construction "may well be doubted."<sup>3</sup> However, "while contemporaneous and long-continued departmental construction of an ambiguous statute is entitled to very great weight, it is quite otherwise where the statute is clear and there is no need for the assistance derived from that source."<sup>4</sup>

#### E. CONSTRUCTION OF PARTICULAR STATUTES.

**1. Revised statutes.**—"A change of language in a revised statute<sup>5</sup> will not change the law from what it was before, unless it be apparent that such was the intention of the legislature."<sup>6</sup> "The reenacted sections are to be given the same meaning they had in the original statute unless a contrary intention is plainly manifested."<sup>7</sup> "Upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law."<sup>8</sup> But "where the language of the Revised Statutes is plain and unambiguous, the grammatical structure simple and accurate, and the meaning of the whole intelligible and obvious, a court is not at liberty by construction to reproduce the law as it stood before the revision. Whatever palpable modifications, alterations, or changes of preexisting laws may be found in the Revised Statutes are as much in force as any of these provisions."<sup>9</sup>

**2. Appropriation acts.**—The general rule of law is that when Congress makes a specific appropriation for any particular purpose, no more shall be expended for that purpose than is thus appropriated; and if a general appropriation applicable to the same purpose would otherwise be available to meet the same expenditure, the specific appropriation operates to repeal in part or supersede the general appropriation and render its use for the specific purpose illegal.<sup>10</sup>

The rule that a specific appropriation is exclusive, and that another general appropriation is not available for the same purpose, is a rule of administration

<sup>1</sup> *Brown v. U. S.* (113 U. S., 563, 571); *U. S. v. Moore* (95 U. S., 760); *U. S. v. Johnston* (124 U. S., 236); *Heath v. Wallace* (138 U. S., 582); 8 Op. Atty. Gen., 198; *U. S. v. Finnel* (185 U. S., 236); *Merchants Nat. Bank v. U. S.* (42 Ct. Cls., 6), *Plummer v. U. S.* (224 U. S., 137). "It is not so important that the construction of a statute as doubtful as this be exactly what Congress intended, as that a construction, acted on for 20 years, should be upheld" (20 Op. Atty. Gen., 362). "When an act of Congress has, by actual decision or by continued usage and practice, received a construction at the proper department and that construction has been acted on for a succession of years, it must be a strong and palpable case of error and injustice that would justify a change in the interpretation to be given to it" (2 Op. Atty. Gen., 558). "The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret" (*U. S. v. Moore*, 95 U. S., 763). *Schell's Exs. v. Fauche* (138 U. S., 572); 20 Op. Atty. Gen., 436; 16 Op. Atty. Gen., 296; compare 17 Op. Atty. Gen., 119.

<sup>2</sup> *U. S. v. Ala. R. Co.* (142 U. S., 621); see also 20 Comp. Dec., 182; *Comp. Digest*, pp. 295, 296; *Thurber v. U. S.* (40 Ct. Cls., 489); *Nelson v. U. S.* (41 Ct. Cls., 163); *Plummer v. U. S.* (224 U. S., 137, 140, 143).

<sup>3</sup> *Garlinger v. U. S.* (30 Ct. Cls., 477). For further citation of cases see 11 Enc. U. S. Rep., 138-143; and see 1 Fed. Stat. Ann. (2d ed.), 78-84; 20 Op. Atty. Gen., 436.

<sup>4</sup> 29 Op. Atty. Gen., 298.

<sup>5</sup> This refers to any statute which has been revised by a subsequent enactment, and is not limited to "The Revised Statutes of the United States."

<sup>6</sup> *Stewart v. Kahn* (11 Wall., 493, 502).

<sup>7</sup> *U. S. v. Le Bris* (121 U. S., 278, 280); see also "Marginal notes in Revised Statutes," sec. VI, D, 2, above.

<sup>8</sup> *McDonald v. Hovey* (110 U. S., 619, 629).

<sup>9</sup> *Bowen v. U. S.* (14 Ct. Cls., 162; 100 U. S., 508).

<sup>10</sup> 27 Op. Atty. Gen., 30, 34.

firmly established by the accounting branch of the Government; but there is no such statutory limitation on the use of appropriations. While this rule is a proper one, it may be remarked of it, first, that it operates within a narrow range; second, that the Comptroller recognizes that two appropriations may sometimes be available—"cumulative" appropriations, as they are called—and, finally, that the Comptroller has noticed certain reasonable limits to the applicability of the general rule in order to accomplish the evident purpose of Congress.<sup>1</sup>

No clause, phrase, or section of an appropriation act ought to be construed as permanent legislation unless such words are used therein as make that purpose clear.<sup>2</sup> "Annually," "hereafter," and similar words in an appropriation act indicate permanent legislation.<sup>3</sup> Permanent legislation contained in an appropriation act becomes effective, where not otherwise specified, immediately upon approval of the act.<sup>4</sup>

**3. Penal laws.**—The general rule is that penal statutes are to be strictly construed, which means in effect that the language is not to be extended so as to include persons or things not clearly within its terms.<sup>5</sup> But in construing penal laws as all others the whole purpose is to effectuate the legislative intent if possible; and therefore it is settled that the rule of strict construction does not require that the purpose be ignored or defeated; it merely means that cases must not be brought within the provisions of the statute that are not clearly embraced by it. On the other hand, a narrow, technical, or forced construction of words is not to be adopted so as to exclude cases that are obviously within its provisions.<sup>6</sup> The words of a penal statute are to be given their full meaning;<sup>7</sup> and effect is to be given to every word used if it can be done without violating the obvious intention of the legislature.<sup>8</sup>

"While we are bound to give the person accused the benefit of every statutory provision, we are not bound to import words into the statute which are not found there."<sup>9</sup> "In expounding a penal statute the court will not extend it beyond the plain meaning of its words,"<sup>10</sup> but the rule of strict construction is not violated by giving to words the more extended of two meanings where such construction best harmonizes with the context and most fully promotes the policy and objects of the legislation.<sup>11</sup>

<sup>1</sup> 26 Op. Atty. Gen., 81, citing 3 Comp. Dec., 71; 6 Comp. Dec., 124; 7 Comp. Dec., 665; 9 Comp. Dec., 259; 10 Comp. Dec., 655; 12 Comp. Dec., 61; 7 Comp. Dec., 142; 4 Comp. Dec., 121; 1 Comp. Dec., 357; 2 Comp. Dec., 59; 8 Comp. Dec., 685; 10 Comp. Dec., 832.

<sup>2</sup> 27 Op. Atty. Gen., 108; but see 7 Op. Atty. Gen., 306. *Vulte's Case* (47 Ct. Cls., 324, 327; 233 U. S., 509, 514); file 24501-26, July 11, 1911.

<sup>3</sup> *U. S. v. Jarvis* (26 Fed. Cas. No. 15468); Comp. Dec., May 28, 1908 (87 S. and A. Memo. 716).

<sup>4</sup> 7 Op. Atty. Gen., 306; Comp. Dec., May 28, 1908 (87 S. and A. Memo., 716); *Chance v. U. S.* (38 Ct. Cls., 75); see also *Arnold v. U. S.* (9 Cranch, 104, 119); 14 Op. Atty. Gen., 542; 14 Op. Atty. Gen., 681; 10 Comp. Dec., 281; 12 Comp. Dec., 306; 13 Comp. Dec., 429; 14 Comp. Dec., 607; *U. S. v. Ewing* (140 U. S., 143); file 28500-54, March 5, 1915; file 26254-1729, Mar. 6, 1915; file 26254-1729: 1, Comp. Dec., Mar. 10, 1915; file 5942-192, Mar. 12, 1915; and see 30 Op. Atty. Gen., 334; 22 Comp. Dec., 640; 5 Comp. Dec., 762; file 5460-70, Mar. 22, 1915; 26253-364: 1, Mar. 23, 1915; 27 Op. Atty. Gen., 552; file 9644-55, Mar. 22, 1919.

<sup>5</sup> *U. S. v. Lacher* (134 U. S., 624).

<sup>6</sup> *Northern Securities Co. v. U. S.* (193 U. S., 197, 358); *U. S. v. Wiltberger* (5 Wheat., 76); *U. S. v. Palmer* (3 Wheat., 610, 629); *The Emily* (9 Wheat., 381, 388).

<sup>7</sup> *U. S. v. Hartwell* (6 Wall., 385, 386).

<sup>8</sup> *U. S. v. Gooding* (12 Wheat., 460, 477); see file 26260-1392, June 29, 1911.

<sup>9</sup> *Grin v. Shine* (187 U. S., 181, 186).

<sup>10</sup> *U. S. v. Morris* (14 Pet., 464, 475); *Northern Securities Co. v. U. S.* (193 U. S., 197, 358); *U. S. v. Wiltberger*, (5 Wheat., 76, 95).

<sup>11</sup> *U. S. v. Hartwell* (6 Wall., 385); *U. S. v. Winn* (3 Sumn., 209, 28 Fed. Cas. No. 16740).

**4. Remedial statutes** are to be liberally construed so as to accomplish the beneficial purpose of the legislature to the fullest extent consistent with the language of the law;<sup>1</sup> but a statute is not to be so liberally construed as to violate its language.<sup>2</sup>

**5. Mandatory and directory statutes.**—The question whether or not a statute is mandatory or directory depends upon the intention of the legislature, to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other.<sup>3</sup>

“It is well settled that ‘may,’ in any statute, is to be construed as equivalent to ‘shall’ or ‘must’ when the public interests or rights are concerned and when the public or third persons have a right *de jure* [in law] to claim that the power granted shall be exercised.”<sup>4</sup>

“The general rule is that, where Congress confers a power upon an executive officer which involves the rights or interests of private individuals or the general public, the language used by Congress is to be considered as imposing a duty rather than a discretion.”<sup>4</sup>

Thus, a statute providing that the Secretary of the Navy “is hereby authorized” to furnish a clothing bounty to apprentices on enlistment in the Navy is mandatory. While the ordinary meaning of this language is generally permissive, nevertheless in this case, the object of the statute being to encourage enlistments, it “is to be construed as imposing upon the Secretary of the Navy an imperative obligation and not merely discretionary power.”<sup>4</sup>

“Shall” will be construed as “may” where no public or private right is impaired by such construction; but where the public are interested, or where the public or third persons have a legal claim that the act shall be done, it is imperative and will be construed to mean “must.” For example, section 1498, Revised Statutes, providing that naval examining boards “shall consist of not less than three officers senior in rank to the officer to be examined,” was evidently framed as a protection to officers generally, and is therefore construed as mandatory; hence the proceedings of a board are fatally defective where one of the members was junior to the candidate.<sup>5</sup>

“The rule of construction of statutory provisions regulating the time, form, and mode of proceeding by courts and public officers is that they are generally to be deemed directory and as intended merely to secure system, uniformity, and dispatch in the conduct of public business. ‘Provisions of this character are not usually regarded as mandatory unless accompanied by negative words, importing that the acts required shall not be done in any other manner or time than designated.’”<sup>6</sup>

<sup>1</sup> *Jones v. Guaranty, etc., Co.* (101 U. S., 622, 626); *Beley v. Naphtaly* (169 U. S., 353, 359, 360); *Ramsey v. Tacoma Land Co.* (196 U. S., 360, 362); 20 Comp. Dec., 380.

<sup>2</sup> *U. S. v. St. Anthony R. Co.* (192 U. S., 524, 540).

<sup>3</sup> File 26260-1244, April 14, 1911; see also 8 Op. Atty. Gen., 112.

<sup>4</sup> 25 Op. Atty. Gen., 270; file 26539-551.

<sup>5</sup> File 26260-1244, April 14, 1911; see also 8 Op. Atty. Gen., 112.

<sup>6</sup> *In re Stein*, 105 Fed. Rep., 749, 750, quoting *French v. Edwards* (13 Wall., 506-511); see also *Indianapolis, etc., R. Co. v. Horst* (93 U. S., 301); *West Wisconsin R. Co. v. Foley* (94 U. S., 100); *Labadie v. U. S.* (31 Ct. Cls., 436); *Woolridge v. McKenna* (8 Fed. Rep., 650); *Thomas's Motion* (15 Ct. Cls., 335).

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## **PART 1.**

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### **THE CONSTITUTION OF THE UNITED STATES OF AMERICA.**

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## HISTORICAL NOTE.

[Compiled principally from notes to Constitution in Revised Statutes of the United States, second edition, and S. Doc. No. 427, 66th Cong., 3d sess.]

**The original Constitution.**—In May, 1785, a committee of Congress made a report recommending an alteration in the Articles of Confederation, but no action was taken on it, and it was left to the State Legislatures to proceed in the matter. In January, 1786, the Legislature of Virginia passed a resolution providing for the appointment of five commissioners, who, or any three of them, should meet such commissioners as might be appointed in the other States of the Union, at a time and place to be agreed upon, to take into consideration the trade of the United States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States such an act, relative to this great object, as, when ratified by them, will enable the United States in Congress effectually to provide for the same. The Virginia commissioners, after some correspondence, fixed the first Monday in September as the time, and the city of Annapolis as the place for the meeting, but only four other States were represented, viz: Delaware, New York, New Jersey, and Pennsylvania; the commissioners appointed by Massachusetts, New Hampshire, North Carolina, and Rhode Island failed to attend. Under the circumstances of so partial a representation, the commissioners present agreed upon a report (drawn by Mr. Hamilton, of New York), expressing their unanimous conviction that it might essentially tend to advance the interests of the Union if the States by which they were respectively delegated would concur, and use their endeavors to procure the concurrence of the other States, in the appointment of commissioners to meet at Philadelphia on the second Monday of May following, to take into consideration the situation of the United States; to devise such further provisions as should appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled as, when agreed to by them and afterwards confirmed by the Legislatures of every State, would effectually provide for the same.

Congress, on the 21st of February, 1787, adopted a resolution in favor of a convention, and the Legislatures of those States which had not already done so (with the exception of Rhode Island) promptly appointed delegates. On the 25th of May, seven States having convened, George Washington, of Virginia, was unanimously elected President, and the consideration of the proposed constitution was commenced. On the 17th of September, 1787, the Constitution as engrossed and agreed upon was signed by all the members present, except

Mr. Gerry, of Massachusetts, and Messrs. Mason and Randolph, of Virginia. The president of the convention transmitted it to Congress, with a resolution stating how the proposed Federal Government should be put in operation, and an explanatory letter. Congress, on the 28th of September, 1787, directed the Constitution so framed, with the resolutions and letter concerning the same, to "be transmitted to the several Legislatures in order to be submitted to a convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the convention."

On the 4th of March, 1789, the day which had been fixed for commencing the operations of Government under the new Constitution, it had been ratified by the conventions chosen in each State to consider it, as follows: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787; Georgia, January 2, 1788; Connecticut, January 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 26, 1788; and New York, July 26, 1788.

The President informed Congress, on the 28th of January, 1790, that North Carolina had ratified the Constitution November 21, 1789; and he informed Congress on the 1st of June, 1790, that Rhode Island had ratified the Constitution May 29, 1789. Vermont, in convention, ratified the Constitution January 10, 1791, and was, by an act of Congress approved February 18, 1791, "received and admitted into this Union as a new and entire member of the United States."

**The first ten amendments** to the Constitution of the United States [commonly known as the "Bill of Rights"] were proposed to the legislatures of the several States by the First Congress, on the 25th of September, 1789. They were ratified by the following States, and the notifications of ratification by the governors thereof were successively communicated by the President to Congress: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; Pennsylvania, March 10, 1790; New York, March 27, 1790; Rhode Island, June 15, 1790; Vermont, November 3, 1791, and Virginia, December 15, 1791. There is no evidence on the journals of Congress that the legislatures of Connecticut, Georgia, and Massachusetts ratified them.

**The eleventh amendment** to the Constitution of the United States was proposed to the legislatures of the several States by the Third Congress on the 5th of March, 1794; and was



declared in a message from the President to Congress, dated the 8th of January, 1798, to have been ratified by the legislatures of three-fourths of the States.

**The twelfth amendment** to the Constitution of the United States was proposed to the legislatures of the several States by the Eighth Congress, on the 12th of December, 1803, in lieu of the original third paragraph of the first section of the second article; and was declared in a proclamation of the Secretary of State, dated the 25th of September, 1804, to have been ratified by the legislatures of three-fourths of the States.

**The thirteenth amendment** to the Constitution of the United States was proposed to the legislatures of the several States by the Thirty-eighth Congress, on the 1st of February, 1865, and was declared, in a proclamation of the Secretary of State, dated the 18th of December, 1865, to have been ratified by the legislatures of twenty-seven of the thirty-six States, viz: Illinois, Rhode Island, Michigan, Maryland, New York, West Virginia, Maine, Kansas, Massachusetts, Pennsylvania, Virginia, Ohio, Missouri, Nevada, Indiana, Louisiana, Minnesota, Wisconsin, Vermont, Tennessee, Arkansas, Connecticut, New Hampshire, South Carolina, Alabama, North Carolina, and Georgia.

**The fourteenth amendment** to the Constitution of the United States was proposed to the legislatures of the several States by the Thirty-ninth Congress, on the 16th of June, 1866. On the 21st of July, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution declaring that "the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the Constitution of the United States, duly proposed by two-thirds of each House of the Thirty-ninth Congress: Therefore *Resolved*, That said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." The Secretary of State accordingly issued a proclamation, dated the 28th of July, 1868, declaring that the proposed fourteenth amendment had been ratified, in the manner hereafter mentioned, by the legislatures of thirty of the thirty-six States, viz: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, September 11, 1866 (and the legislature of the same State passed a resolution in April, 1868, to withdraw its consent to it); Oregon, September 19, 1866; Vermont, November 9, 1866; Georgia rejected it November 13, 1866, and ratified it July 21, 1868; North Carolina rejected it December 4, 1866, and ratified it July 4, 1868; South Carolina rejected it December 20, 1866, and ratified it July 9, 1868; New York ratified it January 10, 1867; Ohio ratified it January 11, 1867 (and the legislature of the same State passed a resolu-

tion in January, 1868, to withdraw its consent to it); Illinois ratified it January 15, 1867; West Virginia, January 16, 1867; Kansas, January 18, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Missouri, January 26, 1867; Indiana, January 20, 1867; Minnesota, February 1, 1867; Rhode Island, February 7, 1867; Wisconsin, February 13, 1867; Pennsylvania, February 13, 1867; Michigan, February 15, 1867; Massachusetts, March 20, 1867; Nebraska June 15, 1867; Iowa, April 3, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; Louisiana, July 9, 1868, and Alabama, July 13, 1868. Georgia again ratified the amendment February 2, 1870. Texas rejected it November 1, 1866, and ratified it February 18, 1870. Virginia rejected it January 19, 1867, and ratified it October 8, 1869. The amendment was rejected by Kentucky January 10, 1867; by Delaware February 8, 1867; by Maryland March 23, 1867, and was not afterwards ratified by either State.

**The fifteenth amendment** to the Constitution of the United States was proposed to the legislatures of the several States by the Fortieth Congress on the 27th of February, 1869, and was declared, in a proclamation of the Secretary of State, dated March 30, 1870, to have been ratified by the legislatures of twenty-nine of the thirty-seven States. The dates of these ratifications (arranged in the order of their reception at the Department of State) were: From North Carolina, March 5, 1869; West Virginia, March 3, 1869; Massachusetts, March 9-12, 1869; Wisconsin, March 9, 1869; Maine, March 12, 1869; Louisiana, March 5, 1869; Michigan, March 8, 1869; South Carolina, March 16, 1869; Pennsylvania, March 26, 1869; Arkansas, March 30, 1869; Connecticut, May 19, 1869; Florida, June 15, 1869; Illinois, March 5, 1869; Indiana, May 13-14, 1869; New York, March 17-April 14, 1869 (and the legislature of the same State passed a resolution January 5, 1870, to withdraw its consent to it); New Hampshire, July 7, 1869; Nevada, March 1, 1869; Vermont, October 21, 1869; Virginia, October 8, 1869; Missouri, January 10, 1870; Mississippi, January 15-17, 1870; Ohio, January 27, 1870; Iowa, February 3, 1870; Kansas, January 18-19, 1870; Minnesota, February 19, 1870; Rhode Island, January 18, 1870; Nebraska, February 17, 1870; Texas, February 18, 1870. The State of Georgia also ratified the amendment February 2, 1870.

**The sixteenth amendment** to the Constitution of the United States was proposed to the legislatures of the several States by the Sixty-first Congress on the 12th day of July, 1909, and was declared, in an announcement by the Secretary of State, dated February 25, 1913, to have been ratified by the legislatures of the following thirty-eight of the forty-eight States. The dates of these ratifications were: Alabama, August 17, 1909; Kentucky, February 8, 1910; South Carolina, February 23, 1910; Illinois, March 1, 1910; Mississippi, March 11, 1910; Oklahoma, March 14, 1910; Maryland, April 8, 1910; Georgia, August 3, 1910; Texas, August 17, 1910; Ohio, January 19, 1911; Idaho, January 20, 1911; Oregon, January 23, 1911; Washington, January 26, 1911; California, January 31, 1911; Montana,

January 31, 1911; Indiana, February 6, 1911; Nevada, February 8, 1911; Nebraska, February 11, 1911; North Carolina, February 11, 1911; Colorado, February 20, 1911; North Dakota, February 21, 1911; Michigan, February 23, 1911; Iowa, February 27, 1911; Kansas, March 6, 1911; Missouri, March 16, 1911; Maine, March 31, 1911; Tennessee, April 11, 1911; Arkansas, April 22, 1911; Wisconsin, May 26, 1911; New York, July 12, 1911; South Dakota, February 3, 1912; Arizona, April 9, 1912; Minnesota, June 12, 1912; Louisiana, July 1, 1912; Delaware, February 3, 1913; Wyoming, February 3, 1913; New Jersey, February 5, 1913; New Mexico, February 5, 1913. The States of Connecticut, New Hampshire, Rhode Island, and Utah rejected this amendment.

**The seventeenth amendment** to the Constitution of the United States was proposed to the legislatures of the several States by the Sixty-second Congress on the 16th day of May, 1912, and was declared, in an announcement by the Secretary of State, dated May 31, 1913, to have been ratified by the legislatures of the following thirty-six of the forty-eight States. The dates of these ratifications were: Massachusetts, May 22, 1912; Arizona, June 3, 1912; Minnesota, June 10, 1912; New York, January 15, 1913; Kansas, January 17, 1913; Oregon, January 23, 1913; North Carolina, January 25, 1913; California, January 28, 1913; Michigan, January 28, 1913; Idaho, January 31, 1913; West Virginia, February 4, 1913; Nebraska, February 5, 1913; Iowa, February 6, 1913; Montana, February 7, 1913; Texas, February 7, 1913; Washington, February 7, 1913; Wyoming, February 11, 1913; Colorado, February 13, 1913; Illinois, February 13, 1913; North Dakota, February 18, 1913; Nevada, February 19, 1913; Vermont, February 19, 1913; Maine, February 20, 1913; New Hampshire, February 21, 1913; Oklahoma, February 24, 1913; Ohio, February 25, 1913; South Dakota, February 27, 1913;

Indiana, March 6, 1913; Missouri, March 7, 1913; New Mexico, March 15, 1913; New Jersey, March 18, 1913; Tennessee, April 1, 1913; Arkansas, April 14, 1913; Connecticut, April 15, 1913; Pennsylvania, April 15, 1913; Wisconsin, May 9, 1913.

**The eighteenth amendment** to the Constitution of the United States was proposed to the legislatures of the several States by the Sixty-fifth Congress on the 19th day of December, 1917, and was declared, in an announcement by the Acting Secretary of State, dated January 29, 1919, to have been ratified by the legislatures of three-fourths of the whole number of States in the United States, as follows: Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

**The nineteenth amendment** to the Constitution of the United States was proposed to the legislatures of the several States by the Sixty-sixth Congress on the 5th day of June, 1919, and was declared, in an announcement by the Secretary of State dated August 26, 1920, to have been ratified by the legislatures of three-fourths of the whole number of States in the United States, as follows: Wisconsin, Illinois, Michigan, Ohio, Massachusetts, Iowa, Missouri, Nebraska, Montana, Minnesota, New Hampshire, Utah, California, Maine, Pennsylvania, Kansas, Arkansas, Texas, New York, South Dakota, North Dakota, Colorado, Rhode Island, Indiana, Kentucky, Oregon, Wyoming, Nevada, Arizona, New Jersey, Oklahoma, West Virginia, New Mexico, Idaho, Washington, and Tennessee.



# THE CONSTITUTION.

[The text of the Constitution and of the amendments given below is reproduced from S. Doc. No. 427, 66th Cong., 3d sess.]

[The preamble.] WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

## ARTICLE I.

**SECTION 1. [Legislative powers vested in Congress.]** All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

**Congress can not legislate in detail.**—To attempt to regulate by statute the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined and which are essential to the proper action of the Government. (*U. S. v. Macdaniel*, 7 Pet., 14; *U. S. v. Webster*, 28 Fed. Cas., 515; *Lewis Pub. Co. v. Wyman*, 182 Fed. Rep., 13, 16; *Haas v. Henkel*, 216 U. S., 462, 480; 6 Op. Atty. Gen., 358.)

**Quasi legislative powers may be exercised by heads of departments.**—Congress can only legislate in a general way, and large powers are necessarily intrusted to the different departments. They really exercise in this way by delegation, and necessarily so, for the purpose of carrying on the vast affairs of the Government and its details, authority which in a strict sense pertains to Congress. (21 Op. Atty. Gen., 438, 439.) The authority thus exercised by heads of departments is “quasi legislative.” (16 Op. Atty. Gen., 495.)

For other decisions concerning executive regulations, see note to section 161, Revised Statutes.

**Constitutionality of Statutes.**—“To warrant a court in declaring unconstitutional a law passed by Congress, the defect of legislative power must be of the most plain and indisputable character. The fact that a law of Congress has been in course of execution for many years and has been acquiesced in during that time is a strong reason why the courts, especially those of a subordinate character, should not decide the same to be unconstitutional.” (*U. S. v. Mackenzie*, 30 Fed. Cas. No. 18313.)

Although the President should veto an act on the ground that he believed it to be unconstitutional, if it should subsequently be passed by Congress over his veto and the President proceed to carry it into execution, such action by him can not be enjoined by the courts. (*Mississippi v. Johnson*, 4 Wall., 475.)

The Attorney General is authorized by statute to pass upon the constitutionality of acts of Congress when requested to render an opinion thereon by the President or head of a department. (Sec. 358, R. S.; 27 Op. Atty. Gen., 259.)

“Every law is to be carried out so far forth as is consistent with the Constitution, and no further. The sound part of it must be executed, and the vicious portion of it suffered to drop. A legislative act is not to be treated as void merely because it is coupled with an abortive attempt to usurp executive powers. It stands to reason that if a condition such as this is asserted to be void it could have no effect whatever, either upon the subject matter or upon other parts of the law to which it is appended. \* \* \* You [the President] are therefore entirely justified in treating this condition (if it be a condition) as if the paper on which it is written were blank.” (9 Op. Atty. Gen., 462.)

**Congress can not enact advice or counsel.** It can enact nothing but that which is to have full vigor and effect of a law. (18 Op. Atty. Gen., 18; but see sec. 1755, R. S.) However, where Congress enacted a law which was construed by the Attorney General to be advisory only, and not mandatory upon the President as claimed, the Attorney General in his opinion to the President remarked: “But it is what you called it in your message—a recommendation; and your respectful deference to the wishes of Congress induced you to carry it out, though you were not bound to do so.” (9 Op. Atty. Gen., 462.)

**“Procuring legislation by the private solicitation of persons who have no official relations which authorize them to communicate with Congress is never to be commended; it can be excused only where the motive is as manifestly honest as it was in this case. You, yourself, speaking of this very affair in a solemn message have declared it to be dangerous to the subordination and discipline of the Army, since, if it were encouraged, ‘officers might then be found, instead of performing their appropriate duties, besieging the halls of Congress for the purpose of obtaining special favors and choice**

places by legislative enactment.' " (Atty. Gen. to the President, 9 Op. Atty. Gen., 468; Messages and Papers of the Presidents, vol. 5, p. 597; see also acts July 11, 1919, sec. 6, 41 Stat., 68, and Aug. 24, 1912, sec. 6, 37 Stat., 555.)

By General Orders, No. 32, War Department, March 15, 1873, it was ordered that "no officer, either *active* or *retired*, shall, directly or indirectly, without being called upon by proper authority, solicit, suggest, or recommend action by Members of Congress for or against military affairs;" that "all petitions to Congress by officers relative to subjects of a military character will be forwarded through the General of the Army and Secretary of War for their action and transmittal;" and that "an officer visiting

the seat of government *during a congressional session* will, upon his arrival, register his name at the Adjutant General's Office, as now required, and, in addition, address a letter to the Adjutant General of the Army, reciting the purpose of and time that will be embraced by his visit and the authority under which he is absent from his command or station. The purpose or object so recited will be the strict guide of the officer during his stay." (As to authority of Secretary of War to issue such an order, see letter of Secretary of War in reply to House Resolution of April 13, 1874, as published in Executive Document No. 275, House of Representatives, 43d Cong., 1st sess.; Lieber on Regulations, Appendix A.)

**SECTION 2. [CLAUSE 1. Election of Representatives.]** <sup>1</sup> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

**[CLAUSE 2. Qualifications of Representatives.]** <sup>2</sup> No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

**[CLAUSE 3. Apportionment of Representatives and direct taxes.]** <sup>3</sup> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

The first sentence of this clause is amended by the fourteenth amendment, second section.

**[CLAUSE 4. Vacancies in House of Representatives.]** <sup>4</sup> When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

**[CLAUSE 5. Officers and impeaching power of House of Representatives.]** <sup>5</sup> The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

**SECTION 3. [CLAUSE 1. Number and election of Senators.]** <sup>1</sup> The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

This clause is superseded by the seventeenth amendment.



[CLAUSE 2. **Term of Senators and filling of vacancies.**] <sup>2</sup> Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

This clause is modified by the seventeenth amendment.

[CLAUSE 3. **Qualifications of Senators.**] <sup>3</sup> No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[CLAUSE 4. **The Vice-President and his vote.**] <sup>4</sup> The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[CLAUSE 5. **Officers of the Senate.**] <sup>5</sup> The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

[CLAUSE 6. **Trial by Senate of impeachments.**] <sup>6</sup> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[CLAUSE 7. **Judgment in cases of impeachment.**] <sup>7</sup> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION 4. [CLAUSE 1. **Holding of elections for Senators and Representatives.**] <sup>1</sup> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

[CLAUSE 2. **Annual session of Congress.**] <sup>2</sup> The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION 5. [CLAUSE 1. **Regularity of elections, quorum to do business, etc.**] <sup>1</sup> Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

**Acts of Member not legally elected.**—A member of Congress who has actually been seated is a de facto member, and acts performed by him as such are valid, although he may subsequently be unseated as the result of an elec-

tion contest. So held with reference to the nomination of a candidate for appointment as a midshipman at the Naval Academy. (21 Op. Atty. Gen., 342.)

[**CLAUSE 2. Rules of proceedings; punishment of members.**] <sup>2</sup> Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

[**CLAUSE 3. Journal of proceedings.**] <sup>3</sup> Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[**CLAUSE 4. Temporary adjournments.**] <sup>4</sup> Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

A temporary adjournment is not a "recess of the Senate" within the meaning of Article II, section 2, clause 3, empowering the President to fill vacancies. "Recess" refers

only to the case where the Senate adjourns sine die (23 Op. Atty. Gen., 599; affirmed, 29 Op. Atty. Gen., 602; contra, *Gould v. U. S.*, 19 Ct. Cls., 593, 595; 33 Op. Atty. Gen., 20.)

**SECTION 6. [CLAUSE 1. Compensation and privilege of Senators and Representatives.]** <sup>1</sup> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

The privilege from arrest does not exempt Senators and Representatives from being served with, and required to obey, a subpoena in a criminal case. (*U. S. v. Cooper*, 25 Fed. Cas. No. 14861.)

**Naval courts-martial and courts of inquiry** have power to issue like process to compel witnesses to appear and testify as United States courts of criminal jurisdiction; and refusal of any person to appear and testify when so subpoenaed is punishable as a misdemeanor by fine and imprisonment. (Act Feb. 16, 1909, secs. 11 and 12, 35 Stat., 621, 622.) *Held*, that under this law a court of inquiry is empowered to subpoena a Representative attending a session of Congress, but that if he refused to appear, he could not be compelled to do so owing to the fact that under this clause of the Constitution he would be privileged from arrest for the misdemeanor so committed. (Court of inquiry Rec. No. 5203, pp. 1281-1286, 1293-1294, 1339-1343, 1363-1365, 1422.)

[In the case cited the court of inquiry issued a subpoena for Representative John W. Weeks.

The record showed that he was advised by the Speaker and parliamentarians of the House not to respond without an order of the House; that this would necessitate the introduction of a resolution in the House, which would possibly create a debate and produce considerable publicity as to the subject of the inquiry; that he was willing to appear voluntarily without a subpoena; that the Department had been consulted and held as above stated. Accordingly, the court decided to withdraw the subpoena, and Representative Weeks thereupon voluntarily appeared and testified.]

**Privilege applies only to civil cases.**— "The words 'treason, felony, and breach of the peace' were used by the framers of the Constitution in Sec. 6, Art. I, and should be construed, in the same sense as those words were commonly used and understood in England as applied to the parliamentary privilege, and as excluding from the privilege all arrests and prosecutions for criminal offenses, and confining the privilege alone to arrests in civil cases." (*Williamson v. U. S.*, 207 U. S., 427.)

[**CLAUSE 2. Appointment of Senators or Representatives to other offices.**]

<sup>2</sup> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.



This clause prevents the appointment of a former Senator to a civil office created after his resignation from the Senate, but "during the time for which he was elected." (17 Op. Atty. Gen., 365.) It also prevents his appointment as a member of the Cabinet, where the salary of the office was increased during his service in the Senate. (See note to sec. 160, R. S.) The President is not authorized to nominate for office a person ineligible under this clause, and such a nomination, although confirmed by the Senate, can not be made the

basis of an appointment to the nominee even when his disqualification ceases. (17 Op. Atty. Gen., 522.)

The Secretary of War is not in the military service, but is a civil officer. (*U. S. v. Burns*, 12 Wall., 246.)

Whether a retired Army officer can receive pay as such while holding a seat in Congress is a question of grave doubt which only a determination of the Supreme Court can satisfactorily settle. (20 Op. Atty. Gen., 686; see also file 27231-74, May 12, 1916.)

SECTION 7. [CLAUSE 1. Bills for raising revenue.] <sup>1</sup>All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[CLAUSE 2. Approval and disapproval of bills by President.] <sup>2</sup>Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

**Bills vetoed as unconstitutional and becoming law without President's approval.**—Where certain bills were enacted into law without the approval of President Johnson, who had vetoed them on the ground of their unconstitutionality, he proceeded to put them into effect, and it was held by the Supreme Court that such action on the part of the President could not be enjoined, notwithstanding the alleged unconstitutionality of the statutes. (*Mississippi v. Johnson*, 4 Wall., 475.)

**Veto of bill authorizing restoration of dismissed officer.**—A bill passed by both houses of Congress provided: "That the President be, and he is hereby, authorized to nominate and, by and with the advice and consent of the Senate, to appoint Fitz John Porter, late a major general of the United States Volunteers and a brevet brigadier general and colonel of the Army, to the position of colonel in the Army of the United States, of the same grade and rank held by him at the time of his dismissal from the Army by sentence of court-martial promulgated January 27, 1863. \* \* \*

This bill was vetoed by the President in a message reading in part as follows:

"It is apparent that should this bill become a law it will create a new office which can be filled by the appointment of the particular in-

dividual whom it specifies, and can not be filled otherwise; or it may be said with perhaps greater precision of statement that it will create a new office upon condition that the particular person designated shall be chosen to fill it. Such an act, as it seems to me, is either unnecessary and ineffectual or it involves an encroachment by the legislative branch of the Government upon the authority of the Executive. As the Congress has no power under the Constitution to nominate or appoint an officer and can not lawfully impose upon the President the duty of nominating or appointing to office any particular individual of its own selection, this bill, if it can fairly be construed as requiring the President to make the nomination and, by and with the advice and consent of the Senate, the appointment which it authorizes is in manifest violation of the Constitution. If such be not its just interpretation, it must be regarded as a mere enactment of advice and counsel, which lacks in the very nature of things the force of positive law and can serve no useful purpose upon the statute books." (Veto message of President Arthur, July 2, 1884, Messages and Papers of the Presidents, vol. 8, p. 221.)

The Attorney General advised the President that the above bill was beyond the power of Congress and should not be approved by the President,

for reasons similar to those afterwards given in the veto message above quoted. (See 18 Op. Atty. Gen., 18, noted under Art. II, sec. 2, clause 2.)

*The Secretary of the Navy in commenting upon the above veto message stated:* "The foregoing clear exposition of the force of section 2 of Article II of the Constitution \* \* \* shows that an effectual barrier has been established by the Constitution to any restoration to the Navy, by legislation, of particular officers who have been dismissed therefrom; and the Supreme Court has further established the proposition that such dismissals when once accomplished can not be revoked by the Executive. No more important doctrines than these can be stated bearing upon the welfare of our Navy personnel." (Annual Report, 1884, p. 43. See also note to Art. II, sec. 2, clause 2, "Restoration of dismissed officers.")

**Veto of bill to annul the finding and sentence of a court-martial.**—"There are other causes that deter me from giving this bill the sanction of my approval. The judgment of the court-martial by which, more than twenty years since, Fitz John Porter was tried and convicted was pronounced by a tribunal composed of nine general officers of distinguished character and ability. Its investigation of the charges for which it found the accused guilty was thorough and conscientious, and its findings and sentence were in due course of law approved by Abraham Lincoln, then President of the United States. Its legal competency, its jurisdiction of the accused and of the subject of the accusations, and the substantial regularity of all of its proceedings are matters which have never been brought into question. Its judgment, therefore, is final and conclusive in its character \* \* \*.

"The provisions of the bill now under consideration are avowedly based on the assumption that the findings of the court-martial have been discovered to be erroneous; but it will be borne in mind that the investigation which is claimed to have resulted in this discovery was made many years after the events to which that evidence related and under circumstances that made it impossible to reproduce the evidence on which they were based.

"It seems to me that the proposed legislation would establish a dangerous precedent, calculated to imperil in no small measure the binding force and effect of the judgments of the various tribunals established under our Constitution and laws.

"I have already, in the exercise of the pardoning power with which the President is vested by the Constitution, remitted the continuing penalty which had made it impossible for Fitz John Porter to hold any office of trust or profit under the Government of the United States; but I am unwilling to give my sanction to any legislation which shall practically annul and set at naught the solemn and deliberate conclusions of the tribunal by which he was convicted and of the President by whom its findings were examined and approved." (Veto message of President Arthur, July 2, 1884, Messages and Papers of the Presidents, vol. 8, p. 221.)

**Veto of bill to alter military records.**—

"The bill is objectionable because, if approved, it will require that for all purposes that are controlled by the laws of the United States, Aaron Cornish shall be held and considered to have been honorably discharged as assistant surgeon from the Ninety-seventh New York Volunteer Infantry. But it is a fact that Asst. Surg. Cornish was dismissed from the military service of the United States as of the organization mentioned September 8, 1862, in pursuance of an order issued by competent authority. In addition to this the approval of this bill will require an alteration of historical records that should be kept inviolate. If approved, the bill will also require the issuance of a certificate of honorable discharge in the case of an officer who, as a matter of fact, was not honorably discharged from the military service. It is impossible to discharge Cornish honorably now, because both he and the organization of which he was a member passed out of the military service of the United States and beyond military control more than 40 years ago. And to issue a certificate to show that he is now, or was at some previous time, honorably discharged from the military service of the United States would be to issue a false certificate.

"It is easily possible, without any alteration of historical records and without the issuance of a discharge certificate that is contrary to the fact, to confer upon Aaron Cornish, or any other person claiming under him, any right or benefit to which he, or such other person, would have been entitled, if it were a fact that he actually was honorably discharged from the military service of the United States. If, as is presumably the case, it is desired to give him, or some other person claiming under him, a pensionable status, of which he or such other person is now deprived by reason of the fact that he was not honorably discharged, that object can be accomplished with certainty, without requiring any alteration of records and without the issue of an incorrect discharge certificate, by enacting a law providing as follows:

"That in the administration of the pension laws, Aaron Cornish, who was assistant surgeon, Ninety-seventh New York Volunteer Infantry; shall hereafter be held and considered to have been discharged honorably from the military service of the United States as a member of said organization on the eighth day of September, eighteen hundred and sixty-two." (Veto message of President Taft, Mar. 28, 1910, quoting and adopting report of The Adjutant General of the Army; S. Doc. No. 464, 61st Cong., 2d sess.; 45 Cong. Rec., pt. 4, pp. 3848, 3849.)

**Veto of bill to restore to active list officer voluntarily retired.**—"I inclose herewith copy of reports of the Secretary of the Navy and of the Chief of the Bureau of Navigation adverse to the signature of this bill. The report of the Chief of the Bureau of Navigation gives the precedents which this bill follows. In each case special reasons were believed to exist at the time why a special exception should be made, but actual experience has shown that in each case the restoration served as a prece-



dent for the restoration of somebody else where the cause was not quite so strong. Commander White was transferred to the retired list three years ago on his own application. He now seeks reinstatement. All the advantages that should be derived from the legislation under which he was retired will be lost if the various individuals who take advantage of it are encouraged to believe that whenever they desire to undo their action that end can be achieved by supplemental special legislation. I agree entirely with Admiral Pillsbury's statement that legislation of this character does not contribute to the best interests of the service. I accordingly return the bill without my approval." (Veto message of President Roosevelt, Apr. 7, 1908, 42 Cong. Rec., pt. 5, p. 4503, 60th Cong., 1st sess.)

**Veto of bill to restore to active list officer compulsorily retired.**—"In accordance with the provisions of the personnel act of March 3, 1899, Capt. Veeder was placed upon the retired list with the rank of commodore, being one of the officers deemed by the board of five rear admirals less efficient than the remaining captains on the active list. The finding of this board was approved by me, acting upon the recommendation of the Navy Depart-

ment, and I see no reason why that action should be reversed. The board was composed of well-known officers, and I believe that their recommendation was, in accordance with their oaths, based upon the relative standing and special fitness of the officer concerned, as well as the efficiency of the naval service. If this bill for the relief of Commodore Veeder is approved, it will probably be followed by others of a similar nature for the return of all officers who have been placed on the retired list in accordance with the provisions of the personnel act, and it is my opinion that the enacting of this measure into a law will have a most injurious effect upon the naval service." (Veto message of President Taft, Mar. 4, 1911, 46 Cong. Rec., pt. 5, p. 4290, 61st Cong., 3d sess. But see act Mar. 3, 1915, 38 Stat., 939, making provision for restoration to active list of all officers compulsorily retired under the personnel act of Mar. 3, 1899; and see act of Aug. 29, 1916, 39 Stat., 602, 603, making provision for restoration to the active list of Commodore Veeder and other officers named therein.)

**Veto of bill to make retired officers of Army not amenable to court-martial.**—See note to section 1457, Revised Statutes.

[CLAUSE 3. President's action on joint resolutions.] <sup>3</sup> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8. The Congress shall have Power [CLAUSE 1. Revenue power, common defense and general welfare.] <sup>1</sup> To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[CLAUSE 2. Borrowing power.] <sup>2</sup> To borrow money on the credit of the United States;

[CLAUSE 3. Power over commerce.] <sup>3</sup> To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes;

[CLAUSE 4. Naturalization and bankruptcies.] <sup>4</sup> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

"The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. 'A naturalized citizen,' said Chief Justice Marshall, 'becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.

The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States precisely under the same circumstances which a native might sue.' Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, a fortiori, no act or omission of Congress, as to the providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation."

(U. S. v. Wong Kim Ark, 169 U. S., 649. As to loss of citizenship, compare Mackenzie v. Hare, 239 U. S., 299.)

**Naturalization of enlisted men of the Navy and Marine Corps.**—Special provision has been made by Congress in these cases, which form exceptions to the general naturalization law. (See act May 9, 1918, 40 Stat., 542.)

**Deserters from the military or naval service,** who desert in time of war, "are

deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof." (Sec. 1998, R. S., as amended by act Aug. 22, 1912, 37 Stat., 356.)

**For other statutes and decisions** relating to citizenship and naturalization, see note to Amendments, Art. XIV.

[CLAUSE 5. **Coinage, weights, and measures.**] <sup>5</sup> To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[CLAUSE 6. **Counterfeiting.**] <sup>6</sup> To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

[CLAUSE 7. **Post offices and post roads.**] <sup>7</sup> To establish Post Offices and post Roads;

[CLAUSE 8. **Patents and copyrights.**] <sup>8</sup> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

**Right of Government to use a patent.**—Congress has provided that the owner of any patented invention may recover reasonable compensation by suit in the Court of Claims for the unauthorized use thereof by the United States; but that this shall not apply to any device invented by any person while in the employment or service of the United States, or who is in such employment or service at the time of making claim, or to the assignee of any such patentee. (Act June 25, 1910, 36 Stat., 851, as amended by act July 1, 1918, 40 Stat., 705. See also act Oct. 6, 1917, sec. 10 (i), 40 Stat., 422.)

"It has been determined that the Government of the United States has no right to use a patented invention without compensation to the owner, under the constitutional provision that in the exercise of the power of eminent domain it may take private property for public use, but not without making just compensation therefor. (U. S. v. Burns, 12 Wall., 246; Cammeyer v. Newton, 94 U. S., 225; James v. Campbell, 104 U. S., 356; Hollister v. Benedict Mfg. Co., 113 U. S., 59; U. S. v. Palmer, 128 U. S., 262; Belknap v. Schild, 161 U. S., 10.)" 23 Op. Atty. Gen., 302.)

[CLAUSE 9. **Inferior courts.**] <sup>9</sup> To constitute Tribunals inferior to the Supreme Court;

**Courts-martial.**—This clause does not apply to military and naval courts, which form no part of the judicial system of the United States, but are instrumentalities of the executive, created by Congress under its power "to make rules for the government and regulation of the land and naval forces." (See Kurtz v. Moffitt, 115 U. S., 500; Dynes v. Hoover, 20 How., 78; Ex parte Milligan, 4 Wall., 137; U. S. v. Mackenzie, 30 Fed. Cas. No. 18313; Ex parte Henderson, 11 Fed. Cas. No. 6349; Ex parte Dickey, 204 Fed. Rep., 322; O. M. O. 24, 1914, p. 19.)

**Judicial system of United States.**—The United States has been divided by Congress into "judicial districts" and "judicial circuits." Each State comprises one or more judicial districts, and in each district there is a court called a District Court for which there are provided one or more district judges, with a few exceptions in which only one judge is provided for two districts in the same State. There are nine judicial circuits, each of which necessarily embraces a number of judicial districts. In each judicial circuit there is a Circuit Court of Appeals consisting of three judges, who may be either circuit judges, of whom two

or more are authorized for each judicial circuit, or any of the district judges within the circuit. In addition, the justices of the Supreme Court, of whom there are nine including the Chief Justice, are allotted one to each circuit, and are authorized to sit as judges of the Circuit Court of Appeals within their respective circuits, being designated as the "circuit justice" for the circuit.

The circuit courts of appeal for the respective circuits exercise appellate jurisdiction over the district courts within the circuit, except that in certain cases appeals and writs of error may be taken direct to the Supreme Court. The judgments of the circuit courts of appeal are final in a great many cases. In others, appeals and writs of error may be taken to the Supreme Court.

In addition, Congress has established special tribunals of very limited jurisdiction, such as consular courts, the Court of Claims, and the Court of Customs Appeals. It has also provided for courts in Alaska, District of Columbia, Hawaii, Philippine Islands, and Porto Rico. (See Judicial Code, act Mar. 3, 1911, 36 Stat., 1087.)



[**CLAUSE 10. Crimes at sea and offenses against law of nations.**] <sup>10</sup> To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

The judicial power of the United States embraces "all cases of admiralty and maritime jurisdiction." (Art. III, sec. 2, clause 1.)

**Piracies and felonies** committed on the high seas are defined and punished by the Criminal Code, act of March 4, 1909, sections 290-310 (35 Stat., 1145-1148); offenses within the admiralty and maritime jurisdiction are defined and punished by same act, secs. 272-289 (35 Stat., 1142-1145.)

**Power of Congress to punish offenses.**—The Constitution contains no grant to Congress of power to provide for the punishment of crimes except piracies and felonies committed on the high seas, offenses against the law of nations, treason, and counterfeiting the securities and current coin of the United States. Nevertheless, Congress has power to provide for the punishment of other crimes within the State or within the territory over which Congress has plenary and exclusive jurisdiction. (*Logan v. U. S.*, 144 U. S., 283.)

Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by the Constitution to Congress, must be valid. (*U. S. v. Gettysburg Electric R. Co.*, 160 U. S., 679.)

The Government of the Union is not dependent on the States for the execution of the great powers assigned to it; its means are adequate to its ends. (*McCulloch v. Maryland*, 4 Wheat., 316, 424; *In re Debs*, 158 U. S., 578.)

Implied power in Congress to pass laws to define and punish offenses is also derived from the Constitutional grant to Congress to declare war, to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces, and to provide for organizing, arming and disciplining the militia and for governing of such part of them as may be employed in the public service. Like implied authority is also vested in Congress from the power conferred to exercise exclusive jurisdiction over places purchased by the consent of the legisla-

ture of the State in which the same shall be for the erection of forts, magazines, arsenals, dock yards and other needful buildings, and from the clause empowering Congress to pass all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States or any department or officer thereof. (*U. S. v. Hall*, 98 U. S., 346; see also *U. S. v. Barnow*, 239 U. S., 77.)

Any act committed with a view to evading the legislation of Congress passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offense against the United States. But an act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, can not be made an offense against the United States unless it has some relation to the execution of a power of Congress or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the State can alone legislate. (*U. S. v. Fox*, 95 U. S., 672.)

**Miscellaneous cases.**—*U. S. v. White*, 27 Fed. Rep., 203 (not necessary for Congress to name offense); *U. S. v. Smith*, 5 Wheat., 157 (not necessary for Congress to define the offense); *U. S. v. Kelly*, 11 Wheat., 417 (judicial definition of offense not defined by Congress); *U. S. v. Holmes*, 5 Wheat., 417 (offense on vessel held by pirates); *U. S. v. Bowers*, 5 Wheat., 198 (offense committed by foreigner on foreign vessel at sea); *U. S. v. Arjona*, 120 U. S., 484 (offense against law of nations). See also, *U. S. v. Palmer*, 3 Wheat., 610; *U. S. v. Wiltberger*, 5 Wheat., 76; *U. S. v. Pirates*, 5 Wheat., 184; *U. S. v. Bevans*, 3 Wheat., 336.

"That the laws of nations constitute a part of the laws of the land is established from the face of the Constitution, upon principle and by authority. But the laws of war constitute much the greater part of the law of nations. Like the other laws of nations, they exist and are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress." (11 Op. Atty. Gen., 299.)

[**CLAUSE 11. Power to declare war and regulate captures, etc.**] <sup>11</sup> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

I. THE WAR POWER.

II. PROPERTY OF BELLIGERENTS.

III. ACQUISITION AND GOVERNMENT OF TERRITORY.

IV. DISCIPLINE OF ARMY.

V. MARTIAL LAW.

I. THE WAR POWER.

Power of Congress to declare war and President's power as Commander in

**Chief.**—"Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of forces and the conduct of campaigns. That power and duty belong to the President as Commander in Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their

extent must be determined by their nature and by the principles of our institutions. The power to make the necessary laws is in Congress, the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authority essential to its due exercise. But neither can the President in war more than in peace intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress can not direct the conduct of campaigns, nor can the President or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment for offenses, either of soldiers or civilians, unless in cases of a controlling necessity which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature." (Ex parte Milligan, 4 Wall., 2, 139, concurring opinion of four justices; see also *Swaim v. U. S.*, 28 Ct. Cls., 173, 221, affirmed, 165 U. S., 553; and see note to Art. II, sec. 2, clause 1.)

**Power of President in advance of congressional action.**—"If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." (Prize Cases, 2 Black, 635.)

"Whether the President in fulfilling his duties as Commander in Chief in suppressing an insurrection has met with such armed hostile resistance and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents is a question to be decided by him, and this court must be governed by the decisions and acts of the political department of the Government to which this power was intrusted. He must determine what degree of force the crisis demands. The proclamation of blockade is itself official and conclusive evidence to the court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case." (Prize Cases, 2 Black, 635.)

"A state of actual war may exist without any formal declaration of it by either party; and this is true of both a civil and a foreign war." (Prize Cases, 2 Black, 635.)

"That a foreign nation, or insurrectionary body of citizens, may by invasion of the United States or by other acts bring about a condition of affairs which will warrant the President in declaring, in advance of congressional legislation, that a state of war exists, was asserted by the Supreme Court in the Prize Cases." (2 Willoughby Const., 796.) [That power of declaring war is exclusive with Congress, see *Perkins v. Rogers*, 35 Ind., 167.]

"The question in the present case is, When did the Rebellion begin and end? \* \* \* The proclamation of intended blockade by the President may, therefore, be assumed as marking the first of these dates, and the proclamation that the war had closed as marking the second." (The Protector, 12 Wall., 700.)

[The President's proclamations of intended blockade were issued on April 19 and 27, 1861; see also 102 U. S., 426, 438; 9 Wall., 71; 15 Op. Atty. Gen., 572, 574; secs. 1997 and 4749, R. S.; proclamations that the war had closed were issued on April 2 and August 20, 1866.]

**Extent of war power.**—"The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution. In the latter case the power is not limited to victories in the field and to the dispersion of the insurrectionary forces. It carries with it inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress." (Stewart v. Kahn, 11 Wall., 493.)

The power to prohibit the liquor traffic as a means of increasing war efficiency is part of the war power of Congress. (*Hamilton v. Kentucky Distilleries Co.*, 251 U. S., 146; *Ruppert v. Caffey*, 251 U. S., 264.)

Congress has the authority to raise and support armies and to make rules and regulations for the protection of the health and welfare of those composing them against the evils of prostitution, and may leave the details of such regulations to the Secretary of War. A citizen may legally be convicted of setting up a house of ill fame within five miles of a military station, that being the distance designated by the Secretary of War in regulations made by him under the act of May 18, 1917, section 13 (40 Stat., 76). (*McKinley v. U. S.*, 249 U. S., 397.)

## II. PROPERTY OF BELLIGERENTS.

**Effect of declaration of war.**—"The people of the two countries become immediately the enemies of each other—all intercourse, commercial or otherwise, between them unlawful—all contracts existing at the commencement of the war suspended, and all made during its existence utterly void. The insurance of enemies' property, the drawing of bills of exchange or purchase on the enemies' country, the remission of bills or money to it are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved and, in fine, interdiction of trade and intercourse, direct or indirect, is absolute and complete by the mere force and effect of war itself. All the property of the people of the two countries on land or sea are subject to capture and confiscation by the adverse party as enemies' property, with certain qualifications as it respects property on land (*Brown v. U. S.*, 8 Cranch, 110). All treaties between the belligerent parties are annulled. The ports of the respective countries may be blockaded, and letters of marque and reprisal granted as rights of war, and the law of prizes as defined by the law of nations comes into full and complete operation, resulting from maritime captures, jure belli. War also effects a change in the mutual relations of all States or countries, not directly, as in the case of belligerents, but immediately and indirectly, though they have no part in the contest, but remain neutral."



(Prize Cases, 2 Black, 635, 682, dissenting opinion Justice Nelson; see also *McCormick v. Humphrey*, 27 Ind., 154; *Perkins v. Rogers*, 35 Ind., 167.)

**Confiscation of enemy property.**—"War gives the right to confiscate but does not of itself confiscate the property of the enemy." (Brown v. U. S., 8 Cranch, 110; see also *Britton v. Butler*, 4 Fed. Cas. No. 1903; *Wagner v. Schooner Juanita*, 28 Fed. Cas. No. 17039; *Miller v. U. S.*, 11 Wall., 304; *Brown v. Hiatt*, 4 Fed. Cas. No. 2011.)

"When war breaks out the question what shall be done with enemy property in our country is a question rather of policy than of law. The rule which we apply to the property of our enemy will be applied by him to the property of our citizens. Like all other questions of policy it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary." (Brown v. U. S., 8 Cranch, 110.)

**Authority of military commander to seize private property.**—"Private property may be taken by a military commander to prevent it from falling into the hands of the enemy or for the purpose of converting it to the use of the public; but the danger must be immediate and impending, or the necessity urgent for the public service such as will not admit of delay and where the action of the civil authority would be too late in providing the means which the occasion calls for. The facts as they appeared to the officer must furnish the rule for the application of these principles. But the officer can not take possession of private property for the purpose of insuring the success of a distant expedition upon which he is about to march." (*Mitchell v. Harmony*, 13 How., 115.)

"If private property there [in conquered territory] was taken by an officer or a soldier of the occupying army, acting in his military character, when by the laws of war or the proclamation of the commanding general it should have been exempt from seizure, the owner could have complained to that commander, who might have ordered restitution or sent the offending party before a military tribunal, as circumstances might have required, or he could have had recourse to the Government for redress. But there can be no doubt of the right of the Army to appropriate any property there, although belonging to private individuals, which was necessary for its support or convenient for its use. This was a belligerent right which was not extinguished by the occupation of the country, although the necessity for its exercise was thereby lessened. However exempt from seizure on other grounds private property there may have been, it was always subject to be appropriated when required by the necessities or convenience of the Army, though the owner of property taken in such case may have had a just claim against the Government for indemnity." (*Dow v. Johnson*, 100 U. S., 158, 167; compare, *Heflebower v. U. S.*, 21 Ct. Cls., 237; *U. S. v. Pacific R. Co.*, 120 U. S., 239; *Alexander v. U. S.*, 39 Ct. Cls., 383; 13 Op. Atty. Gen., 111; *Wiggins's Case*, 3 Ct. Cls., 413.)

"Extraordinary and unforeseen occasions arise, however, beyond a doubt, in cases of extreme necessity in time of war or of immediate or impending danger in which private property may be impressed into the public service or may be seized and appropriated to the public use or may even be destroyed without the consent of the owner. \* \* \* The rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser and that the Government is bound to make full compensation to the owner." (*U. S. v. Russell*, 13 Wall., 623.)

**Status of inhabitants in enemy country.**—"The district of country declared by the constituted authorities during the late Civil War to be in insurrection against the Government of the United States was enemy territory, and all the people residing within such district were, according to public law and for all purposes connected with the prosecution of the war, liable to be treated by the United States, pending the war and while they remained within the lines of insurrection, as enemies without reference to their personal sentiments and dispositions." (*Ford v. Surget*, 97 U. S., 594.)

"It is said that, though remaining in rebel territory, Mrs. Alexander has no personal sympathy with the rebel cause and that her property therefore can not be regarded as enemy property; but the court can not inquire into the personal character and dispositions of individual inhabitants of enemy territory. We must be governed by the principle of public law so often announced by this bench as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States must be regarded as enemies until, by action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed." (*Mrs. Alexander's Cotton*, 2 Wall., 404; see also, *Miller v. U. S.*, 11 Wall., 268, sustaining laws providing for confiscation of private property owned by friendly as well as hostile inhabitants of the Confederate States.)

### III. ACQUISITION AND GOVERNMENT OF TERRITORY.

**Power to acquire territory.**—"The genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the General Government to vindicate by arms if it should become necessary its own rights and the rights of its citizens. A war, therefore, declared by Congress can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's territory. The United States, it is true, may enlarge its boundaries by conquest or treaty and may demand the cession of territory as a condition of peace in order to indemnify its citizens for the injuries they have suffered, or to reimburse the Government for the expense of the war; but this can be done only by the treaty-making power or the legisla-

tive authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and power are purely military. \* \* \* He may invade the hostile country and subject it to the sovereignty and authority of the United States; but his conquests do not enlarge the boundaries of this Union nor extend the operations of our institutions and laws beyond the limits before assigned to them by the legislative power." (Fleming v. Page, 9 How., 603.)

"The Constitution confers absolutely upon the Government of the Union the power of making war and of making treaties; consequently that Government possesses the power of acquiring territory, either by conquest or treaty." (American Insurance Co. v. Canter, 1 Pet., 511.)

"The war power and the treaty-making power each carries with it authority to acquire new territory." (Stewart v. Kahn, 11 Wall., 493.)

"The power to acquire territory, either by conquest or treaty, is vested by the Constitution in the United States." (U. S. v. Huckabee, 16 Wall., 414.)

The port of Tampico, Mexico, while in the military possession of the United States and governed by its military authorities acting under the orders of the President, was not a part of the United States and did not cease to be a foreign country in the sense in which these words are used in the acts of Congress. "It is true that when Tampico had been captured and the state of Tamaulipas subjugated, other nations were bound to regard the country while our possession continued as the territory of the United States and to respect it as such. \* \* \* As regards all other nations it was a part of the United States and belonged to them as exclusively as the territory included in our established boundaries. But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws. \* \* \* The power of the President under which Tampico and the state of Tamaulipas were conquered and held in subjection was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his Government." Tampico therefore continued to be a foreign port "nor did our laws extend over it." (Fleming v. Page, 9 How., 603.)

Status of Porto Rico while under military government previous to ratification of treaty of peace ceding the island to the United States: "During this period the United States and Porto Rico were still foreign countries with respect to each other. \* \* \* The fact that notwithstanding the military occupation of the United States Porto Rico remained a foreign country within the revenue laws is established by the case of Fleming v. Page." (Dooley v. U. S., 182 U. S., 222.)

"Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a military government appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own

under which as a free and independent people they may control their own affairs without interference by other nations." As between the United States and all foreign nations, Cuba was to be treated as if it were conquered territory. "But as between the United States and Cuba, that island is territory held in trust for the inhabitants of Cuba to whom it rightfully belongs." (Neely v. Henkel, 180 U. S., 109; see also 23 Op. Atty. Gen., 120.)

**Government of conquered territory during war.**—By the conquest and military occupation of the port of Castine, Me., by the British during the War of 1812, "the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended and the laws of the United States could no longer be rightfully enforced there or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case no other laws could be obligatory upon them; for where there is no protection or allegiance or sovereignty there can be no claim to obedience." (U. S. v. Rice, 4 Wheat., 246.)

"Although the city of New Orleans was conquered and taken possession of in a civil war waged on the part of the United States to put down an insurrection and restore the supremacy of the National Government in the Confederate States, that Government had the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war. \* \* \* In such cases the conquering power has a right to displace the preexisting authority and to assume to such an extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases save those which are found in the laws and usages of war. \* \* \* In such cases the laws of war take the place of the Constitution and laws of the United States as applied in time of peace." (New Orleans v. New York Mail S. S. Co., 20 Wall., 387; Dooley v. U. S., 182 U. S., 222.)

"While his [military commander's] power is necessarily despotic, this must be understood rather in an administrative than in a legislative sense. While in legislating for a conquered country he may disregard the laws of that country, he is not wholly above the laws of his own. \* \* \* His power to administer would be absolute, but his power to legislate would not be without certain restrictions—in other words, they would not extend beyond the necessities of the case. \* \* \* It was said that the courts established in Mexico



during the war 'were nothing more than the agents of the military power to assist it in preserving order in the conquered territory and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power and their decisions under its control whenever the commanding officer thought proper to interfere. They were not courts of the United States and had no right to adjudicate upon a question of 'prize or no prize,' although Congress in the exercise of its general authority in relation to the national courts would have power to validate their action." (*Dooley v. U. S.*, 182 U. S., 222.)

"So long as the war continued it can not be denied that he [the President] might institute temporary governments in insurgent districts occupied by the national forces or take measures in any States for the restoration of State governments faithful to the Union, employing, however, in such efforts only such means and agents as were authorized by constitutional laws." (*Texas v. White*, 7 Wall., 700.)

"The municipal laws—that is, such as affect private rights of persons and property and provide for the punishment of crime—are generally allowed to remain in force and to be administered by the ordinary tribunals as they were administered before the occupation. They are considered as continuing unless suspended or superseded by the occupying belligerent." (*Dow v. Johnson*, 100 U. S., 158.)

"While we see no reason to doubt the conclusion of the court that the port of Tampico [during its occupation by the United States in the Mexican War] was still a foreign port, it is not perceived why the fact that there was no act of Congress establishing a customhouse there or authorizing the appointment of a collector should have prevented the collector appointed by the military commander from granting the usual documents required to be issued to a vessel engaged in the coasting trade. A collector, though appointed by a military commander, may be presumed to have the ordinary power of a collector under an act of Congress, with authority to grant clearances to ports within the United States, though, of course, he would have no power to make a domestic port of what was in reality a foreign port." (*De Lima v. Bidwell*, 182 U. S., 1.)

**Government of conquered and ceded territory after war.**—See note to Article IV, section 3, clause 2.

#### IV. DISCIPLINE OF ARMY.

**Jurisdiction over persons in military service during war.**—"The question here is, What is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country. It is not the civil law of the conquering country. It is military law—the law of war—and its supremacy for the protection of the officers and soldiers of the Army when in service in the field in the enemy's country is as essential to the efficiency of the Army as the supremacy of the civil law at home and in time of peace is essential to the preservation of liberty." (*Dow v. Johnson*, 100 U. S., 158, 170.)

"This doctrine of nonliability to the tribunals of the invaded country for acts of warfare is as applicable to members of the Confederate Army when in Pennsylvania as to members of the National Army when in the insurgent States. The officers or soldiers of neither Army could be called to account civilly or criminally in those tribunals for such acts, whether those acts resulted in the destruction of property or the destruction of life. Nor could they be required by those tribunals to explain or justify their conduct upon any averment of the injured party that the acts complained of were unauthorized by the necessities of war." (*Dow v. Johnson*, 100 U. S., 158, 169.)

Courts-martial did not have exclusive jurisdiction to try persons in the Army for offenses punishable by State laws during the Civil War while they were in States "occupying as members of the Union their normal and constitutional relation to the Federal Government, in which the supremacy of that Government was recognized and the civil courts were open and in the undisturbed exercise of their jurisdiction. When the armies of the United States were in the territory of insurgent States, banded together in hostility to the National Government, and making war against it—in other words, when the armies of the United States were in the enemy's country—the military tribunals mentioned had under the laws of war and the authority conferred by the section named exclusive jurisdiction to try and punish offenses of every grade committed by persons in the military service. Officers and soldiers of the armies of the Union were not subject during the war to the laws of the enemy or amenable to his tribunals for offenses committed by them. They were answerable only to their own Government and only by its laws as enforced by its armies could they be punished. \* \* \* The fact that when the offense was committed for which the defendant was indicted the State of Tennessee was in the military occupation of the United States with a military governor at its head appointed by the President can not alter this conclusion. Tennessee was one of the insurgent States forming the organization known as the Confederate States, against which the war was waged. Her territory was enemy's country, and its character in this respect was not changed until long afterwards \* \* \*. The laws of the State for the punishment of crime were continued in force only for the protection and benefit of its own people." (*Coleman v. Tennessee*, 97 U. S., 513, 515; see also *Tennessee v. Hibdon*, 23 Fed. Rep., 795; 24 Op. Atty. Gen., 570.)

When the armies of the United States are in the enemy's country, the established military tribunals of the United States have under the laws of war and statutory authority exclusive jurisdiction to try and punish offenses of every grade committed by persons in the military service. (24 Op. Atty. Gen., 570, citing *Coleman v. Tennessee*, 97 U. S., 509.)

"While it is true that the jurisdiction of military tribunals is not exclusive *in time of peace* and in territory where the supremacy of the United States is recognized and the relations between the local government and the National Government normal, and where also the exer-



cise of jurisdiction of the local civil courts is not disturbed, it is equally true that when the armies of the United States are in hostile territory, and as in the present case engaged in actual warfare, the jurisdiction of such tribunals over such offenses is exclusive; and it is evident from the decisions cited that in reference to the present question [Philippine insurrection] the country was none the less 'enemy's country' and the territory hostile because it was harassed by insurrection against a sovereignty perfect in law rather than attacked or defended by a recognized belligerent." (24 Op. Atty. Gen., 570.)

"It is well settled that a foreign army permitted to march through a friendly country or to be stationed in it by authority of its sovereign or government is exempt from its civil and criminal jurisdiction \* \* \*. Much more must this exemption prevail where a hostile army invades an enemy's country. There would be something singularly absurd in permitting an officer or soldier of an invading army to be tried by his enemy whose country it had invaded. The same reasons for his exemption from criminal prosecution apply to civil proceedings. There would be as much incongruity and as little likelihood of freedom from the irritations of the war in civil as in criminal proceedings prosecuted during its continuance. In both instances, from the very nature of war the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army \* \* \*. It is manifest that if officers or soldiers of the Army could be required to leave their posts and troops upon the summons of every local tribunal on pain of a judgment by default against them which at the termination of hostilities could be enforced by suit in their own States, the efficiency of the Army as a hostile force would be utterly destroyed." (Dow v. Johnson, 100 U. S., 158, 165.)

"Nor is the position of the invading belligerent affected or his relation to the local tribunals changed by his temporary occupation and domination of any portion of the enemy's country \* \* \*. The municipal laws—that is, such as affect private rights of persons and property and provide for the punishment of crime—are generally allowed to remain in force and to be administered by the ordinary tribunals as they were administered before the occupation. They are considered as continuing unless suspended or superseded by the occupying belligerent. But their continued enforcement is not for the protection or control of the army or its officers or soldiers. These remain subject to the laws of war and are responsible for their conduct only to their own government and the tribunals by which those laws are administered. If guilty of wanton cruelty to persons or of unnecessary spoliation of property or of other acts not authorized by the laws of war, they may be tried and punished by the military tribunals. They are amenable to no other tribunal except that of public opinion, which it is to be hoped will always brand with infamy all who authorize or sanction acts of cruelty and oppression." (Dow v. Johnson, 100 U. S., 158; see also 24 Op. Atty. Gen., 570.)

An officer of the Army may be sued in the courts of the United States for unauthorized seizure of the property of a citizen traveling with the Army as a trader during the war with Mexico. "The trespass was committed out of the limits of the United States. But an action may be maintained in the circuit court for any district in which the defendant may be found upon process against him where the citizenship of the respective parties gives jurisdiction to a court of the United States." (Mitchell v. Harmony, 13 How., 115.)

The validity of a seizure by a United States officer in command of troops while in an insurgent State could not be tried in a municipal court in a common-law proceeding, where the property seized belonged to an enemy, as such seizure was an act of war and no action can be maintained in such court against the captor of booty. This conclusion does not conflict with the ruling of the Supreme Court in Mitchell v. Harmony, as there the property in question belonged to a citizen and not to an enemy. (Coolidge v. Guthrie, 6 Fed. Cas. No. 3185.)

An officer of the Federal Army was sued in New Orleans for seizure of private property by a subordinate officer under his authority, alleged to be a wanton abuse of power. Judgment was entered against defendant, with interest and costs. Suit was brought on this judgment in the Federal court for the district of Maine and judgment entered by that court for \$2,659.67 and costs. This was reversed by the Supreme Court on ground that lower courts were without jurisdiction. (Dow v. Johnson, 100 U. S., 158.)

An officer in the Army of the United States who, while operating in the Philippines during the insurrection in those islands and while the government of military occupation was in force therein, committed homicide against a native of those islands, was amenable only to the laws of war and could not be tried by the civil courts of those islands or of the United States; and having left the military service, he could not be tried for the offense by a military court. A court-martial has no jurisdiction over an officer after he has left the service, and a military commission has no jurisdiction to try such officer after peace has been proclaimed. (24 Op. Atty. Gen., 570.) [While the United States was not at war with any recognized power during the Philippine insurrection, nevertheless a state of war existed for certain purposes as to all the military forces of the United States directly engaged in the suppression of said insurrection (7 Comp. Dec., 345); see note to section 290, Revised Statutes.]

An officer of United States Volunteers was charged with having deliberately murdered a brother officer during the Mexican War at a place in Mexico occupied by the United States troops and under the jurisdiction of the United States. He escaped to the United States during the progress of his trial by a military commission. *Held*, that he could not be tried by any civil court of the United States; and the volunteer forces to which he belonged having been disbanded and mustered out of the service, he could not be brought to trial by a military court

as for a military offense. "However much it is to be regretted that the extraordinary case of Capt. Foster should escape a judicial or military investigation, it is of infinitely higher moment that the constitutional principles of the Government as wisely expounded by the judiciary should be upheld and enforced. If the country hereafter should be likely to be placed in circumstances under which a similar case might arise, Congress can easily provide against a recurrence of the difficulties of the present case." (5 Op. Atty. Gen., 55.)

#### V. MARTIAL LAW.

**Military jurisdiction over civilians in time of war.**—"There are under the Constitution three kinds of military jurisdiction: One to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within the States or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of States maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under the military law, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as military government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander, under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated martial law proper, and is called into action by Congress or temporarily when the action of Congress can not be invited, in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities whose ordinary law no longer adequately secures public safety and private rights." (Ex parte Milligan, 4 Wall., 2, 141, concurring opinion of four justices.)

**"Martial law is the law of military necessity in the actual presence of war.** It is administered by the general of the Army, and is in fact his will." (U. S. v. Dieckman, 92 U. S., 520. For other definitions, see 8 Op. Atty. Gen., 365; In re Egan, 8 Fed. Cas. No. 4303; In re Ezeta, 62 Fed. Rep., 972.)

"What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful. 'Whatever force is necessary for self-defense is also lawful. This law, applied nationally, is the martial law, which is an offshoot of the common law, and although ordinarily dormant in peace, may be called forth by insurrection or invasion.'" (Commonwealth v. Shortall, 206 Pa. St., 165; 65 L. R. A., 193.)

"The right in the military officer to govern by martial law, as we have said, arises upon the fact of existing or immediately impending force at a given place and time, against legal authority, which the civil authority is incom-

petent to overcome; and it is exercised precisely upon the principle on which self-defense justifies the use of force by individuals. \* \* \* That is, there are cases where force must be resisted by force, instead of waiting for the civil authorities. \* \* \* This is the doctrine expressed by the maxim, *inter arma silent leges*; \* \* \* that is, that in the midst of actual force, for arms is used as meaning force, the law is silent." (Griffin v. Wilcox, 21 Ind., 370.)

"As has been said by a distinguished civilian, 'when foreign invasion or civil war renders it impossible for courts of law to sit, or to enforce the execution of their judgments, it becomes necessary to find some rude substitute for them and to employ for that purpose the military, which is the only remaining force in the community; and, while the laws are silenced by the noise of arms, the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society; but no longer.' This necessity must be shown affirmatively by the party assuming to exercise this extraordinary and irregular power over the life, liberty, and property of the citizen, whenever it is called in question." (In re Egan, 8 Fed. Cas. No. 4303.)

"Public danger warrants the substitution of executive process for judicial process." (Moyer v. Peabody, 212 U. S., 78.)

"Unquestionably a State may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the State as to require the use of the military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war, and the established government resorted to the rights and usages of war to maintain itself and to overcome the unlawful opposition." (Luther v. Borden, 7 How., 1.)

"It is not unfrequently said that the community must be either in a state of peace or war, as there is no intermediate state. But from the point of view now under consideration this is an error. There may be peace for all the ordinary purposes of life and yet a state of disorder, violence, and danger in special directions, which, though not technically war, has in its limited field the same effect, and if important enough to call for martial law for suppression is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war. The condition in fact exists, and the law must recognize it, no matter how opinions may differ as to what it should be most correctly called." (Commonwealth v. Shortall, 206 Pa. St., 165; 65 L. R. A., 193.)

**Martial law "is called into action by Congress, or temporarily, when the action of Congress can not be invited, in the case of justifying or excusing peril, by the President."** (Ex parte Milligan, 4 Wall., 2, concurring opinion; see also Despan v. Olney, 7 Fed. Cas. No. 3822.)



"It is to be borne in mind that this power is not one to be exercised only by the highest officers of the Government, in whose hands it might be exercised with moderation. It is claimed for the President as Commander in Chief and as incident to a state of war. But if it exists at all it exists as the law of war or martial law, and may be exercised by the military officer in command of any district without reference to his rank, as rightfully as by the President himself. He might be afraid to exercise it without orders from his superior, but if it exists at all it belongs to him as well as to the President." (*Johnson v. Jones*, 44 Ill., 143; 92 Am. Dec., 159.)

**Limitations upon exercise of martial law.**—"Martial law can not arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration. \* \* \* There are occasions when martial rule can be properly applied. If in foreign invasions or civil war the courts are actually closed and it is impossible to administer criminal justice according to law, then on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown, to preserve the safety of the Army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration, for if this government is continued after the courts are reinstated it is a gross usurpation of power. Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." (*Ex parte Milligan*, 4 Wall., 2.)

"A citizen not connected with the military service and resident in a State where the courts are open and in the proper exercise of their jurisdiction can not, even when the privilege of the writ of habeas corpus is suspended, be tried, convicted, or sentenced otherwise than by the ordinary courts of law." (*Ex parte Milligan*, 4 Wall., 3.)

The Federal authority having been unopposed in the State of Indiana and the Federal courts open for the trial of offenses and the redress of grievances, the usages of war could not, under the Constitution, afford any sanction for the trial there of a citizen in civil life not connected with the military or naval service by a military tribunal for any offense whatever. "It is claimed that martial law covers, with its broad mantle, the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it and of which he is the judge) has the power, within the lines of his military district, to suspend all civil rights and their remedies and subject citizens, as well as soldiers, to the rule of *his will*; and in the exercise of his lawful authority can not be restrained except by his superior officer or the President of the United States. \* \* \* Martial law established on such a basis destroys every guaranty of the Constitution and effectually renders the 'military independent of and superior to the civil

power.' \* \* \* Civil liberty and this kind of martial law can not endure together. \* \* \* It will be borne in mind that this is not a question of the power to proclaim martial law when war exists in a community and the courts and civil authorities are overthrown." (*Ex parte Milligan*, 4 Wall., 3, 124-127.)

"Martial law is exercised in our country, the military being on the spot to execute it where no civil authority exists; but where the civil authority exists, the Constitution is imperative that it shall be paramount to the military." (*Griffin v. Wilcox*, 21 Ind., 370.)

"Martial law is restricted to those places which are the theater of war and to their immediate vicinity. Modified by the necessities of war, it is obvious it can not operate beyond these bounds." (*In re Kemp*, 16 Wis., 359.)

"Neither can even the Commander in Chief of the Army extend martial law beyond the sphere of military operations. If he possessed this power, in time of war or insurrection, over the whole extent of the Nation, whether within the theater of military operations or not, the political institutions and laws of the land would be entirely at his mercy." (*Jones v. Seward*, 40 Barb. (N. Y.), 563.)

"But when the civil courts, in the midst of loyal communities, are exercising their ordinary jurisdiction, the appeal to the military arm or to martial law is needless." (*Johnson v. Jones*, 44 Ill., 143; 92 Am. Dec., 159.)

See note to Article I, section 8, clause 13, "Civil responsibility of persons in military service."

**Effect of martial law.**—When martial law is declared by a State during a local insurrection, "the officers engaged in its military service might lawfully arrest anyone who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection, and might order a house to be forcibly entered and searched when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the Government would be mere parade and rather encourage attack than repel it." (*Luther v. Borden*, 7 How., 1.)

"The effect of martial law is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned, there is no limit but the necessities and exigency of the situation; and in this respect there is no difference between a public war and domestic insurrection." (*Commonwealth v. Shortall*, 206 Pa. St., 165; 65 L. R. A., 193.)

Martial law "overrides and suppresses all existing civil laws, civil officers, and civil authorities by the arbitrary exercise of military power; and every citizen or subject, in other words the entire population of the country, within the confines of its power, is subjected to the mere will or caprice of the commander. He holds the lives, liberty, and property of all in the palm of his hand. Martial law is regulated by no known or established system or code of laws, as it is over and above all of them. The commander is the legislator, judge, and executioner. His order to the provost marshal is



the beginning and the end of the trial and condemnation of the accused. There may be a hearing, or not, at his will. If permitted, it may be before a drumhead court-martial or the more formal board of a military commission, or both forms may be dispensed with and the trial and condemnation be equally legal, though not equally humane and judicious." (In re Egan, 8 Fed. Cas. No. 4303.)

"The will of the military chief \* \* \* is, subject to slight limitations, the law of the military zone or theater of war. It is sometimes spoken of as a substitute for the civil law. It is said also that the proclamation of martial law ousts or suspends the civil jurisdiction. These expressions are hardly accurate. The invasion or insurrection sets aside, suspends, and nullifies the actual operation of the Constitution and laws. The guaranties of the Constitution as well as the common law and statutes, and the functions and powers of the courts and officers, become inoperative by virtue of the disturbance. The proclamation of martial law simply recognizes the status or condition of things resulting from the invasion or insurrection and declares it. In sending the army into such territory to occupy it and execute the will of the military chief for the time being, as a means of restoring peace and order, the executive merely adopts a method of restoring and making effective the Constitution and laws within that territory, in obedience to his sworn duty to support the Constitution and execute the laws." (State v. Brown, 71 W. Va., 519, 521; 33 Ann. Cas., 2.)

"In most, if not all, of the instances in which the civil courts have treated sentences of the military commissions as void, the commissions acted and the sentences were pronounced in tranquil territory, not covered by any proclamation of martial law, in which there was no actual war, in which the Constitution and laws were in full and unobstructed operation." (State v. Brown, 71 W. Va., 519, 524; 33 Ann. Cas., 3.) ["In some parts of the country, during the War of 1812, our officers made arbitrary arrests and by military tribunals tried citizens who were not in the military service. These arrests and trials when brought to the notice of the courts were uniformly condemned as illegal." (Ex parte Milligan, 4 Wall., 128.)]

"Power to establish a military commission for the punishment of offenses committed within the military zone is challenged in argument; but we think such a commission is a recognized and necessary incident and instrumentality of martial government. A mere power of detention of offenders may be wholly inadequate to the exigencies and effectiveness of such government. How long an insurrection or a war may last depends upon its character." (State v. Brown, 71 W. Va., 519, 525; 33 Ann. Cas., 4.)

"So long as such arrests [without judicial process] are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and can not be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief. \* \* \* When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he

deems the necessities of the moment." (Moyer v. Peabody, 212 U. S., 78.)

"No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression and any injury willfully done to person or property, the party by whom or by whose order it is committed will undoubtedly be answerable." (Luther v. Borden, 7 How., 1.)

"It is an unbending rule of law that the exercise of military power where the rights of the citizen are concerned shall never be pushed beyond what the exigency requires." (Raymond v. Thomas, 91 U. S., 712.)

During the war of 1812 Gen. Jackson declared martial law in New Orleans. By his order some of the citizens were arrested for seditious publications. A writ of habeas corpus was issued and served on Gen. Jackson, who tore up the writ and sent the judge by force beyond his lines. Later, news was received of the treaty of peace and martial law revoked. The court issued a process against Jackson for contempt of court. He came into court personally, submitted to its jurisdiction, and paid a fine of \$1,000. "I have always been taught to believe that Judge Hall was right in imposing the fine and that Gen. Jackson earned the brightest page in his history by paying it and gracefully submitting to the judicial power. Such I believe is the judgment of history and of thoughtful judicial inquirers, though a grateful country very properly refunded to her favorite general the sum he had paid for a necessary but unauthorized exercise of military power." (Dissenting opinion of Mr. Justice Miller, Dow v. Johnson, 100 U. S., 158, 194; see also Ex parte Beck (245 Fed. Rep., 967, 973.)

**Military commissions.**—"The laws of war constitute much the greater part of the law of nations. Like the other laws of nations, they exist and are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress \* \* \* It is manifest from what has been said, that military tribunals exist under and according to the laws and usages of war in the interest of justice and mercy. They are established to save human life, and to prevent cruelty as far as possible. The commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the law and usage of war. \* \* \* That the laws of war authorized commanders to create and establish military commissions, courts, or tribunals for the trial of offenders against the laws of war, whether they be active or secret participants in the hostilities, can not be denied. \* \* \* It must be constantly borne in mind that such tribunals \* \* \* can not exist except in time of war, and can not then take cognizance of offenders or offences where the civil courts are open, except offenders and offences against the laws of war \* \* \* The fact that the civil courts are open does not affect the right of the military tribunal to hold as a prisoner and to try. The civil courts have no more right to prevent the military, in time of war, from trying an offender against the laws of war than they have a right to interfere with and prevent a bat-

tle." (11 Op. Atty. Gen. 297, holding that "the persons charged with the assassination of the President in the city of Washington, on the 14th of April, 1865, may be lawfully tried before a military tribunal"; see also *Carver v. U. S.*, 16 Ct. Cls., 361; 111 U. S., 609.)

A military commission was without jurisdiction to try a member of the United States Army in occupation of Cuba in 1900, for homicide, notwithstanding that the offense was not cognizable by Army court-martial. Although Cuba was being governed by the President of the United States, principally by means of American soldiers, it did not have the status of martial law or military government. (23 Op. Atty. Gen., 120.)

[CLAUSE 12. Raising and support of armies.] <sup>12</sup> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two years;

[CLAUSE 13. Provision for a Navy.] <sup>13</sup> To provide and maintain a Navy;

#### I. POWER TO PROVIDE NAVY.

#### II. FREEDOM FROM STATE INTERFERENCE.

#### III. JURISDICTION OF CIVIL AUTHORITIES.

#### IV. RESPONSIBILITY OF MILITARY AUTHORITIES FOR ILLEGAL ACTS.

#### V. PROTECTION OF MILITARY OFFICERS FOR ACTS DONE IN PERFORMANCE OF DUTY.

#### I. POWER TO PROVIDE NAVY.

**Distinguished from power to govern Navy.**—"The power to formulate Articles for the Government of the Navy and punish individual officers for violation thereof is conferred upon Congress by the clause of the Constitution authorizing it 'to make rules for the government and regulation of the land and naval forces;' [Art. I, sec. 8, clause 14.] The power to provide what persons may be appointed or enlisted in the naval service, the qualifications they must possess, and the total number of the entire force, is conferred by the clause authorizing the Congress 'to provide and maintain a Navy.' Statutes passed under the first clause mentioned are penal and are to be enforced by courts-martial; those passed under the second clause are enacted in the interest of the Navy at large and are to be administered by the President either alone or with the aid of examining boards or such other instrumentalities as may be determined upon by Congress. Persons excluded from appointment for lack of any required qualification—health, age, nationality, height, temperament, or any other condition that Congress might see fit to impose—are not being punished under penal laws for their failure to measure up to the necessary requirements, but are merely incidentally affected by the Government's policy \* \* \* ." (File 26260-1392, June 29, 1911, pp. 24-25; see also Op. Atty. Gen., Feb. 15, 1918, file 26282-326: 2.)

**Acquiring and manning ships of war.**—This clause authorizes the Government to buy or build any number of steam or other ships of war, to man, arm, and otherwise prepare them for war, and to dispatch them to any accessible

Rules governing military commissions and provost courts convened by naval authority are published in C. M. O. Nos. 13, 1916, page 6, and 15, 1917, page 8.

See "Unconstitutional Claims of Military Authority," published in Journal of the American Institute of Criminal Law and Criminology, vol. 5, page 718, for criticism of decisions of the United States Supreme Court and other authorities above cited; see also, *Johnson v. Duncan*, 3 Martin (La.) 530, 6 Am. Dec. 675, cited in dissenting opinion in *Luther v. Borden*, 7 How. 83, in dissenting opinion in *Re Moyer*, 12 L. R. A. (N. S.) 979, 35 Colo. 159, etc.

part of the globe; and to establish a naval academy to prepare young men for the naval service. (*U. S. v. Rhodes*, 27 Fed. Cas. No. 16151.) Similar authority might be implied in the power to "declare war." (*U. S. v. Burlington, etc., Ferry Co.*, 21 Fed. Rep., 340.)

**Power to compel military service.**—Powers granted to Congress by Article I, section 8, of the Constitution, include power to compel military service, exercised by the selective draft law of May 18, 1917 (40 Stat., 76). This conclusion, obvious upon the face of the Constitution, is confirmed by a historical examination of the subject. (*Selective Draft Law Cases*, 245 U. S., 366.)

**Allowance of pensions.**—Congress is empowered to give or withhold a pension, to prescribe who may receive it, and to determine all the circumstances and conditions under which any application therefor shall be prosecuted. No man has a legal right to a pension; the whole control of the matter is within the domain of congressional power. (*Frisbie v. U. S.*, 157 U. S., 166; see also *U. S. v. Van Leuven*, 62 Fed. Rep., 56.)

#### II. FREEDOM FROM STATE INTERFERENCE.

**State interference with Federal instrumentalities.**—The principle that no State has the right to interfere with the instrumentalities of the Federal Government has been recognized from the earliest days of our Government. (File 6769-21, July 19, 1911, and 26524-54, Feb. 12, 1914.)

"Such is the law with reference to all instrumentalities created by the Federal Government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers." (*Fort Leavenworth, etc. R. Co. v. Lowe*, 114 U. S., 525.)

"Such being the distinct and independent character of the two Governments within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of



the National Government to preserve its rightful supremacy in cases of conflict of authority. In their laws and mode of enforcement neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, and whether any at all, shall be vested in their officers, are matters subject to their own control, in the regulation of which neither can interfere with the other. Now, among the powers assigned to the National Government is the power to raise and support armies and the power to provide for the government and regulation of the land and naval forces. \* \* \* No interference with the execution of this power of the National Government in the formation, organization, and government of the armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service." (*U. S. v. Tarble*, 13 Wall., 397.)

"A building on a tract of land owned by the United States, used as a fort, or for other public purposes of the Federal Government, is exempted, as an instrumentality of the Government, from any such control or interference by the State as will defeat or embarrass its effective use for those purposes" [although such land may not be under the exclusive jurisdiction of the United States]. (*Chicago, etc. R. Co. v. McGlinn*, 114 U. S., 545, explaining *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S., 525.)

"If any particular State had it in its power to intermeddle with the police and government of an Army or Navy \* \* \* upon any pretext, there would be an end of the exclusive authority of the United States in this respect. Wars and other measures unpopular in particular sections of the country might be impeded in their prosecution by the interference of the State authorities. Such a conflict of jurisdictions must terminate in anarchy and confusion." (*Argument of Attorney-General, U. S. v. Bevans*, 3 Wheat., 374.)

"National banks are instrumentalities of the Federal Government. \* \* \* It follows that an attempt by a State to define their duties or control the conduct of their affairs is absolutely void whenever such attempted exercise of authority expressly conflicts with the laws of the United States and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal Government to discharge the duties for the performance of which they were created." (*Davis v. Bank*, 161 U. S., 275.)

**Taxation of Federal instrumentalities.**—"If the States may tax one instrumentality employed by the Government in the execution of its powers, they may tax any and every other instrumentality. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the customs-house; they may tax judicial process; they may tax all the means employed by the Government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States." (*McCulloch v. Maryland*, 4 Wheat., 432, per Chief Justice Marshall.)

**Taxation of Federal property.**—"It is familiar law that a State has no power to tax property of the United States within its limits. This exemption of their property from State taxation—and by State taxation we mean any taxation by authority of the State, whether it be strictly for State purposes or for more local and special objects—is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency." (*Wisconsin C. R. Co. v. Price County*, 133 U. S., 496; *Van Brocklin v. Tennessee*, 117 U. S., 151.)

**Poll taxes upon persons in Navy.**—"A poll tax upon the person of an officer of the Navy levied by a State or municipality within the confines of which he is ordered officially to perform duty as an agent of the Government in his capacity as such officer is not such a tax as he can be lawfully required to pay." (*File 9212-22*, Feb. 21, 1912; see also *file 9212-47*, and *Ex parte White*, 228 Fed. Rep., 88.)

**State tax on Federal automobiles.**—"Automobiles purchased for the President under appropriations made by Congress are not subject to taxation by a State, nor can the chauffeurs operating said machines be taxed by a State for the privilege of performing the duties pertaining to their employment." (28 Op. Atty. Gen., 604.)

"A State may, however, in order to protect the public against dangers that might arise from performing the duties of a lawful employment in an unlawful manner, adopt reasonable police regulations which require that certain conditions be complied with before entering upon such occupation, and the fees intended merely to pay the expenses of complying with these requirements may be exacted." (28 Op. Atty. Gen., 604.)

"Under existing law and appropriations an employee of the Federal Government who pays a fee to a State for a chauffeur's license to operate a Government-owned motor vehicle on public business is not entitled to reimbursement therefor from public funds. Quære, whether the Federal Government, while denying the right of a State to exact from it a motor vehicle license fee, should at the same time accept such a license and place the tag evidencing it upon such motor vehicle." (23 Comp. Dec., 386.)

A law of a State penalizing those who operate motor trucks on highways without having obtained licenses based on examination of competency and payment of a fee, can not constitutionally apply to an employee of the Post Office Department while engaged in driving a Government motor truck over a post road in the performance of his official duty. (*Johnson v. Maryland*, 254 U. S., 51.)

**Hunters' licenses issued by States.**—"The appropriation 'General expenses, Bureau of Entomology,' is not available for the payment of a fee for a hunter's license to be issued by a State to a scientific investigator of the Department of Agriculture as an attempted condition precedent to his performing his official duties in that State. (23 Comp. Dec., 57.)

**State taxation of Federal salaries.**—"The powers of the National Government can



only be executed by officers whose services must be compensated by Congress. The allowance is in its discretion. The presumption is that the compensation given by law is no more than the services are worth, and only such in amount as will secure from the officer the diligent performance of his duties. \* \* \* The compensation of an officer of the United States is fixed by a law made by Congress. It is in its exclusive discretion to determine what shall be given. \* \* \* Does not a tax, then, by a State upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entirety? It certainly has such an effect." (*Dobbins v. Commissioners*, 16 Pet., 435.)

**Taxation of Federal telegrams.**—A State tax upon telegraph messages could not be collected upon messages sent by officers of the United States on public business. (*Western Union Tel. Co. v. Texas*, 105 U. S., 460.)

**Taxation of Federal contractors.**—"Can a contractor for supplying a military post with provisions be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true that the property of the contractor may be taxed, as the property of other citizens; and so may the local property of the bank. But we do not admit that the act of purchasing or of conveying the articles purchased can be under State control." (*Osborn v. United States Bank*, 9 Wheat., 867.)

**Taxation of passenger transportation.**—"A special tax on railroad and stage companies for every passenger carried out of the State by them is a tax on the passenger for the privilege of passing through the State by the ordinary modes of travel and is inconsistent with objects for which the Federal Government was established and with rights conferred by the Constitution on that Government and on the people. An exercise of such a power is accordingly void." (*Crandall v. Nevada*, 6 Wall., 35.)

"The Federal power has a right to declare and prosecute wars and as a necessary incident to raise and transport troops through and over the territory of any State of the Union. If this right is dependent in any sense, however limited, upon the pleasure of a State, the Government itself may be overthrown by an obstruction to its exercise. Much the largest part of transportation of troops during the late rebellion was by railroads, and largely through States whose people were hostile to the Union. If the tax levied by Nevada on railroad passengers had been the law of Tennessee, enlarged to meet the wishes of her people, the Treasury of the United States could not have paid the tax necessary to enable its armies to pass through her territory." (*Crandall v. Nevada*, 6 Wall., 35.)

"The United States has a right to require the services of its citizens at the seat of Federal Government in all executive, legislative, and judicial departments, and at all points in the several States where the functions of the Government are to be performed \* \* \*. The citizens of the United States have the correla-

tive right to approach the great departments of the Government, the ports of entry through which commerce is conducted, and the various Federal offices in the States. The taxing power, being in its nature unlimited over the subjects within its control, would enable the State governments to destroy the above-mentioned rights of the Federal Government and of its citizens if the right of transit through the States by railroad and other ordinary modes of travel were one of the legitimate objects of State taxation." (*Crandall v. Nevada*, 6 Wall., 36; compare 28 Op. Atty Gen., 435.)

**Inspection of powder.**—The powder officer for the harbor of Norfolk, appointed under the laws of Virginia to superintend the handling of all powder to and from vessels in the harbor, has no authority over powder belonging to the Federal Government, and the United States is not liable for any charge for services performed by him under the authority of that law. (25 Op. Atty. Gen., 234; compare 28 Op. Atty Gen., 604.)

"It is not open to question that such a law is the legitimate exercise by the State of its police power so far as its provisions do not affect the agencies of the Federal Government or impair their efficiency in performing the functions which they are designed to perform. No police regulation of a State, however, can be permitted to interfere with the instrumentalities of the Federal Government \* \* \*. If the State of Virginia has authority to control the shipment through the State of powder belonging to the Government and impose a charge therefor, it may stop such powder at its borders on the ground that it is improperly boxed, or that it is not boxed in accordance with regulations of the State. It is obvious that such a proceeding would seriously interfere with and impede an agency of the Government. If Virginia may make and enforce such a police regulation, it follows that every other State may do the same \* \* \*. If the State may control the transfer of powder belonging to the Government, it may inspect a regiment of Cavalry under a police regulation providing for the inspection of all horses coming within its borders. If one State may inspect a regiment of Cavalry and impose a charge therefor, it follows that every other State may do the same. If a regiment of Cavalry may be inspected and turned back—for, of course, the power to inspect includes the power to stop—an army of Cavalry and Artillery may be inspected and stopped at the borders of a State \* \* \*. If a State under the exercise of its police power may prevent the Federal Government from sending its troops and munitions of war to different parts of the country, the Constitution did not in fact 'provide for the common defense.'" (25 Op. Atty. Gen., 234.)

**Inspection of battleships.**—"The health laws of a State do not extend to agencies of the Federal Government, and as battleships belonging to the United States are agencies of the Federal Government, the charges by a health officer of a State for the inspection of such battleships are not a legal claim against the United States." (13 Comp. Dec., 672, followed, file 6118-3, Nov. 22, 1907.)

"Quarantine charges have been allowed in some instances where naval vessels, particularly colliers which have no medical officers on board, arrive from a foreign port, or from an infected port in the United States. In such instances it is always assumed that actual services are rendered by the inspecting officer, and that such services are necessary in defense and protection of the public health, and the payment is for such services. The case reported \* \* \* is entirely different. No services were rendered, and the charge is in the nature of a quarantine fee or tax. While the department desires to afford all reasonable facilities to quarantine officers in making inspections, it can not undertake to pay fees of this character every time a war vessel enters a port of the United States. Such charges are unnecessary and would become onerous if made at every port entered by naval vessels. The bill referred to \* \* \* should, therefore, not be paid." (File 3983, Mar. 5, 1906; followed, file 6118-2, Dec. 29, 1906.) [This decision was prior to the decision of the Comptroller of the Treasury quoted in preceding paragraph. See also 23 Op. Atty. Gen., 299, noted below.]

**Inspection of horses.**—Where the Federal Government acquiesces in the requirement of State laws and makes arrangements for inspection of its horses in accordance therewith, the expense is properly payable from its appropriations. (Comp. Dec., June 12, 1915, War Dept. Bul. No. 26, July 16, 1915, distinguishing 21 Comp. Dec., 449.)

**Toll for property of United States passing over wharves.**—"The State harbor commissioners of California are charged by the laws of that State with the supervision and control of the wharves and landings of the harbor of San Francisco, with the right to collect dockage, wharfage, rent, or toll. The imposition of a toll or charge by such commissioners on merchandise, being the property of the United States, passing to or over the wharves at San Francisco, is constitutional and valid, the charge being for a service rendered; the Government is not entitled to such services free of toll." (23 Op. Atty. Gen., 299.)

"It has been adjudged that the United States Government is not entitled to have property or troops transported free over a railroad, even where a land grant provided that the road shall remain a public highway for the use of the Government free from all toll or other charges for transportation, since that act did not include free use of rolling stock (Lake Superior & M. R. Co. v. U. S., 93 U. S., 412). This principle fairly includes the Government use of State or municipal wharf and harbor facilities. That is to say, the different kinds of Government property affected in this case, while used for public service and in sovereign and important operations of the Government such as required this shipment, are not instrumentalities or agencies which are necessarily free from local charges for services or facilities generally legitimate. Indeed, from *Railroad Co. v. Peniston* (18 Wall., 5, 36), showing that a tax upon property of agents of the United States does not necessarily

hinder the efficient exercise of their powers or discharge of their duties, it seems to be a consequence that the same distinction would apply to the Government itself, and that a charge upon Government property which was not a tax upon operations of the Government or a direct obstruction to the exercise of Federal powers would not necessarily be invalid. This is also the conclusion to be drawn from *Railroad Co. v. United States* (93 U. S., 442); so that, while Government property may not be taxed nor Government instrumentalities or agencies nor the operations of the Government be obstructed or burdened in any such way, if the Government is properly liable to pay charges for transportation, a charge for services or facilities analogous to transportation and connected with it would not be a tax and would not be invalid on that score." (23 Op. Atty. Gen., 299; compare 28 Op. Atty. Gen., 604.)

**State health laws.**—The health authorities of the State of Illinois are without jurisdiction to require reports from the naval authorities at Great Lakes, apart from any question of jurisdiction over the lands occupied by the naval training station at that place. (File 14560-174, Apr. 19, 1916. See also file 4778-95, Dec. 16, 1916, re training station, San Francisco, Cal.)

**Exemption from State laws requiring employment of pilots.**—"Commanders of public vessels are not required to employ and pay branch pilots upon entering the ports and harbors of the United States. This exemption extends to all vessels belonging to the United States, and employed in the public service, whether they are armed or not." (4 Op. Atty. Gen., 532.)

"The penalties imposed by State laws for piloting vessels without due license from the State have no application to persons employed as pilots on board of the public vessels of the United States, the latter vessels being within the exclusive jurisdiction of the United States." (16 Op. Atty. Gen., 647.)

**Exemption from compulsory personal services under State laws.**—"The salary of a Federal officer may not be taxed; he may be exempted from any personal services which will interfere with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties." (*Bank v. Commonwealth*, 9 Wall., 353.)

Persons connected with the military service of the United States are exempt from performing road duty upon order of the county authorities when compliance with such order would interfere with their duty to the Federal Government. The land for a military post having been purchased by the United States with the consent of the State, neither the State nor other local authorities have power to interfere with any instrumentalities necessary to the proper use of such location as a military post. This would be true even if the land had been acquired within the State without any consent whatever on the part of the legislature of the State. It is certainly true that the county authorities would have no right to interfere in any way with the troops located at the post.



It is not claimed that the officers and enlisted men of the Army stationed at the fort are subject to road duty in the county. The same is true of teamsters employed and regularly used by the quartermaster's department at the fort. A military post could not be properly maintained without teamsters. The character of an Army teamster's service and his duties are such that it would be impossible for him to perform them properly and be at the call of the road commissioners to work public roads of the county outside of the Government's property. The State and county have no right to call on him to be absent from the fort when such absence would interfere with the proper discharge of his duties as a necessary and important, even if an humble, part of the Army of the United States. The necessary conclusion is that the detention of the petitioner in jail for failure to perform road duty is in violation of his rights under the Constitution and laws of the United States, such laws including the Articles of War and the Army Regulations, the latter made in pursuance of the statutes of the United States, and therefore for present purposes considered as a part of the statutes. (*Pundt v. Pendleton*, 167 Fed. Rep., 997; compare *Butler v. Perry*, 240 U. S., 328.)

As to the exemption of civil employees under the War Department from jury duty in a State court where such exemption is not allowed by the court, the Attorney General is reluctant to render an opinion, as to do so might bring him in conflict with a judicial tribunal. In this case the State judge in refusing the claim notified the War Department that he would excuse the men from such duty if in the department's opinion not to do so would seriously prejudice the public interest. Under these circumstances no such serious occasion has as yet arisen as would justify the Attorney General in reviewing the ruling of the State judge. "If the claim of right to jury duty from Government workmen shall in the future be so far pressed as to cause serious inconvenience in your [Secretary of War's] judgment, of course I can not then hesitate to meet the question." (20 Op. Att'y. Gen., 618; see also file 21090-3, Sept. 3, 1908.)

**Limitation upon exemption from State interference.**—"These agencies [of the Federal Government] are exempt from State control by police regulation, or by the exercise of the taxing power, so far only as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve the Government." (*Bank v. Commonwealth*, 9 Wall., 353; *Railroad Co. v. Peniston*, 18 Wall., 5; *Western Union Tel. Co. v. Mayor*, 38 Fed. Rep., 560.)

### III. JURISDICTION OF CIVIL AUTHORITIES.

**Exemption of Federal officers and subordinates from arrest by State authorities.**—"An officer of the United States Army, in the discharge of his duty, acting in obedience to commands by the Secretary of War, who in turn is executing an act of Congress, is not subject to arrest on a warrant or order of a State

court, and \* \* \* such arrest is wholly illegal." (*In re Turner*, 119 Fed. Rep., 231; see also *State v. Burton*, 103 Atl., 962.)

"It is begging the whole question, and it is idle, to say that any and all Federal officers are amenable and subject to the laws, civil and criminal, of Iowa when within the State. Of course they are. The Secretary of War, the general of the Armies, the Chief Justice, and even the President, perhaps, are subject to all laws of Iowa when in Iowa. No one disputes this. But that is not the question. Can any one of those officers, or any subordinate, in the discharge of his duties as a Government officer, be subject to the laws of the State while in the State? That is the question and the only question. The State is not greater than the Nation, but, on the contrary, the State is but a part, and a small part, of the Nation. And, if I am wrong, then instead of the President, and the Secretary of War, and the general of the Army, being in control, we will have army commands given by and through the courts, and an officer like Major Turner cashiered and dismissed from the service if he refuses to obey the commands from his superiors, and if he does obey them, thrown into a county jail for contempt of court." (*In re Turner*, 119 Fed. Rep., 231.)

"The arrest, under authority of a State, of a Federal officer, and that officer one of the Federal Army in the performance of a command by a superior which he dare not disobey, presents a matter of urgency, and it is within the discretion of the Federal court to at once take cognizance of the case, and act at once, rather than allow the case to be carried through three courts, taking two or three years of time." (*In re Turner*, 119 Fed. Rep., 231.) [In this case an officer of the Army was enjoined by a State court from obeying the orders of the Secretary of War. He disregarded the injunction and was attached and imprisoned for contempt. His release was ordered by the Federal court upon writ of habeas corpus.]

There is no act of Congress authorizing a call by the governor of a State for the surrender of an officer of the Navy charged with having broken the peace of such State, nor any law authorizing an arrest by the Executive with a view to a forcible surrender by him for the purposes of trial. However, advised that the accused be ordered by the Navy Department to surrender himself. (1 Op. Att'y. Gen., 244. See further, note to Art. IV, sec. 2, clause 2, and Art. I, sec. 8, clause 14; see also note to sec. 355, Revised Statutes.)

The State authorities are not empowered to arrest persons, either in the naval or the civil service of the United States, within the limits of a navy yard, whether on shore or on board vessels at the yard, without first obtaining the permission of the commandant, to the end that such service of process shall not interfere with or obstruct operations of the United States Government. (File 6769-21, July 19, 1911.)

However, where a police officer, holding a warrant for the arrest of an enlisted man upon a charge of misdemeanor, persuaded the man to leave his vessel on liberty and accompany the police officer outside the limits of the navy yard, there making the arrest, it was held by the



Attorney General that while there are authorities which indicate that an application to the commanding officer is a necessary condition precedent to the State's acquiring jurisdiction (especially *Ex parte McRoberts*, 16 Iowa, 600, 604), yet the better view, as held in the case of *In re O'Connor* (37 Wis., 379), is that application to the commanding officer is not jurisdictional, the matter being one that does not go to the jurisdiction of the civil court issuing the process; that there is no doubt that the members of the military forces of the United States are subject in times of peace to the criminal laws of the States; and, accordingly, that want of an application to the commanding officer would be a mere informality which might make the warrant of arrest irregular but would not make it void or liable to be attacked upon a habeas corpus proceeding. (File 7657-261:1, Nov. 14, 1914.)

"If the civil magistrate has become de facto seized of a case of murder, if indictment is pending, if the accused is thus in the actual jurisdiction of the law of the land, it is not material to the validity of the proceedings at law and the right of the magistrate to go on according to the *lex loci*, whether the party passed into the hands of the magistrate regularly, by the act and with the consent of his commanding officer, or whether by breach of arrest of the party, desertion, or any other violation of military duty." (6 Op. Atty. Gen., 413.)

A mail carrier, although on duty, is subject to arrest by the State authorities upon a charge of murder. (*U. S. v. Kirby*, 7 Wall., 482, holding specifically that the police officer making such arrest was not subject to criminal proceedings for violation of the Federal statute against delaying the mails.) From this decision of the Supreme Court it would appear that the well-established principle, that the State authorities can not interfere with an instrumentality of the Federal Government, is subject to an exception in a case where a person of the Federal Government is arrested in good faith, upon a charge of felony. However, it would seem that the charge upon which such an arrest is made would require a very clear *prima facie* case to warrant such action, as otherwise the Federal Government might be seriously interfered with and embarrassed in its official functions. In the case presented, an enlisted man was arrested upon a charge of felony while traveling through a State under orders; was acquitted, and has been released and proceeded to carry out his orders. This would have been a good case in which to test the question, in view of the fact, as now appears, that the charge was wholly without foundation. In its present status it does not appear that there is any action which can be taken by the Government. Should another case of this character arise, and the department be promptly informed thereof, consideration might be given to the feasibility of having the legality of the arrest tested in habeas corpus proceedings instituted in behalf of the United States. (File 26524-70, Aug. 12, 1914.)

The imposition of a sentence of imprisonment for 60 days on a soldier by the authorities of a city for a violation of a city ordinance, where the act charged did not result in nor threaten any injury to person or property, is unwarranted, and

the soldier will be discharged by the Federal court and restored to the custody of his commanding officer, on petition of the latter in habeas corpus proceedings. (*Ex parte Schlaffer*, 151 Fed. Rep., 921.)

While an enlisted soldier in time of peace may be subjected to arrest and punishment for violation of a municipal ordinance, the same as a civilian, yet where any punishment is sought to be inflicted which will interfere with the performance of the duties which he owes to the United States, the utmost good faith is required from the civil authorities and any unfair or unjust discrimination against the offender because he is a soldier, or departure from the strict requirements of the law, or any cruel or unusual punishment, can be as justly inquired into by the Federal courts in proceedings instituted by his commanding officer as it can be in protecting the interests of the United States in any matter where its necessary governmental agencies are involved. (*Ex parte Schlaffer*, 154 Fed. Rep., 921.)

"A court or judge of the United States has power to issue a writ of habeas corpus on petition of the United States for the purpose of an inquiry into the cause of detention of a prisoner held by a State to answer to a criminal charge, where it is alleged by the petitioner that the act charged as a crime was committed by the prisoner in the performance of his duty as a soldier of the United States; and it has authority to determine summarily as a fact whether or not such allegation is true, and if found to be true to discharge the prisoner on the ground that the State is without jurisdiction to try him for such act." (*U. S. v. Lipsett*, 156 Fed. Rep., 65.)

"It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a State court, and subject to its laws, may, by the decision of a single judge of the Federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the State court of an indictment found under the laws of that State be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued." (*Drury v. Lewis*, 200 U. S., 1, quoting from *Baker v. Grice*, 169 U. S., 284. In the *Drury* case the court remanded the accused for trial to the State court, the evidence being conflicting as to whether or not he had in fact exceeded his Federal authority.)

We are of opinion that while the circuit court has the power to do so, and may discharge the accused in advance of his trial, if he is restrained of his liberty in violation of the National Constitution, it is not bound in every case to exercise such a power immediately upon application for the writ. We can not suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The Federal courts should exercise their discretion in the light of the relations existing under our system of Govern-

ment between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to regard and protect rights secured by the Constitution. (Ex parte Royall, 117 U. S., 241; see also Tinsley v. Anderson, 171 U. S., 101; Ex parte Wood, 155 Fed. Rep., 190.)

In the absence of express statutory authorization, the general authority of the President to see that the laws of the United States are faithfully executed empowered him to appoint a deputy marshal to protect a Federal judge whose life was threatened in consequence of the conscientious and faithful discharge of his duties. Where such deputy was arrested and brought to trial in a State court upon a charge of murder, for a homicide committed while acting within the line of duty thus assigned him, he was entitled to release on habeas corpus issued by a Federal judge. (In re Neagle, 135 U. S., 1.)

It is recognized that during times of peace the military power in the United States is subordinate to the civil, and that an enlisted man is amenable to the statutory law and under proper circumstances and on necessary occasions may be subject to arrest and detention for the violation of municipal ordinances the same as any civilian. The relations existing between the police force and the enlisted men and the peace and welfare of the community demand consistent and harmonious action, both by the officers in command on the one side and the higher municipal authorities on the other, in checking and controlling the forces under each. The enlisted man should be as obedient and subservient to civil law when called upon as he is to military law, and the municipal authorities should recognize his peculiar conditions and responsibilities and act in harmony and accord with his officers. It is not considered that enlisted men should be treated and held in any detention or attempted punishment the same as though they were answerable to no other power. Their position and the requirements of their constitutional duty demand in behalf of the National Government from the municipal authorities such a recognition of its rights as would accomplish a preservation of the peace and the observance of the city ordinances without in any way affecting their duties as soldiers. (Ex parte Schlaiffer, 154 Fed. Rep., 921.)

Where persons in the Navy or Marine Corps are arrested by the Federal or State authorities while on leave for criminal offenses and return to duty under bail, they may be granted leave of absence by their commanding officer in order to appear in the civil court for trial. (File 5322, G. O. No. 121, par. 17, Navy Dept., Sept. 17, 1914.)

By enlistment a person is not absolved from liability to arrest for taxes on property due previous to his enlistment. (Webster v. Seymour, 8 Vt., 135.)

**State courts can not order release of persons held by authority of United States.**—"No State, judge, or court, after they are judicially informed that a party is imprisoned under the authority of the United

States, has any right to interfere with him, or require him to be brought before them. And if the authority of the State, in form of judicial process or otherwise, should attempt to control the marshal or other authorized officer of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of the law against illegal interference." (Ableman v. Booth, 21 How., 506.)

"We do not question the authority of the State court, or judge, who is authorized by the laws of the State to issue the writ of habeas corpus, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. But after the return is made, and the State judge or court is judicially apprised that the party is in custody under the authority of the United States, they can proceed no further." (Ableman v. Booth, 21 How., 506; see also United States v. Tarble, 13 Wall., 397.)

In the event that a writ of habeas corpus should be issued by a State court to a commanding officer of the Navy or Marine Corps, afloat or ashore, the latter will communicate with the Secretary of the Navy; and, if instructions are not received by the commanding officer from the Secretary of the Navy by the return day of the writ, the officer upon whom the writ is served will make return thereto, showing that the party is held by authority of the United States, but without producing the body of the party in court. (G. O. No. 121, Sept. 17, 1914; compare 12 Op. Atty. Gen., 258.)

**State courts cannot punish perjury committed before Federal court.**—"The power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the Government in whose tribunals that proceeding is had. It is essential to the impartial and efficient administration of justice in the tribunals of the Nation that witnesses should be able to testify freely before them, unrestrained by legislation of the State or by fear of punishment in the State courts. The administration of justice in the national tribunals would be greatly embarrassed and impeded if a witness testifying before a court of the United States, or upon a contested election of a Member of Congress, were liable to prosecution and punishment in the courts of a State upon a charge of perjury preferred by a disappointed suitor or contestant or instituted by local passion or prejudice. A witness who gives his testimony, pursuant to the Constitution and laws of the United States, in a case pending in a court or other judicial tribunal of the United States, whether he testifies in the presence of that tribunal, or before any magistrate or officer either of the Nation or of the State designated by act of Congress for that purpose, is accountable for the truth of his testimony to the United States only; and perjury committed in so testifying is an offense against the public of the



United States, and within the exclusive jurisdiction of the courts of the United States." (Thomas v. Loney, 134 U. S., 372.)

**Mandamus against Federal officers.**—See note to Article II, section 1, clause 1, "Mandamus against heads of departments."

**Habeas corpus proceedings in Federal courts to discharge persons from the Navy.**—Where a person is being held for trial by court-martial, he will not be discharged from the jurisdiction of the court and from the military service even though his original enlistment was fraudulent. (In re Morrissey, 137 U. S., 157; Ex parte Rock, 171 Fed. Rep., 240; Dillingham v. Booker, 163 Fed. Rep., 696, file 5956-6; In re Scott, 144 Fed. Rep., 79, file 2757-4; In re Lessard, 134 Fed. Rep., 305; U. S. v. Reeves, 126 Fed. Rep., 127, file 152-04; Solomon v. Davenport, 87 Fed. Rep., 318; see also file 5624, Feb. 17, 1896; compare Ex parte Bakley, 148 Fed. Rep., 56, affirmed, Dillingham v. Bakley, 152 Fed. Rep., 1022, file 5506-5; and Ex parte Lisk, 145 Fed. Rep., 860, file 2757-8, in which latter cases the court ordered the petitioner's release from naval custody.)

For other decisions, see note to Article I, section 8, clause 14, "Judgments of courts-martial acting within their jurisdiction not open to review by civil courts," and see note to section 761, Revised Statutes.

#### IV. RESPONSIBILITY OF MILITARY AUTHORITIES FOR ILLEGAL ACTS.

**Civil responsibility of persons in military service.**—"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of Government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to the supremacy and to observe the liabilities which it imposes upon the exercise of the authority which it gives." (U. S. v. Lee, 106 U. S., 196.)

A person making an illegal arrest, even when the privilege of the writ of habeas corpus is suspended, is liable to damages in a civil suit for such arrest, and to punishment in a criminal prosecution. (Griffin v. Wilcox, 21 Ind., 372.)

Although martial law exists, "no more force \* \* \* can be used than is necessary to accomplish the object. And if the power is exercised for the purpose of oppression and any injury willfully done to person or property, the party by whom or by whose order it is committed, will undoubtedly be answerable." (Luther v. Borden, 7 How., 1.)

At the close of the War of 1812, Gen. Jackson was sentenced to pay a fine of \$1,000 for contempt of court, in refusing obedience to a writ of habeas corpus, which fine he paid. (See Dow v. Johnson, 100 U. S., 158, 194, noted under Art. I, sec. 8, clause 11, "Effect of martial law".)

**Captain of a ship.**—"No doubt there are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding that he had sole command at the time and acted to the best of his

knowledge. That is the position of the captain of a ship." (Moyer v. Peabody, 212 U. S., 78.)

A commanding officer in the Navy "is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury, either from malice, cruelty, or any species of oppression founded on considerations independent of public ends. The humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong as well as the highest in office." (Wilkes v. Dinsman, 7 How., 89.) [In this case suit was brought by a marine against the commanding officer of a squadron, the marine alleging that he was illegally detained on board after the expiration of his term of enlistment, and that he was illegally punished by the commanding officer. Judgment was given against the squadron commander, but was reversed by the Supreme Court, which, while making the above statement as to the responsibility of commanding officers, held that in this case the detention was legal, and that the commanding officer had the legal right to inflict punishment; that "the commander was acting as a public officer, invested with certain discretionary powers, and can not be made answerable for any injury when acting within the scope of his authority and not influenced by malice, corruption, or cruelty. His position is quasi judicial. Hence the burden of proof that the officer exceeded his powers is upon the party complaining; the rule of law being that the acts of a public officer on public matters within his jurisdiction, and where he has a discretion, are to be presumed legal until shown by others to be unjustifiable. It is not enough to show that he committed an error in judgment, but it must have been a malicious and willful error." See Dinsman v. Wilkes (12 How., 389).]

**Members of a court-martial.**—Members of a duly constituted and organized naval court-martial "are responsible in civil courts for any abuse of power or illegal proceedings." (Par. 241, Naval Courts and Boards, 1917.) [On general subject of responsibility of judges of civil courts, see Spalding v. Vilas, 161 U. S., 483, and Bradley v. Fisher, 13 Wall., 335.]

"If a court-martial has no jurisdiction over the subject matter of the charge it has been convened to try, or shall inflict a punishment forbidden by law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may on an action of a party aggrieved by it inquire into the want of the court's jurisdiction and give him redress." (Dynes v. Hoover, 20 How., 65.)

"In such cases, as has just been said, all of the parties to such illegal trial are trespassers upon a party aggrieved by it, and he may recover damages from them on a proper suit in a civil court by the verdict of a jury." (Dynes v. Hoover, 20 How., 65.)

"According to our laws, all military courts are under a constant subordination to the ordinary courts of law. Officers who have abused their powers, though only in regard to their own soldiers, are liable to prosecution in a court of law, and compelled to make satisfaction. Even any flagrant abuse of authority by members of a court-martial, when sitting to judge their own people and determine in cases entirely of a



military kind, makes them liable to the animadversion of the civil judge." (Johnson v. Duncan, 6 Am. Dec., 679; 3 Martin (I.a.), 530.)

**Judge Advocate General of the Navy.**—In 1904 suit was entered by Paymaster Robert B. Rodney, retired, against Capt. Sam. C. Lemly, Judge Advocate General of the Navy, based upon action alleged to have been taken by Captain Lemly in his official capacity. The United States attorney for the District of Columbia was instructed by the Department of Justice to appear in behalf of the Judge Advocate General in response to the summons upon the latter. June 23, 1904, an order was entered by the chief justice of the Supreme Court of the District of Columbia dismissing the suit. (At law, No. 46683, Supreme Court of the District of Columbia; file 204-04.)

**Illegal order not a defense.**—"It can never be maintained that a military officer can justify himself for doing an unlawful act by producing the order of his superior. The order may palliate, but it can not justify." (Mitchell v. Harmony, 13 Wall., 115.)

"Neither the Secretary of the Treasury nor the President could nullify the statute, and though the defendant [collector of the port of New York] may have thought himself bound to obey the instructions of the former, his mistaken sense of duty could not justify his refusal of the clearance, and these instructions afford him no protection unless they were authorized in law." (Hendricks v. Gonzalez, 67 Fed. Rep., 351; see also Kilbourn v. Thompson, 103 U. S., 168.)

A naval officer is liable in an action of trespass for seizing the plaintiff's ship in obedience to an order of the President based upon a misinterpretation by him of an act of Congress. "I confess the first bias of my mind was very strong in favor of the opinion that, though the instructions of the Executive could not give a right they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, and which indeed is indispensably necessary to every military system appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. \* \* \* But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is that the instructions can not change the nature of the transaction nor legalize an act which without them would have been a plain trespass." (Little v. Barreme, 2 Cranch, 170, opinion of Chief Justice Marshall.) [In this case the Supreme Court affirmed the judgment of the lower court against the officer, in the sum of \$8,504 damages and costs.]

"In time of peace, at least, an officer is not obliged to obey an illegal order. \* \* \* It becomes his duty, at once or within a reasonable time, to appeal to the highest authority

for revocation, modification, or correction of the illegal order." (Ide v. U. S., 25 Ct. Cls., 407; 150 U. S., 517. See also C. M. O. 37, 1915.)

"Captain Gambier, of the British Navy, by the order of Admiral Boscawen, pulled down the houses of sutlers on the coast of Nova Scotia, who were supplying the sailors with spirituous liquors, the health of the sailors being injured by frequenting them. The motive was evidently a laudable one, and the act done for the public service. Yet it was an invasion of the rights of private property and without the authority of law, and the officer who executed the order was held liable to an action, and the sutlers recovered damages against him to the value of the property destroyed." (See Mitchell v. Harmony, 13 How., 115.)

An officer of the Army was sued for seizing property of plaintiff during the war with Mexico under the order of his superior officer. Judgment was rendered against defendant and affirmed by the Supreme Court, amounting to \$104,562.23. Plaintiff was a trader and went from the United States into the adjoining Mexican provinces, which were in possession of the military authorities of the United States, for the purpose of carrying on a trade which was sanctioned by the executive branch of the Government (as a means to conciliation of the provinces bordering on the United States) and also by the commanding military officer. "It is certainly true as a general rule that no citizen could lawfully trade with a public enemy; and if found to be engaged in such illicit traffic his goods are liable to seizure and confiscation. But the rule has no application to a case of this kind; nor can an officer of the United States seize the property of an American citizen for an act which the constituted authorities, acting within the scope of their lawful powers, have authorized to be done." Accordingly held that "it was improper for an officer of the United States to seize the property upon the ground of trading with the enemy;" and that "the officer who made the seizure can not justify his trespass by showing the orders of his superior officer. An order to commit a trespass can afford no justification to the person by whom it was executed;" that "if the power exercised by Col. Doniphan had been within the limits of a discretion confided to him by law, his order would have justified the defendant even if the commander had abused his power or acted from improper motives. But we have already said that the law did not confide to him a discretionary power over private property. Urgent necessity would alone give him the right; and the verdict finds that this necessity did not exist. Consequently the order given was an order to do an illegal act, to commit a trespass upon the property of another, and can afford no justification to the person by whom it was executed. The case of Captain Gambier, to which we have just referred, is directly in point upon this question." (Mitchell v. Harmony, 13 How., 115.)

"The willful killing of a soldier by a guard may be as clearly murder as the willful killing of one citizen by another. Nor will any order of a superior officer to an inferior in rank justify the willful killing of a person under the peace and protection of the law. A soldier is bound

to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor his oath to do it. So far from such an order being a justification, it makes the party giving the order an accomplice in the crime. For instance, an order from an officer to a soldier to shoot another for disrespectful words merely would, if obeyed, be murder both in the officer and soldier." (*U. S. v. Carr*, 25 Fed. Cas. No. 14732; see below, "Order not clearly illegal may be defense," and "Extenuating and aggravating circumstances.")

**Order not clearly illegal may be defense.**—"The law is that an order given by an officer to his private, which does not expressly or clearly show on its face its illegality, the soldier is bound to obey; and such order is his full protection. The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as he may consider them valid or invalid, the precious moment for action would be wasted. Its law is that of obedience. No question can be left open of the right to command in the army, or of the duty of obedience in the soldier." (*In re Fair*, 100 Fed. Rep., 149; *U. S. v. Lipsett*, 156 Fed. Rep., 71.)

An order illegal in itself and not justifiable by the rules and usages of war, so that a man of ordinary sense and understanding would know when he heard it read or given that the order was illegal, would afford a soldier no protection for a crime committed under such order; but an order given by an officer to his private which does not expressly and clearly show on its face or body thereof its own illegality the soldier would be bound to obey and such order would be a protection to him. (*Riggs v. State*, 43 Tenn. (3 Cold.), 85; *U. S. v. Clark*, 31 Fed. Rep., 710, 717.)

"Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I can not but think that the law should excuse the military subordinate when acting in obedience to the order of his commander. Otherwise he is placed in the dangerous dilemma of being liable for damages to third persons for obedience to an order, or to the loss of his commission and disgrace for disobedience thereto \* \* \*. The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in the Army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as he may consider them valid or invalid, the camp would be turned into a debating school where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions." (*McCall v. McDowell*, 15 Fed. Cas. No. 8673; quoted with approval, *U. S. v. Clark*, 31 Fed. Rep., 710, 716; *U. S. v. Lipsett*, 156 Fed. Rep., 71.)

"A military subordinate is not liable in damages for making an illegal arrest if he acted in pursuance of an order from his superior which was legal on its face; the liability for the false

imprisonment is confined to the officer who gave the order." (*McCall v. McDowell*, 15 Fed. Cas. No. 8673.)

"The defendant does not stand in the situation of an officer who merely obeys the command of his superior," if "it appears that he advised the order and volunteered to execute it when according to military usage that duty more properly belonged to an officer of inferior grade." (*Mitchell v. Harmony*, 13 How., 115.)

"Soldiers might reasonably think that their officer had good grounds for ordering them to fire into a disorderly crowd which to them might not appear to be at that moment engaged in acts of dangerous violence, but soldiers could hardly suppose that their officer could have any good grounds for ordering them to fire a volley down a crowded street when no disturbance of any kind was either in progress or apprehended. The doctrine that a soldier is bound under all circumstances whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the colonel by the orders of the captain, or in deserting to the enemy on the field of battle on the order of his immediate superior. I think it is not less monstrous to suppose that superior orders would justify a soldier in the massacre of unoffending civilians in time of peace, or in the exercise of inhuman cruelties, such as the slaughter of women and children, during a rebellion. The only line that presents itself to my mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds. The inconvenience of being subject to two jurisdictions, the sympathies of which are not unlikely to be opposed to each other, is an inevitable consequence of the double necessity of preserving on the one hand the supremacy of the law, and on the other the discipline of the Army." (2 Willoughby Const., 1195, quoting 1 Stephen's Hist. Cr. L. Eng., 205.)

"An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." (*In re Grimley*, 137 U. S., 153. See also 6 Op. Atty. Gen., 357, 365, and *Martin v. Mott*, 12 Wheat., 30.)

**Extenuating and aggravating circumstances.**—"In respect to those compulsory duties, whether in reenlisting or detaining on board or in punishing or imprisoning on shore, while arduously endeavoring to perform them in such a manner as might advance the science and commerce and glory of his country rather than his own personal designs, a public officer invested with certain discretionary powers never has been and never should be made answerable for any injury when acting within the scope of his authority and not influenced by malice, corruption, or cruelty \* \* \*. The officer being intrusted with a discretion for public purposes is not to be punished for the exercise of it, unless it is first proved against him either that he exercised the power confided to him in cases without his jurisdiction or in a manner not confided to him, as, with malice, cruelty, or willful oppression, or in the words of Lord Mansfield, that he exercised it



as if 'the heart is wrong.' In short, it is not enough to show that he committed an error in judgment, but it must have been a malicious and willful error." (U. S. v. Clark, 31 Fed. Rep., 710, 716; *Wilkes v. Dinsman*, 7 How., 89.)

"In an action of false imprisonment the defendant [plaintiff], by his gross and incendiary language on the news of the assassination of Abraham Lincoln, the President of the United States, having provoked his arrest, though the same was illegal, such provocation must be taken into account in mitigation of damages." (*McCall v. McDowell*, 15 Fed. Cas. No. 8673.)

"In an action for false imprisonment, where the arrest complained of was illegal but was caused by the defendant while acting as commanding officer of a military department of the United States, without malice or intention to injure or oppress the plaintiff, but from good motives and considerations involving the public peace and safety, the plaintiff is only entitled to recover compensatory damages." (*McCall v. McDowell*, 15 Fed. Cas. No. 8673.)

"The move upon Chihuahua was undoubtedly undertaken from high and patriotic motives. It was boldly planned and gallantly executed and contributed to the successful issue of the war. But it is not for the court to say what protection or indemnity is due from the public to an officer who, in his zeal for the honor and interest of his country, and in the excitement of military operations, has trespassed on private rights. That question belongs to the political department of the Government." (*Mitchell v. Harmony*, 13 How., 115.)

In *Beckwith v. Bean* (98 U. S., 266) a judgment for \$15,000 against two Army officers for arresting a civilian during the Civil War on the charge of aiding and abetting deserters from the Army, was reversed on the ground that certain evidence in mitigation had been erroneously excluded by the trial court; and that, if the officers acted in good faith, as the evidence excluded was intended to show, "they were entitled by every consideration of justice to stand before the jury in a more favorable light upon the question of damages than they would or should have stood had they been actuated by ill-will or sought to oppress one whose conduct had not justified the conclusion that he had violated any law."

"If a homicide be committed by a military guard without malice and in the performance of his supposed duty as a soldier, such homicide is excusable unless it was manifestly beyond the scope of his authority or was such that a man of ordinary sense and understanding would know that it was illegal." (U. S. v. Clark, 31 Fed. Rep., 710.) [In this case it was held that the finding of an Army court of inquiry was entitled to great weight as showing that guard was not to blame.]

"In charging the jury in *U. S. v. Carr*, 1 Woods, 484 [25 Fed. Cas. No. 14732], Mr. Justice Woods instructed them to 'inquire whether at the moment he fired his piece at the deceased, with his surroundings at that time, he had reasonable grounds to believe and did believe that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder

which threatened speedily to ripen into a mutiny. If he had reasonable ground so to believe, and did so believe, then the killing was not unlawful. \* \* \* But it must be understood that the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required." (U. S. v. Clark, 31 Fed. Rep., 716.)

"A public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion, even although an individual may suffer by his mistake. A contrary principle would, indeed, be pregnant with the greatest mischiefs." (*Kendall v. Stokes*, 3 How., 87; see also *Spalding v. Vilas*, 161 U. S., 483.)

"The defendant having caused the arrest and imprisonment of the plaintiff, who was a civilian and not amenable to military law, it was his duty to make provision against his being treated with undue harshness and severity or subjected to any treatment or discipline not necessary and proper to restrain him of his liberty for the time being; and having failed to do so and suffered the plaintiff to be confined in the guardhouse with drunken soldiers and to be compelled to lay in common with military culprits, the damages for the false imprisonment must be enhanced on account of such treatment." (*McCall v. McDowell*, 15 Fed. Cas. No. 8673.)

"But in this case the defendant does not stand in the situation of an officer who merely obeys the command of his superior. For it appears that he advised the order and volunteered to execute it when according to military usage that duty more properly belonged to an officer of inferior grade." (*Mitchell v. Harmony*, 13 How., 115.)

#### V. PROTECTION OF MILITARY OFFICERS FOR ACTS DONE IN PERFORMANCE OF DUTY.

**Congress may protect officers against civil or criminal responsibility.**—"Congress has power to protect officers and persons engaged or concerned in making arbitrary arrests and imprisonments, or arrests or imprisonments without ordinary legal warrant or cause, under the authority or in pursuance of an act suspending the writ of habeas corpus, by the passage of laws indemnifying such officers and persons against the ordinary legal consequences thereof or declaring that they shall not be liable to an action or other legal proceeding therefor." (*McCall v. McDowell*, 15 Fed. Cas. No. 8673.)

"It is not for the court to say what protection or indemnity is due from the public to an officer who, in his zeal for the honor and interest of his country and in the excitement of military operations, has trespassed on private rights. That question belongs to the political department of the Government." (*Mitchell v. Harmony*, 13 How., 115.)

An act of Congress passed during the Civil War (Mar. 3, 1863, 12 Stat., 756) provided that any order of the President during the existing war should be a defense to any prosecution,



civil or criminal, "for any search, seizure, arrest or imprisonment, made, done, or committed, or acts omitted to be done," under authority of such order. This act was upheld, the court saying: "That an act passed after the event which in effect ratifies what has been done and declares that no suit shall be sustained against the party acting under color of authority is valid, so far as Congress could have conferred such authority before, admits of no reasonable doubt. These are ordinary acts of indemnity passed by all governments when the occasion requires." (*Mitchell v. Clark*, 110 U. S., 633; see also *O'Reilly De Camara v. Brooke*, 142 Fed. Rep., 858; 209 U. S., 45.)

Referring to acts of March 3, 1863 (12 Stat., 756), and March 2, 1867 (14 Stat., 432), it was held by the Supreme Court that "these statutes were enacted among other things to protect parties from liability to prosecution for acts done in the arrest and imprisonment of persons during the existence of the rebellion, under orders or proclamations of the President or by his authority or approval, who were charged with participation in the rebellion, or as aiders or abettors, or as being guilty of disloyal practices in aid thereof, or any violation of the usages or the laws of war"; that said statutes do not "cover all acts done by officers in the military service of the United States, simply because they are acting under the general authority of the President as commander in chief of the armies of the United States"; that, "assuming that they are not liable to any constitutional objection, they only cover acts done under orders or proclamations issued by the President or by his authority"; that "they do not dispense with the exhibition of the order or authority upon which a party relies"; and, accordingly, that "where certain military officers of the United States, being sued for the arrest and imprisonment of a person in Vermont, not connected with the military service of the United States, alleged in their pleas that the arrest and imprisonment were made under the authority and by the order of the President, whose orders as commander in chief of the armies of the United States by the rules and regulations of the Army they were bound to obey, without setting forth any order, general or special, of the President directing or approving of the acts in question, \* \* \* the pleas were defective

and insufficient." (*Bean v. Beckwith*, 18 Wall., 510.) [In the case of *In re Murphy*, 17 Fed. Cas. No. 9947, it was held that the act of March 2, 1867, validating arrest of citizens by military under acts of Congress and proclamations and orders of President or by his authority and approval, was void as ex post facto. In *Griffin v. Wilcox* (21 Ind., 370) the act of March 3, 1863, was held to violate the fourth amendment.]

"When an officer of the United States is sued for the performance of his duty, the Government is bound to protect him by paying the costs of his defense. If he defends himself, and proves upon his trial that he was executing the law, or the orders of his superior, his expenses ought to be reimbursed to him." (9 Op. Atty. Gen., 51, case of Capt. Wilkes; compare 22 Comp. Dec., 264.)

"This is required by the plain principles of justice as well as by sound policy. No man of common prudence would enter the public service if he knew that the performance of his duty would render him liable to be plagued to death with lawsuits which he must carry on at his own expense. For this reason it has been the uniform practice of the Federal Government, ever since its foundation, to take upon itself the defense of its officers who are sued or prosecuted for executing its laws. The following are some of the cases in which this has been done: *Mitchell v. Harmony*, 13 How., 115; *Elliott v. Swartwout*, 10 Pet., 137; *Tracy v. Swartwout*, 10 Pet., 80; *Lawrence v. Allen*, 7 How., 785; *Same v. Caswell*, 13 Howard, 488; *Greely v. Thompson*, 10 How., 225; *King v. Maxwell*, 17 How., 147; *The United States v. Guthrie*, 17 How., 284; *The United States v. Booth*, 18 How., 476; *Greely v. Burgess*, 18 How., 413; *Stairs v. Peaslee*, 18 How., 521; *Gelston v. Hoyt*, 3 Wheat., 247; *Fleming v. Page*, 9 How., 603; *Kendall v. The United States*, 12 Pet., 51 [524]; *Marbury v. Madison*, 1 Cr., 137. In *Little v. Barreme*, 2 Cr., 170, the Government took no part in the defense, but it afterwards assumed the judgment and paid it with interest and all charges." (9 Op. Atty. Gen., 51; see also 12 Comp. Dec., 208, and 12 Comp. Dec., 191.)

**Civil responsibility for seizure of private property during war.**—See note to Art. I, sec. 8, cl. 11, "Jurisdiction over persons in military service during war."

[CLAUSE 14. Regulation of land and naval forces.] <sup>14</sup> To make Rules for the Government and Regulation of the land and naval Forces;

- I. GENERAL POWERS OF CONGRESS AND PRESIDENT.
- II. POWER TO CREATE COURTS-MARTIAL.
- III. FINALITY OF COURT-MARTIAL PROCEEDINGS.
- IV. JURISDICTION OF COURTS-MARTIAL.
- V. JURISDICTION OF CIVIL COURTS.
- VI. APPLICATION OF CONSTITUTION TO THE NAVY.

#### I. GENERAL POWERS OF CONGRESS AND PRESIDENT.

**Land and naval forces.**—"Armies, divisions, brigades, regiments, companies, guards,

sentinels; fleets, squadrons, separate vessels, boats, crews, are land and naval forces, integrally and independently, no less than when compounded in the general mass, and so is the individual soldier and seaman." (U. S. v. Mackenzie, 30 Fed. Cas. No. 18313.)

**Powers of Congress and of the President.**—"The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authority essential to its due exercise. But neither can the President in war more than in peace intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the peo-

ple whose will is expressed in the fundamental law." (Ex parte Milligan, 4 Wall., 129.)

"Congress may increase the Army or reduce the Army or abolish it altogether; but so long as we have a military force, Congress can not take away from the President the supreme command. It is true that the Constitution has conferred upon Congress the exclusive power 'to make rules for the Government and regulation of the land and naval forces;' but the two powers are distinct; neither can trench upon the other; the President can not under the guise of military orders evade the legislative regulations by which he in common with the Army must be governed; and Congress can not in the guise of 'rules for the government' of the Army impair the authority of the President as Commander in Chief." (Swaim v. U. S., 28 Ct. Cls., 173, 221; affirmed, 165 U. S., 553.)

For other cases see note to Article II, section 2, clause 1; and see note to Article II section 2, clause 2, as to powers of Congress and of the President with reference to appointments and promotions in the Army and Navy.

**Delegation of power to make regulations.**—Congress can only legislate in a general way, and large powers are necessarily intrusted to the different departments. They really exercise in this way by delegation, and necessarily so, for the purpose of carrying on the vast affairs of the Government and its details, authority which in a strict sense pertains to Congress. (21 Op. Atty. Gen., 438, 439.)

While of course Congress can not constitutionally delegate to the President legislative powers, "it may, in conferring powers constitutionally exercisable by him, prescribe or omit prescribing, special rules of their administration or may specially authorize him to make the rules. When Congress neither prescribes them nor expressly authorizes him to make them, he has the authority, inherent in the powers conferred, of making regulations necessarily incidental to their exercise." (McCall's Case, 15 Fed. Cas., 1230.)

It is well settled that executive regulations when directly approved by Congress have the absolute force of law equally with other legislative acts. Regulations not approved by Congress have the force of law only when founded on the President's constitutional powers as Commander in Chief of the Army and Navy or when consistent with and supplementary to the statutes which have been enacted by Congress. (In re Smith, 23 Ct. Cls., 452, 459.)

Congress has approved regulations issued by the Secretary of the Navy with the approval of the President and authorized him to make changes therein in the same manner. (Sec. 1547, R. S.) The Navy Regulations so issued by the Secretary of the Navy have the force and effect of positive law. (27 Op. Atty. Gen., 257; Ex parte Reed, 100 U. S., 13; Smith v. Whitney, 116 U. S., 180.)

For citation of decisions on subject of executive regulations, see note to sections 161 and 1547, Revised Statutes; see also Article II, section 2, clause 1.

**Power of President to change established customs.**—A custom which "has come

down to us from the British Navy and which has been expressed in regulations sanctioned by Congress, has thus become, in effect, a national policy; it is believed that a change therein would involve matters more properly a subject for the exercise of the constitutional powers vested in Congress 'to provide and maintain a Navy' and 'to make rules for the government and regulation of the land and naval forces.' In other words, the regulation in this case did not prescribe the rule, but was merely declaratory of the preexisting rule based on established custom. Under such circumstances an amendment of the regulation would involve something more than occurs in the ordinary case; that is to say, it would involve not merely the change of a regulation but a radical change in previous custom which Congress has indicated should be continued. That the President's power to make such changes is not without limitation is supported by the Attorney General's opinion holding that the President was without authority to make radical changes in regulations prescribing in accordance with custom the duties to be performed by staff officers of the Marine Corps. (30 Op. Atty. Gen., 234.)" (File 3973-107, Feb. 16, 1915.)

## II. POWER TO CREATE COURTS-MARTIAL.

### **Trials by jury not required in the Navy.**—

Among the powers conferred upon Congress by the eighth section of the first article of the Constitution are the following: "To provide and maintain a Navy;" "to make rules for the government and regulation of the land and naval forces;" and the fifth amendment, which requires a presentment of a grand jury in cases of capital or otherwise infamous crimes expressly excepts from its operation "cases arising in the land or naval forces;" and by the second section of the second article of the Constitution it is declared that "the President shall be Commander in Chief of the Army and Navy of the United States and of the militia of the several States when called into the actual service of the United States."—"These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations and that the power to do so is given without any connection between it and the third article of the Constitution defining the judicial power of the United States; indeed that the two powers are entirely independent of each other." (Dynes v. Hoover, 20 How., 65; see also U. S. v. Mackenzie, 30 Fed. Cas. No. 18313; Ex parte Henderson, 11 Fed. Cas. No. 6349; Ex parte Dickey, 204 Fed. Rep., 322.)

"Under these powers it has always been supposed that Congress may provide for the trial by court-martial of persons in the land or naval forces, or in the militia in service, for military offenses. This is the usual mode of trial for these offenses which had prevailed in England, the country from which we borrowed most of our laws, for more than a hundred years prior to the adoption of our Constitution, and, in fact, ever since England has had any standing army at all. It is also the mode which pre-



vailed in the colonies at the time the Convention sat, and it has been a part of our code of laws relating to the government of the land and naval forces and of the militia in service ever since we had a Government. This mode of trial of military men for military offenses has become too well fixed in our system to now admit of question." (Ex parte Henderson, 11 Fed. Cas. No. 6349.)

"The sixth amendment affirms that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,' language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment or presentment before anyone can be held to answer for high crimes, *excepts* 'cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger;' and the framers of the Constitution doubtless meant to limit the right of trial by jury in the sixth amendment to those persons who were subject to indictment or presentment in the fifth. The discipline necessary to the efficiency of the Army and Navy required other and swifter modes of trial than are furnished by the common-law courts; and in pursuance of the power conferred by the Constitution Congress has declared the kinds of trial and the manner in which they shall be conducted for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and while thus serving surrenders his right to be tried by the civil courts." (Ex parte Milligan, 4 Wall., 3, 123.)

"It is not denied that the power to make rules for the government of the Army and Navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the Constitution to the present time." (Ex parte Milligan, 4 Wall., 137, concurring opinion of four justices.)

In the exercise of this power Congress has enacted rules for the regulation of the Army, known as the Articles of War (sec. 1342, R. S.), and for the Navy, known as the Articles for the Government of the Navy (sec. 1624, R. S.). Every officer before he enters on the duties of his office subscribes to these articles and places himself within the power of courts-martial to pass on any offense which he may have committed in contravention of them. (Carter v. McClaughry, 183 U. S., 365.)

"The notion suggested by Sir Matthew Hale and repeated by Sir William Blackstone (Com., vol. 1, p. 213) that 'martial [military] law is built on no settled principles but is entirely arbitrary in its decisions and is in truth not law but something indulged rather than allowed by law' is an exploded absurdity. A court-martial is a lawful tribunal, existing by the same authority that any other court exists by, and the law military a branch of the law as valid as any other, and it differs from the general law of the land in authority only in this that it applies to officers and soldiers of the Army, but not to other members of the body politic, and that it

is limited to breaches of military duty. \* \* \* There is the less room for the superficial remark of Sir Matthew Hale to be applied in the United States, inasmuch as the Constitution expressly empowers Congress 'to make (special) rules for the government of the land and naval forces' and expressly excepts the trial of cases arising in the land or naval service from the ordinary provisions of law." (6 Op. Atty. Gen., 413.)

### III. FINALITY OF COURT-MARTIAL PROCEEDINGS.

**Judgments of courts-martial acting within their jurisdiction not open to review by civil courts.**—Courts-martial are lawful tribunals with authority to finally determine any case over which they have jurisdiction, and their proceedings when confirmed as provided are not open to review by the civil tribunals except for the purpose of ascertaining whether the military or naval court had jurisdiction of the person and subject matter and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced. (Carter v. McClaughry, 183 U. S., 365; see also Grafton v. U. S., 206 U. S., 333, 348.)

"With the sentences of courts-martial which have been convened regularly and have proceeded legally and by which punishments are directed not forbidden by law or which are according to the laws and customs of the sea, civil courts have nothing to do nor are they in any way alterable by them." (Dynes v. Hoover, 20 How., 65.)

"Within the sphere of their jurisdiction the judgments and sentences of courts-martial are as final and conclusive as those of civil tribunals of last resort, and the only authority of civil courts is to inquire whether the military authorities are proceeding regularly within their jurisdiction. If they are, they can not be interfered with no matter what errors may be committed in the exercise of their lawful jurisdiction." (In re McVey, 23 Fed. Rep., 878.)

"Undoubtedly errors are committed by courts-martial which a civil tribunal would regard as sufficient ground for a reversal of their judgments if it were sitting as an appellate court. But there is always this radical difference between an appellate court sitting for the correction of errors and a civil court into which the record of a court-martial is collateral—in the former there is not a failure of justice; the appellate court may reverse a judgment or prescribe another or award a new trial; in the latter the court must either give full effect to the sentence or pronounce it wholly void." (Swaim v. U. S., 28 Ct. Cls., 217; affirmed, 165 U. S., 553.)

An officer of the Army attacked the sentence of a court-martial on the ground, among other things, that it was void because in violation of the fifth amendment, declaring that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. On behalf of the Government it was argued that the question was one within the power of the court-martial to decide, and must be held to have been waived or be assumed to have been ruled



against the accused, in which case the decision would be conclusive on habeas corpus, since if incorrect it would be merely error and would not go to the jurisdiction. It had been held by the Supreme Court that the courts of the District of Columbia had jurisdiction to decide a similar question in cases tried by them, and that their decision would not be reviewed in that particular on habeas corpus. "It is difficult to see why the sentences of courts-martial, courts authorized by law in the enforcement of a system of government for a separate community recognized by the Constitution, are not within this rule. Its applicability would seem to be essential to the maintenance of that discipline which renders the Army efficient in war and morally progressive in peace and which is secured by the military code and the decisions of the military courts." (*Carter v. McClaughry*, 183 U. S., 365.)

Although error was committed by a naval court-martial in permitting the judge advocate to be present for a short time during a closed session of the court, this was an error of procedure only, and could not be corrected by a civil court in habeas corpus proceedings. "It is clear that the civil courts are in no sense appellate tribunals for the revision of proceedings in courts-martial. It has been decided that in such cases the civil courts should not interfere if it appears that the court-martial had jurisdiction of the person and of the subject matter which was tried before it and that errors in procedure in military courts can be corrected only by the proper military authorities." (*Ex parte Tucker*, 212 Fed. Rep., 569.)

"We must not be understood by anything we have said as intending in the slightest degree to impair the salutary rule that the sentences of courts-martial when affirmed by the military tribunal of last resort can not be revised by the civil courts save only when void because of an absolute want of power and not merely voidable because of defective exercise of power possessed." (*Carter v. McClaughry*, 183 U. S., 365; see also *Dynes v. Hoover*, 20 How., 65, 82; *Keyes v. U. S.*, 109 U. S., 336; *Swain v. U. S.*, 165 U. S., 553; *Smith v. Whitney*, 116 U. S., 167.)

"The court-martial for the trial of Capt. Oberlin M. Carter was convened by orders issued by the President; and he was therefore the reviewing authority and the court of last resort." (*Carter v. McClaughry*, 183 U. S., 365, 385.)

"Where a court-martial had jurisdiction to try petitioner for an offense against the naval regulations and to impose sentence authorized thereby, a civil court in habeas corpus proceeding could only review the question of jurisdiction and could not pass on alleged errors of law committed by the court-martial or on the severity of the sentence imposed." (*Ex parte Dickey*, 204 Fed. Rep., 322.)

"The case before me shows that the court-martial under which the petitioner was tried was properly constituted; that the charge and specification were in due form and authorized under the regulations for the government of the Navy; that the trial court had jurisdiction of the case and of the subject matter of the charge and acted within the scope of its lawful author-

ity; that it also acted within its authority in imposing sentence; that such sentence was duly approved by the commander in chief of the Atlantic Fleet, by whom the court was convened; that it was also approved by the Secretary of the Navy, the final reviewing authority provided by law to act upon records of courts-martial in cases which do not extend to the loss of life or to the dismissal of a commissioned or warrant officer; that the sentence, therefore, can not be revised by the civil courts. \* \* \*

If the petitioner was harshly dealt with and a sentence of undue severity was imposed, such sentence seems to have been within the powers of the court-martial, and it is held by the Supreme Court of the United States that the remedy must be found elsewhere than in courts of law." (*Ex parte Dickey*, 204 Fed. Rep., 322.)

What is conduct unbecoming an officer and a gentleman, or conduct to the prejudice of good order and discipline, is a question exclusively within the jurisdiction of a court-martial to determine, and its decision is not subject to review by a civil court. (*Carter v. McClaughry*, 183 U. S., 400; *Swain v. U. S.*, 165 U. S., 553; *Smith v. Whitney*, 116 U. S., 178; *Fletcher v. U. S.*, 26 Ct. Cls., 562, 563, reversed, on other grounds, 148 U. S., 84.)

Neither the Supreme Court of the District of Columbia nor the Supreme Court of the United States has any appellate jurisdiction over a naval court-martial nor over offenses which such a court has power to try. Neither of these courts is authorized to interfere with the court-martial in the performance of its duty, by way of writ of prohibition or any order of that nature. (*Wales v. Whitney*, 114 U. S., 564, 570; compare *State v. Peake*, 40 L. R. A. (N. S.), 354.)

Whether the Supreme Court of the District of Columbia has power to issue a writ of prohibition to a court-martial—*quaere*. (*Smith v. Whitney*, 116 U. S., 168.)

"Where an officer of the Army during the War with Spain, after having been acquitted by a court-martial of charges preferred against him, was, by direction of the commanding generals retried by the court-martial on the same charge, and was convicted and dismissed from the service, and thereafter peace having been declared, and its term of enlistment having expired, his regiment was mustered out and discharged, it was held that mandamus would not lie on his relation against the Secretary of War to compel the respondent to cause the relator to be mustered out and discharged." (*Brown v. Root*, 18 App. D. C., 239.) [In this case there was not a second trial, but a revision by the court of its finding, by order of the convening authority.] "The United States Court of Claims would probably have jurisdiction of an action by the relator to establish the validity of his claim to salary accruing after the date of his dismissal." (Same case.)

"When the offense charged is trivial and the punishment is likewise trivial, a civil court should not be called upon to examine the legality of the sentence of a court-martial; and when called upon is not required by substantial justice to apply a stricter rule than that which prevails in ordinary criminal cases." (*Weirman v. U. S.*, 36 Ct. Cls., 236, 239.)

## IV. JURISDICTION OF COURTS-MARTIAL.

**Persons subject to jurisdiction of Federal courts-martial.**—Everyone connected with the military and naval service is amenable to the jurisdiction which Congress has created for their government, and while thus serving surrenders his right to be tried by the civil courts. (Ex parte Milligan, 4 Wall., 3, 123. See notes to sec. 1624, R. S.) The jurisdiction of courts-martial includes:

*Retired officers.*—(Runkle v. U. S., 19 Ct. Cls., 396; 122 U. S., 543; Closson v. U. S., 7 App. (D. C.), 460; secs. 1256 and 1457, R. S.; Naval Dig., 1916, 539.)

*Chiefs of bureaus in the Navy Department.*—(18 Op. Atty. Gen., 176; see also Smith v. U. S., 26 Ct. Cls., 143; Smith v. Whitney, 116 U. S., 181; Wales v. Whitney, 114 U. S., 564.)

*Judge Advocate General of the Army.*—(Swaim v. U. S., 28 Ct. Cls., 173; 165 U. S., 553.)

*Clerks to paymasters in the Navy*, although neither officers (in a constitutional sense) nor enlisted men. (Ex parte Reed, 100 U. S., 13; Johnson v. Sayre, 158 U. S., 109; U. S. v. Bogart, 24 Fed. Cas. No. 14616; In re Reed, 20 Fed. Cas. No. 11636; In re Bogart, 3 Fed. Cas. No. 1596. But see Ex parte Van Vranken, 47 Fed. Rep., 888, reversed, 163 U. S., 694.) [Paymasters' clerks were not strictly officers of the Navy at the time these decisions were rendered (U. S. v. Mouat, 124 U. S., 303). Their status has since been changed and they are now officers of the Navy. (Naval appropriation act Mar. 3, 1915, 38 Stat., 942; 27 Op. Atty. Gen., 157; see also U. S. v. Hendee, 124 U. S., 309.)]

*Army contractors*, under a specific statutory provision subjecting them to jurisdiction of courts-martial (Holmes v. Sheridan, 12 Fed. Cas. No. 6644); but only for fraud or willful neglect of duty in connection with their contracts (Ex parte Henderson, 11 Fed. Cas. No. 6349).

*Naval Militiamen*, when employed in the service of the United States in time of war or public danger (File 3973-107, Feb. 16, 1915; Johnson v. Sayre, 158 U. S., 109, 114); or for refusing to obey the order of the President calling them forth into the service of the United States (Martin v. Mott, 12 Wheat., 19; Houston v. Moore, 5 Wheat., 1; naval militia act, Feb. 16, 1914, sec. 5, 38 Stat., 285).

*Civilians.*—As to trials of civilians by military courts in time of war, see note to Art. I, sec. 8, clause 11, "Military jurisdiction over civilians in time of war."

Persons lawfully called, drafted or ordered into, or to duty or for training in, the military service are subject to jurisdiction of Army courts-martial from the dates they are required by the terms of the call, draft, or order to obey same; all retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field both within and without the territorial jurisdiction of the United States: all persons admitted into the Regular Army Soldiers' Home at Washington,

D. C.; all persons under sentence adjudged by courts-martial. (Act Aug. 29, 1916, sec. 3, 39 Stat., 650, amending sec. 1342, R. S., art. 2; see Ex parte Gerlach, 247 Fed. Rep., 616.)

All persons who in time of war, or of rebellion against the United States, are found in the capacity of spies, etc. (Sec. 1624, R. S., art. 5.)

*De facto enlisted man.*—Where a man without enlisting in the Navy served the full term of enlistment, he is entitled to an honorable discharge and on reenlistment to the benefits of his de facto enlistment. (File 5839, July 5, 1904; see also 26 Op. Atty. Gen., 319; Circular War Department, Mar. 18, 1901.)

A fraudulent enlistment is still an enlistment, and a man so enlisting is de facto in the service and subject to the jurisdiction of a naval court-martial. (File 5624, Feb. 17, 1896; U. S. v. Reaves, 126 Fed. Rep., 127, file 152-04; Ex parte Rock, 171 Fed. Rep., 240; Dillingham v. Booker, 163 Fed. Rep., 696, file 5956-6; In re Scott 144 Fed. Rep., 79, file 2757-4; In re Lessard, 134 Fed. Rep., 305; Solomon v. Davenport, 87 Fed. Rep., 318; In re Morrissey, 137 U. S., 157; compare Ex parte Bakley, 148 Fed. Rep., 56, affirmed, Dillingham v. Bakley, 152 Fed. Rep., 1022, file 5506-5, and Ex parte Lisk, 145 Fed. Rep., 860, file 2757-8.)

"It seems to me illogical to say that a man can commit a crime and when arrested obtain a discharge on the ground that the original enlistment was not regular or proper." (In re Hamilton and Carroll, Superior Court, Fulton Co. (Ga.) Atlanta Circuit, file 7969 and 7988-04; see also, In re McVey, 23 Fed. Rep., 878.)

*Soldier whose enlistment has expired.*—"The proceedings against the prisoner having been instituted while he was clearly within the jurisdiction of the military authorities, by the preferring of charges and by his arrest as well as by the forwarding of the charges to headquarters with an application for the appointment of a court-martial for his trial, the question for determination is, Did that jurisdiction cease and expire at the end of the prisoner's term of enlistment so that all proceedings after that date were void? The general rule is that when the jurisdiction of a court attaches in a particular case by the commencement of proceedings and the arrest of the accused, it will continue for all the purposes of trial, judgment, and execution. \* \* \* The general rule is grounded in sound reason. Many of the greatest military offenses are not cognizable by the courts of common law. A soldier might be guilty on the eve of the expiration of his term of enlistment of the grossest insults to his officers or of disobedience of orders or of desertion in the face of an enemy; and if he could not be held for trial after the end of his term he would escape punishment altogether. To hold that in every such case the jurisdiction of a court-martial would cease with the expiration of the term of enlistment would be to shield the guilty from punishment, to encourage crime, and to greatly demoralize the military service. The jurisdiction, therefore, in such cases is to be maintained upon the highest considerations of public policy. But such considerations are not alone sufficient to support the jurisdiction of a court which has power to deal with life, liberty, and property. The jurisdiction of a



criminal court must rest upon sound principles of law and not merely upon considerations of public interest and convenience. It frequently happens that the guilty go acquit because there is no lawful mode of trial and punishment provided. The jurisdiction in the cases named and in many others of like character must therefore be upheld upon the ground first mentioned, to-wit, that the court-martial acquired it by the proper commencement of proceedings and could not be divested of it by any subsequent change in the status of the accused; and this reason applies as well to a case where the crime is one known to the common or statute law, as to one in which the offense is purely military." (*Barrett v. Hopkins*, 7 Fed. Rep., 312; see also, *In re Bogart*, 3 Fed. Cas. No. 1596; *In re Bird*, 3 Fed. Cas. No. 1428; file 26251-5447, Dec. 8, 1911; 9 comp. Dec., 229.)

If before the expiration of his term of service an enlisted man commits a military crime, for the purpose of trying such offense an arrest or restraint would be justifiable. (*U. S. v. Travers*, 28 Fed. Cas. No. 16537, Mr. Justice Story.)

The statute of limitations applicable to trials by court-martial for desertion from the Navy provides, "That said limitation shall not begin until the end of the term for which said person was enlisted in the service." (Art. 62, A. G. N., sec. 1624, R. S., as amended by act Feb. 25, 1895, 28 Stat., 680.)

The statute authorizing detention of enlisted men in the Navy under certain circumstances beyond the expiration of the term for which they were enlisted provides "that all persons sent home or detained by a commanding officer, according to the provisions of this act, shall be subject in all respects to the laws and regulations for the government of the Navy until their return to an Atlantic or Pacific port and their regular discharge." Sec. 1422, R. S., as amended by act Mar. 3, 1875, 18 Stat., 484.)

*Officer dismissed from Army.*—Where an accused is proceeded against as an officer of the Army or Navy and jurisdiction attaches in respect of him as such, this includes not only the power to hear and determine the case, but the power to execute and enforce the sentence of the law. Having been sentenced, his status was that of a person held by authority of the United States as an offender against its laws, although pursuant to the sentence he had been dismissed before entering upon the period of imprisonment adjudged. The principle that where jurisdiction has attached, it can not be divested by mere subsequent change of status has been applied as justifying the trial and sentence of an enlisted man after expiration of the term of enlistment and the execution of sentence after many years and the severance of all connection with the Army. (*Carter v. McLaughry*, 183 U. S., 365, citing *Barrett v. Hopkins*, 7 Fed. Rep., 312, *Coleman v. Tennessee*, 97 U. S., 509; 16 Op. Atty. Gen., 349; and *Ex parte Mason*, 105 U. S., 696; see also *Rose v. Roberts*, 99 Fed. Rep., 948.)

*Soldier discharged from the Army.*—"Soldiers sentenced by court-martial to dishonorable discharge and confinement shall, until dis-

charged from such confinement, remain subject to the Articles of War and other laws relating to the administration of military justice." (Act June 18, 1898, sec. 5, 30 Stat., 484; *In re Bird*, 3 Fed. Cas. No. 1428; *In re Craig*, 70 Fed. Rep., 969; *Ex parte Wildman*, 29 Fed. Cas. No. 17653a; *Carter v. McLaughry*, 183 U. S., 365; see also act Aug. 29, 1916, noted above, under "Civilians.")

*Persons discharged from the Navy.*—"And if any person, being guilty of any of the offenses described in this article while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed." (Art. 14, Articles for the Government of the Navy, sec. 1624, R. S.; *In re Bogart*, 3 Fed. Cas. No. 1596; see also *In re Bird*, 3 Fed. Cas. No. 1428, noted under sec. 1426, R. S., "Effect of discharge," and see file 28550-951:3, May 13, 1919; U. S. ex rel. *Viscardi v. MacDonald*, 265 Fed. Rep., 695; U. S. ex rel. *Sartartonio v. Warden of Naval Prison*, 265 Fed. Rep., 787; 31 Op. Atty. Gen., 521.)

*Persons in constructive custody of civil courts.*—Where an officer of the Army is arrested by the civil authorities on the charge of felony and released on bail, he is amenable to the military authorities and may be tried by them for the military offense involved. However, "Although not necessary in the actual case, yet in deference to the spirit of our institutions and to the civil authorities, it may be expedient for the military authorities to suspend the trial of the military relations of the act of killing \* \* \* until the civil relations of that act shall have been tried by the civil magistrate." (6 Op. Atty. Gen., 413; see also 21 Op. Atty. Gen. 504.)

The fact that an enlisted man convicted by a civil court was turned over to naval jurisdiction, sentence being suspended, is deemed sufficient authority to proceed with his trial by general court-martial for unauthorized absence. (File 26524-36, Jan. 15, 1912.)

The naval authorities have jurisdiction to try by court-martial and confine an enlisted man paroled by the civil authorities where the governor of the State consents to such man's delivery to the Navy for disciplinary action. (File 26524-44.)

An enlisted man tried by court-martial while on parole by civil authorities can not obtain his release from Army jurisdiction by habeas corpus proceedings. The court officials in whose custody he belonged while on parole are the only ones who could raise the question. (Case of John W. Pieper, Supreme Court, District of Columbia, 1912; see also *In re Fox*, 51 Fed. Rep., 427.)

See cases noted below under "Persons not subject to jurisdiction of Federal courts-martial."

*Persons not subject to jurisdiction of Federal courts-martial.*—*Civilians*—Congress have no power, and never had, to subject a person not in the military or naval service of the United States to a trial by a court-martial for any crime, especially one that is capital and infamous. This is plain enough upon the face of



the Constitution. (Ex parte Henderson, 11 Fed. Cas. No. 6349. As to trial of civilians by military courts in time of war, see note to Art. I, sec. 8, clause 11, "Military jurisdiction over civilians in time of war," and see above, under "Persons subject to jurisdiction of Federal courts-martial;" see also *Holmes v. Sheridan*, 12 Fed. Cas. No. 6644, as to trials of Army contractors; *Martin v. Mott*, 12 Wheat., 19, as to trials of militiamen prior to entering service of United States; and *U. S. v. Travers*, 28 Fed. Cas. No. 16537, as to status of civilians visiting military posts.)

*Officers discharged from Army.*—A court-martial has no jurisdiction over an officer of the Army after he has left the service. (24 Op. Att'y. Gen., 570; 5 Op. Att'y. Gen., 55; compare, cases noted above, "Persons subject to jurisdiction of Federal courts-martial.")

*Officers resigned from the Navy.*—Unless there be some act of Congress which prolonged his liability to military courts and military offenses after he had been allowed to leave the service, an officer is not subject to trial by naval court-martial on charges preferred after that date. (G. O. No. 143, Navy Department, Oct. 28, 1869; see *In re Bogart*, 3 Fed. Cas. No. 1596.)

*Marine whose enlistment has expired.*—Where the enlistment of a marine has expired, and there is no legal authority for retaining him in the service, in point of law he is entirely discharged from the Marine Corps. "If, therefore, he had been restrained of his liberty, or prevented from leaving the navy yard, the detention would have been illegal. He might, by a habeas corpus to this court, have been liberated, and might well have sustained an action for damages. If under such circumstances he had attempted to depart from the navy yard and had been forcibly prevented, he would have had a right to repel force by force, and if necessary to have taken the life of his opponent. And if he had been killed in this attempt to recover his liberty it might under such circumstances have been murder in the perpetrator. But although the prisoner was thus in contemplation of law discharged, yet he might remain if he and the officers of the garrison pleased. He might remain in expectation of his pay or of a pension or of a certificate of discharge, which should be a voucher for his good behavior and of his having left the garrison without desertion. And if he chose to remain (however reluctantly), and to perform military service partially until he could obtain a regular discharge or receive his pay, although not a soldier, he was undoubtedly liable in a limited degree to the regulations necessary to the peace and subordination of a military garrison. And even if he was unlawfully detained or remained under an erroneous impression that he was bound so to do, this would not authorize him, in collateral things, to violate the laws. For even an unlawful detention will not authorize a man to perpetrate crimes against innocent persons, or on other occasions disconnected with his attempts to recover his liberty. \* \* \* But suppose him to be in the most favored condition and entitled to all the rights of a stranger, still in a military post or garrison every person who is voluntarily there, either as a visitor or guest, is bound to

observe peace and order and to conduct himself inoffensively. If he excite a riot, if he attempt to stab or wound or kill anyone within the lines, he is liable to be arrested and detained until he can be placed in the hands of the proper tribunals having jurisdiction to punish him. It is not competent for mere military officers in such cases to apply imprisonment by way of punishment, but it is their duty to apply it if necessary to prevent bloodshed and to restore peace and to keep the offender to answer over to a competent tribunal." (*U. S. v. Travers*, 28 Fed. Cas. No. 16537, Mr. Justice Story.)

*Naval Militia men participating in cruises with Regular Navy.*—"Until they are called into the service of the United States, Naval Militia men are, and remain, civilians, and consequently are not subject to punishment as such. The captain is charged with the safety, discipline, and well-being of his ship. He is not charged by law with the discipline of the passengers, except in so far as it affects the safety or discipline of his ship, and he is not authorized to administer any punishments on them. He is clothed with full authority in virtue of his position to use necessary force toward Naval Militia men who jeopardize the safety or discipline of the ship or refuse compliance with general or special orders. In effecting this he is authorized to use such ordinary methods as may be necessary. He would be justified in limiting offenders to certain parts of the ship or exercising other forms of restraint, or even, if circumstances demanded, confining the offender to a room, but always with the object of preserving the safety and discipline of the ship and not at all in the sense of inflicting a punishment, as such. \* \* \* The naval commanding officer has supreme authority over all persons on board his ship, including members of militia organizations; and \* \* \* while he can not try the latter by court-martial or impose punishments upon them under article 24 of the Articles for the Government of the Navy [section 1624, Revised Statutes], nevertheless he may, if necessary, place them in confinement or remove them from the vessel when circumstances demand, under lawful regulations to be adopted by the Department. It should, however, be distinctly understood that such action is not authorized as punishment, but only in so far as is necessary to maintain the discipline of the ship and the supreme authority of the commanding officer." (File 3973-107, Feb. 16, 1915.)

*Persons in constructive custody of civil courts.*—An enlisted man arrested as a deserter while on parole for a civil offense will not be tried by court-martial, because constructively in the custody of the civil authorities, but should be discharged from the Navy as undesirable as of the date of his conviction in the civil courts. (File 4495-02, May 27, 1902; see also File 26283-281; *In re Wall*, 8 Fed. Rep., 85.)

An enlisted man released by Federal civil authorities on bail should not be placed under restraint upon his return to the Navy, unless it should develop that he is not to be tried in the civil court, in view of the fact that the civil court has adequate power to cause his appearance when required. (File 26283-281, June 27, 1911; see also 21 Op. Att'y. Gen., 504.)

See cases noted above under "Persons subject to jurisdiction of Federal courts-martial."

**Offenses triable by court-martial.**—It is not possible for an officer to do any act punishable by the known laws of the land, however foreign that act may be to his duties or immediate relation as a soldier, which shall not be cognizable by court-martial. To commit a crime of any sort is, to say the least of it, in general unofficerlike and ungentlemanly conduct. Undoubtedly cases may and do occur of assault or even homicide by an officer of the Army which constitute a technical crime at law, the facts of which when they come to be scrutinized by the eye of a court-martial would be held the reverse of criminal and highly honorable to the party accused. These are exceptional cases. The general proposition remains true, that it is the part of an officer and a gentleman to observe the laws of his country, and for not doing it he would in most cases be censurable and in all his conduct would be lawfully subject to military inquiry. His conviction or acquittal by the State court of the offense against the general law does not discharge him from responsibility for the military offense involved in the same facts. (6 Op. Atty. Gen., 413, cited with approval in *U. S. v. Clark*, 31 Fed. Rep., 710, 712; see also *In re Bird*, 3 Fed. Cas. No. 1428. As to double jeopardy, see note to Amendments, Art. V.)

"Wherever our Army or Navy may go beyond our territorial limits, neither can go beyond the authority of the President or the jurisdiction of Congress." (Ex parte Milligan, 4 Wall., 141.)

"When the act charged as 'conduct to the prejudice of good order and military discipline' is actually a crime against society which is punishable by imprisonment in the penitentiary, it seems to us clear a court-martial is authorized to inflict that kind of punishment. The act done is a civil crime, and the trial is for that act. The proceedings are had in a court-martial because the offender is personally answerable to that jurisdiction." (Ex parte Mason, 105 U. S., 696.)

"Under every system of military law, for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business." (*Smith v. Whitney*, 116 U. S., 168, 183.)

Offense committed by de facto civilian; see note to section 1426, Revised Statutes, "Revocation of discharge issued under illegal sentence of court-martial."

**Court-martial can not convene in foreign jurisdiction.**—No naval court or assembly of a judicial character shall be ordered or permitted to assemble or conduct any part of its proceedings in any place subject to foreign jurisdiction. When, however, United States forces have landed in foreign territory for military purposes, that part of the foreign territory actually occupied by such forces is not subject to foreign jurisdiction within the meaning of this section. (Naval Courts and Boards, 1917,

sec. 215, citing C. M. O. No. 42, 1915, p. 10, superseding Art. R-703, Navy Regs., 1913.)

Where naval court-martial was held in place subject to foreign jurisdiction, the proceedings were disapproved. (Harwood, p. 57). Compare file 26504-254, Oct. 26, 1915, C. M. O. No. 42, 1915, p. 10.)

See note to Article I, section 8, clause 11, under "IV. Discipline of Army."

**Courts-martial other than naval can not convene on vessel of regular Navy.**—Naval Militia officers can not convene State courts-martial on board a vessel of the regular Navy in the service of the United States; as the established policy of this Government, expressed in Navy Regulations which have been approved by Congress and are still in effect, does not permit any other than a naval court-martial to be held on board a naval vessel. (Citing Art. R-3845, Navy Regs., 1913; Art. 987, Navy Regs., 1870; sec. 1547, R. S.) This policy has its origin in the customs and regulations of the British Navy (citing McArthur on Courts-Martial, 1813, vol. 1, p. 205). (File 3973-107, Feb. 16, 1915.) By act of August 29, 1916 (39 Stat., 598), naval militia courts-martial were authorized to convene on board naval vessels; this act was repealed by naval appropriation act of July 1, 1918 (40 Stat., 708), repealing all laws "relating to the Naval Militia and the National Naval Volunteers.")

"In the interest of the speedy administration of justice, the prompt disposal of public business, and the general efficiency of the armed forces," it was recommended by the Judge Advocate General of the Navy that article R-3845, Navy Regulations, 1913, be rescinded, in order that Army courts-martial might be permitted to convene on naval vessels. (File 26504-339, Sept. 7, 1918.)

#### V. JURISDICTION OF CIVIL COURTS.

**Jurisdiction of civil authorities over persons in military and naval service.**—Commanding officers of the Army, in time of peace, are required under certain conditions to deliver to the civil authorities for trial persons subject to military law for whom application has been duly made by such civil authorities. (Act Aug. 29, 1916, 39 Stat., 662, amending sec. 1342, R. S., art. 59.) [No similar statute relating to the Navy; as to naval orders and practice, see note to Article IV, section 2 clause 2.]

There can be no doubt of the power of Congress to govern the Army and Navy by bringing offenses committed in either under the cognizance of the courts of law. This power is fully executed in respect to the Army in the Rules and Articles of War [cited above]. But no such expression of intention is introduced in the naval code. Whether, then, the courts of law are to take cognizance of offenses committed in the naval forces depends entirely upon the true intent of Congress in that behalf, as expressed in the Crimes acts and in the naval code. (*U. S. v. Mackenzie*, 30 Fed. Cas. No. 18313.)

There is no act of Congress authorizing a call by the governor of a State for the surrender of an officer of the Navy charged with having broken the peace of such State, nor any law



authorizing an arrest by the executive with a view to the forcible surrender by him for the purposes of trial. However, advised that the accused be ordered by the Navy Department to surrender himself. (1 Op. Atty. Gen., 244; see also note to Art. I, sec. 8, clause 13, and Art. IV, sec. 2, clause 2. And see note to sec. 355, R. S.)

"Offenders in the land forces in certain cases were to be delivered over to the courts of law for trial and punishment. A similar provision is contained in the English mutiny act (2 McArthur, 229), without which it would seem to be thought that, under the general authority to try all cases not capital, courts-martial would have exclusive cognizance of that class of offenses when committed in the army \* \* \*. But no such direction or authority is incorporated in the naval code, and the design of Congress, therefore, to give the entire jurisdiction over the offenses enumerated to the naval courts-martial would seem indubitable \* \* \*. If Congress means its penal law shall apply to ships of war, those vessels will be specifically named." (U. S. v. Mackenzie, 30 Fed. Cas. No. 18313.) [The Federal criminal code, approved Mar. 4, 1909, in terms extends to crimes committed upon the high seas or any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, on board any vessel "belonging in whole or in part to the United States." 35 Stat., 1142, 1148, secs. 272, 310.]

In the case of Commander Mackenzie "the act of killing an inferior by a superior, which came under inquiry charged as unlawful homicide, occurred on board a ship of war at sea; and the questions pertinent to the present subject were whether the act was cognizable exclusively by a naval court-martial or by that concurrently with the competent ordinary courts of the United States. The fact of the act having occurred on board a ship of war and at sea influenced materially the arguments on the question of jurisdiction. For this reason Ex-Chancellor Kent and Mr. Justice Betts of the Southern District of New York both inclined, the former positively, the latter less so, to the opinion that the jurisdiction of the naval authorities was exclusive, more especially as the act of Congress for the government of the Navy does not contain the same recognition of the civil authorities as that for the government of the Army \* \* \*. At the same time each of those eminent jurisconsults maintained confidently the competency and legality of a naval court-martial, at least as having concurrent jurisdiction with the civil courts." (6 Op. Atty. Gen., 413.)

"Undoubtedly the general rule is that the jurisdiction of civil courts is concurrent as to offenses triable before courts-martial." (Franklin v. U. S., 216 U. S., 559, 568, citing 6 Op. Atty. Gen., 413, 419, U. S. v. Clark, 31 Fed. Rep., 710.)

"That a Government which possesses the broad power of war, which 'may provide and maintain a navy,' which 'may make rules for the government and regulation of the land and naval forces,' has power to punish an offense committed by a marine on board a ship of war,

wherever that ship may lie, is a proposition never to be questioned in this court." The inquiry respects not the extent of the power of Congress, but the extent to which that power has been exercised. (U. S. v. Bevans, 3 Wheat., 336.)

A Federal statute providing for the punishment of murder committed on the high seas or on any river, haven, basin, or bay out of the jurisdiction of any particular State, does not apply to murder committed on board a warship while in waters within the jurisdiction of the State of Massachusetts. (U. S. v. Bevans, 3 Wheat., 336.)

A Federal statute providing "that if any person or persons shall, within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States, commit the crime of willful murder, such person or persons, on being thereof convicted, shall suffer death," did not include murder committed on a United States warship, as the word "place," the same as the words with which it was associated, was intended to apply to objects which are "in their nature fixed and territorial." (U. S. v. Bevans, 3 Wheat., 336.)

"This construction [that the word "place" does not include a warship] is strengthened by the fact that at the time of passing this law the United States did not possess a single ship of war. It may, therefore, be reasonably supposed that a provision for the punishment of crimes in the Navy might be postponed until some provision for a navy should be made. While taking this view of the subject, it is not entirely unworthy of remark that afterwards, when a navy was created and Congress did proceed to make rules for its regulation and government, no jurisdiction is given to the courts of the United States of any crime committed in a ship of war, wherever it may be stationed." (U. S. v. Bevans, 3 Wheat., 336.)

The word "place" within the Revised Statutes punishing homicide embraces a United States battleship moored at Cob Dock, in the waters of Wallabout Bay, in the East River, these waters being included in the cession of jurisdiction by the State of New York to the Federal Government. "In the Bevans case the defendant was indicted and convicted for murder on board the United States ship of war *Independence* while lying in the waters of Boston Harbor and while such vessel was in commission and in the actual service of the United States. In this case the Supreme Court held that it was not the offense committed but the place in which it was committed that determined the question of jurisdiction. It appeared that the United States had no jurisdiction over the waters of Boston Bay, in which the gunboat *Independence* was lying when the murder was committed, but that such waters were within the sole and exclusive jurisdiction of the State of Massachusetts. The very opposite is true in the case at bar \* \* \*. While the facts of these two cases are very similar, yet they are entirely different and the direct opposite of each other in the matter of jurisdiction \* \* \*. We must, therefore, hold that \* \* \* the battleship *Indiana* was a 'place' within the mean-



ing of the United States statutes." (U. S. v. Carter, 84 Fed. Rep., 622.)

The courts of the Philippine Islands have no jurisdiction over offenses committed on board a naval vessel at Cavite, notwithstanding the provision in act No. 1457 of the Philippine Commission that "the jurisdiction of the city of Manila for police purposes only shall extend to 3 miles from the shore into Manila Bay," etc. The laws for the government of the Navy, the Navy Regulations, and lawful orders of superior naval authority, embody the only police regulations in force on board naval vessels. (File 26524-19, Oct. 26, 1910.)

Article 6 of the Articles for the Government of the Navy (sec. 1624, R. S.) does not vest exclusive jurisdiction in a naval court-martial of the crime of murder. The general rule is that jurisdiction of civil courts is concurrent as to offenses triable before courts-martial. Accordingly, *held* that homicide committed on a naval hospital ship at Olongapo, Philippine Islands, by a civilian may be tried by a Federal court in the first judicial district of the United States to which the offender is brought. Courts of the Philippine Islands did not have jurisdiction in this case, as the offense, if any, was against the United States, and the Philippine courts only have jurisdiction of offenses against Philippine Government. (28 Op. Atty. Gen., 24.)

Public ships of war of the United States "are exempt even from a foreign jurisdiction; and when lying in the domains of another nation are not subject to its courts, but all civil and criminal causes arising on board of them are exclusively cognizable in the courts of the United States. This is a principle of public law which has its foundation in the equality and independence of sovereign States, and in the fatal inconveniences and confusion which any other rule would introduce. \* \* \* Every argument by which this exemption is sustained as to foreign States applies with equal force as between the United States and every particular State of the Union; and it is fortified by other arguments drawn from the peculiar nature and provisions of our own municipal Constitution." (Argument of Attorney General, U. S. v. Bevens, 3 Wheat., 373, 374.)

"The principle that every power have exclusive jurisdiction over offenses committed on board their own public ships wherever they may be is also demonstrated in a speech of the present Chief Justice of the United States [Marshall], delivered in the House of Representatives in the celebrated case of *Nash alias Robins*, which argument, though made in another forum and for another object, applies with irresistible force to every claim of jurisdiction over a public ship that may be set up by any sovereign power other than that to which such ship belongs (Bee 266 n). All jurisdiction is founded on consent; either the consent of all the citizens implied in the social compact itself, or the express consent of the party or his sovereign. But in this case, so far from there being any consent implied or express, that the State courts should take cognizance of offenses committed on board of ships of war belonging to the United States, those ships enter the ports of the different States under the permission of the

State governments, which is as much a waiver of jurisdiction as it would be in the case of a foreign ship entering by the same permission. A foreign ship would be exempt from the local jurisdiction; and the sovereignty of the United States on board their own ships of war can not be less perfect while they remain in any of the ports of the Confederacy than if they were in a port wholly foreign. But we have seen that when they are in a foreign port they are exempt from the jurisdiction of the country. With still more reason must they be exempt from the jurisdiction of the local tribunals when they are in a port of the Union." (Argument for United States, U. S. v. Bevens, 3 Wheat., 352-355.) [In this case the Supreme Court held that it was "unnecessary to decide the question respecting the jurisdiction of the State court." The Attorney General argued that "if the offense in question be not cognizable by the circuit court [of the United States] it is entirely dispensable," [the State courts being without jurisdiction, and the naval courts-martial's jurisdiction not including this crime, under the Articles for the Government of the Navy]. The Supreme Court, however, merely decided that the Federal circuit court did not have jurisdiction.]

Whether, if murder should be committed on board a ship of war lying within the body of any county, the courts of the State might not interpose, may well be doubted. (6 Op. Atty. Gen., 413; compare *Ex parte Tatem*, 23 Fed. Cas. No. 1759; 16 Op. Atty. Gen., 647.)

A naval court-martial has jurisdiction to try an enlisted man of the Navy for fatally wounding another enlisted man on board a ship of war in the Thames River, opposite the city of New London, Conn. The civil authorities of Connecticut decided that the case "should be dealt with by the authorities of the United States." The Attorney General stated, among other things, that the State authorities "might probably" have tried the man for manslaughter. (16 Op. Atty. Gen., 578.)

Murder committed by an enlisted man on board a naval vessel at the navy yard, Philadelphia, may be dealt with by naval court-martial as manslaughter. (G. O. M. Rec. No. 16098; file 6674-10, Mar. 8, 1910.)

"The charge of Mr. Justice Betts [in U. S. v. Mackenzie, 30 Fed. Cas. No. 18313] is legal authority to the point that a court-martial having lawfully entered upon cognizance of a case, the civil magistrate can not lawfully interrupt or disturb its jurisdiction and right of complete and final action." (6 Op. Atty. Gen., 413.)

"In any case in which the delivery of a person in the Navy or Marine Corps for trial is desired by the civil authorities, Federal or State, and such person is a naval prisoner (which includes any person serving sentence of court-martial or in custody awaiting trial by court-martial or disposition of charges against him), he will not in general be delivered to the Federal or State authorities until he has served the sentence of the naval court-martial, or his case has otherwise been finally disposed of by the naval authorities." (G. O. No. 121, Navy Department, Sept. 17, 1914; Naval Courts and Boards, 1917, sec. 29 (15).)

As to jurisdiction of civil authorities over persons in military service, see further, note to Article I, section 8, clause 11, "Jurisdiction over persons in military service during war," and note to Article I, section 8, clause 13, "Exemption of Federal officers and subordinates from arrest by State authorities."

#### VI. APPLICATION OF CONSTITUTION TO THE NAVY.

**Whether constitutional limitations restrict Congress in legislating for Navy.**—The requirement as to presentment or indictment by grand jury as a prerequisite to trial for criminal offenses, does not extend to "cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." (Art. V of the amendments, *Runkle v. U. S.*, 19 Ct. Cls., 410, 411.) [As to trials by consular courts, see *In re Ross*, 140 U. S., 453.]

The Sixth Amendment, entitling the accused to be confronted with the witnesses against him, has no application to the proceedings of courts-martial: nevertheless the principles enumerated by the civil courts are persuasive in giving effect to a legislative enactment to accomplish a similar intent in proceedings of courts-martial. (*Mullan v. U. S.*, 42 Ct. Cls., 157, 176; affirmed 212 U. S., 516.)

The right of trial by jury, guaranteed to persons accused of crime (Art. III, sec. 2, clause 3, and Art. VI, amendments) does not apply to persons in the Army and Navy, as this right was evidently intended to be limited to persons who were subject to presentment or indictment by grand jury, and also trial by court-martial was the mode which prevailed in England and in the colonies, at the time the Constitution was framed, for the punishment of persons in the military and naval service. (See note above, under this clause, "Trials by jury not required in the Navy.")

"The Constitution itself provides for military government as well as for civil government. And we do not understand it to be claimed that the civil safeguards of the Constitution have application in cases within the proper sphere of the former \* \* \*. It is not denied that the power to make rules for the government of the Army and Navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the Constitution to the present time. Nor in our judgment does the fifth or any other amendment abridge that power \* \* \*. We think, therefore, that the power of Congress in the government of the land and naval forces and of the militia is not at all affected by the fifth or any other amendment." (Concurring opinion of Chief Justice Chase and three other justices in *Ex parte Milligan*, 4 Wall., 137; see also *In re Bogart*, 3 Fed. Cas. No. 1596.)

"Aside from constitutional provisions, it is a plain dictate of common justice that no person shall be deprived of life, liberty, or property without due process of law." Accordingly, the proceedings of a court-martial are illegal where one member was detached and another substi-

tuted by the Chief of the Bureau of Navigation without authority from the Secretary of the Navy who convened the court. (22 Op. Atty. Gen., 137.)

"If it be desirable or necessary that the prisoner in a civil court be present at every proceeding after indictment, it seems to be still more so that a prisoner before a court-martial should be present, for he ordinarily is not represented by counsel learned in the law and watchful of his interests, but (as in this case) by some naval officer acting from a humane motive." (*Weirman v. U. S.*, 36 Ct. Cls., 236. See further note to Amendments, Art. V, "Proceedings in absence of accused.")

"The Constitution does apply, and is universally admitted to apply, with the same force and effect to military courts as to other tribunals." (9 Op. Atty. Gen., 230.) [It was held by the same Attorney General that an article of war "authorized 'depositions taken in accordance with it to be read in cases not capital,' although the Constitution provides that the accused in criminal prosecutions shall have the right to be confronted with the witnesses against him." (File 26260-1392, June 29, 1911, p. 30, citing 9 Op. Atty. Gen., 311, 312.)]

"Let us see if the sentence [of an Army court-martial] was void because in violation of the fifth amendment. That amendment declares: 'Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.' The Government objects in the outset that the fifth amendment is not applicable in proceedings by court-martial. \* \* \* Reserving, however, the determination of these questions, it is nevertheless clear that the system under which the accused was tried, and his status as an officer of the Army, must be borne in mind in deciding whether the amendment, if applicable, was or was not violated by this sentence. \* \* \* The result is that we are of opinion that the sentence can not be invalidated on any of the grounds so far considered." (*Carter v. McLaughry*, 183 U. S., 365.) [It was not decided in this case whether the prohibition against double jeopardy, in the fifth amendment, applies to Army courts-martial. But see *Grafton v. U. S.*, 206 U. S., 352, noted below.]

Courts-martial are "courts authorized by law in the enforcement of a system of government for a separate community recognized by the Constitution," and "it is difficult to see why" the finality of their sentences should not be determined by the same rule which has been applied to the courts of the District of Columbia. (*Carter v. McLaughry*, 183 U. S., 365. For decisions as to whether constitutional limitations restrict Congress in legislating for the District of Columbia and for the Territories, see note to Art. IV, sec. 3, clause 2.)

The fact that Congress is given power by the Constitution "to make rules for the government and regulation of the land and naval forces" does not enable it to control the President's discretion in respect of those appointments which the same supreme law [Const., Art. II, sec. 2, clause 2] requires him to make. The general power to regulate such forces can not be taken to nullify the specific mandate



to the President to appoint to offices where Congress has made no other provision. (30 Op. Atty. Gen., 177; see also note to Art. II, sec. 2, clause 2.)

"Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter." (*Grafton v. U. S.*, 206 U. S., 352.)

A board of officers organized under an act of Congress for the reduction of the Army is "not a court of any kind," and it is unnecessary to consider "how far its irregularities extended,"

although it is contended by an officer mustered out of the service pursuant to the board's finding that its proceedings "were in many respects irregular, illegal, and in violation of his constitutional rights." (*Duryea v. U. S.*, 17 Ct. Cls., 24; see also file 26260-1392, June 29, 1911.)

See *In re Ross* (140 U. S., 453), holding that "By the Constitution of the United States a government is ordained and established 'for the United States of America,' and not for countries outside of their limits; and that Constitution can have no operation in another country"; and accordingly that Congress is empowered to authorize the trial of a capital offense by a consular court in China, etc., without indictment by grand jury, and without a jury on the trial.

[CLAUSE 15. Calling forth of the Militia.] <sup>15</sup> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

**Naval Militia.**—Congress has provided "that in the event of war, actual or threatened, with any foreign nation involving danger of invasion, or of rebellion against the authority of the Government of the United States, or whenever the President is, in his judgment, unable with the regular forces at his command to execute the laws of the United States, it shall be lawful for the President to call forth such number of the Naval Militia of a State, or of the States, or Territories, or of the District of Columbia, as he may deem necessary to repel such invasion, suppress such rebellion, or to enable him to execute such laws, and to issue his orders for that purpose, through the governor of the respective State or Territory, or through the commanding officer of the Naval Militia of the District of Columbia, from which State, Territory, or District such Naval Militia may be called, to such officers of the Naval Militia as he may think proper." (Sec. 3, act Feb. 16, 1914, 38 Stat., 284, repealed by naval appropriation act July 1, 1918, 40 Stat., 708.)

"The authority to decide whether the exigencies contemplated in the Constitution of the United States, and the act of Congress \* \* \* in which the President has authority to call forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions, have arisen, is exclusively vested in the President, and his decision is exclusive [conclusive] upon all other persons." (*Martin v. Mott*, 12 Wheat., 19; *Luther v. Borden*, 7 How., 1.)

"It is obvious that there are two ways by which the militia may be called into service; the one is under State authority, the other under authority of the United States. \* \* \* But the possession of this power, or even the passing of laws in the exercise of it, does not preclude the General Government from leaning upon the State authority, if they think proper, for the purpose of calling the militia into service." (*Houston v. Moore*, 5 Wheat., 1, 36.)

"The power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary

and proper means to effectuate the object. One of the best means to repel invasions is to provide the requisite force for action before the invader himself has reached the soil." (*Martin v. Mott*, 12 Wheat., 19.)

"The Constitution, which enumerates the exclusive purposes for which the militia may be called into the service of the United States, affords no warrant for the use of the militia by the General Government, except to suppress insurrection, repel invasions, or to execute the laws of the Union, and hence the President has no authority to call forth the Organized Militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation." (29 Op. Atty. Gen., 322.)

"As 'insurrection' is necessarily internal and domestic, within the territorial limits of the Nation, this portion of the sentence can afford no warrant for sending the militia to suppress it elsewhere. And even if an insurrection of our own citizens were set on foot and threateningly maintained in a foreign jurisdiction and upon our border, to send an armed force there to suppress it would be an act of war which the President can not rightfully do." (29 Op. Atty. Gen., 322.)

"The term 'to repel invasion' may be, in some respects, more elastic in its meaning. Thus, if the militia were called into the service of the General Government to repel an invasion, it would not be necessary to discontinue their use at the boundary line, but they might (within certain limits at least) pursue and capture the invading force, even beyond that line, and just as the Regular Army might be used for that purpose. This may well be held to be within the meaning of the term 'to repel invasion.' Then, too, if an armed force were assembled upon our border, so near and under circumstances which plainly indicated hostility and an intended invasion, this Government might attack and capture or defeat such forces, using either the Regular Army or the militia for that purpose. This, also, would be but one of the ways of repelling an invasion. But this is quite different from and affords no warrant



for sending the militia into a foreign country in time of peace and when no invasion is made or threatened." (29 Op. Atty. Gen., 322.)

"The only remaining occasion for calling out the militia is 'to execute the laws of the Union.' But this certainly means to execute such laws where, and only where, they are in force and can be executed or enforced. \* \* \* Outside of our own limits 'the laws of the Union' are not executed by armed force, either regular or militia. \* \* \* What is certainly meant by this provision is, that Congress shall have power to call out the militia in aid of the civil power, for the peaceful execution of the laws of the Union, wherever such laws are in force and may be compulsorily executed, much as a sheriff may call upon a posse comitatus to peacefully disperse a riot or execute the laws. Under our Constitution, as it has been uniformly construed from the first, the military is subordinate and subservient to the civil power, and it can be called upon to execute the laws of the Union only in aid of the civil power and where the civil power has jurisdiction of such enforcement. Even the Regular Army can be thus called upon only on such occasions; and, certainly, the militia can not be thus called upon at any other." (29 Op. Atty. Gen., 322.)

Congress has provided that the Naval Militia, when called into the service of the United States, shall be required to serve "either within or without the territory of the United States." (Act Feb. 16, 1914, sec. 4, 38 Stat., 284, Gen. Order No. 77, Feb. 25, 1914, repealed by naval appropriation act July 1, 1918; 40 Stat., 708.)

[**CLAUSE 16. Power over the militia.**] <sup>18</sup> To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

**Naval Militia.**—Congress made detailed provision for "organizing, arming, and disciplining" the naval militia and "for governing such part of them as may be employed in the service of the United States," by act February 16, 1914. (38 Stat., 283, G. O. No. 77, Feb. 25, 1914; repealed by naval appropriation act July 1, 1918, 40 Stat. 708.)

"Congress is thus expressly vested with the power to \* \* \* provide for governing such part only of the militia of the several States as, having been called forth to execute the laws of the Union, to suppress insurrections, or to repel invasions, is employed in the service of the United States." (Johnson v. Sayre, 158 U. S., 114.)

"It is also too plain for argument that the power here given to Congress over the militia is of a limited nature and confined to the objects specified in these clauses, and that in all other respects and for all other purposes the militia are subject to the control and government of the State authorities." (Houston v. Moore, 5 Wheat., 1, 50, dissenting opinion of Mr. Justice Story.)

"Congress have no power and never had to subject a militiaman not in the military or naval

Such a provision "must be read in view of the constitutional power of Congress to call forth the militia only to suppress insurrection, repel invasions, or to execute the laws of the Union. Congress can not, by its own enactment, enlarge the power conferred upon it by the Constitution; and if this provision were construed to authorize Congress to use the Organized Militia for any other than the three purposes specified, it would be unconstitutional. This provision applies only to cases where, under the Constitution, said militia may be used outside of our own borders, and was, doubtless, inserted as a matter of precaution and to prevent the possible recurrence of what took place in our last war with Great Britain, when portions of the militia refused to obey orders to cross the Canadian border." (29 Op. Atty. Gen., 322.)

**Duty outside the United States under selective draft law.**—The service which may be exacted of the citizen under the Army power, which includes the power to compel military service, is not limited to the specific purposes for which Congress is expressly authorized by the militia clause to call the militia; the presence in the Constitution of such express regulations affords no basis for an inference that the Army power, when exerted, is not complete and dominant to the extent of its exercise. (Selective Draft Law Cases, 245 U. S., 366.)

Congress may conscript for military duty in a foreign country; the militia clause is not a limitation upon the war power. (Cox v. Wood, 247 U. S., 3.)

service of the United States \* \* \* to a trial by court-martial for any crime, especially one that is capital or infamous. This is plain enough upon the face of the Constitution." (Ex parte Henderson, 11 Fed. Cas., 1076.)

The purpose of the naval militia law of February 16, 1914, "is to encourage on the part of the Government the development of a source from which the Nation in time of war may be supplied with a body of men trained in the handling of the weapons of marine warfare that may immediately be added to the Regular Navy for the efficient handling of vessels of war." Naval vessels loaned to State militia organizations may be used only for the training and instruction of the militia. "While it may perhaps be said that in a certain sense the use by the State of Maryland of the *Montgomery* for the purpose of quelling 'riots, insurrection, or defiance of civil law within the State limits' is such a use as may tend to promote the efficiency of the naval militia that may be aboard, it is nevertheless considered that such a use of a naval vessel, her armament and equipment, for what is in reality a purely local police work is a use entirely foreign to the promotion of the efficiency of the naval militia as contemplated by

the act of February 16, 1914 \* \* \*." (File 4570-194, Mar. 15, 1915.)

"So long as the militia are acting under the military jurisdiction of the State to which they belong, the powers of legislation over them are concurrent in the General and State Government. Congress has power to provide for organizing, arming, and disciplining them, and this power being unlimited, except in the two particulars of officering and training them, according to the discipline to be prescribed by Congress, it may be exercised to any extent that may be deemed necessary by Congress. But at State militia the power of the State governments to legislate on the same subjects having existed prior to the formation of the Constitution and not having been prohibited by that instrument it remains with the States, subordinate, nevertheless, to the paramount law of the General Government operating upon the same subject." (Houston v. Moore, 5 Wheat., 1, 16.)

"After a detachment of the militia have been called forth, and have entered into the service of the United States, the authority of the General Government over such detachment is exclusive. This is also obvious. Over the national militia the State governments never had or could have jurisdiction. None such is conferred by the Constitution of the United States, consequently none such can exist." (Houston v. Moore, 5 Wheat., 1, 17.)

Congress is empowered to fix the period when a portion of the militia, called forth by the President, shall enter the service of the United States and change their character from State to National militia. "That Congress might by law have fixed the period by confining it to the draft, the order given to the chief magistrate or other militia officer of the State, to the arrival of the men at the place of rendezvous, or to any other circumstance, I can entertain no doubt. This would certainly be included in the more extensive powers of calling forth the militia, organizing, arming, disciplining, and governing them." (Houston v. Moore, 5 Wheat., 1, 17.)

Congress may provide for the punishment by court-martial of a militiaman who refuses or neglects to obey the order of the President calling forth the militia. "This flows from the power bestowed upon the General Government to call them forth, and consequently to punish disobedience to a legal order, and by no means proves that the call of the President places the detachment in the service of the United States." (Houston v. Moore, 5 Wheat., 1, 18.)

"Although a militiaman who refused to obey the orders of the President calling him into the public service under the act of 1795 is not, in the sense of that act, 'employed in the service of the United States' so as to be subject to the rules and articles of war, yet he is liable to be tried for the offense under the fifth section of the same act, by a court-martial, called under the authority of the United States." (Martin v. Mott, 12 Wheat., 19.) Under the same circumstances the militiaman might be tried by a court-

martial of the State for refusing to respond to the call of the President. (Houston v. Moore, 5 Wheat., 1.)

Members of the naval militia, participating with the Regular Navy in cruises for the purpose of training and instruction, are not employed in the service of the United States, but remain civilians and consequently are not subject to punishment under the Articles for the Government of the Navy. The naval officer in command has, however, full authority to enforce any orders which affect the discipline, safety, and well-being of the ship or any part of the armament, equipment, or crew of the vessel under his command, and to this end may, if necessary, place militiamen in confinement or remove them from the vessel under lawful regulations issued by the Navy Department, not as punishment, but merely to maintain discipline. (File 3973-107, Feb. 16, 1915; see note to Art. I, sec. 8, clause 14, concerning jurisdiction of Federal courts-martial.)

Naval militia officers can not impose punishments on men belonging to their organizations while cruising on board a vessel of the Regular Navy, nor can naval militia officers convene State courts-martial on such vessels. (File 3973-107, Feb. 16, 1915.) By act of Aug. 29, 1916, 39 Stat., 598, naval militia courts-martial were authorized to convene on board naval vessels; this act was repealed by naval appropriations act July 1, 1918 (40 Stat., 708).

Naval militia officers cruising with the Regular Navy for training and instruction are authorized by law to perform duty and to exercise authority over the naval personnel of inferior rank, but can not impose punishments upon persons in the naval service. (File 3973-107, Feb. 16, 1915.)

"A State statute providing that all able-bodied male citizens of the State between 18 and 45, except those exempted, shall be subject to military duty, and shall be enrolled and designated as the State militia and prohibiting all bodies of men other than the regularly organized volunteer militia of the State and the troops of the United States from associating together as military organizations or drilling or parading with arms in any city of the State without license from the governor, as to these provisions is constitutional and does not infringe the laws of the United States." (Presser v. Illinois, 116 U. S., 252.)

**Federal power dominant.**—The militia power reserved to the States by the militia clause of the Constitution, while separate and distinct in its field, and while serving to diminish occasion for exercising the Army power, is subject to be restricted in, or even deprived of, its area of operation through the Army power, which includes the power to compel military service, according to the extent to which Congress, in its discretion, finds necessity for calling the latter into play. (Selective Draft Law Cases, 245 U. S., 366.)

[CLAUSE 17. Power of exclusive legislation.] <sup>17</sup> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress,



become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

See note to section 355, Revised Statutes, as to jurisdiction over naval reservations and other places belonging to the United States.

[**CLAUSE 18. General legislative power.**] <sup>18</sup> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

**SECTION 9. [CLAUSE 1. Migration or importation of persons.]** <sup>1</sup> The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[**CLAUSE 2. Writ of habeas corpus.**] <sup>2</sup> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

**Definition.**—The writ of habeas corpus is a high prerogative writ known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error to examine the legality of the commitment. (Ex parte Watkins, 3 Pet., 202.) [The ordinary writ of habeas corpus, known as “habeas corpus ad subjiciendum,” is the written order of a judge or court of competent jurisdiction, addressed to a person who is alleged to restrain another of his liberty without authority of law, and requiring the speedy production in court of the person so alleged to be illegally restrained, together with a return or statement setting forth the true cause of such restraint. If satisfactory cause be shown at the hearing, the court will remand the prisoner into the custody of the respondent; otherwise his immediate release will be ordered.]

“For the meaning of the term habeas corpus, resort must unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States must be given by the written law.” (Ex parte Bollman, 4 Cranch, 75.)

Only “privilege” of writ may be suspended.—“Suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on its return the court decides whether the applicant is denied the right of proceeding any further.” (Ex parte Milligan, 4 Wall., 2; see also, In re Fagan, 8 Fed. Cas. No. 4604.)

May be suspended only by authority of Congress.—“If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States [that is, the power to issue writs of habeas corpus], it is for the legislature to say so. The question depends on political considerations on which the legislature is to decide.” (Per Marshall, C. J., Ex parte Bollman, 4

Cranch, 75, 101; followed by Taney, C. J., in Ex parte Merryman, 17 Fed. Cas. No. 9487; see also Ex parte Benedict, 3 Fed. Cas., 1292; McCall v. McDowell, 15 Fed. Cas. No. 8673; In re Kemp, 16 Wis., 359, 377; Griffin v. Wilcox, 21 Ind., 383; 8 Op. Atty. Gen., 372; Warren v. Paul, 22 Ind., 277; Prigg v. Pennsylvania, 16 Pet., 619; Wright v. Johnson, 5 Ark., 687; In re Boyle, 6 Idaho, 609, 57 Pac., 706, 45 L. R. A., 832; Ex parte Moore, 64 N. C., 802.)

The President has power to declare martial law, and as a necessary consequence to suspend the privilege of the writ of habeas corpus. Martial law and the privilege of this writ are wholly incompatible. The remark of Chief Justice Marshall in the Bollman case seems to have been an obiter dictum [a remark made by the way, or incidentally]; and at the time of Chief Justice Taney’s opinion, the President had not declared martial law; the case of Ex parte Benedict is to be distinguished for the same reason. (Ex parte Field, 9 Fed. Cas. No. 4761; see also Ex parte Vallandigham, 27 Fed. Cas. No. 16816.)

“There is a plain distinction between the suspension of the writ in the sense of the clause of the Constitution, and the right of a military commander to refuse obedience when justified by the exigencies of war, or the ipso facto suspension which takes place wherever martial law actually exists, which the Chief Justice seems to have overlooked. But this kind of suspension, which comes with war and exists without proclamation or other act, is limited by the necessities of war. It applies only to cases where the demands upon the officer’s time and services are such that he can not consistently with his superior military duty, yield obedience to the mandates of the civil authorities, and to cases arising within districts which are properly subjected to martial law. In cases of the latter description, it is probable that the civil magistrates would be bound to take judicial notice of the existence of martial law, by



which their functions are so far suspended, but as to the former, it would seem that the military officer should, if practicable, make return of the facts showing his excuse." (In re Kemp, 16 Wis., 359.)

Only Congress can repeal all power to issue the writ; but the President has lawful power to suspend the privilege of persons arrested in case of a great and dangerous rebellion, for he is especially charged by the Constitution with the "public safety." (10 Op. Atty. Gen., 74; see also In re Dugan, 6 D. C., 139.)

By act of March 3, 1863, Congress authorized the President to suspend the privilege of the writ of habeas corpus "during the present rebellion," whenever in his judgment the public safety may require it. "This law was passed in a time of great national peril, when our heritage of free government was in danger. An armed rebellion against the national authority, of greater proportion than history affords an example of, was raging; and the public safety required that the privilege of the writ of habeas corpus should be suspended. The President had practically suspended it, and detained suspected persons in custody without trial; but his authority to do this was questioned. It was claimed that Congress alone could exercise this power; and that the legislature, and not the President, should judge of the political considerations on which the right to suspend it rested. The privilege of this great writ had never before been withheld from the citizen; and as the exigence of the times demanded immediate action, it was of the highest importance that the lawfulness of the suspension should be established. It was under these circumstances, which were such as to arrest the attention of the country, that this law was passed." (Ex parte Milligan, 4 Wall., 2, 115; see also, Matter of Dunn, 8 Fed. Cas. No. 4171; Matter of Oliver, 17 Wis., 686.)

"It is essential to the safety of every Government that in a great crisis like the one we have just passed through [civil war] there should be a power somewhere of suspending the writ of habeas corpus." (Ex parte Milligan, 4 Wall., 2.)

**When privilege of writ may be suspended.**—Under the Constitution the privilege

of the writ of habeas corpus may be suspended only in two cases, namely, "rebellion," and "invasion." (Matter of Keeler, 14 Fed. Cas. No. 7637.)

**Effect of suspension.**—"A citizen not connected with the military service and resident in a State where the courts are open and in the proper exercise of their jurisdiction can not, even when the privilege of the writ of habeas corpus is suspended, be tried, convicted, or sentenced otherwise than by the ordinary courts of law." (Ex parte Milligan, 4 Wall., 2; but see concurring opinion of four justices in this case; see also McCall v. McDowell, 15 Fed. Cas. No. 8673.)

"In the emergency of the times, an immediate public investigation according to law may not be possible; and yet the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the Government, if it should see fit, in the exercise of a proper discretion, to make arrests, should not be required to produce the person arrested in answer to a writ of habeas corpus. The Constitution goes no further. It does not say that after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of common law. If it had intended this result, it was easy by the use of direct words to have accomplished it." (Ex parte Milligan, 4 Wall., 2.)

A person making an illegal arrest, even when the privilege of the writ of habeas corpus is suspended, is liable to damages in a civil suit for such arrest and to punishment in a criminal prosecution. (Griffin v. Wilcox, 21 Ind., 372.)

Effect of President's proclamation suspending privilege of writ is to stop proceedings upon habeas corpus although commenced prior to date of proclamation. (Matter of Dunn, 8 Fed. Cas. No. 4171.)

As to power of Congress to protect military officers against civil or criminal responsibility, see note to Article I, section 8, clause 13.

On general subject of habeas corpus, see sections 751, et seq., Revised Statutes.

[CLAUSE 3. Bills of attainder and ex post facto laws.]<sup>3</sup> No Bill of Attainder or ex post facto Law shall be passed.

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the textbooks, judicial magistracy; it pronounces upon the guilt of the party without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense." (Cummings v. Missouri, 4 Wall., 277; see also In re Yung Sing Hee, 36 Fed. Rep., 437; In re De Giacomo, 7 Fed. Cas. No.

3747; Anderson v. Baker, 23 Md., 623; Drehman v. Stifle, 8 Wall., 601; Fletcher v. Peck, 6 Cranch, 138.)

The injustice and tyranny which characterize ex post facto laws consist altogether in their retrospective operation, which applies with equal force, although not exclusively, to bills of attainder. (Ogden v. Saunders, 12 Wheat., 266.)

A provision that persons convicted of certain crimes shall not be permitted to vote or hold office is not in the nature of a bill of attainder, as it requires conviction before the penalties are made to attach. (Washington v. State, 75 Ala., 585.)

A federal statute, providing that deserters from the military and naval service shall forfeit their rights of citizenship and the right to become citizens, is not void as a bill of attainder, because it contemplates trial by a court-martial

to enforce this penalty as well as the other penalties for desertion. (*Gotcheus v. Matheson*, 58 Barb. (N. Y.), 153, 61 N. Y., 425; see also *State v. Symonds*, 57 Maine, 148; *Holt v. Holt*, 59 Maine, 464; *Severance v. Healy*, 50 N. H., 448; *Huber v. Reilly*, 53 Pa. St., 112; *McCafferty v. Guyer*, 59 Pa. St., 110; *Kurtz v. Moditt*, 115 U. S., 501; and see secs. 1996 and 1998, R. S.)

The following are examples of statutes held void as bills of attainder: A federal statute prescribing an oath that deponent had never voluntarily borne arms against the United States or given aid to its enemies, etc., as a qualification for admission as an attorney before the United States courts (*Ex parte Garland*, 4 Wall., 333); a similar requirement as a condition precedent to holding office or practicing law or ministry in a State (*Cummings v. Missouri*, 4 Wall., 277; see also *In re Shorter*, 22 Fed. Cas. No. 12811); a statute making the nonpayment of taxes during the Civil War evidence of disloyalty, and providing for the forfeiture of lands without a judicial hearing (*Martin v. Snowden*, 18 Gratt., 100); providing castration upon conviction of second offense (*Davis v. Berry*, 216 Fed. Rep., 413, 419); a statute excluding from the United States Chinese citizens (*In re Yung Sing Hee*, 36 Fed. Rep., 437; compare *In re Chae Chan Ping*, 36 Fed. Rep., 431). [A provision that no person shall be civilly prosecuted for any act done by virtue of military authority was held not to be a bill of attainder. (*Drehman v. Stifle*, 8 Wall., 596; see also *Clark v. Dick*, 5 Fed. Cas. No. 2818.)]

**Ex post facto laws.**—A statute belongs to this class “which by its necessary operation and ‘in its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage.’ \* \* \* Of course a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offense was committed. And therefore it is well settled that the accused is not of right entitled to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offense charged against him.” (*Thompson v. Utah*, 170 U. S., 343; see also *Duncan v. Missouri*, 152 U. S., 382; *Medley, Petitioner*, 134 U. S., 171.)

“The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it can not lawfully, we think, in so doing dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.” (*Cooley on Const. Lim.*, quoted with approval in *Thompson v. Utah*, 170 U. S., 343; see also *Kring v. Missouri*, 107 U. S., 221.)

No one has a vested right in mere modes of procedure. Statutes regulating procedure, if they leave untouched all the substantial protections with which existing law surrounds the person accused of crime, are not within the constitutional inhibition of ex post facto laws. But a statute which takes from the accused a substantial right given to him by the law in force at the time to which his guilt relates would be ex post facto in its nature and operation, and

legislation of that kind can not be sustained simply because, in a general sense, it may be said to regulate procedure. (*Thompson v. Utah*, 170 U. S., 343; see also *Gibson v. Mississippi*, 162 U. S., 590; *State v. Fourchy*, 106 La., 749.)

“The difficulty is not so much as to the soundness of the general rule that an accused has no vested right in particular modes of procedure, as in determining whether particular statutes by their operation take from an accused any right that was regarded at the time of the adoption of the Constitution as vital for the protection of life and liberty and which he enjoyed at the time of the offense charged against him.” (*Thompson v. Utah*, 170 U. S., 343.)

Ex post facto laws include: “First, every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. Second, every law that aggravates a crime or makes it greater than it was when committed. Third, every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. Fourth, every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender.” (Per Chase, J., *Calder v. Bull*, 3 Dall., 386.)

The above classification by Justice Chase, although obiter dictum, “has often been repeated by judges and text-writers in discussing the subject. Still it may not be presumptuous to say that doubts may be entertained whether his fourth class does not include cases outside of the prohibition; whether every law that alters the legal rules of evidence and receives different testimony than the law required at the time of the commission of the offense in order to convict the offender, is an ex post facto law.” (*Moore v. State*, 43 N. J. L., 216.)

A statute is not void as ex post facto because it removes disability of witness, thereby enlarging the classes of persons who are competent to testify in criminal cases. (*Hopt v. Utah*, 110 U. S., 589.)

A statute authorizing the comparison of disputed handwriting with any writing proved to be genuine is not ex post facto, although applicable to crimes committed prior to its enactment and altering the legal rules of evidence in existence at the time of the commission of the offense. (*Thompson v. Missouri*, 171 U. S., 380. This decision related to a State law. A similar statute was passed by Congress, Feb. 26, 1913, 37 Stat., 683.)

“We are not to be understood as holding that there may not be such a statutory alteration of the fundamental rules in criminal trials as might bring the statute in conflict with the ex post facto clause of the Constitution. If, for instance, the statute had taken from the jury the right to determine the sufficiency or effect of the evidence which it made admissible, a different question would have been presented. We mean now only to adjudge that the statute is to be regarded as one merely regulating procedure and may be applied to crimes committed prior to its passage without impairing the substantial guaranties of life and liberty



that are secured to an accused by the supreme law of the land." (*Thompson v. Missouri*, 171 U. S., 380.)

A statute providing that "in all questions affecting the credibility of a witness his general moral character may be given in evidence," is not *ex post facto* as applied to trials for offenses committed before its passage. (*Robinson v. State*, 84 Ind., 453.)

A constitutional provision that a person convicted of certain offenses should not be permitted to hold office is not *ex post facto*, because it does not take away a legal right nor impose any legal burden, one of which is necessary to the infliction of a penalty; but merely withholds a constitutional provision which is grantable or revocable by the sovereign power of the State at pleasure. (*Washington v. State*, 75 Ala., 585; but see *Cummings v. Missouri*, 4 Wall., 277; *Ex parte Garland*, 4 Wall., 333.)

Desertion from the military or naval service is a continuing offense, and therefore statutes increasing the penalties upon conviction are not *ex post facto* as applied to one in desertion at the time such statutes were enacted. (*Huber v. Reily*, 53 Pa. St., 115; *Gotcheus v. Matheson*,

58 Barb. (N. Y.), 153, reversed on other grounds, 61 N. Y., 425; see also *Kurtz v. Moffitt*, 115 U. S., 501; *Murphy v. Ramsey*, 114 U. S., 42; and see secs. 1996 and 1998, R. S.)

A law which is not penal and does not interfere with the vested rights of individuals is within the constitutional power of Congress and is not objectionable as a retrospective law. (*McNamara v. U. S.*, 28 Ct. Cls., 416.) Retrospective laws which do not impair the obligation of contracts or partake of the character of *ex post facto* laws are not condemned or forbidden by any part of the Constitution. (*Satterlee v. Matthewson*, 2 Pet., 410.)

The constitutional prohibition applies to penal and criminal proceedings and not to civil proceedings which affect private rights retrospectively. (*Watson v. Mercer*, 8 Pet., 110; *In re Sawyer*, 124 U. S., 219; *Locke v. New Orleans*, 4 Wall., 173; *Calder v. Bull*, 3 Dall., 393; *De Pass v. Bidwell*, 124 Fed. Rep., 623.) Proceedings for recovery of penalties and forfeitures are included, as well as criminal laws and cases. (*U. S. v. Hughes*, 26 Fed. Cas. No. 15416.)

[**CLAUSE 4. Capitation and direct taxes.**] <sup>4</sup> No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

See Amendments, Art. XVI.

[**CLAUSE 5. Export duties.**] <sup>5</sup> No Tax or Duty shall be laid on Articles exported from any State.

[**CLAUSE 6. Freedom of commerce.**] <sup>6</sup> No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

[**CLAUSE 7. Appropriations and accounting of public money.**] <sup>7</sup> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

[**CLAUSE 8. Titles of nobility and gifts from foreign States.**] <sup>8</sup> No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

**Acceptance of presents from foreign states, etc.**—The provision of this clause applies as well to a titular prince as to a reigning one; and a simple remembrance of courtesy, even if merely a photograph, falls under the inclusion of "any present of any kind whatever." (24 Op. Atty. Gen., 116.)

"This prohibition expressly relates to official persons, and does not extend, under the circumstances outlined, to a department of the Government or to governmental institutions." (24 Op. Atty. Gen., 116.)

If the present is not to be given by any king, prince or foreign state, but by the citizens of Ponta Delgada, Azores, its acceptance by the commanding officer of a naval vessel without the consent of Congress, would not be a viola-

tion of this clause of the Constitution. (File 9644-43, Apr. 6, 1918.)

"A minister plenipotentiary from the United States to a foreign power can not, without the consent of Congress, accept a similar commission from a third power; though he is not prohibited from rendering a friendly service to a foreign Government, even that of negotiating a treaty, provided he does not become an officer thereof." (13 Op. Atty. Gen., 537.)

"The marshal of the United States for the southern district of Florida can not at the same time hold the office of commercial agent of France." (6 Op. Atty. Gen., 409.)

"The \* \* \* clause as to the acceptance of any emoluments, title, or office from foreign governments is founded in a just jealousy of



foreign influence of any sort. Whether, in a practical sense, it can produce much effect, has been thought doubtful. A patriot will not be likely to be seduced from his duties to his country by the accepting of any title or present from a foreign government. An intriguing or corrupt agent will not be restrained from guilty machinations in the service of a foreign state by such constitutional restrictions \* \* \*." (File 3707, June 15, 1904, quoting Story on the Constitution, vol. 2, pp. 223, 224.)

"The reasons for the prohibition in question apply as well to enlisted men in the military service as to officers, the difference between the cases of officers and men in this respect being one of degree only; and there may be doubt as to whether such prohibition was not intended to apply to all persons in the service of the Government, and not to those only who are appointed to office in one of the modes mentioned in Article II, section 2, clause 2." (File 3707, June 15, 1904, citing 16 Op. Atty. Gen., 113, holding an enlisted man of the Army to be an "officer" within the meaning of section 750, Revised Statutes, allowing expenses incurred by witnesses for the Government; see also 27 Op. Atty. Gen., 468, 472; compare 28 Op. Atty. Gen., 320.)

"The question whether the provision of the Constitution above quoted includes within its terms any person occupying a position of trust or profit under the United States, such as an enlisted man in the Navy, is not free from doubt. There are decisions which have given the word 'officer' a very broad construction in other connections \* \* \*." (File 9644-27, Jan. 24, 1913; see also file 7515-158, Sept. 27, 1917; file 1098-98, Aug. 9, 1918; but see 28 Op. Atty. Gen., 320.)

It is provided by law that "hereafter any present, decoration, or other thing, which shall be conferred or presented by any foreign government to any officer of the United States, civil, naval, or military, shall be tendered through the Department of State, and not to the individual in person, but such present, decoration, or other thing shall not be delivered by the Department of State unless so authorized by act of Congress." (Act June 31 1881, sec. 3, 21 Stat., 604.) "The within-named medals were tendered through the Department of State, and that department, which, under the act just cited, is charged with determining in what cases congressional authority for the delivery of things presented by foreign governments is necessary, holds that such authority

is not required in this instance, on the ground that enlisted men of the Navy and Marine Corps are not officers of the United States within the constitutional prohibition and the act of 1881 above quoted. The forwarding of the medals to this department for distribution constitutes a delivery thereof so far as the Department of State is concerned." (File 3707, June 15, 1904, holding that the medals may properly be delivered by the Navy Department to the enlisted men for whom they were intended. See also, file 9644-27, Jan. 24, 1913.)

"No decoration or other thing, the acceptance of which is authorized by this act, and no decoration heretofore accepted, or which may hereafter be accepted, by consent of Congress, by any officer of the United States, from any foreign government, shall be publicly shown or exposed upon the person of the officer so receiving the same." (Act Jan. 31, 1881, sec. 2, 21 Stat., 604.)

"The public wearing of medals presented by foreign governments is not authorized by the Navy Regulations." (File 3707, June 15, 1904.)

Members of the "military forces" of the United States serving in the war with Germany were permitted and authorized to accept until one year after the war, decorations from certain foreign governments, and "to accept and wear any medal or decoration heretofore bestowed" by any of said governments, by the Army appropriation act approved July 9, 1918 (40 Stat., 872). This statute applies to the Navy and Marine Corps. (31 Op. Atty. Gen., 445; see also id., 452.)

A clerk of class 4 in the Post Office Department is inhibited by this clause of the Constitution from accepting an insignia conferred by the German Emperor, unless the consent of Congress be first obtained. Section 3 of the act of January 31, 1881 (21 Stat., 604), does not authorize the delivery of decorations unless authority therefor be first obtained by act of Congress. (27 Op. Atty. Gen., 219.)

Acceptance by officers and enlisted men of employment and compensation from the government of Brazil, the government of Haiti, and the government of the Dominican Republic, respectively, was authorized October 13, 1914 (38 Stat., 780), June 12, 1916 (39 Stat., 223), and February 11, 1918 (40 Stat., 437). See also act of June 5, 1920 (41 Stat. 1056), applicable to all South American Republics.

**SECTION 10. [CLAUSE 1. States not to make treaties, coin money, pass ex post facto laws, impair contracts, etc.]** <sup>1</sup> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

**Obligation of contracts.**—"The United States can not, any more than a State, interfere with private rights except for legitimate governmental purposes. They are not included within the Constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the

States they are prohibited from depriving persons or corporations of property without due process of law." (Sinking Fund Cases, 99 U. S., 700.)

"It is unnecessary to discuss the question whether Congress has unrestricted power to do what the States can not do in the impairing of

contract obligations. It is probable it would be held that in some instances and for some purposes it can. Such an instance might be the enactment of a bankrupt law, which necessarily implies the impairment and even the entire discharge of contract obligations. It is not improbable, however, that an act of Congress which should provide for the repudiation of any substantial part of a valid contract would be obnoxious to those other provisions of the Federal Constitution which are intended to protect the citizen and his property against arbitrary seizure and confiscation." (22 Op. Atty. Gen., 194.)

"Congress has express power to enact bankrupt laws, and we do not say that a law made in the execution of any other express power, which incidentally only impairs the obligation of a contract, can be held to be unconstitutional for that reason. But we think it clear that those who framed and those who adopted the Consti-

tution intended that the spirit of this prohibition should pervade the entire body of legislation \* \* \*. In other words, we can not doubt that a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution." (Hepburn v. Griswold, 8 Wall., 623.)

"Nor can it be truly asserted that Congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless or partially fruitless. Directly it may, confessedly by passing a bankrupt act, embracing past as well as future transactions \* \* \*. So it may relieve parties from their apparent obligations indirectly, in a multitude of ways. It may declare war, or even in peace pass nonintercourse acts, or direct an embargo." (Knox v. Lee, 12 Wall., 457.)

[CLAUSE 2. States not to lay imposts or duties, except, etc.] <sup>2</sup> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

[CLAUSE 3. States not to lay tonnage duty, make compacts, engage in war, etc.] <sup>3</sup> No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

## ARTICLE II.

SECTION 1. [CLAUSE 1. Executive power vested in President; terms of President and Vice-President.] <sup>1</sup> The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice-President, chosen for the same Term, be elected, as follows:

**Courts without power over President.**—"The executive power is vested in a President, and as far as his powers are derived from the Constitution he is beyond the reach of any other department, except in the mode prescribed by the Constitution, through the impeaching power." (Kendall v. U. S., 12 Pet., 524.)

The courts are not empowered to enjoin the President from executing an act of Congress, even though such act had been vetoed by the President as unconstitutional and had become a law without his approval. "A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office can not be received, whether it described him as President or as a citizen of a State. The motion for leave to file the bill is therefore denied." (Mississippi v. Johnson, 4 Wall., 475.)

"A subpoena may issue to the President of the United States to compel his attendance as a witness, and an accused person is entitled to it of course." (U. S. v. Burr, 25 Fed. Cas. No. 14692d.)

"A subpoena duces tecum may issue to the President of the United States, directing him to bring any paper of which the party praying it has a right to avail himself as testimony." (U. S. v. Burr, 25 Fed. Cas. No. 14692d.)

"While a subpoena may be directed against the President to produce a paper, or for some other purpose, in case of his refusal to obey the subpoena, the courts would be without power to enforce process." (25 Op. Atty. Gen., 326.)

**Subordinate executive officers.**—"The President's duty in general requires his superintendence of the administration; yet this duty can not require of him to become the administrative officer of every department and bureau,



or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform. This can not be, because if it were practicable it would be to absorb the duties and responsibilities of the various departments of the Government in the personal action of the one chief executive officer. It can not be, for the strongest reason, that it is impracticable—nay, impossible.” (*Williams v. U. S.*, 1 How., 290; 10 Op. Atty. Gen., 527.)

The heads of the executive departments, familiarly known as Cabinet officers, aid the President “in the performance of the great duties of his office and represent him in a thousand acts to which it can hardly be supposed his personal attention is called.” (In re Neagle, 135 U. S., 1.)

The Constitution does not specify the subordinate administrative functionaries by whose agency or counsels the details of public business are to be transacted. It recognizes the existence of such official agents and advisers in saying that the President “may require the opinion, in writing, of the principal officer of each of the executive departments upon any subject relating to the duties of their respective offices” (Art. II, sec. 2, clause 1); and these officers are again recognized by the Constitution in the clause which vests the appointment of certain inferior officers “in the heads of departments” (Art. II, sec. 2, clause 2), and it leaves the number and organization of those departments to be determined by Congress. (6 Op. Atty. Gen., 326; see also note to sec. 158, R. S.)

“The President acts and speaks through the heads of the departments, and the acts of the head of an executive department must be presumed to be by the direction of the President. If the surrounding circumstances show that the act was that of the Secretary alone, the presumption may be otherwise.” (*Weller v. U. S.*, 41 Ct. Cls., 324.) So also, where the act to be done is judicial in character, such as the approval of the sentence of a court-martial, the personal judgment of the President is required, and can not be delegated to the head of a department. (*Runkle v. U. S.*, 122 U. S., 543, explained, *U. S. v. Fletcher*, 148 U. S., 86; *Id. v. U. S.*, 25 Ct. Cls., 407, 150 U. S., 517; see also note to sec. 158, R. S.)

The order of the Secretary of War is the order of the President, within the terms of a statute providing that certain officers of the Army should not perform any duties beyond the line of their immediate profession “except by the special order of the President.” (9 Op. Atty. Gen., 465.)

“By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties he is authorized to appoint certain officers who act by his authority and in conformity with his orders. In such cases their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still

there exists and can exist no power to control that discretion. The subjects are political. They respect the Nation, not individual rights, and, being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of Congress for establishing the Department of Foreign Affairs [now Department of State]. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is to be communicated. The acts of such an officer, as an officer, can never be examined by the courts.” (*Marbury v. Madison*, 1 Cranch, 137.)

“It is the general theory of departmental administration that the heads of the executive departments are the executors of the will of the President.” (10 Op. Atty. Gen., 527.)

“There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine that Congress can not impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grow out of and are subject to the control of law and not the direction of the President. And this is emphatically the case where the duty enjoined is of a mere ministerial character.” (*Kendall v. U. S.*, 12 Pet., 524.)

**Legal responsibility of executive officers.**—“If one of the heads of departments commits any illegal act, under color of office, by which an individual sustains an injury, it can not be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding and being compelled to obey the judgment of the law.” (*Marbury v. Madison*, 1 Cranch, 137.)

“The same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions apply to a large extent to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts. As in the case of a judicial officer, we recognize a distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority and action having more or less connection with the general matters committed by law to his control or supervision. \* \* \* Personal motives can not be imputed to duly authorized official conduct. In exercising the functions of his office the head of an executive department keeping within the limits of his authority should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages.” (*Spalding v. Vilas*, 161 U. S., 483.)

“A public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one but is one



in relation to which it is his duty to exercise judgment and discretion, even although an individual may suffer by his mistake. A contrary principle would, indeed, be pregnant with the greatest mischiefs." (*Kendall v. Stokes*, 3 How., 87. See also note to Art. I., sec. 8, clause 13, "Civil responsibility of persons in military service.")

**Liability of Government for acts of executive officers.**—"No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents. It does not undertake to guarantee to any person the fidelity of the officers whom it employs, since that would involve it in all its operations in endless embarrassments and difficulties and losses which would be subversive of the public interests." (*Gibbons v. U. S.*, 8 Wall., 269. See note to sec. 236, R. S.; see also note to Art. I, sec. 8, clause 13, "Congress may protect officers against civil or criminal responsibility.")

**Mandamus against heads of departments.**—"It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised, in which he is the mere organ of the executive will, it is again repeated that any application to a court to control in any respect his conduct would be rejected without hesitation. But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President and the performance of which the President can not lawfully forbid, and therefore is never presumed to have forbidden, as, for example, to record a commission or a patent for land which has received all the legal solemnities, or to give a copy of some record; in such cases it is not perceived on what grounds the courts of the country are further excused from giving judgment that right be done to an injured individual than if the same services were to be performed by a person not the head of a department." (*Marbury v. Madison*, 1 Cranch, 137. See also *Gaines v. Thompson*, 7 Wall., 347; *Kendall v. U. S.*, 12 Pet., 524; *U. S. v. Schurz*, 102 U. S., 378; *Georgia v. Stanton*, 6 Wall., 50; *Riverside Oil Co. v. Hitchcock*, 190 U. S., 316; *Bates, etc., Co. v. Payne*, 194 U. S., 106; *Marquez v. Frisbie*, 101 U. S., 473; *U. S. v. Black*, 128 U. S., 40; *U. S. v. Windom*, 137 U. S., 636; *Boynton v. Blaine*, 139 U. S., 306; *Dudley v. James*, 83 Fed. Rep., 349; *Taylor v. Kercheval*, 82 Fed. Rep., 497; *Brown v. Root*, 18 App. D. C., 239. And see note to sec. 236, R. S., "Mandamus to compel payments" and note to sec. 417, R. S.)

A State court has no power to issue a writ of mandamus to a Federal officer. (See *McClung v. Silliman*, 6 Wheat., 598; *Kendall v. U. S.*, 12 Pet., 524; *U. S. v. Schurz*, 102 U. S., 378.)

Where a subordinate officer refuses to obey the order of the head of a department, any person aggrieved thereby may obtain a mandamus to enforce obedience by such subordinate. (*U. S. v. Black*, 128 U. S., 50; see also *Knight v. U. S. Land Assn.*, 142 U. S., 161.)

**Subpoena to head of department.**—In the absence of specific authority on the subject, I am inclined to think that you are not legally bound to appear and testify in obedience to a subpoena of a court. This question, however, does not actually arise upon the facts which you submit, and is therefore at present hypothetical. Yet it is to be remembered that Attorney General Lincoln saw fit to respond to a subpoena to testify as a witness by appearance in court for that purpose. I would suggest that in this instance, inasmuch as it is purposed to take the testimony by commission, and you are thus not required to appear in court, but before a referee or commissioner, an arrangement might readily be made which would better comport with the dignity of your office, as the head of an executive department of the Government, whereby such testimony as you should deem proper and advisable to give could be taken at the Department of Commerce and Labor." (25 Op. Atty. Gen., 326. In this connection, see file 26276-173, May 12, 1917, and see note to sec. 871, R. S.)

**Appeals to President and heads of departments.**—It is competent for Congress to give finality to the determination of subordinate administrative officers, provided due process of law, that is, notice and a hearing, is provided. (*Orchard v. Alexander*, 157 U. S., 372.) Where Congress does not do this, the head of a department may change the erroneous decision of a subordinate (*U. S. v. Cobb*, 11 Fed. Rep., 76); and appeals may be taken to the head of the department because of his supervisory powers over the whole business of the department. (*Knight v. U. S. Land Assn.*, 142 U. S., 161.) In such cases the appeal should be to the head of the department and not to the President. (10 Op. Atty. Gen., 526.)

As a general rule, no appeal lies to the President from the head of a department, whose acts are presumed to be the acts of the President himself. (9 Op. Atty. Gen., 462.) However, in the naval service appeals may be taken to the President from the orders or decisions of the Secretary of the Navy. (Art. 5323, Naval Instructions, 1913.)

"You have often declared that no appeal from the head of any department lies to you. Such appeals are irregular, for reasons which have often been given by this office and which need not now be repeated. An official act done by the Secretary of War is your act, and a demand made upon you to reverse it is no more than a remonstrance addressed to yourself against yourself." (Attorney General to the President, 9 Op. Atty. Gen., 463.)

[CLAUSE 2. Electors of President and Vice-President.] <sup>2</sup> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Represent-

ative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.

This clause has been superseded by the twelfth amendment.

[CLAUSE 3. Time of choosing electors, and voting by.] <sup>3</sup> The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[CLAUSE 4. Qualifications of President.] <sup>4</sup> No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

[CLAUSE 5. Succession to duties of Presidency.] <sup>5</sup> In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

Succession to duties of President is provided for by act of January 19, 1886 (24 Stat., 1).

[CLAUSE 6. Compensation of President.] <sup>6</sup> The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.



[**CLAUSE 7. Oath of President.**] <sup>7</sup> Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

**SECTION 2. [CLAUSE 1. Commander in Chief; authority over heads of departments; pardoning power.]** <sup>1</sup> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

I. POWERS OF COMMANDER IN CHIEF.

II. EXECUTIVE DEPARTMENTS.

III. POWER TO PARDON OFFENSES AGAINST UNITED STATES.

I. POWERS OF COMMANDER IN CHIEF.

**Powers of Congress and of the President.**—"Congress has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander in Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature and by the principles of our institutions. The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authority essential to its due exercise. But neither can the President in war more than in peace intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law." (Ex parte Milligan, 4 Wall., 139; concurring opinion of four justices.)

"Congress may increase the Army, or reduce the Army, or abolish it altogether; but so long as we have a military force, Congress can not take away from the President the supreme command. It is true that the Constitution has conferred upon Congress the exclusive power 'to make rules for the government and regulation of the land and naval forces'; but the two powers are distinct; neither can trench upon the other; the President can not, under the disguise of military orders, invade the legislative regulations by which he, in common with the Army, must be governed; and Congress can not, in the disguise of 'rules for the government' of the Army, impair the authority of the President as Commander in Chief." (Swain v. U. S., 28

Ct. Cls., 173, 221; affirmed, 165 U. S., 553; 28 Op. Atty. Gen., 274.)

"No act of Congress, no act even of the President himself, can, by constitutional possibility, authorize or create any military officer not subordinate to the President." (7 Op. Atty. Gen., 465.)

An appropriation under the War Department was made "to be expended according to the plans and estimates of Capt. Meigs and under his superintendence: *Provided*, That the office of engineer of the Potomac waterworks is hereby abolished, and its duties shall hereafter be discharged by the chief engineer of the Washington Aqueduct." In answer to the contention that this appropriation was mandatory upon the President as to the character of duties to be performed by Capt. Meigs in connection with its expenditure, the Attorney General said: "As Commander in Chief of the Army it is your right to decide, according to your own judgment, what officer shall perform any particular duty, and as the supreme executive magistrate you have power of appointment. Congress could not, if it would, take away from the President or in anywise diminish the authority conferred upon him by the Constitution. This clause of the appropriation bill was not intended to appoint Capt. Meigs chief engineer of the aqueduct, nor was it meant to interfere with your authority over him or any other of your military subordinates. \* \* \* If Congress had really intended to make him independent of you, that purpose could not be accomplished in this indirect manner any more than if it was attempted directly. Congress is vested with legislative power; the authority of the President is executive. Neither has a right to interfere with the functions of the other. Every law is to be carried out so far forth as is consistent with the Constitution and no further. \* \* \* You are therefore entirely justified in treating this condition (if it be a condition) as if the paper on which it is written were blank." (9 Op. Atty. Gen., 462.)

"The first aspect in which this clause [see preceding paragraph] presented itself to my mind was that it interfered with the right of the President to be 'Commander in Chief of the Army and Navy of the United States.' If this had really been the case there would have been an end to the question. Upon further examina-



tion I deemed it impossible that Congress could have intended to interfere with the clear right of the President to command the Army and to order its officers to any duty he might deem most expedient for the public interest. If they could withdraw an officer from the command of the President and select him for the performance of an executive duty, they might upon the same principle annex to an appropriation to carry on a war a condition requiring it not to be used for the defense of the country unless a particular person of its own selection should command the Army. It was impossible that Congress could have had such an intention, and therefore, according to my construction of the clause in question, it merely designated Capt. Meigs as its preference for the work, without intending to deprive the President of the power to order him to any other Army duty for the performance of which he might consider him better adapted.

\* \* \* Under these circumstances I have deemed it but fair to inform Congress that whilst I do not consider the bill unconstitutional, this is only because, in my opinion, Congress did not intend by the language which they have employed to interfere with my absolute authority to order Capt. Meigs to any other service I might deem expedient. My perfect right still remains, notwithstanding the clause, to send him away from Washington to any part of the Union to superintend the erection of a fortification or any other appropriate duty. \* \* \* It is not improbable that another question of grave importance may arise out of this clause. Is the appropriation conditional and will it fall provided I do not deem it proper that it shall be expended under the superintendence of Capt. Meigs? \* \* \* I desire to express no opinion upon the subject. Should the question ever arise, it shall have my serious consideration." (Messages and Papers of the Presidents, vol. 5, p. 597. As to invalidity of the condition in this case, see Attorney General's opinion quoted in preceding paragraph.)

An appropriation was made for the support and maintenance of the Marine Corps, with a condition attached that "no part of the appropriation herein made for the Marine Corps shall be expended for the purposes for which said appropriations are made unless officers and enlisted men shall serve as heretofore on board all battleships and armored cruisers, and also upon such other vessels of the Navy as the President may direct, in detachments of not less than eight per centum of the strength of the enlisted men of the Navy on said vessels." It was held by the Attorney General [without citing authorities] that the condition attached to this appropriation was valid and constitutional, and that if the President as Commander in Chief desired to employ the Marine Corps he must comply with the condition expressed. "Inasmuch as Congress has power to create or not to create, as it shall deem expedient, a marine corps, it has power to create a marine corps, make appropriation for its pay, but provide that such appropriation shall not be available unless the Marine Corps be employed in some designated way." (27 Op. Atty. Gen., 259.)

When Congress created the office of adjutant and inspector of the Marine Corps, without speci-

fying its duties or where they should be performed, it was intended that the office should be clothed with the functions and duties which by established custom had been performed by such an officer in a military service. The duties of an adjutant are such as require that they be performed at headquarters of his organization. Accordingly, a regulation approved by the President, purporting to authorize or permit the detail of the adjutant and inspector of the Marine Corps to duty away from headquarters, and placing the office at headquarters in charge of a subordinate officer of the adjutant and inspector's department, is contrary to law and of no effect. The President may have the right to detail this officer temporarily away from headquarters, but this can not be established as a permanent system. (30 Op. Atty. Gen., 234.) [In this case it had previously been held by the Navy Department that the law did not specify that the adjutant and inspector of the Marine Corps should be permanently stationed at headquarters; and, following the Meigs case and others above cited, that Congress was not empowered to limit the authority of the President in this respect; and accordingly that the matter was properly a subject for regulation by the President. File 26836-7:35, Feb. 13, 1913.]

"It is \* \* \* no degradation of the position of the President to say, through the forms of judicial construction in passing on his executive acts with reference to the retired list, that his power is regulated alone by acts of Congress \* \* \*. The retired list is of comparatively recent origin; and for years the Army endured through peace and survived in war, efficient in the hands of the President for the maintenance of the national honor, and the due enforcement of the law, without the existence of the retired list, so the regulation of that department of the service can in no wise interfere with the constitutional right and power of the President as Commander in Chief of the military forces of the United States. While the President is made Commander in Chief by the Constitution, Congress have the right to legislate for the Army, not impairing his efficiency as such commander in chief, and when a law is passed for the regulation of the Army, having that constitutional qualification, he becomes as to that law an executive officer, and is limited in the discharge of his duty by the statute." (McBlair v. U. S., 19 Ct. Cls., 540, 541.)

**"The power of the Executive to establish rules and regulations for the government of the Army, is undoubted." (U. S. v. Eliason, 16 Pet., 291.)**

Army regulations have the force of law "when founded on the President's constitutional powers as Commander in Chief of the Army." (In re Smith, 23 Ct. Cls., 459.)

For other cases, see Article I, section 8, clause 14; see also note to sections 161 and 1547, Revised Statutes.

**Power of President over subordinates.—**"A military officer can not be invested with greater authority by Congress than the Commander in Chief, and a power of command devolved by statute on an officer of the Army or Navy is necessarily shared by the President. The power to command depends upon discipline and discipline depends upon the power to

punish; and the power to punish can only be exercised in time of peace through the medium of a military tribunal. If the President has no authority in matters pertaining to military tribunals unless it be 'expressly' granted by Congress, then Congress by the simple expedient of exclusively granting the authority to appoint courts-martial and approve sentences to a few officers of the Army, tacitly ignoring the President, could practically defeat the express declaration of the Constitution and strip the office of commander in chief of all real powers of command. The court can not ascribe any such purpose to the legislation of Congress." (Swaim v. U. S., 28 Ct. Cls., 173, 221; affirmed 165 U. S., 553; followed 28 Op. Att'y. Gen., 487.)

"As Commander in Chief the President is authorized to give orders to his subordinates, and the convening of a court-martial is simply the giving of an order to certain officers to assemble as a court, and when so assembled, to exercise certain powers conferred upon them by the Articles of War." (Runkle's case, 91 Ct. Cls., 396, 409, approved in Swaim v. U. S., 165 U. S., 553, 556, holding that "it is within the power of the President as Commander in Chief to convene a general court-martial," in the Army. In the Navy the President is expressly authorized by statute to convene general courts-martial. Sec. 1624 R. S., art. 38.)

"It is said that courts-martial are the creatures of statute law, but so also are regiments. There can be no standing army without statutory authority. Congress may place the command of a regiment in a colonel, a lieutenant colonel, a major, or any other officer; but when Congress so enact, they without words to that effect likewise place the command in the Commander in Chief. His name is to be understood as written in every statute which confers upon a military officer military authority." (Swaim v. U. S., 28 Ct. Cls., 173, 224; affirmed 165 U. S., 553.)

An order of the Secretary of War to an officer of the Army is the order of the President and should be obeyed as such. An appeal from such order to the President is no more than a remonstrance addressed to the President against himself. (9 Op. Att'y. Gen., 463, 465. For other decisions, see note to Art. II, sec. 1, clause 1; see also note to sec. 158, R. S.)

**Militia.**—The President is the Commander in Chief of the Army and Navy at all times, and Commander in Chief of the militia only when called into the actual service of the United States. (Johnson v. Sayre, 158 U. S., 115; 10 Op. Att'y. Gen., 17.)

## II. EXECUTIVE DEPARTMENTS.

The "principal officer in each of the executive departments," referred to in this clause means the same as "heads of departments" in the next clause of this section relating to appointments to office. (U. S. v. Germaine, 99 U. S., 511.) See note to section 158, Revised Statutes, as to origin and growth of Executive Departments, and see note to Art. II, sec. 1, clause 1.

The President is authorized by this section to require the opinion of the Attorney General

in any matter relating to the duties of his department, and his authority in this respect is not restricted by section 354, Revised Statutes, to obtaining the Attorney General's opinion only upon questions of law. (23 Op. Att'y. Gen., 360.)

The President has also required the opinion in writing of officers subordinate to the head of a department. (See veto message of President Roosevelt, Apr. 7, 1908, 42d Cong. Rec., pt. 5, p. 4503, 60th Cong., 1st sess., noted under Art. I, sec. 7, clause 2, with which there was transmitted a written opinion furnished by the Chief of the Bureau of Navigation, Navy Department, by direction of the President.)

## III. POWER TO PARDON OFFENSES AGAINST UNITED STATES.

"A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offense that afterwards it can not be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position. But it does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the Government any obligation to give it. The offense being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done or justly suffered, and no satisfaction for it can be required." (Knote v. U. S., 95 U. S., 149; Illinois Cen. R. Co. v. Bosworth, 133 U. S., 104.)

**Pardoning power.**—"A power to pardon seems, indeed, indispensable under the most correct administration of the law by human tribunals. Since, otherwise, men would sometimes fall a prey to the vindictiveness of accusers, the inaccuracy of testimony, and the fallibility of jurors and courts." (1 Kent, Com., Lec. XIII, p. 284.)

"Under the Constitution the power of the President to grant reprieves and pardons is plenary, absolute, and without limit or control as to the offense, the beneficiary, the time, or the nature or extent of his pardon." (27 Op. Att'y. Gen., 178.)

"The power of pardon in criminal cases has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance. We adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." (U. S. v. Wilson, 7 Pet., 160, per Marshall, C. J.; see also, Ex parte Wells, 18 How., 307; Burdick v. U. S., 236 U. S., 79.)



This clause confers upon the President the power to pardon every offense known to the law, with the single exception stated (*Ex parte Garland*, 4 Wall., 333; *Ex parte Wells*, 18 How., 309); that exception, according to a well-known legal maxim [*‘expressio unius est exclusio alterius,’*—the expression of one thing is the exclusion of another], strengthens the application of the provision to all offenses not excepted, “so that we can certainly say there can be no offense against the United States, except in cases of impeachment, over which the President has not an absolute pardoning power.” (*U. S. v. Thomasson*, 28 Fed. Cas. No. 16479.)

**Contempt of court.**—Contempts of the Federal courts are offenses against the United States, and therefore within the pardoning power of the President. “If we adopt, as the Supreme Court of the United States has decided we should, the principles established by the common law respecting the operation of a pardon, there can be no doubt it may embrace such a case.” (3 Op. Atty. Gen., 622; 4 Op. Atty. Gen., 458; *In re Mullee*, 17 Fed. Cas. No. 9911.) So far as concerns the President’s power to pardon such contempts, “there need be no hesitation to act in the premises. Indeed, I know beyond question that the power exists.” (19 Op. Atty. Gen., 476.)

The power of the President to pardon for contempt of court is seriously doubted in any case, and upon principle and authority can not be held to exist in cases of civil contempt, where the proceeding is instituted to enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them entitled. (*In re Nevitt*, 117 Fed. Rep., 448; see also *Hendryx v. Fitzpatrick*, 19 Fed. Rep., 811.)

[The Supreme Court has never passed definitely on the existence of the pardoning power in cases of contempt of court. In the case of *The Laura*, 114 U. S., 411, 413, it was stated: “It may be conceded that, except in cases of impeachment and where fines are imposed by a coordinate department of the Government, for contempt of its authority, the President, under the general, unqualified grant of power to pardon offenses against the United States, may remit fines, penalties, and forfeitures of every description arising under the laws of the United States.” In *Ex parte Fisk*, 113 U. S., 713, 718, after holding that under the laws then in force, “the exercise of the power of punishment for contempt of their orders by courts of general jurisdiction is not subject to review by writ of error or appeal to this court,” it was remarked: “Nor is there, in the system of Federal jurisprudence, any relief against such orders when the court has authority to make them, except through the court making the order, or possibly by the exercise of the pardoning power.”]

General courts-martial in the Navy are authorized to punish naval witnesses for contempt by article 42 of the Articles for the Government of the Navy (sec. 1624, R. S.); civilian witnesses guilty of contempt are punishable by information in the district court of the United States,

which information it is the duty of the district attorney to file upon certification of the facts to him by the naval court. (Act Feb. 16, 1909, sec. 12, 35 Stat., 622.)

**When pardon may be granted.**—The President “can pardon or relieve only when an offense against the law has been established by proof or the admissions of the party, and a penalty thereby incurred.” (2 Op. Atty. Gen., 485; see also *Burdick v. U. S.*, 236 U. S., 79, in which this question was discussed but not decided.)

The power to pardon any offense “may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.” (*Ex parte Garland*, 4 Wall., 333; see also 6 Op. Atty. Gen., 20; 5 Op. Atty. Gen., 687; 2 Op. Atty. Gen., 275; 1 Op. Atty. Gen., 341; compare *Burdick v. U. S.*, 236 U. S., 79.)

The Navy Department has adopted the rule formulated by the Department of Justice and approved by the President, of declining to recommend the issuance of a pardon in any case prior to conviction. (File 26282-84; Mar. 27, 1912; see also file 26262-1344:5; but see file 26282-85, Apr. 8, 1912.)

In cases of enlisted men convicted of desertion from the naval service, the rule was adopted by the Navy Department of recommending that a pardon be issued, for the purpose of restoring rights of citizenship forfeited under sections 1996 and 1998, Revised Statutes, where the applicant had served sentence for the offense, and then only after two years from date of discharge from prison and provided the applicant produces satisfactory affidavits to the effect that he has lived an upright and industrious life since the date of his discharge. (File 26282-84; loss of the rights of citizenship do not now follow upon conviction of desertion except in time of war. Act Aug. 22, 1912, 37 Stat., 356.)

Where a naval prisoner has served sentence for an offense other than desertion, the Navy Department will not recommend that he be pardoned, as loss of the rights of citizenship does not attach in his case. (File 26282-214, Mar. 18, 1915. See also, 1 Op. Atty. Gen., 359; 23 Op. Atty. Gen., 360. As to conclusiveness of finding of court-martial, see note to Art. I, sec. 7, clause 2, “Veto of bill to annul the finding and sentence of a court-martial.”)

The President may exercise his pardoning power at any time, so long as any of the legal consequences of the offense remain. (*Stetler’s case*, 22 Fed. Cas. No. 13380.) Thus, loss of numbers being a continuing punishment, the President may, by pardon, restore the officer to his original position. (12 Op. Atty. Gen., 547; 17 Op. Atty. Gen., 656; see also 20 Op. Atty. Gen., 243. And see 17 Op. Atty. Gen. 31, file 26261-246:1, Mar. 18, 1914, and 26262-1794:1.) But the promotion of an officer completely executes a sentence of loss of numbers and a pardon issued thereafter can not restore him to his original position. (File 26261-246:1, Mar. 18, 1914; 26262-1794:1, Dec. 21, 1916. But see contra file 1208, Mar. 31, 1905, case of Maj. James E. Mahoney. See also 4 Op. Atty. Gen.,



8, and 31 Op. Atty. Gen., 419, as to effect of promotion upon sentence of suspension from rank and pay.)

"I have already, in the exercise of the pardoning power with which the President is vested by the Constitution, remitted the continuing penalty which had made it impossible for Fitz John Porter to hold any office of trust or profit under the Government of the United States." (Veto message of President Arthur, July 2, 1884, noted under Art. I, sec. 7, clause 2.)

When the sentence of a court has been served, a pardon may be granted to remove the disability of the offender to testify as a witness which followed upon conviction of felony. (*U. S. v. Jones*, 26 Fed. Cas. No. 15493; *Boyd v. U. S.*, 142 U. S., 453.)

After death of a deserter a pardon can not be issued at request of his representatives. (File 3846-98, June 10, 1898.)

**"This power of the President is not subject to legislative control.** Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him can not be fettered by any legislative restrictions." (*Ex parte Garland*, 4 Wall., 333. See also, *U. S. v. Klein*, 13 Wall., 147; 5 Op. Atty. Gen., 582; 8 Op. Atty. Gen., 281; 20 Op. Atty. Gen., 668; 22 Op. Atty. Gen., 39; 23 Op. Atty. Gen., 360. But see act Aug. 22, 1912, 37 Stat., 356, which provided that "the loss of rights of citizenship heretofore imposed by law upon deserters from the military or naval service may be mitigated or remitted by the President where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interests.")

The power of the President "can not be interrupted, abridged, or limited by any legislative enactment." (*The Laura*, 114 U. S., 411.)

"It is not within the power of Congress to impose or continue in force a penalty or punishment for an offense, or conviction thereof, that has been thus pardoned, nor impose or continue in force disabilities that have been thus removed." (27 Op. Atty. Gen., 178.)

**Power of Congress.**—"Although the Constitution vests in the President power to grant reprieves and pardons for offenses against the United States, this power has never been held to take from Congress the power to pass acts of general amnesty." (*Brown v. Walker*, 161 U. S., 591.)

**Power of other officers.**—"Is that power [pardoning power of President] exclusive, in the sense that no other officer can remit forfeitures or penalties incurred for the violation of the laws of the United States? This question can not be answered in the affirmative without adjudging that the practice in reference to remissions by the Secretary of the Treasury and other officers, which has been observed and acquiesced in for nearly a century, is forbidden by the Constitution. That practice commenced very shortly after the adoption of the instrument, and was perhaps suggested by legislation in England, which, without interfering with, abridging, or restricting the power of pardon belonging to the Crown, invested certain

subordinate officers with authority to remit penalties and forfeitures arising from violations of the revenue and customs laws of that country." (*The Laura*, 114 U. S., 411; see also 6 Op. Atty. Gen., 488.)

The powers of the President are not as broad as the powers of an English king. By the Constitution "the power to grant reprieves and pardons is given, in terms, to the President; but the power to remit forfeitures, fines, and penalties (as distinct from the pardon of crimes) is not given. Yet the king had both powers." (10 Op. Atty. Gen., 454. But see *The Laura*, 114 U. S., 411, in which it was stated: "It may be conceded that, except in cases of impeachment and where fines are imposed by a coordinate department of the Government for contempt of its authority, the President, under the general unqualified grant of power to pardon offenses against the United States, may remit fines, penalties, and forfeitures of every description arising under the laws of Congress.")

Article 112 of the Articles of War (sec. 1342, R. S.) provided, with reference to the Army, that "Every officer who is authorized to order a general court-martial shall have power to pardon or mitigate any punishment adjudged by it, except the punishment of death or of dismissal of an officer. Every officer commanding a regiment or garrison in which a regimental or garrison court-martial may be held, shall have power to pardon or mitigate any punishment which such court may adjudge." (This article of war has been superseded by act of Aug. 29, 1916, 39 Stat., 658, amending sec. 1342, R. S., arts 50-53, which latter act was amended by act of July 9, 1918, 40 Stat., 882, 883. See 1 Op. Atty. Gen., 327; 4 Op. Atty. Gen., 444; 6 Op. Atty. Gen., 124, 125; 19 Op. Atty. Gen., 106; 17 Op. Atty. Gen., 656; see also *People v. Bowen*, 43 Cal., 441.)

By article 54 of the Articles of the Government of the Navy (sec. 1624, R. S.) it is provided that "Every officer who is authorized to convene a general court-martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm." (See 20 Op. Atty. Gen., 243; 15 Op. Atty. Gen., 175; 17 Op. Atty. Gen., 31; 10 Op. Atty. Gen., 64; 17 Comp. Dec., 311; 13 Comp. Dec., 726; see also art. 33, A. G. N., as to sentences of summary courts-martial.)

It may be questioned whether section 1624, Revised Statutes, article 54, applies to the action of the President. (*Mullan v. U. S.*, 212 U. S., 516.)

"It may be conceded that there is a technical difference between the commutation of a sentence and the mitigation thereof. The first is a change of a punishment to which a person has been condemned into one less severe, substituting a less for a greater punishment by authority of law. To mitigate a sentence is to reduce or lessen the amount of the penalty or punishment." (*Mullan v. U. S.*, 212 U. S., 516.)

By act of February 16, 1909 (sec. 9, 35 Stat. 621), it is provided "That the Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court-martial convened by

his order or by that of any officer of the Navy or Marine Corps."

The Adjutant General of the Army has power, "by direction of the President of the United States," to sign a letter removing the disabilities resulting from the conviction of an officer, which letter will operate as a pardon by the President. (27 Op. Atty. Gen. 178; see below "Form of pardon.")

**Constructive pardon.**—The promotion of an officer of the Marine Corps is a constructive pardon of a previous sentence pronounced but not executed. (6 Op. Atty. Gen., 123.) Similarly, as to the promotion of an officer under arrest on charges. (4 Op. Atty. Gen., 124; 8 Op. Atty. Gen., 237.) The promotion of a passed midshipman to the office of lieutenant in the Navy, is an implicit pardon of sentence of suspension on half pay which he was under. (4 Op. Atty. Gen., 8.) So also as to the appointment of a convicted deserter as a commissioned officer in the Navy. (File 5460-82, June 3, 1916.) But where steps have been taken with a view to the promotion of an officer, before the promotion is consummated he may be tried by court-martial for offenses previously committed. (G. C. M. records, Nos. 23553, 26451, 28681, and 28798.) And where an officer was nominated and confirmed for advancement in rank, after he has been recommended for trial by court-martial, but the commission was not signed by the President, the necessary steps for his trial were proceeded with until stayed by the acceptance of said officer's resignation "for the good of the service." (File 26251-2833, Mar. 31, 1910.)

An order of the Secretary of the Navy to an officer, while under sentence of suspension, to attend a court-martial as a witness does not operate as a constructive pardon. (6 Op. Atty. Gen., 714.) Nor does the restoration of an accused person to duty without trial. Inasmuch as the Secretary of the Navy has no power to expressly pardon any offense—this being a power vested by the Constitution in the President, which can not be delegated—it follows that no action of the Secretary could amount to a constructive pardon. (File 26251-1963:1, Aug. 17, 1910, p. 13.)

A pardon by implication or construction is a thing not known to or recognized by the law. Accordingly, *held* that the temporary promotion of an officer of the Navy while under charges awaiting trial by general court-martial does not operate as a constructive pardon of the offenses charged against him. As to effect of permanent promotion upon execution of a sentence imposed in a lower grade, *quære*. (31 Op. Atty. Gen. 419, overruling opinions of Attorneys General above cited relating to constructive pardons.)

**Conditional pardon.**—The power of the President to grant conditional pardons is unquestioned, and is commonly exercised in practice. (See 1 Op. Atty. Gen., 482; 11 Op. Atty. Gen., 229; *Waring v. U. S.*, 7 Ct. Cls., 502; *In re Ruhl*, 20 Fed. Cas. No. 12124; *U. S. v. Ground*, 27 Fed. Cas. No. 16299; *U. S. v. Klein*, 13 Wall., 142; *U. S. v. Wilson*, 7 Pet., 161; *Semmes v. U. S.*, 91 U. S., 21; see also 5 Op. Atty. Gen., 368; 14 Op. Atty. Gen., 124.)

Thus, a pardon has been granted to an enlisted man in the Marine Corps on condition

that he reenlist. (Case of John L. Lennon, file 5945-19; see also file 3000-1898.) So also, an officer of the Navy, sentenced to loss of numbers, has been pardoned on condition that he take rank in a specified place in his grade, below his original position. (File 26282-26.)

"When a person convicted of murder accepts a 'commutation of sentence or pardon' upon condition that he be imprisoned at hard labor for the term of his natural life, there can be no question as to the binding force of the acceptance." (*In re Ross*, 140 U. S., 453.)

**Partial pardon.**—The President may by pardon remit disabilities resulting from conviction, without pardoning the offense. Thus he may issue pardons to deserters for the purpose of restoring their rights of citizenship (14 Op. Atty. Gen., 124), and such pardons have been frequently granted in practice (file 26282; Report of Judge Advocate General to President's Commission on Economy and Efficiency, Nov. 28, 1910, file 28067; see also 3 Op. Atty. Gen., 418; 11 Op. Atty. Gen., 227; *U. S. v. Lukins*, 26 Fed. Cas. No. 15638), and he may mitigate a sentence of dismissal in the case of an officer of the Navy to suspension for a term of years without pay. (4 Op. Atty. Gen., 433; 15 Op. Atty. Gen., 464; *Mullan v. U. S.*, 212 U. S., 516.)

**General pardon and amnesty.**—The President has power to grant general amnesty by proclamation, without legislative authority. (*Armstrong v. U. S.*, 13 Wall., 154; 20 Op. Atty. Gen., 330.) "Amnesty" is usually exercised in favor of classes of persons prior to conviction. (*Brown v. Walker*, 161 U. S., 601.)

A general pardon and amnesty, made by a public proclamation of the President, has the force of public law, and courts and officers must take notice of it, whether especially called to their attention or not. (*Jenkins v. Collard*, 145 U. S., 560.) In this respect, a general pardon is to be distinguished from an individual pardon, which is the private, though official, act of the Chief Executive, and will not be judicially noticed by the court, but must be specially pleaded. (*U. S. v. Wilson*, 7 Pet., 159; *Burdick v. U. S.*, 236 U. S., 79.)

Amnesty and pardon "are of different character and have different purposes. The one overlooks offense; the other remits punishment. The first is usually addressed to crimes against the sovereignty of the State, to political offenses, forgiveness being deemed more expedient for the public welfare than prosecution and punishment. The second condones infractions of the peace of the State. Amnesty is usually general, addressed to classes, or even communities—a legislative act or under legislation, constitutional or statutory—the act of the supreme magistrate. There may or may not be distinct acts of acceptance. If other rights are dependent upon it and are asserted, there is affirmative evidence of acceptance. \* \* \* If there be no other rights, its only purpose is to stay the movement of the law. Its function is exercised when it overlooks the offense and the offender, leaving both in oblivion." (*Burdick v. U. S.*, 236 U. S., 79.)

**Delivery and acceptance.**—The pardon is a deed, to the validity of which delivery is essential, and the delivery is not complete



without acceptance. It may be rejected by the person to whom it is tendered, and, if rejected, there is no power in the court to force it upon the individual. (*U. S. v. Wilson*, 7 Pet., 150; *Burdick v. U. S.*, 236 U. S., 79.)

A pardon must be accepted before a witness may be required to answer incriminating questions connecting him with matters for which the pardon grants him immunity. The witness has the right, if he desires to do so, to refuse the pardon and decline to testify. (*Burdick v. U. S.*, 236 U. S., 79.)

**Procedure upon requests for pardon.**—Pursuant to an understanding between the Department of Justice and the Departments of War and Navy, and by rules relating to applications for pardon adopted by the Attorney General and approved by the President, the Department of Justice will not consider applications for pardon for desertion or other offenses against the military and naval laws. When applications are received by the Department of Justice, they are referred to the Secretary of the Navy or the Secretary of War for consideration. The Department of Justice does, however, issue the formal warrants of pardon in Army and Navy cases. (Letter of Department of Justice, Sept. 6, 1904, file 7466-04.)

In practice in Navy cases, where the Secretary of the Navy approves an application for pardon and transmits it to the President with favorable recommendation, if a pardon is to be granted, the Secretary's letter is returned with the President's approval indorsed thereon; the papers are then transmitted to the Department of Justice, where the formal warrant of pardon is prepared for the President's signature; when signed by the President, the warrant of pardon is sent by the Department of Justice to the Secretary of the Navy, to be transmitted to the beneficiary, together with a blank form of receipt and acceptance to be signed by the recipient of the pardon and returned by him to the Navy Department for file. (File 26282; Rept. of Judge Advocate General to President's Commission on Economy and Efficiency, Nov. 28, 1910, file 28067.)

**Form of pardon.**—"Nor is the form which this pardon may assume at all important, or the manner of its promulgation. Whenever the President, as an act of grace or clemency, intervenes to condone, in whole or in part, an offense committed, or to prevent or remit the whole or a portion of a punishment ordered, or to commute the whole or a portion thereof by the substitution of another less severe, or to remove disabilities consequent upon conviction, and in whatever form this is done, whether by a formal pardon directed and delivered to the beneficiary, by Executive order through The Adjutant General, or by a proclamation of amnesty to a class of offenders, this is always and necessarily an exercise of the pardoning power vested in the President by the Constitution. In no other way can the President interfere to condone an offense, prevent or mitigate a punishment adjudged, or remove disabilities consequent upon conviction." (27 Op. Atty. Gen., 178; but see above, "Delivery and acceptance.")

The following communication, addressed by The Adjutant General of the Army to the governor of Kansas, was held to constitute a pardon by the President: "By direction of the President of the United States, the disabilities resulting from the dismissal of Albert H. Campbell, formerly a captain in the Fourteenth Regiment Kansas Volunteer Cavalry, by sentence of general court-martial promulgated in General Orders, No. 54, May 30, 1865, Department of Arkansas, are hereby removed, and he may be recommissioned should your excellency so desire." (27 Op. Atty. Gen., 178.)

"That such pardon to be effective need not be addressed to the beneficiary is abundantly shown by the various proclamations of pardon and amnesty granted by different Presidents to large classes of offenders, and which have been uniformly upheld as effective by the Supreme Court. (See 1 Winthrop Mil. Law, 2d ed., 714-715.) In such cases all persons embraced in the proclamation are entitled to its benefits, although they may never before have heard of the amnesty. Indeed, the usual way of pardoning military offenders is by Executive order promulgated and entered in the records of the War Department. (1 Winthrop, 714.)" (27 Op. Atty. Gen., 178.)

The Constitution of the United States confers upon the President "power to *grant* pardons for offenses against the United States," thus assimilating a pardon to an express grant by deed, and the general constitutional provision is of this character. This was but an adoption of the English rule that a pardon was a grant under the great seal. Even an instrument granting a pardon under the sign manual of the King was not sufficient. All the courts in this country, construing the constitutional provision, hold that a pardon is an express act of the executive or legislature evidenced by something in the nature of a formal grant. Assent of the grantee is needed to make it complete, a meeting of the minds of the parties concerned being essential. (31 Op. Atty. Gen., 419.)

**Effect of pardon.**—"A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full it releases the punishment and blots out the existence of the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. \* \* \* There is only one limitation to its operation; it does not restore offices forfeited or property or interests vested in others in consequence of the conviction of judgment." (Ex parte Garland, 4 Wall., 333. But see *In re Spenser*, 22 Fed. Cas. No. 13234, noted below; 11 Op. Atty. Gen., 228; the latter holding that the acceptance of a pardon is a confession of legal guilt. See also *Roberts v. State*, 160 N. Y., 217.)

Where error has been committed, it is more benign to grant a new trial to an officer who has been convicted by court-martial than to grant him a pardon, which would be "most humiliating to the prisoner." "Is there any mode by which his honor can be rescued from the imputation thrown upon it by an improper sentence



of a first court, except that of ordering a second?" (1 Op. Atty. Gen., 233; see note to amendments, Art. V.)

A pardon may involve "consequences of even greater disgrace than those from which it purports to relieve. Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected—preferring to be the victim of the law rather than its acknowledged transgressor; preferring death, even, to such certain ignominy. \* \* \* The latter [pardon] carries an imputation of guilt; acceptance a confession of it." (Burdick v. U. S., 236 U. S., 79.)

"Moneys once in the Treasury can only be withdrawn by an appropriation by law. However large, therefore, may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, as there is to all his powers—it can not touch moneys in the Treasury of the United States, except expressly authorized by act of Congress. The Constitution places this restriction upon the pardoning power. Where, however, property condemned, or its proceeds, have not thus vested, but remain under control of the Executive, or of officers subject to his orders, or are in the custody of the judicial tribunals, the property will be restored or its proceeds delivered to the original owner upon his full pardon." (Knote v. U. S., 95 U. S., 149.)

"The test, then, is whether the proceeds of a fine, penalty, or forfeiture has passed into the Treasury of the United States. If not, the pardoning power of the President may act upon it \* \* \*." (23 Op. Atty. Gen., 360, 363; see also 14 Op. Atty. Gen., 599; 16 Op. Atty. Gen., 1; 8 Op. Atty. Gen., 281; 2 Op. Atty. Gen., 329; 10 Op. Atty. Gen., 452; Vanderslice v. U. S., 19 Ct. Cls., 481.)

"The effect of the pardon is prospective and not retrospective. It removes the guilt and restores the party to a state of innocence. But it does not change the past and can not annihilate the established fact that he was guilty of the offense." (In re Spenser, 22 Fed. Cas. No. 13234.)

The President's pardon does not alter the fact that the service of an enlisted man convicted of desertion was not "honest and faithful" within the meaning of statutes relating to the Army. Congress has the right to prescribe qualifications and conditions for enlisted men and to forbid those not possessing such qualifications to enter the military service. (22 Op. Atty. Gen., 39.)

"A pardon can not change existing or accomplished facts, although it may remove or prevent their consequences; and in this case the pardon can not change the fact that this officer has never been honorably discharged from the Army." (27 Op. Atty. Gen., 178.) "The act is plain and unequivocal; it provides for a pension to those only who have been 'honorably discharged' from the Army or Navy. This officer has not been so discharged, and is therefore not within the terms of the grant." (Same case.)

The pardon of a convicted deserter from the Navy blots out his offense and he may legally

be reenlisted, notwithstanding the provisions of sections 1420 and 1624 (art. 19), Revised Statutes, prohibiting the enlistment of deserters in the naval service. (26 Op. Atty. Gen., 617, overruled by 31 Op. Atty. Gen., 225, noted below; see also 22 Op. Atty. Gen., 39, above noted.)

Section 1441, Revised Statutes, and the acts of February 16, 1914 (38 Stat., 283, 290), and August 29, 1916 (39 Stat., 589), are rules relating to qualifications for office in the Navy, and for membership in the Naval Reserve Force, which do not impose a penalty as such on individual offenders, and the incidental disabilities which they may suffer by reason of these statutes are not removed by a pardon. Similarly, sections 1420 and 1624, article 19, Revised Statutes, as amended by act of August 22, 1912 (37 Stat., 356), are statutes relating to the general organization and efficiency of the Navy, which affect only incidentally particular classes of individuals, and are obviously not intended as punishment for offenses; they place deserters in the same category with minors, insane persons, and intoxicated persons as not qualified for the naval service; and a pardon does not remove the disqualification attached to the fact of desertion and render the deserter eligible for reenlistment in the naval service. On the other hand, section 1998, Revised Statutes, as amended by the act of August 22, 1912 (37 Stat., 356), prescribes disabilities, not merely incidental to qualifications for service in the Navy, but in effect and by express avowal constituting punishment of offenses, which as such would of course be wiped out by an unconditional pardon. (31 Op. Atty. Gen., 225, overruling 26 Op. Atty. Gen., 617, noted above.)

By sections 4756, 4757, Revised Statutes, benefits are conferred on persons formerly in the naval service who have "not been discharged for misconduct." The recipient of a pardon is entitled to the benefits of these sections in the same manner and with the same force as if he had never been discharged for misconduct. (File 5789-99, Sept. 2, 1899.)

A pardon for desertion operates from its date to relieve from all further penalties and forfeitures consequent upon desertion, but a man is not entitled to arrears of pension or to relief covering the period during which he was not in a pensionable status; that is, prior to date of pardon. (File 2443-03.)

Congress has a constitutional right to prohibit the officers of the Government from paying persons who encouraged rebellion, and they can not consider such claims, although the claimants may have received an Executive pardon. (Hart v. U. S., 16 Ct. Cls., 484; affirmed 118 U. S., 62; compare U. S. v. Klein, 13 Wall., 147.)

A pardon can not restore an officer to the service after a sentence of dismissal has been executed (Vanderslice v. U. S., 19 Ct. Cls., 481; 11 Op. Atty. Gen., 19); but it may restore an officer to his original position in his grade after a sentence of loss of numbers (12 Op. Atty. Gen., 547); and prior to execution of a sentence of dismissal the President may mitigate it to suspension from rank and pay. (4 Op. Atty. Gen., 433.)

Where a convicted offender has been given an unconditional pardon, the President can not afterwards issue him a supplemental pardon for the specific purpose of relieving him of disabilities resulting from State laws. If such disabilities were not removed by the pardon already issued, they are a matter under the control of the State and not of the Federal pardoning power. (7 Op. Atty. Gen., 760.) "As to the matter of incidental disabilities of conviction for crime, it has seemed to me that a pardon by the proper pardoning power of one jurisdiction does not affect disabilities imposed by another jurisdiction." (8 Op. Atty. Gen., 234.)

A pardon obtained by fraud is void and of no effect. (11 Op. Atty. Gen., 227.)

A pardon issued to a deserter from the Navy does not authorize the Navy Department to remove the mark of desertion entered on its records, the entry being one of fact, which is not altered by the pardon. (File 26251-1963:1, Aug. 17, 1910; compare file 1768-D, 1902, case of Ezekiel Downey.)

A person convicted of an offense against the laws of the United States, which disfranchises him as a citizen, can be restored to his rights by a pardon issued before or after he has suffered the other penalties incident to his con-

viction. (9 Op. Atty. Gen., 478; see also 14 Op. Atty. Gen., 124; compare 7 Op. Atty. Gen., 760.)

"There are two general classes of punishments for military offenses. First, those which directly affect the person or property of the offender, such as death, imprisonment, or dismissal; fines; the return or restoration of property or money wrongfully held, and the like. These are prescribed by law or established usage, and are imposed in the sentence itself. Second, certain disabilities, such as the deprivation of certain civil and political rights which persons otherwise similarly situated may have and enjoy—such as the rights of citizenship, the right to vote or to hold office, to be employed in the Government or to enlist or be appointed in the Army, and the like. These are prescribed by law or established usage, but are not imposed by the sentence and are rather consequences of the conviction. It is with these that we have to do here. From these considerations it is obvious that this communication \* \* \* was necessarily an exercise of the pardoning power and as such was effective to the extent there expressed, namely, in the removal of all disabilities consequent upon the conviction of the officer." (27 Op. Atty. Gen., 178.)

[CLAUSE 2. Treaty making power; appointment of officers.] <sup>2</sup> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

- I. OFFICERS OF THE UNITED STATES.
- II. CONSTITUTIONAL POWER OF APPOINTMENT.
- III. POWER OF CONGRESS.
- IV. STATUTORY REQUIREMENTS AND QUALIFICATIONS.
- V. POWER OF SENATE.
- VI. WHAT CONSTITUTES APPOINTMENT.
- VII. PAY AND OATH OF OFFICERS.
- VIII. POWER OF REMOVAL.
- IX. RIGHT OF OFFICERS TO RESIGN.

#### I. OFFICERS OF THE UNITED STATES.

**Who are officers of the United States.**— "What is necessary to constitute a person an officer of the United States in any of the various branches of its service has been fully considered by this court in *United States v. Germaine* (99 U. S., 508). In that case it was distinctly pointed out that under the Constitution of the United States all its officers were appointed by

the President, by and with the consent of the Senate, or by a court of law, or the head of a department; and the heads of departments were defined in that opinion to be what are now called the members of the Cabinet. Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States." (*U. S. v. Mouat*, 124 U. S., 303; 4 Comp. Dec., 696.)

"This provision of the Constitution divides inferior officers into two classes, according to the source from which the power of appointment is derived"; namely, officers appointed by the President, by and with the advice and consent of the Senate, in accordance with the duty directly imposed on the President by the Constitution itself; and officers otherwise appointed in accordance with the direction of Congress. (30 Op. Atty. Gen., 177.)

"It would be impossible to define, except arbitrarily, the meaning of the words 'inferior



officers,' in their application to officers of the different branches of the public service who have no official relation to each other, and it would not be easy to separate all the officers of the Government into two classes and draw a satisfactory line which would define the inferior, in the sense in which it is claimed that word is used, from those of the higher class, nor is it necessary to attempt to do either. In our opinion, the words as used in connection with the other language of the same clause, have a plain, definite, and intelligible meaning, capable of unmistakable application to effect the purposes of that provision of the Constitution. Having specified certain officers, ministers, consuls, and judges of the Supreme Court who shall be nominated by the President and appointed by and with the advice and consent of the Senate in all cases, the Constitution leaves it to Congress to vest in the President alone, the courts of law, or the heads of departments the appointment of any officer inferior or subordinate to them, respectively, whenever Congress thinks proper so to do." (*Collins v. U. S.*, 14 Ct. Cls., 568.)

"The word inferior is not here used in that vague, indefinite, and quite inaccurate sense which has been suggested—the sense of petty or unimportant; but it means subordinate or inferior to those officers in whom respectively the power of appointment may be vested—the President, the courts of law, and the heads of departments." (*Collins v. U. S.*, 14 Ct. Cls., 568; see also 23 Op. Atty. Gen., 574, 578, 579.)

"Whenever, therefore, Congress thinks proper to vest in the President alone, in a court of law, or in the head of a department the appointment of any of their respective subordinate officers, other than those named in the clause under consideration, or whose appointment is otherwise provided for by the Constitution, it must be held that such officers are inferior officers within the meaning of the Constitution, whose appointment in that manner Congress has the power to authorize; and the act of Congress must be respected and enforced by the executive officers of the Government." (*Collins v. U. S.*, 14 Ct. Cls., 568; see also *U. S. v. Germaine*, 99 U. S., 508.)

"An office is a public station or employment conferred by the appointment of Government. The term embraces the ideas of tenure, duration, emolument, and duties." (*U. S. v. Hartwell*, 6 Wall., 385, holding that a clerk in the office of an Assistant Treasurer of the United States is a public officer within the meaning of a penal statute. For other cases, see note to act July 31, 1894, sec. 2, 28 Stat., 205.)

The clerks employed in the offices of the several departments of the Government are not liable to militia duty, being executive officers of the Government of the United States, under the terms of the statute exempting from such duty the Vice President, the officers, judicial and executive, of the Government of the United States, the members of both houses of Congress and their respective officers, all custom-house officers, with their clerks, all post officers and stage drivers employed in the care and conveyance of the mail, etc. (*Ex parte Smith*, 2 Cranch, C. C., 693, 22 Fed.

Cas. No. 12967, cited with approval in *U. S. v. Hartwell*, 6 Wall., 385, 393.)

A person may be an officer within the meaning of statutory enactments, although not an officer of the United States in the constitutional sense. Thus, clerks to paymasters in the Navy, although not appointed in any of the methods provided for by the Constitution, were held officers of the Navy within the meaning of a statute providing for increased pay according to length of service (*U. S. v. Hendee*, 124 U. S., 309, affirming 22 Ct. Cls., 134), but at the same time were held not to be officers in the constitutional sense (*U. S. v. Mouat*, 124 U. S., 303). Later, when the appointment of these clerks was vested in the Secretary of the Navy by regulations issued in accordance with section 1547, Revised Statutes, it was held that they thus became officers of the United States in the constitutional sense, as well as in the popular meaning of the term. (27 Op. Atty. Gen., 157; but see *Ashton v. U. S.*, 51 Ct. Cls., 65. Congress has now provided for the appointment of pay clerks in the constitutional manner; see act Mar. 3, 1915, 38 Stat., 942.) Similarly, a midshipman at the Naval Academy, although appointed by the Secretary of the Navy, "by direction of the President," was held not to be an officer of the Navy within the meaning of article 36 of the Articles for the Government of the Navy (sec. 1624, R. S.), restricting dismissals from the Navy (*Weller v. U. S.*, 41 Ct. Cls., 324); although held to be an officer within the meaning of various other statutes. (See sec. 1512, R. S. See further, *Perkins v. U. S.*, 20 Ct. Cls., 438, affirmed 116 U. S., 483; *U. S. v. Moore*, 95 U. S., 760; *U. S. v. Redgrave*, 116 U. S., 474, and sec. 1, R. S.)

## II. CONSTITUTIONAL POWER OF APPOINTMENT.

**Who are to make appointments to office.**—"When Congress creates an office, but does not vest the power of appointment thereto in any of the persons specified, then the Constitution operates, *proprio vigore* [of its own force], and immediately casts upon the President, by and with the advice and consent of the Senate, the duty of appointing thereto." (30 Op. Atty. Gen., 177. See also note to sec. 169, R. S.)

In the absence of an express enactment to the contrary, the appointment of any officer of the United States belongs to the President and Senate. (29 Op. Atty. Gen., 116, citing, 6 Op. Atty. Gen., 1; 15 Op. Atty. Gen., 3, 449; 17 Op. Atty. Gen., 532; 18 Op. Atty. Gen., 98, 298; 26 Op. Atty. Gen., 627.)

"The appointing power here designated in the latter part of the section was no doubt intended to be exercised by the department of the Government to which the officer to be appointed most appropriately belonged." (*Ex parte Hennen*, 13 Pet., 258; *Collins v. U. S.*, 14 Ct. Cls., 568, 575.)

Congress "may authorize the President or the head of the War Department to appoint an Army officer, because the officer to be appointed is inferior to the one thus vested with the appointing power." (*Collins v. U. S.*, 14 Ct. Cls., 568.)



"A statute which provides that 'the President be, and he is hereby, authorized to reinstate Maj. C., late of the United States Army, and to retire him in that grade, as of the date he was previously mustered out,' confers authority on the President alone to reinstate the officer, without the advice and consent of the Senate." (Collins v. U. S., 14 Ct. Cls., 568, syllabus.)

"In Moore's case (95 U. S., 760) the Supreme Court has gone much further than we now go, or than this case requires, in upholding the validity of an appointment made without the advice and consent of the Senate. The statutes provided that \* \* \* all appointments in the Medical Corps [of the Navy] should be with the advice and consent of the Senate. (Sec. 1369, R. S.) \* \* \* Moore was an assistant surgeon who had successfully passed his examination for promotion and had been notified by the Secretary of the Navy that the report of the board of examiners was approved by the department, and from that date he would be regarded as a 'passed assistant surgeon.' It was held by the Supreme Court that 'the place of passed assistant surgeon is an office, and the notification by the Secretary of the Navy was a valid appointment to it.'" (Collins v. U. S., 14 Ct. Cls., 568.)

An officer [deputy commissioner of fisheries] appointed by the head of a department without statutory authority was not legally appointed, and his status is therefore that of a de facto officer. (29 Op. Atty. Gen., 116.)

When the President is authorized by statute to appoint certain officers of the Navy and Marine Corps, the advice and consent of the Senate is not required. "The appointments provided for by this legislation are not such as by the Constitution are required to be made in any particular way. It was within the province of Congress to prescribe by whom and how these additional officers should be chosen, appointed, and commissioned. Congress might have directed that they should be appointed by the President, by and with the advice and consent of the Senate, but such was not the method actually provided for. The provision of the statute is that the President is authorized to appoint. I see no ground whatever for holding that the advice and consent of the Senate is requisite to a lawful appointment under this legislation. An examination of kindred enactments relating to appointments in the Navy as well as appointments in the Army indicates that Congress frequently discriminates between appointments to be made by the President alone and appointments to be made by the President by and with the advice and consent of the Senate." (22 Op. Atty. Gen., 82.)

"The statutes appear to be entirely silent upon the subject as to who shall make the appointments of midshipmen at the Naval Academy, except that, if Members of Congress fail to nominate, such vacancies shall be filled by appointment of the Secretary of the Navy. (Sec. 1514, R. S.) The appointment in this case was made 'by direction of the President,' and we understand that this is and has been the universal practice in the making of appointments with the exception above stated." (Weller v. U. S., 41 Ct. Cls., 324, 336; see also 10 Op. Atty. Gen., 46.)

The only question to be solved here is whether there is provision for the appointment of a secretary to the Admiral by some one other than by the President, by and with the advice and consent of the Senate. The expression of the statute is, that the Admiral "shall be allowed" a secretary. That on its face indicates that the appointment is to be personal to the Admiral and so suggests that he is to make the selection. On account of this and the provisions of the Navy Regulations in force when the law was passed providing for appointment of his secretary by the Admiral, *held*, that appointment in this case was not to be made with the advice and consent of the Senate. (19 Op. Atty. Gen., 589.)

By section 169, Revised Statutes, Congress has vested in the heads of departments the appointment of clerks, laborers, and other employees in their departments. (See note of decisions under that section as to positions included therein.)

The following are examples of statutes in which Congress has in the past vested the appointment of naval officers in the President alone: *Admiral of the Navy* (act Mar. 2, 1899, 30 Stat., 995; act Mar. 3, 1899, 30 Stat., 1045); *warrant officers* (sec. 1405, R. S.; act Mar. 4, 1913, 37 Stat., 891; etc.); *ensigns, when appointed from warrant officers* (act Mar. 3, 1901, 31 Stat., 1129); *Commandant of the Marine Corps* (act June 6, 1874, 18 Stat., 58); *second lieutenants, Marine Corps* (act Mar. 3, 1899, sec. 19, 30 Stat., 1008); *Spanish War appointments* (act May 4, 1898, 30 Stat., 369). See also 23 Op. Atty. Gen., 574, 578; 23 Op. Atty. Gen., 138.

**Power of appointment limited by Constitution.**—"Power of appointment under the United States can not be communicated by act of Congress to persons not named to that end by the Constitution." (8 Op. Atty. Gen., 41.)

"Congress has power to distribute at its pleasure the appointment of inferior officers between the President, courts of law, and heads of departments, or to vest such appointments exclusively in one or two of those depositories; but it has not power to vest appointments elsewhere directly or indirectly." (13 Op. Atty. Gen., 516, 521.)

Appointments made by heads of bureaus in accordance with statute are presumed to be made with approval of the head of the department and are made by the head of a department within the meaning of the Constitution. (Price v. Abbott, 17 Fed. Rep., 506; *Frelinghuysen v. Baldwin*, 12 Fed. Rep., 396; *Stanton v. Wilkeson*, 22 Fed. Cas. No. 13299.)

"It was argued that the appointment of Hatch was illegal because it was made by the Secretary of the Treasury and should have been made by the superintendent of immigration. But the Constitution does not allow Congress to vest the appointment of inferior officers elsewhere than 'in the President alone, in the courts of law, or in the heads of departments;' the act of 1891 manifestly contemplates and intends that the inspectors of immigration shall be appointed by the Secretary of the Treasury; and appointments of such officers by the superintendent of immigration could be upheld only by presuming them to be made

with the concurrence or approval of the Secretary of the Treasury, his official head." (Elkin v. U. S., 142 U. S., 651.)

"Congress has at various times authorized appointments independently of the President, courts of law, or heads of departments in departmental bureaus, in the customs service, in the internal-revenue service, in the land office, and in some other branches of the civil service. Upon this legislation it may be observed: First, that in some of these cases, such as those of deputy marshals and deputy clerks, the persons appointed are representatives of the officers who appoint them and who in some particulars are responsible for their conduct; and perhaps it was considered by Congress that the office was substantially in the principal. Second, that it was no doubt considered by Congress that some of the persons whose appointments were thus provided for were not officers in the constitutional sense of the term. Many employments now universally held to be offices were not evidently such at the outset, but with the growth of the Government were raised to that rank. Thus the force of these legislative precedents is somewhat weakened. Yet it can not be denied that some of them take for granted that Congress is absolute in the matter of appointments. Such, however, is not the constitutional rule." (13 Op. Atty. Gen., 516, 521.)

"Congress has no power whatever to vest the appointment of any employee coming fairly within the definition of an inferior officer of the Government in any other public authority but the President, the heads of departments, or the judicial tribunals." (13 Op. Atty. Gen., 522; 4 Op. Atty. Gen., 164.)

Where a customs officer is appointable by the collector with the approbation of the Secretary of the Treasury, this approbation is really the appointment, or else the appointment "is null and void under the Constitution." (4 Op. Atty. Gen., 164; 13 Op. Atty. Gen., 522.)

"So the Supreme Court has held that a clerk appointed by the Assistant Treasurer with the approbation of the Secretary of the Treasury, was 'appointed by the head of the department within the meaning of the constitutional provision on the subject of the appointing power.' (U. S. v. Hartwell, 6 Wall., 393, 394.) Attorney General Speed thought that a provision in the internal revenue act of March 3, 1865, giving to assessors the appointment of assistant assessors (13 Stat., 469), was 'clearly unconstitutional' (11 Op. Atty. Gen., 212), and such appears to have been the opinion of Congress itself, when its attention was called to the subject, for the act of January 15, 1866, repealed that provision and gave the appointment of assistant assessors to the Secretary of the Treasury." (13 Op. Atty. Gen., 516.)

A statute providing for the appointment of certain officers by the commandant of the Marine Corps, "being in derogation of the Constitution, is to be literally construed and on its terms." Accordingly, held that said statute contemplated merely occasional and transitory appointments under exceptional conditions. (2 Op. Atty. Gen., 77.)

The power of appointment, being discretionary, can not be delegated by the head of the department, though he may inquire, investigate, and determine by the aid of subordinates; but the final determination must be his act, and not theirs. (21 Op. Atty. Gen., 355.)

The power of appointment, especially where fixed by statute in the head of the department, can not be delegated to subordinates without authority of Congress. (29 Op. Atty. Gen., 273.)

### III. POWER OF CONGRESS.

#### Congress may refuse appropriations.—

"The power of appointment [of an agent or commissioner to make certain investigations] results from the obligation of the executive department of the Government 'to take care that the laws be faithfully executed'; an obligation imposed by the Constitution [Art. II, sec. 3] and from the authority of which no mere act of the legislature can occasion a dispensation. Congress may, however, indirectly limit the exercise of this power by refusing appropriations to sustain it, and thus paralyze a function which it is not competent to destroy." (4 Op. Atty. Gen., 248; see also note to Art. II, sec. 3.)

Congress may change the rank or pay of an officer of the Army, or transfer him to the retired list, but it "can not appoint him to a new and different office, because the Constitution vests the appointing power in the President with the advice of the Senate, or in certain cases, in the President alone, the heads of the executive departments, or the courts of law." (Wood v. U. S., 15 Ct. Cls., 151; affirmed 107 U. S., 414; see also Moser v. U. S., 42 Ct. Cls., 86.)

The rank of officers of the Navy is not to be changed except by and with the advice and consent of the Senate. (Act June 17, 1878, 20 Stat., 144, amending sec. 1506, R. S.)

Congress can not control appointing power.—"I entertain no doubt that the power of appointment of officers, the duty to appoint whom devolves directly on the President and Senate by virtue of the Constitution itself, is one involving a discretion not entirely to be controlled by Congress. This power is from a source above Congress, namely, the Constitution, and can not be destroyed by the inferior power." (30 Op. Atty. Gen., 177, in which it was also stated: "In this opinion it is only necessary to consider appointments the duty to make which is directly imposed on the President by the Constitution itself; no discussion of the other class [where Congress designates the person or persons who are to appoint to a given office created by it] will be entered upon. That a difference exists between the two is intimated in U. S. v. Perkins, 116 U. S., 483, 485.")

"Nor does the fact that Congress is given power by the Constitution 'to make rules for the government and regulation of the land and naval forces,' enable it to control the President's discretion in respect of those appointments which the same supreme law requires him to make. The general power to regulate such forces can not be taken to nullify the specific



mandate to the President to appoint to offices where Congress has made no other provision." (30 Op. Att'y. Gen., 177; 29 Op. Att'y. Gen., 254.)

Conceding that Congress has power, under its constitutional authority to make rules for the government and regulation of the land and naval forces, to regulate appointments to offices in the Army and Navy, such power can not be carried to the designation of particular individuals to fill such offices, without imposing an unconstitutional restriction upon the appointing power. (18 Op. Att'y. Gen., 18; see also 13 Op. Att'y. Gen., 516, holding that, "unless controlled by authority, I should not take this power to embrace the subject of appointments"; and see 8 Op. Att'y. Gen., 231, 29 Op. Att'y. Gen., 254, to the same effect.)

"It may now be considered to be definitely settled by the practice of the Government, that the regulation and government of the Army include, as being properly within their scope, the regulation of appointment and promotion of officers therein. Hence, as the Constitution expressly confers upon Congress authority 'to make rules for the government and regulation of' the Army, that body may impose such restrictions and limitations upon the appointing power as it deems proper in regard to promotions or appointments to any and all vacancies in the Army, provided the restrictions and limitations be not incompatible with the exercise of the appointing power." (14 Op. Att'y. Gen., 164.)

"A promotion in the Army is an appointment to a higher office therein. The custom, so far as I am aware, has always been to nominate the promoted officer to the Senate and subsequently to appoint and commission him anew." (30 Op. Att'y. Gen., 177.)

Promotion by seniority is provided for in the Army by section 1257, Revised Statutes, which is generally similar to section 1458, Revised Statutes, requiring that in the Navy "the next officer in rank shall be promoted to the place of a retired officer, according to the established rules of the service; and the same rule of promotion shall be applied successively to the vacancies consequent upon the retirement of an officer." Also, by act of October 1, 1890 (26 Stat., 562, sec. 3), it is provided that "if any officer [of the Army] fails to pass a satisfactory examination and is reported unfit for promotion, the officer next below him in rank, having passed said examination, shall receive the promotion;" and by section 1480, Revised Statutes, provision is made for promotion of staff officers of the Navy by seniority. (As to constitutionality of these statutes, see notes to secs. 1458 and 1480, R. S. By amendments to secs. 1458 and 1480, R. S., promotion by selection to certain grades in the Navy is provided for.)

"I do not think \* \* \* that the act of October 1, 1890, makes it obligatory upon the President to promote the senior officer in the grade of major when a vacancy exists in the grade of lieutenant-colonel in the Quartermaster Corps, if in his opinion the record of the officer has been such as to indicate that he is disqualified for promotion." (30 Op. Att'y. Gen., 177. The Attorney-General expressly limited this opinion to the cases of officers ap-

pointed by the President with the concurrence of the Senate, under direct authority of the Constitution. See also *Ray v. Garrison*, 42 App. D. C., 34, and 29 Op. Att'y. Gen., 254.

"Respecting promotions in the Army, I have been unable, after careful examination, to find a single instance where the power of Congress to prescribe the rule therefor has been even doubted." (14 Op. Att'y. Gen., 164, Jan. 9, 1873.)

In view of section 1480, Revised Statutes, as amended by act of February 27, 1877, promotions of staff officers of the Navy should be made by seniority; accordingly, the claim of an assistant surgeon, who has passed the necessary examinations, to be promoted according to seniority, is well founded. (17 Op. Att'y. Gen., 48.)

"The rules which existed at the date of the act of 1866 concerning the subject of appointment and promotion in the Army [including provisions for promotion by seniority] became, as it were, fixed; and having the force of law they must be taken to control the appointing power in regard to that subject until Congress shall otherwise direct." (14 Op. Att'y. Gen., 164. The act mentioned provided that the existing Army Regulations should "remain in force" until future action on the part of Congress.)

"In filling *original vacancies* or offices in the Army newly created, the opinion was advanced by President Monroe, in a message to the Senate dated April 12, 1822, that 'Congress had no right under the Constitution to impose any restraint by law on the power granted to the President, so as to prevent his making a free selection of proper persons for these offices from the whole body of his fellow-citizens.' The Senate, however, disagreed with that opinion, maintaining that, as the Constitution conferred upon Congress power to 'make rules for the government and regulation of' the Army, that body had a right to make any which it thought would benefit the public service and to fix the rule both as to promotions and appointments in the Army." (14 Op. Att'y. Gen., 164; but see 29 Op. Att'y. Gen., 254.)

For other cases, see notes to sections 1458 and 1480, Revised Statutes.

**Congress can not designate appointee.—** A bill providing that "the President be, and he is hereby, authorized to nominate and by and with the advice and consent of the Senate to appoint" a designated person to the position of colonel in the Army, is beyond the power of Congress and should not be approved by the President for the following reasons: First. If the bill be viewed as making it imperative upon the President to appoint, Congress can not impose such requirement and thus virtually assume a power (that of making an appointment to office) which does not constitutionally belong to it; and if it be regarded as advisory only, it is without the essential element of a law, and Congress can enact nothing but that which is to have full vigor and effect of a law. Second. The authority of Congress to make rules for the government and regulation of the land and naval forces, and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," can not be carried to the designation by law of a particular individual to fill a military office, without conflict-



ing with the power of appointment expressly given the President. Third. By this bill Congress in effect creates an office only upon condition that it is to be filled by a particular individual named. If this principle were adopted generally in the creation of offices, it would obviously result in constraining the appointing power to accept the condition imposed and fill the offices with the individuals designated by Congress, thus frustrating the design of the Constitution, which is that officers must be alone selected according to the judgment and will of the person and body in whom the powers of nominating, advising, and consenting, and appointing are vested. "Regarding the bill as imposing, or attempting to impose, upon the President a duty to appoint the person designated therein, it is without any support in the Constitution. It is an assumption of an implied power which is not based upon any express power, and clearly invades the constitutional rights of the President." (18 Op. Atty. Gen., 18. See also *U. S. v. Ferreira*, 13 How., 40, holding unconstitutional a law which directed certain Federal judges to act as commissioners for adjudication of claims: "If they are to be regarded as officers, holding offices under the Government, the power of appointment is in the President, by and with the advice and consent of the Senate, and Congress could not by law designate the persons to fill these offices." And see note to Art. I, sec. 7, clause 2.)

"It has been alleged, I think, without sufficient cause, that this clause is unconstitutional because it has created a new office and has appointed Capt. Meigs to perform its duties. If it had done this, it would have been a clear question, because Congress have no right to appoint to any office, this being specially conferred upon the President and Senate. It is evident that Congress intended nothing more by this clause than to express a decided opinion that Capt. Meigs should be continued in the employment to which he had been previously assigned by competent authority." (Messages and Papers of the Presidents, vol. 5, p. 597. See further, as to this case, note to Art. II, sec. 2, clause 1, "Powers of Congress and of the President.")

**Restoration of dismissed officers.**—"While affirming in the strongest terms its opinion of the general inexpediency of restoring dismissed officers, the department also relies for the protection of the service upon the unconstitutionality of legislation for such purposes, as set forth in the message of July 2, 1884, returning, without executive approval, a bill contemplating such action." (Annual Report Sec. Nav., 1884, p. 42; see note to Art. I, sec. 7, clause 2, for message cited; see also 17 Op. Atty. Gen., 297.)

"No more powerful influence for the demoralization of the naval service is to be found than that which results from the restoration of officers dismissed for drunkenness or other misconduct, or for demonstrated incapacity. Cases of restoration which have occurred in the past would hardly have been possible but for a lenient spirit in the service, which, although it may proceed from kindly motives, indicates an indifference on the part of officers themselves concerning the tone of the Navy, and a

disregard of their imperative duty to contribute by every means in their power to the maintenance of a high standard of professional character. Public opinion should not only sternly condemn all officers who are guilty of such misconduct as to disqualify them from service on the active list of the Navy, but also those who, from whatever cause, lend themselves to efforts for the restoration of worthless and ejected members of their profession." (Ann. Rept. Sec. Nav., 1884, p. 42.)

**Additional duties imposed on officer.**—"It is pointed to as invalidating the act that while Congress may create an office it can not appoint the officer. As, however, the two persons whose eligibility is questioned were at the time of the passage of the act and of their action under it already officers of the United States who had been heretofore appointed by the President and confirmed by the Senate, we do not think that because additional duties germane to the offices already held by them were devolved upon them by the act it was necessary that they should be again appointed by the President and confirmed by the Senate. It can not be doubted, and it has frequently been the case, that Congress may increase the power and duty of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed." (*Shoemaker v. U. S.*, 147 U. S., 282. In this connection see secs. 255 and 1550, R. S., concerning the designation of officers as disbursing agents.)

While Congress can not appoint to office, it may authorize a particular person or official to perform certain acts. (*Kentucky v. Dennison*, 24 How., 66, holding that Congress might authorize but not compel State officers to perform certain duties with reference to the interstate extradition of fugitives from justice; see also act Feb. 16, 1909, sec. 15, 35 Stat., 622, authorizing arrest of deserters from the Navy by State officers.)

#### IV. STATUTORY REQUIREMENTS AND QUALIFICATIONS.

**Competitive examinations for appointment.**—"A rule, whether prescribed by Congress or by the President in pursuance of authority given by Congress, that a vacant civil office must be given to the person who is found to stand foremost in a competitive examination, in effect makes the judges in that examination the appointing power to that office and thus contravenes the constitutional provisions on the subject of appointments. \* \* \* Viewing the appointing power conferred in the Constitution as a substantial, and not merely a nominal function, I can not but believe that the judgment and will of the constitutional depository of that power should be exercised in every appointment. The power was lodged where it is because the makers of the Constitution, after careful consideration, thought that in no other depositories of it could the judgment and the will to make proper appointments so certainly be found. \* \* \* If Congress can compel the President to nominate a person selected by others, it can compel the Senate to advise and consent to the nomination. \* \* \* Advice and consent imply an exercise of judgment and

will. So does nomination. So does appointment. There is this difference, that the judgment and will of the Senate can regard only the person proposed by the President, while there is no similar constitutional limitation upon his judgment and will. But there is no right in Congress to constrain either to adopt the judgment and will of others. Such constraint frustrates the constitutional design, that the judgment of the Senate shall revise the judgment of the President, and that the judgment of both shall concur in filling the office." (13 Op. Atty. Gen., 516.)

**Advisory board.**—"The appointing power may avail itself of the judgment of others as one means of information. For want of personal knowledge of candidates, it has habitually done so from the foundation of the Government. But this has been done in its discretion. I see no constitutional objection to an examining board rendering no imperative judgments, but only aiding the appointing power with information. A legal obligation to follow the judgment of such a board is inconsistent with the constitutional independence of the appointing power." (13 Op. Atty. Gen., 516.)

**Discretion of appointing power.**—"The argument has been made that the unquestioned right of Congress to create offices implies a right to prescribe qualification for them. This is admitted. But this right to prescribe qualifications is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the constitution vests the power of appointment. (13 Op. Atty. Gen., 516.)

"It has been suggested that the appointments now vested in the courts and heads of departments could be transferred by Congress to the President, and that he could appoint according to the result of a competitive test, certified by an examining board. To this mode of selection, if discretionary with the President, there is no constitutional objection, and the same mode, under a similar condition, could be used by the various appointing powers under present laws; it being always understood that the appointing power resorts to this test as a way of finding out the fittest person for the vacant office, and is not bound to abide by it if satisfied that the appointment of another would best serve the public interests. In short, the test of a competitive examination may be resorted to in order to inform the conscience of the appointing power, but can not be made legally conclusive upon that power against its own judgment and will." (13 Op. Atty. Gen., 516.)

**Unconstitutional precedents.**—"The legislation of the country from an early period has been supposed to authorize a different constitutional view from that which is herein expressed [see preceding paragraphs]. \* \* \* But when a congressional construction is inconsistent with the plain meaning of the Constitution, as ascertained by authoritative canons, that meaning can not be overruled by such construction, how often soever repeated. \* \* \* It more concerns us to ascertain what is the constitutional rule than to learn whether the rule has always been observed. Nineteen violations of the Constitution do not justify a twentieth. The present question, in its

essence, is whether the appointing power belongs to Congress or to those named in the Constitution as the depositories of that power; for if Congress can ordain that an office shall be filled by the person whom the examiners pronounce the fittest, it can ordain that the office shall be filled by the person whom Congress judges the fittest, and may directly appoint its favorite. \* \* \* An enactment that the President shall appoint to a certain office the person adjudged by the examiners to be the fittest is not different, in constitutional principle, from an enactment that he shall appoint John Doe to that office. In neither case are his judgment and will called into exercise." (13 Op. Atty. Gen., 516.)

**Qualifications in general.**—"Although the appointing power alone can designate an individual for an office, either Congress, by direct legislation, or the President, by authority derived from Congress, can prescribe qualifications and require that the designation shall be made out of a class of persons ascertained by proper tests to have those qualifications; and it is not necessary that the judges in the tests should be chosen by the appointing power. Attorney General Legare has given an opinion upon a question similar in principle. Discussing the subject of appointment of inspectors of customs by the Secretary of the Treasury, he considers that it would 'be a fair constitutional exercise of the power of Congress to require that the Secretary should make an appointment out of a certain number of nominees proposed by a collector.'" (13 Op. Atty. Gen., 516, citing 4 Op. Atty. Gen., 164; see also, 26 Op. Atty. Gen., 502; 25 Op. Atty. Gen., 341.)

"It has been argued that a right in Congress to limit in the least the field of selection implies a right to carry on the controlling process to the designation of a particular individual. But I do not think this a fair conclusion. Congress could require that officers shall be of American citizenship or of a certain age, that judges should be of the legal profession and of a certain standing in the profession, and still leave room to the appointing power for the exercise of its own judgment and will; and I am not prepared to affirm that to go further and require that the selection shall be made from persons found by an examining board to be qualified in such particulars as diligence, scholarship, integrity, good manners, and attachment to the Government would impose an unconstitutional limitation on the appointing power. It would still have a reasonable scope for its own judgment and will. But it may be asked, At what point must the controlling process stop? I confess my inability to answer. But the difficulty between drawing a line between such limitations as are, and such as are not, allowed by the Constitution, is not proof that both classes do not exist. In constitutional and legal inquiries right or wrong is often a question of degree. Yet it is impossible to tell precisely where in the scale right ceases and wrong begins. \* \* \* In the matter now in question, it is not supposable that Congress or the President would require of candidates for office qualifications unattainable by a sufficient number to afford ample room for choice." (13 Op. Atty. Gen., 516.)



A statute prescribing the qualifications necessary for appointment as an officer of the Navy, "being in derogation of the appointing power should be strictly construed and not extended by implication to include anything which does not clearly come within the meaning of the language used." (File 8622-2, Feb. 10, 1908.)

**Nomination of ineligible.**—The President is not authorized to nominate for office a person ineligible under Article I, section 6, clause 2, and such a nomination, although confirmed by the Senate, can not be made the basis of an appointment to the nominee, even when his disqualification ceases. (17 Op. Atty. Gen., 522.)

**Appointment of ineligible.**—The qualifications of a candidate are presumed to have been ascertained and found satisfactory previous to his appointment to office; and a subsequent administration can not, in the absence of fraud, deprive the incumbent of his office, although evidence should be produced that he did not possess the statutory qualifications for appointment. (28 Op. Atty. Gen., 180.)

"The law presumes that persons acting in a public capacity have been duly appointed, and their acts as de facto officers have in the interest of the public been upheld, though invalid as to them. (*Ball v. U. S.*, 140 U. S., 118, 129; *McDowell v. U. S.*, 159 ib. 596, and authorities therein cited.)" (*Northrup v. U. S.*, 45 Ct. Cls., 50.)

#### V. POWER OF SENATE.

"The Senate can not originate an appointment; its constitutional action is confined to a simple affirmation or rejection of the President's nominations; and such nominations fail whenever it disagrees to them. The Senate may suggest conditions and limitations to the President, but can not vary those submitted by him; for no appointment can be made except on his nomination, agreed to without qualification or alteration. In the case of John R. Coxe, jr., nominated for lieutenant in the Navy from date, and confirmed with the qualification that he shall take rank next after Lieut. Elisha Peck, a commission can not properly issue." (3 Op. Atty. Gen., 188; see also 4 Op. Atty. Gen., 218.)

"The harmony of the two subordinate branches, the independence of the President, the just weight of the Senate, and the useful operation of the power itself, will no doubt be best secured by confining each branch to its peculiar function and not allowing either to deviate from the order of procedure prescribed by the Constitution." (3 Op. Atty. Gen., 188.)

The confirmation of an officer nominated for promotion may be made as well by the confirmation of his successor as in any other way provided it shows the assent of the Senate to such promotion. (23 Op. Atty. Gen., 30.)

#### VI. WHAT CONSTITUTES APPOINTMENT.

"To constitute an appointment under this article, it is necessary, first, that the President should nominate the person proposed to be appointed; second, that the Senate should advise and consent that the nominee should be

appointed; and, third, that in pursuance of such nomination and such advice and consent the appointment should be actually made." (4 Op. Atty. Gen., 218.)

The Constitution seems to contemplate three distinct operations: First, the nomination. This is the sole act of the President and is completely voluntary. Second, the appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate. Third, the commission. To grant a commission to a person appointed might, perhaps, be deemed a duty enjoined by the Constitution. "He shall," says that instrument, "commission all the officers of the United States." The acts of appointing the officer and commissioning the person appointed can scarcely be considered as one and the same, since the power to perform them is given in two separate and distinct sections of the Constitution. The appointment being the sole act of the President must be completely evidenced when it is shown that he has done everything to be performed by him. Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself, still it would be made when the last act to be done by the President was performed, or, at furthest, when the commission was complete. The last act to be done by the President is the signature of the commission. He has then acted on the advice and consent of the Senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment on the advice and consent of the Senate concurring with his nomination has been made, and the officer appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction. (*Marbury v. Madison*, 1 Cranch, 137.)

The appointment is the sole act of the appointing power; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so he may refuse to accept; but neither the one nor the other is capable of rendering the appointment a nonentity. (*Marbury v. Madison*, 1 Cranch, 137.)

**Acceptance is not necessary to render the appointment complete;** accordingly where a candidate was not above the maximum age for appointment when confirmed by the Senate, the statutory requirement was fulfilled, and he can legally be commissioned and accept the appointment after passing said age. (File 8622-2, Feb. 10, 1908.)

Acceptance is necessary to vest the office in the appointee, and a formal acceptance is the evidence which in the public service generally it has been customary to require. (12 Op. Atty. Gen., 229.) But where a former officer of the Army asked the President in writing to reinstate him, under an act of Congress, and the President did so, no further formal acceptance was necessary. (*Collins v. U. S.*, 15 Ct. Cls., 31.) Execution of the oath of office may be regarded as an acceptance of the appointment.



(8 Comp. Dec., 521; 19 Op. Atty. Gen., 284.) An officer need not formally accept a promotion. Where he died before so doing acceptance is conclusively presumed. (12 Op. Atty. Gen., 229.)

**Date of appointment.**—An appointment made to take effect at a prior date is inoperative prior to the date on which it was actually made and accepted. (8 Comp. Dec., 521; 20 Comp. Dec., 214, citing *Morey v. U. S.*, 35 Ct. Cls., 603, *Jackson v. U. S.*, 42 Ct. Cls., 39, 17 Comp. Dec., 452. But see act Mar. 4, 1913, 37 Stat., 892, as to pay of officers of the Navy on promotion.)

## VII. PAY AND OATH OF OFFICERS.

**Pay of officers.**—With some exceptions, Congress may at any time make alterations of the salaries of public officers, to take effect from the passage of the act. The only contract which arises upon a statute establishing a salary is to pay the incumbent of the office that salary while the law remains in force and unchanged. When the statute is repealed, superseded, or amended so as to alter the amount of the salary for the time being, the contract from that time forward is correspondingly changed. (*Fisher v. U. S.*, 15 Ct. Cls., 329, citing *Patten's Case*, 7 Ct. Cls., 362; *Butler v. Penn.*, 10 How., 402; *Territory v. Pyle*, 1 Oreg., 151; *Koontz v. Franklin*, 76 Penn., 156.) The constitutional exceptions and limitations are that the compensation of the President shall neither be increased nor diminished during the period for which he shall have been elected (Art. II, sec. 1), and that the judges, both of the Supreme and inferior courts, shall receive for their services a compensation which shall not be diminished during their continuance in office. (Art. III, sec. 1.) (*Fisher v. U. S.*, 15 Ct. Cls., 329. See also note to sec. 167, R. S.)

To entitle an officer to recover pay claimed but not received, he must prove his case, as the compensation annexed to a public office is incident to the title to the office and not to the exercise of the functions of such office. (*Northrup v. U. S.*, 45 Ct. Cls., 50; as to right of Government to recover money paid by mistake of law to persons who were not officers of the United States, see note to sec. 236, R. S., "VIII. REOPENING OF ACCOUNTS.")

Pay of disbursing officer may commence prior to furnishing bond—that is, upon acceptance of appointment or entering upon duty—the same as other officers. (16 Op. Atty. Gen., 38; *U. S. v. Eaton*, 169 U. S., 346; *Glavey v. U. S.*, 182 U. S., 595; *U. S. v. Bradley*, 10 Pet., 343; *U. S. v. Linn*, 15 Pet., 290.)

**Oath of office.**—The fact that an officer is his own successor does not relieve him from the requirement of taking the oath of office prescribed by sections 1756 and 1757, Revised Statutes. The law "contemplates that the oath shall be taken at every new appointment before entering upon the duty." (19 Op. Atty. Gen., 219.)

A promotion in the Army is an appointment to a higher office therein. (30 Op. Atty. Gen., 177.)

For other cases, see notes to sections 1458 and 1757, Revised Statutes.

## VIII. POWER OF REMOVAL.

**May be removed by President.**—"In the absence of a constitutional provision or statutory regulation it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment. This power of removal from office was a subject much disputed and upon which a great diversity of opinion was entertained in the early history of this Government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate, both constituting the appointing power. No one denied the power of the President and Senate, jointly, to remove where the tenure of the office was not fixed by the Constitution, which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted as the practical construction of the Constitution that this power was vested in the President alone, and such would appear to have been the legislative construction of the Constitution." (Ex parte Hennen, 13 Pet., 230.)

Congress may be empowered to fix the term of an officer of the District of Columbia so that he would have a right to hold during said term independently of the Executive and without his appointment being revocable by the President, as was indicated by Chief Justice Marshall in *Marbury v. Madison* (1 Cranch, 137). This power might be sustained under the authority of Congress to exercise exclusive legislation in all cases whatsoever over the seat of government. (Art. I, sec. 8, clause 17.) A distinction, however, exists as to other officers appointed outside of such District. (*Parsons v. U. S.*, 167 U. S., 324.)

The President has the power, without the concurrence of the Senate, to remove a United States attorney who was appointed for a fixed term prior to the expiration of such term. (*Parsons v. U. S.*, 167 U. S., 324.)

By section 1767, Revised Statutes [repealed March 3, 1887], it was provided that any person appointed to office by and with the advice and consent of the Senate should be entitled to hold during the term for which appointed, "unless sooner removed by and with the advice and consent of the Senate, or by the appointment, with the like advice and consent, of a successor in his place." Under this section it was proper for the President to "execute a formal act" removing the officer, "pursuant to the resolution of the Senate advising and consenting to his removal." (12 Op. Atty. Gen., 468.) The repeal of this section was intended to restore to the President the power of removal without the advice and consent of the Senate, if indeed that power had ever been taken from him. (*Parsons v. U. S.*, 167 U. S., 327.)

**Military and naval officers.**—"The various methods by which persons in the military or naval service of the United States may be involuntarily separated therefrom are embraced in the terms 'discharged,' 'dismissed,' and 'wholly retired.' The word 'discharged' is properly 'limited in its application to those who have enlisted for definite periods' (*Emory v. U. S.*, 19 Ct. Cls., 254, 262), and unless qualified by other words—as, for example, 'dishonorable'

discharge, 'bad-conduct' discharge, discharge 'without honor'—it does not carry with it any stigma of disgrace or punishment. 'Dismissed' is a term peculiarly applicable to officers and is the equivalent of a dishonorable discharge. 'Wholly retired' is a phrase coined for the purpose of conveying, with reference to officers, the same idea as attaches to the word 'discharged' when applied to enlisted men. The meaning of these terms and the importance of distinguishing between them was discussed by the Court of Claims in the case last above cited. \* \* \* It is evident that the term 'discharged' as used in the act of 1882, now under consideration [providing for the discharge of officers who fail morally on examination for promotion], was intended to be synonymous with the words 'wholly retired,' and it has been given that construction by the department and by Congress." (File 26260-1392, June 29, 1911, p. 25.)

**Statutory restrictions upon President.**—By section 1229, Revised Statutes, it was provided that no officer in the military or naval service shall be dismissed in time of peace except pursuant to the sentence of a court-martial. This provision is repeated in section 1624, Revised Statutes, article 36, as to officers of the Navy, and in section 1342, Revised Statutes, as to officers of the Army. These enactments have been held constitutional in so far as concerns officers whose appointments were not made with the advice and consent of the Senate, the court saying: "Whether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President by and with the advice and consent of the Senate, under the authority of the Constitution (Art. II, sec. 2), does not arise in this case and need not be considered. We have no doubt that when Congress by law vests the appointment of inferior officers in the heads of departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed. The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto." (Perkins v. U. S., 20 Ct. Cls., 438; quoted and expressly adopted by the Supreme Court in U. S. v. Perkins, 116 U. S., 483; compare U. S. v. Andrews, 240 U. S., 90.)

Where an enlisted man was appointed by the President as a warrant officer in the Navy, without being discharged from his enlistment: *Held*, that it would not be legal to revoke his appointment, thereby restoring him to his former status as an enlisted man, and then discharge him from the Navy without sentence of court-martial. That this would be doing indirectly what the law does not allow to be done directly, and while "most desirable" in the case presented, was beyond the power of the President. (28 Op. Atty. Gen., 325.)

A midshipman at the Naval Academy is not an officer of the Navy within the meaning of sec-

tions 1229 and 1624 (art. 36) of the Revised Statutes, restricting dismissals from the Navy. "Whether Congress has the constitutional power of such restriction is not necessary to decide in this case." (Weller v. U. S., 41 Ct. Cls., 324, distinguishing U. S. v. Perkins, 116 U. S., 483, which held that a cadet engineer who had graduated from the Academy and had served in the Navy two years under orders was an officer within the meaning of these statutes.) A cadet at West Point is not an officer within the meaning of section 1229, Revised Statutes. (Hartigan v. U. S., 196 U. S., 169, citing on general subject Mullan v. U. S., 140 U. S., 240; Shurtleff v. U. S., 189 U. S., 311.)

Whatever power the President may have to dismiss civil officers, it does not apply to officers of the Army and Navy, who, under Revised Statutes, section 1229, shall not in time of peace be dismissed except upon and in pursuance of the sentence of a court-martial or in commutation thereof. (U. S. v. Andrews, 240 U. S., 90. See note to secs. 1229 and 1624, art. 36, R. S.)

It is well settled that in time of war the President has the authority, under the Constitution and laws, to dismiss an officer of the Army or Navy from the service for any cause which in his judgment either renders the officer unsuitable for, or whose dismissal would promote, the public service. (Brown v. Root, 18 App. D. C., 239.)

As to right of officer to trial by court-martial after dismissal, see section 1624, art. 37, Revised Statutes, and Wallace v. United States (55 Ct. Cls., 396.)

**Power of President and Senate.**—Section 1229, Revised Statutes, does not deprive the President of power, by and with the advice and consent of the Senate, to remove a commissioned officer of the Army or Navy. Accordingly, the President has the power to remove such officers by the appointment of others in their places, with the concurrence of the Senate. (Blake v. U. S., 103 U. S., 227; McElrath v. U. S., 102 U. S., 426; Keyes v. U. S., 109 U. S., 336, 339; Quackenbush v. U. S., 177 U. S., 25; 24 Op. Atty. Gen., 89; compare 15 Op. Atty. Gen., 463; 16 Op. Atty. Gen., 203.)

A nomination made by the President to the Senate of A B in the place of C D, removed, operates to remove the incumbent upon confirmation of the Senate, notwithstanding that no letter of dismissal was previously addressed to C D. The removal takes effect upon notification to the incumbent by letter in the name of the President, or upon arrival of his successor to enter upon duty. (8 Op. Atty. Gen., 379.)

**Reduction of Army.**—The President was authorized by act of July 15, 1870, providing for the reduction of the Army, to "muster out" officers reported unfit for duty; and this authority was not limited by the act of July 17, 1866, now embodied in section 1229, Revised Statutes. "The purpose of the act 17th July, 1866, was not to attach a life tenure or element of vested right to the office, but to save officers 'in time of peace' from the ignominy of a hasty and dishonorable dismissal. The practical results of that statute in connection with the other provisions of law bearing upon the subject are these: That in time of war the President may dismiss



an officer from the service at any moment and for any cause; that in time of peace he may dismiss him for cause with the cooperation of a court-martial, or remove him without cause with the consent of the Senate. The acts of 1866 and 1870 are, therefore, neither in conflict nor in *pari materia*. They spring from different provisions of the Constitution. The one is an exercise of the legislative power 'to make rules for the government and regulation of the land and naval forces'; the other of the power 'to raise and support armies.' The former relates to the punishment or protection of the individual officer; the latter to the Army at large. It was the purpose of the one to secure to each officer a trial by court-martial in all cases 'in time of peace'; it was the purpose of the other to reduce the Army of the United States from 45 to 25 regiments." (*Sherburne v. U. S.*, 16 Ct. Cls., 491; see also *Street v. U. S.*, 24 Ct. Cls., 230; *Duryea v. U. S.*, 17 Ct. Cls., 24; and file 26260-1392, June 29, 1911.)

The courts will not grant an injunction to prevent the removal of an officer from the classified civil service (*White v. Berry*, 171 U. S., 366): "The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power. In the absence of specific provision to the contrary, the power of removal is incident to the power of appointment. \* \* \* Unless, therefore, there be some specific pro-

vision to the contrary, the action of the Secretary of the Interior in removing the petitioner from office on account of inefficiency is beyond review in the courts, either by mandamus to reinstate him or by compelling payment of salary as though he had not been removed." (*Keim v. U. S.*, 177 U. S., 290; see also *Brown v. Root*, 18 App. D. C., 239.)

"Under the former laws the courts had no power to review the action of the head of a department in discharging an employee for inefficiency. *Keim v. United States*, 177 U. S., 290; *Taylor v. Taft*, 24 App. D. C., 95." Whether that rule is changed by act August 23, 1912 (37 Stat. 413), not decided, as that act has not been made effective by the action of the Civil Service Commission as therein provided. (*Persing v. Daniels*, 43 App. D. C., 470.)

Where a statute specifies certain causes of removal from office, the incumbent is entitled to a hearing prior to his removal (*Reagan v. U. S.*, 182 U. S., 419); however, the specific mention of certain causes for removal is not exclusive, and the incumbent of an office may accordingly be removed for other causes; and in the case of removal for causes not specified in the statute he can not demand a hearing. (*Shurtleff v. U. S.*, 189 U. S., 311.)

#### IX. RIGHT OF OFFICERS TO RESIGN.

"The resignation of an officer of the Navy is not effective until it has been duly accepted by the President, who possesses the power of compelling the officer to remain in the service by declining to accept such resignation." (File 26505-21 and 28, citing *Edwards v. U. S.*, 103 U. S., 471; sec. 1624, R. S., art. 10; file 26262-2146.)

[CLAUSE 3. Recess appointments.] <sup>3</sup>The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

**Recess of Senate.**—It was held by the Court of Claims, May 26, 1884, that there was "no doubt" that a vacancy occurring while the Senate was temporarily adjourned could be and was legally filled by appointment of the President in accordance with this clause of the Constitution, and that the appointee legally held the office until he was notified of his rejection by the Senate at its next regular session established by law, which began on the first Monday of the following December. (*Gould v. U. S.*, 19 Ct. Cls., 593, 595.) The Attorney General, thereafter (Dec. 24, 1901), expressly dissented from the Court of Claims decision, and advised the President that a vacancy occurring during a temporary adjournment of the Senate could not be filled by him as a recess appointment, but that such appointments could be made only when the Senate adjourned *sine die*. (23 Op. Atty. Gen., 599; affirmed 29 Op. Atty. Gen., 602; modified, 33 Op. Atty. Gen., 20.)

**Vacancies in heads of Departments, bureaus, etc.**—The President has the right under the Constitution, and impliedly under section 181, Revised Statutes, to make a temporary appointment, designation, or assignment of one officer to perform the duties of

another in the case of a vacancy caused by death, disability, or otherwise during the recess of the Senate; and such temporary appointment, designation, or assignment is not limited by law to any particular period. (25 Op. Atty. Gen., 258. See sec. 181, R. S., and note.)

**Form of appointment.**—A temporary appointment during a recess of the Senate need not be made in any prescribed form. A communication from the Secretary of War informing the recipient that he has been appointed an officer of the Army by the President is sufficient, and answers the purpose of a commission if a commission is necessary. (*O'Shea v. U. S.*, 28 Ct. Cls., 392.)

**Effect of temporary appointment.**—Where the term of an officer, such as the chief of a bureau in the Navy Department, is limited by law to four years (see sec. 421, R. S.), the period during which the appointee serves under an ad interim appointment by the President is not counted, but the four years do not commence to run until the appointment has been made with the advice and consent of the Senate, even though the nomination is worded to take effect from the date of the ad interim appointment. (16 Op. Atty. Gen., 648.)

**Temporary appointment not accepted.**—A recess commission which was not accepted, and was therefore never of any practical effect, should not be accepted after the appointment has been confirmed by the Senate, but should be disregarded and a permanent commission issued in the usual manner. (File 8622-2, Feb. 10, 1908; see also 2 Op. Atty. Gen., 336; *U. S. v. Kirkpatrick*, 9 Wheat., 721.)

**Vacancy may be filled during recess, although it existed while Senate was in session.**—"If we interpret the word 'happen' as being merely equivalent to 'happen to exist' (as I think we may legitimately do), then all vacancies which, from any casualty, happen to exist at a time when the Senate can not be consulted as to filling them, may be temporarily filled by the President; and the whole purpose of the Constitution is completely accomplished." (1 Op. Atty. Gen., 631; see also *Matter of Farrow*, 3 Fed. Rep., 115.) Accordingly, the President has power to fill not only vacancies which originated in the recess of the Senate, but also vacancies which existed while the Senate was in session. (16 Op. Atty. Gen., 522; see also 12 Op. Atty. Gen., 449.)

"Mr. Wirt in 1823, Mr. Tancy in 1833, and Mr. Legare in 1841, concur in opinion that vacancies first occurring during the session of the Senate may be filled by the President in the recess." (12 Op. Atty. Gen., 33.)

"If the question were new, and now for the first time to be considered, I might have serious doubts of your constitutional power to fill up the vacancy, by temporary appointment, in the recess of the Senate. But the question is not new. It is settled in favor of the power, so far at least as a constitutional question can be settled, by the continued practice of your predecessors, and the reiterated opinions of mine, and sanctioned, as far as I know or believe, by the unbroken acquiescence of the Senate." (10 Op. Atty. Gen., 356.)

Where an office was created by Congress, to be filled by and with the advice and consent of the Senate, but was not filled during the session in which it was created, the President has power to make a recess appointment thereto after the Senate adjourns. (26 Op. Atty. Gen., 234; see also 19 Op. Atty. Gen., 261; *In re Yancey*, 28 Fed. Rep., 445; compare file 6288-2, Mar. 29, 1907.)

Where the Senate fails or refuses to confirm the President's nominee, and the President during the next recess of the Senate makes an appointment thereto, such appointment is valid. (*Matter of Farrow*, 3 Fed. Rep., 112; 12 Op. Atty. Gen., 32.)

"No money shall be paid from the Treasury, as salary, to any person appointed during the recess of the Senate to fill a vacancy in any

existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate." (Sec. 1761, R. S.; 26 Op. Atty. Gen. 234; 30 Op. Atty. Gen., 314; 21 Comp. Dec., 722; but see 17 Comp. Dec., 95.)

A commission issued by the President during a recess of the Senate continues in force until the end of the next session, even though the President's appointee is in the meantime rejected by the Senate. (4 Op. Atty. Gen., 30; 2 Op. Atty. Gen., 336; *In re Marshalsip*, etc., 20 Fed. Rep., 382.)

A vacancy having occurred during the session of the Senate and the Senate having failed to confirm an appointment, the President may then appoint the nominee or any other person to fill the vacancy by temporary commission to expire at the end of the next session of the Senate. (30 Op. Atty. Gen., 314, citing 1 Op. Atty. Gen., 631; 2 Op. Atty. Gen., 525; 3 Op. Atty. Gen., 673; 4 Op. Atty. Gen., 523; 7 Op. Atty. Gen., 186; 10 Op. Atty. Gen., 356; 12 Op. Atty. Gen., 32; 12 Op. Atty. Gen., 455; 14 Op. Atty. Gen., 562; 16 Op. Atty. Gen., 522; 26 Op. Atty. Gen., 234.) "As several of the opinions to which I have just referred discuss the entire subject with marked thoroughness, I have concluded to simply state the conclusion at which my predecessors arrived. These opinions announce, as a doctrine of administrative law, that the expression in the Constitution, 'all vacancies that may happen during the recess,' signifies 'all vacancies that may happen to exist during the recess.' Furthermore, these opinions concur in the general conclusion that howsoever a vacancy happens to exist it may be filled by temporary appointment of the President, and they agree that it is the true spirit and meaning of the Constitution to have all the offices, which Congress indicates to be needful for the ends of government by creating them, filled provisionally rather than that they remain vacant or that a special call of the Senate be required for the purpose of confirmation." (30 Op. Atty. Gen., 314.)

"When an office is created and takes effect during a session of the Senate and a subsequent session of Congress passes without the same being filled, the President can not make a valid appointment to such office during a recess of the Senate." (*Schenck v. Peay*, 21 Fed. Cas. No. 12451.)

**Revocation of commission.**—A commission as lieutenant commander in the Navy, issued during a recess of the Senate, can not, after acceptance, be revoked. (File 4389, Nov. 18, 1907.)

**SECTION 3. [Messages to Congress; execution of laws; commissioning of officers; etc.]** He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to



such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

- I. DUTY TO SEE THAT LAWS ARE EXECUTED.
- II. DUTY TO COMMISSION OFFICERS.

#### I. DUTY TO SEE THAT LAWS ARE EXECUTED.

**Execution of laws.**—"The Constitution, section 3, Article II, declares that the President 'shall take care that the laws be faithfully executed,' and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and by and with the advice and consent of the Senate to appoint the most important of them, and to fill vacancies. He is declared to be Commander in Chief of the Army and Navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments. \* \* \* These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that 'he shall take care that the laws be faithfully executed.' \* \* \* We can not doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection." (In re Neagle, 135 U. S., 1.)

The duty of the President under this clause is not limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, but includes the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution. (In re Neagle, 135 U. S., 1.)

The Secretary of War is authorized by this section to appoint an agent or commissioner to conduct certain investigations, although such agent or commissioner can not be paid for his services but must await the action of Congress, in view of a statute prohibiting any payments to agents or commissioners thereafter appointed, except out of specific appropriations to be made by law. "The power of appointment results from the obligation of the executive department of the Government 'to take care that the laws be faithfully executed;' an obligation imposed by the Constitution and from the authority of which no mere act of the legislature can occasion a dispensation. Congress may, however, indirectly limit the exercise of this power by refusing appropriations to sustain it, and thus paralyze a function which it is not competent

to destroy. This would seem to be the purpose of the act of August 26, 1842, which may be regarded as an exposition of the legislative will, and to which, except in cases of commanding exigency, I think the executive action should be conformed; for whilst it is quite clear that the power of appointment is unimpaired by the acts of Congress referred to, it is equally obvious that the intention of those by whom they were passed was to discountenance its ordinary execution." (4 Op. Att'y. Gen., 248.)

It is one of the highest duties of the President to take care that the laws be faithfully executed, and consequently that they may not be abused by any officer under his authority or control, to the grievance of any citizen. Accordingly, the President has constitutional power to order the discontinuance of a suit by the Attorney General or his subordinates. (2 Op. Att'y. Gen., 53.)

If a district attorney should refuse to obey the President's order, the prosecution, while he remained in office, would still go on; in such case the removal of the disobedient officer and the substitution of one more worthy in his place would enable the President, through him, faithfully to execute the law; and it is for this, among other reasons, that the power of removing the district attorney resides in the President. (2 Op. Att'y. Gen., 482.)

"The only power, therefore, which the President possesses where the 'life, liberty, or property' of a private citizen are concerned, is the power and duty prescribed in the third section of the second article, which requires 'that he shall take care that the laws shall be faithfully executed.' He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself; but he is to take care that they be faithfully carried into execution as they are expounded and adjudged by the coordinate branch of the Government to which that duty is assigned by the Constitution. It is thus made his duty to come to the aid of the judicial authority if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm. But in exercising this power he acts in subordination to judicial authority, assisting it to execute the process and enforce its judgments." (Ex parte Merryman, 17 Fed. Cas. No. 9487.)

"The President has, under the Constitution and laws, certain duties to perform, among these being to take care that the laws be faithfully executed; that is, that the other executive and administrative officers of the Government faithfully perform their duties; but the statutes regulate and prescribe these duties, and he has no more power to add to or subtract from the duties imposed upon subordinate executive and administrative officers by the law than those officers have to add or subtract from his duties." (19 Op. Att'y. Gen., 686.)

"It was urged at the bar that the Postmaster General was alone subject to the direction and control of the President with respect to the

execution of the duty imposed upon him by this law, and this right of the President is claimed as growing out of the obligation imposed upon him by the Constitution to take care that the laws be faithfully executed. This is a doctrine that can not receive the sanction of this court. It would be vesting in the President a dispensing power which has no countenance for its support in any part of the Constitution and is asserting a principle which, if carried out in its results to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress and paralyze the administration of justice." (*Kendall v. U. S.*, 12 Pet., 524.)

## II. DUTY TO COMMISSION OFFICERS.

**Commissioning officers.**—"Hereafter the commissions of all officers under the direction and control of the Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, and the Secretary of Agriculture shall be made out and recorded in the respective departments under which they are to serve, and the department seal affixed thereto, any laws to the contrary notwithstanding: *Provided*, That the said seal shall not be affixed to any such commission before the same shall have been signed by the President of the United States." (Act Mar. 28, 1896, 29 Stat., 75.)

"The President is authorized to make out and deliver, after the adjournment of the Senate, commissions for all officers whose appointments have been advised and consented to by the Senate." (Sec. 1773, R. S.)

It is not necessary for the President personally to sign the commissions of officers appointed by him without the advice and consent of the Senate, but such commissions may be issued by the Secretary of the Navy. However, "it is proper" that the commission should declare the act to be an act of the President, performed by the head of the department as his representative. (22 Op. Atty. Gen., 82; file 28687-22, June 14, 1917; 22724-34, July 28, Aug. 1, and Aug. 6, 1917.)

Form of commission, where appointment is made during recess of the Senate. (See note to Art. II, sec. 2, clause 3, "Form of appointment.")

To grant a commission to a person appointed might, perhaps, be deemed a duty enjoined by the Constitution. "He shall," says that instrument, "commission all the officers of the United States." (*Marbury v. Madison*, 1 Cranch, 137.)

The commission is not necessarily the appointment, though conclusive evidence of it. (*Marbury v. Madison*, 1 Cranch, 137; see note to Art. II, sec. 2, clause 2.) The acts of appointing the officer and commissioning the person appointed can scarcely be considered as one and the same, since the power to perform them is given in two separate and distinct sections of the Constitution. (*Marbury v. Madison*, 1 Cranch, 137; 25 Op. Atty. Gen., 292; *Quackenbush v. U. S.*, 177 U. S., 27.)

Appointments by the President are always evidenced by commissions. (19 Op. Atty. Gen., 589, 592.)

Retired officers advanced in rank "shall be entitled to and shall receive commissions in accordance with such advanced rank." (Act

Mar. 4, 1911, 36 Stat. 1354; see file 26509-33, Mar. 24, 1910.)

**Advancement in rank only.**—An assistant paymaster advanced in rank from ensign to lieutenant (junior grade), without receiving an advancement in grade, need not be commissioned, as this is merely an advancement in rank, without change in office, which remains, as before, that of assistant paymaster. (File 26254-542; see also 19 Op. Atty. Gen., 169, 173; 20 Op. Atty. Gen., 358; 16 Op. Atty. Gen., 652; 25 Op. Atty. Gen., 185, 313; *Cloud v. U. S.*, 43 Ct. Cls., 69; 17 Comp. Dec., 255; 16 Comp. Dec., 662; sec. 1506, R. S., as amended; file 28687-4:1, Sept. 16, 1916; 4649-02, July 17, 1902, noted under sec. 421, R. S.; 28687-16, Dec. 30, 1916; 26254-2171, Jan. 16, 1917; 22 Op. Atty. Gen., 480; but see file 1282-01, Mar. 19, 1901, in which the Secretary of the Navy directed that staff officers advanced in rank without advancement in grade or change of office, should be nominated, and after confirmation by the Senate, commissioned with the higher rank, thereby expressly changing the "long established custom of the department to advise officers of the staff corps of the Navy of the attainment of a higher rank in their grade by a letter of notification only." See also file 28687-4:1, Sept. 16, 1916, holding that former practice might legally be reverted to; and file 28687-22, June 14, 1917, to same effect. And see Op. Atty. Gen., Dec. 27, 1916, file 28687-4:8, stating that rank may be conferred by mere notification without confirmation or commission.)

**Governors of Guam and Tutuila.**—Naval officers appointed by the Secretary of the Navy, under the direction of the President, as governors of the islands of Guam and Tutuila, may be issued commissions by the President in the usual form, such commissions being desirable "for administrative reasons," and merely evidence of appointments already made under the power of the President as Commander in Chief. (25 Op. Atty. Gen., 292.)

**Withholding commission.**—"Even after confirmation by the Senate, the President may in his discretion withhold a commission from the applicant. And until a commission, signifying that the purpose of the President has not been changed, the appointment is not fully consummated." (4 Op. Atty. Gen., 218, citing *Marbury v. Madison*, 1 Cranch, 137; see also 12 Op. Atty. Gen., 306; 13 Op. Atty. Gen., 44; file 4996, June 1, 1906; file 26251-2833, Mar. 31, 1910.)

The President is not required to issue a commission to an officer who had been recommended for trial by general court-martial for shortages in his accounts and indebtedness, and who thereafter presented his resignation, which was accepted "for the good of the service," in the meantime having been nominated by the President for promotion, which nomination was confirmed by the Senate, but whose commission had not been signed by the President. (File 26251-2833.)

But if the commission be signed and sealed, and the officer be of a class not removable by the President, in that case the President's right over the office no longer exists. The right of the appointee thereto is vested, his commission irrevocable. (12 Op. Atty. Gen., 304.)



A commission should not be issued for sentimental reasons where no services are to be rendered under it, the appointment having been declined after confirmation by the Senate. (4 Op. J. A. G., 443, Oct. 19, 1893; quoted, file 26251-2833, Mar. 31, 1910; see also file 8622-2, Feb. 10, 1908.)

When the Senate, in confirming the nomination of a candidate for lieutenant in the Navy, specifies that he shall take rank next after a designated officer, thus varying the terms of the nomination, a commission can not properly issue. (3 Op. Atty. Gen., 188; see also 4 Op. Atty. Gen., 218; and see note to Art. II, sec. 2, clause 2.)

When the President nominates for office a person ineligible thereto, under Article I, section 6, clause 2, although the Senate confirms the nomination, it can not be made the basis of an appointment even when his disqualification ceases. (17 Op. Atty. Gen., 522.)

**Erroneous commission.**—A commission issued to an officer who had not qualified for promotion, but was nominated and confirmed through error, is null and void. (File 26260-1193-1, Jan. 11, 1912; see also 11 Comp. Dec., 43; file 26260-110-1, June 21, 1909; file 26260-132; file 26254-645, Comp. Dec., Feb. 21, 1911, 120 S. and A. Memo. 1684; file 26254-482, Comp. Dec., Sept. 15, 1910; file 26254-655, Comp. Dec., Feb. 28, 1911; file 26254-654, Comp. Dec., Feb. 27, 1911, 120 S. and A. Memo., 1687; 17 Comp. Dec., 611; and see file 5172-93, Apr. 16, 1907, file 26254-286½, May 27, 1909; 15 Comp. Dec., 584.)

The President and Senate, by nomination and confirmation, may correct an error in the date of a military commission. (3 Op. Atty. Gen., 307; 8 Op. Atty. Gen., 223.)

Where a militia officer mustered into the service of the United States had been erroneously commissioned by the governor of his State, it was proper for the governor to issue him a second commission to correct the error, and such new commission being in accordance with the law of the State, would relate back to the time when he entered the service of the United States. (*Nutt v. U. S.*, 41 Ct. Cls., 368.)

**Date of.**—Where an officer is transferred from the retired list to the active list by special act of Congress, without stating the position he is to take on the active list, the only appropriate date which can be fixed for his restoration is the date of the act itself. (File 2871-7, Oct. 11, 1907.)

When naval officers are commissioned on the same date, the numbering of the commissions to determine the relative rank of the officers, is, in the absence of statutes, a matter of practice in the Navy Department, and not governed by law. (1 Op. Atty. Gen., 325; file 28026-1209-4, Oct. 25, 1915; 11130-27, Aug. 26, 1915; *Toulon v. U. S.*, 52 Ct. Cls. 333.)

In cases where appointing power did not fill a vacancy at the time it was created, or the person at the time was ineligible for appointment, and the department acted promptly, it is not deemed advisable to antedate the commission. (File 9466-03.)

Where the filling of vacancies is discretionary with the President, the commissions need not

be made to date from the occurrence of the vacancy unless the appointing power so decides. (File 7151-03; see also file 3089-04, 9 Comp. Dec. 612.)

Where new offices are created by law, and it is provided therein that no person shall be appointed until he has been found qualified by examination, the commissions issued should not bear a date prior to that when the candidate qualified by examination. (File 5460-72-1, May 19, 1915; see also 14 Op. Atty. Gen. 192. On general subject of antedating commissions see 19 Ct. Cls. 145, 17 Op. Atty. Gen., 319, 19 Ct. Cls. 137.)

An ensign who failed on examination for promotion, was suspended, and after six months qualified and was promoted, should not be given in his commission the same date as that on which he would have been promoted had he been found qualified upon his first examination, as this would entitle him to pay for a period of six months during which he was not performing the duties of the higher grade and had demonstrated his incompetency therefor. (File 26266-475, May, 1915; see act Mar. 4, 1913, 37 Stat., 892.)

When the term of an officer, such as the chief of a bureau in the Navy Department, is limited by law to four years (see sec. 421, R. S.), the period during which the appointee serves under an ad interim appointment by the President is not counted, but the four years do not commence to run until the appointment has been made with the advice and consent of the Senate, even though the nomination is worded to take effect from the date of the ad interim appointment. (16 Op. Atty. Gen., 656.)

For other cases, see note to section 1458, Revised Statutes.

**Changes in date.**—See above, "Erroneous commission."

While an officer might have been promoted to the grade of captain in the Marine Corps when a vacancy in that grade occurred, such action was discretionary with the appointing power; and since such action was not taken, but the officer was promoted and commissioned as of a later date, there is no law or regulation entitling him to have his commission date from the occurrence of the vacancy. (File 2518-04.)

The statutes and regulations governing precedence having once been determined in any particular case, considerations of repose intervene and become important. Disturbance of the Navy lists is prejudicial to the service, and should not be sanctioned where doubt exists respecting the appropriate action, and where a considerable length of time has elapsed. (File 8171-03; file 9019-01; 13 Op. J. A. G., 127; see also file 1957-03, 7794-02; 26255-83-4, Aug. 4, 1911; 11130-35, Dec. 20, 1916.)

The action taken at the time an officer's commission was issued should be regarded as conclusive by subsequent administrations, and his case should not therefore be reopened. Opinions regarding doctrine of *res judicata* in administrative action considered and applied. (File 11130-6, Dec. 23, 1909; see also note to sec. 417, R. S.; and see file 2346-1, Aug. 23, 1905.)

SECTION 4. [Impeachment of civil officers.] The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

### ARTICLE III.

SECTION 1. [Courts of United States; terms and compensation of judges.] The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

"Of all the courts which the United States may, under their general powers, constitute, one only—the Supreme Court—possesses jurisdiction derived immediately from the Constitution, and of which the legislative power can not deprive it. All other courts created by the General Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the General Government will authorize them to confer \* \* \*. The power which Congress possesses to create

courts of inferior jurisdiction necessarily implies the power to limit the jurisdiction of those courts to particular objects \* \* \*. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense." (U. S. v. Hudson, 7 Cranch, 32.)

See note to Article I, section 8, clause 9, as to the judicial system of the United States, and the status of courts-martial.

SECTION 2. [CLAUSE 1. **Extent of the judicial power.**].—<sup>1</sup> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

**Political questions.**—"Those questions which respect the rights of a part of a foreign empire which asserts, or is contending for, its independence, and the conduct which must be observed by the courts of the Union toward the subjects of such section of an empire who may be brought before the tribunals of this country \* \* \* are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise, to whom are intrusted all its foreign relations, than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it. In such contests a nation may engage itself with the one party or the other—may observe absolute neutrality—or may make a limited recognition of it. The proceedings in the court must depend so entirely on the course of the Government that it is difficult to give a precise answer to questions which do not refer to a particular nation. It may be said, generally, that if the

Government remains neutral, and recognizes the existence of a civil war, its courts can not consider as criminal those acts of hostility which war authorizes, and which the new Government may direct against the enemy. To decide otherwise, would be to determine that the war prosecuted by one of the parties was unlawful, and would be to array the nation to which the court belongs against that party. This would transcend the limits prescribed to the judicial department." (U. S. v. Palmer, 3 Wheat., 610; see also *The Divina Pastora*, 4 Wheat., 52; *The Santissima Trinidad*, 7 Wheat., 283; and *Kennett v. Chambers*, 14 How., 38.)

"Can there be any doubt that when the executive branch of the Government, which is charged with the foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view, it is not material to inquire nor is it the province of the court to determine whether the Executive be right or wrong. It is enough to know that in the exercise of his constitutional functions he has de-



cided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and Government of the Union. If this were not the rule, cases might often arise in which, on most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States, whilst the other would consider it in a state of war. No well-regulated government has ever sanctioned a principle so unwise and so destructive of national character." (*Williams v. Suffolk Ins. Co.*, 13 Pet., 415.)

"Who is the sovereign *de jure* or *de facto* of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any Government conclusively binds the judges, as well as all other officers, citizens, and subjects of the Government. All courts are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the Government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence nor in accord with the pleadings." (*Jones v. U. S.*, 137 U. S., 202.)

"If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this, respecting the boundaries of nations, is, as has been truly said, more a political than a legal question, and in its discussion the courts of every country must respect the announced will of the legislature." (*Foster v. Neilson*, 2 Pet., 253; see also *Ex parte Cooper*, 143 U. S., 472.)

The ratification and existence of a treaty are political questions. (*Doe v. Braden*, 16 How., 635; *Terlinden v. Ames*, 184 U. S., 270.) Whether a particular individual is to be recognized as the accredited diplomatic representative of a foreign Government, is a political question. (*In re Baiz*, 135 U. S., 403.) As to which of two contesting factions is the *de jure* government of a State of the Union is a political question (*Luther v. Borden*, 7 How., 1), as is the question of the necessity for calling out the militia (*Martin v. Mott*, 12 Wheat., 19), and also the question when troops of the United States should be withdrawn from Cuba, which was presented during its military occupation. (*Neely v. Henkel*, 180 U. S., 109.)

With reference to a bill filed to restrain the Secretary of War and officers of the Army from executing certain acts of Congress providing for a military government in the State of Georgia, the court stated in its opinion: "That these matters, both as stated in the body of the bill and in the prayers for relief, call for the judgment of the court upon political questions and upon rights, not of person or property but of a political character, will hardly be denied. For

the rights for the protection of which our authority is invoked are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State with all its constitutional powers and privileges. No case of private rights or private property infringed or in danger of actual or threatened infringement, is presented by the bill in a judicial form for the judgment of the court." (*Georgia v. Stanton*, 6 Wall., 50.)

**International law.**—"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these to the works of jurists and commentators who, by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat." (*The Paquete Habana*, 175 U. S., 677.)

"International law, in its widest and most comprehensive sense, \* \* \* is part of our law and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination. The most certain guide, no doubt, for the decisions of such questions, is a treaty or a statute of this country. But when \* \* \* there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations." (*Hilton v. Guyot*, 159 U. S., 113.)

"An act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." (*The Charming Betsy*, 2 Cranch, 64.)

"Until an act be passed, the court is bound by the law of nations, which is a part of the law of the land." (*The Nereide*, 9 Cranch, 388.)

A public vessel of war of a foreign sovereign at peace with the United States, coming into our ports and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country. (*The Exchange*, 7 Cranch, 116.)

**Admiralty and maritime jurisdiction.**—"The general maritime law is only so far applicable as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law, or the laws of war, which have the effect of law in no country further than they are accepted and received as such." (*The Lottawanna*, 21 Wall., 558.)

The cession of all cases of admiralty and maritime jurisdiction to the Federal Government can not be construed as a cession of the waters on which those cases may arise. This article was not intended for the cession of territory or of general jurisdiction. It was obviously

designed for other purposes. It is in the eighth section of the second article that we are to look for cessions of territory and of exclusive jurisdiction. It is to be observed that the power of exclusive legislation (which is jurisdiction) is united with cession of territory which is to be the free act of the States. It is difficult to compare the two sections together without feeling a conviction, not to be strengthened by any commentary on them, that in describing the judicial power the framers of our Constitution had not in view any cession of territory, or which is essentially the same, of general jurisdiction. It is not questioned that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction is in the

government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still the general jurisdiction over the place subject to this grant of power adheres to the territory as a portion of the sovereignty of the State not yet given away. Accordingly, under a Federal law providing for the punishment of murder committed on the high seas, or in any river, haven, basin, or bay out of the jurisdiction of any particular State, it was held that murder committed on board a warship of the United States in Boston Harbor was not cognizable by the Federal courts, as the waters of the harbor were within the jurisdiction of the State of Massachusetts. (*U. S. v. Bevans*, 3 Wheat., 336.)

[**CLAUSE 2. Jurisdiction of Supreme Court.**]<sup>2</sup> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[**CLAUSE 3. Jury trials; places of holding.**]<sup>3</sup> The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

See note to Article I, section 8, clause 14, "Trials by jury not required in the Navy; and Amendments, Article VI, "Jury trial."

**SECTION 3. [CLAUSE 1. Treason defined; evidence required to convict.]**<sup>1</sup> Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

**War must be actually levied against the United States.**—"However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war and actually to levy war are distinct offenses. \* \* \* It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. \* \* \* It is, therefore, more safe, as well as more consonant to the principles of our Constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the Constitutional definition should receive such punishment as the legislature in its wisdom may provide." (*Ex parte Bollman*, 4 Cranch, 75; see also *U. S. v. The Insurgents*, 2

Dall., 335; *U. S. v. Mitchell*, 2 Dall., 348; *U. S. v. Burr*, 4 Cranch, 469, 25 Fed. Cas. No. 14692; *U. S. v. Hoxie*, 26 Fed. Cas. No. 15407.)

**Foreigner may be guilty.**—"As a foreigner domiciled in the country he was bound to obey all the laws of the United States not immediately relating to citizenship, and was equally amenable with citizens to the penalties prescribed for their infraction. He owed allegiance to the government of the country so long as he resided within its limits, and can claim no exemption from the statutes passed to punish treason, or the giving of aid and comfort to the insurgent states. The law on this subject is well settled and universally recognized." (*Radich v. Hutchins*, 95 U. S., 210; see also *Carlisle v. U. S.*, 16 Wall., 147; *U. S. v. Villato*, 2 Dall., 370.)

**Statutory definition.**—"Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason." (Sec. 1, Criminal Code, act Mar. 4, 1909, 35 Stat., 1088.)

[**CLAUSE 2. Punishment of treason.**]<sup>2</sup> The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.



**Punishment.**—"Whoever is convicted of treason shall suffer death; or at the discretion of the court, shall be imprisoned not less than five years and fined not less than ten thousand dollars, to be levied on and collected out of any or all of his property, real and personal, of which he was the owner at the time of committing

such treason, any sale or conveyance to the contrary notwithstanding; and every person so convicted of treason shall, moreover, be incapable of holding any office under the United States." (Sec. 2, Criminal Code, Act Mar. 4, 1909, 35 Stat., 1088; see also sec. 1624, R. S., art. 4.)

## ARTICLE IV.

**SECTION 1. [Full faith and credit between States as to public records, etc.]** Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

**SECTION 2. [CLAUSE 1. Privileges and immunities of citizens.]** <sup>1</sup> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

**[CLAUSE 2. Extradition between States.]** <sup>2</sup> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

**Persons in Navy.**—There is no act of Congress authorizing a call by the governor of a State for the surrender of an officer of the Navy charged with having broken the peace of such State, nor any law authorizing an arrest by the Executive with a view to a forcible surrender by him for the purposes of trial. (1 Op. Atty. Gen., 244. See also note to Art. I, sec. 8, clause 13, "Exemption of Federal officers and subordinates from arrest by State authorities;" Art. I, sec. 8, clause 14, "Jurisdiction of civil authorities over persons in military and naval service;" and note to sec. 355, R. S.)

In the absence of legal provision for delivery to the civil authorities of a State of persons in the military service, on original demand made upon the President, it rests in "the discretion of the President in what cases he will exercise his military authority over the citizens composing the Army to constrain them to surrender themselves to the civil authorities of the States." The President in such cases may properly adopt, by analogy, the principle of the Constitution relative to the surrender of fugitives by the governors of the States, applying the details of the statute enacted thereunder, "so far as to require the demand to be made by the governor of the State or Territory to which the complainant belongs, on the copy of an indictment found or an affidavit made specifying the particular offense and authenticated as by that act is provided." (2 Op. Atty. Gen., 12.)

Should the civil authorities undertake collusively to obstruct or impede the military authorities in the exercise of their just and

appropriate jurisdiction of a charge in its military relations, it would be the bounden duty of the military authorities to maintain their jurisdiction and to yield it only to an order of the President for good cause or to the ultimate decision of the law by the Supreme Court of the United States. (6 Op. Atty. Gen., 413, 429.)

In cases where a person in the Navy is desired by State authorities for trial upon criminal charges the Secretary of the Navy in practice authorizes his surrender by the immediate commanding officer of the man upon presentation of warrant in due form and proper hands, provided that the man concerned is not a naval prisoner and satisfactory assurances are given as to his return without expense to the United States when the proceedings against him are completed, provided his return is then desired by the naval authorities. This applies to cases where the man is serving at a navy yard or other place within the limits of the State which desires his surrender. In other cases—that is, where the man is outside the State—"requisition for the delivery of the party must be made by the governor or chief executive of such State, addressed to the Secretary of the Navy, showing that the party desired is charged with a crime in that State for which he could be extradited under the Constitution of the United States, the enactments of Congress, and the laws of the State desiring his delivery." (See G. O. No. 121, Navy Dept., Sept. 17, 1914, which contains detailed instructions concerning the delivery of men to civil authorities; see also sec. 5278, R. S., as to interstate extradition of fugitives from justice.)

**[CLAUSE 3. Persons held to service or labor.]** <sup>3</sup> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such

Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION 3. [CLAUSE 1. Admission and formation of new States.] <sup>1</sup> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[CLAUSE 2. Power of Congress over territory and other property.] <sup>2</sup> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

- I. POWER OF CONGRESS OVER TERRITORY.
- II. GOVERNMENT OF CEDED AND CONQUERED TERRITORY.
- III. MILITARY GOVERNOR'S POWER IN ABSENCE OF LEGISLATION.
- IV. STATUS OF INSULAR POSSESSIONS.
- V. APPLICATION OF CONSTITUTION TO TERRITORIES.
- VI. STATUS OF INHABITANTS OF INSULAR POSSESSIONS.

#### I. POWER OF CONGRESS OVER TERRITORY.

**Sources of power to govern territories.**—“The term territory as here used is merely descriptive of one kind of property and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation, and has been considered the foundation upon which the territorial governments rest.” (U. S. v. Gratiot, 14 Pet., 526.)

“The power of Congress to organize territorial governments and make laws for their inhabitants arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States as from the ownership of the country in which its territories are, and the right of exclusive sovereignty which must exist in the National Government and can be found nowhere else.” (U. S. v. Kagama, 118 U. S., 375.)

The power to govern “is an authority which arises not necessarily from the territorial clause of the Constitution but from the necessities of the case and from the inability of the States to act on the subject.” (De Lima v. Bidwell, 182 U. S., 1.)

“The power of governing and legislating for a territory is the inevitable consequence of the right to acquire and hold property. Could this possibly be contested, the Constitution of the United States declares that ‘Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States.’” (Sere v. Pitot, 6 Cranch, 332; see also American Ins. Co. v. Canter, 1 Pet., 511.)

“The power of Congress over the territories of the United States is \* \* \* general and plenary, arising from and incidental to the right to acquire the territory itself and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property of the United States. It would be absurd to hold that the United States has the power to acquire territory and no power to govern it when acquired.” (Late Corporation of the Church of Jesus Christ v. U. S., 136 U. S., 1.)

“The power there given [Art. IV, sec. 3, clause 2], whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to or was claimed by the United States, and was within their boundaries as stated by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign Government. It was a special provision for a known and particular territory and to meet a present emergency and nothing more. A brief summary of the history of the times, as well as the careful and measured terms in which the article is framed, will show the correctness of this proposition.” (Scott v. Sandford, 19 How., 393; opinion of Chief Justice Taney.)

“There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States, or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way except by the admission of new States. \* \* \* But no power is given to acquire a territory to be held and governed permanently in that character. \* \* \* It is acquired to become a State and not to be held as a colony and governed by Congress with absolute authority; and as the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State upon an equal footing with the other States, must rest upon the same discretion. It is a question for the political department of the Government and not the judicial; and whatever the political department of the Government shall recognize as within the limits of the United States the judicial department is also bound to recognize



and to administer in it the laws of the United States so far as they apply, and to maintain in the territory the authority and rights of the Government and also the personal rights and rights of property of the individual citizens as secured by the Constitution. All we mean to say on this point is that, as there is no express regulation in the Constitution defining the power which the General Government may exercise over a person or property of a citizen in a territory thus acquired, the court must necessarily look to the provisions and principles of the Constitution and its distribution of powers for the rules and principles by which its decision must be governed." (*Scott v. Sandford*, 19 How., 393; opinion of Chief Justice Taney.)

## II. GOVERNMENT OF CEDED AND CONQUERED TERRITORY.

**Government of conquered territory during war.**—See note to Article I, section 8, clause 11.

**Government of conquered and ceded territory after war.**—The government established by the military commanders, by authority of the President as Commander-in-Chief, in upper California, which was conquered by the United States forces during the War with Mexico, lawfully continued in existence after the treaty of peace by which the territory was formally annexed to the United States, and until Congress had legislated for its government. "The territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with power also to admit new States into this Union, with only such limitations as are expressed in the section in which this power is given. The government of which Col. Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the Army and Navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the Government. And the more so as it was continued until the people of the territory met in convention to form a State government, which was subsequently recognized by Congress under its powers to admit new States into the Union." (*Cross v. Harrison*, 16 How., 164.)

"The opinion [*Cross v. Harrison*] which is a long one, establishes the three following propo-

sitions: (1) That under the war power the military governor of California was authorized to prescribe a scale of duties upon importations from foreign countries to San Francisco and to collect the same through a collector appointed by himself until the ratification of the treaty of peace. (2) That after such ratification duties were legally exacted under the tariff laws of the United States, which took effect immediately. (3) That the civil government established in California continued from the necessities of the case until Congress provided a Territorial government." (*De Lima v. Bidwell*, 182 U. S., 1.)

"We have no doubt, however, that from the necessities of the case, the right to administer the government of Porto Rico continued in the military commander after the ratification of the treaty and until further action by Congress." (*Dooley v. U. S.*, 182 U. S., 222.)

"By the ratification of the treaty of peace, Porto Rico ceased to be subject to the Crown of Spain and became subject to the legislative power of Congress. But the civil government of the United States can not extend immediately and of its own force over conquered and ceded territory. Theoretically Congress might prepare and enact a scheme of civil government to take effect immediately upon the cession, but practically there always have been delays and always will be. Time is required for a study of the situation and for the maturing and enacting of an adequate scheme of civil government. In the meantime, pending the action of Congress, there is no civil power under our system of government, not even that of the President as civil executive, which can take the place of the government which has ceased to exist by the cession. Is it possible that under such circumstances there must be an interregnum? We think clearly not. The authority to govern such ceded territory is found in the laws applicable to conquest and cession. That authority is the military power under the control of the President as Commander in Chief." (*Santiago v. Noguera*, 214 U. S., 260.)

**Guam and Tutuila.**—"The political status of these islands is anomalous. Neither the Constitution nor the laws of the United States have been extended to them, and the only administrative authority existing in them is that derived mediately or immediately from the President as Commander in Chief of the Army and Navy of the United States. On December 23, 1898, the President placed the island of Guam under the control of the Department of the Navy with direction that the Secretary 'will take such steps as may be necessary to establish the authority of the United States and to give it the necessary protection and government'; and in pursuance of the authority thus conferred the then Secretary appointed a naval officer as 'naval governor of the island of Guam, this duty being in addition to your (his) duty as commander of a division of the Asiatic Fleet.' And on February 19, 1900, the President likewise turned over to your [Navy] department the control of the island of Tutuila and the other islands of the Samoan group belonging to the United States, for the purposes of a naval station. A naval officer was detailed by the Secretary to assume command of such station, the

order concluding as follows: 'Your position as commandant will invest you with authority over the islands in the group within the limits of the station.' In the one case, therefore, a naval governor was appointed, and in the other the commandant was invested with gubernatorial functions over the islands in the group embraced within the limits of the station." (25 Op. Atty. Gen., 292, holding that commissions in the usual form may be issued by the President to the naval officers serving as governors of these islands; see also 25 Op. Atty. Gen., 59, 128, 242.)

"Guam is an unorganized territory of small extent, concerning which Congress has abstained from legislating almost wholly; \* \* \* Congress will doubtless, at the proper time, take up the subject and legislate for Guam, either by special laws fitted to its situation and condition, or by extending to it, as it did in the case of Alaska, Porto Rico, and Hawaii, the general laws of the United States not locally inapplicable." (25 Op. Atty. Gen., 128; see also Annual Report of Secretary of the Navy, 1907, pp. 25, 26, recommending that Congress by legislation provide a system of government for these islands.)

In Guam "a complete government has been instituted and conducted by the Navy Department through an officer of the Navy appointed as governor by the Secretary and commissioned by the President under an order of President McKinley \* \* \*. This order was dated December 23, 1898, and of course was an exercise of the war power, and the executive government thus established seems to have survived and continued since the ratification of the treaty, with the silent acquiescence of Congress, in accordance with the doctrine that a temporary and provisional government of this nature continues *ex necessitate rei* until further action by Congress. (*Dooley v. United States*, 182 U. S., 222, citing *Cross v. Harrison*, 16 How., 164.) The Guam government did not grow out of a military reservation, but was a military government of the entire island in consequence of occupation and conquest from Spain." (26 Op. Atty. Gen., 98.)

The Supreme Court of the District of Columbia has no jurisdiction in a *habeas corpus* proceeding instituted against the Secretary of the Navy to inquire into the grounds of the detention of a person in the island of Guam pursuant to the sentence of the civil court established in that island. "We are compelled to give a negative answer to the question, notwithstanding it may possibly be that the party on whose behalf the petition is presented is restrained of his liberty under the order of a tribunal unknown to the Constitution and law, and is without certain remedy in any other court." (*McGowan v. Moody*, 22 App. D. C., 148.)

Guam having been ceded to the United States by the Treaty of Paris of December 10, 1898, was necessarily governed by the military power of this country because the island has never been organized as a Territory. Those acts of Congress which provide for the punishment of offenses not specially provided for by any law of the United States and which also provide for the trial of such offenses in courts of the United States Territories provided with

organized Territorial government do not exclude the exercise of the military authority to punish offenders by virtue of the regulations. (*Woog v. U. S.*, 48 Ct. Cls., 80.)

The existing governments in Guam and Samoa have been recognized by Congress in various enactments, as, for example, the act of June 28, 1906 (34 Stat., 552), providing for the acknowledgment of deeds, etc., affecting lands in the District of Columbia or any territory of the United States.

### III. MILITARY GOVERNOR'S POWER IN ABSENCE OF LEGISLATION.

**Authority of military commander.**—"It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country—that is, laws which are intended for the protection of private rights—continue in force until abrogated or changed by the new government or sovereign. \* \* \* As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus \* \* \* the laws of a country in support of an established religion or abridging the freedom of the press, or authorizing cruel and unusual punishments and the like would at once cease to be of obligatory force, without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws, affecting the possession, use, and transfer of property and designed to secure good order and peace in the community and promote its health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until by direct action of the new government they are altered or repealed." (*Chicago, etc., R. Co. v. McGlimm*, 114 U. S., 547.)

[The joint resolution of Congress providing for the annexation of the Hawaiian Islands as a part of the territory of the United States contained a provision that "the municipal legislation of the Hawaiian Islands \* \* \* not inconsistent with this joint resolution nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." *Held*, that the laws of Hawaii continued in effect, which provided for the trial of criminal offenses without compliance with the requirements of the Federal Constitution as to presentment and indictment by grand jury and trial by jury. (*Hawaii v. Mankichi*, 190 U. S., 197.)]

"While his [military commander's] power is necessarily despotic, this must be understood rather in an administrative than in a legislative sense. While in legislating for a conquered territory he may disregard the laws of that country, he is not wholly above the laws of his own. For instance, it is clear that while a military commander during the Civil War was in occupa-



tion of a Southern port he could impose duties upon merchandise arriving from abroad, it would hardly be contended that he could also impose duties upon merchandise arriving from ports of his own country. His power to administer would be absolute, but his power to legislate would not be without certain restrictions—in other words, they would not extend beyond the necessities of the case.” (*Dooley v. U. S.*, 182 U. S., 222.)

“The authority of the President as Commander in Chief to exact duties upon imports from the United States [into Porto Rico] ceased with the ratification of the treaty of peace, and her right to the free entry of goods from the ports of the United States continued until Congress should constitutionally legislate upon the subject.” (*Dooley v. U. S.*, 182 U. S., 236.)

An order issued by the officer in command of the forces of the United States in South Carolina during the period of reconstruction, wholly annulling a decree rendered by a court of chancery in that State in a case within its jurisdiction, was void. It was an arbitrary stretch of authority, needful to no good end that can be imagined. Whether Congress could have conferred the power to do such an act is a question not presented. “It is an unbending rule of law that the exercise of military power where the rights of the citizen are concerned shall never be pushed beyond what the exigency requires.” (*Raymond v. Thomas*, 91 U. S., 712.)

“The instructions to the governor [of Guam], dated January 12, 1899, prior to the ratification of the treaty of peace with Spain, contained the following: ‘Within the absolute domain of naval authority, which necessarily is and must remain supreme in the ceded territory until the legislation of the United States shall otherwise provide, the municipal laws of the territory, in respect to private rights and property and the repression of crime, are to be considered as continuing in force and to be administered by the ordinary tribunals as far as practicable. The operations of civil and municipal government are to be performed by such officers as may accept the supremacy of the United States by taking the oath of allegiance or by officers chosen as far as may be practicable from the inhabitants of the island.’ These instructions seem not to have been superseded in June and July, 1900. Their recognition of the continuance in force of the municipal laws of the territory was not intended as more than a recognition of what would have been presumed in the absence of instructions and can not be regarded as intended to deny the power of the governor to alter the laws. They were continued in force as to the inhabitants among themselves, but not to control the governor; that is to say, the government itself. His power as military governor was intended to be plenary. He had authority to do what the exigencies of military government required, and held the supreme legislative, executive, and judicial authority of the island. At that time, in that distant and little-known island, the President could not do otherwise than leave him a large discretion, and his acts should not be held void upon strictly technical reasoning.” (25 Op. Att’y Gen., 59.)

The naval governor of Guam “exercises plenary powers, subject to the supervision of the Secretary of the Navy and, of course, of the President, over all public affairs of the island of Guam, including the organization and procedure of the local courts in civil and criminal matters;” his authority extends “to the granting of reprieves and pardons, one of the highest prerogatives of sovereignty and executive power,” and includes “the modification of laws and the abolition and institution of courts;” he “has authority to prescribe the form of penal code to be administered and to modify said code at his pleasure, subject to the approval of his superiors.” (File 9351-976, Dec. 3, 1910.)

In a case in which an enlisted man of the Marine Corps was sentenced by the civil courts in Guam to “banishment for six months,” this being an undesirable punishment to impose upon members of the Government forces, the governor of Guam may be directed by the Secretary of the Navy to remit that portion of the sentence in the case presented and “to issue immediately the necessary order or decree abolishing the punishment of banishment as an appropriate sentence to be adjudged by the civil courts of said island in the cases of all persons in the naval or military service of the United States.” (File 9351-976, Dec. 3, 1910.)

In the absence of congressional legislation, authority of the naval governor of Guam is supreme. He is accordingly authorized to designate place of confinement for prisoner of the naval government of Guam, within territory under sovereignty of the United States. His action in designating a prison in the Philippine Islands as place of confinement meets with approval of the Secretary of the Navy in the case of a civilian convicted by the courts of Guam of misappropriation of public funds while postmaster at Guam. (File 9351-1436:4, June 3, 1915.)

#### IV. STATUS OF INSULAR POSSESSIONS.

**Status of conquered and ceded territory after war.**—Military possession of foreign territory is not of itself sufficient to change its foreign character. (See cases noted under Art. I, sec. 8, clause 11, “Power to acquire territory.”) “Nor is a treaty ceding such territory sufficient without a surrender of possession.” But there is no authority “for holding that a district ceded to and in the possession of the United States remains for any purpose a foreign country. Both these conditions must exist to produce a change of nationality for revenue purposes.” (*De Lima v. Bidwell*, 182 U. S., 1, as to status of Porto Rico; see also *Dooley v. U. S.*, 182 U. S., 236; and *Downes v. Bidwell*, 182 U. S., 263.)

“The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the customs union presupposes that a country may be domestic for one purpose and foreign for another. It may undoubtedly become necessary for the adequate administration of a domestic territory to pass a special act providing the proper machinery and officers, as the President would have no authority, except under the war power, to administer it himself; but no act is necessary to make it domestic territory if once

it has been ceded to the United States." (De Lima v. Bidwell, 182 U. S., 1.)

"The Philippines, like Porto Rico, became by virtue of the treaty ceded conquered territory, or territory ceded by way of indemnity. The territory ceased to be situated as Castine was when occupied by the British forces in the War of 1812, or as Tampico was when occupied by the troops of the United States during the Mexican War, 'cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was a part.' \* \* \*. The Philippines were not simply occupied, but acquired, and, having been granted and delivered to the United States by their former master, were no longer under the sovereignty of any foreign nation." (Fourteen Diamond Rings v. U. S., 183 U. S., 177; see also Lincoln v. U. S., 197 U. S., 427.)

A port in the island of Guam is not a "port of the United States" within the meaning of section 4347, Revised Statutes, as amended, prohibiting the transportation of merchandise in foreign bottoms from one port of the United States to another port of the United States. This legislation has not been expressly extended to include trade with Guam, which is an unorganized territory of small extent, concerning which Congress has abstained from legislating almost entirely; "and I do not think, in view of this inaction of the legislative body, that we should search among old statutes for fragments of law which we can, by construction, apply to the island." (25 Op. Atty. Gen., 128.)

#### V. APPLICATION OF CONSTITUTION TO TERRITORIES.

**Whether constitutional limitations restrict Congress in legislating for Territories.**—"The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion they are represented by the Government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be admitted in respect to this as to every power of society over its members, that it is not absolute and unlimited." (Murphy v. Ramsey, 114 U. S., 15.)

"Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and distinct application of its provisions." (Mormon Church Case, 136 U. S., 1; American Publishing Co. v. Fisher, 166 U. S., 464.)

"While, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any

or all of the Territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free governments, which can not be with immunity transcended. \* \* \* But this does not suggest that every express limitation of the Constitution which is applicable has not force, but only signifies that even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they can not be transgressed, although not expressed in so many words in the Constitution." (Downes v. Bidwell, 182 U. S., 244.)

"Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to form and manner in which a conceded power may be exercised, but which are absolute denials of all authority under any circumstances or conditions, to do particular acts. In the nature of things, limitations of this character can not, under any circumstances, be transcended, because of complete absence of power." (Downes v. Bidwell, 182 U. S., 244.)

"There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time and place, and such as are operative only 'throughout the United States,' or among the several States. Thus, when the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill of that description. Perhaps the same remark may be applied to the fifth amendment, that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people to peacefully assemble and to petition the Government for a redress of grievances.' We do not wish, however, to be understood as expressing an opinion how far the Bill of Rights contained in the first eight amendments is of general and how far of local application. \* \* \* We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property, to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government." (Downes v. Bidwell, 182 U. S., 244, opinion Mr. Justice Brown.)



To hold that the prohibitions of the fourth amendment, against unreasonable searches and seizures, is a restriction upon Congress and yet not a restriction upon a government created by Congress, would be a contradiction of terms. Accordingly, *held* that the fourth amendment is applicable to territorial governments. (*Territory v. Cutinola*, 4 N. Mex., 305, 14 Pac., 809.)

"Whatever may be finally decided by the American people as to the status of these islands and their inhabitants—whether they shall be introduced into the sisterhood of States or be permitted to form independent governments—it does not follow that in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled, under the principles of the Constitution, to be protected in life, liberty, and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States. \* \* \* We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect." (*Downes v. Bidwell*, 182 U. S., 244, opinion Mr. Justice Brown.)

"The Constitution speaks, not simply to the States in their organized capacities, but to all peoples, whether of States or Territories, who are subject to the authority of the United States." (*Downes v. Bidwell*, 182 U. S., 244, opinion Mr. Justice Harlan, dissenting.)

"There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this district [District of Columbia] may be lawfully deprived of the benefit of any of the constitutional guaranties of life, liberty, and property—especially of the privilege of trial by jury in criminal cases." (*Callan v. Wilson*, 127 U. S., 540; see also *Capital Traction Co. v. Hof*, 174 U. S., 5.)

See *Rasmussen v. U. S.* (197 U. S., 522), holding the provisions of the Constitution applicable to Alaska; *Neely v. Henkel* (180 U. S., 122), holding Constitution not applicable to Cuba during military occupation by United States; *Hawaii v. Mankichi* (190 U. S., 211), as to Hawaii, holding that "most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation;" see also *Dorr v. U. S.* (195 U. S., 138) as to Philippines; and *Reynolds v. U. S.* (98 U. S., 145) and *Wilkerson v. Utah* (99 U. S., 133) as to Territory of Utah.

By section 1891, Revised Statutes, it was provided that "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere within the United States." ["Guam is an unorganized territory \* \* \*."] (25 Op.

Atty. Gen., 128.) So also are the Virgin Islands of the United States, notwithstanding the act of March 3, 1917 (39 Stat., 1132), providing a temporary government therefor. (32 Op. Atty. Gen., 118, construing sec. 1860, R. S., as amended.)]

When the Constitution has once been formally extended by Congress to Territories, neither Congress nor the Territorial legislature can enact laws inconsistent therewith. (*Downes v. Bidwell*, 182 U. S., 270.)

For decisions as to whether constitutional limitations restrict Congress in legislating for the Navy, see note to Article I, section 8, clause 14.

#### VI. STATUS OF INHABITANTS OF INSULAR POSSESSIONS.

**Citizenship in territories.**—The treaty of peace with Spain, ceding to the United States Porto Rico, Guam, and the Philippine Islands, provided that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress." The inhabitants of the Philippine Islands were declared "citizens of the Philippine Islands and as such entitled to the protection of the United States." (Act July 1, 1902, 32 Stat., 691.) The inhabitants of Porto Rico were declared "citizens of Porto Rico and as such entitled to the protection of the United States." (Act Apr. 12, 1900, 31 Stat., 77.) The naturalization act of June 29, 1906, section 30 (34 Stat., 606), provided for the naturalization, upon compliance therewith, of persons "not citizens who owe permanent allegiance to the United States." Inhabitants of Guam desiring to become citizens of the United States may be naturalized by application to a court of competent jurisdiction in the United States, but can not be naturalized by any court in Guam. (File 26252-90, Feb. 27, 1914, see also file 26252-96, Feb. 10, 1915; compare 29 Op. Atty. Gen., 521, as to Porto Rico, and see note to amendments, Article XIV.) The citizens of Hawaii were made citizens of the United States by act of April 30, 1900 (31 Stat., 141).

A citizen of Porto Rico is not eligible for appointment as second lieutenant in the Marine Corps (file 6730-04; as to eligibility for employment at navy yards, see file 3194-3 and 3194-4; and see *U. S. v. Bowyer*, 25 App. D. C., 121.)

By act of March 2, 1917 (39 Stat., 953, sec. 5), certain "citizens of Porto Rico" were declared citizens of the United States and provision was made for the naturalization of others.

Certain Danish citizens residing in the Virgin Islands of the United States were to be held "to have accepted citizenship in the United States," and provision was made for the naturalization of others by convention between the United States and Denmark, proclaimed January 25, 1917 (39 Stat. 1706, 1712). (See file 26252-143:3, July 14, 1919.)

**Native inhabitants of island possessions are not "aliens."**—"Citizens of Porto Rico, whose permanent allegiance is due to the United States; who live in the peace of the dominion of the United States; the organic law

of whose domicile was enacted by the United States and is enforced through officials sworn to support the Constitution of the United States, are not 'aliens' and upon their arrival by water at the ports of our mainland are not 'alien immigrants' within the intent and meaning of the act of 1891" providing for detention and deportation under certain conditions. (*Gonzales v. Williams*, 192 U. S., 1.)

**Naturalization of natives.**—"Citizens of the Philippine Islands or of Porto Rico, while not citizens of the United States, are not aliens, and, prior to the passage of the act of 1906 [34 Stat., 596], were not capable of being naturalized for two reasons: First, the naturalization laws of the United States applied only to aliens; and, second, they required a renunciation of former allegiance \* \* \*. The effect of section 30 [act of 1906] was to make applicable to

citizens of the Philippine Islands and Porto Rico those provisions which had theretofore applied only to aliens \* \* \*. Congress did not intend to extend the privilege of citizenship to those who had become citizens of the Philippine Islands under the act of 1902, unless they were free white persons or of African nativity or descent," as required by section 2169, Revised Statutes. Accordingly, *held* that "a citizen of the Philippine Islands who ethnologically was one-fourth white and three-fourths brown or Malay could not be naturalized," and the fact that he had service in the Navy did not affect his status under section 2169, Revised Statutes. (In re Alverto, 198 Fed. Rep., 688; see also note to amendments, Article XIV and see naturalization act of May 9, 1918.)

**For other cases**, as to citizenship in general, see note to amendments, Article XIV.

**SECTION 4. [States guaranteed protection and republican form of government.]** The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

**Use of naval vessel loaned to State for training of naval militia.**—"In accordance with the provisions of the Constitution and of the laws enacted in pursuance thereof, the President, in cases not affecting the execution of the laws or the protection of the property of the United States, may use the military or naval forces of the United States within the boundaries of the several States only on application of the legislature of the State, or, in case the legislature cannot be convened, on application of the governor. In other words, it is considered that the President, except as indicated, is not legally authorized to use, or permit to be used, the naval forces under his command to assist any particular State in the maintenance of law and order within its boundaries. As a naval vessel

is one of the integral and most important units going to make up the naval forces of the United States, it would seem that this prohibition to the use of the naval forces would extend to such an important part thereof as a naval vessel that is armed and equipped for war. \* \* \* Should occasion ever arise in the future making desirable the use of the *Montgomery* for the purposes referred to by the State, [to quell "riots, insurrection, or defiance of civil law within the State limits"] it is considered that the only lawful manner in which the vessel could be so used would be in accordance with the provisions of the Constitution, upon 'application of the legislature or of the executive (when the legislature cannot be convened)' made to the President." (File 4570-194, Mar., 15, 1915.)

## ARTICLE V.

**[Procedure to amend Constitution.]** The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

## ARTICLE VI.

**[CLAUSE 1. Validity of debts and engagements.]** <sup>1</sup> All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as



valid against the United States under this Constitution, as under the Confederation.

[CLAUSE 2. **Supreme law of the land.**] <sup>2</sup> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[CLAUSE 3. **Oaths of public officers; no religious test.**] <sup>3</sup> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

## ARTICLE VII.

[**Ratification of Constitution.**] The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In Witness whereof We have hereunto subscribed our Names,

GO WASHINGTON

*Presidt and deputy from Virginia*

*New Hampshire.*

JOHN LANGDON

NICHOLAS GILMAN

*Massachusetts.*

NATHANIEL GORHAM

RUFUS KING

*Connecticut.*

WM SAML JOHNSON

ROGER SHERMAN

*New York.*

ALEXANDER HAMILTON

*New Jersey.*

WIL: LIVINGSTON

WM PATTERSON

DAVID BREARLEY.

JONA: DAYTON

*Pennsylvania.*

B. FRANKLIN

THOMAS MIFFLIN

ROBT. MORRIS

GEO. CLYMER

THOS. FITZSIMONS

JARED INGERSOLL

JAMES WILSON

GOUV MORRIS

*Delaware.*

GEO: READ  
JOHN DICKINSON  
JACO: BROOM

GUNNING BEDFORD jun  
RICHARD BASSETT

*Maryland.*

JAMES McHENRY  
DANL CARROLL

DAN: of ST THOS JENIFER

*Virginia.*

JOHN BLAIR—

JAMES MADISON JR.

*North Carolina.*

WM BLOUNT  
HU WILLIAMSON

RICHD DOBBS SPAIGHT,

*South Carolina.*

J. RUTLEDGE  
CHARLES PINCKNEY

CHARLES COTESWORTH PINCKNEY  
PIERCE BUTLER.

*Georgia.*

WILLIAM FEW  
Attest:

ABR BALDWIN  
WILLIAM JACKSON, *Secretary.*

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

## [ARTICLE I.]

[Freedom of religion, speech, and press; and right of assembly and petition.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**The Bill of Rights.**—"The law is perfectly well settled that the first 10 amendments of the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well recognized exceptions arising from the necessities of the case." (Robertson v. Baldwin, 165 U. S., 275.)

"These securities in personal liberty, thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. \* \* \* Time has proven the discernment of our ancestors. \* \* \* Those great and good men fore-

saw that troublous times would arise when rulers and people would become restive under restraint and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of Constitutional liberty would be in peril unless established by irrevocable law. \* \* \* The Constitution of the United States is a law for rulers and people, equally in war and in peace. \* \* \* No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." (Ex parte Milligan, 4 Wall., 3, 120. But see note to Art. I, sec. 8, clause 11, "Military jurisdiction over civilians in time of war," and Art. I, sec. 9, clause 2.)



## [ARTICLE II.]

[The right to bear arms.] A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

"The provision of the Second Amendment to the Constitution, that 'the right of the people to keep and bear arms shall not be infringed,' is a limitation only on the power of Congress and the National Government, and not of the States. But in view of the fact that all citizens capable of bearing arms constitute the

reserved military force of the National Government, as well as in view of its general powers, the State can not prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security." (*Presser v. Illinois*, 116 U. S., 252.)

## [ARTICLE III.]

[Quartering of soldiers in houses.] No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

## [ARTICLE IV.]

[Security from unreasonable searches and seizures.] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**Unreasonable searches and seizures.**—"The constitutional guaranties of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail they can only be opened and examined under like warrant, issued upon similar oath or affirmation and particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution." (*Ex parte Jackson*, 96 U. S., 727.)

"Prison authorities have no right to open and inspect letters to or sent by prisoners without the consent of such prisoners. They may, however, retain unopened letters until the prisoner is released or the letters otherwise lawfully disposed of." (Art. 68, Manual for Government of United States Naval Prisons.)

The fourth and fifth amendments "throw great light on each other. For the 'unreasonable searches and seizures' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the fifth amendment, throws light on the

question as to what is an 'unreasonable search and seizure' within the meaning of the fourth amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." (*Boyd v. U. S.*, 116 U. S., 633.)

"The security intended to be guaranteed by the fourth amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted. But the English and nearly all of the American cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent." (*Adams v. New York*, 192 U. S., 597.) But one whose property has been illegally seized and is being held by officers of the law for the purpose of using same as evidence in a criminal prosecution, may recover the possession thereof by legal proceedings and thus prevent its being used against him. (*Weeks v. U. S.*, 232 U. S., 383. See further, note to Amendments, Art. V, "Self-Crimination.")

**Arrest of military offenders.**—"A deserter may be arrested by a military officer, or private duly authorized to make the arrest." (*In re Fair*, 100 Fed. Rep., 149, 152.)

An officer of the Army may lawfully arrest a deserter and hold him for trial by court-martial

without a warrant. (*Hutchings v. Van Bokkellen*, 34 Me., 126; cited in *Kurtz v. Mollitt*, 115 U. S., 501.)

"Of course the right of military officers, whether of the Army or Navy, to apprehend and return deserters is interwoven in the very fabric of the organization and administration both of the Army and the Navy." (File 5621-1, Nov. 17, 1906, Attorney General to Secretary of the Navy.)

In the absence of legislation, "a police officer of a State, or a private citizen, has no authority as such, without any warrant or military order, to arrest and detain a deserter from the Army of the United States." (*Kurtz v. Mollitt*, 115 U. S., 487; compare file 5621, letters from Attorney General to Secretary of the Navy, Sept. 18 and Nov. 17, 1906.)

It has been provided by statute "that it shall be lawful for any civil officer having authority under the laws of the United States or of any State, Territory, or District to arrest offenders, to summarily arrest a deserter from the Navy or Marine Corps of the United States and deliver him into the custody of the naval authorities." (Act Feb. 16, 1909, sec. 15, 35 Stat., 622; see also act June 18, 1898, 30 Stat., 484, with reference to the Army.)

"Deserters may legally be arrested (1) by any officer or duly authorized enlisted man in the naval service; (2) by any civil officer having general or special authority to arrest offenders within any given jurisdiction; (3) by private

detectives who are authorized to make arrests; and (4) by any person who is expressly authorized by the naval authorities to arrest deserters." (File 26516-92:1, Sept. 27, 1912; see also 26516-218.)

"When a deserter is delivered to the Navy, the fact that the person who arrested him was not authorized to make such an arrest is not legal ground for his discharge from naval custody \* \* \*. This is a matter in which the Government has no concern, persons who assume to arrest deserters without legal authority therefor doing so at their peril." (File 26516-92:1, Sept. 27, 1912.)

"A reward for the arrest of a deserter or straggler with authorized expenses incurred in his return to the service may be paid to a private detective agency notwithstanding the prohibition in the act of March 3, 1893 (27 Stat., 591), against the employment in any Government service of an 'employee of the Pinkerton Detective Agency, or similar agency.'" (File 26516-38, Dec. 3, 1910; file 26516-92:1, Sept. 27, 1912.)

The Navy Department "desires that detective work in connection with the apprehension and delivery of deserters from the Navy in the United States shall be confined to recognized police officers. It is considered undignified and undesirable to encourage or employ the services of private detectives or agents for such purposes, and the practice will be discontinued." (File 24918, July 17, 1907.)

## [ARTICLE V.]

[Indictment required; provision against double jeopardy and compulsory self-incrimination; protection of life, liberty, and property.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### I. INDICTMENT BY GRAND JURY.

### II. PROTECTION AGAINST DOUBLE JEOPARDY.

### III. COMPELLING PERSON TO BE WITNESS AGAINST HIMSELF.

### IV. PROTECTION OF LIFE, LIBERTY, AND PROPERTY.

### V. PRESENCE OF ACCUSED AT TRIAL.

### VI. REMEDY WHEN DUE PROCESS DENIED.

### I. INDICTMENT BY GRAND JURY.

**Infamous crime.**—A crime is "infamous" where it is punishable by imprisonment in a state prison or penitentiary, whether the accused is or is not sentenced or put to hard labor. "In determining whether the crime is infamous, the question is, Whether it is one for

which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one." (*In re Claasen*, 140 U. S., 200.)

"What punishments may be considered as infamous may be affected by the changes of public opinion from one age to another. In former times, being put in the stocks was not considered as necessarily infamous. And by the first judiciary act of the United States whipping was classed with moderate fines and short terms of imprisonment in limiting the criminal jurisdiction of the District courts to cases 'where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted.' \* \* \*. But at the present day either stocks or whipping might be thought an infamous punishment. For more than a century imprisonment at hard labor in the



State prison or penitentiary or other institution has been considered an infamous punishment in England and America." (Ex parte Wilson, 114 U. S., 417.)

**Grand jury.**—The limitation, "When in actual service in time of war or public danger," in this article, refers only to the militia, and does not apply to the regular land and naval forces. In respect to these latter, the power of Congress is irrespective of the actual condition of the country, and the same in time of peace as in time of war or public danger. (U. S. v. MacKenzie, 30 Fed. Cas. No. 18313; Johnson v. Sayre, 158 U. S., 114; In re Bogart, 3 Fed. Cas. No. 1596; see also Ex parte Mason, 105 U. S., 700.)

(As to trials by courts-martial, see note to Art. I, sec. 8, clause 14.)

## II. PROTECTION AGAINST DOUBLE JEOPARDY.

**Double jeopardy.**—By the Articles of War it is provided that "No person [in the Army] shall be tried a second time for the same offense." (Art. 102, sec. 1342, R. S.) There is no similar statute with reference to the Navy. As to whether this amendment of the Constitution applies to the Army and Navy, see note to Article I, section 8, clause 14, "Whether Constitutional limitations restrict Congress in legislating for Navy."

By the Articles for the Government of the Navy it is provided that "it shall be his [convening authority's] duty either to remit any part or the whole of any sentence [of a summary court-martial] the execution of which would, in the opinion of the surgeon or senior medical officer on board, given in writing, produce serious injury to the health of the person sentenced; or to submit the case again, without delay, to the same or to another summary court-martial, which shall have the power, upon the testimony already taken, to remit the former punishment and to assign some other of the authorized punishments in the place thereof." (Art. 33, sec. 1624, R. S.)

"The jeopardy of the law means a real peril, originally of life or limb, and always of substantial punishment or penalty. The provision of the Constitution is (fifth amendment): 'Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.' Another fundamental idea is that there must be a trial upon an indictment for an offense, or upon some equivalent charge and presentment, as by court-martial, submitting a definite issue and involving conviction or acquittal. The person must be in danger of condemnation; a mere inquiry or other informal proceeding (informal in a judicial sense), ending in a reprimand, does not satisfy either element of the principle of second jeopardy. Of course, if there is a trial in some form which *might* result in conviction and punishment, the jeopardy is none the less complete and valid as a bar to another trial because, in fact, it issues in a simple rebuke; for absolute acquittal, if the peril is real, is equally a bar. These principles indicate the logic underlying the old common-law pleas of *autrefois convict* and *autrefois acquit*." (25 Op. Atty. Gen., 623.)

An investigation by a board of inquest or by a court of inquiry is not a "trial" in any sense of an issue or of an accused person. (25 Op. Atty. Gen., 623.)

The reprimand of an officer by the commander in chief of a fleet, or by the Secretary of the Navy, does not bar subsequent trial by court-martial of the same officer for the same offense. (25 Op. Atty. Gen., 623; 28 Op. Atty. Gen., 622.)

Suspension of an officer from duty by his commanding officer, although imposed as punishment for an offense, does not bar subsequent trial by general court-martial for the same offense. (C. M. O. No. 7, 1914; C. M. O. No. 31, 1914.)

The commanding officer of a naval vessel in imposing punishment is not a court; his investigation of a charge is not a trial; his finding is not a conviction or acquittal; and the punishment which he decides to impose is not a sentence. (File 26251-6297:9, Dec. 28, 1914; C. M. O. 7, 1914; C. M. O. 31, 1914.)

A plea before a court-martial of a former arrest and discharge is bad; a former trial only is a defense under the Articles of War. Also, under this amendment, "a mere arrest, even in cases punishable in life or limb, is not considered as constituting this jeopardy. The principle is derived to us immediately from the common law. It is a maxim of this law, 'that a man shall not be brought into danger of his life more than once for the same offense;' but, to give the benefit of this maxim, it is necessary that he should have been actually *acquitted* or *convicted* on a former trial, and the record of this fact must be produced." (1 Op. Atty. Gen., 294.)

While not a legal bar to trial, it is "not free from legal censure" to bring an officer of the Army to trial for a charge which has once been "knowingly passed over." In such case the charge "ought not, either in candor or in justice, to be in future brought into question." (1 Op. Atty. Gen., 294.)

"The weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him; certainly so after acquittal." (Kepner v. U. S., 195 U. S., 100, citing Coleman v. Tennessee, 97 U. S., 509; see also Ex parte Glenn, 111 Fed. Rep., 261.)

"Undoubtedly in those jurisdictions where a trial of one accused of crime can only be by a jury and a verdict of acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. But protection being against a second trial for the same offense, it is obvious that where one has been tried before a competent tribunal having jurisdiction he has been put in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict or acquit." (Kepner v. U. S., 195 U. S., 100.)

"This principle is derived to us immediately from the common law." (1 Op. Atty. Gen., 294; 6 Op. Atty. Gen., 204.) It embodies the common-law rule in criminal trials, as expressed in the pleas of "*autres fois acquit*," or a former acquittal, and "*autres fois convict*" or a former conviction. (1 Op. Atty. Gen., 240.)

**Court must have jurisdiction.**—"We assume as indisputable, on principle and authority, that before a person can be said to have

been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged." (*Grafton v. U. S.*, 206 U. S., 345.)

**Acquittal on defective indictment is bar to second trial.**—"It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict, and it was found upon a defective indictment. The protection is not \* \* \* against the peril of second punishment, but against being tried for the same offense." (*Kepler v. U. S.*, 195 U. S., 100.)

"A general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing." (*U. S. v. Ball*, 163 U. S., 662.)

"As to the defendant who had been acquitted by the verdict duly rendered and received, the court could take no other action than to order his discharge. The verdict of acquittal was final and could not be reviewed on error or otherwise without putting him twice in jeopardy and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense." (*U. S. v. Ball*, 163 U. S., 662.)

"As the judgment [against an accused] stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment or of any lesser degree thereof. No power can wrest from him the right to so use that judgment." (*Trono v. U. S.*, 199 U. S., 521.)

**Returning record of court-martial for revision of its findings or sentence does not constitute trying the accused a second time for the same offense, in violation of this article.** (*Ex parte Reed*, 100 U. S., 13; *Swain v. U. S.*, 165 U. S., 553; *Carter v. McClaughry*, 183 U. S., 365; 6 Op. Atty. Gen., 204, 205.)

"Undoubtedly, errors are committed by courts-martial which a civil tribunal would regard as sufficient ground for a reversal for their judgments if it were sitting as an appellate court. But there is always this radical difference between an appellate court sitting for the correction of errors and a civil court into which the record of a court-martial is collateral; in the former there is not a failure of justice: the appellate court may reverse a judgment or prescribe another or award a new trial; in the latter the court must either give full effect to the sentence or pronounce it wholly void." (*Swain v. U. S.*, 28 Ct. Cls., 217.)

When a naval court-martial is ordered by the convening authority to revise its proceedings, new evidence shall not be admissible. (*Naval Courts and Boards*, 1917, sec. 375.)

"A court-martial on reversal does not rehear the case; it only reconsiders the record for the purpose of correcting or modifying any conclusions thereon. The true analogy of such a reversal, to take an example from the practice of civil courts, is the case of a jury sent out by the court to reconsider the verdict. Such is the

whole current of authorities, as well in the United States as in Great Britain." (6 Op. Atty. Gen., 205.)

**Offenses different in degree only.**—An acquittal of murder may be pleaded in bar of an indictment for manslaughter based upon the same killing; "because the latter charge was included in the former, and if it had so appeared on the trial the defendant might have been convicted of the inferior offense;" and an acquittal of manslaughter will preclude a future prosecution for murder, "for if he were innocent of the modified crime he could not be guilty of the same fact, with the addition of malice and design." (*Grafton v. U. S.*, 206 U. S., 333, 350, quoting *Chitty Cr. L.*)

**Offenses violating both military and civil law.**—"The subject of the civil responsibility of the Army was very carefully considered by Attorney General Cushing in Steiner's case (6 Op. Atty. Gen., 413) and the conclusion reached that an act criminal both by military and general law is subject to be tried either by a military or civil court, and that a conviction or acquittal by the civil authorities of the offense against the general law does not discharge from responsibility for the military offense involved in the same facts. The converse of this proposition is equally true." (*U. S. v. Clark*, 31 Fed. Rep., 710, 712.) [Note: In the Steiner case the Attorney General's opinion related to the jurisdiction of military and State courts, in a case where the offense was cognizable by both.]

But where both courts derive their jurisdiction from the United States, an acquittal by one may be pleaded in bar of trial by the other for an offense substantially identical, although called by a different name. Thus the acquittal by court-martial of a person belonging to the Army upon a charge of homicide was a valid bar to a trial of the same person for the same homicide by the courts of the Philippine Islands. (*Grafton v. U. S.*, 206 U. S., 333.)

"It may be difficult at times to determine whether the offense for which an officer or soldier is being tried is in every substantial respect the same offense for which he had been previously tried. We will not therefore attempt to formulate any rule by which every conceivable case must be solved." (*Grafton v. U. S.*, 206 U. S., 355.)

"Undoubtedly the general rule is that the jurisdiction of civil courts is concurrent as to offenses triable before courts-martial." (*Franklin v. U. S.*, 216 U. S., 559, 568, citing 6 Op. Atty. Gen., 413, 419, *U. S. v. Clark*, 31 Fed. Rep., 710.)

**Offenses violating the laws of two governments.**—"Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace



of the State, a riot, an assault, or a murder, and subject the same person to a punishment, under the State laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender can not be doubted. Yet it can not be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable." (*Moore v. Illinois*, 14 How., 20.)

"We do not call in question the correctness of the general doctrine \* \* \* that the same act may in some instances be an offense against two governments, and that the transgressor may be held liable to punishment by both when the punishment is of such a character that it can be twice inflicted, or by either of the two governments if the punishment from its nature can be only once suffered. It may well be that the satisfaction which the transgressor makes for the violated law of the United States is no atonement for the violated law of Tennessee." (*Coleman v. Tennessee*, 97 U. S., 509.)

The trial and punishment of a naval officer by the court of a foreign country for violating the laws of that country is not a bar to his trial by naval court-martial for violating the Articles for the Government of the Navy (sec. 1624, R. S.) by the same acts. (File 26251-8144, Nov. 22, 1913.)

**New trial upon motion of accused.**—If the accused seeks a new trial, or appeals from the judgment against him and asks for its reversal, he can not thereafter plead former jeopardy if he is successful in obtaining a reversal of the judgment. And if the judgment convicted him of a lesser offense than that charged and thereby acquitted him of the greater offense, he can not avail himself even of that part of the judgment which contained an acquittal, but upon his new trial may be convicted of the greater offense. By seeking a new trial the accused waives his right to the plea of former jeopardy. (*Trono v. U. S.*, 199 U. S., 521; *U. S. v. Ball*, 163 U. S., 662.)

Where an error has been committed in a trial by court-martial which is prejudicial to the accused, and the accused himself seeks to have the conviction disapproved and a new trial granted, he thereby waives his right to plead former jeopardy when brought to trial a second time for the same offense, and the court-martial is compelled to proceed with the trial. It was not the intention of the law to deny the accused the right to a new trial where prejudicial error has been committed and he himself seeks it. "Is there any mode by which his honor can be rescued from the imputation thrown upon it by an improper sentence of a first court, except that of ordering a second?" (1 Op. Atty. Gen., 233; see also 27 Op. Atty. Gen., 200.)

This principle is designed for the benefit of the accused, not for his prejudice; and "there is no principle in law better settled than that a party has the right to waive a rule designed merely for his own benefit." (1 Op. Atty. Gen., 233.)

"This provision is in accordance with a well-known doctrine of the law of England to the same effect. That is to say, by the common

law, as understood and administered both in England and the United States, there can not be a new trial *at the instance of the Government*, in a case of treason or felony, though there may be in a case of misdemeanor where a party is alleged to be improperly convicted, but not where he has been acquitted." (6 Op. Atty. Gen., 204, 205.)

"The granting of new trials after conviction and approval of sentence is not in accordance with the practice of military and naval courts. \* \* \* It is to be noted that it is only upon and as an incident to a disapproval of a sentence that a new trial can be allowed; after approval there can legally be no such proceeding." Any newly discovered matter of defense deemed to be of such importance as in a proceeding before a civil court to be made the basis of an application for a new trial may, in a naval case, be presented for consideration in connection with an application for Executive clemency." (File 6674-38, Apr. 30, 1907; C. M. O. 92-1918, p. 16.)

"[The Secretary of the Navy may set aside the proceedings, or remit or mitigate, in whole or in part, the sentence imposed by any naval court-martial convened by his order or by that of any officer of the Navy or Marine Corps." (Act Feb. 16, 1909, sec. 9, 35 Stat., 621.)]

**Trial interrupted before completion.**—"The law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. \* \* \* Such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial." (*U. S. v. Perez*, 9 Wheat., 579.)

"This is the settled law of the Federal courts." (*Keel v. Montana*, 213 U. S., 135.)

### III. COMPELLING PERSON TO BE WITNESS AGAINST HIMSELF.

**Self-crimination.**—The privilege granted by this article is not limited to the defendant on trial for crime, but includes all witnesses in criminal proceedings. (*Counselman v. Hitchcock*, 142 U. S., 562; *U. S. v. Kimball*, 117 Fed. Rep., 160.)

It is provided by statute with reference to naval general courts-martial and courts of inquiry "that no witness shall be compelled to incriminate himself or to answer any question which may tend to incriminate or degrade him." (Act Feb. 16, 1909, sec. 12, 35 Stat., 622.)

In trials by court-martial and proceedings before courts of inquiry the accused or person charged "shall, at his own request but not otherwise, be a competent witness." (Act Mar. 16, 1878, 20 Stat., 30; *Naval Courts and Boards*, 1917, secs. 138, 512.)

**Waiver of privilege.**—When an accused person voluntarily testifies in his own behalf, he

thereby waives his constitutional privilege as to the subject-matter of such testimony, and may be cross-examined thereon with the same latitude which is allowed in the cross-examination of ordinary witnesses. (*Fitzpatrick v. U. S.*, 178 U. S., 304.)

If a witness waives his privilege by answering questions of a criminating character, it is then too late for him to stop and he may be required to make a full disclosure of the facts relating thereto regarding which he is interrogated. (*Brown v. Walker*, 161 U. S., 591.)

It is decided by an abundance of authority that the privilege of refusing to testify is a purely personal one; that the witness may waive it; that no objection from the parties, on the score of crimination of the witness, can be entertained; and that the counsel for the witness can only be heard in defense of his right. It would seem to follow that where this right has been violated, it is for the witness to complain, and not the defendant. If ordered to testify in a case where he is privileged, it is a matter exclusively between the court and the witness. The latter may stand out and be committed for contempt, or he may submit; but the party has no right to interfere or complain of the error. Accordingly, if a court-martial committed an error in requiring a witness to answer, the error is not such as to require a disapproval of the proceedings. (17 Op. Atty. Gen., 616.)

**Duty of court.**—A witness can not avoid answering any question by the mere statement that the answer would tend to incriminate him, without regard to whether the statement is reasonable or not. It is for the judge before whom the question arises to decide whether an answer to the question may reasonably have a tendency to criminate the witness, or to furnish proof of an element or link in the chain of evidence necessary to convict him of a crime. (*Ex parte Irvine*, 74 Fed. Rep., 954.)

It is not sufficient to excuse the witness from testifying that he may, in his own mind, think his answer to the question might, by possibility, lead to a criminal charge against him, or tend to convict him of it if made. The court must be able to perceive that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. (*U. S. v. McCarthy*, 18 Fed. Rep., 87.)

However, "if the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact." (*U. S. v. Burr*, 25 Fed. Cas. No. 14692e, per Chief Justice Marshall; see also *Counselman v. Hitchcock*, 142 U. S., 547; *In re Shera*, 114 Fed. Rep., 207; *In re Kanter*, 117 Fed. Rep., 356.) But the court may compel an answer, if of opinion that no direct answer to the question could furnish evidence against the witness. (*U. S. v. Miller*, 26 Fed. Cas. No. 15772; see also, *In re Levin*, 131 Fed. Rep., 388.)

**When required to answer.**—Where it clearly appears to the court that a witness contumaciously or mistakenly refuses to furnish evidence which can not possibly injure him, he

will not be permitted to shield himself behind the privilege (*In re Kanter*, 117 Fed. Rep., 356); but the motive of the witness in pleading the privilege will not be inquired into "where, from the evidence and the nature of the question the court can definitely determine that the question, if answered in a particular way, will form a link in the chain of evidence to establish the commission of a crime by the witness. \* \* \*

It is only where the criminating effect of the question is doubtful that the motive of the witness may be considered, for in such a case his bad faith would have a tendency to show that his answer would not subject him to the danger of a criminal prosecution or help to prove him guilty of crime." (*Ex parte Irvine*, 74 Fed. Rep., 964.)

"If the testimony relate to criminal acts long since past, and against the prosecution of which the statute of limitations has run, or for which he has already received a pardon or is guaranteed an immunity, the amendment does not apply. \* \* \* The criminality provided against is a present, not a past criminality, which lingers only as a memory and involves no present danger of prosecution." (*Hale v. Henkel*, 201 U. S., 43.)

Witness may be required to answer by a Federal court, if there is a Federal statute granting him immunity, although his answers may expose him to prosecution in the State courts to which the Federal statute has no application. (*Brown v. Walker*, 161 U. S., 591.)

By section 860, Revised Statutes, a general provision was enacted with reference to witnesses giving criminating testimony in judicial proceedings, under which it was claimed that witnesses might be compelled to answer criminating questions, as they were protected from prosecution therefor by said section. However, section 860 proved ineffective for this purpose, as it was held by the courts not to be as broad as the privilege conferred by the Constitution. (*See Counselman v. Hitchcock*, 142 U. S., 547.) It was repealed by act of May 7, 1910, (36 Stat., 352). By act of February 11, 1893 (27 Stat., 443), Congress passed an immunity statute applicable to testimony given before the Interstate Commerce Commission, which was broader in its terms than section 860, Revised Statutes, and was upheld by the Supreme Court as requiring witnesses to answer. (*Brown v. Walker*, 161 U. S., 591; see also *Hale v. Henkel*, 201 U. S., 43, upholding an immunity statute enacted Feb. 25, 1903, 32 Stat., 904, with reference to prosecutions under the antitrust act.)

**A pardon must be accepted** before a witness may be required to answer questions connecting him with matters for which the pardon grants him immunity. The witness has the right, if he desires to do so, to refuse the pardon and decline to testify. (*Burdick v. U. S.*, 236 U. S., 79.) [The President "can pardon or relieve only when an offense against the law has been established by proof or the admissions of the party, and a penalty thereby incurred." (2 Op. Atty. Gen., 485; see also *Burdick v. U. S.*, 236 U. S., 79, in which this question was discussed but not decided.)]

"It is to be borne in mind that the power of the President under the Constitution to grant pardons and the right of a witness must be kept



in accommodation. Both have sanction in the Constitution, and it should therefore be the anxiety of the law to preserve both—to leave to each its proper place. In this, as in other conflicts between personal rights and the powers of government, technical—even nice—distinctions are proper to be regarded.” (*Burdick v. U. S.*, 236 U. S., 79.)

“The seizure or compulsory production of a man’s private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself, and, in a prosecution for a crime, penalty, or forfeiture is equally within the prohibition of the fifth amendment.” (*Boyd v. U. S.*, 116 U. S., 616.)

“We have been unable to perceive that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.” (*Boyd v. U. S.*, 116 U. S., 633; compare *Adams v. New York*, 192 U. S., 585.)

“The fact that papers which are pertinent to the issue may have been illegally taken from the possession of the party against whom they are offered is not a valid objection to their admissibility. The court considers the competency of the evidence, and not the method by which it was obtained \* \* \* and by the introduction of such evidence defendant is not compelled to incriminate himself.” (*Adams v. New York*, 192 U. S., 585, distinguishing *Boyd v. U. S.*, on the ground that in that case it was attempted to compel defendant to produce his books and papers, on the pain of having statements of Government’s counsel as to the contents thereof taken as true and used as testimony for the Government, and that the law there held to be unconstitutional “virtually compelled the defendant to furnish testimony against himself.”)

“While an incidental seizure of incriminating papers, made in the execution of a legal warrant, and their use as evidence may be justified, and a collateral issue will not be raised to ascertain the source of competent evidence \* \* \* that rule does not justify the retention of letters seized in violation of the protection given by the fourth amendment where an application in the cause for their return has been made by the accused before trial.” (*Weeks v. U. S.*, 232 U. S., 383.)

“Where letters and papers of the accused were taken from his premises by an official of the United States, acting under color of office but without any search warrant and in violation of the constitutional rights of accused under the fourth amendment, and a seasonable application for return of the letters and papers has been refused and they are used in evidence over his objection, prejudicial error is committed, and the judgment should be reversed.” (*Weeks v. U. S.*, 232 U. S., 383.)

“The tendency of those executing Federal criminal laws to obtain convictions by means of unlawful seizures and enforced confessions in violation of Federal rights is not to be sanctioned by the courts which are charged with the support of constitutional rights.” (*Weeks v. U. S.*, 232 U. S., 383.)

See note to section 1624, Revised Statutes, article 42.

**Compelling witness to exhibit himself.**—“The prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent.” (*Holt v. U. S.*, 218 U. S., 253, citing *Adams v. New York*, 192 U. S., 585.)

“A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reasons.” *Held*, that this objection “is based upon an extravagant extension of the fifth amendment,” and that the testimony is admissible. (*Holt v. U. S.*, 218 U. S., 245.)

“A confession freely and voluntarily made is evidence of the most satisfactory character. But the presumption upon which weight is given to such evidence, namely, that an innocent man will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made, either in consequence of inducements of a temporal nature held out by one in authority touching the charge preferred, or because of a threat or promise made by or in presence of such person in reference to such charge.” (*Hopt v. Utah*, 110 U. S., 574.)

If the testimony may tend merely to degrade and not to incriminate the witness, he may be required to answer, unless the question is one which is not material to the issue and is intended to impair the credibility of the witness, in which case he may refuse to answer. (*Brown v. Walker*, 161 U. S., 591, and cases there cited; see also *C. M. O.*, No. 29, 1914.)

#### IV. PROTECTION OF LIFE, LIBERTY, AND PROPERTY.

**Due process of law.**—The proposition has been uniformly accepted by American courts that the words “due process of law” are equivalent in meaning to the words “law of the land” contained in *Magna Charta*. (*Twining v. New Jersey*, 211 U. S., 78.)

“By the law of the land is most clearly intended the general law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, and property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not law of the land.” (*Dartmouth College v. Woodward*, 4 Wheat., 518, argument of Webster; quoted in *Hurtado v. California*, 110 U. S., 516.)

The Supreme Court has always declined to give a comprehensive definition of this phrase, and has preferred that its full meaning should be gradually ascertained by the process of in-

clusion and exclusion in the course of the decisions of cases as they arise." (*Twining v. New Jersey*, 211 U. S., 78.)

"To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers can not be reviewed or set aside by the courts." (*Reaves v. Ainsworth*, 219 U. S., 296, 304.)

"It is sufficient to say that by due process of law is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained, and whenever it is necessary for the protection of the parties it must give them an opportunity to be heard respecting the justness of the judgment sought. The clause, therefore, means that there can be no proceeding against life, liberty, or property which may result in deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights." (*Hagar v. Reclamation District*, 111 U. S., 701.)

"Any legal proceeding enforced by public authority, whether sanctioned by age and custom or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." (*Hurtado v. California*, 110 U. S., 516.) And this expression is not, therefore, necessarily limited to "settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." (*Twining v. New Jersey*, 211 U. S., 78. See also *Holden v. Hardy*, 169 U. S., 366.)

"If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law." (*Missouri Pac. Ry. Co. v. Humes*, 115 U. S., 512.)

"Due process of law \* \* \* is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of the Government." (*Giozza v. Tiernan*, 148 U. S., 657.)

"**Liberty**" means "not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the engagement of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." (*Allgeyer v. Louisiana*, 165 U. S., 578.)

An officer of the Navy placed under arrest for trial by court-martial and ordered to confine himself to the limits of the city of Washington, is not deprived of his liberty so as to entitle him to a writ of habeas corpus on the allegation that he was unlawfully restrained by the Secretary of the Navy. "In the case of a man in the military or naval service, where he is, whether as an officer or a private, always more or less subject in his movements, by the very necessity of military rule and subordination, to the orders of his superior officer, it should be made clear that some unusual restraint upon his liberty of personal movement exists to justify the issue of the writ; otherwise, every order of the superior officer directing the movements of his subordinate, which necessarily to some extent curtails his freedom of will, may be held to be a restraint of his liberty, and the party so ordered may seek relief from obedience by means of a writ of habeas corpus." (*Wales v. Whitney*, 114 U. S., 564.)

**Office is not "property."**—"An officer in the Army or Navy of the United States does not hold his office by contract, but at the will of the sovereign power." (*Crenshaw v. U. S.*, 134 U. S., 99.) "Whatever the form of the statute, the officer under it does not hold by contract. He enjoys a privilege revocable by the sovereignty at will; and one legislature can not deprive its successor of the power of revocation." (Same case.)

"An officer created by statute is not the property of the incumbent. Being given by statute it can be taken away by statute, and therefore the rules of law applicable to proceedings to deprive a person of property lawfully acquired are not, in general, applicable to proceedings of examining boards in cases of promotion. The rules of procedure, even in civil cases, where rights of property are involved, are not applicable here except in so far as they are made so by statute and regulations adopted by the Navy Department in accordance with statute laws. \* \* \* Neither can such examinations be assimilated in any manner to criminal proceedings, which they in no sense resemble. \* \* \* The offices held by naval officers Congress creates, abolishes, and limits at will. Congress has complete power, if it wishes, not only to stop promotions but to abolish these offices. It might declare that no one should hereafter be promoted who was not over 6 feet high; or it might direct that all officers not of the required height should be discharged; and it can certainly pass an act like that of 1882 directing the discharge of officers whose unfitness arises from their own misconduct." (File 26260-1392, June 29, 1911, quoting Secretary of Navy's "General Instructions" of Dec. 14, 1894, in case of Frederick W. Crocker.)

However, "if the constitutional provision relating to due process of law applied" to the case of an officer discharged from the Navy for failing morally to qualify for promotion, "it would be more than satisfied by the procedure established;" under which "his case is heard by a board constituted in accordance with express provisions of law and sworn to 'honestly and impartially examine and report upon the case of \_\_\_\_\_, now before the



board and about to be examined;’ all matters considered by the board, whether affecting the officer’s physical, mental, moral, or professional qualifications for promotion, are entered of record; the candidate, if his record shows him *prima facie* unfit for promotion, is so informed by the board and given an opportunity to be heard; the finding and recommendation of the board are expressly stated in all cases to be based upon matters recorded, and are so referred to the department and the President for review.” (File 26260-1392, June 29, 1911, p. 31, citing *In re Sing Lee*, 54 Fed. Rep., 336; *Turner v. Williams*, 194 U. S., 289, 290; *Murray v. Hoboken Land Company*, 18 How., 274.)

**Private property taken for public use.**—See note to Article I, section 8, clause 11, “Authority of military commander to seize private property”; see also note to Article I, section 8, clause 8, “Right of Government to use a patent”; and see act of August 1, 1888 (25 Stat., 357), as to acquisition of lands for public uses by condemnation.

**“Aside from constitutional provisions,** it is a plain dictate of common justice that no person shall be deprived of life, liberty, or property without due process of law.” (22 Op. Atty. Gen., 137. See note to Art. I, sec. 8, clause 14, “Whether constitutional limitations restrict Congress in legislating for Navy.”)

**Court illegally constituted.**—“Trial by a court [martial] not regularly constituted is not a trial which can be said to be ‘due process of law.’ I am of opinion, therefore, that the so-called court-martial, so far as the trial of Brown is concerned, must remain illegal, and its judgment ought not to be enforced.” (22 Op. Atty. Gen., 137. In this case, one member of a naval court-martial was detached and another substituted by the Chief of the Bureau of Navigation without authority from the Secretary of the Navy, who convened the court.)

**Court must have jurisdiction.**—To constitute due process of law, the court which renders judgment in a case must have jurisdiction, both of the parties and of the subject-matter of the proceedings. (*Pennoyer v. Neff*, 95 U. S., 714.) Consent of the accused can not confer jurisdiction upon a court not possessing it by virtue of statutory authority. (22 Op. Atty. Gen., 137.)

**Review not required.**—“A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law.” (McKane v. Durston, 153 U. S., 684; see also *Reetz v. Michigan*, 188 U. S., 505; *Andrews v. Swartz*, 156 U. S., 272; *Fallbrook v. Bradley*, 164 U. S., 112; *Rogers v. Peck*, 199 U. S., 425; *Frank v. Mangum*, 237 U. S., 309.)

**Use of depositions.**—Due process of law does not require that the accused in a criminal case be confronted with the witnesses against him. The provision of the sixth amendment on this subject does not apply to State courts, and is not extended to them by the due process provision of the fourteenth amendment. Accordingly, *held* that the deposition of a witness may be admitted against an accused in a State

court without violating the Federal Constitution: “We are of opinion that no Federal right of the plaintiffs in error was violated by admitting this deposition in evidence. Its admission was but a slight extension of the rule of the common law, even as contended for by counsel. The extension is not of such a fundamental character as to deprive the accused of due process of law \* \* \*. The accused has, as held by the State court in such case, been once confronted with the witness, and has had opportunity to cross-examine him, and it seems reasonable that when the State can not procure the attendance of the witness at the trial, and he is a nonresident and is permanently beyond the jurisdiction of the State, that his deposition might be read equally as well as when his attendance could not be enforced because of death or of illness, or his evidence given by reason of insanity.” (*West v. Louisiana*, 194 U. S., 258.)

**Self-incrimination.**—Due process of law does not include exemption by witnesses from compulsory self-incrimination. (*Twining v. New Jersey*, 211 U. S., 78. That right is guaranteed witnesses in the Federal courts by another clause of this amendment. See above, “Self-incrimination.”)

**Excessive bail, excessive fines, and cruel and unusual punishments** are prohibited by the eighth amendment, and are not included in the due-process clause. (*In re Kemmler*, 136 U. S., 436.)

**Errors of procedure.**—“The due process of law guaranteed by the fourteenth amendment has regard to substance of right, and not to matters of form or procedure. \* \* \* This familiar phrase does not mean that the operations of the State government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the State courts, or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such cases.” (*Frank v. Mangum*, 237 U. S., 309.)

**“If a trial is in fact dominated by a mob,** so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law. But the State may supply such corrective process as to it seems proper. \* \* \* Repeated instances are reported of verdicts and judgments set aside and new trials granted for disorder or mob violence interfering with the prisoner’s right to a fair trial. \* \* \* The Georgia courts, in the present case, proceeded upon the theory that Frank would have been entitled to this relief had his charges been true, and they refused a new trial only because they found his charges untrue save in a few minor particulars not amounting to more than

irregularities and not prejudicial to the accused. There was here no denial of due process of law." (*Frank v. Mangum*, 237 U. S., 309.)

**Prisoner unable to hear testimony.**—"Where the prisoner was convicted of the crime of murder and sentenced to imprisonment for life, although he did not hear a word of the evidence given upon the trial because of his almost total deafness, his inability to hear being such that it required a person to speak through an ear trumpet close to his ear in order that such person should be heard by him, and the trial court having failed to see to it that the testimony in the case was repeated to him through his ear trumpet, this court said that this was 'at most an error, which did not take away from the court its jurisdiction over the subject matter and over the person accused.'" (*Frank v. Mangum*, 237 U. S., 309, explaining *Felts v. Murphy*, 201 U. S., 123, 129.)

**Failure to arraign.**—"In *Garland v. Washington*, 232 U. S., 642, 645, it was held that the want of a formal arraignment, treated by the State as depriving the accused of no substantial right, and as having been waived, and thereby lost, did not amount to depriving defendant of his liberty without due process of law." (*Frank v. Mangum*, 237 U. S., 309.)

#### V. PRESENCE OF ACCUSED AT TRIAL.

**Proceedings in absence of accused.**—It was provided by a statute of Utah that, "if the indictment is for a felony, the defendant must be personally present at his trial; but if for a misdemeanor, the trial may be had in the absence of the defendant." Held that, under this statute, the accused can not waive his right to be present at a trial for felony, even during the trial of challenges of jurors. "We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view, as well of the relations which the accused holds to the public as of the end of human punishment. \* \* \* The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty can not be dispensed with or affected by the consent of the accused, much less by his mere failure to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. \* \* \* Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony that he shall be personally present at the trial; that is, at every stage of the trial when his substantial

rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution." (*Hopt v. Utah*, 110 U. S., 574; distinguished in *Diaz v. U. S.*, 223 U. S., 442, 458, and in *Frank v. Mangum*, 237 U. S., 309.)

"The personal presence of the accused, from the beginning to the end of a trial for felony, involving life or liberty, as well as at the time final judgment is rendered against him, may be, and must be assumed to be, vital to the proper conduct of his defense, and can not be dispensed with." (*Schwab v. Berggren*, 143 U. S., 442, distinguished in *Diaz v. U. S.*, 223 U. S., 442, 458.)

Due process of law does not require the presence of the accused in an appellate court at the time the judgment sentencing him to death is affirmed. (*Schwab v. Berggren*, 143 U. S., 442.)

"In trials for felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial. The making of challenges is an essential part of the trial of a person accused of crime, and it is one of his substantial rights to be brought face to face with the jurors when the challenges are made." (*Lewis v. U. S.*, 146 U. S., 370; distinguished in *Diaz v. U. S.*, 223 U. S., 442, 458.)

"It is the law of Kentucky that occasional absence of the accused from the trial from which no injury results to his substantial rights is not reversible error. And we think, in applying that rule to the case at bar, plaintiff in error was not deprived of due process of law within the meaning of the fourteenth amendment of the Constitution of the United States." (*Howard v. Kentucky*, 200 U. S., 164.) "It may be admitted that the words 'due process of law,' as used in the fourteenth amendment, protect fundamental rights. What those are can not ever be the cause of much dispute. In giving them protection, however, it was not designed, as was observed by the Chief Justice in *In re Converse*, supra (137 U. S., 624) 'to interfere with the power of the State to protect the lives, liberty, and property of its citizens; nor with the exercise of that power in the adjudication of the courts of the State in administering the process provided by the law of the State.'" (*Howard v. Kentucky*, 200 U. S., 164, 173.)

"While the rule may be otherwise in cases that are capital, or where the accused is in custody under the control of the court, or where special statutory provisions apply," nevertheless, "where the offense is not capital, and the accused is not in custody, his voluntary absence does not nullify what has been done in, or prevent the completion of, his trial, but operates as a waiver of his right to be present and leaves the court free to proceed." (*Diaz v. U. S.*, 223 U. S., 442.)

"The accused was represented and heard by counsel at every stage of the proceedings. He also was present in person at all the proceedings preliminary to the trial and at the time it was begun and during the major part of it. But on two occasions, in the latter part of the trial, he voluntarily absented himself and sent



to the court a message expressly consenting that the trial proceed in his absence, which was done. On these occasions two witnesses for the Government were both examined and cross-examined. No complaint grounded upon his absence was made in the trial court or in the Supreme Court of the Philippines; and the objection now made is, not that he did not voluntarily waive his right to be present, if he could waive it, but that it could not be waived, and that the court was therefore without power to proceed in his absence." Under these circumstances "held that the continuation of the trial during the voluntary absence of the accused in this case while it proceeded with his counsel present did not violate the provisions of section 5 of the Philippine act of July 1, 1902, giving him a right to be present and heard." (*Diaz v. U. S.*, 223 U. S., 442.)

"In cases of felony our courts, with substantial accord, have regarded it [right of accused to be present] as extending to every stage of the trial, inclusive of the empaneling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself. And with like accord they have regarded an accused who is in custody and one who is charged with a capital offense as incapable of waiving the right; the one, because his presence or absence is not within his own control, and the other, because, in addition to being usually in custody, he is deemed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction." (*Diaz v. U. S.*, 223 U. S., 442, 455.)

"But, where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present." (*Diaz v. U. S.*, 223 U. S., 442, 455.)

Where an accused who was at large on bail was present when his trial was begun and during the taking of a portion of the evidence for the Government, and then fled the jurisdiction, the trial proceeded in his absence, the remaining evidence being taken and a verdict of guilt returned. Subsequently he was apprehended, and sentence was then imposed, notwithstanding his objection that the trial had proceeded in his absence. On appeal the judgment was affirmed, the court stating: "It does not seem to us to be consonant with the dictates of common sense that an accused person, being at large upon bail, should be at liberty, whenever he pleased, to withdraw himself from the courts of his country and to break up a trial already commenced. The practical result of such a proposition, if allowed to be law, would be to prevent any trial whatever until the accused person himself should be pleased to permit it. For by the statute (Rev. Stat. of U. S., sec. 1015) he is entitled as a matter of right to be enlarged upon bail 'in all criminal cases where the offense is not punishable by death'; and, therefore, in

all such cases he may by absconding prevent a trial. This would be a travesty of justice which could not be tolerated; and it is not required or justified by any regard for the right of personal liberty. On the contrary, the inevitable result would be to abridge the right of personal liberty by abridging or restricting the right now granted by the statute to be abroad on bail until the verdict is rendered. But we do not think that any rule of law or constitutional principle leads us to any conclusion that would be so disastrous as well to the administration of justice as to the true interests of civil liberty." (*Falk v. U. S.*, 15 App. D. C., 446, 454, quoted approvingly in *Diaz v. U. S.*, 223 U. S., 442, 457.)

"The question is one of broad public policy whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries and turn them into a solemn farce, and ultimately compel society, for its own safety, to restrict the operation of the principle of personal liberty. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield." (*Falk v. U. S.*, 15 App. D. C., 446, 460, quoted approvingly in *Diaz v. U. S.*, 223 U. S., 442, 458.)

"The right of a prisoner to be present at his trial does not include the right to prevent a trial by unseemly disturbance. The defendant had the opportunity to be present at the whole of his trial. He was, in fact, present while the jury were being empaneled and the evidence was being introduced. He was absent during a part of the opening, only because of his own disorderly conduct. It does not lie in his mouth to complain of the order which was made necessary by his own misconduct, and which he could at any time have terminated by signifying his willingness to avoid creating disturbance." (*U. S. v. Davis*, 25 Fed. Cas. No. 14923, cited in *Diaz v. U. S.*, 223 U. S., 442, 456.)

"If, after the trial of an indictment is commenced, the accused escapes from custody, and, for that reason, his further attendance can not be had, the trial may proceed in his absence." (*U. S. v. Loughery*, 26 Fed. Cas. No. 15631; cited in *Diaz v. U. S.*, 223 U. S., 442, 456.)

"In cases where the prisoner's life or liberty is in peril he must be present during the whole of the trial and until final judgment. If absent, there is a want of jurisdiction of the person, and the court can not proceed with the trial or receive the verdict or pronounce the final judgment. A prisoner in custody is not a free agent; his being in court depends upon proper authority bringing him there; he can not waive anything by his absence. \* \* \* But where the offense is trivial and life or liberty is not in jeopardy, the rule is to be relaxed." (*Weirman v. U. S.*, 36 Ct. Cls., 236.)

"If it is desirable or necessary that the prisoner in a civil court be present at every proceeding after indictment, it seems to be still more so

that a prisoner before a court-martial should be present, for he ordinarily is not represented by counsel learned in the law and watchful of his interests, but (as in this case) by some naval officer acting from a humane motive." (*Weirman v. U. S.*, 36 Ct. Cls., 236.)

"The court will always require the presence of the prisoner in court during trial, if he be in close custody of the law, unless in case the prisoner expressly himself, and not by counsel, waives his right to be present, but the court may require it if it shall deem it advisable to do so." (*State v. Kelly*, 97 N. C., 404, quoting *Falk v. U. S.*, 15 App. D. C., 457.)

The action of a naval court-martial, in permitting the accused upon a request made expressly by himself and not merely by counsel to be absent from the immediate presence of the court during the testimony of expert witnesses for the defense concerning the physical and mental condition of the accused, did not invalidate the proceedings, such action being due to humanitarian considerations based upon representations of counsel for the accused as to the latter's health, and that it would be "cruel" to require his personal attendance during specified portions of the trial. (G. C. M. Rec. 29422. See also *Simon v. Craft*, 182 U. S., 427, 435, explained in *Frank v. Mangum*, 237 U. S., 309.) Nevertheless courts-martial are empowered to require the presence of the accused during the entire proceedings and should always exercise this power to avoid any possible irregularity. (C. M. O. 51, 1914.)

The presence of the judge-advocate when a naval court-martial is closed for deliberation and when the accused, his counsel, and spectators have consequently withdrawn, while a grave irregularity and a disregard of Navy Regulations, would not necessarily render the proceedings invalid. (C. M. O. 6, 1915; see also *Ex parte Tucker*, 212 Fed. Rep., 569.)

A distinction exists "between what the common law requires with respect to trial by jury in criminal cases and what the States may enact without contravening the 'due process' clause of the fourteenth amendment." Thus "in the *Lewis* case [above noted] which was a conviction of murder in a circuit court of the United States, the trial practice being regulated by the common law, it was held to be a leading principle, pervading the entire law of criminal procedure, that after indictment nothing should be done in the absence of the prisoner; that the making of challenges is an essential part of the trial, and it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time the challenges were made; and that in the absence of a statute, this right as it existed at common law must not be abridged;" while in *Howard v. Kentucky* (above noted) "this court, finding that by the law of the State an occasional absence of the accused from the trial, from which no injury resulted to his substantial rights, was not deemed material error, held that the application of this rule of law did not amount to a denial of due process within the meaning of the fourteenth amendment. In fact, this court has sustained the States in establishing a great variety of departures from the common-law procedure respecting jury trials." (*Frank v. Mangum*, 237 U. S., 309.)

"The practice established in the criminal courts of Georgia that a defendant may waive his right to be present when the jury renders its verdict and that such waiver may be given after as well as before the event \* \* \* is a regulation of criminal procedure that it is within the authority of the State to adopt. In adopting it the State declares in effect, as it reasonably may declare, that the right of the accused to be present at the reception of the verdict is but an incident of the right of trial by jury; and since the State may, without infringing the fourteenth amendment, abolish trial by jury, it may limit the effect to be given to an error respecting one of the incidents of such trial. The presence of the prisoner when the verdict is rendered is not so essential a part of the hearing that a rule of practice permitting the accused to waive it, and holding him bound by the waiver, amounts to a deprivation of 'due process of law.'" (*Frank v. Mangum*, 237 U. S., 309.)

"As to the 'due process of law' that is required by the fourteenth amendment, it is perfectly well-settled that a criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense." (*Frank v. Mangum*, 237 U. S., 309.)

## VI. REMEDY WHEN DUE PROCESS DENIED.

**Habeas corpus proceedings where due process of law alleged to have been denied.**—"It is clear that the civil courts are in no sense appellate tribunals for the revision of proceedings in courts-martial. It has been decided that in such cases the civil courts should not interfere if it appears that the court-martial has jurisdiction of the person and of the subject matter which was tried before it, and that errors of procedure in military courts can be corrected only by the proper military authorities. \* \* \* It is true that Tucker's legal rights were disregarded by the court-martial when it allowed the judge advocate to be present, even for a short time, at the closed session; but I do not think it is the business of this court to correct the error. The statute in question relates to procedure, not to jurisdiction, and the nonobservance of it by military tribunals is a matter for the revising military authorities, not for the civil courts." (*Ex parte Tucker*, 212 Fed. Rep., 569, citing act July 27, 1892, sec. 2, 27 Stat., 277, relating to the Army; there is no similar statute relating to trials by naval court-martial.)

"If he is held in custody by reason of his conviction upon a criminal charge before a court having plenary jurisdiction over the subject matter or offense, the place where it was committed, and the person of the prisoner, it results from the nature of the writ itself that he can not have relief on habeas corpus. Mere errors in point of law, however serious,



committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, can not be reviewed by habeas corpus. That writ can not be employed as a substitute for the writ of error." (Frank v. Mangum, 237 U. S., 309.)

"Where it is made to appear to a court of the United States that an applicant for habeas corpus is in the custody of a State officer in the ordinary course of a criminal prosecution, under a law of the State not in itself repugnant to the Federal Constitution, the writ, in the absence of very special circumstances, ought not to be issued until the State prosecution has reached its conclusion, and not even then until the Federal questions arising upon the record have been brought before this court upon writ of error." (Frank v. Mangum, 237 U. S., 309.)

"It is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the fourteenth amendment." (Frank v. Mangum, 237 U. S., 309.)

"It is open to the courts of the United States, upon an application for a writ of habeas corpus, to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not." (Frank v. Mangum, 237 U. S., 309.)

## [ARTICLE VI.]

[Right to speedy and public trial by jury; to confront witnesses; to have counsel, etc.] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

- I. SPEEDY TRIAL.
- II. PUBLIC TRIAL.
- III. JURY TRIAL.
- IV. IMPARTIAL TRIAL.
- V. RIGHT TO BE INFORMED OF ACCUSATION.
- VI. CONFRONTING WITNESSES.
- VII. COMPULSORY PROCESS FOR OBTAINING WITNESSES.
- VIII. ASSISTANCE OF COUNSEL.

### I. SPEEDY TRIAL.

**In general.**—"The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." (Beavers v. Haubert, 198 U. S., 86.)

"The discipline necessary to the efficiency of the Army and Navy required other and swifter modes of trial than are furnished by the common law courts." (Ex parte Milligan, 4 Wall., 3, 123.)

**Provisions to secure this right in the Navy.**—"No person shall be tried by naval court-martial for any offense committed more than two years before the issuing of the order for his trial, unless by reason of some manifest impediment he shall not have been amenable to justice within that period. (Art. 61, A. G. N., sec. 1624, R. S., as amended by act Feb. 25, 1895, 28 Stat., 680. As to special provisions relating to trials for desertion, see same act,

art. 62, A. G. N.) This legislation was intended "to require reasonable diligence on the part of public officers in apprehending offenders and bringing them to justice, and not to place a premium on the ingenuity of such offenders as succeeded in concealing their whereabouts and escaping apprehension for a limited period." (C. M. O. 27, 1913; file 26251-9538, Oct. 30, 1914.)

"Offenses shall not be allowed to accumulate in order that sufficient matter may thus be collectively obtained for a trial, without giving due notice to the offender." (Art. R-1411, Navy Regs., 1913.)

"The certainty of prompt punishment is more conducive to discipline than punishment deferred long after the offense." (Art. R-1404, Navy Regs., 1913.)

Whenever practicable, the trial by deck court of a person in the Navy shall take place "within 48 hours after the offense is committed" (Naval Courts and Boards, 1917, sec. 480.) If it is decided by the competent officer that the accused shall be brought to trial before a courts-martial, "the court shall be assembled for that purpose as soon as the nature of the case and the interests of the public service will allow." (Art. R-1408, Navy Regs., 1913.)

"When the proceedings of any general court-martial have commenced, they shall not be suspended or delayed on account of the absence of any of the members, provided five or more are assembled; but the court is enjoined to sit from day to day, Sundays excepted, until sentence is given, unless temporarily adjourned by the authority which convened it." (Art. 45, A. G. N., sec. 1624, R. S.)

It should not be attempted to conduct a trial by general court-martial in undue haste and at unusual hours. The action of a naval court-martial, after completing a trial which had lasted several days, in immediately commencing another trial at 5.15 in the afternoon and completing it the same day, when the case was not one of extraordinary urgency, is not approved by the Navy Department. In this case, the court's findings and the errors made in the record strikingly exemplified the consequences of its action, and must be attributed to some extent to "overfatigue of the mind" and undue haste resulting from the unusual hour at which the proceedings were commenced and hurried to a conclusion. Had the accused been convicted and given a substantial punishment, counsel in his behalf might well have urged that the case had not been given the time and careful consideration to which it was entitled. (C. M. O. 27, 1913; Naval Courts and Boards, 1917, sec. 216.)

## II. PUBLIC TRIAL.

**In general.**—"The sessions of courts-martial shall be public, and all persons except such as may be required to give evidence shall be admitted." (Naval Courts and Boards, 1917, sec. 217.)

All deliberation of a court-martial takes place with closed doors. "At other times [except as to those persons who have been summoned as witnesses] it is open to the public, military or otherwise, with such limitation as the capacity of the room or tent in which it is held, and the convenience of the court and parties before it, may dictate." (Simmons, 3d ed., 175.)

[By act of March 3, 1913 (37 Stat., 731), relating to the taking of evidence in equity proceedings under the Antitrust Act, it was provided that "the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable."]

"A court of the United States ought never to sit with its doors of entrance closed, so as to prevent publicity in its proceedings, but its police must be maintained. Where the court has not prescribed any general rule or made any special or particular order on the subject, the specific duty of the marshal to maintain and regulate its police according to law is an incident of his general duty to attend the court. When, during the pendency of a particular proceeding, there is reason to believe that an unrestricted admission of persons of a known class or association would endanger the security of the administration of justice, or in any manner prevent the police of the court from being properly maintained, the marshal, without excluding absolutely such persons as a class, may adopt prudential measures to prevent their indiscriminate admission, regulating the exercise of his discretion so that their exclusion is not carried beyond the exigency of the particular occasion." (U. S. v. Buck, 24 Fed. Cas. No. 14680.)

"The statutes regulating the course of procedure in military courts show that, in con-

templation of Congress, these courts stand on the same footing as other judicial tribunals of the country. Their sittings, for example, are free to the attendance of the public, like those of other courts \* \* \*." (11 Op. Atty. Gen., 137, 141.)

"Whether a court-martial may technically within its legal right close its doors to the public during the trial of an accused, such a procedure is contrary to the authority of text writers on the subject, to the spirit of the Constitution, and to the usual practice of the Federal courts. To permit closed sessions would be to introduce a practice into the service that might be made an instrument of oppression contrary to the genius of our laws and institutions, to a sound public policy, and one which, while upon occasion might be of benefit to an accused, could be made in cases a most objectionable procedure." (File 26504-115, Jan. 24, 1911.)

"The exclusion of persons in certain cases [where the evidence is indecent], as above indicated [decisions of State courts], may have been allowed, but it seems to be contrary to the spirit if not to the letter of the Constitution; and in the case of courts-martial [Navy] it is certainly contrary to a practice that has extended uniformly, so far as precedents have been discovered, for very many years." (File 26504-115, Jan. 24, 1911.) As to the exclusion of certain classes of persons in trials by State courts, see *State v. Hensley* (75 Ohio Stat., 255, 9 Ann. Cas., 108); *State v. Nyhus* (19 N. D., 326, 27 L. R. A. (N. S.), 487).

"The sessions of a general court-martial shall be public, and in general all persons except such as may be required to give evidence shall be admitted. However, in cases where it may seem desirable that certain classes of spectators, such as women, children, and others, should be excluded during the trial, the court, when convened by the Secretary of the Navy or the convening authority in other cases, should communicate with the Secretary of the Navy requesting permission therefor and giving a full statement of the reasons." (C. M. O. 51, 1914.)

## III. JURY TRIAL.

**Special cases.**—See note to Article I, section 8, clause 14, "Trials by jury not required in the Navy."

"The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought." (Act Mar. 3, 1911, sec. 41, 36 Stat., 1100.)

This legislation is not exclusive of the jurisdiction of a consular tribunal in China, etc., to try for a similar offense committed on board a private ship of the United States in a port of the country in which the tribunal is established, when the offender is not taken to the United States. (In re Ross, 140 U. S., 453.)

A homicide committed on a naval hospital ship at Olongapo, P. I., occurred "out of the jurisdiction of any particular State or district." (28 Op. Atty. Gen., 24.)



## IV. IMPARTIAL TRIAL.

**Right of challenge.**—In trials by naval general court-martial, "the accused and the judge advocate have the mutual right of challenge. It is the duty of the judge advocate to ask the accused if he objects to any member of the court appointed to try him, and a minute of this inquiry and the answer thereto is invariably to be entered on the record. As a general rule, whatever objection either party may make to any member shall be decided upon before the court is sworn, but at any stage of the proceedings prior to the findings challenges may be made, either by the judge advocate or the accused, for cause not previously known. \* \* \* The objection, the cause assigned, the statement, if any, of the challenged member, and the decision of the court shall be regularly and specifically entered on the record." (Naval Courts and Boards, 1917, sec. 277.)

**Members of a naval court-martial may testify as witnesses** in a case and then resume their seats as members. (Naval Courts and Boards, 1917, sec. 139.) "Under the settled law of evidence members of a jury are competent witnesses in a criminal case on trial before them, and it has been held that 'the analogy of a court-martial is that of a jury in the trial of a civil case, the approving power in the former occupying the relation of the judge in the latter.'" Furthermore, the practice of permitting the judge in a civil court to testify as a witness in a case before him is authorized by statute in at least one State, has been judicially upheld in other States, and has been practiced and upheld in the highest court of England. (File 26251-6020:11; see also *Keyes v. U. S.*, 15 Ct. Cls., 533; affirmed 109 U. S., 336.)

The objection to a member of a court-martial continuing to sit as such after testifying against the accused, goes to the *propriety* of his sitting under the circumstances, not to his *legal capacity* thus to sit. (15 Op. Atty. Gen., 434.)

"The rules in regard to the competency of witnesses are the same in courts-martial as in the courts of the common law. Hence, as we have seen, the prosecutor is admissible as a witness, as also are the members of the court." Where a member testifies as a witness "he is not thereby disqualified from resuming his seat as a member of the court, but where there is a sufficient number of members without him to constitute the court, it is more in accordance with the usage in civil courts that he should withdraw." (Greenleaf on Evidence, 16th ed., sec. 487, p. 465.)

## V. RIGHT TO BE INFORMED OF ACCUSATION.

**Arrests in the Navy.**—"The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; and no other charges than those so furnished shall be urged against him at the trial, unless it shall appear to the court that intelligence of such other charges had not reached the officer ordering the court when the accused was put under arrest, or that some witness material to the support of such charge was at that time absent and can be produced at the trial; in which case reasonable time shall

be given to the accused to make his defense against such new charge." (Art. 43, A. G. N., sec. 1624, R. S. See note to said section for cases construing and applying this article.)

## VI. CONFRONTING WITNESSES.

This constitutional provision does not apply to the Navy. (*Mullan v. U. S.*, 42 Ct. Cls., 157, 176; affirmed 212 U. S., 516.)

**Use of depositions.**—It is provided by statute that "the depositions of witnesses may be taken on reasonable notice to the opposite party, and when duly authenticated, may be put in evidence before naval courts, except in capital cases and cases where the punishment may be imprisonment or confinement for more than one year as follows: First, depositions of civilian witnesses residing outside the State, Territory, or district in which a naval court is ordered to sit; second, depositions of persons in the naval or military service stationed or residing outside the State, Territory, or District in which a naval court is ordered to sit, or who are under orders to go outside of such State, Territory, or District; third, where such naval court is convened on board a vessel of the United States, or at a naval station not within any State, Territory, or District of the United States, the depositions of witnesses may be taken and used as herein provided whenever such witnesses reside or are stationed at such a distance from the place where said naval court is ordered to sit, or are about to go to such a distance as, in the judgment of the convening authority, would render it impracticable to secure their personal attendance." (Act Feb. 16, 1909, sec. 16, 35 Stat., 622; see also art. 25 Articles of War, sec. 1342, R. S., as amended by act of Aug. 29, 1916, 39 Stat., 655, which contains broader provisions with reference to use of depositions before Army courts; and see 9 Op. Atty. Gen., 311, 312, and file 26260-1392, June 29, 1911, p. 30; see also 2 Op. Atty. Gen., 344.)

"In any case where it is necessary to use depositions at the trial thereof and depositions are so used, the maximum punishment under such circumstances shall in no case exceed imprisonment or confinement for one year." (Naval Courts and Boards, 1917, sec. 390.)

**"The proceedings of courts of inquiry shall \* \* \* in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court-martial, provided oral testimony can not be obtained."** (Art. 60, A. G. N., sec. 1624, R. S.; C. M. O. 46, 1917, p. 13; Naval Courts and Boards, 1917, sec. 198, Changes No. 1.)

"If, in the case of a commissioned or warrant officer, the maximum sentence, under the \* \* \* limitations of punishment, extends to dismissal, and if, upon the trial, oral testimony can not be obtained, by reason of which fact the record of proceedings of the court of inquiry, upon whose findings such trial is wholly or partially based is used in evidence, the maximum punishment which may be imposed shall not extend to dismissal, but shall, instead, be limited not to exceed the loss of 100 numbers in rank." (Naval Courts and Boards, 1917, sec. 390.)

"All testimony before a summary court-martial shall be given orally, upon oath or affirmation, administered by the senior member of the court." (Art. 29, A. G. N., sec. 1624, R. S.)

**In proceedings before courts of inquiry** "the party whose conduct shall be the subject of inquiry, or his attorney, shall have the right to cross-examine all the witnesses." (Art. 59, A. G. N., sec. 1624, R. S.)

"The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (*Mattox v. U. S.*, 156 U. S., 240.)

The admission of a deposition in evidence against an accused on trial in a State court does not violate any right which he possesses under the Federal Constitution. The provision of the sixth amendment relating to the subject does not apply to State courts, and the right to be confronted with the witnesses against him does not extend to the defendant in a State court under the provision of the fourteenth amendment that no State shall deprive any person of life, liberty, or property "without due process of law." The admission of the deposition "was but a slight extension of the rule of the common law, even as contended for by counsel. The extension is not of such a fundamental character as to deprive the accused of due process of law \* \* \*. The accused has, as held by the State court in such case, been once confronted with the witness and has had opportunity to cross-examine him, and it seems reasonable that when the State can not procure the attendance of the witness at the trial and he is a nonresident and is permanently beyond the jurisdiction of the State that his deposition might be read equally as well as when his attendance could not be enforced because of death or of illness or his evidence given by reason of insanity." (*West v. Louisiana*, 194 U. S., 258.)

**Dying declarations.**—This provision of the Constitution does not prevent the admission of dying declarations in accordance with rules of evidence which were well established long before the adoption of the Constitution. (*Kirby v. U. S.*, 174 U. S., 61.)

**Witness absent by fault of accused.**—"The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement he can not complain if competent evidence is admitted to supply the place of that which he had kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted

with the witnesses against him, but if he voluntarily keeps the witnesses away he can not insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated." (*Reynolds v. U. S.*, 98 U. S., 160.)

**Admissions as to what witness would testify if present.**—"Article 6 of the amendments \* \* \* gives the accused a right to a trial by jury. But the same article gives him the further right to be confronted with the witnesses against him and to have the assistance of counsel. Is it possible that an accused can not admit and be bound by the admission that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel and waives it the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional nor statutory mandate and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy." (*Schick v. U. S.*, 195 U. S., 65, 71; *Mullan v. U. S.*, 212 U. S., 516, 520.)

**"A commissioned officer of the Navy can waive the provisions of article 60 of section 1624, Revised Statutes, and allow the proceedings of a court of inquiry to be evidence on a court-martial the sentence of which may extend to his dismissal; \* \* \* and where, at the request of such an officer, the Secretary of the Navy convenes a court-martial to try him on matter which had already been the subject of a court of inquiry, on condition that the proceedings of such court of inquiry be evidence, each party having the privilege, however, of introducing other evidence, the accused is not deprived of any substantial right so that the sentence of the court-martial is invalidated."** (*Mullan v. U. S.*, 212 U. S., 516.)

## VII. COMPULSORY PROCESS FOR OBTAINING WITNESSES.

A naval court-martial or court of inquiry has power to issue like process to compel witnesses to appear and testify which United States courts of criminal jurisdiction within the State, Territory, or district where such naval court is ordered to sit may lawfully issue; and persons duly subpoenaed as witnesses before general courts-martial or courts of inquiry, who refuse to appear or to testify, may be punished by fine and imprisonment, except where such persons reside beyond the State, Territory, or district in which such naval court is held. (Act Feb. 16, 1909, secs. 11 and 12, 35 Stat., 621, 622.)

"The accused is, in general, entitled to have all the material witnesses for his defense summoned, except when their testimony would be merely cumulative and evidently add nothing to the strength of his case. As far as possible he should be allowed a full and free defense, as the least denial to him of any proper facility, opportunity, or latitude for it may serve to defeat the ends of justice." (*Naval Courts and Boards*, 1917, sec. 126.)



The Navy Department will not, at the expense of the United States, summon witnesses from a distance, either for the prosecution or the defense, who have no personal knowledge of the facts at issue. The best evidence of the character of the accused is his official record in the service, which is furnished the judge advocate; while members of the court-martial in this case, and officers who are on duty at the place of trial, have had service which should render them fully competent to qualify as experts and testify as such either for the prosecution or the defense. (File 26251-7777:3, July 5, 1913; Naval Courts and Boards, 1917, sec. 125.)

[Medical experts are in practice employed and paid by the accused, and are not summoned by the Government as witnesses for the accused. G. C. M. Rec. Nos. 28613, 29422; Ct. of Inq. Rec. No. 5777; C. M. O. 20-1915, p. 6; see also note to sec. 848, R. S.]

As to right of compulsory process to compel Members of Congress to attend and testify before naval courts, see note to Article I, section 6, clause 1. Upon question of issuing process to secure the attendance of the President as a witness, see note to Article II, section 1, clause 1.

#### VIII. ASSISTANCE OF COUNSEL.

**Trials in the Navy.**—In trials by naval court-martial the accused is entitled to counsel as a right, and the court can not properly deny him the assistance of a professional or other adviser. Enlisted men to be tried shall be particularly advised of their rights in the premises, and should be represented by counsel, if practicable, unless they explicitly state that they do not desire such assistance. When the accused has no legal adviser, the commandant of the navy yard or station, the commander in chief, or the senior officer present, within whose jurisdiction the court sits, shall, if the accused so requests, detail a suitable officer to act as his counsel. If there be no such officer available, the fact shall be reported to the convening authority for action. An officer so detailed shall perform such duties as usually devolve upon the counsel for the defense before civil courts in criminal cases. As such counsel he shall use all legal means to protect the interests of the accused and to present to the court such defense as the accused may have. (Naval Courts and Boards, 1917; secs. 265, 266.)

"The accused and his counsel have a right to the opinion of the judge advocate, in or out of court, upon any question of law arising out of the proceedings." (Naval Courts and Boards, 1917, sec. 254.)

"In the event that the accused has no coun-

sel, the judge advocate shall protect his interests, having in mind, however, at all times his duties as prosecutor." (Naval Courts and Boards, 1917, sec. 255.)

"The complainant and all defendants or interested parties before a court of inquiry may be allowed to have friends or counsel present during open court." (Naval Courts and Boards, 1917, sec. 508.) "The party whose conduct shall be the subject of inquiry, or his attorney, shall have the right to cross-examine all the witnesses." (Art. 59, A. G. N., sec. 1624, R. S.)

When an enlisted man, while a prisoner at large awaiting trial by summary court-martial, was afforded ample time in which to secure civilian counsel, but at his trial requested a postponement, for such time as he would be permitted, to go in person to some city in the State for the purpose of engaging counsel, the court properly decided that this request was unreasonable. This action of the court did not deny the accused the right to be represented by civilian counsel, but decided in effect that, as he had had ample time and opportunity to secure counsel and had failed to do so, his demand that he be set at liberty for this purpose was unreasonable. The accused refused to allow any officer of the Navy on duty at place of trial to act as his counsel, whereupon the court properly decided that the accused "had denied himself the benefit of counsel," and proceeded with the trial. (File 26287-15:37, Apr. 7, 1913, S. C. M. Rec. No. 5131, 1913.)

"The courts have repeatedly decided that the defendant in a criminal case in which counsel is appointed for him by the Government has no choice in the matter and his wishes even are not to be consulted as to the individual who shall be designated to defend him." (File 26251-6020:11, July 7, 1913.)

When it is contended by civilian counsel employed by the accused after completion of the trial, "that the accused was not properly represented by counsel," the commissioned officer appointed to defend him being incompetent, and at the same time it is asserted "that the accused should have been acquitted upon the evidence before the court," the contention is considered "as being wholly without merit." Such contentions have been many times urged in criminal cases, and likewise have been many times frowned down upon and discouraged by the courts. As stated by the supreme court of Missouri in such a case, with reference to counsel representing the accused at his trial, "if he did nothing else he seems to have convinced his successor, the present counsel in the case, that upon the facts disclosed he ought to have obtained an acquittal." (File 26251-6020:11, July 7, 1913.)

#### [ARTICLE VII.]

[Jury trial in suits at common law.] In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

## [ARTICLE VIII.]

[Excessive bail or fines and cruel punishments prohibited.] Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**Cruel and unusual punishments.**—The imposition of a heavier punishment for a second offense is not prohibited by this article. (*McDonald v. Massachusetts*, 180 U. S., 311.)

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies something inhuman and barbarous, something more than the mere extinguishment of life." (Ex parte Kemmler, 136 U. S., 436. See also *Wilkerson v. Utah*, 99 U. S., 130, holding that death by shooting is not cruel and unusual within the meaning of this amendment.)

"Infamous" punishments within the meaning of the fifth amendment "can not be limited to those punishments which are cruel or unusual; because, by the seventh [eighth] amendment of the Constitution, 'cruel and unusual punishments' are wholly forbidden, and can not therefore be lawfully inflicted even in cases of convictions upon indictments duly presented by a grand jury. \* \* \* What punishments may be considered as infamous may be affected by the changes of public opinion from one age to another. In former times, being put in the stocks was not considered as necessarily infamous. And by the first judiciary act of the United States, whipping was classed with moderate fines and short terms of imprisonment in limiting the criminal jurisdiction of the district courts to cases 'where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted.' \* \* \* But at the present day either stocks or whipping might be thought an infamous punishment. For more than a century, imprisonment at hard labor in the State prison or penitentiary or other institution has been considered an infamous punishment in England and America." (Ex parte Wilson, 114 U. S., 417.)

"In no case shall punishment by flogging, or by branding, marking, or tattooing on the body be adjudged by any court-martial or be inflicted upon any person in the Navy." (Art. 49, A. G. N., sec. 1624, R. S.)

"The use of irons, single or double, as a form of punishment in the Navy of the United States is hereby abolished, except for the purposes of safe custody or when part of the sentence imposed by a general court-martial." (Act May 13, 1908, 35 Stat., 132; see also act Feb. 16, 1909, sec. 8, 35 Stat., 621.)

"It shall be the duty of a court-martial, in all cases of conviction, to adjudge a punishment adequate to the nature of the offense; but the members thereof may recommend the person convicted as deserving of clemency, and state, on the record, their reasons for so doing." (Art. 51, A. G. N., sec. 1624, R. S.)

"In interpreting the eighth amendment it will be regarded as a precept of justice that punishment for crime should be graduated and proportioned to the offense. \* \* \* What constitutes a cruel and unusual punishment prohibited by the eighth amendment has not been exactly defined and no case has heretofore occurred in this court calling for an exhaustive definition. \* \* \* The eighth amendment is progressive and does not prohibit merely the cruel and unusual punishments known in 1689 and 1787, but may acquire wider meaning as public opinion becomes enlightened by humane justice; and a similar provision in the Philippine bill of rights applies to long-continued imprisonment with accessories disproportionate to the offense." (*Weems v. U. S.*, 217 U. S., 349.)

"In determining whether a punishment is cruel and unusual as fixed by the Philippine Commission, this court will consider the punishment of the same or similar crimes in other parts of the United States, as exhibiting the difference between power unrestrained and that exercised under the spirit of constitutional limitations formed to establish justice." (*Weems v. U. S.*, 217 U. S., 349.)

"Where the minimum sentence which the court might impose is cruel and unusual within the prohibition of a bill of rights, the fault is in the law and not in the sentence, and if there is no other law under which sentence can be imposed, it is the duty of the court to declare the law void." (*Weems v. U. S.*, 217 U. S., 349.)

## [ARTICLE IX.]

[Rights reserved to the people.] The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

## [ARTICLE X.]

[Powers reserved to the States.] The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.



## ARTICLE XI.

[Limitations upon judicial powers.] The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

## ARTICLE XII.

[Election of President and Vice-President.] The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

## ARTICLE XIII.

SECTION 1. [Slavery and involuntary servitude prohibited.] Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. [Power of Congress.] Congress shall have power to enforce this article by appropriate legislation.

**Involuntary servitude.**—"It is clear \* \* \* that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptions—such as military and naval enlistments—or to the right of parents and guardians as to their minor children or wards. The amendment, however, makes no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, Where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview. From the earliest historical period the contract of the sailor has been treated as an exceptional one and involving to a certain extent the surrender of his personal liberty during the life of the contract." (*Robertson v. Baldwin*, 165 U. S., 275; see also *Butler v. Perry*, 240 U. S., 328.)

"Does the epithet 'involuntary' attach to the word 'servitude' continuously, and make illegal any service which becomes involuntary at any time during its existence; or does it attach only at the inception of the servitude, and characterize it as unlawful because unlawfully entered into? If the former be the true construction, then no one, not even a soldier, sailor, or apprentice can surrender his liberty even for a day; and the soldier may desert his regiment upon the eve of battle and the sailor abandon his ship at any intermediate port or landing, or even in a storm at sea, provided only he can find means of escaping to another vessel. If the latter, then an individual may, for a valuable consideration, contract for the surrender of his personal liberty for a definite time and for a recognized purpose, and subordinate his going and coming to the will of another during the continuance of the contract. \* \* \* Not that all such contracts would be lawful, but that a service which was knowingly and willfully entered into could not be termed involuntary. Thus if one should agree, for a yearly wage, to serve another in a particular capacity during his life, and never to leave his estate without his consent, the contract might not be enforceable for the want

of a legal remedy, or might be void upon the grounds of public policy, but the servitude could not be properly termed involuntary. Such agreements for a limited personal servitude at one time were very common in England, and by statute \* \* \* it was enacted that if any servant in husbandry or any artificer, calico printer, hands-craftsman, miner, collier, keelman, pitman, glassman, potter, laborer, or other person should contract to serve another for a definite time and should desert such service during the term of the contract he was made liable to a criminal punishment. The breach of a contract for personal service has not, however, been recognized in this country as involving a liability to criminal punishment except in the cases of soldiers, sailors, and possibly some others, nor would public opinion tolerate a statute to that effect. But we are also of opinion that, even if the contract of a seaman could be considered within the letter of the thirteenth amendment, it is not, within its spirit, a case of involuntary servitude." (*Robertson v. Baldwin*, 165 U. S., 275.)

The Supreme Court is unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, and is constrained to the conclusion that the contention to that effect is refuted by its mere statement. (*Selection Draft Law Cases*, 245 U. S., 366.)

A person in the military or naval service, whether an officer or a private, is always more or less subject in his movements, by the very necessity of military rule and subordination, to the orders of his superior officer; and unless it is clear that some unusual restraint upon his liberty of personal movement exists he can not claim that he is unlawfully deprived of his liberty; "otherwise every order of the superior officer directing the movements of his subordinate, which necessarily to some extent curtails his freedom of will, may be held to be a restraint of his liberty, and the party so ordered may seek relief from obedience by means of a writ of habeas corpus." (*Wales v. Whitney*, 114 U. S., 564.)

## ARTICLE XIV.

SECTION 1. [Citizenship; privileges and immunities of citizens.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person



of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Citizenship.**—"There can not be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are in this connection reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance. For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words 'subject,' 'inhabitant,' and 'citizen' have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense, it is understood as conveying the idea of membership of a nation and nothing more." (*Minor v. Happersett*, 21 Wall., 162.)

"As appears upon the face of the amendment as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in *Dred Scott v. Sandford*, 1857, and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States. \* \* \* But the opening words, 'All persons born,' are general, not to say universal, restricted only by place and jurisdiction and not by color or race, as was clearly recognized in all the opinions delivered in the *Slaughter House Cases* above cited [16 Wall., 36]." (*U. S. v. Wong Kim Ark*, 169 U. S., 649.)

This amendment "declares that persons may be citizens of the United States without regard to the citizenship of a particular State \* \* \* the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is

only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear then that there is a citizenship of the United States and a citizenship of a State, which are distinct from each other and which depend upon different characteristics or circumstances in the individual." (*Slaughter House Cases*, 16 Wall., 36.)

**Subject to jurisdiction thereof.**—"The real object of the fourteenth amendment of the Constitution in qualifying the words, 'all persons born in the United States,' by the addition, 'and subject to the jurisdiction thereof,' would appear to have been to exclude by the fewest and fittest words (besides children of members of the Indian tribes standing in peculiar relation to the National Government, unknown to the common law), the two classes of cases—children born of alien enemies in hostile occupation and children of diplomatic representatives of a foreign State—both of which, as has already been shown by the law of England and by our own law from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country." (*U. S. v. Wong Kim Ark*, 169 U. S., 649, modifying as incorrect a remark in *Slaughter House Cases*, 16 Wall., 36, that "the phrase, 'subject to its jurisdiction,' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.")

**Indians.**—"Indians born within the territorial limits of the United States, members of and owing immediate allegiance to one of the Indian tribes (an alien though dependent power), although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof' within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States of ambassadors or other public ministers of foreign nations. \* \* \* Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the fourteenth amendment, by being naturalized in the United States, by or under some treaty or statute." (*Elk v. Wilkins*, 112 U. S., 94; file 9212-48, Aug. 3, 1914; see also, as to status of Indians, *U. S. v. Hadley*, 99 Fed. Rep., 437; *U. S. v. Elm*, 25 Fed. Cas. No. 15048; *Matter of Heff*, 197 U. S., 504; 7 Op. Atty. Gen., 746; *McKay v. Campbell*, 16 Fed. Cas. No. 8840; *U. S. v. Wong Kim Ark*, 169 U. S., 680.)

Special provision has been made for the naturalization of Indians by various acts of Congress. Thus by act of February 8, 1887 (24 Stat., 390), after providing for the allotment of lands in Indian reservations to any Indian located thereon, it was provided by section 6,

as amended by act of March 3, 1901 (31 Stat., 1447): "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, *and every Indian in Indian Territory* is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property." [The words in italics were added by the amendatory act above cited. The original act provided (section 8) that its provisions should not extend to certain tribes of Indians in the Indian Territory, "nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by Executive order."]

By act of May 8, 1906 (34 Stat., 182), section 6 of the act of 1887, above quoted, was amended to read as follows: "That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 5 of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other

property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subjected to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this act shall not extend to any Indians in the Indian Territory."

By section 1992, Revised Statutes, it was provided that, "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States."

An Indian born in Indian Territory, and who had resided in Oklahoma after its admission as a State, was held to be a citizen of the United States by virtue of the above statutes, and accordingly eligible, if otherwise qualified, for appointment as an assistant surgeon in the Medical Reserve Corps of the Navy. (File 26252-99, May, 1915. In this case the Secretary of the Interior reported: "Inasmuch as all allotments to members of the Cherokee Tribe have been completed and the Cherokee citizenship rolls have been closed as of March 4, 1907, it appears that \* \* \* is now a citizen of the United States and of the State of Oklahoma, and is entitled to all the rights, privileges and immunities of such citizens, as prescribed by section 6 of the act of Congress approved February 8, 1887 (24 Stat., 390), as amended by the act of Congress approved March 3, 1901 (31 Stat., 1447).")

An Indian who belonged to the Seneca Nation in the State of New York is *prima facie* not a citizen of the United States, and should be required to establish his citizenship by satisfactory evidence when he applies for enlistment in the Navy. Suggested, however, as there is no law making citizenship a condition precedent to enlistment, the Navy Department is authorized to enlist such Indians, regardless of citizenship, if considered desirable, this being a matter of departmental regulation. (File 9212-48, Aug. 3, 1914, citing, as to status of New York Indians, *Hatch v. Luckman*, 118 N. Y. S. 694, affirmed, 140 N. Y. S., 1123, holding that "the Indians of this State do not possess the rights of citizenship and are regarded as wards of the State"; compare 18 Op. Atty. Gen., 181.)

**Chinese.**—A person of the Chinese race, born in the United States of alien parents, subject to the jurisdiction of this country, is a citizen of United States by birth without regard to whether or not the laws permit the naturalization of persons of his race. "The fourteenth amendment, while it leaves the power where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and com-



plete right to citizenship. No one doubts that the amendment, as soon as it was promulgated, applied to persons of African descent born in the United States, wherever the birthplace of their parents might have been; and yet, for two years afterwards, there was no statute authorizing persons of that race to be naturalized. If the omission or the refusal of Congress to permit certain classes of persons to be made citizens by naturalization could be allowed the effect of correspondingly restricting the classes of persons who should become citizens by birth, it would be in the power of Congress at any time, by striking negroes out of the naturalization laws, and limiting those laws, as they were formerly limited, to white persons only, to defeat the main purpose of the constitutional amendment." (*U. S. v. Wong Kim Ark*, 169 U. S., 649.)

"This claim of American citizenship by a person of Chinese descent is one which can be easily fabricated, and which if fabricated is very difficult to be disproved by the Government. On the other hand, if it is true there are generally no witnesses who can prove it except Chinese witnesses. It is easy to decide such cases on the theory that all such claims are false. Probably many of them are false, but some of them must be true, for there must be a considerable number of persons of Chinese descent born here since Chinese immigration into this country began." (*U. S. v. Len Jin*, 192 Fed. Rep., 580; file 26252-68, June 19, 1912; file 26252-100, June 1, 1915.)

"In matters of this kind it is the duty of claimants to submit the best possible evidence. As there is no record evidence, the next best must be considered instead. That should contain the affidavit of the claimant, setting forth all he knows of his early life; where he lives, what he did before enlisting in the Navy; all about his parents, if he knows anything about them; when they came to this country; what business, if any, his father engaged in, particularly whether or not he was employed in any diplomatic or official capacity under the Emperor; when his parents left, and where they are at the present time; whether he himself has been out of the country, and if so, when and where, and how long a time he remained away. In other words, a detailed statement of facts tending to support his claim which may be the subject of an independent investigation as to their truth." (Comp. Dec., May 27, 1914, file 26252-84; see also, file 26252-100, June 1, 1915.)

It is the practice of the Navy Department, in cases of this character, after consideration of affidavits submitted by claimants, to refer the papers to the Department of Labor with request for a statement of such pertinent facts as it might be able to furnish. Then when papers are returned, with additional information, it is usually possible to determine whether the evidence is sufficient to establish citizenship. (File 26252-100, June 1, 1915.)

**Japanese.**—An alien born abroad of Japanese parents is not eligible to become a naturalized citizen of the United States; and where a certificate of naturalization was issued such alien by a court of competent jurisdiction,

such certificate is null and void and does not entitle him to the benefits of citizenship. (File 26252, Apr. 9, 1908, 85 S. and A. Memo., 622.)

The son of a German father and a Japanese mother is not a "white person" within the meaning of section 2169, Revised Statutes, and therefore is not eligible to naturalization. (In re Young, 198 Fed. Rep., 714.)

For other cases, see below, "Persons who serve in the Navy or Marine Corps."

**Children born on foreign vessel,** although within the waters of the United States, are considered as born in the country to which the vessel belongs, and not within the jurisdiction of the United States. Accordingly, they are not citizens of this country by birth. (In re Look Tin Sing, 21 Fed. Rep., 906.)

**Citizenship in insular possessions.**—See note to Article IV, section 3, clause 2.

**Children born abroad of citizen parents** "are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." (Sec. 1993, R. S.) In order for such children to receive the protection of the Government, if they continue to reside outside the United States, they are "required, upon reaching the age of 18 years, to record at an American consulate their intention to become residents and remain citizens of the United States," and "to take the oath of allegiance to the United States upon attaining their majority." (Act Mar. 2, 1907, sec. 6, 34 Stat., 1229.)

**Children born abroad of alien parents** shall be deemed citizens of the United States by virtue of the naturalization of or resumption of American citizenship by the parent; provided such naturalization or resumption takes place during the minority of such children. The citizenship of such children shall begin at the time such children begin to reside permanently in the United States. (Act Mar. 2, 1907, sec. 5, 34 Stat., 1229.)

**Alien adopted by American parents.**—See file 3194-1, October 17, 1906, recommending that rule forbidding the employment of aliens at navy yards be suspended in this case, without deciding question of citizenship.

**Stepchildren born of foreign parents.**—Should a minor's stepfather become naturalized during the lifetime of said minor's mother, the mother would become a citizen as the result of her husband's naturalization, and being a citizen, her son would also become a citizen. But naturalization of the stepfather after the death of the mother could not have the effect to make the minor child a citizen. (Comp. Dec., June 16, 1913, 148 S. and A. Memo. 2656; *U. S. v. Rodgers*, 144 Fed. Rep., 711; *U. S. v. Keller*, 13 Fed. Rep., 82.)

A minor son is not made a citizen by virtue of the fact that his stepfather took out his first citizenship paper prior to his death. (Comp. Dec., June 26, 1913, 148 S. and A. Memo., 2674.)

**Any woman who marries a citizen of the United States,** and who might herself be lawfully naturalized, is deemed a citizen. (Sec. 1994, R. S.) In such cases the woman shall be assumed to retain her American citizenship

after the termination of the marital relation if she continues to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation. (Act Mar. 2, 1907, sec. 4, 34 Stat., 1229.)

**Persons who serve in the Navy or Marine Corps,** or Coast Guard, or on board of any vessel of the United States Government, may be naturalized under special provisions contained in the act of May 9, 1918 (40 Stat., 542), amending the general naturalization act of June 29, 1906 (34 Stat., 596). Special provisions as to aliens serving with Naval Reserve Force are contained in act of May 22, 1917 (40 Stat., 84).

The law providing specifically for naturalization of persons who have served as enlisted men of the Navy or Marine Corps does not extend the right of naturalization to persons who are excluded by section 2169, Revised Statutes, which is limited to "free white persons and to aliens of African nativity and to persons of African descent." That section of the Revised Statutes has not been repealed by subsequent naturalization laws, but is still in effect. Accordingly, "a citizen of the Philippine Islands who ethnologically was one-fourth white and three-fourths brown or Malay could not be naturalized," notwithstanding his service in the Navy. (In re Alverto, 198 Fed. Rep., 688; see, also, In re Buntaro Kumagai, 163 Fed. Rep., 922, and *Bessho v. U. S.*, 178 Fed. Rep., 245, as to naturalization of Japanese; but see contra, as to Filipinos, 27 Op. Atty. Gen., 12; In re Monico Lopez, C. M. O. 49, 1915, p. 23, and In re Engracio Bawtista, C. M. O. 72, 1917, p. 16. The act of May 9, 1918 (40 Stat., 542), specifically provides for naturalization of Filipinos who serve in the Navy, Marine Corps, or Naval Auxiliary Service.

**For general naturalization law,** see acts of June 29, 1906 (34 Stat., 596), and May 9, 1918 (40 Stat., 542).

**Forfeiture of citizenship.**—"The power of naturalization vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. 'A naturalized citizen,' said Chief Justice Marshall, 'becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual \* \* \*.' Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, a fortiori [for stronger reasons], no act or omission of Congress \* \* \* can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation." (U. S. v. Wong Kim Ark, 169 U. S., 649.)

Persons who desert from the military or naval service in time of war are deemed to have vol-

untarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of exercising any rights of citizenship. The same penalties apply to persons who leave the jurisdiction with intent to avoid the draft. (Secs. 1996 and 1998, R. S., as amended by act Aug. 22, 1912, 37 Stat., 356. As to constitutionality of this enactment, see cases noted under Art. I, sec. 9, clause 3.)

**Cancellation of certificate.**—When a naturalized alien takes up permanent residence in any foreign country within five years after his naturalization, in the absence of countervailing evidence, it shall be deemed that it was not his intention to become a permanent citizen of the United States, and his certificate of citizenship may be canceled as fraudulent. (Act June 29, 1906, sec. 15, 34 Stat., 601.)

**Expatriation.**—The right of expatriation is expressly recognized by section 1999, Revised Statutes. But "no American citizen shall be allowed to expatriate himself when this country is at war." (Act Mar. 2, 1907, sec. 2, 34 Stat., 1228; file 26252-105, Aug. 30, 1916.)

"Any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state." (Act Mar. 2, 1907, sec. 2, 34 Stat., 1228.)

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe." (Act Mar. 2, 1907, sec. 2, 34 Stat., 1228.)

"Any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein." (Act Mar. 2, 1907, sec. 3, 34 Stat., 1228.)

**Repatriation of citizens** who were deemed to have expatriated themselves by service in foreign armies engaged in war with a country with which the United States was also at war, was provided for by act of October 5, 1917 (40 Stat., 340).

**Right to vote not right of citizenship.**—"Certainly, if the courts can consider any question as settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage." (Minor v. Happersett, 21 Wall., 162. See also U. S. v. Reese, 92 U. S., 214.)

"Sex has never been made one of the elements of citizenship in the United States. In this



respect men have never had an advantage over women. The same laws precisely apply to both. The fourteenth amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the amendment. She has always been a citizen from her birth and entitled to all the privileges and immunities of citizenship. The amendment prohibited the State, of which she is a citizen, from abridging any of her privileges and immunities as a citizen of the United States; but it did not confer citizenship on her. That she had before its adoption. \* \* \* The amendment did not add to the privileges and

immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the constitution and laws of the States, but it operates for this purpose, if at all, through the States and the State laws, and not directly upon the citizen. It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted." (*Minor v. Happersett*, 21 Wall., 162.)

**SECTION 2. [Apportionment of Representation.]** Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**SECTION 3. [Disabilities resulting from disloyalty of officers.]** No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

**SECTION 4. [Validity of the public debt, etc.]** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**SECTION 5. [Power of Congress.]** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## ARTICLE XV.

**SECTION 1. [Suffrage not to be abridged for race, color, etc.]** The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

SECTION 2. [Power of Congress.] The Congress shall have power to enforce this article by appropriate legislation.

## ARTICLE XVI.

[Income taxes.] The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

## ARTICLE XVII.

[CLAUSE 1. Election of Senators.] The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

[CLAUSE 2. Vacancies in Senate, how filled.] <sup>2</sup> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

[CLAUSE 3. Amendment not retroactive.] <sup>3</sup> This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

## ARTICLE XVIII.

SECTION 1. [Prohibition of intoxicating liquors for beverage purposes.] After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. [Power of Congress and States.] The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. [Ratification required within seven years.] This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

## ARTICLE XIX.

SECTION 1. [Woman suffrage.] The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

SECTION 2. [Power of Congress.] Congress shall have power to enforce this article by appropriate legislation.



# ANALYTICAL INDEX TO THE CONSTITUTION OF THE UNITED STATES AND THE AMENDMENTS THERETO.

[Reprinted from Revised Statutes of the United States, second edition, and Senate Document No. 12, Sixty-third Congress, first session, with necessary additions to include eighteenth and nineteenth amendments.]

## A.

	Arti- cle.	Sec- tion.	Clause.
ABRIDGED. The privileges or immunities of citizens of the United States shall not be. [Amendments].....	14	1	..
ABSENT MEMBERS, in such manner and under such penalties as it may provide. Each House is authorized to compel the attendance of.....	1	5	1
ACCOUNTS of receipts and expenditures of public money shall be published from time to time. A statement of the.....	1	9	7
ACCUSATION. In all criminal prosecutions the accused shall be informed of the cause and nature of the. [Amendments].....	6	..	..
ACCUSED shall have a speedy public trial. In all criminal prosecutions the. [Amendments].....	6	..	..
He shall be tried by an impartial jury of the State and district where the crime was committed. [Amendments].....	6	..	..
He shall be informed of the nature of the accusation. [Amendments].....	6	..	..
He shall be confronted with the witnesses against him. [Amendments].....	6	..	..
He shall have compulsory process for obtaining witnesses in his favor. [Amendments].....	6	..	..
He shall have the assistance of counsel for his defense. [Amendments].....	6	..	..
ACTIONS at common law involving over twenty dollars shall be tried by jury. [Amendments].....	7	..	..
ACTS, records, and judicial proceedings of another State. Full faith and credit shall be given in each State to the.....	4	1	..
ACTS. Congress shall prescribe the manner of proving such acts, records, and proceedings.....	4	1	..
ADJOURN from day to day. A smaller number than a quorum of each House may.....	1	5	1
ADJOURN for more than three days, nor to any other place than that in which they shall be sitting. Neither House shall, during the session of Congress, without the consent of the other.....	1	5	4
ADJOURNMENT, the President may adjourn them to such time as he shall think proper. In case of disagreement between the two Houses as to.....	2	3	..
ADMIRALTY and maritime jurisdiction. The judicial power shall extend to all cases of.....	3	2	1
ADMITTED by the Congress into this Union, but no new State shall be formed or erected within the jurisdiction of any other State. New States may be..	4	3	1
Nor shall any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures and of Congress.....	4	3	1
ADOPTION of the Constitution shall be valid. All debts and engagements contracted by the Confederation and before the.....	6	..	1

	Arti- cle.	Sec- tion.	Clause.
ADVICE and consent of the Senate. The President shall have power to make treaties by and with the.....	2	2	2
To appoint ambassadors or other public ministers and consuls by and with the.....	2	2	2
To appoint all other officers of the United States not herein otherwise provided for by and with the.....	2	2	
AFFIRMATION. Senators sitting to try impeachments shall be on oath or....	1	3	6
To be taken by the President of the United States. Form of the oath or...	2	1	7
No warrants shall be issued but upon probable cause and on oath or. [Amendments].....	4	..	..
To support the Constitution. Senators and Representatives, members of State legislatures, executive and judicial officers, both State and Federal, shall be bound by oath or.....	6	..	3
AGE. No person shall be a Representative who shall not have attained twenty-five years of.....	1	2	2
No person shall be a Senator who shall not have attained thirty years of....	1	3	3
AGREEMENT or compact with another State without the consent of Congress. No State shall enter into any.....	1	10	3
AID AND COMFORT. Treason against the United States shall consist in levying war against them, adhering to their enemies, and giving them....	3	3	1
ALLIANCE or confederation. No State shall enter into any treaty of.....	1	10	1
AMBASSADORS, or other public ministers and consuls. The President may appoint.....	2	2	2
The judicial power of the United States shall extend to all cases affecting..	3	2	1
AMENDMENTS TO THE CONSTITUTION. Whenever two-thirds of both Houses shall deem it necessary, Congress shall propose.....	5	..	..
On application of the legislatures of two-thirds of the States, Congress shall call a convention to propose .....	5	..	..
Shall be valid when ratified by the legislatures of, or by conventions in, three-fourths of the States.....	5	..	..
ANSWER for a capital or infamous crime unless on presentment of a grand jury. No person shall be held to. [Amendments].....	5	..	..
Except in cases in the land or naval forces, or in the militia when in actual service. [Amendments].....	5	..	..
APPELLATE JURISDICTION both as to law and fact, with such exceptions and under such regulations as Congress shall make. In what cases the Supreme Court shall have.....	3	2	2
APPLICATION of the legislature or the executive of a State. The United States shall protect each State against invasion and domestic violence on the....	4	4	..
APPLICATION of the legislatures of two-thirds of the States, Congress shall call a convention for proposing amendments to the Constitution. On the....	5	..	..
APPOINTMENT of officers and authority to train the militia reserved to the States respectively.....	1	8	16
Of such inferior officers as they may think proper in the President alone. Congress may by law vest the.....	2	2	2
APPOINTMENTS in the courts of law or in the heads of Departments. Congress may by law vest the.....	2	2	2
APPORTIONMENT of representation and direct taxation among the several States. Provisions relating to the. [Repealed by section 2 of fourteenth amendment.] .....	1	2	3
APPORTIONMENT. Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States. The sixteenth amendment. [Amendments.].....	16	..	..
Of Representatives among the several States. Provisions relating to the. [Amendments].....	14	2	..



	Arti- cle.	Sec- tion.	Clause.
APPROPRIATE LEGISLATION. Congress shall have power to make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.....	1	8	18
Congress shall have power to enforce the thirteenth article, prohibiting slavery, by. [Amendments].....	13	2	..
Congress shall have power to enforce the provisions of the fourteenth article by. [Amendments].....	14	5	..
Congress shall have power to enforce the provisions of the fifteenth article by. [Amendments].....	15	2	..
APPROPRIATION of money for raising and supporting armies shall be for a longer term than two years. But no.....	1	8	12
APPROPRIATIONS made by law. No money shall be drawn from the Treasury but in consequence of.....	1	9	7
APPROVE and sign a bill before it shall become a law. The President shall... He shall return it to the House in which it originated, with his objections, if he do not.....	1	7	2
ARMIES, but no appropriation for that use shall be for a longer term than two years. Congress shall have power to raise and support.....	1	8	12
ARMIES. Congress shall make rules for the government and regulation of the land and naval forces.....	1	8	14
ARMS shall not be infringed. A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear. [Amendments].....	2	..	..
ARREST during their attendance at the session of their respective Houses, and in going to and returning from the same. Members shall in all cases, except treason, felony, and breach of the peace, be privileged from .....	1	6	1
ARSENALS. Congress shall exercise exclusive authority over all places purchased for the erection of.....	1	8	17
ARTICLES exported from any State. No tax or duty shall be laid on.....	1	9	5
ARTS by securing to authors and inventors their patent rights. Congress may promote the progress of science and the useful.....	1	8	8
ASSISTANCE of counsel for his defense. In all criminal prosecutions the accused shall have the. [Amendments].....	6	..	..
ASSUMPTION of the debt or obligations incurred in aid of rebellion or insurrection against the United States. Provisions against the. [Amendments]..	14	4	..
ATTAINDER or EX POST FACTO law shall be passed. No bill of.....	1	9	3
ATTAINDER, EX POST FACTO law, or law impairing the obligation of contracts. No State shall pass any bill of.....	1	10	1
ATTAINDER of treason shall not work corruption of blood or forfeiture, except during the life of the person attainted.....	3	3	2
AUTHORS and inventors the exclusive right of their writings and inventions. Congress shall have power to secure to .....	1	8	..

**B.**

BAIL. Excessive bail shall not be required, nor excessive fines nor cruel and unusual punishments imposed. [Amendments].....	8	..	..
BALLOT for President and Vice-President. The electors shall vote by. [Amendments].....	12	..	..
BALLOT. If no person have a majority of the electoral votes for President and Vice-President, the House of Representatives shall immediately choose the President by. [Amendments].....	12	..	..
BANKRUPTCIES. Congress shall have power to pass uniform laws on the subject of.....	1	8	4

	Arti- cle.	Sec- tion.	Clause.
BASIS of representation among the several States. Provisions relating to the [Amendments].....	14	2	..
BEAR ARMS shall not be infringed. A well-regulated militia being necessary to the security of a free State, the right of the people to keep and [Amendments].....	2	..	..
BEHAVIOR. The judges of the Supreme and inferior courts shall hold their offices during good.....	3	1	..
BILL OF ATTAINDER or EX POST FACTO law shall be passed. No.....	1	9	3
BILL OF ATTAINDER, EX POST FACTO law, or law impairing the obligation of contracts. No State shall pass any.....	1	10	1
BILLS of credit No State shall emit.....	1	10	1
BILLS for raising revenue shall originate in the House of Representatives. All.	1	7	1
BILLS which have passed the Senate and House of Representatives shall, before they become laws, be presented to the President.....	1	7	2
If he approve, he shall sign them; if he disapprove, he shall return them, with his objections, to that House in which they originated.....	1	7	2
BILLS. Upon the reconsideration of a bill returned by the President, with his objections, if two-thirds of each House agree to pass the same, it shall become a law.....	1	7	2
Upon the reconsideration of a bill returned by the President, the question shall be taken by yeas and nays.....	1	7	2
Not returned by the President within ten days (Sundays excepted), shall, unless Congress adjourn, become laws.....	1	7	2
BORROW money on the credit of the United States. Congress shall have power to.....	1	8	2
BOUNTIES and pensions, shall not be questioned. The validity of the public debt incurred in suppressing insurrection and rebellion against the United States, including the debt for. [Amendments].....	14	4	..
BREACH of the peace, shall be privileged from arrest while attending the session, and in going to and returning from the same. Senators and Representatives, except for treason, felony, and.....	1	6	1
BRIBERY, or other high crimes and misdemeanors. The President, Vice-President, and all civil officers shall be removed on impeachment for and conviction of treason.....	2	4	..

## C.

CAPITAL or otherwise infamous crime, unless on indictment of a grand jury, except in certain specified cases. No person shall be held to answer for a [Amendments].....	5	..	..
CAPITATION or other direct tax shall be laid unless in proportion to the census or enumeration. [See sixteenth amendment] No .....	1	9	4
CAPTURES on land and water. Congress shall make rules concerning.....	1	8	11
CASTING VOTE. The Vice-President shall have no vote unless the Senate be equally divided .....	1	3	4
CENSUS or enumeration of the inhabitants shall be made within three years after the first meeting of Congress, and within every subsequent term of ten years thereafter.....	1	2	3
CENSUS or enumeration. No capitation or other direct tax shall be laid except in proportion to the. [See sixteenth amendment] .....	1	9	4
CHIEF JUSTICE shall preside when the President of the United States is tried upon impeachment. The.....	1	3	6
CHOOSING the electors and the day on which they shall give their votes, which shall be the same throughout the United States. Congress may determine the time of.....	2	1	3



	Arti- cle.	Sec- tion.	Clause.
CITIZEN of the United States at the adoption of the Constitution shall be eligi- ble to the office of President. No person not a natural born.....	2	1	4
CITIZEN of the United States. No person shall be a Senator who shall not have attained the age of thirty years and been nine years a.....	1	3	3
No person shall be a Representative who shall not have attained the age of twenty-five years and been seven years a.....	1	2	2
CITIZENSHIP. Citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.....	4	2	1
All persons born or naturalized in the United States, and subject to the juris- diction thereof, are citizens of the United States and of the State in which they reside. [Amendments].....	14	1	..
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. [Amendments].....	14	1	..
Nor shall any State deprive any person of life, liberty, or property without due process of law. [Amendments].....	14	1	..
Nor deny to any person within its jurisdiction the equal protection of the laws. [Amendments].....	14	1	..
CITIZENS OR SUBJECTS of a foreign state. The judicial power of the United States shall not extend to suits in law or equity brought against one of the States by the citizens of another State, or by. [Amendments].....	11	..	..
CIVIL OFFICERS of the United States shall, on impeachment for and conviction of treason, bribery, and other high crimes and misdemeanors, be removed. All.....	2	4	..
CLAIMS of the United States or any particular State in the Territory or public property. Nothing in this Constitution shall be construed to prejudice..	4	3	2
CLASSIFICATION OF SENATORS. Immediately after they shall be assem- bled after the first election, they shall be divided as equally as may be into three classes.....	1	3	2
The seats of the Senators of the first class shall be vacated at the expiration of the second year.....	1	3	2
The seats of the Senators of the second class at the expiration of the fourth year.....	1	3	2
The seats of the Senators of the third class at the expiration of the sixth year. .....	1	3	2
COIN a tender in payment of debts. No State shall make anything but gold and silver.....	1	10	1
COIN money and regulate the value thereof and of foreign coin. Congress shall have power to.....	1	8	5
COIN of the United States. Congress shall provide for punishing the counter- feiting the securities and current.....	1	8	6
COLOR, or previous condition of servitude. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race. [Amendments].....	15	1	..
COMFORT. Treason against the United States shall consist in levying war against them, and giving their enemies aid and.....	3	3	1
COMMANDER IN CHIEF of the Army and Navy, and of the militia when in actual service. The President shall be.....	2	2	1
COMMERCE with foreign nations, among the States, and with Indian tribes. Congress shall have power to regulate.....	1	8	3
COMMERCE OR REVENUE. No preference shall be given to the ports of one State over those of another by any regulation of.....	1	9	6
Vessels clearing from the ports of one State shall not pay duties in those of another.....	1	9	6
COMMISSIONS to expire at the end of the next session. The President may fill vacancies that happen in the recess of the Senate by granting.....	2	2	3
COMMON DEFENSE, promote the general welfare, etc. To insure the. [Pre- amble.]			

	Arti- cle.	Sec- tion.	Clause.
COMMON DEFENSE and general welfare. Congress shall have power to provide for the.....	1	8	1
COMMON LAW, where the amount involved exceeds twenty dollars, shall be tried by jury. Suits at. [Amendments].....	7	..	..
No fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the. [Amendments].....	7	..	..
COMPACT with another State. No State shall, without the consent of Congress, enter into any agreement or.....	1	10	3
COMPACT with a foreign power. No State shall, without the consent of Congress, enter into any agreement or.....	1	10	3
COMPENSATION of Senators and Representatives to be ascertained by law...	1	6	1
COMPENSATION of the President shall not be increased nor diminished during the period for which he shall be elected.....	2	1	6
COMPENSATION of the judges of the Supreme and inferior courts shall not be diminished during their continuance in office.....	3	1	..
COMPENSATION. Private property shall not be taken for public use without just. [Amendments].....	5	..	..
COMPULSORY PROCESS for obtaining witnesses in his favor. In criminal prosecutions the accused shall have. [Amendments].....	6	..	..
CONFEDERATION. No State shall enter into any treaty, alliance, or.....	1	10	1
CONFEDERATION. All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under it as under the.....	6	..	1
CONFESSION in open court. Conviction of treason shall be on the testimony of two persons to the overt act, or upon.....	3	3	1
CONGRESS of the United States. All legislative powers shall be vested in a...	1	1	..
Shall consist of a Senate and House of Representatives.....	1	1	..
Shall assemble at least once in every year, which shall be on the first Monday of December, unless they by law appoint a different day.....	1	4	2
May at any time alter regulations for elections of Senators and Representatives, except as to the places of choosing Senators.....	1	4	1
Each House shall be the judge of the elections, returns, and qualifications of its own members.....	1	5	1
A majority of each House shall constitute a quorum to do business.....	1	5	1
A smaller number may adjourn from day to day and may be authorized to compel the attendance of absent members.....	1	5	1
Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.....	1	5	2
Each House shall keep a journal of its proceedings.....	1	5	3
Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days.....	1	5	4
Senators and Representatives shall receive a compensation to be ascertained by law.....	1	6	1
They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during attendance at their respective Houses, and in going to and returning from the same.....	1	6	1
No Senator or Representative shall, during his term, be appointed to any civil office which shall have been created, or of which the emoluments shall have been increased during such term.....	1	6	2
No person holding any office under the United States shall, while in office, be a member of either House of Congress.....	1	6	2
All bills for raising revenue shall originate in the House of Representatives.	1	7	1
Proceedings in cases of bills returned by the President with his objections..	1	7	1
Shall have power to lay and collect duties, imposts, and excises, pay the debts, and provide for the common defense and general welfare.....	1	8	1



CONGRESS of the United States—Continued.

	Arti- cle.	Sec- tion.	Clause.
Shall have power to borrow money on the credit of the United States.....	1	8	2
To regulate foreign and domestic commerce, and with the Indian tribes....	1	8	3
To establish a uniform rule of naturalization and uniform laws on the subject of bankruptcies.....	1	8	4
To coin money, regulate its value, and the value of foreign coin, and to fix the standard of weights and measures.....	1	8	5
To punish the counterfeiting the securities and current coin of the United States.....	1	8	6
To establish post-offices and post-roads.....	1	8	7
To promote the progress of science and the useful arts.....	1	8	8
To constitute tribunals inferior to the Supreme Court.....	1	8	9
To define and to punish piracies and felonies on the high seas and to punish offenses against the law of nations.....	1	8	10
To declare war, grant letters of marque and reprisal, and make rules concern- ing captures on land and water.....	1	8	11
To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.....	1	8	12
To provide and maintain a Navy.....	1	8	13
To make rules for the government of the Army and Navy.....	1	8	14
To call out the militia to execute the laws, suppress insurrections, and repel invasions.....	1	8	15
To provide for organizing, arming, and equipping the militia.....	1	8	16
To exercise exclusive legislation over the District fixed for the seat of gov- ernment, and over forts, magazines, arsenals, and dockyards.....	1	8	17
To make all laws necessary and proper to carry into execution all powers vested by the Constitution in the Government of the United States.....	1	8	18
No person holding any office under the United States shall accept of any present, emolument, office, or title of any kind from any foreign State, without consent of.....	1	9	8
May determine the time of choosing the the electors for President and Vice- President and the day on which they shall give their votes.....	2	1	3
The President may, on extraordinary occasions, convene either House of....	2	3	..
The manner in which the acts, records, and judicial proceedings of the States shall be proved, shall be prescribed by.....	4	1	..
New States may be admitted by Congress into this Union.....	4	3	1
Shall have power to make all needful rules and regulations respecting the territory or other property belonging to the United States.....	4	3	2
Amendments to the Constitution shall be proposed whenever it shall be deemed necessary by two-thirds of both Houses of.....	5	..	..
Persons engaged in insurrection or rebellion against the United States dis- qualified for Senators or Representatives in. [Amendments].....	14	3	..
But such disqualifications may be removed by a vote of two-thirds of both Houses of. [Amendments].....	14	3	..
Shall have power to enforce, by appropriate legislation, the thirteenth amendment. [Amendments].....	13	2	..
Shall have power to enforce, by appropriate legislation, the fourteenth amendment. [Amendments].....	14	5	..
Shall have power to enforce, by appropriate legislation, the fifteenth amend- ment. [Amendments].....	15	2	..
Shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment, and without regard to any census or enu- meration, the sixteenth amendment. [Amendments].....	16	..	..
Shall have concurrent power with the States to enforce, by appropriate leg- islation, the eighteenth amendment. [Amendments].....	18	2	..

	Arti- cle.	Sec- tion.	Clause.
CONSENT. No State shall be deprived of its equal suffrage in the Senate with- out its.....	5	..	..
CONSENT OF CONGRESS. No person holding any office of profit or trust under the United States shall accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign potentate, without the.....	1	9	8
No State shall lay any imposts or duties on imports, except what may be absolutely necessary for executing its inspection laws, without the.....	1	10	2
No State shall lay any duty of tonnage, keep troops or ships of war in time of peace, without the.....	1	10	3
No State shall enter into any agreement or compact with another State, or with a foreign power, without the.....	1	10	3
No State shall engage in war unless actually invaded, or in such imminent danger as will not admit of delay, without the.....	1	10	3
No new State shall be formed or erected within the jurisdiction of any other State, or any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures thereof, as well as the.....	4	3	1
CONSENT of the legislature of the State in which the same may be. Congress shall exercise exclusive authority over all places purchased for the erec- tion of forts, magazines, arsenals, dockyards, and other needful buildings with the.....	1	8	17
CONSENT of the legislatures of the States and of Congress. No State shall be formed by the junction of two or more States or parts of States without the.....	4	3	
CONSENT OF THE OTHER. Neither House, during the session of Congress, shall adjourn for more than three days, nor to any other place than that in which they shall be sitting, without the.....	1	5	4
CONSENT OF THE OWNER. No soldier shall be quartered in time of peace in any house without the. [Amendments].....	3	..	..
CONSENT OF THE SENATE. The President shall have power to make treaties, by and with the advice and.....	2	2	2
The President shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers created by law and not otherwise herein provided for, by and with the advice and.....	2	2	2
CONSTITUTION, in the Government of the United States, or in any depart- ment or officer thereof. Congress shall have power to pass all laws neces- sary to the execution of the powers vested by.....	1	8	18
CONSTITUTION, shall be eligible to the office of President. No person, except a natural-born citizen, or a citizen at the time of the adoption of the.....	2	1	4
CONSTITUTION. The President, before he enters upon the execution of his office, shall take an oath to preserve, protect, and defend the.....	2	..	7
CONSTITUTION, laws, and treaties of the United States. The judicial power shall extend to all cases arising under the.....	3	2	1
CONSTITUTION shall be so construed as to prejudice any claims of the United States, or of any State (in respect to territory or other property of the United States). Nothing in the.....	4	3	2
CONSTITUTION. The manner in which amendments to, may be proposed and ratified.....	5	..	..
CONSTITUTION shall be as valid under it as under the Confederation. All debts and engagements contracted before the adoption of the.....	6	..	1
CONSTITUTION and the laws made in pursuance thereof, and all treaties made, or which shall be made, by the United States, shall be the supreme law of the land. The.....	6	..	2
The judges in every State, anything in the constitution or laws of a State to the contrary notwithstanding, shall be bound thereby.....	6	..	2



	Arti- cle.	Sec- tion.	Clause.
CONSTITUTION. All officers, legislative, executive, and judicial, of the United States, and of the several States, shall be bound by an oath to support the.....	6	..	3
But no religious test shall ever be required as a qualification for any office or public trust.....	6	..	3
CONSTITUTION, between the States so ratifying the same. The ratification of the conventions of nine States shall be sufficient for the establishment of the.....	7	..	..
CONSTITUTION of certain rights shall not be construed to deny or disparage others retained by the people. The enumeration in the. [Amendments].....	9	..	..
CONSTITUTION, nor prohibited by it to the States, are reserved to the States respectively or to the people. Powers not delegated to the United States by the. [Amendments].....	10	..	..
CONSTITUTION, and then engaged in rebellion against the United States. Disqualification for office imposed upon certain classes of persons who took an oath to support the. [Amendments].....	14	3	..
CONSTITUTION. Done in convention by the unanimous consent of the States present, September 17, 1787.			
CONTRACTS. No State shall pass any <i>ex post facto</i> law, or law impairing the obligation of.....	1	10	1
CONTROVERSIES to which the United States shall be a party; between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; between a State or its citizens and foreign States, citizens, or subjects. The judicial power shall extend to.....	3	2	1
CONVENE CONGRESS or either House, on extraordinary occasion. The President may.....	2	3	..
CONVENTION for proposing amendments to the Constitution. Congress, on the application of two-thirds of the legislatures of the States, may call a.....	5	..	..
CONVENTION, by the unanimous consent of the States present on the 17th of September, 1787. Adoption of the Constitution in.....	7	..	..
CONVENTIONS of nine States shall be sufficient for the establishment of the Constitution. The ratification of the.....	7	..	..
CONVICTION in cases of impeachment shall not be had without the concurrence of two-thirds of the members present.....	1	3	6
COPYRIGHTS to authors for limited times. Congress shall have power to provide for.....	1	8	8
CORRUPTION OF BLOOD. Attainder of treason shall not work.....	3	3	2
COUNSEL for his defense. In all criminal prosecutions the accused shall have the assistance of. [Amendments].....	6	..	..
COUNTERFEITING the securities and current coin of the United States. Congress shall provide for the punishment of.....	1	8	6
COURTS. Congress shall have power to constitute tribunals inferior to the Supreme Court.....	1	8	9
COURTS OF LAW. Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the heads of Departments, or in the.....	2	2	2
COURTS as Congress may establish. The judicial power of the United States shall be vested in one Supreme Court and such inferior.....	3	1	..
COURTS. The judges of the Supreme and inferior courts shall hold their offices during good behavior.....	3	1	..
Their compensation shall not be diminished during their continuance in office.....	3	1	..
CREDIT. No State shall emit bills of.....	1	10	1

	Arti- cle.	Sec- tion.	Clause.
CREDIT of the United States. Congress shall have power to borrow money on the.....	1	8	2
CREDIT shall be given in every other State to the public acts, records, and judicial proceedings of each State. Full faith and.....	4	1	..
CRIME, unless on a presentment of a grand jury. No person shall be held to answer for a capital or otherwise infamous. [Amendments].....	5	..	..
Except in cases in the military and naval forces, or in the militia, when in actual service. [Amendments].....	5	..	..
CRIMES AND MISDEMEANORS. The President, Vice-President, and all civil officers shall be removed on impeachment for and conviction of treason, bribery, or other.....	2	4	..
CRIMES, except in cases of impeachment, shall be tried by jury. All.....	3	2	3
They shall be tried in the State within which they may be committed.....	3	2	3
When not committed in a State, they shall be tried at the places which Congress may by law have provided.....	3	2	
CRIMINAL PROSECUTIONS, the accused shall have a speedy and public trial by jury in the State and district where the crime was committed. In all. [Amendments].....	6	..	..
He shall be informed of the nature and cause of the accusation. [Amendments].....	6	..	..
He shall be confronted with the witnesses against him. [Amendments].....	6	..	..
He shall have compulsory process for obtaining witnesses in his favor. [Amendments].....	6	..	..
He shall have the assistance of counsel in his defense. [Amendments].....	6	..	..
CRIMINATE HIMSELF. No person as a witness shall be compelled to. [Amendments].....	5	..	..
CRUEL AND UNUSUAL PUNISHMENTS inflicted. Excessive bail shall not be required, nor excessive fines imposed, nor. [Amendments].....	8	..	..

## D.

DANGER as will not admit of delay. No State shall, without the consent of Congress, engage in war, unless actually invaded or in such imminent....	1	10	3
DAY on which they shall vote for President and Vice-President, which shall be the same throughout the United States. Congress may determine the time of choosing the electors and the.....	2	1	3
DAY TO DAY, and may be authorized to compel the attendance of absent members. A smaller number than a quorum of each House may adjourn from.	1	5	1
DEATH, resignation, or inability of the President, the powers and duties of his office shall devolve on the Vice-President. In case of the.....	2	1	5
DEATH, resignation, or inability of the President. Congress may provide by law for the case of the removal.....	2	1	5
DEBT of the United States, including debts for pensions and bounties incurred in suppressing insurrection or rebellion, shall not be questioned. The validity of the public. [Amendments].....	14	4	..
DEBTS. No State shall make anything but gold and silver coin a tender in payment of.....	1	10	1
DEBTS and provide for the common defense and general welfare of the United States. Congress shall have power to pay the.....	1	8	1
DEBTS and engagements contracted before the adoption of this Constitution shall be as valid against the United States under it as under the Confederation	6	..	1
DEBTS or obligations incurred in aid of insurrection or rebellion against the United States, or claims for the loss or emancipation of any slave. Neither the United States nor any State shall assume or pay any. [Amendments].	14	4	..
DECLARE WAR, grant letters of marque and reprisal, and make rules concerning captures on land and water. Congress shall have power to.....	1	8	11



	Arti- cle.	Sec- tion.	Clause.
DEFENSE, promote the general welfare, etc. To insure the common. [Preamble.]			
DEFENSE and general welfare throughout the United States. Congress shall have power to pay the debts and provide for the common.....	1	8	1
DEFENSE. In all criminal prosecutions the accused shall have the assistance of counsel for his. [Amendments].....	6	..	..
DELAWARE entitled to one Representative in the First Congress .....	1	2	3
DELAY. No State shall, without the consent of Congress, engage in war unless actually invaded, or in such imminent danger as will not admit of.....	1	10	3
DELEGATED to the United States, nor prohibited to the States, are reserved to the States or to the people. The powers not. [Amendments].....	10	..	..
DENY OR DISPARAGE others retained by the people. The enumeration in the Constitution of certain rights shall not be construed to. [Amendments]	9	..	..
DEPARTMENTS upon any subject relating to their duties. The President may require the written opinion of the principal officers in each of the Executive.	2	2	1
DEPARTMENTS. Congress may by law vest the appointment of inferior officers in the heads of.....	2	2	2
DIRECT TAX shall be laid unless in proportion to the census or enumeration. No capitation or other.....	1	9	4
DIRECT TAXES and Representatives, how apportioned among the several States. [Repealed by the second section of the fourteenth amendment]..	1	2	3
DISABILITY of the President and Vice-President. Provisions in case of the..	2	1	5
DISABILITY. No person shall be a Senator or Representative in Congress, or Presidential elector, or hold any office, civil or military, under the United States, or any State, who having previously taken an oath as a legislative, executive, or judicial officer of the United States, or of any State, to support the Constitution, afterwards engaged in insurrection or rebellion against the United States. [Amendments].....	14	3	..
DISABILITY. But Congress may, by a vote of two-thirds of each House, remove such. [Amendments].....	14	3	..
DISAGREEMENT between the two Houses as to the time of adjournment, the President may adjourn them to such time as he may think proper. In case of.....	2	3	..
DISORDERLY BEHAVIOR. Each House may punish its members for.....	1	5	2
And with the concurrence of two-thirds expel a member for .....	1	5	2
DISPARAGE others retained by the people. The enumeration in the Constitution of certain rights shall not be construed to deny or. [Amendments].	9	..	..
DISQUALIFICATION. No Senator or Representative shall, during the time for which he was elected, be appointed to any office under the United States which shall have been created or its emoluments increased during such term.....	1	6	2
No person holding any office under the United States shall be a member of either House during his continuance in office.....	1	6	2
No person shall be a member of either House, Presidential elector, or hold any office under the United States, or any State, who, having previously sworn to support the Constitution, afterwards engaged in insurrection or rebellion. [Amendments].....	14	3	..
But Congress may, by a vote of two-thirds of each House, remove such disability. [Amendments].....	14	3	..
DISTRICT OF COLUMBIA. Congress shall exercise exclusive legislation in all cases over the.....	1	8	17
DOCKYARDS. Congress shall have exclusive authority over all places purchased for the erection of.....	1	8	17
DOMESTIC TRANQUILLITY, provide for the common defense, etc. To insure. [Preamble.]			

	Arti- cle.	Sec- tion.	Clause.
DOMESTIC VIOLENCE. The United States shall protect each State against invasion and.....	4	4	..
DUE PROCESS OF LAW. No person shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property without. [Amendments].....	5	..	..
No State shall deprive any person of life, liberty, or property without. [Amendments].....	14	1	..
DUTIES AND POWERS of the office of President, in case of his death, removal, or inability to act, shall devolve on the Vice-President.....	2	1	5
DUTIES AND POWERS. In case of the disability of the President and Vice-President, Congress shall declare what officer shall act.....	2	1	5
DUTIES, imposts, and excises. Congress shall have power to lay and collect taxes.....	1	8	1
Shall be uniform throughout the United States.....	1	8	1
DUTIES shall be laid on articles exported from any State. No tax or .....	1	9	5
DUTIES in another State. Vessels clearing in the ports of one State shall not be obliged to pay .....	1	9	6
On imports and exports, without the consent of Congress, except where necessary for executing its inspection laws. No State shall lay any .....	1	10	2
DUTIES on imports or exports. The net produce of all such duties shall be for the use of the Treasury of the United States.....	1	10	2
All laws laying such duties shall be subject to the revision and control of Congress.....	1	10	2
DUTY OF TONNAGE without the consent of Congress. No State shall lay any.	1	10	3

## E.

ELECTION of President and Vice-President. Congress may determine the day for the.....	2	1	3
Shall be the same throughout the United States. The day of the.....	2	1	3
ELECTIONS for Senators and Representatives. The legislatures of the States shall prescribe the times, places, and manner of holding.....	1	4	1
But Congress may, at any time, alter such regulations, except as to the places of choosing Senators.....	1	4	1
ELECTIONS for Senators and Representatives. Returns and qualifications of its own members. Each House shall be judge of the.....	1	5	1
ELECTORS for members of the House of Representatives. Qualifications of...	1	2	1
ELECTORS for members of the Senate, qualifications of. The seventeenth amendment. [Amendments].....	17	..	..
ELECTORS for President and Vice-President. Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress.....	2	1	2
But no Senator or Representative, or person holding an office of trust or profit under the United States shall be appointed an elector.....	2	1	2
ELECTORS. Congress may determine the time of choosing the electors and the day on which they shall give their votes.....	2	1	3
Which day shall be the same throughout the United States.....	2	1	3
The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves. [Amendments].....	12	..	..
ELECTORS shall name, in their ballots, the person voted for as President; and in distinct ballots the person voted for as Vice-President. [Amendments].	12	..	..
They shall make distinct lists of the persons voted for as President and of persons voted for as Vice-President, which they shall sign and certify, and transmit sealed to the seat of government, directed to the President of the Senate. [Amendments].....	12	..	..



	Arti- cle.	Sec- tion.	Clause.
ELECTORS—Continued.			
No person having taken an oath as a legislative, executive, or judicial officer of the United States, or of any State, and afterwards engaged in insurrection or rebellion against the United States, shall be an elector. [Amendments]..	14	3	..
But Congress may, by a vote of two-thirds of each House, remove such disability. [Amendments].....	14	3	..
EMANCIPATION of any slave shall be held to be illegal and void. Claims for the loss or. [Amendments].....	14	4	..
EMIT BILLS OF CREDIT. No State shall.....	1	10	1
EMOLUMENT of any kind from any king, prince, or foreign State, without the consent of Congress. No person holding any office under the United States shall accept any.....	1	9	
ENEMIES. Treason shall consist in levying war against the United States, in adhering to, or giving aid and comfort to their.....	3	3	1
ENGAGEMENTS contracted before the adoption of this Constitution shall be valid. All debts and.....	6	..	1
ENUMERATION of the inhabitants shall be made within three years after the first meeting of Congress, and within every subsequent term of ten years thereafter.....	1	2	3
Ratio of representation not to exceed one for every 30,000 until the first enumeration shall be made.....	1	2	3
In the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. The. [Amendments.] [See sixteenth amendment].....	9	..	..
EQUAL PROTECTION of the laws. No State shall deny to any person within its jurisdiction the. [Amendments].....	14	1	..
EQUAL SUFFRAGE in the Senate. No State shall be deprived without its consent of its.....	5	..	..
ESTABLISHMENT of this Constitution between the States ratifying the same. The ratification of nine States shall be sufficient for the.....	7	..	..
EXCESSIVE BAIL shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. [Amendments].....	8	..	..
EXCISES. Congress shall have power to lay and collect taxes, duties, imposts, and.....	1	8	1
Shall be uniform throughout the United States. All duties, imposts, and..	1	8	1
EXCLUSIVE LEGISLATION, in all cases, over such district as may become the seat of government. Congress shall exercise.....	1	8	17
EXCLUSIVE LEGISLATION over all places purchased for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. Congress shall exercise.....	1	8	17
EXECUTIVE OF A STATE. The United States shall protect each State against invasion and domestic violence on the application of the legislature or the..	4	4	..
EXECUTIVE AND JUDICIAL OFFICERS of the United States and of the several States shall be bound by an oath to support the Constitution.....	6	..	3
EXECUTIVE DEPARTMENTS. On subjects relating to their duties the President may require the written opinions of the principal officers in each of the.....	2	2	1
Congress may by law vest the appointment of inferior officers in the heads of..	2	2	2
EXECUTIVE POWER shall be vested in a President of the United States of America. The.....	2	1	1
EXPEL A MEMBER. Each House, with the concurrence of two-thirds, may.	1	5	2
EXPENDITURES of public money shall be published from time to time. A regular statement of the receipts and.....	1	9	7
EXPORTATION OF INTOXICATING LIQUORS for beverage purposes prohibited. [Amendments].....	18	1	..
EXPORTATIONS from any State. No tax or duty shall be laid on.....	1	9	5

	Arti- cle.	Sec- tion.	Clause.
EXPORTS OR IMPORTS, except upon certain conditions. No State shall, without the consent of Congress, lay any duties on.....	1	10	2
Laid by any State shall be for the use of the Treasury. The net produce of all duties on.....	1	10	2
Shall be subject to the revision and control of Congress. All laws of the States laying duties on.....	1	10	2
EX POST FACTO law shall be passed. No bill of attainder or.....	1	9	3
EX POST FACTO law, or law impairing the obligation of contracts. No State shall pass any bill of attainder.....	1	10	1
EXTRAORDINARY OCCASIONS. The President may convene both Houses or either of them.....	2	3	..

**F.**

FAITH and credit in each State shall be given to the acts, records, and judicial proceedings of another State. Full.....	4	1	..
FELONY, and breach of the peace. Members of Congress shall not be privileged from arrest for treason.....	1	6	1
FELONIES committed on the high seas. Congress shall have power to define and punish piracies and.....	1	8	10
FINES. Excessive fines shall not be imposed. [Amendments].	8	..	..
FOREIGN COIN. Congress shall have power to coin money, fix the standard of weights and measures, and to regulate the value of.....	1	8	5
FOREIGN NATIONS among the States and with the Indian tribes. Congress shall have power to regulate commerce with.....	1	8	3
FOREIGN POWER. No State shall, without the consent of Congress, enter into any compact or agreement with any.....	1	10	3
FORFEITURE except during the life of the person attainted. Attainder of treason shall not work.....	3	3	2
FORMATION of new States. Provisions relating to the.....	4	3	1
FORM OF GOVERNMENT. The United States shall guarantee to every State in this Union a republican.....	4	4	..
And shall protect each of them against invasion; and on application of the legislature or of the executive (when the legislature can not be convened) against domestic violence.....	4	4	..
FORTS, magazines, arsenals, dockyards, and other needful buildings. Congress shall exercise exclusive authority over all places purchased for the erection of.....	1	8	17
FREEDOM of speech or the press. Congress shall make no law abridging the. [Amendments].	1	..	..
FREE STATE, the right of the people to keep and bear arms shall not be infringed. A well-regulated militia being necessary to the security of a. [Amendments].	2	..	..
FUGITIVES from crime found in another State shall, on demand, be delivered up to the authorities of the State from which they may flee.....	4	2	2
FUGITIVES from service or labor in one State, escaping into another State, shall be delivered up to the party to whom such service or labor may be due....	4	2	3

**G.**

GENERAL WELFARE and secure the blessings of liberty, etc. To promote the. [Preamble.]			
GENERAL WELFARE. Congress shall have power to provide for the common defense and.....	1	8	1
GEORGIA shall be entitled to three Representatives in the First Congress.....	1	2	3
GOLD AND SILVER coin a tender in payment of debts. No State shall make anything but.....	1	10	1



	Arti- cle.	Sec- tion.	Clause.
GOOD BEHAVIOR. The judges of the Supreme and inferior courts shall hold their offices during.....	3	1	..
GOVERNMENT. The United States shall guarantee to every State in this Union a republican form of.....	4	4	..
And shall protect each of them against invasion; and on application of the legislature or of the executive (when the legislature can not be convened) against domestic violence.....	4	4	..
GRAND JURY. No person shall be held to answer for a capital or otherwise infamous crime, unless on the presentment of a. [Amendments].....	5	..	..
Except in cases arising in the land and naval forces, and in the militia when in actual service. [Amendments].....	5	..	..
GUARANTEE to every State in this Union a republican form of government. The United States shall.....	4	4	..
GUARANTEE. And shall protect each of them against invasion, and on application of the legislature or of the executive (when the legislature can not be convened) against domestic violence.....	4	4	..

## H.

HABEAS CORPUS shall not be suspended unless in cases of rebellion or invasion. The writ of.....	1	9	2
HEADS OF DEPARTMENTS. Congress may by law vest the appointment of inferior officers in the.....	2	2	2
On any subject relating to their duties, the President may require the written opinion of the principal officers in each of the Executive Departments....	2	2	1
HIGH CRIMES AND MISDEMEANORS. The President, Vice-President, and all civil officers shall be removed on impeachment for and conviction of treason, bribery, or other.....	2	4	..
HOUSE OF REPRESENTATIVES. Congress shall consist of a Senate and....	1	1	..
Shall be composed of members chosen every second year.....	1	2	1
Qualifications of electors for members of the.....	1	2	1
No person shall be a member who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States.....	1	2	2
The executives of the several States shall issue writs of election to fill vacancies in the.....	1	2	4
Shall choose their Speaker and other officers.....	1	2	5
Shall have the sole power of impeachment.....	1	2	5
Shall be the judge of the elections, returns, and qualifications of its own members.....	1	5	1
A majority shall constitute a quorum to do business.....	1	5	1
Less than a majority may adjourn from day to day, and compel the attendance of absent members.....	1	5	1
May determine its own rules of proceedings.....	1	5	2
May punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.....	1	5	2
Shall keep a journal of its proceedings.....	1	5	3
Shall not adjourn for more than three days during the session of Congress without the consent of the Senate.....	1	5	4
For any speech or debate in either House, members shall not be questioned in any other place.....	1	6	1
No person holding any office under the United States shall, while holding such office, be a member of the.....	1	6	2
No member shall, during the time for which he was elected, be appointed to an office which shall have been created or the emoluments increased during his membership.....	1	6	2
All bills for raising revenue shall originate in the.....	1	7	1

	Arti- cle.	Sec- tion.	Clause
HOUSE OF REPRESENTATIVES—Continued.			
The votes for President and Vice-President shall be counted in the presence of the Senate and. [Amendments].....	12	..	..
If no person have a majority of electoral votes, then from the three highest on the list the House of Representatives shall immediately, by ballot, choose a President. [Amendments].....	12	..	..
They shall vote by States, each State counting one vote. [Amendments]..	12	..	..
A quorum shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to the choice of a President. [Amendments].....	12	..	..
No person having as a legislative, executive, or judicial officer of the United States, or of any State, taken an oath to support the Constitution, and afterwards engaged in insurrection or rebellion against the United States, shall be a member of the. [Amendments].....	14	3	..
But Congress may, by a vote of two-thirds of each House, remove such disability. [Amendments].....	14	3	..
I.			
IMMINENT DANGER as will not admit of delay. No state shall, without the consent of Congress, engage in war, unless actually invaded or in such....	1	10	3
IMMUNITIES. Members of Congress shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same.....	1	6	1
No soldier shall be quartered in any house without the consent of the owner in time of peace. [Amendments].....	3	..	..
No person shall be twice put in jeopardy of life or limb for the same offense. [Amendments].....	5	..	..
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside. [Amendments].....	14	1	..
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. [Amendments].....	14	1	..
Nor shall any State deprive any person of life, liberty, or property without due process of law. [Amendments].....	14	1	..
Nor deny to any person within its jurisdiction the equal protection of the laws. [Amendments].....	14	1	..
IMPEACHMENT. The President may grant reprieves and pardons except in cases of.....	2	2	1
The House of Representatives shall have the sole power of.....	1	2	5
The trial of all crimes shall be by jury, except in cases of.....	3	2	3
IMPEACHMENT for and conviction of treason, bribery, and other high crimes and misdemeanors. The President, Vice-President, and all civil officers shall be removed upon.....	2	4	..
IMPEACHMENTS. The Senate shall have sole power to try all.....	1	3	6
The Senate shall be on oath or affirmation when sitting for the trial of.....	1	3	6
When the President of the United States is tried the Chief Justice shall preside.....	1	3	6
No person shall be convicted without the concurrence of two-thirds of the members present.....	1	3	6
Judgment shall not extend beyond removal from office and disqualification to hold office.....	1	3	7
But the party convicted shall be liable to indictment and punishment according to law.....	1	3	7
IMPORTATION OF INTOXICATING LIQUORS for beverage purposes prohibited. [Amendments] .....	18	1	..



	Arti- cle.	Sec- tion.	Clause.
IMPORTATION of slaves prior to 1808 shall not be prohibited by the Congress.	1	9	1
But a tax or duty of ten dollars for each person may be imposed on such....	1	9	1
IMPORTS OR EXPORTS except what may be absolutely necessary for exe- cuting its inspection laws. No State shall, without the consent of Con- gress, lay any imposts or duties on.....	1	10	2
IMPORTS OR EXPORTS laid by any State shall be for the use of the Treasury. The net produce of all duties on.....	1	10	2
IMPORTS OR EXPORTS shall be subject to the revision and control of Con- gress. All laws of States laying duties on.....	1	10	2
IMPOSTS AND EXCISES. Congress shall have power to lay and collect taxes, duties.....	1	8	1
Shall be uniform throughout the United States. All taxes, duties.....	1	8	1
INABILITY of the President, the powers and duties of his office shall devolve on the Vice-President. In case of the death, resignation, or.....	2	1	5
INABILITY of the President or Vice-President. Congress may provide by law for the case of the removal, death, resignation, or.....	2	1	5
INCOMES, the Congress shall have power to lay and collect taxes on. The six- teenth amendment. [Amendments].....	16	..	..
INDIAN TRIBES. Congress shall have power to regulate commerce with the.	1	8	3
INDICTMENT or presentment of a grand jury. No person shall be held to answer for a capital or infamous crime unless on. [Amendments].....	5	..	..
Except in cases arising in the land or naval forces or in the militia when in actual service. [Amendments].....	5	..	..
INDICTMENT, trial, judgment, and punishment, according to law. The party convicted in case of impeachment shall nevertheless be liable and sub- ject to. ....	1	3	7
INFAMOUS CRIME unless on presentment or indictment of a grand jury. No person shall be held to answer for a capital or. [Amendments].....	5	..	..
INFERIOR COURTS. Congress shall have power to constitute tribunals inferior to the Supreme Court.....	1	8	9
INFERIOR COURTS as Congress may establish. The judicial power of the United States shall be vested in one Supreme Court and such.....	3	1	..
The judges of both the Supreme and inferior courts shall hold their offices during good behavior.....	3	1	..
Their compensation shall not be diminished during their continuance in office.....	3	1	..
INFERIOR OFFICERS in the courts of law, in the President alone, or in the heads of Departments. Congress, if they think proper, may by law vest the appointment of. ....	2	2	2
INHABITANT OF THE STATE for which he shall be chosen. No person shall be a Senator who shall not have attained the age of thirty years, been nine years a citizen of the United States, and who shall not, when elected, be an.....	1	3	3
INSURRECTION OR REBELLION against the United States. No person shall be a Senator or Representative in Congress, or Presidential elector, or hold any office, civil or military, under the United States, or any State, who, having taken an oath as a legislative, executive, or judicial officer of the United States, or of a State, afterwards engaged in. [Amendments].	14	3	..
But Congress may, by a vote of two-thirds of each House, remove such dis- abilities. [Amendments].....	14	3	..
Debts declared illegal and void which were contracted in aid of. [Amend- ments].....	14	4	..
INSURRECTIONS and repel invasions. Congress shall provide for calling forth the militia to suppress.....	1	8	15
INTOXICATING LIQUORS, for beverage purposes, prohibited. [Amend- ments] .....	18	1	..

	Arti- cle.	Sec- tion.	Clause.
INVASION. No State shall, without the consent of Congress, engage in war unless actually invaded, or in such imminent danger as will not admit of delay.....	1	10	3
The writ of habeas corpus shall not be suspended unless in case of rebellion or.	1	9	2
INVASION and domestic violence. The United States shall protect each State against.....	4	4	..
INVASIONS. Congress shall provide for calling forth the militia to suppress insurrections and repel.....	1	8	15
INVENTORS AND AUTHORS in their inventions and writings. Congress may pass laws to secure for limited times exclusive rights to.....	1	8	8
INVOLUNTARY SERVITUDE, except as a punishment for crime, abolished in the United States. Slavery and. [Amendments].....	13	1	..

## J.

JEOPARDY of life or limb for the same offense. No person shall be twice put in. [Amendments].....	5	..	..
JOURNAL of its proceedings. Each House shall keep a.....	1	5	3
JUDGES in every State shall be bound by the Constitution, the laws made in pursuance thereof, and treaties of the United States, which shall be the supreme law of the land.....	6	..	2
JUDGES of the Supreme and inferior courts shall hold their offices during good behavior.....	3	1	..
Their compensation shall not be diminished during their continuance in office.....	3	1	..
JUDGMENT in cases of impeachment shall not extend further than to removal from office and disqualification to hold any office of honor, trust, or profit under the United States.....	1	3	7
But the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.....	1	3	7
JUDICIAL POWER OF THE UNITED STATES. Congress shall have power to constitute tribunals inferior to the Supreme Court.....	1	8	9
The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish.....	3	1	..
The judges of the Supreme and inferior courts shall hold their offices during good behavior.....	3	1	..
Their compensation shall not be diminished during their continuance in office.....	3	1	..
It shall extend to all cases in law and equity arising under the Constitution, laws, and treaties of the United States.....	3	2	1
To all cases affecting ambassadors, other public ministers and consuls.....	3	2	1
To all cases of admiralty and maritime jurisdiction.....	3	2	1
To controversies to which the United States shall be a party.....	3	2	1
To controversies between two or more States.....	3	2	1
To controversies between a State and citizens of another State.....	3	2	1
To controversies between citizens of different States.....	3	2	1
To citizens of the same State claiming lands under grants of different States..	3	2	1
To controversies between a State or its citizens and foreign states, citizens, or subjects.....	3	2	1
In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.....	3	2	2
In all other cases before mentioned it shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make.....	3	2	2



	Arti- cle.	Sec- tion.	Clause.
JUDICIAL POWER OF THE UNITED STATES—Continued.			
The trial of all crimes, except in cases of impeachment, shall be by jury-....	3	2	3
The trial shall be held in the State where the crimes shall have been committed.....	3	2	3
But when not committed in a State, the trial shall be at such place or places as Congress may by law have directed.....	3	2	3
The judicial power of the United States shall not be held to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state. [Amendments].....	11	..	..
JUDICIAL PROCEEDINGS of every other State. Full faith and credit shall be given in each State to the acts, records, and.....	4	1	..
Congress shall prescribe the manner of proving such acts, records, and proceedings.....	4	1	..
JUDICIAL and executive officers of the United States and of the several States shall be bound by an oath to support the Constitution.....	6	..	3
JUDICIARY. The Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a State may be a party.....	3	2	2
The Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and regulations as Congress may make.....	3	2	2
JUNCTION of two or more States or parts of States without the consent of the legislatures and of Congress. No State shall be formed by the.....	4	3	1
JURISDICTION of another State. No new State shall be formed or erected within the.....	4	3	1
JURISDICTION, both as to law and fact, with such exceptions and under such regulations as Congress may make. The Supreme Court shall have appellate.....	3	2	2
JURISDICTION. In all cases affecting ambassadors, and other public ministers and consuls, and in cases where a State is a party, the Supreme Court shall have original.....	3	2	2
JURY. The trial of all crimes, except in cases of impeachment, shall be by....	3	2	3
In all criminal prosecutions the accused shall have a speedy and public trial by. [Amendments].....	6	..	..
All suits at common law, where the value exceeds twenty dollars, shall be tried by. [Amendments].....	7	..	..
Where a fact has been tried by a jury it shall not be reexamined except by the rules of the common law. [Amendments].....	7	..	..
JUST COMPENSATION. Private property shall not be taken for public use without. [Amendments].....	5	..	..
JUSTICE, insure domestic tranquillity, etc. To establish. [Preamble.]			

L.

LABOR, in one State, escaping into another State, shall be delivered up to the party to whom such service or labor may be due. Fugitives from service or.	4	2	3
LAND and naval forces. Congress shall make rules for the government and regulation of the.....	1	8	14
LAW and fact, with exceptions and under regulations to be made by Congress. The Supreme Court shall have appellate jurisdiction as to.....	3	2	2
LAW of the land. The Constitution, the laws made in pursuance thereof, and treaties of the United States shall be the supreme.....	6	..	2
The judges in every State shall be bound thereby.....	6	..	2
LAW of nations. Congress shall provide for punishing offenses against the.....	1	8	10
LAWS. Congress shall have power to provide for calling forth the militia to suppress insurrection, repel invasions, and to execute the.....	1	8	15

	Arti- cle.	Sec- tion.	Clause.
<b>LAWS AND TREATIES</b> of the United States. The judicial power shall extend to all cases in law and equity arising under the Constitution or the.....	3	2	1
<b>LAWS</b> necessary to carry into execution the powers vested in the Government, or in any department or officer of the United States. Congress shall have power to make all.....	1	8	18
<b>LEGAL TENDER</b> in payment of debts. No State shall make anything but gold and silver coin a.....	1	10	1
<b>LEGISLATION</b> in all cases over such district as may become the seat of government. Congress shall have power to exercise exclusive.....	1	8	17
Over all places purchased by consent of the legislatures in the different States for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. Congress shall have power to exercise exclusive.....	1	8	17
<b>LEGISLATION.</b> Congress shall have power to make all laws necessary and proper for carrying into execution all the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.....	1	8	18
Congress shall have power to enforce the thirteenth amendment by appropriate. [Amendments].....	13	2	..
Congress shall have power to enforce the fourteenth amendment by appropriate. [Amendments].....	14	5	..
Congress shall have power to enforce the fifteenth amendment by appropriate. [Amendments].....	15	2	..
<b>LEGISLATIVE</b> powers herein granted shall be vested in a Congress. All.....	1	1	..
<b>LEGISLATURE OR THE EXECUTIVE</b> (when the legislature can not be convened). The United States shall protect each State against invasion; and against domestic violence on the application of the.....	4	4	..
<b>LEGISLATURES</b> of two-thirds of the States, Congress shall call a convention for proposing amendments to the Constitution. On the application of the....	5	..	..
<b>LETTERS</b> of marque and reprisal. Congress shall have power to grant.....	1	8	11
No State shall grant.....	1	10	1
<b>LIBERTY</b> to ourselves and our posterity, etc. To secure the blessings of. [Preamble.]			
<b>LIFE, LIBERTY, AND PROPERTY</b> without due process of law. No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of. [Amendments].....	5	..	..
No State shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of. [Amendments].....	14	1	..
<b>LIFE</b> or limb for the same offense. No person shall be twice put in jeopardy of. [Amendments].....	5	..	..
<b>LOSS</b> or emancipation of any slave shall be held illegal and void. Claims for the. [Amendments].....	14	4	..
<b>M.</b>			
<b>MAGAZINES</b> , arsenals, dockyards, and other needful buildings. Congress shall have exclusive authority over all places purchased for the erection of....	1	8	17
<b>MAJORITY</b> of each House shall constitute a quorum to do business. A.....	1	5	1
But a smaller number may adjourn from day to day and may be authorized to compel the attendance of absent members.....	1	5	1
<b>MAJORITY</b> of all the States shall be necessary to a choice.....	1	5	1
When the choice of a President shall devolve on the House of Representatives, a quorum shall consist of a member or members from two-thirds of the States; but a. [Amendments].....	12	..	..
<b>MAJORITY.</b> When the choice of a Vice President shall devolve on the Senate, a quorum shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. [Amendments].....	12	..	..



	Arti- cle.	Sec- tion.	Clause.
MANUFACTURE of intoxicating liquors for beverage purposes prohibited. [Amendments].....	18	1	..
MARITIME JURISDICTION. The judicial power shall extend to all cases of admiralty and.....	3	2	1
MARQUE and reprisal. Congress shall have power to grant letters of.....	1	8	11
No State shall grant any letters of.....	1	10	1
MARYLAND entitled to six Representatives in the First Congress.....	1	2	3
MASSACHUSETTS entitled to eight Representatives in the First Congress....	1	2	3
MEASURES. Congress shall fix the standard of weights and.....	1	8	5
MEETING OF CONGRESS. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.....	1	4	2
MEMBERS of Congress and of State legislatures shall be bound by oath or affirma- tion to support the Constitution.....	6	..	3
MILITIA to execute the laws, suppress insurrections, and repel invasions. Con- gress shall provide for calling forth the.....	1	8	15
Congress shall provide for organizing, arming, and disciplining the.....	1	8	16
Congress shall provide for governing such part of them as may be employed by the United States.....	1	8	16
Reserving to the States the appointment of the officers and the right to train the militia according to the discipline prescribed by Congress.....	1	8	16
A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. [Amend- ments].....	2	..	..
MISDEMEANORS. The President, Vice President, and all civil officers shall be removed on impeachment for and conviction of treason, bribery, or other high crimes and.....	2	4	..
MONEY on the credit of the United States. Congress shall have power to borrow. Regulate the value thereof and of foreign coin. Congress shall have power to coin.....	1	8	2
Shall be drawn from the Treasury but in consequence of appropriations made by law. No.....	1	8	5
Shall be published from time to time. A regular statement and account of receipts and expenditures of public.....	1	9	7
For raising and supporting armies. No appropriation of money shall be for a longer term than two years.....	1	9	7
	1	8	12

## N.

NATIONS. Congress shall have power to regulate commerce with foreign.....	1	8	3
Congress shall provide for punishing offenses against the law of.....	1	8	10
NATURAL-BORN CITIZEN, or a citizen at the adoption of the Constitution, shall be eligible to the office of President. No person except a.....	2	1	4
NATURALIZATION. Congress shall have power to establish a uniform rule of. NATURALIZED in the United States, and subject to their jurisdiction, shall be citizens of the United States and of the State in which they reside. All persons born or. [Amendments].....	1	8	4
NAVAL FORCES. Congress shall make rules and regulations for the govern- ment and regulation of the land and.....	14	1	..
	1	8	14
NAVY. Congress shall have power to provide and maintain a.....	1	8	13
NEW HAMPSHIRE entitled to three Representatives in the First Congress....	1	2	3
NEW JERSEY entitled to four Representatives in the First Congress.....	1	2	3
NEW STATES may be admitted by Congress into this Union.....	4	3	1
But no new State shall be formed within the jurisdiction of another State....	4	3	1
Nor shall any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures and of Congress.....	4	3	1
NEW YORK entitled to six Representatives in the First Congress.....	1	2	3

	Arti- cle.	Sec- tion.	Clause.
NOBILITY shall be granted by the United States. No title of.....	1	9	8
No State shall grant any title of.....	1	10	1
NOMINATIONS FOR OFFICE by the President. The President shall nomi- nate, and, by and with the advice and consent of the Senate, shall appoint ambassadors and other public officers.....	2	2	2
He may grant commissions to fill vacancies that happen in the recess of the Senate, which shall expire at the end of their next session.....	2	2	3
NORTH CAROLINA entitled to five Representatives in the First Congress....	1	2	3
NUMBER OF ELECTORS for President and Vice President in each State shall be equal to the number of Senators and Representatives to which such State may be entitled in Congress.....	2	1	2
<b>O.</b>			
OATH OF OFFICE of the President of the United States. Form of the.....	2	1	7
OATH OR AFFIRMATION. No warrants shall be issued but upon probable cause, supported by. [Amendments].....	4	..	..
OATH OR AFFIRMATION to support the Constitution. Senators and Repre- sentatives, members of State legislatures, executive and judicial officers of the United States and of the several States, shall be bound by.....	6	..	3
But no religious test shall ever be required as a qualification for office.....	6	..	3
The Senators when sitting to try impeachment shall be on.....	1	3	6
OBJECTIONS. If he shall not approve it, the President shall return the bill to the House in which it originated with his.....	1	7	2
OBLIGATION OF CONTRACTS. No State shall pass any <i>ex post facto</i> law, or law impairing the.....	1	10	1
OBLIGATIONS incurred in aid of insurrection or rebellion against the United States to be held illegal and void. All debts or. [Amendments].....	14	4	..
OFFENSE. No person shall be twice put in jeopardy of life or limb for the same. [Amendments]. .....	5	..	..
OFFENSES against the law of nations. Congress shall provide for punishing..	1	8	10
OFFENSES against the United States, except in cases of impeachment. The President may grant reprieves or pardons for.....	2	2	1
OFFICE under the United States. No person shall be a member of either House while holding any civil.....	1	6	2
No Senator or Representative shall be appointed to any office under the United States which shall have been created, or its emoluments increased, during the term for which he is elected.....	1	6	2
Or title of any kind from any king, prince, or foreign State, without the con- sent of Congress. No person holding any office under the United States shall accept of any present, emolument.....	1	9	8
OFFICE of President, in case of his removal, death, resignation, or inability, shall devolve on the Vice President. The powers and duties of the....	2	1	5
OFFICE during the term of four years. The President and Vice President shall hold.....	2	1	1
Of trust or profit under the United States shall be an elector for President and Vice President. No person holding an.....	2	1	2
OFFICE, civil or military under the United States, or any State, who had taken an oath as a legislative, executive, or judicial officer of the United States, or of any State, and afterwards engaged in insurrection or rebellion. No person shall be a Senator, Representative, or Presidential elector, or hold any. [Amendments].....	14	3	..
OFFICERS in the President alone, in the courts of law, or in the heads of Depart- ments. Congress may vest the appointment of inferior.....	2	2	2
OFFICERS of the United States shall be removed on impeachment for and con- viction of treason, bribery, or other high crimes and misdemeanors. The President, Vice-President, and all civil.....	2	4	..



	Arti- cle.	Sec- tion.	Clause.
OFFICERS. The House of Representatives shall choose their Speaker and other .....	1	2	5
The Senate, in the absence of the Vice-President, shall choose a President pro tempore, and also their other.....	1	3	5
OFFICES becoming vacant in the recess of the Senate may be filled by the President, the commissions to expire at the end of the next session.....	2	2	3
ONE-FIFTH of the members present, be entered on the journal of each House. The yeas and nays shall, at the desire of.....	1	5	3
OPINION of the principal officers in each of the Executive Departments on any subject relating to their duties. The President may require the written..	2	2	1
ORDER, resolution, or vote (except on a question of adjournment), requiring the concurrence of the two Houses, shall be presented to the President. Every.....	1	7	3
ORIGINAL JURISDICTION in all cases affecting ambassadors, other public ministers and consuls, and in which a State may be a party. The Supreme Court shall have.....	3	2	2
OVERT ACT, or on confession in open court. Conviction of treason shall be on the testimony of two witnesses to the.....	3	3	1
<b>P.</b>			
PARDONS, except in cases of impeachment. The President may grant reprieves and.....	2	2	1
PATENT RIGHTS to inventors. Congress may pass laws for securing.....	1	8	8
PEACE. Members of Congress shall not be privileged from arrest for treason, felony, and breach of the.....	1	6	1
No State shall, without the consent of Congress, keep troops or ships of war in time of.....	1	10	3
No soldier shall be quartered in any house without the consent of the owner in time of. [Amendments].....	3	..	..
PENSIONS AND BOUNTIES, shall not be questioned. The validity of the public debt incurred in suppressing insurrection and rebellion against the United States, including the debt for. [Amendments].....	14	4	..
PENNSYLVANIA entitled to eight Representatives in the first Congress.....	1	2	3
PEOPLE peaceably to assemble and petition for redress of grievances shall not be abridged by Congress. The right of the. [Amendments].....	1	..	..
To keep and bear arms shall not be infringed. A well-regulated militia being necessary to the security of a free State, the right of the. [Amendments]. ..	2	..	..
To be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. The right of the. [Amendments].....	4	..	..
The enumeration of certain rights in the Constitution shall not be held to deny or disparage others retained by the. [Amendments].....	9	..	..
Powers not delegated to the United States, nor prohibited to the States, are reserved to the States or to the. [Amendments].....	10	..	..
PERFECT UNION, ETC. To establish a more. [Preamble.]			
PERSONS, HOUSES, PAPERS, and effects against unreasonable searches and seizures. The people shall be secure in their. [Amendments].....	4	..	..
PERSONS as any State may think proper to admit, shall not be prohibited prior to 1808. The migration or importation of such.....	1	9	1
But a tax or duty of ten dollars shall be imposed on the importation of each of such.....	1	9	1
PETITION for the redress of grievances. Congress shall make no law abridging the right of the people peaceably to assemble and to. [Amendments]....	1	..	..
PIRACIES AND FELONIES committed on the high seas. Congress shall define and punish.....	1	8	10

	Arti- cle.	Sec- tion.	Clause.
PLACE than that in which the two Houses shall be sitting. Neither House during the session shall, without the consent of the other, adjourn for more than three days, nor to any other.....	1	5	4
PLACES OF CHOOSING SENATORS. Congress may by law make or alter regulations for the election of Senators and Representatives, except as to the.....	1	4	1
PORTS of one State over those of another. Preference shall not be given by any regulation of commerce or revenue to the.....	1	9	6
PORTS. Vessels clearing from the ports of one State shall not pay duties in another.....	1	9	6
POST-OFFICES AND POST-ROADS. Congress shall establish.....	1	8	7
POWERS herein granted shall be vested in Congress. All legislative.....	1	1	..
POWERS vested by the Constitution in the Government or in any Department or officer of the United States. Congress shall make all laws necessary to carry into execution the.....	1	8	18
POWERS and duties of the office shall devolve on the Vice-President on the removal, death, resignation, or inability of the President. The.....	2	1	5
POWERS not delegated to the United States nor prohibited to the States are reserved to the States and to the people. [Amendments].....	10	..	..
The enumeration of certain rights in this Constitution shall not be held to deny or disparage others retained by the people. [Amendments].....	9	..	..
PREFERENCE, by any regulation of commerce or revenue, shall not be given to the ports of one State over those of another.....	1	9	6
PREJUDICE any claims of the United States or of any particular State respecting the territory or property of the United States. Nothing in this Constitution shall.....	4	3	2
PRESENT, emolument, office, or title of any kind whatever from any king, prince, or foreign State. No person holding any office under the United States shall, without the consent of Congress, accept any.....	1	9	8
PRESENTMENT or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service. No person shall be held to answer for a capital or otherwise infamous crime unless on a. [Amendments].....	5	..	..
PRESIDENT OF THE UNITED STATES. The Senate shall choose a President pro tempore when the Vice-President shall exercise the office of....	1	3	5
The Chief Justice shall preside upon the trial of the.....	1	3	6
Shall approve and sign all bills passed by Congress before they shall become laws.....	1	7	2
Shall return to the House in which it originated, with his objections, any bill which he shall not approve.....	1	7	2
If not returned within ten days (Sundays excepted) it shall become a law, unless Congress shall adjourn before the expiration of that time.....	1	7	2
Every order, resolution, or vote which requires the concurrence of both Houses, except on a question of adjournment, shall be presented to the....	1	7	3
If disapproved by him, shall be returned and proceeded on as in the case of a bill.....	1	7	3
The executive power shall be vested in a.....	2	1	1
He shall hold his office during the term of four years.....	2	1	1
In case of the removal of the President from office, or of his death, resignation, or inability to discharge the duties of his office, the Vice-President shall perform the duties of.....	2	1	5
Congress may declare, by law, in the case of the removal, death, resignation, or inability of the President, what officer shall act as.....	2	1	5
The President shall receive a compensation which shall not be increased nor diminished during his term, nor shall he receive any other emolument from the United States.....	2	1	6



	Arti- cle.	Sec- tion.	Clause.
<b>PRESIDENT OF THE UNITED STATES—Continued.</b>			
Before he enters upon the execution of his office he shall take an oath of office.....	2	1	7
Shall be Commander in Chief of the Army and Navy, and of the militia of the States when called into actual service.....	2	2	1
He may require the opinion, in writing, of the principal officer in each of the Executive Departments.....	2	2	1
He may grant reprieves or pardons for offenses, except in cases of impeachment.....	2	2	1
He may make treaties, by and with the advice and consent of the Senate, two-thirds of the Senators present concurring.....	2	2	2
He may appoint, by and with the advice and consent of the Senate, ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers whose appointments may be authorized by law and not herein provided for.....	2	2	2
Congress may vest the appointment of inferior officers in the.....	2	2	2
He may fill up all vacancies that may happen in the recess of the Senate by commissions which shall expire at the end of their next session.....	2	2	3
He shall give information to Congress of the state of the Union, and recommend measures.....	2	3	..
On extraordinary occasions he may convene both Houses or either House of Congress.....	2	3	..
In case of disagreement between the two Houses as to the time of adjournment, he may adjourn them to such time as he may think proper.....	2	3	..
He shall receive ambassadors and other public ministers.....	2	3	..
He shall take care that the laws be faithfully executed.....	2	3	..
He shall commission all the officers of the United States.....	2	3	..
Shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.....	2	4	..
No person except a natural-born citizen or a citizen of the United States at the adoption of the Constitution shall be eligible to the office of.....	2	1	4
No person who shall not have attained the age of thirty-five years and been fourteen years a citizen of the United States shall be eligible to the office of..	2	1	4
<b>PRESIDENT AND VICE-PRESIDENT. MANNER OF CHOOSING. Each State, by its legislature, shall appoint a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress.....</b>			
No Senator or Representative or person holding an office of trust or profit under the United States shall be an elector.....	2	1	2
Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States.....	2	1	3
The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves. [Amendments].....	12	..	..
They shall name in distinct ballots the person voted for as President and the person voted for as Vice-President. [Amendments].....	12	..	..
They shall make distinct lists of the persons voted for as President and as Vice-President, which they shall sign and certify and transmit sealed to the President of the Senate at the seat of government. [Amendments]..	12	..	..
The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. [Amendments].....	12	..	..
The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed. [Amendments].....	12	..	..

	Arti- cle.	Sec- tion.	Clause.
<b>PRESIDENT AND VICE PRESIDENT. MANNER OF CHOOSING—Con.</b>			
If no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. [Amendments].....	12	..	..
In choosing the President, the votes shall be taken by States, the representation from each State having one vote. [Amendments].....	12	..	..
A quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. [Amendments].....	12	..	..
But if no choice shall be made before the 4th of March next following, then the Vice-President shall act as President, as in the case of the death or disability of the President. [Amendments].....	12	..	..
<b>PRESIDENT OF THE SENATE</b> , but shall have no vote unless the Senate be equally divided. The Vice-President shall be.....	1	3	4
<b>PRESIDENT PRO TEMPORE</b> . In the absence of the Vice-President the Senate shall choose a.....	1	3	5
When the Vice-President shall exercise the office of President of the United States, the Senate shall choose a.....	1	3	5
<b>PRESS</b> . Congress shall pass no law abridging the freedom of speech or of the. [Amendments].....	1	..	..
<b>PREVIOUS CONDITION OF SERVITUDE</b> . The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or. [Amendments].....	15	1	..
<b>PRIVATE PROPERTY</b> shall not be taken for public use without just compensation. [Amendments].....	5	..	..
<b>PRIVILEGE</b> . Senators and Representatives shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same. ....	1	6	1
They shall not be questioned for any speech or debate in either House in any other place.....	1	6	1
<b>PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES</b> . The citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States.....	4	2	1
No soldier shall be quartered in any house without the consent of the owner in time of peace. [Amendments].....	3	..	..
No person shall be twice put in jeopardy of life or limb for the same offense. [Amendments].....	5	..	..
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside. [Amendments].....	14	1	..
No State shall make or enforce any law which shall abridge the. [Amendments].....	14	1	..
No State shall deprive any person of life, liberty, or property without due process of law. [Amendments].....	14	1	..
Nor deny to any person within its jurisdiction the equal protection of its laws. [Amendments].....	14	1	..
<b>PRIZES</b> captured on land or water. Congress shall make rules concerning.....	1	8	11
<b>PROBABLE CAUSE</b> . The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue for such but upon. [Amendments].....	4	..	..
<b>PROCESS OF LAW</b> . No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due. [Amendments].....	5	..	..



	Arti- cle.	Sec- tion.	Clause.
PROCESS OF LAW. No State shall deprive any person of life, liberty, or property without due. [Amendments] .....	14	1	..
PROCESS for obtaining witnesses in his favor. In all criminal prosecutions the accused shall have. [Amendments]. .....	6	..	..
PROGRESS of science and useful arts. Congress shall have power to promote the.....	1	8	8
PROHIBITION of intoxicating liquors for beverage purposes. [Amendments].	18	1	..
PROPERTY of the United States. Congress may dispose of and make all needful rules and regulations respecting the territory or.....	4	3	2
PROPERTY without due process of law. No person shall be compelled in any criminal case to be a witness against himself; nor shall he be deprived of his life, liberty, or. [Amendments]. .....	5	..	..
No State shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of his life, liberty, or. [Amendments]....	14	1	..
PROSECUTIONS. The accused shall have a speedy and public trial in all criminal. [Amendments]. .....	6	..	..
He shall be tried by a jury in the State or district where the crime was committed. [Amendments]. .....	6	..	..
He shall be informed of the nature and cause of the accusation. [Amendments]. .....	6	..	..
He shall be confronted with the witnesses against him. [Amendments]....	6	..	..
He shall have compulsory process for obtaining witnesses. [Amendments].	6	..	..
He shall have counsel for his defense. [Amendments]. .....	6	..	..
PROTECTION of the laws. No State shall deny to any person within its jurisdiction the equal. [Amendments]. .....	14	1	..
PUBLIC DEBT of the United States incurred in suppressing insurrection or rebellion shall not be questioned. The validity of the. [Amendments].	14	4	..
PUBLIC SAFETY may require it. The writ of <i>habeas corpus</i> shall not be suspended, unless when in cases of rebellion or invasion the.....	1	9	2
PUBLIC TRIAL by jury. In all criminal prosecutions the accused shall have a speedy and. [Amendments]. .....	6	..	..
PUBLIC USE. Private property shall not be taken for, without just compensation. [Amendments]. .....	5	..	..
PUNISHMENT according to law. Judgment in cases of impeachment shall not extend further than to removal from, and disqualification for, office; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and. ....	1	3	7
PUNISHMENTS inflicted. Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual. [Amendments]. .....	8	..	..

## Q.

QUALIFICATION FOR OFFICE. No religious test shall ever be required as a. ....	6	..	3
QUALIFICATIONS of electors of Members of the Senate shall be the same as electors for the most numerous branch of the State legislature. The seven-teenth amendment. [Amendments]. .....	17	..	..
QUALIFICATIONS of electors of Members of the House of Representatives shall be the same as electors for the most numerous branch of the State legislature.....	1	2	1
QUALIFICATIONS of Members of the House of Representatives. They shall be 25 years of age, 7 years a citizen of the United States, and an inhabitant of the State in which chosen. ....	1	2	2
QUALIFICATIONS of Senators. They shall be 30 years of age, 9 years a citizen of the United States, and an inhabitant of the State in which chosen. .	1	3	3
Of its own Members. Each House shall be the judge of the election, returns, and. ....	1	5	1

	Arti- cle.	Sec- tion.	Clause.
QUALIFICATIONS of the President. No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of the Constitution, shall be eligible to the office of President.....	2	1	4
Neither shall any person be eligible to the office of President who shall not have attained the age of 35 years, and been 14 years a resident within the United States.....	2	1	4
Of the Vice President. No person constitutionally ineligible to the office of President shall be eligible to that of Vice President. [Amendments]	12	..	..
QUARTERED in any house without the consent of the owner in time of peace. No soldier shall be. [Amendments].	3	..	..
QUORUM to do business. A majority of each House shall constitute a.....	1	5	1
But a smaller number than a quorum may adjourn from day to day, and may be authorized to compel the attendance of absent Members.....	1	5	1
Of the House of Representatives for choosing a President shall consist of a Member or Members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. [Amendments].	12	..	..
QUORUM to elect a Vice President by the Senate. Two-thirds of the whole number of Senators shall be a. [Amendments].	12	..	..
A majority of the whole number shall be necessary to a choice. [Amendments].	12	..	..

## R.

RACE, color, or previous condition of servitude. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of. [Amendments].	15	1	..
RATIFICATION of amendments to the Constitution shall be by the legislatures of three-fourths of the several States or by conventions in three-fourths of the States, accordingly as Congress may propose.....	5	..	..
Of the conventions of nine States shall be sufficient to establish the Constitution between the States so ratifying the same.....	7	..	..
RATIO of representation until the first enumeration under the Constitution shall be made not to exceed one for every thirty thousand.....	1	2	3
RATIO of representation shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. [Amendments].	14	2	..
RATIO. But when the right to vote for presidential electors or Members of Congress, or the legislative, executive, and judicial officers of the State, except for engaging in rebellion or other crime, shall be denied or abridged by a State, the basis of representation shall be reduced therein in the proportion of such denial or abridgment of the right to vote. [Amendments].	14	2	..
REBELLION against the United States. Persons who, while holding certain Federal and State offices, took an oath to support the Constitution, afterwards engaged in insurrection or rebellion, disabled from holding office under the United States. [Amendments].	14	3	..
But Congress may by a vote of two-thirds of each House remove such disability. [Amendments].	14	3	..
REBELLION against the United States. Debts incurred for pensions and bounties for services in suppressing the rebellion shall not be questioned. [Amendments].	14	4	..
All debts and obligations incurred in aid of the rebellion, and all claims for the loss or emancipation of slaves, declared and held to be illegal and void. [Amendments].	14	4	..
REBELLION or invasion. The writ of <i>habeas corpus</i> shall not be suspended except when the public safety may require it in cases of.....	1	9	2
RECEIPTS and expenditures of all public money shall be published from time to time. A regular statement of.....	1	9	7



	Arti- cle.	Sec- tion.	Clause.
RECESS OF THE SENATE. The President may grant commissions, which shall expire at the end of the next session, to fill vacancies that may happen during the.....	2	2	3
RECONSIDERATION of a bill returned by the President with his objections. Proceedings to be had upon the.....	1	7	2
RECORDS, and judicial proceedings of every other State. Full faith and credit shall be given in each State to the acts.....	4	1	..
Congress shall prescribe the manner of proving such acts, records, and proceedings.....	4	1	..
REDRESS OF GRIEVANCES. Congress shall make no law abridging the right of the people peaceably to assemble and to petition for the. [Amendments].....	1	..	..
REGULATIONS, except as to the places of choosing Senators. The time, places, and manner of holding elections for Senators and Representatives shall be prescribed by the legislatures of the States, but Congress may at any time by law make or alter such.....	1	4	1
REGULATIONS of commerce or revenue. Preference to the ports of one State over those of another shall not be given by any.....	1	9	6
RELIGION or prohibiting the free exercise thereof. Congress shall make no law respecting the establishment of. [Amendments].....	1	..	..
RELIGIOUS test shall ever be required as a qualification for any office or public trust under the United States. No.....	6	..	3
REMOVAL of the President from office, the same shall devolve on the Vice-President. In case of the.....	2	1	5
REPRESENTATION. No State, without its consent, shall be deprived of its equal suffrage in the Senate.....	5	..	..
REPRESENTATION and direct taxation, how apportioned among the several States. [This provision is changed by the fourteenth amendment, section 2].....	1	2	3
REPRESENTATION until the first enumeration under the Constitution not to exceed one for every thirty thousand. The ratio of.....	1	2	3
REPRESENTATION in any State. The executive thereof shall issue writs of election to fill vacancies in the.....	1	2	4
REPRESENTATION among the several States shall be according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. The ratio of. [Amendments].....	14	2	..
But where the right to vote in certain Federal and State elections is abridged for any cause other than rebellion or other crime the basis of representation shall be reduced. [Amendments].....	14	2	..
REPRESENTATIVES. Congress shall consist of a Senate and House of.....	1	1	..
Qualifications of electors of members of the House of.....	1	2	1
No person shall be a Representative who shall not have attained the age of twenty-five years, been seven years a citizen of the United States, and an inhabitant of the State in which he shall be chosen.....	1	2	2
And direct taxes, how apportioned among the several States. [Amended by fourteenth amendment, section 2].....	1	2	3
Shall choose their Speaker and other officers. The House of.....	1	2	5
Shall have the sole power of impeachment. The House of.....	1	2	5
Executives of the States shall issue writs of election to fill vacancies in the House of.....	1	2	4
The times, places, and manner of choosing Representatives shall be prescribed by the legislatures of the States.....	1	4	1
But Congress may at any time by law make or alter such regulations except as to the places of choosing Senators.....	1	4	1
And Senators shall receive a compensation to be ascertained by law.....	1	6	1

	Article.	Section.	Clause.
REPRESENTATIVES—Continued.			
Shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during attendance at the session of the House, and in going to and returning from the same.....	1	6	1
Shall not be questioned in any other place for any speech or debate. Members of the House of.....	1	6	1
No member shall be appointed during his term to any civil office which shall have been created, or the emoluments of which shall have been increased, during such term.....	1	6	2
No person holding any office under the United States shall, while holding such office, be a Member of the House of.....	1	6	2
All bills for raising revenue shall originate in the House of.....	1	7	1
No Senator or Representative shall be an elector for President or Vice-President.....	2	1	2
REPRESENTATIVES shall be bound by an oath or affirmation to support the Constitution of the United States. The Senators and.....	6	..	3
REPRESENTATIVES among the several States. Provisions relative to the apportionment of. [Amendments].....	14	2	..
REPRESENTATIVES AND SENATORS. Prescribing certain disqualifications for office as. [Amendments].....	14	3	..
But Congress may, by a vote of two-thirds of each House, remove such disqualification. [Amendments].....	14	3	..
REPRIEVES and pardons except in cases of impeachment. The President may grant.....	2	2	1
REPRISAL. Congress shall have power to grant letters of marque and.....	1	8	11
No State shall grant any letters of marque and.....	1	10	1
REPUBLICAN form of government. The United States shall guarantee to every State in this Union a.....	4	4	..
And shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature can not be convened), against domestic violence.....	4	4	..
RESERVED RIGHTS of the States and the people. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. [Amendments].....	9	..	..
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people. [Amendments].....	10	..	..
RESIGNATION, or inability of the President, the duties and powers of his office shall devolve on the Vice-President. In case of the death.....	2	1	5
RESIGNATION, or inability of the President. Congress may by law provide for the case of the removal, death.....	2	1	5
RESOLUTION, or vote (except on a question of adjournment) requiring the concurrence of the two Houses shall, before it becomes a law, be presented to the President. Every order.....	1	7	3
REVENUE shall originate in the House of Representatives. All bills for raising.....	1	7	1
REVENUE. Preference shall not be given to the ports of one State over those of another by any regulations of commerce or.....	1	9	6
RHODE ISLAND entitled to one Representative in the First Congress.....	1	2	3
RIGHT OF PETITION. Congress shall make no law abridging the right of the people peaceably to assemble and to petition for the redress of grievances. [Amendments].....	1	..	..
RIGHT TO KEEP AND BEAR ARMS. A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. [Amendments].....	2	..	..
RIGHTS in the Constitution shall not be construed to deny or disparage others retained by the people. The enumeration of certain. [Amendments]...	9	..	..



	Arti- cle.	Sec- tion.	Clause.
RIGHTS not delegated to the United States nor prohibited to the States are reserved to the States respectively or to the people. [Amendments].....	10	..	..
RULES of its proceedings. Each House may determine the.....	1	5	2
RULES AND REGULATIONS respecting the territory or other property of the United States. Congress shall dispose of and make all needful.....	4	3	2
RULES OF THE COMMON LAW. All suits involving over twenty dollars shall be tried by jury according to the. [Amendments].....	7	..	..
No fact tried by a jury shall be reexamined except according to the. [Amendments].....	7	..	..

S.

SALE of intoxicating liquors for beverage purposes prohibited. [Amendments].	18	1	..
SCIENCE AND THE USEFUL ARTS by securing to authors and inventors the exclusive right to their writings and discoveries. Congress shall have power to promote the progress of.....	1	8	8
SEARCHES AND SEIZURES shall not be violated. The right of the people to be secure against unreasonable. [Amendments].....	4	..	..
And no warrants shall be issued but upon probable cause, on oath or affirmation, describing the place to be searched and the person or things to be seized. [Amendments].....	4	..	..
SEAT OF GOVERNMENT. Congress shall exercise exclusive legislation in all cases over such district as may become the.....	1	8	17
SECURITIES and current coin of the United States. Congress shall provide for punishing the counterfeiting of the.....	1	8	6
SECURITY OF A FREE STATE, the right of the people to keep and bear arms shall not be infringed. A well-regulated militia being necessary to the. [Amendments].....	2	..	..
SENATE AND HOUSE OF REPRESENTATIVES. The Congress of the United States shall consist of a.....	1	1	..
SENATE OF THE UNITED STATES. The Senate shall be composed of two Senators from each State, chosen by the legislature for six years.....	1	3	1
[Repealed by the seventeenth amendment].....	17	..	1
If vacancies happen during the recess of the legislature of a State, the executive thereof may make temporary appointments until the next meeting of the legislature.....	1	3	2
[Repealed by the seventeenth amendment].....	17	..	1
The Vice President shall be President of the Senate, but shall have no vote unless the Senate be equally divided.....	1	3	4
The Senate shall choose their other officers, and also a President pro tempore in the absence of the Vice President or when he shall exercise the office of President.....	1	3	5
The Senate shall have the sole power to try all impeachments. When sitting for that purpose they shall be on oath or affirmation.....	1	3	6
When the President of the United States is tried the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.....	1	3	6
It shall be the judge of elections, returns, and qualifications of its own members.....	1	5	1
A majority shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members.....	1	5	1
It may determine the rules of its proceedings, punish a member for disorderly behavior, and with the concurrence of two-thirds expel a member.....	1	5	2
It shall keep a journal of its proceedings, and from time to time publish the same, except such parts as may in their judgment require secrecy.....	1	5	3

	Arti- cle.	Sec- tion.	Clause.
SENATE OF THE UNITED STATES—Continued.			
It shall not adjourn for more than three days during a session without the consent of the other House.....	1	5	4
It may propose amendments to bills for raising revenue, but such bills shall originate in the House of Representatives.....	1	7	1
The Senate shall advise and consent to the ratification of all treaties, provided two-thirds of the members present concur.....	2	2	2
It shall advise and consent to the appointment of ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers not herein otherwise provided for.....	2	2	2
It may be convened by the President on extraordinary occasions.....	2	3	..
No State, without its consent, shall be deprived of its equal suffrage in the Senate.....	5	..	..
SENATORS shall, immediately after assembling, under their first election, be divided into three classes, so that the seats of one-third shall become vacant at the expiration of every second year.....	1	3	2
No person shall be a Senator who shall not be thirty years of age, nine years a citizen of the United States, and an inhabitant when elected of the State for which he shall be chosen.....	1	3	3
The times, places, and manner of choosing Senators may be fixed by the legislature of a State, but Congress may by law make or alter such regulations, except as to the places of choosing.....	1	4	1
If vacancies happen during the recess of the legislature of a State, the executive thereof may make temporary appointments until the next meeting of the legislature. [Amendments].....	1	3	2
[Repealed by the seventeenth amendment].....	17	..	2
They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of the Senate and in going to and returning from the same.....	1	6	1
And Representatives shall receive a compensation to be ascertained by law..	1	6	1
Senators and Representatives shall not be questioned for any speech or debate in either House in any other place.....	1	6	1
No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the United States which shall have been created, or of which the emoluments shall have been increased, during such term.....	1	6	2
No person holding any office under the United States shall be a member of either House during his continuance in office.....	1	6	2
No Senator or Representative or person holding an office of trust or profit under the United States shall be an elector for President and Vice President..	2	1	2
Senators and Representatives shall be bound by an oath or affirmation to support the Constitution.....	6	..	3
No person shall be a Senator or Representative who having, as a Federal or State officer, taken an oath to support the Constitution, afterwards engaged in rebellion against the United States. [Amendments].....	14	3	..
But Congress may, by a vote of two-thirds of each House, remove such disability. [Amendments].....	14	3	..
SERVICE OR LABOR in one State, escaping into another State, shall be delivered up to the party to whom such service or labor may be due. Fugitives from.....	4	2	3
SERVITUDE, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist in the United States or any place subject to their jurisdiction. Neither slavery nor involuntary. [Amendments]..	13	1	..
SERVITUDE. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of. [Amendments].....	15	1	..

	Arti- cle.	Sec- tion.	Clause.
SHIPS OF WAR in time of peace, without the consent of Congress. No State shall keep troops or.....	1	10	3
SILVER COIN a tender in payment of debts. No State shall make anything but gold and.....	1	10	1
SLAVE. Neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion, or any claim for the loss or emancipation of any. [Amendments].....	14	4	..
SLAVERY nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist in the United States, or any places subject to their jurisdiction. Neither. [Amendments]....	13	1	..
SOLDIERS shall not be quartered, in time of peace, in any house without the consent of the owner. [Amendments].....	3	..	..
SOUTH CAROLINA entitled to five Representatives in the First Congress.....	1	2	3
SPEAKER and other officers. The House of Representatives shall choose their..	1	2	5
SPEECH OR OF THE PRESS. Congress shall make no law abridging the freedom of. [Amendments].....	1	..	..
SPEEDY AND PUBLIC trial by a jury. In all criminal prosecutions the accused shall have a. [Amendments].....	6	..	..
STANDARD OF WEIGHTS and measures. Congress shall fix the.....	1	8	5
STATE OF THE UNION. The President shall, from time to time, give Congress information of the.....	2	3	..
STATE LEGISLATURES, and all executive and judicial officers of the United States, shall take an oath to support the Constitution. All members of the several.....	6	..	3
STATES. When vacancies happen in the representation from any State, the executive authority shall issue writs of election to fill such vacancies. [See seventeenth amendment].....	1	2	4
Congress shall have power to regulate commerce among the several.....	1	8	3
No State shall enter into any treaty, alliance, or confederation.....	1	10	1
Shall not grant letters of marque and reprisal.....	1	10	1
Shall not coin money.....	1	10	1
Shall not emit bills of credit.....	1	10	1
Shall not make anything but gold and silver coin a tender in payment of debts.....	1	10	1
Shall not pass any bill of attainder, <i>ex post facto</i> law, or law impairing the obligation of contracts.....	1	10	1
Shall not grant any title of nobility.....	1	10	1
Shall not, without the consent of Congress, lay any duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.....	1	10	2
Shall not, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war unless actually invaded or in such imminent danger as will not admit of delay.....	1	10	3
Full faith and credit in every other State shall be given to the public acts, records, and judicial proceedings of each State.....	4	1	..
Congress shall prescribe the manner of proving such acts, records, and proceedings.....	4	1	..
Citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.....	4	2	1
New States may be admitted by Congress into this Union.....	4	3	1
But no new State shall be formed or erected within the jurisdiction of another State.....	4	3	1
Nor any State formed by the junction of two or more States or parts of States, without the consent of the legislatures as well as of Congress.....	4	3	1



	Arti- cle.	Sec- tion.	Clause.
STATES—Continued.			
No State shall be deprived, without its consent, of its equal suffrage in the Senate.....	5	..	..
Three-fourths of the legislatures of the States or conventions of three-fourths of the States, as Congress shall prescribe, may ratify amendments to the Constitution.....	5	..	..
The United States shall guarantee a republican form of government to every State in the Union.....	4	4	..
They shall protect each State against invasion.....	4	4	..
And on application of the legislature, or the executive (when the legislature can not be convened), against domestic violence.....	4	4	..
The ratification by nine States shall be sufficient to establish the Constitution between the States so ratifying the same.....	7	..	..
When the choice of President shall devolve on the House of Representatives, the vote shall be taken by States. [Amendments].....	12	..	..
But in choosing the President the vote shall be taken by States, the representation from each State having one vote. [Amendments].....	12	..	..
A quorum for choice of President shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. [Amendments].....	12	..	..
Shall have concurrent power with Congress to enforce, by appropriate legislation, eighteenth amendment. [Amendments] .....	18	2	..
STATES or to the people. Powers not delegated to the United States, nor prohibited to the States, are reserved to the. [Amendments].....	10	..	..
SUFFRAGE in the Senate. No State shall be deprived without its consent of its equal.....	5	..	..
SUFFRAGE, Woman, nineteenth amendment. [Amendments].....	19	..	..
SUITS at common law, where the value in controversy shall exceed twenty dollars, shall be tried by jury. [Amendments].....	7	..	..
In law or equity against one of the States by citizens of another State or by citizens of a foreign State. The judicial power of the United States shall not extend to. [Amendments].....	11	..	..
SUPREME COURT. Congress shall have power to constitute tribunals inferior to the.....	1	8	9
SUPREME COURT, and such inferior courts as Congress may establish. The judicial power of the United States shall be vested in one.....	3	1	..
The judges of the Supreme and inferior courts shall hold their offices during good behavior.....	3	1	..
The compensation of the judges shall not be diminished during their continuance in office.....	3	1	..
SUPREME COURT shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and in which a State may be a party. The.....	3	2	2
Shall have appellate jurisdiction, both as to law and fact, with such exceptions and regulations as Congress may make. The.....	3	2	2
SUPREME LAW of the land. This Constitution, the laws made in pursuance thereof, and the treaties of the United States shall be the.....	6	..	2
The judges in every State shall be bound thereby.....	6	..	2
SUPPRESS insurrections, and repel invasions. Congress shall provide for calling forth the militia to execute the laws.....	1	8	15
SUPPRESSION of insurrection or rebellion, shall not be questioned. The public debt, including the debt for pensions and bounties incurred in the. [Amendments].....	14	4	..

Arti- cle.	Sec- tion.	Clause.
---------------	---------------	---------

**T.**

TAX shall be laid unless in proportion to the census or enumeration. No capi- tation or other direct. [See sixteenth amendment].....	1	9	4
TAX or duty shall be laid on articles exported from any State. No.....	1	9	5
TAXES (direct) and Representatives, how apportioned among the several States. [See fourteenth amendment, section 2].....	1	2	3
TAXES (direct). Congress shall have power to collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration. The sixteenth amend- ment. [Amendments].....	16	..	..
TAXES, duties, imposts, and excises. Congress shall have power to lay.....	1	8	1
They shall be uniform throughout the United States. [See sixteenth amend- ment].....	1	8	1
TEMPORARY APPOINTMENTS until the next meeting of the legislature. If vacancies happen in the Senate in the recess of the legislature of a State, the executive of the State shall make. [Repealed by seventeenth amendment].	1	3	2
TENDER in payment of debts. No State shall make anything but gold and silver coin a.....	1	10	1
TERM OF FOUR YEARS. The President and Vice-President shall hold their offices for the.....	2	1	1
TERM for which he is elected. No Senator or Representative shall be appointed to any office under the United States which shall have been created or its emoluments increased during the.....	1	6	2
TERRITORY or other property of the United States. Congress shall dispose of and make all needful rules and regulations respecting the.....	4	3	2
TEST as a qualification for any office or public trust shall ever be required. No religious.....	6	..	3
TESTIMONY of two witnesses to the same overt act, or on confession in open court. No person shall be convicted of treason except on the.....	3	3	1
THREE-FOURTHS OF THE LEGISLATURES of the States, or conventions in three-fourths of the States, as Congress shall prescribe, may ratify amendments to the Constitution.....	5	..	..
TIE. The Vice-President shall have no vote unless the Senate be equally divided.....	1	3	4
TIMES, PLACES, AND MANNER of holding elections for Senators and Repre- sentatives shall be prescribed in each State by the legislature thereof....	1	4	1
But Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.....	1	4	1
TITLE OF NOBILITY. The United States shall not grant any.....	1	9	8
No State shall grant any .....	1	10	1
TITLE of any kind, from any king, prince, or foreign State, without the consent of Congress. No person holding any office under the United States shall accept of any.....	1	9	8
TONNAGE without the consent of Congress. No State shall lay any duty of....	1	10	3
TRANQUILLITY, provide for the common defense, etc. To insure domestic. [Preamble.]			
TRANSPORTATION of intoxicating liquors for beverage purposes prohibited. [Amendments].....	18	1	..
TREASON shall consist only in levying war against the United States, or in adhering to their enemies, giving them aid and comfort.....	3	3	1
TREASON. No person shall, unless on the testimony of two witnesses to the same overt act, or on confession in open court, be convicted of.....	3	3	1
Congress shall have the power to declare the punishment of.....	3	3	2
Shall not work corruption of blood. Attainder of.....	3	3	2

	Arti- cle.	Sec- tion.	Clause.
TREASON. Shall not work forfeiture, except during the life of the person attainted. Attainder of.....	3	3	2
TREASON, BRIBERY, or other high crimes and misdemeanors. The President, Vice-President, and all civil officers shall be removed from office on impeachment for and conviction of.....	2	4	..
TREASON, FELONY, AND BREACH OF THE PEACE. Senators and Representatives shall be privileged from arrest while attending or while going to or returning from the sessions of Congress, except in cases of.....	1	6	1
TREASURY, but in consequence of appropriations made by law. No money shall be drawn from the.....	1	9	7
TREATIES. The president shall have power, with the advice and consent of the Senate, provided two-thirds of the Senators present concur, to make....	2	2	2
The judicial power shall extend to all cases arising under the Constitution, laws, and.....	3	2	1
They shall be the supreme law of the land, and the judges in every State shall be bound thereby.....	6	..	2
TREATY, alliance, or confederation. No State shall enter into any.....	1	16	1
TRIAL, judgment, and punishment according to law. Judgment in cases of impeachment shall not extend further than to removal from and disqualification for office; but the party convicted shall nevertheless be liable and subject to indictment.....	1	3	7
TRIAL BY JURY. All crimes, except in cases of impeachment, shall be tried by jury.....	3	2	3
Such trial shall be held in the State within which the crime shall have been committed.....	3	2	3
But when not committed within a State, the trial shall be at such place as Congress may by law have directed.....	3	2	3
In all criminal prosecutions the accused shall have a speedy and public. [Amendments].....	6	..	..
Suits at common law, when the amount exceeds twenty dollars, shall be by. [Amendments].....	7	..	..
TRIBUNALS inferior to the Supreme Court. Congress shall have power to constitute.....	1	8	9
TROOPS or ships of war in time of peace without the consent of Congress. No State shall keep.....	1	10	3
TRUST AND PROFIT under the United States shall be an elector for President and Vice President. No Senator, Representative, or person holding any office of.....	2	1	2
TWO-THIRDS of the members present. No person shall be convicted on impeachment without the concurrence of.....	1	3	6
TWO-THIRDS, may expel a member. Each House, with the concurrence of. .	1	5	2
TWO-THIRDS. A bill returned by the President with his objections may be repassed by each House by a vote of.....	1	7	2
TWO-THIRDS of the Senators present concur. The President shall have power, by and with the advice and consent of the Senate, to make treaties, provided.....	2	2	2
TWO-THIRDS of the legislatures of the several States. Congress shall call a convention for proposing amendments to the Constitution on the application of.....	5	..	..
TWO-THIRDS of both Houses shall deem it necessary. Congress shall propose amendments to the Constitution whenever.....	5	..	..
TWO-THIRDS of the States. When the choice of a President shall devolve on the House of Representatives, a quorum shall consist of a member or members from. [Amendments].....	12	..	..



	Arti- cle.	Sec- tion.	Clause.
TWO-THIRDS of the whole number of Senators. A quorum of the Senate, when choosing a Vice President, shall consist of. [Amendments]. . . . .	12	..	..
TWO-THIRDS, may remove the disabilities imposed by the third section of the fourteenth amendment. Congress, by a vote of. [Amendments]. . . . .	14	3	..
TWO YEARS. Appropriations for raising and supporting armies shall not be for a longer term than. . . . .	1	8	12

## U.

UNION. To establish a more perfect. [Preamble.]			
The President shall, from time to time, give to Congress information of the state of the. . . . .	2	3	..
New States may be admitted by Congress into this. . . . .	4	3	1
But no new State shall be formed or erected within the jurisdiction of another State. . . . .	4	3	1
UNREASONABLE searches and seizures. The people shall be secured in their persons, houses, papers, and effects against. [Amendments]. . . . .	4	..	..
And no warrants shall be issued but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. [Amendments]. . . . .	4	..	9
UNUSUAL punishments inflicted. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and. [Amendments]. . . . .	8	..	..
USE without just compensation. Private property shall not be taken for public. [Amendments]. . . . .	5	..	..
USEFUL arts, by securing for limited times to authors and inventors the exclusive right to their writings and inventions. Congress shall have power to promote the progress of science and the. . . . .	1	8	8

## V.

VACANCIES happening in the representation of a State. The executive thereof shall issue writs of election to fill. . . . .	1	2	4
VACANCIES happening in the Senate in the recess of the legislature of a State. How filled. [See seventeenth amendment]. . . . .	1	3	2
VACANCIES that happened during the recess of the Senate, by granting commissions which shall expire at the end of the next session. The President shall have power to fill. . . . .	2	2	3
VALIDITY of the public debt incurred in suppressing insurrection against the United States, including debt for pensions and bounties, shall not be questioned. [Amendments]. . . . .	14	4	..
VESSELS bound to or from the ports of one State shall not be obliged to enter, clear, or pay duties in another State. . . . .	1	9	6
VETO of a bill by the President. Proceedings of the two Houses upon the. . . .	1	7	2
VICE-PRESIDENT of the United States shall be President of the Senate. . . . .	1	3	4
He shall have no vote unless the Senate be equally divided. . . . .	1	3	4
The Senate shall elect a President pro tempore in the absence of the. . . . .	1	3	5
He shall be chosen for the term of four years. . . . .	2	1	1
The number and the manner of appointing electors for President and. . . . .	2	1	2
In case of the removal, death, resignation, or inability of the President, the powers and duties of his office shall devolve on the. . . . .	2	1	5
VICE-PRESIDENT. Congress may provide by law for the case of the removal, death, resignation, or inability both of the President and. . . . .	2	1	5
On impeachment for and conviction of treason, bribery, and other high crimes and misdemeanors shall be removed from office. The. . . . .	2	4	..
The manner of choosing the. The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves. [Amendments]. . . . .	12	..	..

	Arti- cle.	Sec- tion.	Clause.
VICE-PRESIDENT. The electors shall name, in distinct ballots, the person voted for as Vice-President. [Amendments].....	12	..	..
They shall make distinct lists of the persons voted for as Vice-President, which lists they shall sign and certify, and send sealed to the seat of government, directed to the President of the Senate. [Amendments].....	12	..	..
The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. [Amendments].....	12	..	..
The person having the greatest number of votes shall be Vice-President, if such number be a majority of the whole number of electors. [Amendments].....	12	..	..
If no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President. [Amendments].....	12	..	..
A quorum for this purpose shall consist of two-thirds of the whole number of Senators; and a majority of the whole number shall be necessary to a choice. [Amendments].....	12	..	..
But if the House shall make no choice of a President before the 4th of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. [Amendments].....	12	..	..
No person constitutionally ineligible as President shall be eligible as. [Amendments].....	12	..	..
VIOLENCE. The United States shall guarantee to every State a republican form of government, and shall protect each State against invasion and domestic ..... 4 4 ..	4	4	..
VIRGINIA entitled to ten representatives in the First Congress.....	1	2	3
VOTE. Each Senator shall have one.....	1	3	1
The Vice-President, unless the Senate be equally divided, shall have no...	1	3	4
VOTE requiring the concurrence of the two Houses (except upon a question of adjournment) shall be presented to the President. Every order, resolution, or.....	1	7	3
Shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The right of citizens of the United States to. [Amendments].....	15	1	..
Shall not be denied or abridged on account of sex. [Amendments].....	19	..	..
VOTE OF TWO-THIRDS. Each House may expel a member by a.....	1	5	2
A bill vetoed by the President may be repassed in each House by a.....	1	7	2
No person shall be convicted on an impeachment except by a.....	1	3	6
Whenever both Houses shall deem it necessary, Congress may propose amendments to the Constitution by a.....	5	..	..
The President may make treaties, with the advice and consent of the Senate, by a.....	2	2	2
Disabilities incurred by participation in insurrection or rebellion may be relieved by Congress by a. [Amendments].....	14	3	..

## W.

WAR, grant letters of marque and reprisal, and make rules concerning captures on land and water. Congress shall have power to declare.....	1	8	11
For governing the land and naval forces. Congress shall have power to make rules and articles of.....	1	8	14
No State shall, without the consent of Congress, unless actually invaded, or in such imminent danger as will not admit of delay, engage in.....	1	10	3
WAR against the United States, adhering to their enemies, and giving them aid and comfort. Treason shall consist only in levying.....	3	3	1

	Arti- cle.	Sec- tion.	Clause.
WARRANTS shall issue but upon probable cause, on oath or affirmation, de- scribing the place to be searched and the persons or things to be seized. No. [Amendments].....	4	..	..
WEIGHTS AND MEASURES. Congress shall fix the standard of.....	1	8	5
WELFARE, and to secure the blessings of liberty, etc. To promote the general. [Preamble.]			
WELFARE. Congress shall have power to provide for the common defense and general.....	1	8	1
WITNESS against himself. No person shall, in a criminal case, be compelled to be a. [Amendments].....	5	..	..
WITNESSES against him. In all criminal prosecutions the accused shall be confronted with the. [Amendments].....	6	..	..
WITNESSES in his favor. In all criminal prosecutions the accused shall have compulsory process for obtaining. [Amendments].....	6	..	..
WITNESSES to the same overt act, or on confession in open court. No person shall be convicted of treason unless on the testimony of two.....	3	3	1
WRIT OF HABEAS CORPUS shall not be suspended, unless in case of rebellion or invasion the public safety may require it.....	1	9	2
WRITS of election to fill vacancies in the representation of any State. The ex- ecutive of the State shall issue.....	1	2	4
WRITTEN opinion of the principal officer in each of the Executive Departments on any subject relating to the duties of his office. The President may re- quire the.....	2	2	1

## Y.

YEAS AND NAYS of the members of either House shall, at the desire of one- fifth of those present, be entered on the journals.....	1	5	3
The votes of both Houses upon the reconsideration of a bill returned by the President with his objections shall be determined by.....	1	7	2





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## **PART 2.**

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**THE REVISED STATUTES OF THE UNITED STATES.**

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# AN ACT

To revise and consolidate the statutes of the United States, in force on the first day of December, anno Domini one thousand eight hundred and seventy-three.

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## TITLE I.

### GENERAL PROVISIONS.

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#### CHAPTER ONE.

Sec.

1. Definitions.
2. County.
3. Vessel.

Sec.

4. Vehicle.
5. Company, association.
6. Seal.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, [Definitions.]* In determining the meaning of the revised statutes, or of any act or resolution of Congress passed subsequent to February twenty-fifth, eighteen hundred and seventy-one, words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular; words importing the masculine gender may be applied to females; the words “insane person” and “lunatic” shall include every idiot, non compos, lunatic, and insane person; the word “person” may extend and be applied to partnerships and corporations, and the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense; and a requirement of an “oath” shall be deemed complied with by making affirmation in judicial form.—(25 Feb., 1871, c. 71, s. 2, v. 16, p. 431; 13 July, 1866, c. 184, s. 44, v. 14, p. 163; 30 June, 1864, c. 173, ss. 82, 126, v. 13, pp. 258, 287; 20 July, 1868, c. 186, s. 104, v. 15, p. 166.)

**Sec. 2. [County.]** The word “county” includes a parish, or any other equivalent subdivision of a State or Territory of the United States.—(13 July, 1866, c. 184, s. 9, v. 14, pp. 98, 110.)

**Sec. 3. [Vessel.]** The word “vessel” includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water.—(18 July, 1866, c. 201, s. 1, v. 14, p. 178; 29 June, 1870, c. 169, s. 7, v. 16, p. 170.)

**Sec. 4. [Vehicle.]** The word “vehicle” includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land.—(18 July, 1866, c. 201, s. 1, v. 14, p. 178.)

**Sec. 5. [Company, association.]** The word “company” or “association,” when used in reference to a corporation, shall be deemed to embrace the words “successors and assigns of such company or association,” in like manner as if these last-named words, or words of similar import, were expressed.—(25 July, 1866, c. 242, s. 9, v. 14, p. 241.)

**Sec. 6. [Seal.]** In all cases where a seal is necessary by law to any commission, process, or other instrument provided for by the laws of Congress, it shall be lawful to affix the proper seal by making an impression therewith directly on the paper to which such seal is necessary; which shall be as valid as if made on wax or other adhesive substance.—(31 May, 1854, c. 60, s. 2, v. 10, p. 297.)

## CHAPTER TWO.

### FORM OF STATUTES AND EFFECT OF REPEALS.

Sec.

- 7. Enacting clause.
- 8. Resolving clause.
- 9. No enacting words after first section.
- 10. Numbering and frame of sections.

Sec.

- 11. Title of appropriation acts.
- 12. Repeal not to revive former act.
- 13. Repeals not to affect liabilities, unless, etc.

**Sec. 7. [Enacting clause.]** The enacting clause of all acts of Congress hereafter enacted shall be in the following form: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled."—(25 Feb., 1871, c. 71, s. 1, v. 16, p. 431.)

**Sec. 8. [Resolving clause.]** The resolving clause of all joint resolutions shall be in the following form: "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled."—(25 Feb. 1871, c. 71, s. 1, v. 16, p. 431.)

**Sec. 9. [No enacting words after first section.]** No enacting or resolving words shall be used in any section of an act or resolution of Congress except in the first.—(25 Feb., 1871, c. 71, s. 1, v. 16, p. 431.)

**Sec. 10. [Numbering and frame of sections.]** Each section shall be numbered, and shall contain, as nearly as may be, a single proposition of enactment.—(25 Feb., 1871, c. 71, s. 1, v. 16, p. 431.)

**Sec. 11. [Title of appropriation acts.]** The style and title of all acts making appropriations for the support of Government shall be as follows: "An act making appropriations, (here insert the object) for the year ending June thirtieth (here insert the calendar year).—(26 Aug., 1842, c. 207, s. 2, v. 5, p. 537 [should be "p. 537."])

**Sec. 12. [Repeal not to revive former act.]** Whenever an act is repealed, which repealed a former act, such former act shall not thereby be revived, unless it shall be expressly so provided.—(25 Feb., 1871, c. 71, s. 3, v. 16, p. 431.)

**Sec. 13. [Repeals not to affect liabilities, unless, &c.]** The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.—(25 Feb., 1871, c. 71, s. 4, v. 16, p. 432; *United States v. Ulrici*, 3 Dill., 532.)





# TITLE IV.

## PROVISIONS APPLICABLE TO ALL THE EXECUTIVE DEPARTMENTS.

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Sec.  
 158. Application of provisions of this title.  
 159. "Department" defined.  
 160. Salaries of heads of departments.  
 161. Departmental regulations, property, and records.  
 162. Hours of business.  
 163. Classification of department clerks.  
 164. Examinations for appointment.  
 165. Clerkships open to women.  
 166. Distribution of clerks, temporary detail.  
 167. Salaries of persons employed in the departments.  
 168. Temporary clerks.  
 169. Appointment, number, and compensation of employees authorized.  
 170. Extra compensation to clerks restricted.  
 171. Employment of extra clerks during sessions of Congress.  
 172. Restriction on employment of messengers and laborers.  
 173. Duties of chief clerk; supervising subordinates.  
 174. Duties of chief clerks; monthly reports, etc.  
 175. Action on reports of chief clerks.  
 176. Disbursing clerks.  
 177. Vacancies in head of department; how temporarily filled.  
 178. Vacancies in subordinate offices.

Sec.  
 179. Vacancies, authority of President to fill temporarily.  
 180. Temporary appointments limited to 30 days.  
 181. Restriction on temporary appointments.  
 182. Extra compensation disallowed.  
 183. Oaths, when administered by officers, etc.  
 184. Claims pending in departments—Subpoenas to witnesses.  
 185. Witnesses' fees.  
 186. Compelling testimony.  
 187. Legal assistance in connection with claims.  
 188. Suits in Court of Claims—Evidence furnished by departments.  
 189. Employment of attorneys or counsel.  
 190. Persons formerly in departments not to prosecute claims.  
 191. Certified balances conclusive in settlement of public accounts.  
 192. Expenditures for newspapers.  
 193. Annual report of expenditures from contingent funds.  
 194. Report of clerks employed.  
 195. Time of making annual reports to Congress.  
 196. Time of furnishing annual reports to printer.  
 197. Inventories of department property.  
 198. Data to be furnished for biennial register.

**Sec. 158. [Application of provisions of this Title.]** The provisions of this Title shall apply to the following Executive Departments:

- First. The Department of State.
- Second. The Department of War.
- Third. The Department of the Treasury.
- Fourth. The Department of Justice.
- Fifth. The Post Office Department.
- Sixth. The Department of the Navy.
- Seventh. The Department of the Interior.

For laws and decisions relating to the organization of the Department of the Navy, its bureaus and offices, see Title X, "The Department of the Navy," sections 415 to 436, Revised Statutes.

### ORIGIN AND GROWTH OF EXECUTIVE DEPARTMENTS.

**Recognized by the Constitution.**—The Constitution provides that "the Executive power shall be vested in the President of the

United States," but the Constitution does not specify the subordinate administrative functionaries by whose agency or counsels the details of the public business are to be transacted. It recognizes the existence of such official agents and advisers in saying that the President "may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices"; and these officers are again recognized by the Constitution in the clause which vests the appointment of certain inferior

officers "in the heads of departments"; and it leaves the number and the organization of those departments to be determined by Congress.

**Department of State.**—In the execution of this duty the Constitutional Congress proceeded, at an early day of its first session (July 27, 1789), to establish the Department of Foreign Affairs, with "a principal officer therein," to be called the Secretary for the Department of Foreign Affairs.

But this act, which was the commencement of the organization of executive departments under the Constitution, and a commencement in the direction of a systematic and proper distribution of duties, gave place, after the lapse of a few months (Sept. 15, 1789), to an act which changed the name of the Department of Foreign Affairs to that of Department of State.

**Department of War.**—Next, Congress established the Department of War (Aug. 7, 1789), with a principal officer therein to be called the Secretary for the Department of War, and required to perform duties relative to military or naval affairs.

**Department of Treasury.**—Next came a Department of Treasury (Sept. 2, 1789), the head of it being called the Secretary of the Treasury.

**Attorney General.**—At the same session of Congress, in organizing the judicial business of the United States (Sept. 24, 1789), provision was made for an Attorney General.

**Postmaster General.**—By another act (Sept. 22, 1789) the office of Postmaster General was appointed, subject to the direction of the President, but not in other respects then placed on the same high official relation to the Government as at the present time.

**Original Cabinet.**—Such was the original basis of the executive organization of the Government. The Secretary of State for political and foreign affairs, the Secretary of War for military and naval matters, the Secretary of the Treasury for those of finance, and the Attorney General for legal and judicial ones, were the immediate superior ministerial officers of the President, and his constitutional counselors during the whole period of the administration of Washington. The Cabinet, so called, consisted of these four officers, who, though not in any sense an organized body with legal attributes as such, yet proceeded to act in concert.

**Department of the Navy.**—No material modification occurred in the great outlines of superior administration until during the administration of John Adams, when the magnitude of our commerce and the importance of our maritime relations induced the Government to pay more attention to the military marine and to establish the Department of the Navy, the chief officer of which to be called the Secretary of the Navy, whose duty it should be to execute such orders as he might receive from the President relative to the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as to all other matters connected with the naval establishment of the United States. (Act Apr. 30, 1798.)

**Postmaster General elevated to Cabinet.**—Subsequently to this, and in the long period of the administrations of Jefferson, Madison, Monroe, and John Quincy Adams, no change

in the general character of the executive departments took place, although all of them underwent more or less modification in details. But, at the opening of Jackson's administration [1829], the Postmaster General, whose duties and responsibilities had grown with the growth of the country to be of vast importance, was called, as the public interests required he should be, to the same duties of a cabinet counselor of the President which had been discharged theretofore by the four Secretaries (State, War, Treasury, and Navy) and the Attorney General. This fact constituted the first important alteration in the arrangements of superior administrative duty and accountability which had occurred since 1798, when the Department of the Navy was established.

**Department of the Interior.**—By an act passed at the close of Mr. Polk's administration (Mar. 3, 1849), in order to relieve the Departments of State, War, Treasury, and Navy of branches of public business which now required to be placed in other hands, a new executive department was organized, to be called the Department of the Interior.

(6 Op. Atty. Gen., 326, Mar. 8, 1854.)

**Department of Agriculture.**—Was established by act of May 15, 1862 (12 Stat., 387), section 520, Revised Statutes, but was not made one of the "executive departments" within the meaning of section 158, Revised Statutes, until the act of February 9, 1889 (25 Stat., 659).

**Department of Commerce.**—Was established as an executive department, under the name of Department of Commerce and Labor, by act of February 14, 1903 (32 Stat., 825). Its name was changed to Department of Commerce by act of March 4, 1913 (37 Stat., 736).

**Department of Labor.**—Was established as a separate executive department by act of March 4, 1913 (37 Stat., 736), which amended the act establishing the Department of Commerce and Labor accordingly, making two departments, viz, the Department of Commerce and the Department of Labor, instead of one department, as theretofore.

**Precedence of executive departments and Cabinet officers.**—The Department of the Navy is sixth in order of precedence among the executive departments (see sec. 158, R. S., above); and by act of January 19, 1886 (24 Stat., 1), the Secretary of the Navy is sixth in order of precedence among the Cabinet officers in the matter of succession to the duties of the President, following next after the Postmaster General.

**Status of executive departments.**—Executive departments, with their heads, are not mere agents of the Government, with no power except such as is expressly conferred, but are, on the contrary, parts of the Government itself, of the executive and coordinate branch of the Government, and their acts when executive are the acts of the Government itself. (22 Op. Atty. Gen., 437, 444.)

**Nature of duties.**—In general, the official duties of the head of one of the executive departments, whether imposed by act of Congress or by resolution, are not mere ministerial duties; the head of an executive department of the



Government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion; he must exercise his judgment in expounding the laws and resolutions of Congress under which he is, from time to time, required to act; if he doubts, he has a right to call on the Attorney General to assist him with his counsel; and it would be difficult to imagine why a legal adviser was provided by law for the heads of departments, as well as for the President, unless their duties were regarded as executive, in which judgment and discretion were to be exercised. (*Decatur v. Paulding*, 14 Pet., 497.)

**The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties.** Hence the act of the Secretary of War or Secretary of the Navy in a matter under his jurisdiction is considered as being in legal contemplation the act of the President. (*Wilcox v. Jackson*, 13 Pet., 498, 513; *U. S. v. Cutter*, 25 Fed. Cas. No. 14911; see also, *Wolsey v. Chapman*, 101 U. S., 755, 769; *Williams v. U. S.*, 1 How., 290; *Jones v. U. S.*, 137 U. S., 202; *Truitt v. U. S.*, 38 Ct. Cls., 398; *U. S. v. Eliason*, 16 Pet., 291, 302; *Confiscation Cases*, 20 Wall., 92, 109; *U. S. v. Farden*, 99 U. S., 10, 19; *Runkle v. U. S.*, 122 U. S., 543, 557; *U. S. v. Fletcher*, 148 U. S., 84, 88; *Wood v. Beach*, 156 U. S., 548.) Their acts in such matters may be presumed to have been done by the approbation and direction of the President (*Weller v. U. S.*, 41 Ct. Cls., 324; *Adams v. U. S.*, 42 Ct. Cls., 211), except where he must act judicially (*Truitt v. U. S.*, 38 Ct. Cls., 398; *Runkle v. U. S.*, 122 U. S., 543, 557), for they are the eyes and hands of the President, to execute the laws and his executive rules and regulations (6 Comp. Dec., 61); and it is not necessary that orders issued by them should contain express reference to the direction of the President; whether he is named or not, the act or order is to have legal effect as by construction the act or the order of the supreme executive authority, civil and military, of the United

States. (7 Op. Atty. Gen., 453.) See also *Adams v. U. S.*, 42 Ct. Cls., 191. Many things may be done by the head of an executive department without the actual signature of the President which when done are his acts; but in such case the document should declare it to be the act of the President, performed by the head of the department as his representative. (22 Op. Atty. Gen., 82.)

**Where an order purports on its face to be issued by direction, not of the President but of the Secretary of War, there is nothing to show that the President exercised his discretion under a law providing that the act should be done in the discretion of the President.** No one but the President, or the Secretary acting for him as his constitutional organ, can fulfill the requirements of the act; nor can the Secretary delegate to a subordinate the authority to act for the President so as to fix liability upon the Government. (*Truitt v. U. S.*, 38 Ct. Cls., 398. See also *Weller v. U. S.*, 41 Ct. Cls., 324, 336, and note 8, sec. 1393, R. S.)

In all the cases considered—and we are aware of no authority to the contrary—it will be noted that the power of the President was exercised through the head of the department and not by a subordinate. (*Truitt v. U. S.*, 38 Ct. Cls., 404.)

The signature of the head of a department does not require the use of pen and ink, held and guided by the hand of the person himself. The impress of his name with a stamp or copperplate by himself or in his presence is legally sufficient. (1 Op. Atty. Gen., 670.)

**Officers of the Navy are not agents of the Secretary of the Navy,** but, like the Secretary himself, are the agents and representatives of the President, who is the Commander in Chief of the Army and Navy; and any authority the Secretary may exercise over them he exercises solely as representative of the President. (*McGowan v. Moody*, 22 App. D. C., 148.)

**For other directions,** see note to section 417, Revised Statutes.

**Sec. 159. ["Department," defined.]** The word "Department," when used alone in this Title, and Titles five, six, seven, eight, nine, ten, and eleven, means one of the Executive Departments enumerated in the preceding section.

#### APPLICATION OF SECTION.

**Departments established since Revised Statutes.**—The terms "departments" and "executive departments" as used in acts of Congress and in the Revised Statutes invariably apply to one or more of the several executive departments mentioned in section 158, Revised Statutes, or included within the terms of that section by subsequent enactments, unless a different meaning is clearly indicated by the context. (26 Op. Atty. Gen., 209.)

The term "executive departments" in the Federal statutes refers only to those departments specified in section 158, Revised Statutes, to which certain other departments have since been added. (22 Op. Atty. Gen., 62.) See note to section 158, Revised Statutes.

**Offices not at seat of government.**—The several executive departments are by law established at the seat of government; they

have no existence elsewhere. Only those bureaus and offices can be deemed bureaus and offices in any of these departments which are constituted such by law of its organization. The department, with its bureaus or offices, is in the contemplation of the law an establishment distinct from the branches of the public service and the offices thereof which are under its supervision. Thus the office of postmaster or of collector of internal revenue or of pension agent or of consul is not properly a *department* office—not an office in the department having supervision over the branch of the public service to which it belongs. True, an official relation exists here between the office and the department, one, moreover, of subordination of the former to the latter; but this does not make the office a part of the department. (15 Op. Atty. Gen., 262, 267; 26 Op. Atty. Gen., 254.)

**The Marine Corps headquarters** is a part of the Naval Establishment, but it is not a part

of the Navy Department as established at the seat of Government; it is under the supervision of the executive department, but that relation to the department is not the same as being a part of it. (11 Comp. Dec., 558; file 4600, Apr. 10, 1906; 21686, Apr. 11, 1906.)

**Field services, Army, Postal Service.**—The term "executive department" refers only to what may be called the department proper located at Washington, and does not include those adjuncts of a department engaged wholly in field service; nor the Army, which is not a part of the War Department proper. (4 Comp. Dec., 551; see also 5 Comp. Dec., 667; 7 Comp. Dec., 126.)

Several of the executive departments have field services as parts thereof, and have bureaus and offices attached to them by law with their respective field services. Certain other general Government establishments, such as the Reclamation Service, put under the control of the Secretary of the Interior by law, are not parts of the Interior Department (within the sense of the public printing act). Like conditions are found in other departments of the Government. The Army is under the administrative control of the Secretary of War, but is not a part of the executive department called the War Department located at the seat of government, and its support is specifically appropriated for. A like condition exists as to the Postal Service as distinguished from the Post Office Department here at the seat of government. (11 Comp. Dec., 601; 27 Op. Atty. Gen., 427; 13 Comp. Dec., 733; 15 Comp. Dec., 297; 10 Comp. Dec., 771; 15 Comp. Dec., 111; 20 Comp. Dec., 4.)

The Reclamation Service is not a department or establishment of the Government in Washington, but a field service. (20 Comp. Dec., 42.)

**A clerk in a navy yard** is not a clerk in an executive department, although the navy yard is under the supervision of one of the executive departments. But a clerk who is performing duties away from a department but by direct orders from and under supervision of the department is regarded as a clerk in the department within the act of June 22, 1906, section 5 (34 Stat., 449), restricting transfers of employees from one department to another department. (26 Op. Atty. Gen., 254.)

Employees of the navy yard and gun factory in Washington are under the Navy Department but are not a part of an executive department. (11 Comp. Dec., 97.)

**Forest Service, Department of Agriculture.**—A clerk in the field service of the Forest Service, Department of Agriculture, is not a clerk in an executive department. (27 Op. Atty. Gen., 100.)

The Forest Service in Washington is part of the Department of Agriculture, and clerks on the rolls of the Forest Service in Washington are clerks in an executive department. (27 Op. Atty. Gen., 421.)

That portion of the Forest Service in the field outside of Washington is not a part of the Department of Agriculture *proper*, and printing for such field service is not printing for an executive department. (14 Comp. Dec., 723; see 27 Op. Atty. Gen., 426.)

**Independent commission, board, or office.**—No board, bureau, or office which is not

expressly or by implication under the control of one of the executive departments can be considered as belonging properly to one of them. The Civil Service Commission is not attached in any way to any of the executive departments, nor is it subject in any wise to the control of any of the heads of such departments. (22 Op. Atty. Gen., 62.)

The Civil Service Commission is not an executive department within the meaning of section 190, Revised Statutes, respecting the prosecution of claims. (25 Op. Atty. Gen., 6.)

The Government Printing Office is not a bureau or division of either of the executive departments. (U. S. v. Allison, 91 U. S., 303, reversing 10 Ct. Cls., 449.)

The office of the warden of the jail, District of Columbia, is a bureau or division of the Department of the Interior, it appearing that the whole subject of the jail is under the supervision of the Secretary of the Interior, to whom the warden is required to report. (Manning's case, 13 Wall., 578; explained in U. S. v. Allison, 91 U. S., 307.)

The term "department" as used in laws relating to the civil service is distinguished from "office," "bureau," and "branch," and subordinates of the several executive departments are distinguished from employees of the last-mentioned governmental agencies. The Government Printing Office, the Interstate Commerce Commission, and the Smithsonian Institution are independent of any of the executive departments mentioned in section 158, Revised Statutes. The Bureau of Insular Affairs is an integral part of the War Department. (26 Op. Atty. Gen., 209.)

**The accounting officers of the Treasury** do not constitute a "department" within the meaning of an act of Congress referring to claims "rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same." (U. S. v. Harmon, 147 U. S., 273.)

**Persons employed in a bureau or division of a department** are as much employees in a department as the messengers and others rendering service under the immediate supervision of the Secretary. (Manning's case, 13 Wall., 578.)

The term "executive and judicial departments," as used in section 87 of the public printing act, January 12, 1895 (28 Stat., 622), was intended to include all branches of the executive department of the Government and is not limited in its application to that branch of the service to the principal executive departments, enumerated in section 158, Revised Statutes. Accordingly, *held* that it includes printing and binding for the Interstate Commerce Commission at Washington. (4 Comp. Dec., 273.)

The words "branch" and "department" of the Government are not used synonymously (in sec. 365, R. S.). The latter refers to the executive departments recognized by the Constitution and regularly established by law, and the former to those parts of the Government which are created by statute as independent of any department, such as the Government Printing Office, the Smithsonian Institution, and other organizations. (Perry v. U. S. 28 Ct. Cls., 493.)



**Sec. 160. [Salaries of Heads of Departments.]** Each head of a Department is entitled to a salary of ten thousand dollars a year, to be paid monthly.—(3 Mar., 1873, c. 226, s. 1, v. 17, p. 486; 20 Jan., 1874, c. 11, v. 18, p. 4; 3 Mar., 1875, c. 130, v. 18, p. 396.)

**Amendments.**—By act of January 20, 1874 (18 Stat., 4), the salaries of heads of departments were reduced to \$8,000; by act of February 26, 1907 (34 Stat., 993), their salaries were increased to \$12,000 each; by act of February 17, 1909 (35 Stat., 626), the salary of the Secretary of State was again fixed at \$8,000, until it was increased to \$12,000 by appropriation in the act of March 4, 1911 (36 Stat., 1186). [This exception to the general law fixing salaries of heads of departments was made in the case of the Secretary of State, in order to render eligible for that office a former member of the Senate who would otherwise have been disqualified under the constitutional provision that “no Senator or Representative shall, during the time for which he was elected, be appointed to any civil office

under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time.” (Const., Art. I, sec. 6, clause 2.)]

The salary of the Secretary of Labor was fixed at \$12,000 per annum by act of March 4, 1913 (37 Stat., 736), which established the Department of Labor.

By section 6, legislative, etc., appropriation act, July 16, 1914 (38 Stat., 509), it was provided that “the rates of salary or compensation of officers or employees herein appropriated shall constitute the rate of salary or compensation of such officers or employees, respectively, until otherwise fixed by annual rate of appropriation or other law.”

**Sec. 161. [Departmental Regulations, Property and Records.]** The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.—(27 July, 1789, c. 4, v. 1, p. 28; 15 Sept., 1789, c. 14, v. 1, p. 68; 7 Aug., 1849, c. 7, v. 1, p. 49; 2 Sept., 1789, c. 12, v. 1, p. 65; 8 June, 1872, c. 335, v. 17, p. 283; 30 Apr., 1798, c. 35, v. 1, p. 553; 22 June, 1870, c. 150, s. 8, v. 16, p. 163; 3 Mar., 1849, c. 108, v. 9, p. 395; 15 Aug., 1876, c. 287, s. 3, v. 18, p. 169.)

The “distribution and performance” of the business of the Department of the Navy, and the custody of its records and property are provided for by sections 418–420, Revised Statutes.

Regulations for the purchase, preservation, and disposition of supplies, etc., for the Navy are to be made by the President, under section 1549, Revised Statutes.

Jurisdiction over property accounts in the Navy is conferred upon the Paymaster General of the Navy by act of March 29, 1894 (28 Stat., 47).

Offenses against public property by persons in the naval service are made punishable by section 1624, Revised Statutes, articles 4, 8, and 14.

Inventories of property in departments are required by section 197, Revised Statutes.

#### I. DISTRIBUTION OF BUSINESS.

**Delegation of duties by head of department.**—As Congress well knew that it would be impossible for the head of an executive department to give a hearing in person to all matters coming before that department, it has authorized the head of each department to prescribe rules and regulations for the conduct of the officers and clerks and the distribution and performance of its business. In pursuance of this authority the head of a department may intrust the determination of matters to his assistant, subject of course to his approval. The actions of the assistant on matters of this kind are merely those of a master or referee of a court to hear proofs and report his findings of fact and probably conclusions of law. It is the judge of the court, or in cases of this kind the head of the department, who finally acts on the matter, either adopting the recommendations of the referee or assistant or rejecting them. It is the head of the department who promulgates the conclusion as his own, independent of what the recommendations of his assistant might have been. The courts will conclusively presume that the head of the department acted on the testimony submitted to him as fully as if he had been present at the hearing and had not submitted it to one of his assistants. (Lewis Publishing Co. v. Wyman, 152 Fed. Rep., 787). [In this case the statute required that a hearing be had, and the court held that the head of the de-

#### I. DISTRIBUTION OF BUSINESS.

#### II. CUSTODY OF PROPERTY AND RECORDS.

#### III. NAVY REGULATIONS.

#### IV. CONSTITUTIONALITY AND NECESSITY OF LAWS AUTHORIZING REGULATIONS.

#### V. REGULATIONS DEFINED.

#### VI. WEIGHT OF REGULATIONS.

#### VII. LIMITATIONS UPON POWER TO MAKE REGULATIONS.

#### VIII. RULES FOR TESTING VALIDITY OF REGULATIONS.

#### IX. WAIVER OF REGULATIONS.



partment properly assigned the duty of conducting the hearing to one of his assistants.] To same effect, *Shillito Co. v. McClung*, 51 Fed. Rep., 868; *Parish v. U. S.*, 100 U. S., 500; *Chadwick v. U. S.*, 3 Fed. Rep., 756; *U. S. v. Adams*, 24 Fed. Rep., 348; *Smith v. Hitchcock*, 226 U. S., 53; 1 Comp. Dec., 370; 3 Comp. Dec., 730; 4 Comp. Dec., 462. See also note to section 177, Revised Statutes.

**Transfer of duties.**—This section does not authorize the Secretary of Commerce and Labor to transfer to the disbursing clerk of that department the duties formerly performed by the disbursing clerk of the Bureau of the Census, in the same department. The position of disbursing clerk in the Census Office was established by Congress and has since been regularly appropriated for. Such position must therefore be regarded as essential to the Census organization until Congress otherwise provides, and it would be "inconsistent with law" within the meaning of this section to make the proposed change. (29 Op. Atty. Gen., 247.)

**Authority and signature of assistant.**—So long as the powers delegated to the assistant secretary by his superior remain unrevoked, the authority of the former is coordinate and concurrent with that of the latter. When the assistant acts at a time the Secretary is not absent or sick, under a regulation made by the Secretary prescribing his powers and duties, he should sign with his own proper official designation. When the Secretary is absent or sick, if the assistant is in charge of the department in pursuance of section 177 or 179, Revised Statutes, he should sign as *Acting Secretary*. (19 Op. Atty. Gen., 133.)

## II. CUSTODY OF PROPERTY AND RECORDS.

**Authority of Secretary.**—From this section it appears that the head of a department has full charge and control of all the records and papers belonging to the department. His authority to prescribe whatever rules and regulations he may deem proper regarding their use and custody is unlimited so long as "not inconsistent with law." Such broad discretion would necessarily include the right to determine whether certain documents should or should not be taken from the files of the department for any purpose except for use in connection with departmental business and in accordance with his determination so to instruct the chiefs of bureaus or other officers concerned. (25 Op. Atty. Gen., 326.)

That the head of a department may legally prohibit an officer from producing in court or elsewhere official records was authoritatively decided in *Boske v. Comingore*, 177 U. S., 459. (25 Op. Atty. Gen., 326.)

The head of an executive department may properly decline to furnish official records of his department or copies thereof or to give testimony in a cause pending in court between private parties respecting facts which have come to his knowledge officially, whenever in his judgment the production of such papers or the giving of such testimony might prove prejudicial for any reason to the Government or to the public interests. (25 Op. Atty. Gen., 326.)

The head of an executive department may legally prohibit the chief of a bureau from producing in court any official records of the department or certified copies thereof in obedience to a subpoena duces tecum, and from making or certifying copies of such official records. (25 Op. Atty. Gen., 326.)

**The records of executive departments are quasi-confidential** in their nature and must be classed as privileged communications whose production can not be compelled by a court without express authority of a law of the United States. (25 Op. Atty. Gen., 326.) See Navy Department General Order No. 121, September 17, 1914.

**Transfer of public property.**—The duties of a public officer as custodian of public property do not impliedly authorize him to transfer such property to some other branch or establishment of the Government; on the contrary, such duties impliedly prohibit him from transferring the possession of property committed to his care to some one else. Even though the transfer of property would be to the pecuniary advantage of the Government, and even though such transfer if made would meet with the approval of Congress, the custodian of the property has no legal authority to make such transfer. It is for Congress, under the constitutional grant with respect to the regulation and disposition of the territory and other property of the United States, to say what shall be done with the property in question; mere custodians have no such authority. (29 Op. Atty. Gen., 524; compare 17 Op. Atty. Gen., 480.) See also note to section 355, Revised Statutes.

**Ownership of public property.**—The archives or other property of any department are not in the possession of the head of the department, chief of bureau, or clerk under either, but in the possession of the United States. Hence a party can not by writ of replevin against such head of department or other public officer take papers from the public archives on the allegation of their being his private property. By the writ of replevin a party claiming the rightful possession of a thing takes it away from another party alleged to be wrongfully in possession of the thing. There must be a party *possessory*, as well as a party claiming adverse right of possession. A writ of replevin issued against a public officer in such a case is a nullity. It is the right and duty of the head of the department, and of all persons under his authority, to resist by force any attempt by writ of replevin or otherwise to abstract any document from the archives of the Government. (6 Op. Atty. Gen., 7.)

**For other cases,** see note to section 418, Revised Statutes.

## III. NAVY REGULATIONS.

"There are two general classes of regulations issued by the Secretary of the Navy, namely, first, those which are expressly approved by the President in accordance with an order issued by Secretary Moody, June 22, 1904. These are known as Navy Regulations and are specifically stated to be issued by authority of section 1547, Revised Statutes; and

second, those which are not expressly approved by the President, such as Naval Instructions, Forms of Procedure for Courts and Boards in the Navy and Marine Corps, [now entitled 'Naval Courts and Boards'], Uniform Regulations, Signal Books and Drill Books, General Orders, Court-Martial Orders, Manual for Recruiting Officers, Manual Governing the Transportation of Enlisted Men, Manual for the Medical Department, and Rules for Target Practice and Engineering Competitions. These publications have full force and effect as regulations for the guidance of all persons in the Naval Establishment (Art. 901 (3), Navy Regs., 1913), and have been regarded as authorized by section 161, Revised Statutes (File 3980-942, Apr. 10, 1914), which has never been held to require the President's approval." (File 3980-1044, Mar. 19, 1915.)

Even under section 1547, Revised Statutes, express approval of the President is not required by law, although as a general policy it is obtained in practice. (File 3980-1044, Mar. 19, 1915, citing *Adams v. U. S.*, 42 Ct. Cls., 191; see also 16 Comp. Dec., 354, 358; compare *Phillips v. Grain Corporation*, 279 Fed. Rep. 244, 248.)

**Regulations of the United States Naval Academy** are presumably issued by the Secretary of the Navy pursuant to section 1547, Revised Statutes. (*Weller v. U. S.*, 41 Ct. Cls., 324, 343; but see contra file 313-51, Mar. 19, 1907.) [These regulations, however, are not issued with the express approval of the President as is the practice under that section.]

**Regulations governing deck courts in the Navy** are to be prescribed by the President. (Act of February 16, 1909, section 5, 35 Stat., 621.)

#### IV. CONSTITUTIONALITY AND NECESSITY OF LAWS AUTHORIZING REGULATIONS.

**Not a delegation of legislative power.**—The Supreme Court has held that under the Constitution the power of legislation possessed by Congress can not be delegated (*Field v. Clark*, 143 U. S., 649; see also *Cooper v. Lemon*, 163 Fed. Rep., 147; but the power conferred by these laws is in no sense a delegated power of legislation. (*Butler v. White*, 83 Fed. Rep., 578, reversed, on other grounds, 171 U. S., 379; 25 Op. Atty. Gen., 249.) Congress "may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily." (*Wayman v. Southard*, per Chief Justice Marshall, 10 Wheat., 1.) While of course Congress can not constitutionally delegate to the President (or head of a department) legislative powers, "it may, in conferring powers constitutionally exercisable by him, prescribe or omit prescribing, special rules of their administration, or may specially authorize him to make the rules. When Congress neither prescribes them, nor expressly authorizes him to make them, he has the authority, inherent in the powers conferred, of making regulations necessarily incidental to their exercise." (*McCall's Case*, 15 Fed. Cas., 1230.) The power to make laws can not be dele-

gated to an executive department; but prescribing conditions to enforcement of law is not legislation. (*Dunlap v. U. S.*, 33 Ct. Cls., 135; 173 U. S., 65.) Section 161, Revised Statutes, confers administrative power only, and, under the guise of regulation, legislation can not be exercised. (*U. S. v. United Verde Copper Co.*, 196 U. S., 207; *U. S. v. George*, 228 U. S., 14.) That Congress may enact a law and delegate the power to make all needful rules and regulations not inconsistent therewith is clear. This is not a grant of legislative power; it is only an authority to determine a fact upon which the operation of the law is made to depend. (*Cooper v. Lemon*, 163 Fed. Rep., 147.) The operation of the law may be postponed until the regulations are issued. (*Dunlap v. U. S.*, 173 U. S., 65.)

**Congress can not legislate in detail.**—To attempt to regulate by statute the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the government. (*U. S. v. Macdaniel*, 7 Pet., 14; *U. S. v. Webster*, 28 Fed. Cas., 515; *Lewis Publishing Co. v. Wyman*, 182 Fed. Rep., 13, 16; *Haas v. Henkel*, 216 U. S., 462, 480; 6 Op. Atty. Gen., 358.) Congress can only legislate in a general way, and large powers are necessarily intrusted to the different departments. They really exercise in this way by delegation, and necessarily so, for the purpose of carrying on the vast affairs of the Government and its details, authority which in a strict sense pertains to Congress. (21 Op. Atty. Gen., 438, 439.) The authority thus exercised by heads of departments is "quasi legislative." (16 Op. Atty. Gen., 495.)

**Constitution vests discretion in Congress.**—The Constitution gives Congress power to make all laws necessary and proper for carrying into execution the powers vested by that instrument in the Government of the United States or in any department or officer thereof. That power was exercised by Congress when it authorized the head of a department to provide by regulations not inconsistent with law for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. A particular regulation may not have been absolutely or indispensably necessary to accomplish the objects indicated by the statute; but that is not the test to be applied when we are determining whether an act of Congress transcends the powers conferred upon it by the Constitution. Congress has a large discretion as to the means to be employed in the execution of a power conferred upon it. (*Boske v. Comingore*, 177 U. S., 459.)

#### V. "REGULATIONS" DEFINED.

**Must be general.**—A regulation is a general rule which affects a class of persons, and not merely an order or instruction issued in a par-



titular case. (*Harvey v. U. S.*, 3 Ct. Cls., 38, 42; *Landram v. U. S.*, 16 Ct. Cls., 74.) The term "regulation" implies a rule for a general course of action, and does not apply to a case in which specific instructions are issued applicable to that case alone. (*Christopher v. City of New York*, 13 Barb., 567, 573.) The term "regulation" implies uniformity in operation; it must be general in scope and not discriminate in its application. The function of an order relates more particularly to the execution or enforcement of a rule previously made. (*Morris v. Board of Pilot Commissioners*, 7 Del. Ch., 136; 30 Atl., 667, 669; *Indianapolis Union Ry. Co. v. Dohn*, 153 Ind., 10, 45 L. R. A., 427.) Regulations must be uniform and applicable to all officers under the same circumstances. (*U. S. v. Ripley*, 7 Pet., 18.) [Congress has recognized the distinction between regulations and occasional orders, as, for example, in the act of July 31, 1894, section 12 (28 Stat., 209), which provided that "The Secretary of the Treasury shall prescribe suitable rules and regulations, and may make orders in particular cases, relaxing the requirement of mailing or otherwise sending accounts as aforesaid," etc.] The decision of the head of a department is not in any sense a regulation under section 161, Revised Statutes. Such decision is entitled to and receives great respect and consideration by the court, but it is not binding upon us as a valid regulation of the Department, and can not be so regarded. (*Smith v. U. S.*, 170 U. S., 372, 380.) The power to make regulations does not contemplate *pro re nata* interventions by the Secretary of the Navy. (15 Op. Att. Gen., 634.)

**A regulation is an order** in cases in which it applies, as much so as a special command reiterated on each particular occasion. (30 Op. Att. Gen., 376, 171 S. and A. Memo., 3611; file 26254-1451:11, Apr. 12, 1915.)

**Not limited to a particular book.**—The expression "United States Naval Regulations," as used in the act of March 2, 1895 (28 Stat., 962), has been held by the Comptroller of the Treasury to include Uniform Regulations and a statement of the Chief of the Bureau of Navigation giving the number and character of articles of clothing required as the necessary outfit of officers and seamen; although the Comptroller stated that a strict construction of the expression might limit it to the volume known as "Navy Regulations." (2 Comp. Dec., 150.)

**All orders not included.**—Publications or orders of the Secretary of the Navy or of bureau chiefs or of any officer may be binding upon officers of the Navy, but they are not properly described as "lawful regulations issued by the Secretary of the Navy," the violation of which is punishable under the Articles for the Government of the Navy (sec. 1624, R. S.). Such regulations are those described in sections 1547 and 1548, Revised Statutes, and consist of orders, regulations, and instructions issued by the Secretary prior to July 14, 1862, with such alterations as he may have since adopted with the approval of the President. (25 Op. Att. Gen., 270.) But see above, "III. Navy Regulations."

**Usages included.**—A regulation within the meaning of this section need not be promulgated in any set form, nor in writing, but may

consist of established usages and practices which have become a kind of common law of the Department. (*Haas v. Henkel*, 216 U. S., 462; 167 Fed. Rep., 211.) A usage becomes established in no other way than by the practice of the department; and the same authority which establishes a usage may change it, for a customary law is abrogated by the establishment of a contrary custom; but while it remains unchanged, it is binding. (*U. S. v. Webster*, 28 Fed. Cas., 509.) No change in such usage can have a retroactive effect but must be limited to the future. (*U. S. v. Macdaniel*, 7 Pet., 1, 15.) In the Webster case (above), with reference to the Army, the court said: "Such customs and usages in the military service may be proved by the same kind of evidence as is competent to prove a custom in other cases, but the best evidence will be the regulations of the Army, printed and promulgated by the War Department; for these regulations, if I have a correct view on the subject, are nothing more than an authoritative digest of these customs. These usages and customs, the gradual product of time and circumstances, constitute a sort of complement to the statute law upon the subject; and they may affect the rights and obligations of those who are subject to them in various ways; they may regulate and define their privileges and immunities, the nature of the services which may be required of them, and the kind or amount of compensation to which they may be entitled for the performance of services superadded to the ordinary duties attached to their office. But all this must be consistent with the will of the legislature, expressed in the public laws and not in opposition to it." And a practice of disregarding the terms of an express provision of regulations, although with the acquiescence of the head of the department who issued them, will not accomplish a repeal of the regulation, which nevertheless continues in effect. (*Arthur v. U. S.*, 16 Ct. Cls., 433.) There can be no such thing as a legal custom to disregard a valid regulation. (*G. C. M. O.* 43, 1906, p. 3.) Customs and usages of the service, whether originating in tradition or in specific orders or rulings, are now, as such, not numerous in the Army (or Navy), a large proportion, in obedience to a natural law, having changed their form by becoming merged in written regulations. (1 Winth., 42; file 26836-7: 35, Feb. 13, 1913, p. 4.)

**Classes of Regulations.**—Regulations of the Army [and Navy] consist of four classes: (1) General orders promulgated by the President under his constitutional prerogative as Commander in Chief; (2) departmental regulations prescribed by the Secretary under section 161, Revised Statutes; (3) regulations not approved by Congress but made by the President in the exercise of legislative authority conferred by Congress [see sec. 1547, R. S.]; and (4) regulations expressly approved by Congress. (*In re Smith*, 23 Ct. Cls., 452.) Orders, regulations, and instructions issued by the Secretary of the Navy under section 1547, Revised Statutes, are presumed to be issued with the approval of the President, though they do not bear his signature. (*Adams v. United States*, 42 Ct. Cls., 191, 211; file 3980-1044, Mar. 19, 1915.)



## VI. WEIGHT OF REGULATIONS.

**Have force of law.**—Regulations issued by the head of a department have the force and effect of law and are as binding as if incorporated in the statute law of the United States. (*Stegall v. Thurman*, 175 Fed. Rep., 813; *U. S. v. Barrows*, 24 Fed. Cas. No. 14529; *Haas v. Henkel*, 216 U. S., 462; *Ex parte Reed*, 100 U. S., 13; *U. S. v. Eliason*, 16 Pet., 291; *Gratiot v. U. S.*, 4 How., 80; *U. S. v. Runkle*, 122 U. S., 543; *U. S. v. Freeman*, 3 How., 556; *Kurtz v. Moffit*, 115 U. S., 487, 503; *U. S. v. Hutton*, 26 Fed. Cas. No. 15433; *In re Huttman*, 70 Fed. Rep., 699; *In re Weeks*, 82 Fed. Rep., 729; *Flynn v. Fuellhart*, 106 Fed. Rep., 911; *In re Lamberton*, 124 Fed. Rep., 446; *Alvord v. U. S.*, 95 U. S., 356; *Peters v. U. S.*, 33 Pac., 1031, 2 Okla., 116; *Stansbury v. U. S.*, 37 Pac., 1083, 2 Okla., 151; *Dempsey v. U. S.*, 44 Pac., 382, 2 Okla., 151; *Katzer v. U. S.*, 49 Ct. Cls., 294, decided Feb. 9, 1914, No. 31888; *Adams v. U. S.*, 42 Ct. Cls., 191; *Smith v. Whitney*, 116, U. S. 180; *Pundt v. Pendleton*, 167 Fed. Rep., 997.)

Army regulations concerning the procedure of courts-martial have the force of law. (23 Op. Atty. Gen., 27.)

The Navy Regulations have the force and effect of positive law. (27 Op. Atty. Gen., 257.)

It is well settled that regulations when directly approved by Congress have the absolute force of law, equally with other legislative acts, until repealed by the same power. Congress has treated regulations so approved by it as having the same force as congressional enactments. (*In re Smith*, 23 Ct. Cls., 459.) When Congress expressly adopted and ratified certain general orders issued by the Secretary of the Navy, specifically describing them, and provided that they "shall have the force of law," and further provided that a certain general order, which was quoted in the act, "be and the same is hereby confirmed," it was held by the Attorney General that these orders "were placed upon the footing of legislative acts, and were incorporated into the statute law on the subject of the Navy," and accordingly that alterations therein could be made only by Congress. (13 Op. Atty. Gen., 10; see also *Maddux v. U. S.*, 20 Ct. Cls., 193.) [This opinion of the Attorney-General would apparently be applicable to any regulation or order which had been specifically adopted by Congress, either expressly or by necessary implication, as for example, executive orders fixing the pay of enlisted men in the Navy, which were adopted by Congress in the naval appropriation act which made an increase of 10 per cent in the existing pay of enlisted men and provided that such pay should continue in effect until changed by Congress. (Act May 13, 1908, 35 Stat., 128.) File 26509-106; see Comp. Dec., May 19, 1915, file 26254-1784.]

**Must be consistent with law.**—Regulations not approved by Congress have the force of law only when founded on the President's constitutional powers as Commander in Chief of the Army and Navy, or when consistent with and supplementary to the statutes which have been enacted by Congress. (*In re Smith*, 23 Ct. Cls., 452.) Regulations to have the force of law must be consistent with the statutes, and

the Supreme Court of the United States has never held otherwise. (*U. S. v. Symonds*, 120 U. S. 46; *U. S. v. Ross*, 239 U. S., 536; *Scheide v. U. S.* 52 Ct. Cls., 247.) The regulations of the Army and Navy have the force of law with respect to a person or subject matter of which the Secretary has control, but to have the force of law they must conform to the law. (*Adams v. U. S.*, 42 Ct. Cls., 191.) It will not be pretended that department regulations can control or annul an act of Congress, and when it is said they have the force of law nothing more is meant than that they have that virtue when they are consistent with the laws established by the legislature. (*U. S. v. Webster*, 28 Fed. Cas., 515, 516.)

**Must be limited as to persons and subject matter.**—While in general terms it is often said that the Army and Navy Regulations have the force and effect of law, this can only be properly so where we are dealing with a person or subject matter over which the Secretary has official control. (16 Op. Atty. Gen., 494.) But where the Secretary of the Navy has control of the subject matter, a lawful regulation issued by him is binding on the accounting officers of the Treasury, and will protect disbursing officers from responsibility for compliance therewith. (30 Op. Atty. Gen., 376, 171 S. and A. Memo., 3611. See also file 26254-1451:11, Apr. 12, 1915.) Army regulations, issued pursuant to the explicit provisions of a statute and in execution thereof, when sanctioned by the President, have the force of law, and are conclusive upon the accounting officers of the Treasury; accordingly, when an officer presents with his account an authentic document or certificate of his having commanded a post or arsenal for which an order has been issued from the War Department in conformity with the provisions of the Army Regulations allowing double rations, his right to them is established, nor can they be withheld without doing him a wrong for which the law gives him a remedy. (*U. S. v. Freeman*, 3 How., 567.)

**Are not the law itself.**—Regulations promulgated under section 161, Revised Statutes, have the force of law, but they are not the law itself. (*Laurey v. U. S.*, 32 Ct. Cls., 265.) Regulations prescribed by the President and heads of departments under authority granted by Congress may be regulations prescribed by law so as to lawfully support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen where a statute does not distinctly make the neglect in question a criminal offense. Accordingly, held that a provision in an act of Congress authorizing the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to make all needful regulations for the carrying into effect of the act authorized a regulation requiring dealers to keep certain books; but violation of said regulation was not omitting or failing to do a thing "required by law for the carrying on or conducting of his business" within the meaning of another section of the same act affixing a

penalty. [In this case the language of the law was held not to intend to affix a penalty for the failure to keep the books in question.] *U. S. v. Eaton*, 144 U. S., 677; explained and distinguished in *Caha v. U. S.*, 152 U. S., 211, and *In re Kollock*, 165 U. S., 526; see also *U. S. v. Butter*, 195 Fed. Rep., 657; *U. S. v. Maid*, 116 Fed. Rep., 650; compare *Coopersville Cooperative Creamery Co. v. Lemon*, 163 Fed. Rep., 145; 21 Op. Atty. Gen., 440. (See below, "VII. LIMITATIONS UPON POWER TO MAKE REGULATIONS.")

Regulations made by the head of a department pursuant to statutory authority and in administration thereof, not being demanded by law, are not law in the sense in which that term is used in section 356, Revised Statutes. (25 Op. Atty. Gen., 183.)

A departmental regulation relating to internal administration and practice, when not specially authorized or demanded by law, is not law in the sense in which that term is used in section 356, Revised Statutes. (18 Op. Atty. Gen., 521.)

**Violation of a regulation may be made criminal offense by statute.**—Congress may enact that the violation of certain rules and regulations of the Secretary, not inconsistent with law, which it authorized him to make, should subject property to forfeiture or persons to fine and imprisonment; but such penalties can not be inflicted for violation of a regulation of an executive department without previous legislative sanction. (*U. S. v. Butter*, 195 Fed. Rep., 657; see also *McKirley v. U. S.*, 249 U. S., 397; *Buttfield v. Stranahan*, 192 U. S., 470; *Union Bridge Co. v. U. S.*, 204 U. S., 364; *U. S. v. Grimaud*, 220 U. S., 506; *U. S. v. Breen*, 40 Fed. Rep., 403; *U. S. v. Ormsbee*, 74 Fed. Rep., 208.) Congress has provided that violation of any lawful general order or regulation issued by the Secretary of the Navy shall be punishable by court-martial when the offender is a person in the naval service. (Sec. 1624, R. S., art. 8, clause 20; see also *U. S. v. Moody*, 164 Fed. Rep., 269.)

Where a statute made it a crime to bribe an officer of the United States to violate his "lawful duty," the Supreme Court held that bribery of an officer to violate a department regulation was punishable under the statute. (*Haas v. Henkel*, 216 U. S., 462.) Where the law made it the duty of the Secretary of the Treasury to adjust certain claims, but did not prescribe the manner in which he should obtain the necessary evidence prior to making payments, it was held by the Supreme Court, per Mr. Justice Story, that it devolved upon the Secretary by regulations to prescribe what evidence should be furnished in support of claims; that a regulation made by the Secretary requiring the submission of affidavits and authorizing such affidavits to be made before an officer who was not expressly authorized by any law of the United States to administer an oath in support of claims was a valid regulation; and that any person making a false affidavit in accordance with such a regulation was guilty of false swearing and punishable as for willful and corrupt perjury under an act of Congress then in effect. (*U. S. v. Bailey*, 9 Pet., 238; see also 14 Op. Atty. Gen., 420; and see 29 Op. Atty. Gen., 14, and file 26543-87:2 Apr. 28, 1913, as to affidavits required in Navy cases.)

**Not punishable if regulation invalid.**—In a case in which the Secretary of the Interior by regulation required an affidavit to be submitted by a homestead claimant, it was held by the Supreme Court that submitting a false affidavit under such regulation was not perjury within the statute which dealt with "any case in which a law of the United States authorizes an oath to be administered." In its opinion, the court remarked: "Where the charge is of crime, it must have clear legislative basis," citing *Williamson v. U. S.*, 207 U. S., 425; *U. S. v. Keitel*, 211 U. S., 370; *U. S. v. Eaton*, 144 U. S., 677; *Morrill v. Jones*, 106 U. S., 466; *U. S. v. Biggs*, 211 U. S., 507; and *Dwyer v. U. S.*, 170 Fed. Rep., 160. However, in this case it appeared that the law itself provided what evidence and affidavits should be required of homestead claimants, and that the regulation of the Interior Department added to the statutory requirement; and the court held that this was not an exercise of administrative power, as contemplated by Congress in authorizing regulations to be made, but was an attempted exercise of legislative powers, as the authority to make regulations did not authorize the Secretary either to abridge or enlarge the statute. (*U. S. v. George*, 228 U. S., 14.)

**Regulation may operate as contract.**—A regulation which has not the force of law, may nevertheless, if not inconsistent with law, operate as a contract between the Government and those who work under it, and thereby acquire full force and effect. (*Adams v. U. S.*, 42 Ct. Cls., 191; 13 Comp. Dec., 819; 5 Comp. Dec., 666.)

**The Secretary of the Navy is authorized by this section to issue regulations prescribing the duties of pay officers, and requiring them to make payments upon certain contingencies.** Such regulations must be read as applying only to items fair on their face. In such case an officer refusing to pay would both breach his bond and render himself liable to court-martial, while an officer obeying the regulation can not be held responsible, either financially or criminally. The regulation in such case has binding force of law on the accounting officers of the Government. (30 Op. Atty. Gen., 376, 171 S. and A. Memo., 3611, reversing 21 Comp. Dec., 554, 357, 245.)

## VII. LIMITATIONS UPON POWER TO MAKE REGULATIONS.

**Must be consistent with law.**—Section 161, Revised Statutes, specifically provides that regulations made thereunder shall be "not inconsistent with law."

**Must not usurp power of Congress.**—Where a regulation issued by the head of a department amounts to an attempted exercise of the power of legislation, it is invalid (*U. S. v. United Verde Copper Co.*, 196 U. S., 207; *U. S. v. George*, 228 U. S., 14; 25 Op. Atty. Gen., 249). The head of a department can not by his regulations alter or amend a statute; all that he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. (*Morrill v. Jones*, 106 U. S., 466; see also *U. S. v. Symonds*, 120 U. S., 46, 49; *U. S. v. Bishop*, 120 U. S., 51; *Campbell v. U. S.*, 107 U. S., 407;



*U. S. v. Garlinger*, 169 U. S., 316; *Merritt v. Welsh*, 104 U. S., 694.) Rights, duties, and obligations defined by statute can not be taken away or abridged by regulations. (*Laurey v. U. S.*, 32 Ct. Cls., 259.)

**Must not be retroactive.**—A regulation manifestly can not have a retroactive effect so as to invalidate a claim for services performed before it was in existence. (*U. S. v. Davis*, 132 U. S., 334; *Taylor v. U. S.*, 33 Ct. Cls., 393; see also *U. S. v. Macdaniel*, 7 Pet. 1, 15; *Campbell v. U. S.*, 107 U. S., 407; *U. S. v. Ala. R. Co.*, 142 U. S., 621.)

**Can not prescribe a criminal offense.**—A departmental regulation can not prescribe a criminal offense. (*U. S. v. Eaton*, 144 U. S., 677; *U. S. v. George*, 228 U. S., 14; *U. S. v. Butler*, 195 Fed. Rep., 657. But see *U. S. v. Bailey*, 9 Pet., 238; *Haas v. Henkel*, 216 U. S., 462.) See above, "VI WEIGHT OF REGULATIONS."

**Limitation as to persons.**—The law does not authorize the head of a department to dictate to a civil employee where he shall live (9 Op. Atty. Gen., 23); nor can he make regulations for the conduct of persons not connected with his department (17 Op. Atty. Gen., 524; 16 Op. Atty. Gen., 494; 16 Comp. Dec., 529; 18 Comp. Dec., 992; but see *U. S. v. Freeman*, 3 How., 567; Op. Atty. Gen., May 19, 1915, 171 S. and A. Memo., 3611; however, persons dealing with agents of the government are bound to take notice of the extent of the authority conferred by law and regulation upon such agents (*Whiteside et al v. U. S.*, 93 U. S., 247; *Noble v. U. S.*, 11 Ct. Cls., 608; *Lind v. U. S.*, 49 Ct. Cls., 648).

**Can not change terms of statute.**—A regulation can not enlarge the terms of a statute by requiring a public officer to furnish a bond with a condition different from that which the statute called for (*U. S. v. Tingey*, 5 Pet., 115; *Moses v. U. S.*, 166 U. S., 571); nor by requiring a homestead claimant to furnish affidavits additional to those required by statute (*U. S. v. Eaton*, 144 U. S., 677); but where a statute authorized publishers to send sample copies through the mails at a reduced rate of postage, without limiting the number of sample copies so sent, a regulation issued by the Postmaster General prescribing the maximum number of sample copies to be so transported at reduced rate was valid. (*Lewis Publishing Co. v. Wyman*, 182 Fed. Rep., 13.) A regulation can not enlarge or restrict the liability of an officer on his bond (*Meads v. U. S.*, 81 Fed. Rep., 684; *Smith v. U. S.*, 170 U. S., 372). A regulation may supplement a statute, but can not supersede it. (*Roberts v. U. S.*, 44 Ct. Cls., 411; 15 Comp. Dec., 658.)

The authority to make rules and regulations is to make such administrative regulations as are necessary to carry out the existing law. The right is not given to amend or enlarge the law. (28 Op. Atty. Gen., 389; see also notes to secs. 436 and 1409, R. S.)

**Private debts.**—In the absence of statute, no public officer can make the United States an agent or trustee for the collection of private debts between citizens. (*Taggart's case*, 17 Ct. Cls., 322, compare file 26254-1709.)

## VIII. RULES FOR TESTING VALIDITY OF REGULATIONS.

**Validity sustained if possible.**—In determining whether a regulation promulgated by the head of a department is consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted under section 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress. (*Boske v. Comingore*, 177 U. S., 459; 29 Op. Atty. Gen., 478.) A regulation must be interpreted, if possible, to harmonize with the law. (*Roberts v. U. S.*, 44 Ct. Cls., 411.)

**Valid unless clearly contrary to statute.**—In determining whether a regulation issued by the Secretary of the Navy is valid, the only proper inquiry is whether and how far a rule has been laid down by the statute which restrains the disposition of the subject by executive order or department regulation and usage. Unless the laws on the subject positively require a different action, or altogether prohibit that taken, the questions are subject to administrative settlement by the Secretary of the Navy. In other words, the law prescribes certain rules on the subject; beyond these rules, executive order, regulation or usage have full scope and play. (25 Op. Atty. Gen., 122.)

**Valid when approved by Congress.**—A regulation directly approved by Congress has the absolute force of law. (In re *Smith*, 23 Ct. Cls., 459; file 26254-1451:11, Apr. 12, 1915, citing *Ex parte Reed*, 100 U. S. 22; *Smith v. Whitney*, 116 U. S., 180, 181; see also Op. Atty. Gen., May 19, 1915, 171 S. and A. Memo., 3611.)

**Ratification of Congress implied.**—When Congress allows a regulation to be formulated and published and carried into effect year after year, the legislative ratification must be implied, and it does not comport with national honor to allow such a regulation of an executive department to exist and individuals to acquire rights upon the faith thereof, and then to withhold payment and question the legality of the regulation. (*Maddux v. U. S.*, 20 Ct. Cls., 193.) Congress has not hesitated to annul Navy regulations of which it did not approve, as, for example, Executive order of November 12, 1908 (file 27109), limiting the duty of the Marine Corps to shore stations. (Act Mar. 3, 1909, 35 Stat., 773; 27 Op. Atty. Gen., 259.) Hence, inaction by Congress is equivalent to legislative sanction of regulations, and should be so regarded in testing the validity of a regulation or construing a statute on the same subject. (*Maddux v. U. S.*, above; *Benjamin v. U. S.*, 10 Ct. Cls., 482; file 5252-36 May 5, 1910; 15 Op. Atty. Gen., 646, 647;



see also 22 Op. Atty. Gen., 626; 19 Op. Atty. Gen., 591; file 7657-167, Jan. 17, 1913; 7657-389, Sept. 25, 1916.) Otherwise, however, where there is a direct conflict between the regulation and a statute. (20 Comp. Dec., 741.)

Where regulations have been in force for a number of years and have received the tacit if not express approval of Congress, the court does not feel at liberty to disregard them and hold that they are not authorized by law, even though it "may well be doubted" that they are authorized by law. (*Garlinger v. U. S.*, 30 Ct. Cls. 477.)

#### IX. WAIVER OF REGULATIONS.

**Regulations not binding on head of department.**—The Supreme Court has held that an Army regulation which in terms applies only to persons in the military service does not bind the Secretary of War, as he "is not in the military service in the sense of the regulation, but on the contrary is a civil officer" (*U. S. v. Burns*, 12 Wall., 246); and the Court of Claims, citing this case, held that Army Regulations, "which are intended for the direction and government of the officers and agents of the department, do not bind the Commander in Chief nor the head of the War Department" (*Smith v. U. S.*, 24 Ct. Cls., 215).

May be waived by power which made them.—The above decision of the Court of Claims was cited by the Comptroller of the Treasury (9 Comp. Dec., 280) in holding that a provision of the Army Regulations which was adopted pursuant to and in execution of a statute was one "of ordinary departmental regulations, made to administer the annual appropriations by the heads of departments," and was binding upon the *subordinates* of the Secretary of War so long as he did not abrogate or waive it; but that "you [Secretary of War] are at liberty in my judgment to change, modify, or waive it at your pleasure, always provided that you do not violate some law in your changed or modified regulation, or by such change, modification, or waiver you do not encroach upon or abrogate some contractual right fully vested before notice of such change, modification, or waiver." (See also 2 Comp. Dec., 306; 3 Comp. Dec., 218; 4 Comp. Dec., 40, 266, 387; 6 Comp. Dec., 589.)

In a decision of the Comptroller of the Treasury, July 22, 1899, it was said: "It has been held time out of mind in this office \* \* \* by such able lawyers and officers as Whittlesey, Tayler, and Lawrence, not mentioning its later incumbents, that the authority making a regulation could waive its enforcement, and that any affirmative act by such power contrary to the provisions of such regulation would be treated as a waiver." (6 Comp. Dec., 60.)

Where the Secretary of the Navy suspended the operation of a regulation in a particular case, the Comptroller of the Treasury, January 8, 1900 (6 Comp. Dec., 589), held that the regulation "was waived by the power which made these regulations," and continued: "I know of no law or rule which forbids the head of a department from suspending the operation of a

regulation similar to this in individual instances. The effect of such suspension is to cause a want of uniformity in the operation of these regulations, but if this be a fault it is chargeable to the administration of the regulations and does not imply the want of power to so suspend the operation of a regulation in individual cases."

"Where a rule or regulation is not the essence of a law, but is simply a vehicle for its proper administration, the authority making such rule or regulation may waive its performance or non-performance." (4 Comp. Dec., 387.)

Regulations issued by the head of a department pursuant to statutory authority and in administration thereof can be made or annulled at will and enforced or waived as seems expedient. (25 Op. Atty. Gen., 183.)

A departmental regulation relating to internal administration and practice, when not specially authorized or demanded by law, is such as the officers of bureaus and departments can make or annul at will or enforce or waive as seems expedient. (18 Op. Atty. Gen., 521.)

View that regulations can not be waived.—In a decision of the Comptroller of the Treasury, above-cited (9 Comp. Dec., 280), there was quoted an opinion of the Judge Advocate General of the Army showing that his office had "uniformly and consistently held to the view that Army Regulations made in pursuance of a statute, although subject to modification by the Secretary of War, are not subject to exceptions or waiver in individual cases by the same authority." The Comptroller did not concur in the Judge Advocate General's opinion in that case. However, in 21 Comp. Dec., 482, it was held that relations "made pursuant to or in execution of a statute, are quasi-legislative, and may be held to become a part of the law and to be of the same force as the statute itself, and though they may be changed by the authority making them they are binding on such authority as well as others so long as they are not changed and exceptions can not be granted to them. The power to make regulations involves the power to alter, amend, modify, or revoke the same, but said action must be general and not by specific exception or waiver, and can only be prospective, not retrospective. The distinction should be made between essential regulations made in aid of a statute, such as are necessary to the execution of the statute, and thus have the appearance of being of a decidedly legislative character and regulations which are merely supplemental to them and relate to the minor details of the machinery for the execution of the statute. These latter are made in aid of the statute also, but are not of the character referred to and may more properly be termed administrative and directory. The line of demarcation may not be easily defined but there is a clear distinction between the two classes of regulation." (See also Op. Atty. Gen. to Sec. of Navy, July 19, 1918; file 26254-2476:5.)

Upon the question whether a provision in the Navy Regulations of 1909 could be waived in an individual case, the Judge Advocate General of the Navy, January 22, 1913 (file 5460-60), remarked that said regulation was substantially

identical with a provision contained in the Navy Regulations which received the express sanction of Congress in the enactment of section 1547, Revised Statutes (citing Atty. Gen.'s opinion of Oct. 27, 1909, file 3890-530); that "there are authorities both ways upon the question whether a regulation such as the foregoing may be waived in individual cases. The specific question has never been decided by the Supreme Court of the United States"; and for these and other reasons, recommended that the regulation in question be not waived.

A regulation which has been specifically approved and adopted by Congress, and has thus been placed on the footing of legislative enactments, can be altered only by Congress and can not be waived by the Secretary of the Navy or the President. (13 Op. Atty. Gen., 10; in re Smith, 23 Ct. Cls., 452; *Maddux v. U. S.*, 20 Ct. Cls., 193; file 26509-106.)

The waiver of a regulation, the same as the revocation or amendment thereof, can not, however, be given a retroactive effect so as to disturb vested rights. (*U. S. v. Macdaniel*, 7 Pet., 1, 15; *Campbell v. U. S.*, 107 U. S., 407.)

**Necessity of President's authority to waive.**—The Comptroller of the Treasury has announced the principle that regulations promulgated by the President may be waived by the head of a department; for the heads of the several departments "are the eyes and hands of the President, to execute the laws and his executive rules and regulations; their acts are in a sense his acts; when they waive a regulation, he waives it; for they act for and represent the power and authority of the President." (6 Comp. Dec., 60.)

In the case of Navy Regulations issued under section 1547, Revised Statutes, it has been held that if they may be waived in any case, express authority of the President for such waiver is necessary, for the principle is recognized in the decisions that regulations can be waived only by the authority which made them, and the President and the Secretary of the Navy *both* act in issuing regulations under section 1547,

Revised Statutes. (File 5460-60.) [In 6 Comp. Dec. 589, it was held that a regulation issued under section 1547, Revised Statutes, might be waived by the Secretary of the Navy, who was "the power which made these regulations." At the time said decision was rendered, this statement of the Comptroller was literally true, as the regulations in question were not expressly approved by the President. Section 1547 was afterwards construed by the Attorney General (25 Op. Atty. Gen., 270) to require the express approval of the President, both for the issuing of regulations thereunder, and the making of changes and alterations therein, which opinion has ever since been followed in practice, although it was later held by the Court of Claims that regulations issued by the Secretary of the Navy under section 1547, Revised Statutes, are presumed to have been issued with the approval of the President, though they do not bear his signature (*Adams v. U. S.*, 42 Ct. Cls., 211; file 3980-1044, Mar. 19, 1915).]

**Evidence of waiver.**—Usually an approval of an act by the head of a department, where a rule or regulation has not been complied with, is sufficient evidence of its waiver. (4 Comp. Dec., 387; 6 Comp. Dec., 60.)

In *Arthur v. U. S.*, 16 Ct. Cls., 433, the Court of Claims held that the Army Regulations were obligatory upon the Surgeon General of the Army; and where that officer, with the acquiescence of the Secretary of War and of the accounting officers, repeatedly disregarded such regulations in practice during a period of many years, this did not constitute a legal custom and operate to annul the regulations in question. In this case, however, the court stated that it was unnecessary to decide whether the Secretary of War's approval of contracts varying from the regulations had the effect of suspending their operation in the individual cases.

**Policy of Navy Department.**—On May 5, 1909, the Secretary of the Navy (Meyer) announced that "The department is averse to waiving the provisions of the regulations except in cases of great necessity". (File 17789-10.)

**Sec. 162. [Hours of business.]** From the first day of October until the first day of April, in each year, all the Bureaus and offices in the State, War, Treasury, Navy, and Post-Office Departments, and in the General Land-Office, shall be open for the transaction of the public business at least eight hours in each day; and from the first day of April until the first day of October, in each year, at least ten hours in each day; except Sundays and days declared public holidays by law.—(4 July, 1836, c. 352, s. 12, v. 5, p. 112; 20 June, 1874, c. 328, v. 18, p. 109.)

Closing the departments for deceased ex-officials is prohibited by act of March 3, 1893, section 4 (27 Stat., 715). Draping of building in mourning is prohibited by the same act, section 3 (27 Stat., 715).

The public buildings are to be kept open during stated hours for the transaction of public business. (*Palmer's case*, 17 Ct. Cls., 230, 234; argument for United States.)

**"Days declared public holidays by law."**—The following days in each year are holidays in the District of Columbia "for all

purposes," viz., the first day of January, commonly called New Year's Day; the twenty-second day of February, known as Washington's Birthday; the Fourth of July; the thirtieth day of May, commonly called Decoration Day; the first Monday in September, known as Labor's Holiday; the twenty-fifth day of December, commonly called Christmas Day; every Saturday after twelve o'clock noon; any day appointed or recommended by the President of the United States as a day of public fasting or thanksgiving; and the day of the



inauguration of the President, in every fourth year. (District of Columbia Code, act Mar. 3, 1901, sec. 1389, 31 Stat., 1404; amended by act June 30, 1902, 32 Stat., 543.)

Every Saturday after 12 o'clock noon in the District of Columbia is one of the days declared public holidays by law. Consequently, heads of departments are not obliged to require labor of employees after the hour of noon on Saturdays. (25 Op. Atty. Gen., 40; see also *Adams v. U. S.*, 42 Ct. Cls., 191.)

The "hours of business" as fixed by this section were, by act of June 20, 1874 (18 Stat., 109), also made the maximum hours of labor which could be required of employees in the departments. The act cited read as follows:

"That it shall be the duty of heads of the several executive departments, and of the heads of the respective bureaus therein, in the interests of the public service, to require of all clerks of class one and above, and of chiefs of divisions, such hours of labor as may be deemed necessary for the proper dispatch of the public business, not exceeding, however, the time for which said departments are by law required to be open for business, any usage to the con-

trary notwithstanding." (See 25 Op. Atty. Gen., 40.)

The "hours of labor" of employees in the departments are now fixed at not less than seven, "except Sundays and days declared public holidays by law or Executive order," by act of March 3, 1893 (27 Stat., 715), as amended by act of March 15, 1898, section 7 (30 Stat., 316). See 22 Op. Atty. Gen., 472, 474, as to pay of employees "during the temporary suspension of actual work in the departments in obedience to an Executive order." See also 22 Comp. Dec., 425.

Hours of labor for Government laborers, workmen, and mechanics are fixed at eight by section 3738, Revised Statutes, and act of August 1, 1892 (27 Stat., 340), and amendments thereto.

Heads of departments are required to extend hours of labor in certain cases, when public business is in arrears. (Act Mar. 3, 1893, 27 Stat., 715, as amended by act Mar. 15, 1898, 30 Stat., 317.)

By Naval Instructions (art. 82) the usual hours of labor for clerks in the Navy Department are fixed at from 9 a. m. to 4.30 p. m.

**Sec. 163. [Classification of Department clerks.]** The clerks in the Departments shall be arranged in four classes, distinguished as the first, second, third, and fourth classes.—(3 Mar., 1853, c. 77, s. 3, v. 10, p. 209; 3 Mar., 1855, c. 175, s. 4, v. 10, p. 669; 15 Aug., 1876, c. 287, s. 3, v. 19, p. 169.)

For compensation allowed clerks of these four classes see section 167, Revised Statutes.

Other provisions concerning the classification of clerks are contained in section 6, act January 16, 1883, "to regulate and improve the civil service of the United States" (22 Stat., 405). Pursuant to said act a classification of the civil service, based upon section 163, Revised Statutes, was adopted by each head of a department and Government establishment by direction of the President on June 9, 1896. It arranges officers and employees, other than mere laborers and persons whose appointments are confirmed by the Senate, in classes according to annual salary or compensation, as follows:

- A. Less than \$720.
- B. \$720 or more and less than \$840.
- C. \$840 or more and less than \$900.
- D. \$900 or more and less than \$1,000.
- E. \$1,000 or more and less than \$1,200.
1. \$1,200 or more and less than \$1,400.
2. \$1,400 or more and less than \$1,600.
3. \$1,600 or more and less than \$1,800.

4. \$1,800 or more and less than \$2,000.
5. \$2,000 or more and less than \$2,500.
6. \$2,500 or more.

The classification further provides that no person appointed as a laborer without examination under the rules shall be assigned to work of the same grade as that performed by classified employees, and no person shall be admitted to any place not excepted from examination by the rules until he shall have passed an appropriate examination before the Civil Service Commission and his eligibility has been certified to the appointing officer by the commission. (Report of United States Civil Service Commission, 1912, p. 128; art. 53, Naval Instructions.)

The Railway Mail Service has a different classification, prescribed by section 1402, Revised Statutes, as amended by an act approved August 24, 1912 (37 Stat., 555), and a different classification of certain employees under the Post Office Department is prescribed by act of March 2, 1907 (34 Stat., 1206).

#### **Sec. 164. [Examinations for appointment. Repealed.]**

This section provided as follows: "Sec. 164. No clerk shall be appointed in any department in either of the four classes above designated until he has been examined and found qualified by a board of three examiners, to consist of the chief of the bureau or office into which such clerk is to be appointed and two other clerks to be selected by the head of the department." (3 Mar., 1853, c. 97, s. 3, v. 10, p. 209; 3 Mar., 1855, c. 175, s. 4, v. 10, p. 669.)

It was repealed by act of January 16, 1883 (22 Stat., 403), which act provides for examinations to be conducted by the Civil Service Commission. (18 Op. Atty. Gen., 245.)

See also provision of section 1753, Revised Statutes, authorizing President to prescribe regulations for admission to the civil service; and see sections 1754 and 1755 as to preference of persons disabled in the military or naval service.



**Sec. 165. [Clerkships open to women.]** Women may, in the discretion of the head of any Department, be appointed to any of the clerkships therein authorized by law, upon the same requisites and conditions, and with the same compensations, as are prescribed for men.—(12 July, 1870, c. 251, s. 2, v. 16, pp. 230, 250.)

See sec. 167 R. S.

**Sec. 166. [Distribution of clerks, temporary detail.]** Each head of a Department may, from time to time, alter the distribution among the various bureaus and offices of his Department, of the clerks and other employees allowed by law, except such clerks or employees as may be required by law to be exclusively engaged upon some specific work, as he may find it necessary and proper to do, but all details hereunder shall be made by written order of the head of the Department, and in no case be for a period of time exceeding one hundred and twenty days. *Provided*, That details so made may, on expiration, be renewed from time to time by written order of the head of the Department, in each particular case, for periods of not exceeding one hundred and twenty days. All details heretofore made are hereby revoked, but may be renewed as provided herein.

This section was amended to read as above by section 3 of the act of May 28, 1896 (29 Stat., 179). Originally it provided as follows: "Sec. 166. Each head of a department may from time to time alter the distribution among the various bureaus and offices of his department of the clerks allowed by law, as he may find it necessary and proper to do."—(3 Mar., 1853, c. 97, s. 3, v. 10, p. 211.)

Heads of departments are required to make annual report to Congress of employees detailed to other offices. (Act Mar. 2, 1895, sec. 7, 28 Stat., 808.)

By the legislative, executive, and judicial appropriation act of March 3, 1917 (39 Stat., 1098) and other years, it was provided that all employees appropriated for in the Office of Naval Records and Library "shall be exclusively engaged on the work of this office during the fiscal year" for which the appropriations were made.

As to delegation of duties required by law to be performed by "head of the department" see note to sections 161 and 177, Revised Statutes, and 19 Op. Atty. Gen., 133.

For references to laws concerning detail of employees from executive departments to the Civil Service Commission, from executive departments to the office of the President of the United States, from duty outside of the District of Columbia to duty in the executive departments in the District of Columbia, and concerning transfer of employees from one department to another department, see note to section 169, Revised Statutes.

Expenditures for personal services in the Navy Department from appropriations made for the naval service, are restricted by the naval appropriation act of June 4, 1920 (41 Stat., 833), the legislative, executive, and judicial appropriation act of March 3, 1921 (41 Stat., 1287), and by similar acts for other years.

**Scope of section.**—This section as amended restricts the detail of employees to the department in which they are regularly employed. From a consideration of other laws bearing on the subject (secs. 3678 and 3682, R. S.; act Aug. 5, 1882, sec. 4, 22 Stat., 255) it seems clear that Congress has strictly limited the power and discretion of a head of department in this matter of employment and detail to cases falling within the amended section 166, Revised Statutes. (25 Op. Atty. Gen., 302.)

But see, 30 Op. Atty. Gen., 131, holding that "there appears to be nothing in the statutes which prohibits the head of a department from permitting a clerk of his department to render additional services, without extra compensation the necessity for which arises in his or in other departments." Specifically it was held in this case that the disbursing clerk of one department might legally be designated to disburse moneys for another department, pending the appointment of a disbursing clerk as authorized by law for the latter department.

**Payment of clerks transferred.**—In making distribution of clerks among the various bureaus and offices in accordance with this section, care should be taken that in no case shall any such clerk be paid from any appropriation made for contingent expenses or for any specific or general purpose, unless such payment is specifically provided for in the law granting the appropriation. (20 Op. Atty. Gen., 750.) The use of contingent appropriations for clerical compensation is restricted by section 3682, Revised Statutes, and by act of August 5, 1882, section 4 (22 Stat., 255).

**"Chiefs of divisions"** of the Department of Agriculture are "clerks" within the language of this section. (20 Op. Atty. Gen., 703; see also note to sec. 169, R. S.)

**Increasing and diminishing clerks of different grades.**—By act of August 15, 1876, section 3 (19 Stat., 169), it was provided: "That whenever, in the judgment of the head of any department, the duties assigned to a clerk of one

class can be as well performed by a clerk of a lower class or by a female clerk, it shall be lawful for him to diminish the number of clerks of the higher grade and increase the number of the clerks of the lower grade within the limit of the total appropriation for such clerical service," etc. [This provision is apparently repealed by the act of August 5, 1882, section 4 (22 Stat., 255), which act in part provides as follows: "That no civil officer, clerk \* \* \* or other employees shall, after the first day of October next, be employed in any of the executive departments, or subordinate bureaus or offices thereof at the seat of government, except only at such rates, and in such numbers, respectively, as may be specifically appropriated for by Congress for such clerical and other personal services for each fiscal year. \* \* \* And all laws and parts of laws authorizing the employment of officers, clerks \* \* \* or other employees

at a different rate of pay or in excess of the numbers authorized by appropriations made by Congress be, and they are hereby, repealed." See also 19 Comp. Dec., 708.]

Where the position of disbursing clerk in a bureau was established by Congress, and has since been regularly appropriated for, such position must be regarded as essential to the organization of the bureau in question, and until Congress otherwise provides it would be "inconsistent with law," within the meaning of section 161, Revised Statutes, for the head of the department to transfer the duties formerly performed by such disbursing clerk to the disbursing clerk of the department to which the bureau is attached. (29 Op. Atty. Gen., 247.) See, in this connection, 30 Op. Atty. Gen., 131, noted above, under "Scope of section."

**Sec. 167. [Salaries of persons employed in the Departments.]** The annual salaries of clerks and employes in the Departments, whose compensation is not otherwise prescribed, shall be as follows:

First. To clerks of the fourth class, eighteen hundred dollars.

Second. To clerks of the third class, sixteen hundred dollars.

Third. To clerks of the second class, fourteen hundred dollars.

Fourth. To clerks of the first class, twelve hundred dollars.

Fifth. To the women employed in duties of a clerical character, subordinate to those assigned to clerks of the first class, including copyists and counters, or temporarily employed to perform the duties of a clerk, nine hundred dollars.

Sixth. To messengers, eight hundred and forty dollars.

Seventh. To assistant messengers, seven hundred and twenty dollars.

Eighth. To laborers, seven hundred and twenty dollars.

Ninth. To watchmen, seven hundred and twenty dollars.

(3 Mar., 1853, c. 97, s. 3, v. 10, pp. 209, 211; 22 Apr., 1854, c. 52, s. 1, v. 10, p. 276; 18 Aug., 1856, Res. 18, v. 11, p. 145; 23 July, 1866, c. 208, s. 6, v. 14, p. 207; 12 July, 1870, c. 251, s. 3, v. 16, pp. 230, 250.)

As to classification of department clerks, see section 163, Revised Statutes, and note thereto. Employment and compensation of women—see section 165, Revised Statutes.

This section is modified by act of March 4, 1913, section 2 (37 Stat., 790), fixing the pay of telephone-switchboard operators, assistant messengers, firemen, watchmen, laborers, and charwomen.

Rules for division of time and computation of pay, in the cases of persons in the civil service whose stated compensation is annual or monthly, are given in the act of June 30, 1906, section 6 (34 Stat., 763). Similar rules for computation in cases of persons in the Army are contained in the act of June 12, 1906 (34 Stat., 248).

Congress has provided that appropriations made in the annual legislative, executive, and judicial appropriation act are not to be used for compensation of any person incapacitated otherwise than temporarily for performing service. (Act Mar. 3, 1917, sec. 3, 39 Stat., 1121.)

Annual report to Congress of employees "below a fair standard of efficiency" is required by act of July 11, 1890 (26 Stat., 268).

Compensation may be paid in certain cases where employee is injured in course of employment. (Act Sept. 7, 1916, 39 Stat., 742.)

**An employee of the Government is entitled to the compensation allowed by law, and is not limited by the amount appropriated by Congress.** (Graham's case, 1 Ct. Cls., 380.)

Where one statute establishes the salary of an officer at \$5,000 and another appropriates only \$3,600 therefor, and the latter contains no provision repealing acts inconsistent and none declaring that payment of the amounts appropriated shall be in full compensation, it is simply a case of inadequate appropriation, and the officer can recover the difference. (French's Case, 16 Ct. Cls., 419.)

The compensation of public officers depends upon general and continuing laws, irrespective of the annual appropriation acts. (Collins v.



U. S., 15 Ct. Cls., 22; see also *Briggs v. U. S.*, 15 Ct. Cls., 48; *Freedman's Bank v. U. S.*, 16 Ct. Cls., 19.)

A statute which fixes the annual salary of a public officer at a designated sum without limitation as to time, is not abrogated or suspended by subsequent enactments appropriating a less amount for his services for a particular fiscal year, but containing no words which expressly or impliedly modify or repeal it. (*U. S. v. Langston*, 118 U. S., 389; *Vulté's case*, 47 Ct. Cls., 324, 327, 233 U. S., 509, 514; 20 Comp. Dec., 821; 22 Comp. Dec., 691.)

Where a salary is fixed by statute, and by inadvertence or mistake an inadequate sum is appropriated, no intention to reduce the compensation can be imputed. But where Congress by prospective appropriation acts gives notice to officers that their salaries will be reduced, and this notice is given before the service is rendered, and the intention is clear, the legislative will must be given effect. This would not apply to services performed before the appropriation act was passed. (*Dyer v. U. S.*, 20 Ct. Cls., 171, distinguishing *Graham's case*. See also sec. 169 and note.)

Where the words "in full compensation" are contained in an appropriation act where the amount appropriated is less than the salary fixed by law, such words have a clear, distinct, and well-understood signification, which can not be overlooked or argued out of the act. (*Fisher v. U. S.*, 15 Ct. Cls., 323; *U. S. v. Fisher*, 109 U. S., 143; see also *U. S. v. Mitchell*, 109 U. S., 146.)

**Sec. 168. [Temporary clerks.]** Except when a different compensation is expressly prescribed by law, any clerk temporarily employed to perform the same or similar duties with those belonging to clerks of either class, is entitled to the same salary as is allowed to clerks of that class.—(22 April, 1854, c. 52, s. 1, v. 10, p. 276.)

Any person temporarily appointed under certain circumstances to perform the duties of a pay officer in the Navy during a vacancy shall be entitled to receive the pay of such grade while so acting. See sections 1381 and 1564, Revised Statutes.

Section 242, Revised Statutes, provides that "No clerk temporarily employed in the

The failure of Congress to make specific appropriation for the salary of the disbursing clerk of a department would not appear to be an insuperable objection to the appointment of such clerk in view of section 176, Revised Statutes, which fixes the total compensation of such appointee until otherwise provided by Congress. (30 Op. Atty. Gen., 130.)

The whole question depends on the intention of Congress as expressed in the statutes. (*Belknap v. U. S.*, 150 U. S., 594, quoting *U. S. v. Mitchell*, 109 U. S., 146, 150, and holding that "the payment to an Indian agent of the amount appropriated by Congress for the payment of his salary being less than the amount fixed by general law as the salary of the office, and his receipt of the sum paid 'in full of my pay for services for the period herein expressed', is a full satisfaction of the claim." See also *Dunwoody v. U. S.*, 143 U. S., 578; *Wallace v. U. S.*, 133 U. S., 180; *Kidder v. U. S.*, 20 Ct. Cls., 46; *Francis v. U. S.*, 22 Ct. Cls., 403.)

[Act of August 5, 1882, section 4 (22 Stat., 255), provides that no persons shall be employed in any executive department except at such rates and in such numbers as may be specifically appropriated for by Congress. By legislative, executive, and judicial appropriation act of July 16, 1914, section 6 (38 Stat., 509), it is provided that "the rates of salaries or compensation of officers or employees herein appropriated shall constitute the rate of salary or compensation of such officers or employees, respectively, until otherwise fixed by annual rate of appropriation or other law."]

Department of the Treasury shall receive a greater compensation than at the rate of \$1,200 a year for the time actually employed."

See section 171, Revised Statutes, as to employment of extra clerks during sessions of Congress.

**Sec. 169. [Appointment, number, and compensation of employés authorized.]** Each head of a Department is authorized to employ in his Department such number of clerks of the several classes recognized by law, and such messengers, assistant messengers, copyists, watchmen, laborers, and other employés, and at such rates of compensation, respectively, as may be appropriated for by Congress from year to year.—(Ex parte *Hennen*, 13 Pet. 230; 3 Mar. 1875, c. 129, v. 18, pp. 360, 361, and 365; 3 Mar., 1875, c. 130, ss. 2, 3, v. 18, p. 399.)

See note to section 166, re distribution of clerks and temporary details.

Employment of persons beyond appropriations made by law is prohibited by act of August 5, 1882, section 4 (22 Stat., 255), and act of August 15, 1876, section 5 (19 Stat., 169).

Expenditures beyond appropriations prohibited by section 3679, Revised Statutes.

Acceptance of voluntary service prohibited, except in sudden emergencies. (Act May 1, 1884, 23 Stat., 17; act Mar. 3, 1905, 33 Stat., 1257; and act Feb. 27, 1906, 34 Stat., 49.)



Salaries paid from "lump sum" appropriations can not be increased except under certain prescribed conditions. (Act Aug. 26, 1912, sec. 7, 37 Stat., 626, as amended by act Mar. 4, 1913, sec. 4, 37 Stat., 790; 19 Comp. Dec., 184, 270, 303, 569, 578, 789; 20 Comp. Dec., 9, 128, 131.)

Oath of office prior to appointment is prescribed by section 1757, Revised Statutes, as amended.

Employees serving for a less period than a year are limited to the maximum pro rata rate provided by law for the time they may be in service. (Sec. 2687, R.S.; 27 Op. Att'y. Gen., 358; *Marston v. U. S.*, 71 Fed. Rep., 496.)

Civil employees paid from appropriations for the military or naval establishment or other branch of the public service outside of District of Columbia can not be detailed for duty in any division of any executive department in the District of Columbia. (Act June 22, 1906, sec. 6, 34 Stat., 449; similar provision is contained in act of Aug. 5, 1882, sec. 4, 22 Stat., 255.)

Classified employees not to be detailed for duty outside of District of Columbia at expense of appropriations in legislative, executive and judicial act, except for duty pertaining directly to their work at seat of Government. (Act May 10, 1916, sec. 5, 39 Stat., 120.)

Expenditures for personal services in the Navy Department from appropriations made for the naval service. (See note to section 166, R. S.)

The employment of enlisted men of the Marine Corps on clerical duty at headquarters of the Marine Corps is permitted by law. (File 4600, Apr. 10, 1906; 21686, Apr. 11, 1906.)

Detail of employees from the executive departments to the Civil Service Commission for duty in the District of Columbia is prohibited by act of March 4, 1913 (37 Stat., 750); 20 Comp. Dec., 106.

Temporary detail of employees in executive departments to office of President of the United States is authorized by act of March 4, 1913 (37 Stat., 749).

Transfer of employees from one department to another department is restricted by act of June 22, 1906, section 5 (34 Stat., 449), as amended by acts of October 6, 1917 (40 Stat., 383), and March 28, 1918 (40 Stat., 498).

As to payment of employees temporarily detailed to other departments, see 22 Comp. Dec., 145, and section 3678, Revised Statutes.

For number and compensation of employees authorized by appropriations of Congress, in accordance with this section, to be employed in the Navy Department, see act of July 16, 1914 (38 Stat., 403) and subsequent appropriation acts. See also section 416, Revised Statutes, which specified number and compensation of certain principal employees who "shall be" in the Navy Department; and section 6, legislative, executive, and judicial appropriation act of July 16, 1914 (38 Stat., 509), providing that "the rates of salaries or compensation of officers

or employees herein appropriated shall constitute the rate of salary or compensation of such officers or employees, respectively, until otherwise fixed by annual rate of appropriation or other law."

The word "employ" as used in this section is equivalent to "appoint" (21 Op. Att'y. Gen., 355, 363).

The expression "clerks of the several classes recognized by law," as used in this section, is not limited in its effect to the four main classes of clerks mentioned in sections 163 and 167, Revised Statutes, but has always been treated as including chiefs of division, chief clerks, and disbursing clerks of the various departments. Accordingly, *held* that the chief clerk, chiefs of bureaus, and translator in the State Department are all "clerks" within the meaning of this section, and are to be appointed by the Secretary of State. (21 Op. Att'y. Gen., 363.) In this case the so-called "bureaus" in the State Department were originally established by regulation, and although recognized by Congress in appropriation acts they were not bureaus within the meaning of section 178, Revised Statutes. The Attorney General said: The word "bureau," like many others, is loosely used in the revision, the terminology of the codified statutes not having been made entirely definite and uniform.

The position of chief of the division of Alaska fisheries in the Bureau of Fisheries (\$3,500) was established by an appropriation item, silent as to how or by whom the position should be filled. The general character of his duties is not unlike that of chiefs of divisions generally in the several executive departments. Accordingly, *held* that appointment should be made by head of the department. (29 Op. Att'y. Gen., 116.)

This section was unquestionably intended to have a very comprehensive scope, and to embrace a variety of subordinate officers in the different departments, besides those designated as clerks of the first, second, third, and fourth classes; and in view of the fact that section 169 is a standing provision it is also fair to assume that Congress did not intend it to be limited to the classes of clerks "recognized by law" at the time of the revision. (29 Op. Att'y. Gen., 116.)

Engravers, electrotypers, photographers (Coast and Geodetic Survey), and also physicists, assistant physicists, assistant chemists, laboratory assistants, aids, and superintendent of mechanical plant (Bureau of Standards), fall within the provisions of this section and should be appointed by the head of the department. While they are in the main positions requiring technical skill, they are "clerks" within the meaning of section 169. (29 Op. Att'y. Gen., 116; approving 15 Op. Att'y. Gen., 6.)

In the Navy Department the solicitor, the chief clerk of the department, and the chief clerks of the different bureaus are in practice appointed by the Secretary of the Navy in accordance with this section. The appointment of disbursing clerks is specifically provided for by section 176, Revised Statutes.

A local agent at Seattle, Wash., should be employed by the head of the department under this section. I am advised informally by the Bureau of Fisheries that his duties are to be strictly clerical. (29 Op. Att'y. Gen., 116.)

This section does not invest the head of the Treasury Department with authority to appoint certain deputy bureau officers authorized by law in that department; but their appointment must be made under the Constitution by the President, with the advice and consent of the Senate. (See Constitution, Art. II, sec. 2, par. 2.; 15 Op. Atty. Gen., 3; 26 Op. Atty. Gen., 627.)

The office of Deputy Commissioner of Fisheries, at an annual salary of \$3,000, created by an item in an appropriation act, which failed to specify how or by whom the appointment should be made, or to prescribe its duties, should be filled by the President, by and with the advice and consent of the Senate. In the absence of an express enactment to the contrary the appointment of any officer of the United States belongs to the President and Senate (citing 6 Op. Atty. Gen., 1; 15 Op. Atty. Gen., 3, 449; 17 Op. Atty. Gen., 532; 18 Op. Atty. Gen., 98, 298; 26 Op. Atty. Gen., 627). The title of the office in this case necessarily implies a power to perform all the duties which might be performed by the Commissioner of Fisheries, the nature of whose duties is defined by statute, and whose appointment is vested in the President, by and with the advice and consent of the Senate. Accordingly, *held* that a Deputy Commissioner of Fisheries appointed by the head of the department was not legally appointed, his status being that of a *de facto* officer. (29 Op. Atty. Gen., 116.)

The positions of assistant salmon agent (\$1,800), salmon warden (\$1,200), and deputy wardens (\$600), must be filled by the President, by and with the advice and consent of the Senate. There is no express statutory authority giving the head of the department power to make such appointments. These are officers whose duties are manifestly not clerical, nor can they be considered otherwise within the scope of section 169, Revised Statutes. (29 Op. Atty. Gen., 116.)

**The sole responsibility of every appointment** in a department rests upon the head of that department, except where the power to appoint is otherwise specially provided for by statute. The power of appointment carries with it the power of removal. These powers, being discretionary, can not be delegated by the head of the department, though he may inquire, investigate, and determine by the aid of subordinates; but the final determination must be his act and not theirs. (21 Op. Atty. Gen., 355; 29 Op. Atty. Gen., 274. See note to sec. 177, R. S.)

The power of appointment, especially where fixed by statute in the head of the department, can not be delegated to subordinates without authority of Congress; but where Congress authorizes the chief clerk of a department to sign official papers during the temporary absence of the Secretary and Assistant Secretaries of the department, this is sufficient authority to sign appointment of a special disbursing agent, although the law required such agents be appointed by the head of the department. (29 Op. Atty. Gen., 273.)

The written appointment of the Secretary of the Navy, or his approval in writing, is required for the employment of any clerk, etc., in the

Navy Department. (Art. 52, Naval Instructions, 1913.)

**Appointments made by the heads of bureaus** in accordance with statute are presumed to be made with approval of the head of the department, and are made by the head of a department within the meaning of section 2, Article II, of the Constitution. (*Price v. Abbott*, 17 Fed. Rep., 506; *Frelinghuysen v. Baldwin*, 12 Fed. Rep., 396; *Stanton v. Wilkeson*, 22 Fed. Cas. No. 13299; *Ekiu v. U. S.*, 142 U. S., 651.)

**A substitute clerk can not be employed** in place of a clerk in the Navy Department on leave without pay. (15 Comp. Dec., 856; compare *Chisolm v. U. S.*, 27 Ct. Cls., 94.)

**A substitute clerk can be employed** under a rule of the Civil Service Commission, if approved by the President, where such employment would impose no additional expenditure upon the Government, i. e., where the regular clerk is temporarily absent without pay. And such a rule would not be contrary to the act of August 5, 1882, section 4 (22 Stat., 255). (19 Op. Atty. Gen., 507.)

**An employee entering upon duty on the last day of a month** which has 31 days can not lawfully be paid for services rendered on that day. (20 Comp. Dec., 165, affirming 13 Comp. Dec., 64 and 75; see also 20 Comp. Dec., 772, 867.)

**Date of appointment.**—An appointment made to take effect at a prior date is inoperative prior to the date on which it was actually made and accepted. (8 Comp. Dec., 521; 20 Comp. Dec., 214, citing *Morey v. U. S.*, 35 Ct. Cls., 603; *Jackson v. U. S.*, 42 Ct. Cls., 39; 17 Comp. Dec., 452.)

An appointment to office is an act done, a direct exercise of power in some particular direction, not necessarily evidenced in writing but none the less complete at a particular point of time; and until the act is done it remains undone. Something more than the act of appointment also is necessary to invest the person appointed with the office and to give him the right to compensation. It must be accepted, and it is not understood how an appointment can be accepted, either formally or impliedly, before it has been made. (8 Comp. Dec., 521; *Lee v. U. S.*, 45 Ct. Cls., 62.)

**Acceptance is a distinct act from the appointment.**—The appointment is the sole act of the appointing power; the acceptance is the sole act of the officer, and is in plain common sense posterior to the appointment. As he may resign, so may he refuse to accept; but neither the one nor the other is capable of rendering the appointment a nonentity. (*Marbury v. Madison*, 1 Cranch., 137.)

Acceptance is necessary to vest the office in the appointee, and a formal acceptance is the evidence which in the public service generally, it has been customary to require. (12 Op. Atty. Gen., 229.) But where a former officer of the Army asked the President in writing to reinstate him under an act of Congress, and the President did so, no further formal acceptance was necessary. (*Collins v. U. S.*, 15 Ct. Cls., 31.)

Execution of the oath of office may be regarded as an acceptance of the office. (8 Comp. Dec., 521; 19 Op. Atty. Gen., 284.)



**Expiration of appointment.**—Where the appointment is to terminate, under its terms, upon the happening of an event which is uncertain, notice to the employee of its happening is necessary to end his contract of employment, notwithstanding the prior occurrence of the event which fixed the termination. (20 Comp. Dec., 149.)

**Right to compensation.**—A salary that is established by statute can not be increased or diminished by executive officers. (*Adams v. U. S.*, 20 Ct. Cls., 115; *Dyer v. U. S.*, 20 Ct. Cls., 166.)

A public officer may recover the lawful compensation of his office, notwithstanding that he accepted a less amount and receipted in full therefor. (*Adams v. U. S.*, 20 Ct. Cls., 115; quoted with approval, *Glavey v. U. S.*, 182 U. S., 607.)

It is not within the power of the head of a department to reduce or change the salary of an officer which Congress has specifically pre-

scribed; and an agreement to that effect, being contrary to public policy, will not be enforced or given effect as an estoppel. (*Miller v. U. S.*, 103 Fed. Rep., 413; *Glavey v. U. S.*, 182 U. S., 605. (See also notes to secs. 166 and 167, Revised Statutes.)

There is no legal necessity for the re-appointment of the present incumbents of offices where there appears to be no evidence that Congress intended to abolish the existing positions and create new ones. The mere creation of a new administrative division in which such positions are placed does not establish new offices. The existing offices are continued. (29 Op. Atty. Gen., 116; compare 21 Comp. Dec., 49.)

A new appointment is not made necessary merely by reason of an increase in the salary of an office. (29 Atty. Gen., 116; citing 1 Comp. Dec., 267; 1 Comp. Dec., 313; 3 Comp. Dec., 336; compare 4 Comp. Dec., 28.)

**Sec. 170. [Extra compensation to clerks restricted.]** No money shall be paid to any clerk employed in either Department at an annual salary, as compensation for extra services, unless expressly authorized by law.—(3 Mar., 1863, c. 97, s. 3, v. 10, pp. 209, 211; 17 June, 1844, c. 105, s. 1, v. 5, pp. 681, 687; 28 Feb., 1867, Res. 30, s. 2, v. 14, p. 569.)

Compensation for extra services "which any officer or clerk may be required to perform," unless expressly authorized by law, is prohibited by section 1764, Revised Statutes. See that section and note thereto.

Compensation not to be charged by persons in departments for administering oaths of office to employees on appointment or promotion. (Act Aug. 29, 1890, 26 Stat., 371.)

This section was expressly modified by act of March 3, 1879 (20 Stat., 384), which authorized the Secretary of the Treasury to pay additional compensation to clerks of his department during that year, for work done "in addition to the usual business hours;"

also by act of March 4, 1907 (34 Stat., 1372), providing that, "To enable the Secretary of the Treasury to effect a change in the methods of bookkeeping in the Treasury Department, and to install a double entry system of bookkeeping, \$5,000, or so much thereof as may be necessary, is hereby appropriated, to remain available until expended; said sum to be used by the Secretary of the Treasury, as he shall determine, in payment for services of such of the force of the Division of Bookkeeping and Warrants of the Treasury Department as may be needed to carry the change into effect, notwithstanding the provisions of sections 170, 1763, 1764, and 1765 of the Revised Statutes."

**Sec. 171. [Employment of extra clerks during sessions of Congress.]** No extra clerk shall be employed in any Department, Bureau, or office, at the seat of Government, except during the session of Congress, or when indispensably necessary in answering some call made by either House of Congress at one session to be answered at another; nor then, except by order of the head of the Department in which, or in some Bureau or office of which, such extra clerk shall be employed. And no extra clerk employed in either of the Departments shall receive compensation except for time actually and necessarily employed, nor any greater compensation than three dollars a day for copying, or four dollars a day for any other service.—(26 Aug., 1842, c. 202, s. 15, v. 5, p. 526; 15 Aug., 1876, c. 287, s. 5, v. 19, p. 169.)

In connection with this section consult act of August 5, 1882, section 4 (22 Stat., 255), and act of August 15, 1876, section 5 (19 Stat., 169), which acts prohibit employment of clerks, etc., by heads of departments beyond appropriations made by law. Although the former act expressly repealed section 172, Revised Statutes, it contained no specific reference to this sec-

tion. Section 3682, Revised Statutes, and act of August 5, 1882, section 4 (22 Stat., 255), restrict use of contingent and miscellaneous appropriations for clerical compensation.

This section was repealed (according to the Comptroller) by the act of August 5, 1882, section 4 (22 Stat., 255). (Comp. Dec., Oct. 28, 1915, file 26254-1906.)



**Sec. 172. [Restriction on employment of messengers and laborers. Repealed.]**

**This section was as follows:** "SEC. 172. No messenger, assistant messenger, laborer, nor other subordinate assistant shall be employed in any department, bureau, or office at the seat of Government, or paid out of the contingent fund appropriated to such department, bureau, or office, unless such employment is authorized

by law, or is necessary to carry into effect some object for which an appropriation has been specifically made."—(26 Aug., 1842, c. 202, s. 15, v. 5, p. 526.)

**It was repealed** by act of August 5, 1882, section 4 (22 Stat., 255; 25 Op. Atty. Gen., 302.)

**Sec. 173. [Duties of chief clerks, supervising subordinates.]** Each chief clerk in the several Departments, and Bureaus, and other offices connected with the Departments, shall supervise, under the direction of his immediate superior, the duties of the other clerks therein, and see that they are faithfully performed.—(26 Aug., 1842, c. 202, s. 13, v. 5, p. 525.)

For authority of chief clerks to administer oaths of office, see act of August 29, 1890 (26 Stat., 371.)

For authority of chief clerk to act as chief of bureau, see section 178, Revised Statutes. As to meaning of "chief clerk" see note to section 178, Revised Statutes.

**Chief Clerk, Navy Department.**—To facilitate and aid the Secretary of the Navy in

the exercise of his many and varied and important duties and responsibilities, he has an office force, supervised by the chief clerk of the department, which is required to determine and pass upon all matters requiring his action which, by law or regulation, are not otherwise required to be handled. (File 22353-13.)

**Sec. 174. [Duties of chief clerks; monthly reports, etc.]** Each chief clerk shall take care, from time to time, that the duties of the other clerks are distributed with equality and uniformity, according to the nature of the case. He shall revise such distribution from time to time, for the purpose of correcting any tendency to undue accumulation or reduction of duties, whether arising from individual negligence or incapacity, or from increase or diminution of particular kinds of business. And he shall report monthly to his superior officer any existing defect that he may be aware of in the arrangement or dispatch of business.—(26 Aug., 1842, c. 202, s. 13, v. 5, p. 525.)

Condition of business is required to be reported monthly to head of department by chiefs of bureaus and offices, by act of March 15, 1898 (30 Stat., 317). In the Navy Department a report of condition of business is required quarterly from bureaus and offices. (Art. 11, Naval Instructions.)

Heads of departments are required to make quarterly reports to the President of the condition of business by act March 15, 1898, section 7 (30 Stat., 316.)

**Sec. 175. [Action on reports of chief clerks.]** Each head of a Department, chief of a Bureau, or other superior officer, shall, upon receiving each monthly report of his chief clerk, rendered pursuant to the preceding section, examine the facts stated therein, and take such measures, in the exercise of the powers conferred upon him by law, as may be necessary and proper to amend any existing defects in the arrangement or dispatch of business disclosed by such report.—(26 Aug., 1842, c. 202, s. 13, v. 5, p. 525.)

Heads of departments are required to extend hours of labor in certain cases when public business is in arrears. (Act Mar. 3, 1893,

sec. 5, 27 Stat., 715, as amended by act Mar. 15, 1898, 30 Stat., 317.)

**Sec. 176. [Disbursing clerks.]** The disbursing clerks authorized by law in the several Departments shall be appointed by the heads of the respective Departments, from clerks of the fourth class; and shall each give a bond to the United States for the faithful discharge of the duties of his office according to law in such amount as shall be directed by the Secretary of the Treasury, and

with sureties to the satisfaction of the Solicitor of the Treasury; and shall from time to time renew, strengthen, and increase his official bond, as the Secretary of the Treasury may direct. Each disbursing clerk, except the disbursing clerk of the Treasury Department, must, when directed so to do by the head of the Department, superintend the building occupied by his Department. Each disbursing clerk is entitled to receive, in compensation for his services in disbursing, such sum in addition to his salary as a clerk of the fourth class as shall make his whole annual compensation two thousand dollars a year.—(3 Mar., 1853, c. 97, s. 3, v. 10, pp. 209, 211; 3 Mar., 1855, c. 175, s. 4, v. 10, p. 669; 3 Mar., 1873, c. 226, s. 1, v. 17, p. 485 (492).)

The salary of the disbursing clerk in the Navy Department was fixed at \$2,250 per annum by act of May 29, 1920 (41 Stat., 663), and appropriation acts for prior years. Specific provision for salary of a disbursing clerk in the Navy Department was omitted in the appropriation act of March 3, 1921 (41 Stat., 1282), the position of "disbursing officer" at \$3,000 per annum having in the meantime been created from lump sum appropriations. (See Estimates of Appropriations, 1922, p. 102.)

The appointment of a superintendent for the State, War, and Navy Department Building, by detail from officers of the Army or Navy, is provided for by act of March 3, 1883 (22 Stat., 553). See note to section 415, Revised Statutes.

Temporary appointment in case of absence or sickness of disbursing clerk is authorized by act of March 4, 1909 (35 Stat., 1027).

The employment of special disbursing agents is provided for by section 3614, Revised Statutes. (30 Op. Atty. Gen., 132.)

Disbursing agents abroad are not to be employed for naval service, under contract or otherwise, unless they hold appointments confirmed by the Senate. (Sec. 1550, R. S.)

Duty of disbursing officers to examine payrolls and vouchers. (Act Aug. 23, 1912, 37 Stat., 375.)

Disbursing officers may apply for and obtain decision of Comptroller of the Treasury concerning legality of proposed payments (act July 31, 1894, sec. 8, 28 Stat., 208); and may appeal to Comptroller of the Treasury from disallowances in their accounts by auditor. (Same act and section.)

On general subject of accounting, see section 236, Revised Statutes, and note thereto.

All books, papers, and other matters relating to the office or accounts of disbursing officers of the executive departments shall at all times be subject to inspection and examination by the Comptroller of the Treasury, and the auditor of the Treasury authorized to settle such accounts, or by the duly authorized agents of either of said officials. (Act Feb. 19, 1897, 29 Stat., 550.)

Disbursing officers are required to furnish heads of departments with certain data for annual reports to Congress (sec. 193, R. S.) and are required to make annual report to the Secretary of the Treasury of checks outstanding for three years or more. (Sec. 310, R. S.)

Secretary of the Treasury is required to report annually to Congress disbursing officers delinquent in rendering accounts. (Act May 28, 1896, 29 Stat., 179.)

Embezzlement—on general subject of, see sections 86–96, Criminal Code, act of March 4, 1909 (35 Stat., 1105, 1106), and note to section 1624, Revised Statutes, article 14.

Advances of public money are prohibited by section 3648, Revised Statutes; and such unauthorized advances are punishable as embezzlement under section 87, Criminal Code, act of March 4, 1909 (35 Stat., 1109).

A disbursing officer who fails safely to keep public moneys in his care is guilty of embezzlement. (Sec. 88, Criminal Code, act Mar. 4, 1909, 35 Stat., 1105. See note to sec. 1624, R. S., art. 14.)

A disbursing officer who deposits money in a bank not designated as a depository in accordance with sections 3620 and 3639, Revised Statutes, is liable with his sureties for any loss that may arise from the failure of such bank (20 Op. Atty. Gen., 24); and his conduct in depositing public money in a place not authorized by law is punishable as embezzlement under section 87, Criminal Code, act of March 4, 1909 (35 Stat., 1105); and the conduct of the banker or officers of the bank in knowingly receiving such money on deposit is also punishable as embezzlement by section 96, Criminal Code, act of March 4, 1909 (35 Stat., 1106).

Disbursing officers are prohibited by law from exchanging Government funds in their control for other funds, with certain exceptions. Head of department is required immediately to suspend from duty any disbursing officer who violates this prohibition, and make report to the President to the end that such disbursing officer may be promptly removed from office or restored to duty. (Secs. 3639 and 3651, R. S.) And such unauthorized exchange of Government funds is punishable as embezzlement under section 89, Criminal Code, act of March 4, 1909 (35 Stat., 1105). See note to section 1624, Revised Statutes, article 14.

Taking receipt for larger sum than paid is punishable as embezzlement under sections 86 and 95, Criminal Code, act of March 4, 1909 (35 Stat., 1105, 1106).

Trading in Federal or State funds is punishable under section 103, Criminal Code, act of March 4, 1909 (35 Stat., 1107).



Failure in rendering accounts as provided by law is punishable as embezzlement by section 90, Criminal Code, act of March 4, 1909 (35 Stat., 1105); other proceedings against delinquent officer are provided for by sections 3625-3638, Revised Statutes, and acts of July 31, 1894 (28 Stat., 206), and May 28, 1896, section 4 (29 Stat., 179).

Embezzlement of public or private money or property, keeping false accounts, or making false returns shall be punished by fine and imprisonment by any court, civil or military, having jurisdiction. (Sec. 5306, R. S.)

All moneys received by any officer for the United States must be promptly paid into the Treasury, without deduction (sec. 3617, R. S.); officers violating this requirement shall be removed from office and forfeit moneys withheld (sec. 3619, R. S.); and such failure to deposit public money when required so to do is punishable as embezzlement. (Sec. 91, Criminal Code, act Mar. 4, 1909, 35 Stat., 1105.) But see note to section 236, Revised Statutes, under "SET-OFF."

Any officer of United States who sells for a premium any Treasury note or other public security not his own property, without accounting for such premium, shall be forthwith dismissed from office. (Sec. 3652, R. S.)

Disbursing officers are not allowed to take receipts for payments by check; nor duplicate receipts for cash payments; nor to require a receipt in advance of actual payments. (Navy Regs., 1913, art. R-4303.)

Disbursing officers are not allowed to pay expense connected with any commission or inquiry, except courts-martial or courts of inquiry in the military or naval service, unless special appropriation therefor is made by law. (Sec. 3681, R. S.)

No money can be paid to any bonded officer as compensation who is in arrears to the United States. (Sec. 1766, R. S.)

Upon application to Court of Claims, disbursing officers may be relieved of responsibility for losses incurred without fault or neglect on their part. (Judicial Code, act Mar. 3, 1911, secs. 145, 147, 36 Stat., 1136, 1137.)

Settlement of outstanding checks and accounts of disbursing officers. (See secs. 306-310, R. S., and arts. R-433 et seq., Navy Regs. 1913.)

Lost checks, procedure with reference to. (See secs. 3646, 3647, R. S.; act Feb. 23, 1909, 35 Stat., 643, and art. R-4337, Navy Regs., 1913.)

Laws and decisions concerning bonds—for complete reference to, see section 1383, Revised Statutes, and note thereto.

The President is authorized to increase the sums for which bonds are required by law of all naval agents and other officers employed in the disbursement of public money under direction of the Navy Department. (Sec. 3639, R. S.)

It is expressly provided by law that the United States shall not pay any part of the premium or other cost of furnishing a bond, required by law or otherwise, of any officer or employee of the United States. (Act Aug. 5, 1909, 36 Stat., 118, 125.)

Guaranty companies may be accepted as sole surety on bonds. (Act Aug. 13, 1894, secs. 1 and 3, 28 Stat., 279; 27 Op. Atty. Gen., 627.)

**Historical note.**—It appears to have been originally designed that no demand for the payment of money by the United States should be paid until a claim or account therefor had been audited and certified by the accounting officers. But early in the history of the Government a practice grew up, without express authority of law, of employing agents to disburse moneys appropriated for various objects. Subsequently disbursing officers were expressly authorized by statute and in 1853 were provided for the several departments. (4 Comp. Dec., 334.)

**Compensation of disbursing officers.**—The disbursing clerk of a department is not entitled to any commission over and above the amount of his salary for keeping and disbursing the funds of his department, and other services enumerated. (10 Op. Atty. Gen., 31.)

This section does not authorize the head of a department to diminish or take away the salary of a disbursing clerk as fixed by another provision of law. (*Dunwoody v. U. S.*, 143 U. S., 578; 22 Ct. Cls., 269.)

**Departmental regulations** can not enlarge or restrict the liability of an officer on his bond. (*Meads v. United States*, 81 Fed. Rep., 684.)

**The expense incurred by an officer in furnishing bond** required by law of all disbursing officers of the Government is not a proper charge against the Government, even though the officer serves without compensation. (2 Comp. Dec., 262; *U. S. v. Van Duzee*, 140 U. S., 171; see also 30 Op. Atty. Gen., 129.)

**The premium allowed to be charged on bonds of disbursing officers** is limited by act of August 5, 1909 (36 Stat., 125). This act does not apply to bonds of acting or deputy disbursing clerks. (27 Op. Atty. Gen., 624; 28 Op. Atty. Gen., 28.)

**A bond furnished to the United States** by the disbursing officer in a department takes effect on the date when it is accepted by the Government. (*Moses v. United States*, 166 U. S., 571.)

**Pay of disbursing officer may commence** prior to furnishing bond—that is, upon acceptance of appointment or entering upon duty—the same as other officers. (16 Op. Atty. Gen., 38; *U. S. v. Eaton*, 169 U. S., 346; *Glavey v. U. S.*, 182 U. S., 595; *U. S. v. Bradley*, 10 Pet., 343; *U. S. v. Linn*, 15 Pet., 290. But see note to sec. 1383, R. S., and 21 Comp. Dec., 49, 51.)

**The failure of Congress to make specific appropriation for the salary of the disbursing clerk of a department** would not appear to be an insuperable objection to the appointment of such clerk in view of this section, which fixes the total compensation of such appointee until otherwise provided by Congress. (30 Op. Atty. Gen., 130.)

**The head of a department has power to demand a bond** from an officer appointed to a place of trust, although there is no statutory authority to take such bond. It was held in *United States v. Tingey* (5 Pet., 115) that the United States had the right to take a bond to insure the faithful performance of duty on the part of an individual or officer where such bond was voluntarily given and was not in violation



of any provision of law; but that no officer of the Government has a right, under color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond "with a condition *different* from that prescribed by law." The power of the Government to take bonds in cases where not required by any law or regulation, but only by direction of the head of a department, was recognized again in *United States v. Bradley* (10 Pet., 343, 359). The term "voluntary bond" does not mean that it must have been offered and pressed upon the Government when never asked for or demanded by it. It is a voluntary bond when it is not demanded by any particular statute or regulation based thereon, and when it is not exacted in violation of any law or valid regulation of a department. The Government in such cases has the right to demand a bond, in the absence of any law; but can not extort a bond from a reluctant officer with a condition therein contained different from that which a statute calls for. (*Moses v. U. S.*, 166 U. S., 571; see also *U. S. v. Maurice*, 2 Brock., 96, 26 Fed. Cas. No. 15747; *Jessup v. U. S.*, 106 U. S., 147; *U. S. v. Rogers*, 28 Fed. Rep., 607; 6 Op. Atty. Gen., 24; and see note to sec. 1383, R. S.).

**The authority of disbursing officers of executive departments to make payments is restricted to the payment of fixed salaries, bills for supplies purchased and approved, and other similar demands which do not require for the ascertainment of their validity the exercise of judicial functions in weighing evidence or in the application of general principles of law.** (4 Comp. Dec., 336, 337.)

**Responsibility of disbursing officers.**—The rule that the Government can not be held responsible for the mistakes of its agents includes mistakes of law as well as mistakes of fact, where made by disbursing officers, and as to such officers the policy of the Government has been to acknowledge no payments as made on its behalf save those which were authorized by law. If a disbursing officer makes a mistake of law, the payment is disallowed when his accounts come in for settlement and charged to him as if the money were still in his hands. (*McKee v. U. S.*, 12 Ct. Cls., 532, explaining *McElrath's case*, 12 Ct. Cls., 201. See further, note to sec. 236, R. S.)

Disbursing officers can avoid responsibility by applying to the Comptroller of the Treasury for an advance decision in cases where they may have doubts. (7 Comp. Dec., 271.)

**Sec. 177. [Vacancies in head of Department; how temporarily filled.]** In case of the death, resignation, absence, or sickness of the head of any Department, the first or sole assistant thereof shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such head until a successor is appointed, or such absence or sickness shall cease.—(23 July, 1868, c. 227, s. 1, v. 15, p. 168.)

See limitation contained in section 180, Revised Statutes.

As to vacancy in office of Attorney General, or his absence or disability, see section 347, Revised Statutes.

"Death, resignation, absence, or sickness."

As to construction of these words, see note to section 179, Revised Statutes.

The accounts of disbursing officers never being closed, the accounting officers may readjust their accounts at any time. (*Stevens v. U. S.*, 41 Ct. Cls., 344. See further, note to sec. 236, R. S.)

A disbursing officer is not responsible for illegal payments made by him in good faith and in accordance with the certificate of another officer as to the facts. An appropriation being under the control of the head of a department, it is within the latter's power to prescribe rules to govern the disbursing agent in making disbursements therefrom. (9 Comp. Dec., 545; see also *Maj. Smith's Case*, 23 Ct. Cls., 452; 21 Comp. Dec., 314; Comp. Dec., Nov. 21, 1914, file 26254-1672; 21 Comp. Dec., 357; file 26254-1451:5, Oct. 31, 1914; file 26254-1451:11, Apr. 12, 1915; Op. Atty. Gen., May 19, 1915, 171 S. and A. Memo., 3611.)

Under ordinary circumstances it is the duty of a disbursing officer to pay clerks and employees as set out on the properly certified pay rolls presented to them for payment, but a payment should never be made by a disbursing officer until properly certified. The head of a bureau, through his timekeeper and the appointment division of his department, is supposed to have the information upon which the pay rolls are made up, and is necessarily in possession of the information requisite to make the proper certificate thereto, which the disbursing officer is not, nor can he be. (8 Comp. Dec., 776, 785; see also 20 Comp. Dec., 859.)

For other cases see note to section 285, Revised Statutes.

**Abolishing the position.**—Where the position of disbursing clerk in a bureau was established by Congress, and has since been regularly appropriated for, such position must be regarded as essential to the organization of the bureau in question, and until Congress otherwise provides, it would be "inconsistent with law," within the meaning of section 161, Revised Statutes, for the head of the department to transfer the duties formerly performed by such disbursing clerk to the disbursing clerk of the department to which the bureau is attached. (29 Op. Atty. Gen., 247.)

**The disbursing clerk of one department might legally be designated to disburse moneys for another department, pending the appointment of a disbursing clerk as authorized by law for the latter department.** (30 Op. Atty. Gen., 131.)

In case of the absence of both the Secretary and Assistant Secretary of the Navy, "the Chief of Naval Operations shall be next in succession to act as Secretary of the Navy." (Act Mar. 3, 1915, 38 Stat., 929; see file 22724-40, Apr. 24, 1919.)

**Power inherent in President.**—The power of the President to make temporary appoint-

ment in all such cases is a constitutional one. The power was exercised by the President in regard to the heads of departments in cases in which the law was silent. In the most questionable of the cases, that of Attorney General, whose quasi judicial functions especially would seem to require to stand on legislative authority, proof exists in the files of the Department of Justice that temporary appointment was made by the President prior to the enactment of statutory authority therefor. But a general provision of law is desirable to remove all doubt on the subject. (6 Op. Att'y. Gen., 351, 352.)

There can be no question that the President has the fundamental right as Chief Executive to make such temporary appointment, designation, or assignment of one officer to perform the duties of another whenever the administration of the Government requires it; otherwise the Government would be menaced with a serious interruption of its administration. (25 Op. Att'y. Gen., 258. But see contra 27 Op. Att'y. Gen., 344; see also 28 Op. Att'y. Gen., 487; and see note to sec. 1381, R. S.)

**Authority of assistant.**—The signature of a "first or sole assistant" as the acting head of a department, when attached to a document of that department, implies that one of the conditions provided in section 177, Revised Statutes, which authorizes him to act in that capacity, had arisen. (Marsh v. Nichols, 128 U. S., 615; U. S. v. Twining, 132 Fed. Rep., 129.)

It is clear that, in the absence of the head of a department, the authority with which he is invested can be exercised by the officer who, under the law, becomes for the time acting secretary. (Ryan v. U. S., 136 U. S., 81.)

Under the provisions of this section and section 161, Revised Statutes, the head of a department has authority to assign certain of his duties

to the assistant head thereof, and in the absence or sickness of the head of a department such assistant head may lawfully perform his duties in respect to such matters which have to be determined, settled, and adjudicated in that department. And it not appearing to the contrary, it must be presumed that a legitimate authority existed for official acts performed by the assistant. (Shillito v. McClung, 51 Fed. Rep., 872; Parish v. U. S., 100 U. S., 500; U. S. v. Adams, 24 Fed. Rep., 348; Chadwick v. U. S., 3 Fed. Rep., 756; U. S. v. Peralta, 19 How., 347.) Where the assistant head of a department performs a duty required by law of the head of the department, it will be presumed, in the absence of evidence to the contrary, that he was performing a duty in accordance with law. (Franklin Sugar Refining Co. v. U. S., 178 Fed. Rep., 743.) Where an appeal was heard and decided by the assistant head of a department, it will be presumed, the contrary not appearing, that the Assistant Secretary was lawfully exercising the Secretary's powers, as he was authorized to do by this section. (In re Jem Yuen, 188 Fed. Rep., 350, 354; see U. S. v. Redfern, 180 Fed. Rep., 508; and see note to sec. 178, R. S.)

So long as the powers delegated to the Assistant Secretary by his superior remain unrevoked, the authority of the former is coordinate and concurrent with that of the latter. When the assistant acts at a time the Secretary is not absent or sick, under a regulation made by the Secretary prescribing his powers and duties, he should sign with his own proper official designation. When the Secretary is absent or sick, if the assistant is in charge of the department in pursuance of sections 177 or 179, Revised Statutes, he should sign as *Acting Secretary*. (19 Op. Att'y. Gen., 133.)

**Sec. 178. [Vacancies in subordinate offices.]** In case of the death, resignation, absence, or sickness of the chief of any Bureau, or of any officer thereof whose appointment is not vested in the head of the Department, the assistant or deputy of such chief or of such officer, or if there be none, then the chief clerk of such Bureau, shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such chief or of such officer until a successor is appointed or such absence or sickness shall cease.—(23 July, 1868, c. 227, s. 2, v. 15, p. 168.)

See limitation contained in section 180, Revised Statutes.

"Death, resignation, absence, or sickness."

As to construction of these words, see note to section 179, Revised Statutes.

The courts take judicial notice of the fact that a deputy or assistant to a public officer, in a particular case, is provided for by law, and that such deputy or assistant may exercise the powers and discharge the duties attached to the office during a vacancy in that office, or during the absence or inability of his superior. Where such deputy or assistant signed as "acting" a document required by statute to be signed by his superior, it will be presumed that at the date he so signed he was authorized to exercise the powers and discharge the duties of the office and was therefore at the time "acting" as such

officer. (Keyser v. Hitz, 133 U. S., 138, 145.) For other cases see note to section 177, Revised Statutes.

The words "the assistant or deputy of such chief or of such officer," and "the chief clerk of such Bureau," in this section, can only refer to assistants or deputies and chief clerks whose appointment is specifically provided for by statute. Accordingly, an officer of the Navy detailed by the Secretary of the Navy as assistant to the chief of a bureau in the Navy Department is not, in the absence of a statute making provision for such assistant, authorized to perform the duties of the chief in case of a vacancy or the absence or sickness of his superior. This section must be read in connection with laws providing for the establishment of the Department of the Navy, and spe-



cifically authorizing chief clerks and assistants in certain bureaus. (19 Op. Atty. Gen., 503; 28 Op. Atty. Gen., 95.)

**Assistants to chiefs of bureaus in the Navy Department** are specifically provided for by the following laws: Bureau of Navigation, act of March 3, 1893 (27 Stat., 717); Bureau of Supplies and Accounts, act of July 26, 1894 (28 Stat., 132); February 25, 1903 (32 Stat., 890); Bureau of Ordnance, act of May 4, 1898 (30 Stat., 373); Bureau of Steam Engineering, act of March 3, 1905 (33 Stat., 1111); Bureau of Yards and Docks, Bureau of Construction and Repair, and Judge Advocate General, act of August 29, 1916, 39 Stat., 558. In all of these cases the laws cited specifically provide that the assistant shall perform the duties of the chief of the bureau in the latter's absence. An assistant to the Chief of the Bureau of Medicine and Surgery is authorized by section 1375, Revised Statutes; that section does not contain any provision that such assistant shall perform the duties of the chief of the bureau in the latter's absence, but he is an "assistant" specifically provided for by law and therefore authorized to act as Chief of the Bureau of Medicine and Surgery in accordance with the provisions of section 178, Revised Statutes, and the Attorney General's opinion above cited (19 Op. Atty. Gen., 503). The detail of "not less than fifteen officers of and above the rank of lieutenant commander of the Navy or major of the Marine Corps," to "assist the Chief of Naval Opera-

tions in performing the duties of his office," was authorized by act of August 29, 1916 (39 Stat., 558; see file 22724-40, Apr. 24, 1919.)

In bureaus of the Navy Department where assistants are not specifically provided for by law, officers of the Navy detailed to duty as assistants to the chiefs of such bureaus are not authorized to perform the duties of their chief in case of the latter's absence or sickness. "Without making a question that the assignment of commissioned officers of the Navy to act as assistants to chiefs of bureaus may be within the general powers of the Secretary of the Navy, I think that section 178 can only refer to assistants or deputies whose appointment is specifically provided for by statute." (19 Op. Atty. Gen., 503.) Accordingly, in such cases the chief clerk of the bureau becomes acting chief thereof in case of the latter's absence or sickness, unless otherwise directed by the President under section 179, Revised Statutes. (File 22724-14, Dec. 17, 1909.)

**In certain offices of the Navy Department**, as, for example, the office of the Judge Advocate General, when there was neither an "assistant" nor "chief clerk" specifically provided for by law, the Secretary of the Navy designated officers of the Navy or Marine Corps on duty in the office to perform the duty of the head of the office in the latter's absence. (File 22724-26.) See note to section 179, Revised Statutes.

**Sec. 179. [Vacancies, authority of President to fill temporarily.]** In any of the cases mentioned in the two preceding sections, except the death, resignation, absence, or sickness of the Attorney-General, the President may, in his discretion, authorize and direct the head of any other Department or any other officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease.—(23 July, 1868, c. 227, s. 3, v. 15, p. 168; 22 June, 1870, c. 150, s. 2, v. 16, p. 162.)

As to vacancy in the office of Attorney General, or his absence or sickness, see section 347, Revised Statutes.

The Commanding General of the Army or the chief of any military bureau of the War Department may be assigned to perform the duties of the Secretary of War, under this section. (Act Aug. 5, 1882; 22 Stat., 238.) [It had previously been held by the Attorney General that such assignment could not be made, because of a law forbidding officers of the Army to hold any civil office, either by election or appointment. (14 Op. Atty. Gen., 200.)]

**In the absence of the Secretary and Assistant Secretary of the Navy, and the Chief of Naval Operations**, the President has directed that, "until further orders," the duties of the Secretary of the Navy shall be performed by the following designated persons, in the order named: The Chief of the Bureau of Navigation; in his absence, the Chief of the Bureau of Ordnance; and in the absence of those two, the Chief of the Bureau of Engineering.

(File 1159-765, Bu. Nav.; Navy Regs., 1920, art. 392, as amended; see also file 22724-40, Apr. 24, 1919.)

By act of March 3, 1915 (38 Stat., 929), the Chief of Naval Operations "shall be next in succession to act as Secretary of the Navy" during the temporary absence of the Secretary and the Assistant Secretary.

**Authority of Acting Secretary.**—It is clear that, in the absence of the Secretary, the authority with which he is invested can be exercised by the officer who, under this section, becomes for the time Acting Secretary. (Ryan v. U. S., 136 U. S., 81; Shillito v. McClung, 51 Fed. Rep., 871; 20 Comp. Dec., 11. See note to sec. 177, R. S.)

**"Death, resignation, absence, or sickness."**—The word "death" requires no definition, and the word "sickness" has received none under this law. As to the word "absence" the decisions are not harmonious. The Attorney General's opinions are both ways upon the question whether a vacancy caused by retirement is due to "absence," the later opinions



holding that it is not. An interruption of business caused by suspension of an officer is due to absence, according to the Attorney General, although Congress, in section 1768, Revised Statutes (now repealed), made specific provision for such cases, so that they were not governed by section 179, Revised Statutes. The cases on this subject are as follows:

*A vacancy caused by the retirement of the Paymaster General of the Army* may be temporarily filled under this section. It may well be said that in the eye of the law a retired officer is "absent," he being incapable of rendering the service required. If this construction may not be given to the act, it is clearly *casus omissus* [a case which is not provided for]. There would in that event be no power to provide for the duties of the office *ad interim*. (19 Op. Atty. Gen., 500.)

In a later opinion, the Attorney General held that no provision is made by this section for filling a vacancy caused by retirement, and that, upon the retirement of the Chief of the Bureau of Steam Engineering in the Navy Department, the President was not authorized to designate the Chief of the Bureau of Construction and Repair as Acting Chief of the Bureau of Steam Engineering; that Congress had made no provision for the temporary discharge of his duties, and accordingly the Bureau of Steam Engineering must remain without a head until the place should be filled by new appointment pursuant to sections 421 and 424, Revised Statutes; that "absence" implies a temporary state of being away from the office and a possibility of returning, which is entirely inconsistent with the idea of retirement for physical incapacity, which is a permanent condition. (27 Op. Atty. Gen., 344.) In this later opinion no reference is made to the former opinion with which it is in conflict and which was apparently overlooked. As to inherent power of the President in such cases, see note to sec. 177, R. S.)

Again, the Attorney General held that, aside from the question whether the Marine Corps can be regarded as a bureau of the Navy Department, sections 177, 179, and 180, Revised Statutes, have no application in the case of the retirement of the Commandant of the Marine Corps on account of age, as the vacancy in such case does not result from "death, resignation, absence, or sickness" of the incumbent. (28 Op. Atty. Gen., 487.)

*In case of the suspension of an officer* during a recess of the Senate, the President was authorized, under section 1768, Revised Statutes (now repealed), to designate "some suitable person," to perform the duties of the suspended officer until the end of the next session of the Senate. The suspension of an officer did not create a vacancy, as the suspended officer continued to hold the office, although not entitled to pay under section 1768, Revised Statutes. The word "suspended" imports that the person suspended is still the incumbent of the office; that the interruption of his performance of its duties is temporary and provisional. Temporary designation of an acting officer in this case was properly made under section 1768, Revised Statutes. (13 Op. Atty. Gen., 512.)

The Judge Advocate General of the Army was suspended from rank and duty pursuant to sentence of a general court-martial. (Swaim v. U. S., 165 U. S., 554.) The Secretary of War, July 25, 1884, by direction of the President, designated the senior Assistant Judge Advocate General to "take charge of the office of the Judge Advocate General and perform his duties" during the suspension of the Judge Advocate General. Under this order the Assistant Judge Advocate General became "Acting Judge Advocate General of the Army" from July 25, 1884, to January 3, 1895. (See Dig., J. A. G., Army, 1912, p. 4.) The Attorney General held that "the order assigning Col. Lieber to duty as Acting Judge Advocate General was made in pursuance of section 179 of the Revised Statutes," and that as such Acting Judge Advocate General he was qualified to act as a member of the Board of Commissioners of the Soldiers' Home, under the law which provided that said board should include in its membership "the Judge Advocate General." (20 Op. Atty. Gen., 483.)

"*Resignation*" of an office implies the consent of the incumbent to the giving up of the office and does not include the compulsory retirement of an officer by reason of disability to perform the duties of the office. (27 Op. Atty. Gen., 337.)

The words "*any other officer in either Department*," apply only to an officer who holds a position in the *Department* to which he has been appointed by the President by and with the advice and consent of the Senate. Accordingly, these words do not embrace an officer of the Navy detailed to duty in the Navy Department, because such officer, although appointed to his grade in the Navy by and with the advice and consent of the Senate, does not hold any office in the department to which he has been so appointed. Such an officer can not, therefore, be assigned by the President to perform the duties of the Secretary of the Navy or the chief of a bureau in the Navy Department during the temporary absence of the officials mentioned. (28 Op. Atty. Gen., 95.) See note to section 178, Revised Statutes.

*The holder of an office vacates it* by the acceptance of another incompatible office. He does not vacate it by temporarily performing the duties of another office, when such temporary performance is permitted by law. (13 Op. Atty. Gen., 512. But see 14 Op. Atty. Gen., 200, holding that the Commanding General of the Army could not, under laws then in force, act as Secretary of War without vacating his commission.)

*Power of Secretary to perform duties of subordinate.*—In any case where a vacancy exists in a subordinate position under the Secretary of the Navy, the Secretary has the power to perform the duties of said position until the vacancy is filled. In such a case the Secretary must sign all papers in person, and can not delegate general authority to another to perform the duties of the office and sign papers "By direction of the Secretary of the Navy." So held with reference to vacancy existing in the position of Commandant of the Marine Corps. (28 Op. Atty. Gen., 487. Compare Williams Eng. and Cont. Co. v. U. S., 55 Ct. Cls., 349, noted under sec. 419, R. S.)

**Sec. 180. [Temporary appointments limited to thirty days.]** A vacancy occasioned by death or resignation must not be temporarily filled under the three preceding sections for a longer period than thirty days.—(23 July, 1868, c. 227, s. 3, v. 15, p. 168.)

This section was amended to read as above by act of February 6, 1891, section 91 (26 Stat. 733), which act substituted the word "thirty" for the word "ten" which appeared in the original section.

**President can not make second designation on expiration of first.**—In a case in which the Secretary of War was designated by the President to act as Secretary of the Navy under the provisions of sections 177–180, Revised Statutes, it was held that upon the expiration of the period fixed by this section it was not in the power of the President to designate another officer or the same officer to act for an additional period; that when the vacancy was once temporarily filled for the statutory period the power conferred by the statute is exhausted, and the President is remitted to his constitutional power of appointment; and that no such appointment having been made, "there is and can be no person authorized by designation to sign requisitions upon the Treasury Department on account of Navy payments as Acting Secretary of the Navy." (16 Op. Atty. Gen., 596; affirmed 17 Op. Atty. Gen., 530, 18 Op. Atty. Gen., 58.)

**Purpose of section.**—The temporary term authorized by sections 178 and 180, either by mere operation of the statute or by action of the President, is for no longer period than that limited by this section. The theory seems to be, and very properly, that the department has no more than a *sufficiency* of officers to transact the public business properly; and therefore, that in case of death or resignation this normal equipment is to be restored within the brief period named. (18 Op. Atty. Gen., 50.)

**Computed from date of President's action.**—The limitation imposed by this section upon the temporary filling of vacancies occasioned by death or resignation is to be computed from the date of the President's action. Where the officer appointed to act performed the duties of the vacant office prior to his designation by the President, he was not acting under authority of sections 178–180, Revised Statutes, and such period during which he was acting without authority of these sections is not to be counted in computing the time during which his temporary appointment by the President has force. [In this case the officer was not the "assistant or deputy," and therefore did not succeed to the vacancy by operation of section 178, Revised Statutes.] (15 Op. Atty. Gen., 457.)

**Vacancy can not be filled by operation of law and then by designation of President in excess of 30 days.**—Where an officer succeeds to a vacancy by operation of section 177 or 178, Revised Statutes, and performs the duties of the vacant office during the full period

prescribed by this section, the President can not thereafter designate the same or a different officer to perform the duties of the vacant office during an additional period of 30 days, under authority of section 179, Revised Statutes; but the total period for which the vacancy can be temporarily filled under these sections, either by operation of law or by designation of the President, is 30 days. The legislative purpose was that a vacancy caused by death or resignation shall be permanently filled by constitutional appointment within 30 days. It may be that the action of an assistant after the expiration of the statutory period would not be invalid, being the action of an officer *de facto*; but the statute, even if directory, is no less *obligatory* upon those called upon to act under it than if mandatory, although the legal effect of action or nonaction under a directory statute may be very different from the effect under a mandatory statute. (20 Op. Atty. Gen., 8, reversing 17 Op. Atty. Gen., 535.) [Note: In the case of a "mandatory" statute, all acts done in violation of its terms are absolutely null and void; while in the case of a "directory" statute, acts performed contrary to its terms may be valid, although the officer guilty of violating the statute may otherwise be held responsible therefor. With reference to directory statutes, it was said by Mr. Justice Field, in *French v. Edwards*, 13 Wall., 511: "There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested can not be injuriously affected."]

**Vacancy occurring during recess of the Senate.**—The limitation contained in this section applies only to temporary appointments made while the Senate is in session. It appears from an examination of the Journals of Congress that the Senate was in session when the vacancies referred to in Mr. Devens's opinions occurred (15 Op. Atty. Gen., 458; 16 Op. Atty. Gen., 596), and presumably in the case presented to Mr. Brewster (17 Op. Atty. Gen., 530). The absence of any reference in those opinions to the excepting clause of section 181, Revised Statutes, would seem to place it entirely beyond doubt that the sections referred to were not being construed with reference to vacancies occurring during a recess of the Senate. In the latter case the temporary appointment, designation, or assignment is not limited by law to any particular period. (25 Op. Atty. Gen., 258. See note to sec. 181, R. S.)

**Sec. 181. [Restriction on temporary appointments.]** No temporary appointment, designation, or assignment of one officer to perform the duties of another, in the cases covered by sections one hundred and seventy-seven and one hun-



dred and seventy-eight, shall be made otherwise than as provided by those sections, except to fill a vacancy happening during a recess of the Senate.—(23 July, 1868, c. 227, s. 2, v. 15, p. 168.)

“The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.” (Const., Art. II, sec. 2, clause 3.)

**Senate temporarily adjourned.**—It was held by the Court of Claims, May 26, 1884, that there was “no doubt” that a vacancy occurring while the Senate was temporarily adjourned could be and was legally filled by appointment of the President in accordance with the above provision of the Constitution and that the appointee legally held the office until he was notified of his rejection by the Senate at its next regular session established by law, which began on the first Monday of the following December. (Gould v. U. S., 19 Ct. Cls., 593, 595.) The Attorney General thereafter, December 24, 1901, expressly dissented from the Court of Claims decision, and advised the President that a vacancy occurring during a temporary adjournment of the Senate could not be filled by him as a “recess” appointment, but that such appointments could be made only when the Senate adjourned sine die. (23 Op. Atty. Gen., 599; affirmed 29 Op. Atty. Gen., 602.; but see 33 Op. Atty. Gen., 20.)

**A temporary appointment during a recess of the Senate** need not be made in any prescribed form. A communication from the Secretary of War informing the recipient that he has been appointed an officer of the Army by the President is sufficient, and answers the purpose of a commission if a commission is necessary. (O’Shea v. U. S., 28 Ct. Cls., 392.)

**The President has the right under the Constitution**, and impliedly under section 181, Revised Statutes, to make a temporary appointment, designation, or assignment of one officer to perform the duties of another in the

case of a vacancy caused by death, disability, or otherwise during the recess of the Senate, and such temporary appointment, designation, or assignment is not limited by law to any particular period. The excepting clause in section 181 makes it clear that Congress only intended by the provisions in question to restrict the power of the President temporarily to appoint, designate, or assign one officer to perform the duties of another in the case of vacancies happening while the Senate was in session, the reason for which is manifest, and to leave unrestricted not only the President’s constitutional right to fill vacancies happening during a recess of the Senate by granting commissions which shall expire at the end of the next session, but his fundamental right as Chief Executive to make such a temporary appointment, designation, or assignment of one officer to perform the duties of another whenever the administration of the Government requires it. There can be no question as to the existence of such right. It could not have been the purpose of the Constitution to compel the President to act immediately upon the occurrence of the vacancy. That would frequently be impossible, and if such were the rule, and no other officer could act until a successor was appointed, the Government would be menaced with a serious interruption of its administration. The opinions of Attorneys General Devens and Brewster (15 Op. Atty. Gen., 458; 16 Op. Atty. Gen., 596; 17 Op. Atty. Gen., 530; noted under sec. 180, R. S.) were not rendered with reference to vacancies occurring during a recess of the Senate. (25 Op. Atty. Gen., 258.)

**For other decisions** see note to Constitution, Article II, section 2, clause 3, and to section 1381, Revised Statutes.

**Sec. 182. [Extra compensation disallowed.]** An officer performing the duties of another office, during a vacancy, as authorized by sections one hundred and seventy-seven, one hundred and seventy-eight, and one hundred and seventy-nine, is not by reason thereof entitled to any other compensation than that attached to his proper office.—(23 July, 1868, c. 227, s. 3, v. 15, p. 168.)

**The prohibition in this section** against additional compensation was designed to be general and to apply to every officer performing the duties of an office temporarily vacant, whether the vacancy was caused by death, resignation, absence, or sickness, and whether

such duties devolved upon him by force of the statute or by designation of the President, and such officer is not entitled to any salary other than that which is annexed to the office he holds. (13 Op. Atty. Gen., 8; 13 Op. Atty. Gen., 512, 514.)

**Sec. 183. [Oaths, when administered by officers, etc.]** Any officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud, the Government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army, Navy, Marine Corps or Revenue-Cutter Service, detailed to conduct an investigation, and the recorder, and if there be none the presiding officer, of any military, naval, or



Revenue-Cutter Service board appointed for such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation.

This section was amended and reenacted to read as above by act of February 13, 1911 (36 Stat., 898), which act also superseded the act of March 2, 1901 (31 Stat., 951).

As originally enacted this section provided as follows: "SEC. 183. Any officer or clerk of any of the departments lawfully detailed to investigate frauds or attempt to defraud on the Government, or any irregularity or misconduct of any officer or agent of the United States, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation."—(10 Apr., 1869, Res. No. 15, s. 2, v. 16, p. 55; 7 Mar., 1870, c. 23, v. 16, p. 75.)

The "Revenue Cutter Service" is now the "Coast Guard." (Act Jan. 28, 1915, 38 Stat., 800.)

The solicitor in the office of the Judge Advocate General, Navy Department, was detailed by the Secretary of the Navy, May 2, 1907 (file 5421-11), to investigate reported discrimination against marines in uniform visiting the Library of Congress, and was authorized to administer oaths to witnesses under this section. See also file 26263.

A lieutenant commander in the Navy was detailed by the Secretary of the Navy, April 14, 1914, to investigate and ascertain whether any officer or person in the naval service or connected with the Navy Department had been guilty of any irregularity or misconduct in originating or circulating reports or rumors by means of the public press concerning the relations between an officer of the Navy and Government contractors, and was authorized to administer oaths to witnesses under this section. (File 26251-8827:5; see also 16711-3, July 12, 1911.)

**Boards of investigation.**—It has never been decided that boards of investigation in the Navy have general authority to administer oaths to witnesses in every case. So far as precedent goes, it supports the conclusion that such boards are authorized to swear witnesses only when the subject of the investigation relates to "frauds on, or attempts to defraud, the Government or any irregularity or misconduct of any officer or agent of the United States." (File 3980-842, Sept. 29, 1913.)

The Navy Regulations, 1913, provide that boards of investigation, "although they may collect material information from apparent or known facts, or from written evidence which they may possess, and may record the declarations of persons examined before them, will not take testimony under oath except in important cases in which the order convening the board expressly states that such board is authorized to administer oaths to witnesses in accordance with" the above law. (R-316 (3) and (4).)

Other laws authorizing oaths to be administered by persons in the naval service

or connected with the Navy Department, are as follows:

**For purposes of naval administration.**—Act of March 4, 1917 (39 Stat., 1171), amending the act of March 3, 1901 (31 Stat., 1086), which amended the act of January 25, 1895 (28 Stat., 639), authorizes certain officers of the Navy, Marine Corps, Naval Reserve Force, and Marine Corps Reserve, to administer oaths "for the purposes of the administration of naval justice and for other purposes of naval administration." This law authorizes any of the officers designated therein to administer an oath for any purpose of naval administration (file 26806-94, Nov. 23, 1912; 19037-45, May 26, 1914); but it does not authorize such officers to administer an oath for other purposes, such as in matters relating to the private business of either officers or enlisted men. (File 19037-27, Mar. 30, 1912.)

**Income tax returns.**—The Secretary of the Treasury authorized annual returns of persons in the naval service under the income tax provisions of the act October 3, 1913 (38 Stat., 166-181), and amendments thereto, to be executed before any official authorized to administer oaths for the purposes of that service. (Art. 406, Treas. Regs., 1922; see also U. S. v. Bailey, 9 Pet., 238; 19 Op. Atty. Gen., 401).

**Accounts for travel, etc.**—The sundry civil appropriation act, August 24, 1912, section 8 (37 Stat., 487), authorizes certain officers of the Government, including "chief clerks of the various executive departments and bureaus or clerks designated by them for the purpose," to administer oaths to accounts for travel or other expenses against the United States. See also 19 Op. Atty. Gen., 401.

**Oaths of office.**—The act of August 29, 1890 (26 Stat., 371), authorizes and directs chief clerks of the several executive departments and of the various bureaus and offices thereof in Washington, to administer oaths of office to employees on appointment or promotion. (See also sec. 392, R. S., as amended.)

**The Articles for the Government of the Navy** authorize oaths to be administered by the following officers: Judges advocate and presiding officers of general courts-martial (arts. 40, 41); judges advocate and presiding officers of courts of inquiry (art. 57); recorders and senior members of summary courts-martial (arts. 28 and 29). (Sec. 1624, R. S.)

**Deck courts** are authorized to administer oaths by act of February 16, 1909, section 2 (35 Stat., 621).

**Naval Examining Boards** are authorized to administer oaths by section 1499, Revised Statutes.

**Naval retiring boards** have this authority under sections 1449 and 1450, Revised Statutes.

**Consular powers** may be exercised by officers of the Navy in relation to mariners of the United States, under conditions prescribed by section 1433, Revised Statutes.

**Acknowledgment of deeds and other instruments** affecting lands situate in the District of Columbia or any Territory, may be taken in Guam and Samoa before any notary public or judge appointed therein by proper authority, or by any officer therein who has ex officio the powers of a notary; such acknowledgments

to be verified by the certificate of the governor or acting governor. (Act June 28, 1906, 34 Stat., 552.)

**On general subject** of administration of oaths by officers of the Navy, see file 19037-45, May 26, 1914.

**Sec. 184. [Claims pending in Departments—Subpœnas to witnesses.]** Any head of a Department or Bureau in which a claim against the United States is properly pending may apply to any judge or clerk of any court of the United States, in any State, District, or Territory, to issue a subpœna for a witness being within the jurisdiction of such court, to appear at a time and place in the subpœna stated, before any officer authorized to take depositions to be used in the courts of the United States, there to give full and true answers to such written interrogatories and cross-interrogatories as may be submitted with the application, or to be orally examined and cross-examined upon the subject of such claim.—(14 Feb., 1871, c. 51, s. 1, v. 16, p. 412.)

This section was modified by act of July 25, 1882, section 3 (22 Stat., 175), relative to examination of witnesses in pension claims; which act, however, related to Pension Office only.

**Constitutionality.**—In *re McLean* (37 Fed. Rep., 648) the court held that Congress is not authorized to permit the judicial power to be invoked in aid of an examination pending in an executive department, and accordingly that legislation of this kind was null and would not be enforced. In so holding the court cited and followed *In re Railway Commission* (32 Fed. Rep., 241). The *McLean* case was approved and followed in *In re Interstate Commerce Commission* (53 Fed. Rep., 476), which involved a similar question; but all of these cases were reversed in *Commerce Commission v. Brimson*, decided by the Supreme Court (154 U. S., 447).

Statutes of this class were expressly held to be constitutional in *In re Gross* (78 Fed. Rep., 107), in which case the court cited and applied the decision of the Supreme Court in *Brimson's* case and dissented from *McLean's* case, both above cited. (See *Hayburn's* case, 2 Dall., 409.)

**Procedure.**—This section does not authorize an ex parte procedure. Witnesses are to be subjected not only to examination but to cross-examination. Claimants are therefore entitled to have notice of the time and place of the examination and may be present to cross-examine the witnesses of the Government if they choose to do so. Their attorney may represent them at the examination. A witness examined by the Government is also entitled to consult counsel. The examination is not before a court which may protect the witness in his constitutional right to refuse to answer incriminating questions. The possibility of converting these administrative examinations into very obnoxious inquisitorial proceedings is apparent. The proceeding is not a secret one, like an inquest by a grand jury. So long as counsel for a witness conducts himself with propriety and does not interfere with the examination he has a right to be present. If in the course of the examination

any questions are propounded to a witness the answers to which will tend to incriminate him, he may refuse to answer them. Such refusal, however, must be claimed by the witness as his personal privilege and can not be claimed for him by his counsel. The examiner has no power or right to extort a confession from a witness, even though there is no intention of prosecuting the witness therefor. (*In re O'Shea*, 166 Fed. Rep., 180.)

**Protection of witness.**—The courts can not be expected to neglect the duty which belongs to them of watching against any stealthy encroachment upon the constitutional rights of the citizen; "and the least that they can require of these examiners, so armed with such dangerous power, and invested with such tempting opportunities to invade the constitutional guaranty, is that they shall conduct their examinations in such a manner that the citizen shall be fully warned of his constitutional right, and offered an opportunity to assert it by a refusal to answer; and where the witness is ignorant and helpless, and such warning is neglected, protection can be afforded to him by the courts in no other way than by refusing to give any effect to the examination by way of any criminal prosecution to support it and its object. \* \* \* Until Congress shall set about improving the system of inquisition it is not to be expected that the courts shall aid its usefulness at the expense of the constitutional protection of every citizen. All that we now decide to be necessary to afford the protection of the Constitution to this defendant is that, unless a witness manifestly ignorant of his privilege is informed of it by the examiner so that he may protect himself, consult counsel if he desires, and assert his right to remain silent, the examination can not be used in evidence against him, even on an indictment for false swearing in the progress of the examination itself." (*U. S. v. Bell*, 81 Fed. Rep., 849.) [This decision related particularly to an examination conducted under the pension act of 1882, above cited.]

**Scope of section.**—It is noticeable that this section provides only for investigations "upon the subject" of the claims. It is clear that Con-



gress intended to limit the scope of the investigations, and that an examination which would not be "upon the subject" of a claim would not be within the purview of this section. Accordingly, the application for a subpoena should be drawn with reasonable certainty and precision, so that it should clearly appear upon its face to be in accordance with the act, and that the claim in which the testimony is required should be reasonably identified. Where this was not done, held that the court will not require witness who refuses to answer questions to show cause why he should not answer the interrogatories or be adjudged in contempt of court. (In re Gross, 78 Fed. Rep., 107.)

**Power to require oaths.**—"Whenever the law imposes upon an officer the duty to examine, adjust, and settle claims against the Government, it gives him authority to 'require' that those claims shall be established, or supported at least, by the oaths of witnesses." When power is given to the examining officer to administer oaths there must be the implied power

to require them to be taken. If the needed testimony can be had by affidavits or depositions without the process of the courts, of course such process need not be resorted to. (14 Op. Atty. Gen., 419, 420, citing *U. S. v. Bailey* (9 Pet., 238, 253) as to implied power to require testimony to be submitted under oath.) The original act upon which section 184, Revised Statutes, is based expressly provided that any witness attending in accordance with said act who should be guilty of intentional false swearing in his testimony should be deemed guilty of the crime of perjury. Punishment for perjury is now provided for by section 125, Criminal Code, act of March 4, 1909 (35 Stat., 1111). With reference to the original statute, the Attorney General, in the opinion cited, said: "This statute assumes that there is authority in the heads of departments and bureaus to require oaths in cases of claims against the Government, and gives them very effective process for the exercise of that authority." (14 Op. Atty. Gen., 420.)

**Sec. 185. [Witnesses' fees.]** Witnesses subpoenaed pursuant to the preceding section shall be allowed the same compensation as is allowed witnesses in the courts of the United States.—(14 Feb., 1871, c. 51, s. 1, v. 16, p. 412.)

Fees of witnesses before naval courts-martial and courts of inquiry are provided for by act of February 16, 1909, section 12 (35 Stat., 622). See note to section 848, Revised Statutes.

**Appropriation available.**—In the absence of a special provision for defraying the expenses of witnesses, they may properly be allowed out of the judiciary fund, which makes appropriation "for fees of witnesses,"

and paid by the United States marshal of the district on the certificate or order of the United States commissioner before whom the examination was conducted; while the fees of the commissioner should be paid as in ordinary course, on settling his accounts at the Treasury from the appropriation "for fees of United States commissioners," belonging to the judiciary fund. (17 Op. Atty. Gen., 247.)

**Sec. 186. [Compelling testimony.]** If any witness, after being duly served with such subpoena, neglects or refuses to appear, or, appearing, refuses to testify, the judge of the district in which the subpoena issued may proceed, upon proper process, to enforce obedience to the subpoena, or to punish the disobedience, in like manner as any court of the United States may do in case of process of subpoena ad testificandum issued by such court.—(14 Feb., 1871, c. 51, s. 1, v. 16, p. 412.)

See note of decisions under section 184, Revised Statutes.

**Sec. 187. [Legal assistance in connection with claims.]** Whenever any head of a Department or Bureau having made application pursuant to section one hundred and eighty-four, for a subpoena to procure the attendance of a witness to be examined, is of opinion that the interests of the United States require the attendance of counsel at the examination, or require legal investigation of any claim pending in his Department or Bureau, he shall give notice thereof to the Attorney-General, and of all facts necessary to enable the Attorney-General to furnish proper professional service in attending such examination, or making such investigation, and it shall be the duty of the Attorney-General to provide for such service.—(14 Feb., 1871, c. 51, s. 3, v. 16, p. 412.)

A similar provision is contained in section 364, Revised Statutes.

**Sec. 188. [Suits in Court of Claims—Evidence furnished by Departments.]** In all suits brought against the United States in the Court of Claims founded



upon any contract, agreement, or transaction with any Department, or any Bureau, officer, or agent of a Department, or where the matter or thing on which the claim is based has been passed upon and decided by any Department, Bureau, or officer authorized to adjust it, the Attorney-General shall transmit to such Department, Bureau, or officer, a printed copy of the petition filed by the claimant, with a request that the Department, Bureau, or officer, shall furnish to the Attorney-General all facts, circumstances, and evidence touching the claim in the possession or knowledge of the Department, Bureau, or officer. Such Department, Bureau, or officer shall, without delay, and within a reasonable time, furnish the Attorney-General with a full statement, in writing, of all such facts, information, and proofs. The statement shall contain a reference to or description of all such official documents or papers, if any, as may furnish proof of facts referred to in it, or may be necessary and proper for the defense of the United States against the claim, mentioning the Department, office, or place where the same is kept or may be procured. If the claim has been passed upon and decided by the Department, Bureau, or officer, the statement shall succinctly state the reasons and principles upon which such decision was based. In all cases where such decision was founded upon any act of Congress, or upon any section or clause of such act, the same shall be cited specifically; and if any previous interpretation or construction has been given to such act, section, or clause by the Department, Bureau, or officer, the same shall be set forth succinctly in the statement, and a copy of the opinion filed, if any, shall be annexed to it. Where any decision in the case has been based upon any regulation of a Department, or where such regulation has, in the opinion of the Department, Bureau, or officer transmitting such statement, any bearing upon the claim in suit, the same shall be distinctly quoted at length in the statement. But where more than one case, or a class of cases, is pending, the defense to which rests upon the same facts, circumstances, and proofs, the Department, Bureau, or officer shall only be required to certify and transmit one statement of the same, and such statement shall be held to apply to all such cases, as if made out, certified, and transmitted in each case respectively.—(25 June, 1868, c. 71, s. 6, v. 15, p. 76.)

See Title VIII, Revised Statutes, "Department of Justice."

**Confidential information.**—By act of February 24, 1855, embodied in section 1076, Revised Statutes, the Court of Claims was authorized to "call upon any of the departments for any information or papers it may deem necessary \* \* \* *Provided*, That the head of no department shall answer any call for information or papers if in his opinion it would be injurious to the public interest." Under this provision, it is clear that the head of a depart-

ment is not at liberty to furnish to the court information or papers when to do so would in his opinion be injurious to the public interest, and a return setting forth such opinion would in all such cases be a sufficient answer to the rule. (13 Op. Atty. Gen., 539.) For other cases, see note to sections 161, 418, and 871, Revised Statutes.

**Public policy forbids** the maintenance of any suit requiring the disclosure of confidential matters. (*Totten v. U. S.*, 92 U. S., 105.)

**Sec. 189. [Employment of attorneys or counsel.]** No head of a Department shall employ attorneys or counsel at the expense of the United States; but when in need of counsel or advice, shall call upon the Department of Justice, the officers of which shall attend to the same.—(22 June, 1870, c. 150, s. 17, v. 16, p. 164.)

See Title VIII, Revised Statutes, "Department of Justice."

**Purpose of enactment.**—This law was passed to correct abuses which existed under

the former practice, which permitted heads of departments to employ counsel without applying to the Attorney General. (19 Op. Atty. Gen., 330; 21 Op. Atty. Gen., 195.)

The provisions of law concerning the Department of Justice (see Title VIII, R. S.) "are too conclusive and too specific to leave any doubt that Congress intended to gather into the Department of Justice, under the supervision and control of the Attorney General, all the litigation and all the law business in which the United States are interested, and which previously had been scattered among different public officers, departments, and branches of the Government, and to break up the practice of frequently employing unofficial attorneys for the public service." (*Perry v. U. S.*, 28 Ct. Cls., 491.)

**Employment of district attorneys.**—By an act approved February 26, 1853 (10 Stat., 161), it was provided that, for the services of counsel rendered at the request of a head of a department, the compensation should be such sum as might be stipulated or agreed on. This provision recognized the authority of heads of departments to employ counsel, and under it they employed district attorneys to examine titles and prepare abstracts thereof for submission to the Attorney General, and allowed them special compensation therefor. But the act of 1853 was repealed by a clause in the act of 1870, now embodied in section 189, Revised Statutes. That repeal only altered the mode of employment; that is to say, it in effect invested the Attorney General with sole authority thereafter to employ district attorneys where the performance of such services by him is called for. (19 Op. Atty. Gen., 64.)

Before the passage of the act on which section 189, Revised Statutes, is based, the heads of the several departments were accustomed to employ district attorneys to examine into the titles to lands sought to be purchased by the United States. Under such employment the district attorneys performing the services received compensation for such services over and above the usual compensation allowed by law for district attorneys. Since the passage of this law such services have been required of district attorneys by the Department of Justice. (*Weed v. U. S.*, 82 Fed. Rep., 414, 419.) In this connection see section 355, Revised Statutes.

**The Secretary of War has no authority** without the consent of the Attorney General to employ counsel to appear in court in certain habeas corpus cases (13 Op. Atty. Gen., 583); nor to employ a patent attorney to prosecute an application for a patent (10 Comp. Dec., 686).

**Formerly it was competent for the head of any of the executive departments** to employ a district attorney or other counsel in connection with proceedings in a State court in which the United States was interested; and such district attorney or other counsel was entitled to receive for his services such sum as might be agreed upon. But the authority of the various heads of departments thus to employ counsel at the expense of the United States was taken away by the law now embodied in section 189, Revised Statutes, and it was provided that this power should thereafter be exercised only by the Attorney General. (16 Op. Atty. Gen., 101.) As to proceedings in State courts, see section 367, Revised Statutes.

Where Congress, in an appropriation act passed subsequent to the enactment of this section, authorized the head of a bureau in an executive department "to employ as many persons as he may deem necessary" for the purposes of said appropriation, this did not carry with it authority for the head of the bureau or executive department to which it was attached to employ counsel; as the employment of counsel in executive departments is specifically covered by sections 189, 362, and 363, Revised Statutes; and the general language of an appropriation can not be given such scope as to operate as a repeal, so far as a particular bureau is concerned, of legislation regulating the subject of employing counsel for the Government—legislation which was intended to apply to all branches of the Government, which has remained in force for many years, and the want of which had led to some abuses. (19 Op. Atty. Gen., 330.)

**Duties of Comptroller of the Treasury.**—In practice the Comptroller of the Treasury is asked, in form, for legal advice; in fact, what is desired is information as to his future action in a case, which may come before him for decision. Where, however, the Secretary of the Treasury asks the advice of the accounting officers upon legal questions which do not involve future action by them upon questions of payments, the advice so rendered by the accounting officers is a purely voluntary matter, and to compensate them for such work would be a violation of section 189, Revised Statutes. (20 Op. Atty. Gen., 655, 657.) [The view that the opinions of the Comptroller upon legal questions are purely extraofficial is no longer tenable; by act of July 31, 1894 (28 Stat., 208), he is authorized to render an advance decision upon any question involving a payment. (22 Op. Atty. Gen., 581.) See note to section 236, Revised Statutes.]

**Judge advocate, naval court-martial.**—According to the law regulating courts-martial, the judge advocate is the official prosecutor; and in cases arising in the Navy he is by custom either a naval officer specially designated or a counselor at law employed for that purpose. If a naval officer, he receives no special compensation. If a counselor at law, it has been the custom to pay him as for a professional service. The law now embodied in section 189, Revised Statutes, prohibits the Secretary of any of the executive departments from employing attorneys or counsel at the expense of the United States. Considering it settled that the desired services (judge advocate) are such as can be properly performed only by a naval officer or a counselor at law, the Attorney General holds that if, in the judgment of the Secretary of the Navy, the cases in hand should be conducted by a person of the latter description, the Secretary of the Navy is not at liberty to employ such counsel, but should call upon the Department of Justice which will furnish an officer for the service. (13 Op. Atty. Gen., 515; affirmed 14 Op. Atty. Gen., 13; see *U. S. v. Mackenzie*, 26 Fed. Cas., 1121.) In this connection, see note to section 362, Revised Statutes.

**Legal assistance for judge advocate.**—Special counsel may be employed by the



Attorney General at the request of the Secretary of the Navy to assist the judge advocate in a trial by court-martial; the compensation of such counsel (in the absence of other provision) to be paid from the appropriation for contingent expenses of the Navy. Such counsel should be commissioned by the Attorney General under section 366, Revised Statutes. (18 Op. Atty. Gen., 135.)

**The Secretary of the Navy is not authorized** by sections 3676 and 3681, Revised Statutes, to employ special counsel in his discretion, in connection with cases before naval courts-martial, without applying to the Attorney General. (18 Op. Atty. Gen., 136. See file 26251-10398:6, in which the Secretary of the Navy assigned the law clerk in the office of the Judge Advocate General as counsel to the judge advocate in the trial of a commissioned officer by court-martial; and see Court of Inquiry Record, No. 4952, in which the solicitor in the office of the Judge Advocate General was assigned by the Secretary of the Navy as associate and assistant to the judge advocate.)

**A judge advocate need not be a professional person.** His qualifications must, of course, be of the sort required by members of the bar, but there is no law limiting choice of judge advocates or of their assistants, when needed, to that class. Although there is no statutory provision in regard to naval judge advocates like that for those of the Army, to the effect that they shall belong to the Navy, yet in fact this is generally the case. So, also, assistants for judge advocates might be detailed from the same branch of service, or, indeed, specially intelligent persons might be selected from any line of civil life. (18 Op. Atty. Gen., 137.)

**Counsel in foreign countries.**—In view of section 189, Revised Statutes, the Secretary of the Navy is not authorized to employ counsel in foreign countries to institute suit in behalf of the United States to recover for damages caused to a war vessel of the United States, but the case should be referred to the Department of Justice, which is charged with the duty of determining when the United States shall sue, for what it shall sue, and that such suits shall be brought in appropriate cases. (21 Op. Atty. Gen., 195, citing *U. S. v. San Jacinto Tin Co.*, 125 U. S., 273, 279, 280; and *In re Neagle*, 135 U. S., 65, 67; see also 2 Comp. Dec., 340). The right and duty of the commander of a naval vessel, or of the Secretary of the Navy, to employ in an emergency counsel in a foreign country, when necessary for the protection of such vessel and all that pertains to it, are not now decided, and would involve principles other than those passed upon in determining the general question of employing counsel in a foreign country in behalf of the United States. Section 189, however, was passed to correct what was considered an abuse by the heads of departments of the power to employ counsel. Its terms are undoubtedly broad enough to cover any employment of counsel in cases like that now in question, although they have been so rare that they probably were not a moving cause of the enactment of the law. Congress, however, must have contemplated,

inasmuch as ships of war are constantly on the high seas and in foreign ports, that questions of law would arise in respect to them in the administration of the Navy Department. However, no exception whatever is made of such cases in the law. (21 Op. Atty. Gen., 195.)

While as the law stands at the present time it is doubtless within the province of the Attorney General only to employ counsel in foreign countries to defend the United States against suit for collision by a naval vessel, the Attorney General has neither facilities for communicating with the naval officers abroad, nor has he any method of ascertaining who would be the most desirable attorneys to employ, or by what particular method such employment should be made. The Attorney General, therefore, requested that the Secretary of the Navy act in his stead in arranging for the employment of counsel to defend a suit brought in the Supreme Court of Hongkong by owners of a Chinese junk, *Tung on Tai*, against the master of the U. S. N. A. *Alexander*. (File 4729-1, Apr. 24, 1906.)

If it was the intention of the Attorney General that the Secretary of the Navy should act for him in selecting counsel, such employment to be approved by the Attorney General and the compensation of said counsel to be stipulated by him as provided by section 363, Revised Statutes, counsel so employed would be entitled to such compensation on the certificate of the Attorney General provided for in section 365, Revised Statutes. But such compensation is payable only from the appropriation for payment of assistants to United States district attorneys employed by the Attorney General to aid in special cases, which appropriation specifically provides that it "shall be available also for the payment of foreign counsel employed by the Attorney General in special cases, and such counsel shall not be required to take oath of office in accordance with section 366, Revised Statutes of the United States." (33 Stat., 1207; see also act Aug. 24, 1912, 37 Stat., 465.) The employment by the Secretary of the Navy, and payment from the appropriation for the Navy entitled "Pay, Miscellaneous," of counsel to defend the master of the U. S. N. A. *Alexander* in the suit referred to would be in direct contravention of sections 189, 357, 363, and 365, Revised Statutes. In view of these provisions, the item in that appropriation, "cost of suits," can not properly be construed as authorizing the employment and payment of counsel by the Navy Department. (Comp. Dec., June 5, 1906; file 4729-5.)

If, as is understood to be the case, the fund appropriated to the Department of Justice for the payment of special counsel for the current fiscal year is exhausted, it may be that the appropriation for the next fiscal year may be appropriately drawn upon in a case in which the services of counsel, if now engaged, would actually be rendered in the next fiscal year. (Secretary of the Navy to Attorney General, June 7, 1906; file 4729-1, 5.) This suggestion was adopted, and upon completion of the services the Attorney General advised the Secretary of the Navy that if the counsel employed will make out and forward an account for his services in the case mentioned, from July 1 of the current year to the date of the



conclusion of the case, the same will be approved by the Department of Justice and forwarded to the Auditor for the State and Other Departments for examination, settlement, and payment by warrant transmitted through the United States consul at Hongkong. Such account should not make any mention of expenses. Owing to delay in payment which had already occurred, the Secretary of the Navy, in pursuance of an informal understanding with the Department of Justice, cabled the commander in chief of naval forces on the Asiatic station to "pay and forward receipted bill" of counsel in question. (File 4729-20, Nov., 1906.)

Difficulties are naturally to be expected when statutes general in their terms, such as section 363 (and 189), Revised Statutes, are applied to a case where counsel must be employed in a foreign country under unusual conditions. (Secretary of the Navy to Attorney General, Nov. 9, 1906, file 4729-18.) The Department of Justice is without representatives abroad, and therefore has no direct means of selecting suitable counsel. It seems appropriate that where admiralty proceedings within the jurisdiction of foreign countries are necessary, for the protection of the interests of the United States or those of officers against whom suits are brought for acts done in the line of duty, the Navy Department, through the senior naval officer present, having direct knowledge of the matter, should

be authorized to employ counsel without delay. (Secretary of the Navy to chairmen of the Committees on Naval Affairs, House of Representatives and United States Senate, Apr. 28, 1906, file 4729-1.) See also, to same effect, Annual Report, Secretary of the Navy, 1906, page 17, and Appendix B, which refers to and quotes memorandum of Judge Advocate General, November 24, 1906 (file 4729-21).

Naval officer detailed by Commander in Chief, Asiatic Fleet, as counsel for enlisted men in proceedings before U. S. Court for the Consular District of Hankow, upon charge of manslaughter. (See file 12671-35.)

**Oath of special counsel.**—Special counsel employed by the Attorney General at the request of heads of other departments, to assist in the trial of a case in which the Government is interested, must be commissioned by the Department of Justice as a special assistant to the Attorney General, or to some one of the district attorneys, as the nature of the appointment may require; and shall take the oath required by law to be taken by the district attorneys. (Sec. 366, R. S.; 18 Op. Atty. Gen., 135.) But this does not apply to counsel employed in foreign countries, who are not required to take oath of office. (Act Aug. 24, 1912, 37 Stat., 465; file 4729-18.)

**For other cases** see note to section 362, Revised Statutes.

**Sec. 190.** [Persons formerly in Departments not to prosecute claims.] It shall not be lawful for any person appointed after the first day of June, one thousand eight hundred and seventy-two, as an officer, clerk, or employé in any of the Departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said Departments while he was such officer, clerk, or employé, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employé.—(1 June, 1872, c. 256, s. 5, vol. 17, p. 202.)

**SEC. 113,** Criminal Code, act of March 4, 1909 (35 Stat., 1109), prohibits any Senator, Representative, or Delegate in Congress, and officers and clerks in the employ of the Government, from accepting compensation for services rendered to any person in relation to any proceeding in which the United States is a party, before any department, court-martial, bureau, officer, or civil, military, or naval commission whatever.

**SEC. 109,** Criminal Code, act of March 4, 1909 (35 Stat., 1107), prohibits every officer of the United States, or person holding any place of trust or profit or discharging any official function in connection with any executive department, the Senate, or House of Representatives, to act as agent or attorney for prosecuting any claims against the United States, or otherwise than in the discharge of his proper official duties to assist in the prosecution of any such claim.

**A retired officer of the Army** is "an officer of the United States" within the meaning of section 5498, Revised Statutes [superseded by

section 109, Criminal Code, act of March 4, 1909, 35 Stat., 1107], and therefore prohibited from acting as an agent or attorney for prosecuting any claim against the United States. (Tyler's case, 18 Ct. Cls., 25.) In this case the Court of Claims followed the decision of the Supreme Court in *Tyler v. United States* (105 U. S., 244) which held that a retired officer of the Army is in the service of the United States. In *Winthrop's case* (31 Ct. Cls., 35), the Court of Claims affirmed its previous decision in *Tyler's case*, and expressly dissented from the decision of the New York Court of Appeals, rendered in *People v. Duane* (121 N. Y., 373), which held that a retired officer of the Army does not hold a Federal office. In the *Winthrop case* the Court of Claims cited in support of its decision *Wood's case* (15 Ct. Cls., 151; affirmed 107 U. S., 414), *Franklin's case* (29 Ct. Cls., 6), *Badeau's case* (130 U. S., 439), and *Texas v. De Gress* (53 Tex., 400). The cases were reviewed by the Attorney General in an opinion to the Secretary of the Navy, May 17, 1912 (29 Op. Atty. Gen., 397), holding that a retired officer of the Marine Corps

is an officer in the employ of the Government, and, as such, is prohibited by section 1782, Revised Statutes, from accepting compensation for appearing before any department, court-martial, etc. In this opinion, the Attorney General also dissented from the case of *People v. Duane*, and the case of *Reed v. Schon* (2 Cal. App., 57). [Note: Section 1782, Revised Statutes, was su-

perseded and repealed by Criminal Code, act of March 4, 1909, sections 113 and 341, 35 Stat., 1109 and 1153.]

The Civil Service Commission is not an executive department within the meaning of this section. (25 Op. Atty. Gen., 6.) As to definition of "Departments," see note to section 159, Revised Statutes.

**Sec. 191. [Certified balances conclusive in settlement of public accounts. Repealed.]**

**This section provided as follows:**

"SEC. 191. The balances which may from time to time be stated by the auditor and certified to the heads of departments by the Commissioner of Customs, or the Comptrollers of the Treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of departments, but shall be conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts. The head of the proper department, before signing a warrant for any balance certified to him by a Comptroller, may, however, submit to

such Comptroller any facts in his judgment affecting the correctness of such balance, but the decision of the Comptroller thereon shall be final and conclusive, as hereinbefore provided."—(30 Mar., 1868, c. 36, s. 1, v. 15, p. 54.)

It was expressly repealed by act of July 31, 1894, section 8 (28 Stat., 208), which act contained provisions completely covering the subject matter of this section.

As to effect of accounting officers' action, and references to cases in which this section has been considered, see on general subject section 236, Revised Statutes, and note.

**Sec. 192. [Expenditures for newspapers.]** The amount expended in any one year for newspapers, for any Department, except the Department of State, including all the Bureaus and offices connected therewith, shall not exceed one hundred dollars. And all newspapers purchased with the public money for the use of either of the Departments must be preserved as files for such Department.—(26 Aug., 1842, c. 202, s. 16, v. 5, p. 526.)

The latter portion of this section requiring newspapers purchased for the use of executive departments to be preserved for the permanent files of such departments, was expressly repealed by act of June 22, 1906, section 7 (34 Stat., 449).

By act of June 19, 1878 (20 Stat., 171), punishment was provided for stealing, wrongfully defacing, injuring, mutilating, tearing, or destroying any newspaper, the property of the United States.

By section 1779, Revised Statutes, it is provided that "no executive officer other than the heads of departments, shall apply more than \$30 annually out of the contingent fund under his control to pay for newspapers, pamphlets, periodicals, or other books or prints not necessary for the business of his office."

Section 192 has been modified so as not to apply to subscriptions to newspapers by the Military Information Division, Adjutant General's Office of the Army, for the fiscal years 1898 and thereafter. (Army appropriation act, Mar. 2, 1903, 32 Stat., 929; joint resolution, June 29, 1898, 30 Stat., 749.)

Section 3648, Revised Statutes, provides that "no advance of public money shall be made in any case whatever," and that payment shall not exceed the value of articles previously delivered. Congress has repeatedly enacted that this prohibition shall not apply

to subscriptions to newspapers in specified cases. See Naval appropriation act, August 22, 1912 (37 Stat., 350), and subsequent years, as to foreign and domestic periodicals for the Naval Academy; Army appropriation act, April 23, 1904 (33 Stat., 260), as to foreign and professional newspapers and periodicals for Military Information Division, General Staff Corps; Army appropriation act, March 3, 1911 (36 Stat., 1025), as to foreign, professional, and other newspapers and periodicals for Military Academy; Army appropriation act, March 3, 1909 (35 Stat., 733), as to subscriptions from the appropriations for the Coast Artillery School, Fort Monroe, Va.; sundry civil appropriation act, March 3, 1905 (33 Stat., 1182), as to subscriptions for publications for use in the Immigration Service at large; agricultural appropriation act, March 4, 1909 (35 Stat., 1054), as to publications for use of Department of Agriculture. (This prohibition does not apply to subscriptions from profits on sales by ships stores in the Navy. Comp. Dec., Aug. 11, 1914, file 26254-1571:2; see also act June 24, 1910, 36 Stat., 619.)

Subscriptions for "periodicals" required for official use may be paid in advance. (Act Mar. 4, 1915, 38 Stat., 1049.)

Hereafter subscriptions for newspapers and periodicals for the naval service may be paid for in advance. (Act Mar. 3, 1915, 38 Stat., 929.)



"No executive department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law." (Sec. 3679, R. S., as amended by act Feb. 27, 1906, 34 Stat., 48; see also section 3732, R. S., as amended by act of June 12, 1906, 34 Stat., 255.)

Newspapers are not periodicals within the meaning of act of March 15, 1898, section 3 (30 Stat., 316), providing that thereafter periodicals

for the use of any executive department at the seat of Government shall not be paid for from any appropriation for contingent expenses or for any specific or general purpose unless specifically authorized by the law granting the appropriation. (4 Comp. Dec., 694.)

**Purchase after advertisement.**—The Navy Department desires that all newspapers and periodicals, both American and foreign, for the Naval Establishment, for use on shore, both in and outside the continental limits of the United States, except such as may be purchased by naval attachés, shall be purchased after advertisement in the public press. (Circular, Oct. 6, 1914, file 12809-83.)

**Sec. 193. [Annual report of expenditures from contingent funds.]** The head of each Department shall make an annual report to Congress, giving a detailed statement of the manner in which the contingent fund for his Department, and for the Bureaus and offices therein, has been expended, giving the names of every person to whom any portion thereof has been paid; and if for anything furnished, the quantity and price; and if for any service rendered, the nature of such service, and the time employed, and the particular occasion or cause, in brief, that rendered such service necessary; and the amount of all former appropriations in each case on hand, either in the Treasury or in the hands of any disbursing officer or agent. And he shall require of the disbursing officers, acting under his direction and authority, the return of precise and analytical statements and receipts for all the moneys which may have been from time to time during the next preceding year expended by them, and shall communicate the results of such returns and the sums total, annually, to Congress.—(26 Aug., 1842, c. 202, s. 20, v. 5, p. 527.)

Similar provisions were contained in acts of June 20, 1874 (18 Stat., 96); March 3, 1875 (18 Stat., 355); August 15, 1876 (19 Stat., 156); March 3, 1877 (19 Stat., 306).

For complete references to laws requiring reports to be made by Secretary of the Navy, see section 429, Revised Statutes, and note thereto.

"All appropriations for specific, general, and contingent expenses of the Navy Department shall be under the control and expended by direction of the Secretary of the Navy." (Sec. 3676, R. S.)

"No moneys appropriated for contingent, incidental, or miscellaneous purposes shall be expended or paid for official or clerical compensation." (Sec. 3682, R. S.)

No person shall be employed in any executive department or be paid from any appropriation made for contingent expenses, unless such employment is authorized and payment therefor specifically provided in the law granting the appropriation. (Act Aug. 5, 1882, sec. 4, 22 Stat., 255.)

No purchases shall be made from the contingent fund of any department, bureau, or office, except upon written order of the head of the department. (Sec. 3683, R. S.)

Expenditures from contingent funds for newspapers, pamphlets, periodicals, or other books or prints, are limited by section 1779, Revised Statutes. (See note to sec. 192, R. S.)

Expenditures from contingent funds for law books, books of reference, and periodicals, are prohibited, unless specifically authorized by the appropriation. (Act Mar. 15, 1898, sec. 3, 30 Stat., 316.)

Appropriations for contingent expenses must be apportioned by monthly or other allotments at the beginning of fiscal year, so as to prevent deficiency before end of year; and such apportionment must be adhered to, under penalty of summary dismissal and fine or imprisonment, except in case of extraordinary emergency. (Act Feb. 27, 1906, 34 Stat., 48.)

Use of contingent funds is authorized for investigations of title to land purchased for navy yards, public buildings, etc. (Sec. 355, R. S.)

Expenses of insane persons belonging to the Navy or Marine Corps may be paid from annual appropriation for naval service under head of contingent enumerated. (Sec. 1551, R. S.)



**Sec. 194. [Report of clerks employed. Repealed.]**

**This section read as follows:**

"Sec. 194. The head of each department shall make an annual report to Congress of the names of the clerks and other persons that have been employed in his department and the offices thereof; stating the time that each clerk or other person was actually employed, and the sums paid to each; also, whether they have been usefully employed; whether the services of any of them can be dispensed with without detriment to the public service, and whether the removal of any individuals, and the appointment of others in their stead, is required for the better dispatch of business."—(26 Aug., 1842, c. 202, s. 11, v. 5, p. 525.)

It was repealed by act of March 2, 1895, section 8 (28 Stat., 808).

The Secretary of the Navy is required to make annual report to Congress of civilians employed on clerical duty from "Pay of the Navy," and other naval appropriations (act Jan. 30, 1885, 23 Stat., 295); and is required to make a similar report of the number and com-

pensation of persons employed from "Increase of the Navy," and other general appropriations (act Apr. 17, 1900, 31 Stat., 117); also, a report of persons employed for technical services from appropriations "Equipment of Vessels," "Steam Machinery," "Construction and Repair," "Ordnance and Ordnance Stores," and from appropriations and allotments under the Bureau of Yards and Docks. (Act Mar. 4, 1913, 37 Stat., 768, 770, 771, and appropriation acts for subsequent years.)

**Heads of departments are required to report to Congress** employees detailed to other offices in accordance with section 166, Revised Statutes, as amended. (Act Mar. 2, 1895, sec. 7, 28 Stat., 808.) Also required to report number of employees in each bureau and office below a fair standard of efficiency, and the salary of each. (Act July 11, 1890, sec. 2, 26 Stat., 268.)

**For other reports** required of the Secretary of the Navy, see section 429, Revised Statutes, and note.

**Sec. 195. [Time of making annual reports to Congress.]** Except where a different time is expressly prescribed by law, the various annual reports required to be submitted to Congress by the heads of Departments shall be made at the commencement of each regular session, and shall embrace the transactions of the preceding year.—(See all acts requiring reports.)

Neglect or refusal of any officer to make any report within the time prescribed by law is punishable by fine of not more than \$1,000. (Sec. 101, Criminal Code, act Mar. 4, 1909, 35 Stat., 1107.)

For reports required to be made by the Secretary of Navy, see section 429, Revised Statutes, and note.

**Sec. 196. [Time of furnishing annual reports to printer.]** The head of each Department, except the Department of Justice, shall furnish to the Congressional Printer copies of the documents usually accompanying his annual report, on or before the first day of November in each year, and a copy of his annual report on or before the third Monday of November in each year.—(25 June, 1864, c. 155, ss. 1, 3, v. 13, pp. 184, 5; 22 June, 1870, c. 150, s. 12, v. 16, p. 164.)

The above section was amended by a clause contained in the sundry civil appropriation act of August 1, 1914 (38 Stat., 680), requiring that, during that fiscal year, copy be furnished to the Public Printer as follows: Copies of documents accompanying annual reports, on or before the 15th day of October; copies of annual reports, on or before the 15th day of November; and complete revised proofs of accompanying documents and annual reports, on the 10th and 20th days of November, respectively. (30 Op. Atty. Gen., 293.) This provision was repeated in the sundry civil act for the following year, and was made permanent by

act of July 1, 1916 (39 Stat., 336), which further requires that said reports and accompanying documents be printed, made public and available for distribution within the first five days after the assembling of each regular session of Congress.

Illustrations, maps, etc., are to be excluded from annual reports, except such as are necessary. (Act Aug. 30, 1890, 26 Stat., 411.)

Reports are not to be distributed with "the compliments" of any officer of the Government. (Act Jan. 12, 1895, sec. 73, 28 Stat., 620; act Mar. 3, 1893, 27 Stat., 612; act Aug. 5, 1892, 27 Stat., 388.)

**Sec. 197. [Inventories of Department property.]** The Secretary of State, the Secretary of the Treasury, the Secretary of the Interior, the Secretary of War, the Secretary of the Navy, the Postmaster-General, the Attorney-General,

and Commissioner of Agriculture shall keep, in proper books, a complete inventory of all the property belonging to the United States in the buildings, rooms, offices, and grounds occupied by them, respectively, and under their charge, adding thereto, from time to time, an account of such property as may be procured subsequently to the taking of such inventory, as well as an account of the sale or other disposition of any of such property, [except supplies of stationery and fuel in the public offices and books, pamphlets, and papers in the Library of Congress].—(15 July, 1870, c. 300, s. 1, v. 16, p. 364; 27 Feb., 1877, c. 69, v. 19, p. 241.)

This section was amended to read as above by act of February 27, 1877, section 1 (19 Stat., 241), the amendment consisting in adding to the original section the words printed in brackets.

A similar provision with reference to the Post Office Department is contained in section 397, Revised Statutes, and with reference to the Capitol, Botanical Garden, and the President's House in section 1833, Revised Statutes. Both of these sections require an annual report to Congress of the required inventory and account.

The Secretary of the Navy is required to report to Congress annually account of proceeds from sales of public property. (Secs. 429, 1541, and 3672, R. S., and act Aug. 5, 1882,

22 Stat., 296.) The Bureau of Supplies and Accounts is required to report annually to Congress an account of supplies at the various stations pertaining to the Naval Establishment. (Act Mar. 2, 1889, 25 Stat., 817.)

Disposition of useless papers in executive departments is provided for by act of February 16, 1889 (25 Stat., 672), amended by act of March 2, 1895 (28 Stat., 933). Other provisions of law on the same subject, relating specifically to the Navy, are contained in act of February 16, 1909, section 14 (35 Stat., 622), act of August 22, 1912 (37 Stat., 329), and naval appropriation act of March 3, 1915 (38 Stat., 929).

On general subject of custody of public property, see note to section 161, Revised Statutes.

#### Sec. 198. [Data to be furnished for Biennial Register.—Superseded.]

This section provided as follows:

"SEC. 198. The head of each department shall, as soon as practicable after the last day in September in each year in which a new Congress is to assemble, cause to be filed in the Department of the Interior a full and complete list of all officers, agents, clerks, and employees employed in his department, or in any of the offices or bureaus connected therewith. He shall include in such list all the statistics peculiar to his department required to enable the Secretary of the Interior to prepare the biennial register."—(27 Apr., 1816, Res. No. 6, s. 1, v. 3, p. 342; 3 Mar., 1851, c. 32, s. 1, v. 9, p. 600; 14 July, 1832, Res. No. 11, v. 4, p. 608.)

It was superseded by act of January 12, 1895, section 73 (28 Stat., 618), which contained detailed provisions concerning data to be furnished the Secretary of the Interior for publication in the "Official Register of the United States" every two years. By act of June 7, 1906 (34 Stat., 219), it was provided that "The Director of Census shall edit, index, and publish the Official Register of the United States, and the provisions of existing law imposing that duty upon the Department of the Interior are hereby repealed, and the data to be included in the Official Register, which is now required to be transmitted to the Secretary of the Interior, shall hereafter be transmitted to the Director of the Census."

## TITLE VII.

### DEPARTMENT OF THE TREASURY.

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Sec.	Sec.
233. Establishment of Department of the Treasury.	283. Accounts of Departments of War and the Navy.
236. Settlement of public accounts.	284. Accounts of pay officer of lost vessel.
237. Commencement of fiscal year.	285. Disbursements by order of commanding officer.
248. Forms of keeping and rendering accounts, etc.	286. Fixing date of loss of missing vessels.
250. Settlement of accounts within fiscal year.	287. Accounts of seamen on lost vessel.
251. Rules, regulations, and forms.	288. Compensation for personal effects lost.
255. Appointment of disbursing agents.	289. Payment in case of death.
260. Reports upon appropriations for Departments of War and Navy.	290. Allowance to officers for personal effects lost.
264. Report of Coast Survey expenditures.	297. Auditors may administer oaths.
266. Quarterly publication of receipts and expenditures.	300. Allowance of lost checks.
268. Comptrollers.	301. Treasurer.
269. Duties of First Comptroller.	303. Assistant Treasurer.
271. Power to direct settlement of accounts.	305. Duties of the Treasurer.
272. Report of officers failing to make settlement.	306. Liabilities outstanding three or more years.
273. Duties of Second Comptroller.	307. Vouchers for drafts remaining unpaid.
274. Arrears of pay due deceased seamen.	308. Payment upon presentation of outstanding drafts.
275. Signing bounty certificates.	309. Accounts of disbursing officers unchanged for three years.
276. Auditors.	310. Annual reports of disbursing officers, etc.
277. Duties of auditors.	

## CHAPTER ONE.

### THE DEPARTMENT.

**Sec. 233. [Establishment of Department of the Treasury.]** There shall be at the seat of Government an Executive Department to be known as the Department of the Treasury, and a Secretary of the Treasury, who shall be the head thereof.—(2 Sept., 1789, c. 12, s. 1, v. 1, p. 65.)

See note to section 158 Revised Statutes, concerning executive departments in general.

**Sec. 236. [Settlement of public accounts.]** All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury.—(3 March, 1817, c. 45, s. 2, v. 3, p. 366. *U. S. v. Mann*, 1 Brock, 9 [should be 2 Brock, 9]. *Cooke et al. v. U. S.*, 91 U. S., 389.)

See act of July 31, 1894 (28 Stat., 205 et seq.), relating to the duties of Comptroller of the Treasury and Auditor for the Navy Department.

**Property accounts.**—Settlement of, is provided for by act of March 29, 1894 (28 Stat., 47).

**Inspection of books and records.**—By act of March 15, 1898 (30 Stat., 316), it is provided

that "all books, papers, and other matters relating to the accounts of officers of the Government in the District of Columbia shall at all times be subject to inspection and examination by the Comptroller of the Treasury and the Auditor of the Treasury authorized to settle such accounts, or by the duly authorized agents of either of said officials."



Report of claims allowed.—“The Secretary of the Treasury shall, at the commencement of each session of Congress, report the amount due each claimant whose claim has been allowed in whole or in part to the Speaker of the House of Representatives and the presiding officer of the Senate, who shall lay the same before their respective houses for consideration.” (Act July 7, 1884, 23 Stat., 254.)

Report of delinquent officers.—Provision for annual report to Congress by the Secretary of the Treasury of officers delinquent in rendering accounts is contained in act May 28, 1896, section 4 (29 Stat., 179).

Assignment of claims against United States is restricted by section 3477, Revised Statutes; assignment of pay by enlisted men, Navy, is permitted by section 1576, Revised Statutes; to be discouraged by commanding officer, section 1430, Revised Statutes; allotment of pay by officers, Navy, is permitted by act of June 10, 1896 (29 Stat., 361).

#### I. SCOPE OF SECTION.

#### II. JURISDICTION OF ACCOUNTING OFFICERS.

#### III. LIMITATIONS UPON JURISDICTION.

#### IV. JURISDICTION, ACCOUNTING OFFICERS AND FEDERAL COURTS.

#### V. JURISDICTION, ACCOUNTING OFFICERS AND HEADS OF EXECUTIVE DEPARTMENTS.

#### VI. SET-OFF.

#### VII. EFFECT OF ACCOUNTING OFFICERS' ACTION.

#### VIII. REOPENING OF ACCOUNTS.

#### IX. MANDAMUS PROCEEDINGS TO COMPEL PAYMENTS.

#### I. SCOPE OF SECTION.

**Applies only to Treasury Department proper.**—All claims against the United States are to be settled and adjusted in the Treasury Department; and that is located “at the seat of Government.” The assistant treasurer in New York is a custodian of public money, which he may pay out or transfer upon the order of the proper department or officer; but he has no authority to settle and adjust—that is to say, to determine upon the validity of, any claim against the Government. He can pay only after the adjustment has been made “in the Department of the Treasury,” and then upon drafts drawn for that purpose by the Treasurer. (*Cooke v. U. S.*, 91 U. S., 399.)

**Officers charged with execution of section.**—The principal officers to whom the great responsibility of settling and adjusting accounts under this section is committed by law are called “accounting officers,” which includes the auditors, each acting separately upon different classes of accounts, and the Comptroller of the Treasury. The different processes in the settlement of claims and demands upon the Government, from their receipt by the auditor, through the several stages

of examination, certification, and drawing of warrants for payment, up to the time when the Treasurer issues his drafts, are all matters of accounting to justify the Treasurer in paying out the public money, and are not consummated beyond recall until the claimants receive the negotiable drafts of that officer, drawn, according to the convenience of the parties, upon the Treasury proper, in Washington, or upon one of the several assistant treasurers or designated depositaries in other places. (McKnight's case, 13 Ct. Cls., 305; affirmed 98 U. S., 179.)

“Accounting officers” is a phrase well known as referring to the auditors and Comptroller of the Treasury, who pass upon all claims against the Government before they can be paid out of the Public Treasury. (*Moncure v. Zunts*, 11 Wall., 416, 422.)

In matters of accounting, the several public officers act independently of each other, although the Secretary of the Treasury, being the head of the department, has a right generally to control or revise, to some extent, the action of others in subordinate official positions, and the Comptroller has some power over an auditor and is not bound by the action of that officer which is certified to him. (McKnight's case, 13 Ct. Cls., 306, 307; affirmed 98 U. S., 179.)

The Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the re-examination of any account. (Act July 31, 1894, sec. 8, 28 Stat., 207.)

Section 236, Revised Statutes, must be construed in connection with sections 273–277, Revised Statutes, which specify the jurisdiction of the accounting officers. (Dig. Dec. Second Comptroller, v. 3, par. 735.)

The general provision of law governing the manner of settling claims against the Government is found in section 236, Revised Statutes. This section was taken from section 2 of act of March 3, 1817 (3 Stat., 366), and without detailing the minor changes which have been made in special cases, it is sufficient to state that the law has continued substantially the same ever since. This power of the Treasury Department to settle claims against the United States is exercised by the accounting officers, and under the present law the Auditor for the Navy Department is charged with the duty of settling all claims arising under the naval establishment. (4 Comp. Dec., 587.)

This section provides that all claims and demands against and by the United States shall be settled and adjusted in the Treasury Department, and by section 7 of the act of July 31, 1894 (28 Stat., 206), the Auditor for the Navy Department shall receive and examine all accounts of the naval establishment. The intent of these laws is that bona fide claimants shall have their claims considered by the accounting officers. (Comp. Dec., Dec. 17, 1904, 46 S. and A. Memo., 459.)

**Status of accounting officers.**—The accounting officers do not constitute a “department” within the meaning of a law referring to claims “rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same.” (*U. S. v. Harmon*, 147 U. S., 273.)

The accounting officers of the Treasury are neither contracting nor disbursing officers. In the case of disbursing officers, the policy of the Government has been to acknowledge no payments as made on its behalf save those which were authorized by law. However, where the accounting officers of the Treasury have jurisdiction to settle an account or claim against the Government, a mistake of law committed incidentally in the adjustment will not, after payment of the balance found to be due, affect the finality of the settlement or entitle the Government to recover back the money paid in mistake of law. (*McKee v. U. S.*, 12 Ct. Cls., 533, 534; reversed on other grounds, 97 U. S., 233.) See below "VIII, Reopening of accounts."

Under a special statute providing that the accounting officers shall "settle and adjust" a claim thereunder, the duties of the accounting officers were administrative, not judicial, and the Court of Claims was not divested of jurisdiction over said claim. (*McLean v. U. S.*, 226 U. S., 374, 378, citing *Medbury v. U. S.*, 173 U. S. 492.)

**Itemized accounts required.**—For the expenditure of all public moneys it is the invariable rule to require that accounts shall be itemized as far as practicable, in order that the accounting officers may properly audit them. The law may permit the exercise of discretion in the use of public funds without dispensing with the usual requirement of an itemized account showing fully for what purposes the money has been expended. (4 Comp. Dec., 159; 4 Comp. Dec., 271.)

**The rules prescribed by the Treasury Department for the adjustment of claims against the Government will, if reasonable, be regarded by the courts; but if these rules go to a complete denial of justice to the individual the court, if it have jurisdiction of the subject, can not disregard the rights of the parties.** (*U. S. v. Mann*, 26 Fed. Cas. No. 15716, per Marshall, C. J.)

**Taking security for debt to the Government.**—It is not generally within the duties of public officers to take collateral security, and whenever they do so they are usually acting beyond the scope of their official authority and the United States are not bound by their agreements. However, where public officers, looking to the best interests of the Government, do sometimes accept such security without releasing the debtors or subjecting the United States to liability, in so far as the arrangements are consummated for the benefit of the Government they may be upheld, and the officers commended for their vigilance and zeal in the public service. (*Taggart v. U. S.*, 17 Ct. Cls., 322.)

**Claims against Government voluntarily settled from private funds.**—A naval militia officer who voluntarily pays an obligation of the United States is not entitled to reimbursement from the Government. (Comp. Dec., Feb. 17, 1915, Appeal No. 24365, file 26254-1709, citing 4 Comp. Dec., 409; 6 Comp. Dec., 594; 8 Comp. Dec., 584; 11 Comp. Dec., 486; 12 Comp. Dec., 48.) [In a reconsideration in this case May 22, 1915, it was held that, owing to exceptional circumstances, reimburse-

ment should be allowed, applying 18 Comp. Dec., 299, holding that "An officer of the United States is not, ordinarily, authorized to advance his private funds in payment of any claim against the United States except for expenses incurred by him personally for travel or other personal expense allowed by the terms of his employment. But this is a rule of accounting and should not be permitted to hinder the public business or prevent the payment of just and lawful claims against the Government."]

## II. JURISDICTION OF ACCOUNTING OFFICERS.

**In general.**—Substantially all accounts must pass under the eye and receive the approval of the accounting officers of the Treasury. Even the accounts of the Secretary of the Treasury and of the President come to them for allowance. The business of the accounting officers is to determine what payments shall or shall not be made on behalf of the United States. These functions of office were a part of the wondrous birth of the Treasury system, and have remained unchanged from the foundation of the Government to the present time. It is well known that the Comptrollers have sometimes construed statutes in one way and the courts subsequently in another. Such diversity of judgment is inevitable in the administration of human affairs, and the wonder is that there has been so little of it on the part of these officers. (*McKee v. U. S.*, 12 Ct. Cls., 532, 534; reversed on other grounds, 97 U. S., 233.)

The law devolves upon the accounting officers of the Treasury the duties of examining, settling, and adjusting all accounts, claims and demands in which the United States are concerned, either as debtors or as creditors, and to certify balances arising thereon; their exercise of such duties includes the weighing of evidence, the construction of statutes, and the application of general principles of law in connection therewith. (5 Comp. Dec., 410; 14 Comp. Dec., 169.)

It is the theory, and a wise one, upon which the final adjustment and settlement of accounts in the Treasury Department is founded, that the officers who pass upon them shall be wholly distinct from those who expend the money or incur the liabilities. For the manner in which these latter officers perform the trust imposed upon them they alone are responsible; the Comptroller is only charged with the duty of seeing that they keep within the law. (*Waters v. U. S.*, 21 Ct. Cls., 38.)

The organization of the Department of the Treasury is comprehensive, thorough, and exact; it is supplied not only with skilled accountants but special law officers, and besides has on proper occasions the right to call in aid the opinion of the Attorney General of the United States; it seems fully equipped for the discharge of every fiscal duty and exigency. (*State of Mississippi v. Durham*, 4 Mackey (D. C.), 237.)

The accounting system of the Treasury is one of the oldest, best known, and most highly esteemed parts of our governmental machinery. To its scrutiny all accounts are subjected of per-



sons having business or financial relations with the Government, from the President to the smallest contractor. (*Dennison v. U. S.*, 25 Ct. Cls., 320.)

The machinery of the Treasury Department for the adjustment of accounts is only adapted to the passing upon ordinary accounts upon which controversies are not expected to arise to any great extent, and not at all beyond the means of adjusting from the records and files of the several departments. One of the primary, most important, and most useful objects to be attained in establishing the Court of Claims was to provide a tribunal where claims against the Government should be determined upon legal evidence, taken under the forms and subject to the rules of law, which they are not and never can be in the process of accounting in the Treasury Department. (*McKnight's case*, 13 Ct. Cls., 310; affirmed 98 U. S. 179.)

**Judgments of Court of Claims.**—Even the judgments of the Court of Claims must pass through the same processes of accounting, not for the purpose of review, but to justify the Treasurer in issuing his draft for the payment thereof; and that is what all the long process of accounting leads to. (*McKnight's case*, 13 Ct. Cls., 309; affirmed 98 U. S. 179.)

It is the duty of the Secretary of the Treasury to pay judgments of the Court of Claims; this section does not confer power upon him to go behind the judgment. The accounting officers have no authority to reexamine the judgment, which is conclusive as to everything it embraces. (*U. S. v. Jones*, 119 U. S., 477; see also *Meigs v. U. S.*, 20 Ct. Cls. 181; *U. S. v. O'Grady*, 22 Wall., 641; *Wis. Cent. R. R. Co. v. U. S.*, 164 U. S., 190.)

**Public money.**—The pay and allowances of midshipmen coming out of the general fund of the Treasury is public money to start with, and it will remain public money until it passes from the absolute control of the Government. Accordingly, *held* that funds received by a naval pay officer as commissary officer of the midshipmen's mess at the Naval Academy are public funds, and that he should be required to account for the proper disbursement thereof to the accounting officers of the Treasury, the same as any other public money placed in his hands for disbursement in his official capacity. (14 Comp. Dec., 680.) This decision is not affected by the fact that the midshipmen receipt on the pay roll for their proportionate share of the cost of running the midshipmen's mess; the paymaster does not in fact pay this money to the midshipmen but pays it to himself as commissary of the mess and accounts for it as such commissary; a receipt for money by a midshipman which he did not actually receive is not a good acquittance to the Government. It therefore becomes necessary to show by other evidence what he actually received, and this is accomplished by requiring the commissary officer to render an accounting of the funds paid to him from the pay and rations due the midshipmen and expended by him for their benefit. (Comp. Dec., Dec. 31, 1908, 94 S. and A. Memo., 923.) [The Navy Regulations forbid disbursing officers to require receipts in advance of actual

payment. (Art. R-4303 (2), Navy Regs. 1913; see also art. R-4384, (3).)]

Under Navy regulations prior to July 1, 1907 (revoked by G. O. No. 44, Apr. 16, 1907), the commutation value of rations due enlisted men was credited by the pay officer to himself as such, and debited against himself as commissary officer in charge of the general mess, composed of such enlisted men, the money never actually leaving the pay officer's hands until finally paid out in the shape of mess expenditures and not being paid over to the individual enlisted men who composed the mess. It was held by the Comptroller of the Treasury that such commutation money in the hands of the pay officer was public money until actually expended by him, and he should be required to account for its proper disbursement to the accounting officers of the Treasury, the same as any other public money placed in his hands for disbursement in his official capacity. (12 Comp. Dec., 678; see also 94 S. and A. Memo., 923.)

A sum of \$24,500 was advanced from the appropriation "Pay of the Navy" in 1867 and 1868 for the purpose of conducting a midshipmen's store at the Naval Academy; accumulated profits from this investment amounted in 1908 to about \$31,000; *Held*, that the total sum, representing the original amount and the profits thereon, belongs to the Government and is public money, although the establishment of this fund and its maintenance was without authority of law; further held that such funds should be accounted for to the Treasury Department. (14 Comp. Dec., 680.)

The proceeds from sale of garbage from a receiving ship, including that from the general mess, is public money and must be covered into the Treasury under the provisions of section 3618 of the Revised Statutes as "Miscellaneous receipts." (19 Comp. Dec., 450.)

The profits from sales made by ships' stores in the Navy, as authorized by act of June 24, 1910 (36 Stat., 619), are not public money within the meaning of section 3648 of the Revised Statutes. (Comp. Dec., Aug. 11, 1914, file 26254-1571:2; see also file 26254-1759, Apr. 20, 1915.)

For other cases see note to section 1383, Revised Statutes, under "IX. Liability of Sureties."

### III. LIMITATIONS UPON JURISDICTION.

**Jurisdiction limited by language of statutes in special cases.**—This section undoubtedly gives to the Treasury Department the settlement of all disputed money claims but it is entirely competent for Congress to alter this arrangement, and it has repeatedly done so. Where Congress expressly provides that before payment a claim shall be "examined and settled by the Secretary of War," the obvious construction is that in the case referred to the decision of the Secretary of War was to be the final adjudication. (16 Op. Atty. Gen., 492; affirmed 19 Op. Atty. Gen., 387.) [But nothing short of a clear intent, unequivocally expressed in a statute, will warrant a court in holding that the involved accounts of a public officer are not to be settled at the Treasury as other public accounts are settled, or that Con-



gress has intended to create an extraordinary exception to the accounting system of the United States where no need of such exception exists and where none is in terms declared. *Dennison v. U. S.*, 25 Ct. Cls., 321.]

The word "settle" means to adjust, liquidate, balance or pay. (15 Comp. Dec., 557, citing *Applegate v. Baxley*, 93 Ind., 149.) Where Congress provided that the "settlement" of certain claims "shall be under the direction of the Commissioner of Pensions," held that the word "settlement" was used in the sense of an adjustment, liquidation and payment of the claim, and that the effect of the act was to transfer to the Commissioner of Pensions the power to adjust and settle the claims referred to, and to that extent to deprive the accounting officers of the general jurisdiction to settle such claims, conferred by this section; that the final payments as made under the direction of the Commissioner of Pensions would, of course, come before the accounting officers for settlement; but such settlement would only involve the allowance of credit for the payment of an adjusted claim, and not the settlement of the claim itself. (15 Comp. Dec., 557.)

Where Congress, by act of May 13, 1908 (35 Stat., 128) provided that, upon the existence of certain facts, the Paymaster General of the Navy "shall cause to be paid" a gratuity to the beneficiary of a deceased officer or enlisted man of the Navy or Marine Corps, and that the Secretary of the Navy shall establish regulations requiring each officer and enlisted man to designate the "proper person" to whom the amount should be paid, it was held by the Navy Department that the decision of the Paymaster General, that the facts necessary to authorize payment did not exist in a given case, was necessarily conclusive of the question, except for the right of the claimant to appeal from the action of the Paymaster General to the Secretary of the Navy; and that the Auditor for the Navy Department did not have jurisdiction to review the decision of the Paymaster General. (File 26543-66, Sept. 8 and 9, 1911; compare 22 Comp. Dec., 532; file 26543-148.)

In all cases the officer charged by statute with the duty of allowing or disallowing a claim in his discretion, or according to his judgment, must first act, before the claimant's right is fixed. Then, when he has obtained a decision in his favor, the claimant's demand, of which that decision is *prima facie* if not conclusive determination, if the officer acts within the scope of his authority and in accordance with the provisions of law, may be the foundation of an action in the Court of Claims, or may pass the accounting officers and be paid by draft upon warrant duly issued, as in other cases. (*McKnight's case*, 13 Ct. Cls., 309; affirmed 98 U. S., 179.)

By act of March 2, 1895 (28 Stat., 768) it was provided that "all payments made out of the contingent fund of the House of Representatives, upon vouchers approved by said temporary committee on accounts, shall be deemed, held and taken and are hereby declared to be conclusive upon all the departments and auditing officers of the government." Held, that the Comptroller of the Treasury has no jurisdiction

to render a decision upon any question involved in the payment of accounts which have been so approved by the temporary committee on accounts; that Congress intended by the provision above quoted to place upon said committee the final responsibility of approving all payments to be made from the contingent fund of the House of Representatives, and to make their action conclusive. (2 Comp. Dec., 24.)

The certificate of the Speaker of the House of Representatives as to the salary and mileage of members, being by law (secs. 47, 48, R. S.) made conclusive upon all departments of the Government, the Comptroller has no jurisdiction to render a decision upon the amount due to a member for salary or mileage. (2 Comp. Dec., 339.)

The naval appropriation act of June 24, 1910 (36 Stat., 619), provided that profits from sales by ships' stores in the Navy should be accounted for to the Bureau of Supplies and Accounts, Navy Department. In view of this provision, the Comptroller of the Treasury is without jurisdiction to render a decision as to the legality of proposed expenditures from this fund. (Comp. Dec., Apr. 28, 1915, file 26254-1759:2.)

The accounting officers are without jurisdiction to receive and settle claims of individual officers and enlisted men of the organized militia for pay while engaged in field or camp service for instruction, and are without revisory power in such cases. The officers and men must look to the State, Territory, or District of Columbia in whose service they are engaged; when the United States turns over to the State, Territory or District of Columbia its allotted portion of the appropriation made by Congress for the militia, the disbursing officer is accountable in case he pays out said money for purposes other than that for which it was appropriated by Congress; but if he refuses to pay officers and enlisted men of the militia money to which they are entitled, they can not present individual claims and have them paid through the accounting officers. The accounting officers are without jurisdiction to compel the disbursing officer to make any payment or to afford said officers and enlisted men any remedy. (10 Comp. Dec., 635.) [But this does not apply to pay due the naval militia for joint service or maneuvers with the Navy, as payments in such cases are not required to be made through the disbursing officer of the naval militia organizations. (Comp. Dec., June 20, 1914, file 3973-64:2, and see act Feb. 16, 1914, sec. 12, 38 Stat., 286, later repealed).]

**No jurisdiction to determine whether deductions shall be made from pay of public officers on account of alleged indebtedness.**—The Comptroller of the Treasury is authorized by law (act July 31, 1894, sec. 8, 28 Stat., 207) to render decisions upon questions of payment to be made by disbursing officers of the Government. But the law confers no such function upon the Comptroller nor upon an auditor as deciding that the pay of public officers fixed by statute should be withheld on account of alleged indebtedness of such officers to the United States. When such indebtedness is denied by the officer to whom salary is lawfully due, the matter is one for judi-

cial rather than administrative determination, and a decision of the Comptroller rendered in such case is extraofficial, not required by law, and affords no warrant for the action of the disbursing officer in withholding the officer's salary, in whole or in part. Payment of salary in such case may be enforced by mandamus proceedings, and the officer is not required to bring suit in the Court of Claims. (*Smith v. Jackson*, 241 Fed. Rep., 747; affirmed 246 U. S., 388.)

**Jurisdiction limited to accounts.**—The terms "debtors" and "creditors" used in this section limit and qualify the nature of the claims and demands which are to be settled and adjusted in the Treasury Department. The assumption of the adjudication of private claims against the government by the accounting officers, except as incident to the settlement of accounts, or except when authorized by private act, would impair their functions and defeat the real object for which their offices were created. (Dig. Dec. Second Comp. v. 3, par. 735.)

Where the Paymaster General of the Navy declined to pay a claim for death gratuity under the act of May 13, 1908 (35 Stat., 128), there was nothing in any account which had been rendered to the auditor upon which that officer could review the action of the Paymaster General. Accordingly, held that the Auditor for the Navy Department did not have jurisdiction to settle and adjust the claim in this case, although claimant took the matter up with the auditor's office; that under the law the duties of the auditor relate to the examination of accounts and the certification of balances; that if payment had been made to the beneficiary in this case of a less sum than claimed, the accounts, including the payment of such amount, would be before the auditor, but such was not the fact, as no payment at all had been made; and that claimant's appeal was to the Secretary of the Navy from the Paymaster General's action and not to the accounting officers of the Treasury. (File 26543-66, Sept. 8, 1911.)

**Property accounts.**—The settlement of property accounts is provided for by act of March 29, 1894 (28 Stat., 47). Under said act, the jurisdiction of the accounting officers does not extend back of the decision of the officer whose duty it is to audit property accounts in each department [in the Navy Department, the Paymaster General of the Navy, and the quartermaster of the Marine Corps]; and where such officer has fixed the responsibility for loss or damage to property, and ascertained its value and certified a charge against the responsible officer to the accounting officers, it is not within the jurisdiction of the accounting officers to remove the charge. (Comp. Dec., May 13, 1908, 87 S. and A. Memo., 703; Comp. Dec., July 26, 1915, 173 S. and A., Memo., 3728.) Appeal in such cases arising in the Navy or Marine Corps, may be taken to the Secretary of the Navy who has jurisdiction to cause the charge to be removed. (File 18140-10:2, May 16, 1911.)

The effect of said act of March 29, 1894, was to divest the auditor of the jurisdiction theretofore possessed by him over property accounts

and transactions of the officers of the Navy Department, and to relieve him of all responsibility in relation to the disposition of property intrusted to said officers. Under this act the duty and responsibility of determining questions relating to the correct disposition or loss of property have been transferred to and vested in the proper officer of the Navy Department, and it seems clear that the auditor will have no authority over or in relation to the property mentioned in a cash voucher evidencing the purchase of forage, until he has been furnished with a certificate of the Paymaster General in accordance with said act; jurisdiction over property accounts can not be given to the auditor by injecting papers into cash accounts tending to show what disposition has been made of such property. (2 Comp. Dec., 267; Comp. Dec., June 23, 1908, appeal No. 15210, file 26254-19; 23 Comp. Dec., 28.)

The accounting officers of the Treasury have no jurisdiction to settle accounts of rations issued in kind. (Comp. Dec., June 23, 1908, appeal No. 15210, file 26254-19; Comp. Dec., Mar. 19, 1909, 97 S. and A. Memo., 995.) It follows that the Comptroller of the Treasury has no jurisdiction to render a decision with reference to over-issues of rations to men absent with or without leave. (Comp. Dec., June 27, 1908, file 26254-17. [Quære, Whether Comptroller has jurisdiction to render decisions upon questions relating to the issue of heat and light in kind to officers of the Navy; this question discussed but not decided in file 26254-394, Jan. 29 and Feb. 8, 1910.]

The Comptroller of the Treasury is not authorized to render a decision to the Secretary of War upon the question whether certain members of the organized militia are entitled to issues of uniforms, etc.; as the accounting for such property is regulated by the act of March 29, 1894 (28 Stat., 47). (20 Comp. Dec., 49, 55; see also Comp. Dec., Feb. 3, 1917, file 26254-2177:1).

**Unliquidated damages.**—Under section 236, Revised Statutes, the accounting officers have jurisdiction of all claims against the United States, whether liquidated or unliquidated, but by long-continued practice a rule of law has been established which precludes these officers from allowing claims for unliquidated damages. (5 Comp. Dec., 770.)

Section 236, Revised Statutes, refers to liquidated contract obligations. (Dig. Dec., Second Comp., v. 3, par. 735. See also 4 Op. Atty. Gen., 327, 627; 6 Op. Atty. Gen., 524; 14 Op. Atty. Gen., 424; *Carmick v. U. S.*, 2 Ct. Cls., 126, 140.)

The accounting officers of the Treasury have no jurisdiction to settle claims for unliquidated damages, whether the claims arise from unavoidable accident or from torts. Accordingly, held that there is no jurisdiction to settle claim for damage done to wharf by navy yard tug. (1 Comp. Dec., 283.) [This in the absence of express statutory authority for payment of such claims.]

The head of an executive department is not authorized to pay the actual expenses of repairing a vessel injured in a collision with a Government vessel, the claim arising from the collision being one for unliquidated damages caused by the tort of the Government's officers.



(1 Comp. Dec., 261.) It seems to be the approved practice to commit such claims to the tender mercies of Congress for settlement. (1 Comp. Dec., 285.) [The Court of Claims has said: "We do not find it to be within the official duties of the head of any department to make estimates for appropriations to pay claims which the Government is not in law bound to pay, however much they may be urged to do so by claimants who feel aggrieved by the tortious conduct of public officers. An executive department is not the place to apply for redress of grievances not founded on legal rights." (*Pitman v. U. S.*, 20 Ct. Cls., 256.) The naval appropriation act, June 24, 1910 (36 Stat., 607), authorizes the Secretary of the Navy "to consider, ascertain, adjust and determine" the amounts due on all claims for damages occasioned by collisions for which vessels of the Navy are responsible, where the amount of the claim does not exceed \$500; and to report the amounts due to Congress at each session, through the Treasury Department, for payment as legal claims." The naval appropriation act of July 1, 1918 (40 Stat., 705), authorized the Secretary of the Navy to "consider, ascertain, adjust, determine, and pay" amounts due, not exceeding \$1,000, on claims for damages to and loss of private property of inhabitants of European countries not enemies or their allies, occasioned by men in the naval service during the existing war.]

The accounting officers of the Treasury have jurisdiction to settle claims based on a contract with the Government, either expressed or implied, where it is possible to ascertain either from the terms of the contract, or from extraneous proof, the justice of the claim and the correctness of the amount; but they can not take cognizance of claims for unliquidated damages arising from torts or breach of contract. This has been repeatedly held by the Court of Claims and in opinions of Attorneys General. (2 Comp. Dec., 174; citing *McKee's case*, 12 Ct. Cls., 556 [reversed, 97 U. S., 233]; *Dennis v. U. S.*, 20 Ct. Cls., 119, 14 Op. Atty. Gen., 24; and see 20 Comp. Dec., 661.)

The jurisdiction of the accounting officers is limited to claims arising on contracts, express or implied, and does not extend to a claim for unliquidated damages, even though such claim does not arise from the tort of an officer of the Government. Accordingly, *held* that accounting officers have no jurisdiction of claim for reimbursement for private property destroyed by fire. (2 Comp. Dec., 487.) [Reimbursement for loss or damage of private property belonging to persons in the Navy or Marine Corps has been provided for by various acts of Congress. (See sec. 290, R. S., and note thereto.)]

The accounting officers and heads of departments have no cognizance of claims for unliquidated damages founded on neglect or breach of duty of public officers, even where they grow out of nonperformance of written contracts, other than in payment for work actually done or material furnished and received. (*Pitman v. U. S.*, 20 Ct. Cls., 253; 1 Comp. Dec., 261.)

It is plain that the Government itself is not responsible for the misfeasances, or wrongs, or

neglects, or omissions of duty of subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests. (*Pitman v. U. S.*, 20 Ct. Cls., 255, quoting Judge Story in his work on Agency.)

**Equitable claims.**—The accounting officers have no jurisdiction in a case in which claimant has an equitable claim only, which, however just, the executive officers of the Government are not authorized to settle. (9 Comp. Dec. 663.) [See section 287, Revised Statutes, which requires accounting officers to settle certain classes of accounts in the Navy "on principles of equity and justice."]

#### IV. JURISDICTION, ACCOUNTING OFFICERS AND FEDERAL COURTS.

The Court of Claims at first had a rule that "in every case where the claim is such as is ordinarily settled in any Executive Department, the petition shall show that application for its allowance has been made to that department, and without success, and its decision thereon;" and a petition was dismissed because it did not set forth those facts. On appeal the Supreme Court decided the rule to be unauthorized and void, and remitted the case with directions to proceed to a hearing on the petition, and the rule was thereupon abrogated and the Court of Claims has ever since proceeded to hear cases without reference to the action of the accounting officers thereon. (*McKnight v. U. S.*, 13 Ct. Cls., 312; affirmed 98 U. S., 179; *Clyde v. U. S.*, 13 Wall., 35.)

**Decisions binding on accounting officers.**—By express legislation (act Mar. 4, 1907, 34 Stat., 1356), as well as the ruling of the Supreme Court, the decisions of the Court of Claims, when not appealed from, furnish the rules by which the accounting officers are to be guided in their settlement and adjustment of like cases. (*Leigh v. U. S.*, 43 Ct. Cls., 387; 18 Comp. Dec., 493; Comp. Dec., Sept. 26, 1910, file 26254-539. But see 21 Comp. Dec., 431; reversed 21 Comp. Dec. 561; also, Comp. Dec., Apr. 13, 1916, file 26543-140-2, and 20 Comp. Dec., 821.)

"Clearly it is the duty of the accounting officers, as well as of all other officers of the Government in the discharge of their official duties, to follow the rulings of the United States courts where applicable. \* \* \* Notwithstanding a claim may have been allowed or rejected, if subsequent thereto the Supreme Court or this court has adjudicated such claim or a like claim such adjudication creates a new rule of decision binding on the accounting officers in the subsequent consideration of like claims, whether then pending or subsequently filed." (*Blazek v. U. S.*, 44 Ct. Cls., 188, 191, 192.)

Any doubt which an auditor may have had as to the legality of making deductions from the salary of a public officer in a particular



case "should have been subordinated, first, to the ruling of the Attorney General and, second, beyond all possible question to the judgments of the courts below." (*Smith v. Jackson*, 246 U. S., 388, affirming 241 Fed. Rep., 747.)

The judgments of the Court of Claims, not appealed from, are conclusive upon the accounting officers, who have no authority to reexamine such a judgment. (*U. S. v. Jones*, 119 U. S., 477; *McKnight v. U. S.*, 13 Ct. Cls., 309, affirmed 98 U. S., 179; *Meigs v. U. S.*, 20 Ct. Cls. 181; *U. S. v. O'Grady*, 22 Wall., 641; *Wis. Cent. R. R. Co. v. U. S.*, 164 U. S., 190.)

**The action of the accounting officers is not conclusive** in a suit between the United States and the individual. (*U. S. v. Harmon*, 147 U. S., 274, 275); nor is it even prima facie evidence of the indebtedness of the Government. (*McKnight's case*, 13 Ct. Cls., 292.)

The Court of Claims has jurisdiction, upon reference of the head of any department, to report its findings of fact and conclusions of law with reference to any claim or matter pending in such department which involves controverted questions of fact or law; and the report of the Court of Claims in such a case shall be for the "guidance and action" of the department making the reference. Judiciary Act, March 3, 1911, section 148 (36 Stat., 1137). Where the Comptroller of the Treasury held a provision of the Army Regulations to be null and void, the question was referred by the Secretary of War to the Court of Claims, which reversed the Comptroller of the Treasury and sustained the validity of the regulation. (*In re Smith*, 23 Ct. Cls., 452; see also *Smith v. U. S.*, 24 Ct. Cls., 209.)

Whenever any claim is made against any executive department over which it has jurisdiction, such department may, without action in the Treasury Department, refer such claim to the Court of Claims, provided it be one which the court might, under existing laws, take jurisdiction of on the voluntary action of the claimant. (*Baltimore & Ohio R. Co. v. U. S.*, 34 Ct. Cls., 503.)

The Court of Claims has jurisdiction to try and adjudicate claims or matters which the Secretary of the Treasury may, upon the certificate of any auditor or of the Comptroller of the Treasury, direct to be transmitted to said court, and of which the court might have jurisdiction on the voluntary action of the claimant. (Act Mar. 3, 1911, sec. 148, 36 Stat., 1137.)

**Suits for lost checks.**—When a Government check is lost or stolen, the Revised Statutes (secs. 306-310, 3646) do not require that payment must be postponed for three years or preclude a suit. They simply authorize disbursing officers to duplicate small checks in certain cases. The power given to the accounting officers to duplicate lost checks is not exclusive and does not affect the jurisdiction of the courts. (*Becker v. U. S.*, 26 Ct. Cls., 172, 177.)

For other cases, see "VII. Effect of accounting officers' action."

## V. JURISDICTION, ACCOUNTING OFFICERS AND HEADS OF EXECUTIVE DEPARTMENTS.

- (A) *Secretary of the Navy.*
- (B) *Secretary of War.*
- (C) *Miscellaneous.*

Attorney General.—See note to section 356, Revised Statutes.

Secretary of the Treasury.—The Secretary of the Treasury, being the head of the department, has a right generally to control or revise to some extent the action of others in subordinate official positions. (*McKnight's case*, 13 Ct. Cls., 306, 307, affirmed 98 U. S., 179.) "The Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment, and direct the reexamination of any account." (Act July 31, 1894, sec. 8, 28 Stat., 208.)

### (A) *Secretary of the Navy.*

**The accounting officers of the Treasury have not the burden of responsibility** cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of heads of departments. The Secretary of the Navy represents the President, and exercises his power on subjects confided to his department. He is responsible to the people and the law for any abuse of the powers intrusted to him. His acts and decisions on subjects submitted to his jurisdiction and control by the Constitution and laws do not require the approval of any officer of another department to make them valid and conclusive. The Executive Department of the Government to which is intrusted the control of the subject-matter must necessarily determine all questions appertaining thereto. Where the Comptroller of the Treasury was of the opinion that the Secretary of the Navy had mistaken the law or abused his discretion, and undertook to correct the Secretary's supposed mistake or abuse of discretion, held that the Comptroller "was not bound to assume this responsibility." The propriety of the action taken was a subject peculiarly within the jurisdiction and discretion of the head of the Navy Department, and not subject to revision or correction by the officers of any other department. (*U. S. v. Jones*, 18 How., 92.)

In the *Jones case*, above-cited, the facts were that an officer of the Navy was detached on special duty in France, and a sum of money was transmitted to him by the Secretary of the Navy, to be disbursed for medical attendance required by said officer for a severe and dangerous wound accidentally received by him. The money was disbursed accordingly; however, the accounting officers of the Treasury charged the amount so disbursed by this officer against him on his pay account, and refused to recognize the authority of the Secretary of the Navy in the premises. The Supreme Court, for the reasons set forth above, sustained the Secretary's action and overruled that of the accounting officers.

The Jones case was decided by the Supreme Court in 1855. It has since been quoted and applied in numerous cases, including the following: *U. S. v. Johnston*, 124 U. S., 236, 252; *Barnett v. U. S.*, 16 Ct. Cls., 515; *Waters v. U. S.*, 21 Ct. Cls., 38; *Dyer v. U. S.*, 37 Ct. Cls., 340; *Hayden v. U. S.*, 38 Ct. Cls., 51; *Billings v. U. S.*, 23 Ct. Cls., 179; file 26260-347: C, Oct. 20, 1909, and 26543-66, Sept. 8, 1911; *Op. Atty. Gen.*, May 19, 1915, 171 S. and A. Memo., 3611. [In the case last cited it was held that a Navy regulation concerning responsibility of pay officers is binding on the accounting officers, and that a decision of the Comptroller to the contrary is not conclusive upon the Navy Department. See also file 26254-1451: 11, Apr. 1915.]

**The designation of navy mail clerks** is by act of May 27, 1908 (35 Stat., 417), vested in the uncontrolled discretion of the Postmaster General and Secretary of the Navy, with like uncontrolled discretion to fix their compensation within the prescribed maximum. Accordingly, a decision of the Comptroller of the Treasury that a certain Navy mail clerk designated pursuant to the statute had not been validly designated because such designation was not in accordance with certain general regulations issued by the Secretary of the Navy, was extra-official and not binding upon the Navy Department. *Held further*, that the designation in question was entirely valid. (*Op. Atty. Gen.* to Secy. Navy, July 19, 1918, file 26254-2476:5.)

**The question whether or not the record of an enlisted man in the Marine Corps is "honest and faithful"** within the meaning of section 1281, Revised Statutes, governing payment of retained pay, is one for the naval authorities to decide, and the accounting officers and the courts are not required to reconsider the alleged misconduct and add to the penalty prescribed by the military authorities. The President, acting through the Navy Department, not having declared a forfeiture of retained pay, in addition to discharge from the service, the record of the man in question cannot be reexamined in a collateral proceeding for the purpose of imposing such forfeiture. (*Kingsley v. U. S.*, 24 Ct. Cls., 219.) [In a decision rendered April 21, 1914 (20 Comp. Dec., 751), the Comptroller of the Treasury held that, while he has no jurisdiction to decide as to the character of an enlisted man's discharge, "*from a naval standpoint*," nevertheless, when a question of paying travel allowance to such man is presented, he may decide that a man discharged by the naval authorities on account of expiration of enlistment, was, "*for the purposes of such payment*" not so discharged; that "even though in terms a discharge by reason of expiration of enlistment, and properly so from a naval standpoint, it may for the purposes of this office be regarded otherwise." But see 21 Comp. Dec., 539, noted below, under "(B) *Secretary of War*"; and see 28 *Op. Atty. Gen.*, 83, holding that when the Navy Department in discharging a man determines the character of his discharge, "the executive branch of the Government thereby becomes functus officio."

**Secretary's discretion not reviewable.**—It is not for the court, and it is not for the accounting officers, to say how much or how little shall be allowed to a naval attaché from the appropriation for "maintenance of students and attachés and information from abroad." There being no limit in the statute upon the amount of maintenance which may be allowed, that amount is necessarily within the exclusive jurisdiction of the Secretary of the Navy. The appropriation is in the nature of a contingent fund, to be disbursed by the Secretary of the Navy in his discretion, which is not subject to judicial review. (*Dyer v. U. S.*, 37 Ct. Cls., 340.)

An order of the Secretary of the Navy, appointing a retired officer of the Navy as meteorologist at a navy yard, to perform work ordinarily performed by officers of the Navy, is the order of the President, and the officer is entitled to the salary prescribed by the Secretary of the Navy, from the appropriation for "National Defense," notwithstanding disallowance thereof by the accounting officers. The appropriation in question expressly provides that it is to be expended "at the discretion of the President." (*Hayden v. U. S.*, 38 Ct. Cls., 51.)

**Secretary's approval of travel claims.**—When the Secretary of the Navy has approved an amount claimed as actually expended for steward's fees by a naval officer traveling abroad under orders, it must be treated as conclusive under the provisions of the act August 5, 1882 (22 Stat., 286), it being the practice to allow officers of the Government reimbursement for such expenditures, as a necessary expense of travel abroad. As to the amount of the claim, inasmuch as it has been approved by the Secretary of the Navy, it is clear that the accounting officers have no right to question the reasonableness of such amount, in view of the act above cited; by the terms of the statute, the reasonableness of expenses is left to the discretion of the Secretary of the Navy, and when determined by him, such determination must be taken as conclusive. [The law cited provided that officers traveling abroad under orders shall receive, in lieu of mileage, "only their actual and reasonable expenses, certified under their own signatures and approved by the Secretary of the Navy."] (3 Comp. Dec., 121.) In a later decision, the Comptroller of the Treasury, construing this same act, held that it was intended merely as a safeguard against the allowance of unjust and exorbitant claims, and to place a limit upon the jurisdiction of the accounting officers, and to preclude the allowance of anything not approved by the Secretary of the Navy; but that the accounting officers' jurisdiction remains unimpaired as to items and amounts approved by the Secretary; in other words, the accounting officers cannot allow any items not approved by the Secretary of the Navy; but they are not bound by his approval and may disallow items which he has approved. (14 Comp. Dec., 143.)

The Secretary of the Navy's approval or disapproval of a claim, while entitled to great weight, is not conclusive upon the accounting officers in cases arising under the act of July 1,



1902 (32 Stat., 662, 663), which provided that the Secretary of the Navy may direct that actual and necessary expenses only be allowed to officers performing travel repeatedly between two or more places. And the same thing applies to civilian employees performing travel under the act of March 3, 1875 (18 Stat., 452). (14 Comp. Dec., 143. But see 3 Comp. Dec., 121, noted above.)

The accounting officers are not bound by the approval by the Navy Department of traveling expense accounts of officers or employees of that department; nor are they bound by the disapproval by the Navy Department of such accounts, except in the case of officers of the Navy traveling abroad under orders. (14 Comp. Dec., 143.)

The determination of the classes of expenditure to be allowed as traveling expenses is a proper subject for regulation by the head of the department, and where such regulations have been made they must ordinarily be regarded as controlling. (14 Comp. Dec., 143; see also 9 Comp. Dec., 156.)

The approval by the Secretary of the Navy was held not conclusive upon the accounting officers in cases arising under the act of March 30, 1898 (published in note to sec. 290, R. S.), which provided that "the accounting officers of the Treasury shall in all cases require a schedule and affidavit from each person making a claim" for losses incurred by the destruction of the U. S. S. *Maine*, "such schedule to be approved by the Secretary of the Navy." The Comptroller of the Treasury held that the requirement that such schedules be approved by the Secretary of the Navy seems not only to be entirely consistent with the exercise by the auditor of his usual functions in the settlement of accounts, but to be a wise and salutary safeguard against the allowance of improper claims; that the reasonable construction of the act was that the schedule was required to be approved by the Secretary as a safeguard against the allowance of unjust and exorbitant claims arising from the fact that the accounting officers, without the advice and approval of the Navy Department, were not in position to judge so intelligently as to what articles were suitable and appropriate for an officer or enlisted man of the rank or rating and duty of the person by whom the claim was made; that the effect was to put a limitation upon the jurisdiction of the accounting officers and to preclude the allowance of anything not having the approval of the Secretary, but leaving their jurisdiction unimpaired as to items and amounts approved by him. While, therefore, the approved schedule and affidavit of an officer making claim under said act, were held to constitute a *prima facie* claim as contemplated by the act, it was further held that they were by no means conclusive upon the accounting officers, except to limit their jurisdiction to a consideration of the items and amounts so presented; that while the approved schedule and affidavit might be sufficient alone to justify the allowance of a claim, the auditor was not concluded by them if in his judgment additional proof was necessary and proper to a fair and just adjudication of the claim for which

reimbursement was provided. (4 Comp. Dec., 587.)

**Approval of medical claims.**—The determination of the Secretary of the Navy that expenses of an officer of the Navy for medicines and medical attendance are incurred under circumstances entitling him to reimbursement (sec. 1586, R. S.), is conclusive. Although the Surgeon-General of the Navy declined to recommend this allowance, the Secretary of the Navy has approved same, and this action of the head of the department must be regarded as binding upon all. (2 Comp. Dec., 241, citing *U. S. v. Eliason*, 16 Pet., 291, 302.)

The approval of the administrative officer is *prima facie* evidence of the correctness of the items of the account; and in the absence of clear and unequivocal proof of mistake on the part of such officer, it should be conclusive. (*U. S. v. Jones*, 134 U. S., 483, 488.)

The date of appointment of an officer as specified in his commission, where such date is subsequent to the date of the vacancy he was appointed to fill, is conclusive upon the accounting officers, who have no authority to allow pay from a prior date. (9 Comp. Dec., 612, citing *U. S. v. Vinton*, 28 Fed. Cas. No. 16624, and 4 Op. Atty. Gen., 603. See act of March 4, 1913, 37 Stat., 892.)

The action of the President, by and with the advice and consent of the Senate, in advancing an officer of the Navy on the retired list under the provisions of the act of June 29, 1906 (34 Stat., 554), is not conclusive upon the accounting officers where it subsequently appears that the officer did not [in the opinion of the accounting officers] possess the qualifications necessary to entitle him to such advancement under the law. (14 Comp. Dec., 169.) [In this case, the question was whether the officer was retired for any of the causes mentioned in the act cited; the Comptroller first held, April 30, 1907, that he was not; subsequently, on September 20, 1907 (14 Comp. Dec., 162), the Comptroller reversed his previous decision, and held that the officer was retired for disability originating in line of duty, which was one of the causes mentioned in the act under consideration; thereafter it was held by the Attorney General in a similar case, that he could not agree with the decision of the Comptroller last cited, but concurred in the opinion of the Judge Advocate General that the officer was not retired for disability originating in line of duty (27 Op. Atty. Gen., 221). Thereupon, the Comptroller of the Treasury reopened the case and followed the opinion of the Attorney General, reversing his own last previous decision. 15 Comp. Dec., 584; 97 S. and A. Memo., 1004. This final decision of the Comptroller was upheld by the Supreme Court in *Morse v. U. S.*, 229 U. S., 208.]

**Navy Department may decline to furnish information to accounting officers.**—The Navy Department maintains that the promotion of officers of the Navy and the determination of all questions relating thereto, including the qualifications of the officer, the existence of the vacancy, and the application of section 1505, Revised Statutes, are matters exclusively within the jurisdiction of the Navy



Department, whose action thereupon is not subject to review by any other executive department of the Government or office thereof. The Navy Department accordingly would not furnish the Auditor for the Navy Department with certain information which he requested for the evident purpose of reviewing and possibly overruling the action taken by the department in the case presented. (File 26260-347; C, Oct. 20, 1909.)

In another case, the Navy Department declined to furnish the auditor with papers concerning a claim for payment of death gratuity under the act of May 13, 1908 (35 Stat., 128); holding that the law cited reposes the responsibility for payment of said gratuity in the Paymaster General, under the Secretary of the Navy; that accordingly the decision of the Paymaster General as to the facts involved is necessarily conclusive; and inasmuch as the facts in the particular case showed that the beneficiary named by the deceased was not entitled to payment, the matter was regarded as closed by the Navy Department's decision to that effect, which was not subject to review by the Auditor for the Navy Department. It was also asserted in this case that the accounting officers have no jurisdiction to consider a claim for payment of death gratuity until the Paymaster General has acted upon and allowed same; and when a claim is allowed by the Paymaster General, this establishes claimant's right and he is entitled to demand payment without being required to establish his claim anew to the satisfaction of the accounting officers. (File 26543-66, Sept. 8, 1911; compare 22 Comp. Dec., 532; file 26543-148; see also 20 Comp. Dec., 93.)

**The policy of the Navy Department has been to disapprove the submission to the Comptroller of the Treasury of specific questions involving administrative matters under its own jurisdiction, and the department has not been inclined to invite controversy by specifically requesting his decision upon questions which the law places under the cognizance of the Secretary of the Navy.** (File 11112-476, Feb. 20, 1915.)

**The Comptroller's decision upon a question of law involved in the settlement of accounts under his cognizance, is not binding upon the Navy Department in taking action upon matters under its cognizance, even though the identical question of law may be involved.** There are many authorities to this effect. (File 26254-1451:11, Apr. 12, 1915, citing cases.)

**Comptroller's decision as to validity of a Navy regulation held not binding on the Navy Department, but said regulation is binding on the accounting officers** (30 Op. Atty. Gen., 376, 171 S. and A. Memo., 3611, noted under secs. 161 and 285, R. S.)

A paragraph in the "Regulations Governing the Organization and Administration of the Naval Reserve Force, 1917," article 406, chapter 4, authorizing enrollment of aliens who are citizens of countries friendly to the United States and who have declared their intention to become citizens of the United States, held inconsistent with law and men enrolled in ac-

cordance therewith not entitled to pay and allowances. (Comp. Dec., Oct. 29, 1918, file 28550-470:3.) This decision modified and the regulation in question held to be valid as being specifically authorized by act of May 22, 1917 (40 Stat., 84), overlooked when said regulation was held to be invalid. (Comp. Dec., Nov. 1, 1918, file 28550-470:5.)

**Citizenship of enlisted men.**—Where the Bureau of Navigation decided, after consideration of all the evidence in the case, that a Chinaman who was an enlisted man in the Navy, was a citizen of the United States, and changed his birthplace and citizenship on the department's records accordingly; and the Auditor for the Navy Department, upon a question of pay, decided, after consideration of the same evidence, that it was not sufficient to establish the fact of his birth in the United States; it was held by the Navy Department that the decision of the accounting officers is not in any sense binding upon the Navy Department in its determination of the citizenship or identity of an enlisted man, and that no new evidence having been obtained, the decision of the Bureau of Navigation would not be reopened. (File 26252-56, Feb. 1, 1910.) [Subsequently the Comptroller of the Treasury reversed the auditor's action upon consideration of the same evidence. (Comp. Dec., Mar. 12, 1910, file 26254-424.)]

**Status of personnel question under Navy Department.**—The Navy Department regards the status of an officer of the Navy, under his orders, as a question of fact for its determination, and not that of the accounting officers. (See 12 Comp. Dec., 563, 566; 9 Comp. Dec., 826; 29 Ct. Cls., 403; 16 S. and A. Memo., 145.) Accordingly, held that, upon the facts stated, an officer of the Navy was not detached from his vessel while in a naval hospital under treatment. This being so, he clearly comes within the decisions of the Comptroller of the Treasury and the Court of Claims, which entitle him to sea pay when not detached from his vessel, and a decision of the Comptroller of the Treasury in the specific case was not necessary. (File 26254-2, Apr. 29, 1908. See also 21 Comp. Dec., 539, noted below under "(B) Secretary of War.")

"If men are properly enlisted in the naval service, it is not material to the accounting officers in the settlement of their pay and allowances whether they are at all times lawfully engaged or not. That is a matter to be regulated by the Navy Department, and even though enlisted men be employed in service forbidden by law it is beyond the power of the accounting officers to withhold the pay and allowances which the law prescribes. The legality of such service can become material to the accounting officers only where the enlistments are made solely for such illegal purpose, and then only in passing upon the payments made under said enlistments." (6 Comp. Dec., 758.)

**Comptroller can not relieve officers of duty to obey orders.**—Officers of the Navy must at all times be governed by orders of the Navy Department, and the Comptroller of the Treasury has no jurisdiction to authorize a discre-

gard of such orders. The Navy Department having, by special order, limited the allowance to officers of travel, an officer performing travel governed by such order is guilty of impropriety in requesting the Comptroller of the Treasury to authorize him to exceed the allowance so fixed. His letter, which was addressed to the Comptroller through official channels, was accordingly placed on file in the Navy Department without reference to the Comptroller of the Treasury. (File 26254-58, June 27, 1908.)

The Navy Department fully understands that officers have a right at all times to make claim upon the auditor for any sums to which they may consider themselves legally entitled, and upon the auditor's disallowance to appeal therefrom to the Comptroller of the Treasury, the right of a pay officer in this respect being neither greater nor less than that of any other officer of the Navy. However, in cases where the officer has been guilty of direct disobedience of or negligent failure to comply with a lawful order of the Secretary of the Navy, it is obvious that the accounting officers can no more relieve him from responsibility for his conduct than they could in advance authorize a disobedience of such order. When an officer has been informed to this effect by the Navy Department, his action in thereafter taking the matter up with the accounting officers was not merely an impropriety on his part but was conduct indicative of a disposition to insubordination. (File 26251-3352:1, July 14, 1910.) [In this case the officer failed to comply with a general order requiring him to check the value of clothing outfit against an enlisted man on discharge. It was held by the Navy Department that under the law full discretion was conferred upon the Secretary of the Navy as to whether or not clothing outfit should be checked on discharge, and that the Comptroller of the Treasury had no jurisdiction to relieve a pay officer from responsibility for failing to check the value of clothing outfit when required so to do by the Secretary of the Navy.]

**The accounting officers can not require a disbursing officer of the Navy to make a payment.** Such power is possessed only by the officer's superior. (File 26543-66, Sept. 8, 1911; see also sec. 285, R. S.; *Smith v. U. S.*, 24 Ct. Cls., 215; 10 Comp. Dec., 635.)

**Questions pertaining to the correct pay and allowances of officers of the Navy are placed by law under the jurisdiction of the accounting officers of the Treasury, and do not in general come under the cognizance of the Navy Department, which can not with propriety express an opinion upon a question similar to one pending before the Comptroller.** (File 26254-599, Jan. 4, 1911.)

If there is a balance due to officers of the Navy, the matter is one for adjustment between them and the accounting officers. The Navy Department can not be regarded as having such an interest in the adjustment of individual accounts as to warrant its appealing to the Comptroller of the Treasury in such cases, and feels that to do so in certain cases would set a bad precedent, following which numerous individual officers might thereafter endeavor to have the Navy Department prosecute their

claims. [Letter, August 19, 1912, file 26254-1003, to the Auditor for the Navy Department, in reply to the latter's suggestion that the Secretary of the Navy appeal to the Comptroller of the Treasury for revision of certain accounts in which errors in calculation were made, and the Comptroller had declined to make revision on his own motion at the suggestion of the auditor.]

The Navy Department can not be regarded as having such an interest in the adjustment of individual accounts as to warrant an appeal to the Comptroller of the Treasury; the matter is one for adjustment between such individuals and the accounting officers. (File 26254-431:1, May 4, 1910.)

#### (B) *Secretary of War.*

**The decisions of the War Department should be regarded by the Treasury Department as establishing matters of fact concerning the military relations which exist between the Government and the officers; but upon the facts as thus determined by the War Department, all questions of law involving the financial relations existing between the Government and the officers, and the financial obligations of the Government to the officers must be determined and decided by the accounting officers of the Treasury.** (*Parkhurst v. U. S.*, 29 Ct. Cls., 403.)

**The records of the War Department** (apart from opinions and conclusions of the officer having the custody thereof) are the best evidence of an officer's status in the service; but if the record does not disclose the facts essential to the accounting officers administering the law they may accept from other sources the necessary competent evidence. (*Northrup v. U. S.*, 45 Ct. Cls., 50; see also *Brewington v. U. S.*, 39 Ct. Cls., 399; and act Apr. 19, 1910, 36 Stat. 324, making "the decision of the War Department" conclusive in certain cases.)

**It is the province of the War Department to decide military questions which relate to the cause or manner of severance from the service of officers and enlisted men of the Army; and where that department has determined as a fact that an officer's services ended by the acceptance of his resignation the record of that fact will be accepted as correct by the Comptroller of the Treasury in the adjustment of the claim for pay and allowances in case of the officer.** (21 Comp. Dec., 539.)

"It is peculiarly the province of the War Department to make deductions of fact from the records of military service of which that department is the natural and legal custodian, and to decide military questions which relate not only to the entrance into service but also the cause or manner of severance from service of officers and enlisted men." (21 Comp. Dec., 539, 547.)

**Reason or wisdom of orders to officers cannot be reviewed by accounting officers.**—Where the accounting officers held that the War Department had no authority to send a surgeon to the International Medical Congress at London at the expense of the Government, this decision was reversed by the Court of



Claims, which held that the President himself, or through the War Department, may direct the movements of all officers of the Army, and to whatever place and on whatever business connected with the military service he may order them to proceed, they are bound to obey, at least when such order is not forbidden by law. And in such case the officer is entitled to mileage. It is not for the accounting officers to inquire into the reasons nor to take exceptions to the expediency and wisdom of the orders of the President or of a department when issued within the scope of their authority. Section 191, Revised Statutes [act July 31, 1894, section 8 (28 Stat., 208)], relates only to matters of accounting in the Treasury Department and of ascertaining the balance in each particular account which shall be drawn for the Treasurer. Before the enactment of the provisions of that section, it had been the practice of the President and the heads of departments to interfere and give directions to the accounting officers in the matter of settling accounts, and to change or attempt to change the balances stated by them. The accounting officers resisted the practice, and the controversy, in different forms, was several times referred to the Attorney General, who advised that the President was without such authority, but that the heads of departments, especially the Secretary of the Treasury, did have the power from the nature and general duties of their offices. (Citing 1 Op. Atty. Gen., 624, 678, 705; 2 Op. Atty. Gen., 303, 652; 5 Op. Atty. Gen., 87, 630.) The act was passed apparently to settle conclusively that long standing controversy between executive officers, and to prevent the interferences of others in the settlement of accounts by the accounting officers. (Citing McKee's Case, 12 Ct. Cls., 554.) It makes conclusive upon the executive branch of the Government only the "balances" stated by the latter officers, and their "decision thereon," for the purpose of determining for what amounts, if any, warrants may be drawn on the Treasury. It does not make such decisions conclusive upon the head of a department in the exercise of his discretion as to orders to be issued to his subordinates in such connections as the one now under consideration. (Billings v. U. S., 23 Ct. Cls., 179; file 26254-1451:11, April 12, 1915.)

**The accounting officers are not authorized to inquire into the wisdom, expediency, or necessity of assigning an officer to a command above that pertaining to his grade; but it is within their authority to inquire whether the order of assignment to higher command was carried into effect according to law, and to what extent the officer performed the service to which he was assigned.** (Glenn v. U. S., 37 Ct. Cls., 254.)

**Legal acts of Secretary are conclusive.**—Whatever may be the legal prerequisites of brevet commanders in the Army, their existence is to be presumed from the order or decision of the Secretary of War assigning or determining those commands. That being a legal presumption is conclusive, and the fact must be regarded by the Auditor and Comptroller as established by and according to the

Secretary's decision and orders. Acts done by the Secretary of War within the peculiar and legitimate sphere of his official duty are to be taken and understood as rightly done, and to preclude all collateral inquiry by accounting officers. (5 Op. Atty. Gen., 386, quoted approvingly in Billings v. U. S., 23 Ct. Cls., 179.)

**Army Regulations binding on accounting officers.**—Army Regulations issued pursuant to the explicit provisions of a statute, and in execution thereof, when sanctioned by the President, have the force of law, and are conclusive upon the accounting officers of the Treasury; accordingly, when an officer of the Marine Corps presents with his account an authentic document or certificate of his having commanded a post or arsenal, for which an order has been issued from the War Department in conformity with the provisions of the Army Regulations, allowing double rations, his right to them is established, nor can they be withheld without doing him a wrong for which the law gives him a remedy. (U. S. v. Freeman, 3 How., 566.) For other decisions concerning executive regulations, see note to section 161, Revised Statutes.

**Accounting officers refused to allow compensation for expert employed by authority of Secretary of War at a trial by court-martial.** It was held by the Court of Claims, that the employment of experts before a court-martial is within the legal and proper discretion of the Secretary of War; and his order to employ and pay them is official authority to an officer who, in the ordinary discharge of his duty, makes such payments, and protects him from the summary remedy of having his pay stopped. (In re Maj. William Smith, 24 Ct. Cls., 209.)

**The accounting officers have no jurisdiction to review a decision of the Secretary of War that a soldier did not serve honestly and faithfully.** Except in cases of deserters, the act (June 16, 1890, 26 Stat., 157), makes the Secretary of War the judge as to what misconduct shall constitute a failure to render honest and faithful service within the meaning of the laws relating to retained pay therein specified. The Secretary of War having decided that a soldier did not serve honestly and faithfully, he is not entitled to the retained pay therein specified. (3 Comp. Dec., 557.)

The accounting officers have no authority to review the action of the War Department refusing to discharge a soldier for disability and requiring him to purchase his discharge as a condition precedent to his release from the service, prior to the date on which he was entitled to his discharge. (2 Comp. Dec., 546.)

**In the absence of fraud or plain error,** a finding by the military authorities as to the cause of disease and the period of absence from duty on account thereof, is conclusive upon the accounting officers with reference to stoppage of pay in the accounts of an officer or enlisted man so absent. (20 Comp. Dec., 69.)

**The powers of the Secretary of War,** and the authority which had been attempted to be exercised by subordinate officers of other



departments of reviewing and overruling the decisions of the Secretary of War upon military questions and matters arising in the administration of the War Department, were considered at some length in War Department Circular of November 2, 1901; and the decision of the Secretary of War (Mr. Root) was stated therein as follows: "The department will not hereafter furnish copies of records or statements from them to enable officers or employees of other executive departments to review decisions made by the War Department upon purely military questions, or to make independent decisions with regard to such questions." [This decision of the War Department was quoted by the Navy Department, October 20, 1909 (file 26260-347(C)), and September 8, 1911 (file 26543-66), in cases in which the Auditor for the Navy Department requested information for the evident purpose of reviewing and possibly overruling decisions of the Navy Department upon questions of a purely military nature.]

The War Department does not find it necessary or desirable to decide for the information of the Comptroller whether a former officer of the Army is regarded as having left his command without proper authority, when the records disclose that the War Department had previously determined that the officer's service terminated by acceptance of resignation, and that this decision was not followed by the auditor. (21 Comp. Dec., 540.)

The promotion of a civilian employee by the Secretary of War is not ordinarily open to question, but where it is patent upon its face that the increase of pay was to be temporary and merely for the purpose of accomplishing indirectly something that could not be accomplished directly, namely, to antedate an increase of pay, the accounting officers are warranted in refusing to recognize such promotion as having any legal effect. (23 Comp. Dec., 6.)

(C) *Miscellaneous.*

**Approval of expense accounts.**—Where the execution of a statute is committed to the head of a Department, subject to the President's approval of rules and regulations prescribed pursuant thereto, with no other restriction than that certain expenses be proper and necessary and approved by the Secretary, held that the approval of the Secretary of an account of expenses pursuant to said act is conclusive evidence that they were proper and necessary, unless it appears that their allowance was procured by fraud, or that they were incurred in violation of an act of Congress or of public policy; and that, if the law be held to require that the accounts be audited and passed by the accounting officers, then in auditing those accounts they would have been bound to regard the action of the Secretary in allowing certain expenses, as final. (U. S. v. Johnston, 124 U. S., 236, 252.)

It is impossible to suppose that Congress intended that every account, after being approved by the Secretary, should be subject to review by some subordinate officer of the Treasury, or even by the courts, and to be

disallowed merely because in the judgment of that officer or of the courts, such expenses should not have been incurred. (U. S. v. Johnston, 124 U. S., 249, 250.)

Under a law providing that accounts of chief supervisors of elections were to be approved by the circuit or district court, such approval determines the fact that the services were necessary and proper, and of a character sufficient to entitle the officer to the fee prescribed by law for such services; but such approval of the court does not establish the accuracy of the account, nor take it, *as an account*, out of the supervision of the accounting officers whose duty still remains to examine it, revise it, verify its calculations, scrutinize its vouchers, and ascertain its true amount; nor will the approval of the court render the Government liable, either before the accounting officers or in the Court of Claims, for a service or expenditure not authorized by law. (Dennison v. U. S., 25 Ct. Cls., 322.) But the approval of the court in such a case is *prima facie* evidence of the correctness of the items of the account; and in the absence of clear and unequivocal proof of mistake on the part of the court, it should be conclusive. (U. S. v. Jones, 134 U. S., 483, 488.)

**Discretion of Secretary not reviewable.**—Where Congress intrusts to a public officer the expenditure of a sum of money for a designated purpose, without restriction or limitation as to details, the exercise of judgment and discretion by such officer cannot be reviewed by the accounting officers or the courts, for the mere purpose of determining whether or not the authority was exercised in the most judicious manner. If the officer acts in good faith, keeps within the general scope and authority of the law, and does not undertake to apply the money to other and wholly different purposes from those designated in the act of appropriation, his action cannot be questioned in the final settlement of the accounts, especially as against an innocent employee who, though bound by the law, has no discretion to exercise over the propriety of the orders of his employers. (Plummer v. U. S., 24 Ct. Cls., 519.)

It is the theory, and a wise one, upon which the final adjustment and settlement of accounts in the Treasury Department is founded, that the officers who pass upon them shall be wholly distinct from those who expend the money or incur the liabilities. For the manner in which these latter officers perform the trust imposed upon them, they alone are responsible; the Comptroller is only charged with the duty of seeing that they keep within the law. (Waters v. U. S., 21 Ct. Cls., 38, citing Longwill's Case, 17 Ct. Cls., 288; Ridgway's Case, 18 Ct. Cls., 715; etc.)

The Comptroller of the Treasury has no power to review, revise, or alter items expressly allowed by statute, nor items of expenditure or allowances made upon the judgment and discretion of other officers charged with the duty of expending the money or of making the allowances. His duty extends no further than to see that the officers charged with that duty have authorized the expenditures or have made the allowances. (U. S. v. Waters, 133 U. S., 215; followed 17 Comp. Dec., 263.)

[This statement of the power of the Comptroller applies as well to the Auditors, who also have no power to disallow an item when the question involved in the expenditure is one committed to the judgment and discretion of the head of the Department. (2 Comp. Dec., 336.)]

**The duty of the accounting officers in respect to pensions** is to audit the accounts relating to them, and to certify the balances. But this does not require that they shall take from the Commissioner of Pensions the jurisdiction with which the law clothes him to construe and administer the pension laws, or interfere with his instructions to pension agents. On the contrary, they are bound to conform to his decisions. (17 Op. Atty. Gen., 339, 340; 20 Op. Atty. Gen., 178.)

**The propriety of keeping every branch of the executive government within its legal sphere** is clear. The confusion which would unavoidably arise, if one branch was permitted to usurp the functions of another, would be disastrous to the proper working of the whole. When, therefore, a "difference of opinion" arises between several executive departments as to the construction of the law, the primary question is as to which is vested with the determination and responsibility of the question. That one only can have jurisdiction over the subject-matter is plain. (20 Op. Atty. Gen., 178, 180.)

**Whenever a statute gives a discretionary power to any person**, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. In such a case, the courts must ordinarily assume that discretion conferred upon the officer was properly exercised. (*Mullan v. U. S.*, 140 U. S., 245; *Martin v. Mott*, 12 Wheat., 19, 31.)

It is fully recognized by the accounting officers that where a particular power or discretion has been conferred upon the head of a department or other officer, either by express law or by necessary implication, his acts within the scope of that power, or in the exercise of that discretion, if not prohibited by law, can not be set aside or called in question, either by the accounting officers or by the courts. (5 Comp. Dec., 410, 416; 14 Comp. Dec., 143.)

Where the law (sec. 4577, R. S.) makes it the duty of consular officers to provide subsistence and transportation for destitute seamen, the question whether an American seaman is or is not destitute within the meaning of the law is one to be determined by the consular officer to whom he applies for relief, and the latter's decision will, in the absence of fraud, be conclusive; and it is not within the power of the accounting officers to overrule his determination of that fact. (3 Comp. Dec., 40; 26 Op. Atty. Gen., 631.)

**Where an act of Congress vests in the Secretary of the Interior authority** to determine the method of disbursing money due to Indians, either by paying them in cash or "by expending the same for their benefit, in such manner as he may deem for their best interests," and the Secretary has made such determination, all other officers are bound by this exercise of power by him. (2 Comp. Dec., 642.)

When the Secretary of the Interior in the exercise of a reasonable discretion determines as to the validity of title to rights and property to be acquired by him under the provisions of law, his decision is conclusive upon the accounting officers. (12 Comp. Dec., 691.)

**When the head of a Department approves a voucher for the traveling expenses of an employee at sea**, containing items for wine or carbonated waters used for the specific purpose of controlling seasickness, and not merely as a beverage, with knowledge that the liquids are so used, the amount thereof must be allowed. It is for the head of the Department to determine within his discretion whether such items are a necessary expense of travel under the circumstances. (1 Comp. Dec., 404.)

**When an item is properly payable from an appropriation for contingent expenses**, and is not prohibited by any law or regulation, the discretion of the officer charged with the duty of expending said fund is not subject to review by the accounting officers upon any question as to the necessity or advisability of his expenditures. The responsibility for incurring an expense, as to the necessity or expediency of which opinions may differ, must be assumed by the officer under whose control the appropriation is put. [The question in this case related to purchasing portraits of his predecessors for the office of a public officer. The Comptroller said: "I know of no provision of law prohibiting the purchase of portraits or pictures for your office. The responsibility for the payment of this bill, as an incidental expense of your office, rests with you."] (2 Comp. Dec., 80.)

**In the absence of any law or regulation fixing the amount** which may be allowed for the expenses of a secret agent, the matter is entirely within the discretion of the Postmaster General in the management of the postal service; and his decision as to the amount of expenses, when that discretion is properly exercised, is conclusive upon the accounting officers of the Treasury. (2 Comp. Dec., 336, citing *U. S. v. Waters*, 133 U. S., 208.)

**Where a statute provides that "heads of Departments shall cause this rule to be enforced,"** it is made their duty, and not that of the accounting officers, to determine questions of fact arising thereunder. (20 Comp. Dec., 10.)

**It has frequently been urged upon the accounting officers that it is their duty to recognize the action of the heads of Departments in approving claims as conclusive.** (14 Comp. Dec., 143.) The general provision of law governing the manner of settling claims against the Government is found in section 236, Revised Statutes. Such being the general law upon the subject of the settlement of claims against the United States, special acts, according to established rules of interpretation, must, if possible, be construed in harmony therewith. It is not to be supposed that Congress intended to repeal or modify the general law by implication. Such an intention should clearly appear by apt words to that end, or by necessary intentment. When it is designed to vest in some officer the power of determining certain questions of fact, it is usual to employ clear and unmistakable words



to convey that intention. Where the approval of an expenditure is intended to be binding upon the accounting officers it is usual to so state. Where no such intention is expressed, the mere approval by an administrative officer carries with it no such conclusive force. When a statute designates an officer to determine some question of fact, and expressly or by necessary implication shows that such determination is to be conclusive, the validity of such action, in the absence of fraud, can not generally be questioned by officers of another department of the Government; and this is also true where the matter is one involving the exercise of discretion vested in an administrative officer. But in the determination of facts arising in the ordinary course of business in the several executive departments, the decisions of the administrative official, though of great weight, are not regarded by the accounting officers as conclusive. The opportunity for administrative officials to pass intelligently upon questions of fact arising in their departments is much greater than is that of the accounting officers, and it has accordingly been the purpose of legislation upon the subject of accounts to throw upon the administrative officers the burden of making such decisions. But this is far from admitting that the accounting officers are relieved of the responsibility of inquiring for themselves into the facts of any particular case. Claims bearing the approval of administrative officers and heads of departments are frequently disallowed. The approval of the head of the department does not control the action of the accounting officers, except to cause a disallowance of an expenditure not so approved, if such approval is required by law. (4 Comp. Dec., 587.)

**Items of expense bearing the approval of heads of departments are disallowed every day by the accounting officers.** The latter are required to examine accounts to see if the expenditures are allowed by law. If of such a character that the approval of the head of department is essential, items not approved are promptly disallowed. Only in rare instances, and when so provided by law, is the approval of the head of a department final and conclusive upon the accounting officers. Congress has provided that the approval of vouchers for its contingent expenses shall be final and conclusive, and that the certificate of the Speaker of the House of Representatives as to salary and mileage shall be final. When it is intended that the accounting officers shall not examine and audit accounts upon their merits—that is, determine questions of law and of fact arising therein—plain language can be and is employed by Congress. It is not to be understood that the Comptroller will refuse to give to the approval of the head of a department or of an independent commission that effect which is contemplated by law. Ordinarily that approval is conclusive as to the propriety of expending an appropriation for the purpose for which it is applicable. Nor does the Comptroller in an ordinary case question the necessity for travel made by an employee or the reasonableness of expenses incurred for subsistence, etc. But when the proper execu-

tive officer fixes a limit to such expenses, no employee's voucher for a greater amount will be passed, unless the regulation is waived by the one who made it. (4 Comp. Dec., 270, 271.)

**Nothing short of a clear intent, unequivocally expressed in a statute, will warrant a court in holding that Congress has intended to create an extraordinary exception to the accounting system of the United States, where no need of such exception exists and where none is in terms declared.** (Dennison v. U. S., 25 Ct. Cls., 321.)

**Evidence required.**—The accounting officers are charged with the duty of settling the public accounts. The character and quantity of evidence needed to establish a fact must be determined by them; otherwise, the conclusion reached, which is "final and conclusive upon the executive branch of the government," will be in effect that of the officer who decides what evidence shall go to them. (20 Comp. Dec., 93.)

It is understood so generally as hardly to need a statement now, that the accounting officers do audit the public accounts upon the evidence furnished largely by the certificates of fact made by responsible government officers. But with very few exceptions, made by law, the certificate or approval of an officer is not intended to be conclusive upon the accounting officers. The latter must render a decision upon the legality of a claim for payment or for credit in an account, upon the facts. Upon them is cast the responsibility for securing the facts. Upon other officers is the duty of furnishing upon request such evidence, in addition to certificates, as may be called for by the accounting officers. This right to call for evidence is inseparable from the duty to audit and to decide questions of law and of fact. It must be exercised reasonably, as must any public duty, but the accounting officer, and not an administrative officer incurring liabilities or expending the public funds, must determine the extent to which it is necessary to go in any particular case in collecting the evidence to establish what he believes to be an essential fact as a basis for decision. (20 Comp. Dec., 93.)

**In the expenditure of all public moneys it is the invariable rule to require that accounts shall be furnished itemized as far as practicable, in order that the accounting officers may properly audit them.** The law may permit the exercise of discretion in the use of public funds, without dispensing with the usual requirement of an itemized account showing fully for what purposes the money has been expended. (4 Comp. Dec., 159; 4 Comp. Dec., 271.)

#### VI. SET-OFF.

**Duty of accounting officers.**—Where a person is both debtor and creditor of the United States in any form, the officers of the Treasury Department in settling the accounts not only have the power but are required, in the proper discharge of their duties, to set off the one indebtedness against the other, and to allow and certify for payment only the balance found due on one side or the other. Provisions on this subject are contained in section 1766, Revised



Statutes, and act of March 3, 1875 (18 Stat., 481); but the right to set off exists in such cases independently of those special statutory enactments, and is founded upon what is now section 236, Revised Statutes. (*Taggart v. U. S.*, 17 Ct. Cls., 327.)

It may be regarded as settled law, in accordance with the uniform practice, that the accounting officers have jurisdiction, in proper cases, in the course of settling accounts in the Treasury Department, to set off one debt against another, when a claimant is both debtor and creditor. (*McKnight v. U. S.*, 13 Ct. Cls., 306; affirmed 98 U. S., 179. See also *The Schooner Henry*, 35 Ct. Cls., 393; *Bonafon's case*, 14 Ct. Cls., 489; *Howe's case*, 24 Ct. Cls., 170; *Labadie v. U. S.*, 33 Ct. Cls., 476.)

It is but the exercise of the common right, which belongs to any creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him. (*Gratiot v. U. S.*, 15 Pet., 336.)

I understand it to be the duty of the officers of the Government to enforce this right, as is constantly done by the courts. (Comp. Dec., Apr. 23, 1908, 86 S. and A. Memo., 638.) [In this case the Comptroller held that the indebtedness of naval court-martial prisoners should be set off against pay due such prisoners. In a previous decision the Comptroller based this ruling upon section 1766, Revised Statutes, which provides in part that "no money shall be paid to any person for his compensation who is in arrears to the United States." Subsequently that section was construed by the Attorney General as applicable only to persons who were in a relation of trust to the Government, as contractors or disbursers of the public funds, and as such would have in their hands sums or balances of the public funds for which they were bound to render accounts and to turn the balance of moneys into the Treasury; and that it did not apply to ordinary debtors of the Government. (26 Op. Atty. Gen., 77.) This opinion of the Attorney General was brought to the Comptroller's attention by the Secretary of the Navy, in connection with the indebtedness of court-martial prisoners. The Comptroller, however, in the decision above cited, adhered to his former conclusion, holding that the result was the same irrespective of whether or not the matter was covered by section 1766, Revised Statutes.]

**Extent of right.**—The duty of the accounting officers in matters of set-off has been frequently recognized by the courts. But it does not extend beyond the interest of the United States in matters involved in the settlements. In the absence of statutory authority, neither the accounting officers of the Treasury nor any other public officer can make the United States agents or trustees for the collection of private debts between citizens, nor make contracts in relation to the taking of security for the payment of debts due to the Government so as to bind the United States for any breach of the contract by neglect or otherwise. (*Taggart v. U. S.*, 17 Ct. Cls., 327.) [In this case it was held that where the debtor assigned to the Government as collateral security for his debt, a judgment against a third person to whom the

Government was indebted in a larger amount, the accounting officers were not bound to collect the whole amount of the judgment and pay the balance to the claimant; but performed their full duty in setting off against the Government's indebtedness to the third person so much of said judgment as was necessary to discharge the indebtedness of the claimant to the United States.]

Where a judgment creditor assents to the application of the amount of his judgment, or a part thereof, to the payment of a debt due from him to the United States, the action of the Auditor in settling his accounts accordingly will not be disturbed upon a subsequent objection by him to such action. (7 Comp. Dec., 585; act Mar. 3, 1875, 18 Stat., 481.)

**Allowances made by mistake of law.**—The Government has authority to withhold money due an officer of the Navy to whom an erroneous payment has been made, notwithstanding that the payment was found to be erroneous only upon a construction of law made after the settlement of an account in which payment was allowed. (8 Comp. Dec., 24, citing *Wis. Cent. R. R. Co. v. U. S.*, 164 U. S., 190, 211; but see *Hedrick's Case*, 16 Ct. Cls., 103. For other cases, see below "VIII. REOPENING OF ACCOUNTS.")

**Gratuities.**—Extra pay in the nature of a gratuity, due at the time of his death to an officer of the temporary force of the Navy for the war with Spain, may be properly set off against a debt arising from an overpayment of pay to such officer, but not against a debt arising otherwise. [In this case the officer at the time of his death was entitled to the extra pay, but had not received it; however, any pay which he had received in excess of the amount to which he was entitled, was regarded as to that extent a prepayment of the extra pay.] (6 Comp. Dec., 353; explained, 8 Comp. Dec., 310; see also *Semple v. U. S.*, 24 Ct. Cls., 422.)

However, where extra pay in the nature of a gratuity was granted by statute to officers of the Navy who served during the war with Mexico, and the statute specified the beneficiaries to whom the gratuity should be paid in event of the death of the officer before receiving same, held that indebtedness of an officer to the United States, even because of overpayments of pay, could not be set off against the gratuity due his next of kin, the officer in this case having died before the statute was passed and therefore not having acquired any right to the extra pay at the time of his death. Under such circumstances the extra pay under the statute was in the nature of a direct grant to the officer's heirs. (8 Comp. Dec., 308.)

Where an appropriation was made to be paid to the administrator of a decedent's estate, said decedent having been an original sufferer from the French spoliations, the Secretary of the Treasury was not authorized to withhold the amount of decedent's indebtedness to the United States, the appropriation having been made for the benefit of the next of kin of the original sufferer. (5 Comp. Dec., 866.)

**Indebtedness under a previous enlistment.**—Where an enlisted man is discharged from the Navy in debt to the United States, and is subsequently reenlisted, the amount of his

indebtedness on discharge from the previous enlistment may legally be set-off against pay coming due him under his current enlistment. (Comp. Dec., Apr. 7, 1914, 158 S. and A. Memo., 3037.)

However, where a man is discharged from the Navy upon expiration of enlistment without having been fully checked the amount of a summary court-martial sentence, because of sufficient pay not having accrued to satisfy the forfeiture, the amount of such sentence which remained unchecked at date of discharge, can not be set off against pay coming due the man under a subsequent enlistment in the Navy. His discharge from the previous enlistment operated as a remission of the unexecuted portion of the forfeiture, and the man was not, therefore, indebted to the United States on that account. (Comp. Dec., Apr. 6, 1914, 158 S. and A. Memo., 3035; file 7657-241, June 26, 1914.)

Where a man is paid all money coming due him under his current enlistment, without setting off his indebtedness to the United States under a former enlistment, the pay officer is not liable to checkage if it appear that he had no knowledge of the man's indebtedness accruing under a former enlistment; and there were not sufficient facts to put him on his inquiry. Presumption of indebtedness in such case does not arise from knowledge of former service, and it is not the duty of a pay officer in the Navy to investigate upon reenlistment the account of a man under a previous enlistment. (Comp. Dec., Apr. 7, 1914, 158 S. and A. Memo., 3037.)

**Set-off of unadjudicated claim by the Government.**—The salary of a public officer fixed by statute and indisputably due him, can not be withheld because of alleged indebtedness by him to the Government, denied by the officer, and never adjudicated against him by any court. The officer in such case can require payment of his lawful salary by mandamus proceedings, the question of his indebtedness being a matter for judicial determination upon suit against him by the Government. (*Smith v. Jackson*, 241 Fed. Rep., 747; affirmed 246 U. S., 388.)

**Set-off against Government.**—An officer of the Government who has in his hands money of the United States is entitled to retain it by way of set-off where the United States are indebted to such officer for fees of office; and on a motion made on the part of the United States to commit the officer for failure to pay over the money in his hands, he will be permitted to show that the United States are indebted to him, and if this be shown it is a sufficient cause why he should not be attached. (*U. S. v. Mann*, 26 Fed. Cas. No. 15716, per Marshall, Circuit Justice. See also *U. S. v. Ripley*, 7 Pet., 24; compare *U. S. v. Giles*, 9 Cranch, 236.)

#### VII. EFFECT OF ACCOUNTING OFFICERS' ACTION.

**Conclusive upon Executive Departments.**—For a long series of years, extending from the first organization of the Treasury Department to 1868, there was a controversy as to how far, if at all, the balances and action of a Comptroller were subject to revision and

change by the heads of departments or the President. Upon the advice of several Attorneys General, the question was practically settled against the right of the President, and in favor of the Secretary of the Treasury. But the Comptrollers yielded with reluctance, and in 1868 an act was passed which was afterwards incorporated into the Revised Statutes as section 191, which provided that the balances certified by the Comptrollers "shall be conclusive upon the Executive branch of the Government and be subject to revision only by Congress or the proper courts." (*McKnight v. United States*, 13 Ct. Cls., 307, affirmed 98 U. S., 179; *McKee v. U. S.*, 12 Ct. Cls., 553, reversed 97 U. S., 233.) The object of this law (sec. 191, R. S.) appears to have been to settle a long-standing controversy and render the Comptrollers independent in their action of the heads of departments in certifying balances of accounts, and not to give to the decisions of those officers the character of awards absolutely binding upon the United States. It will be observed that the independence of the Comptrollers provided for by that act only extends to the certified balances which cannot be changed or modified by other executive officers; but in all other matters of accounting, the superiority of the power of the Secretary of the Treasury is not modified but is left as it was before. [Section 191, Revised Statutes, was repealed and superseded by the act of July 31, 1894, section 8 (28 Stat., 208), which also provided that "the Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the reexamination of any account."] (*McKnight v. U. S.*, 13 Ct. Cls., 307, affirmed 98 U. S., 179.)

Before the enactment of the provisions of that section (191, R. S.), it had been the practice of the President and heads of departments to interfere and give directions to the accounting officers in the matter of settling accounts, and to change or attempt to change the balances stated by them. The accounting officers resisted the practice, and the controversy in different forms was several times referred to the Attorney General, who advised that the President was without such authority, but that the heads of departments, especially the Secretary of the Treasury did have the power, from the nature and general duties of their offices. (1 Op. Atty. Gen., 624, 678, 705; 2 Op. Atty. Gen., 303, 652; 5 Op. Atty. Gen., 87, 630.) The act was passed apparently to settle conclusively the long-standing controversy between executive officers, and to prevent the interferences of others in the settlement of accounts by the accounting officers. (*McKee's case*, 12 Ct. Cls., 554, reversed 97 U. S., 233.) It makes conclusive upon the executive branch of the Government only the "balances" stated by the latter officers and their "decision thereon," for the purpose of determining for what amounts, if any, warrants may be drawn on the Treasurer. It does not make such decisions conclusive upon the head of a department in the exercise of his discretion as to orders to be issued to his subordinates. (*Billings v. U. S.*, 23 Ct. Cls., 179; see file 26254-1451:11; and see above, V (A)).



The law devolves upon the accounting officers of the Treasury the duties of examining, settling and adjusting all accounts, claims and demands in which the United States are concerned, either as debtors or as creditors, and to certify balances arising thereon, and their exercise of such duties, including the weighing of evidence, the construction of statutes, and the application of general principles of law in connection therewith, is exclusive unless otherwise provided by special statute. (14 Comp. Dec., 143.) [But see note to section 356, Revised Statutes, "Jurisdiction, Accounting Officers and Attorney-General."]

Where the action of the Comptroller of the Treasury is final and conclusive upon the head of an executive department, the latter's action in directing that the settled accounts be reexamined by a subordinate is of no validity. (Baltimore & Ohio R. Co. v. U. S., 34 Ct. Cls., 504.)

The act of July 31, 1894, section 8, provides that balances certified by the auditors shall be "final and conclusive upon the executive branch of the Government," except that a revision thereof by the Comptroller of the Treasury may be obtained within a year, "whose decision upon such revision shall be final and conclusive upon the executive branch of the Government;" and "that the Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the reexamination of any account" (28 Stat., 207); the same section also authorizes the Comptroller of the Treasury to render a decision in advance of payments, "which decision, when rendered, shall govern the auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement." (28 Stat., 208.)

**Not conclusive upon Congress or Courts.**—The action of the accounting officers of an executive department was never considered as a conclusive determination when the question was brought before a court of justice. The law intended to make the decisions of the accounting officers final and conclusive so far as the executive department was concerned, but not to affect the powers of the legislature or of the judiciary. The action of the accounting officers is not conclusive in a suit between the United States and the individual. (U. S. v. Harmon, 147 U. S., 274, 275.)

Whatever the conclusiveness of executive acts so far as executive departments are concerned, as a rule of administration, it has long been settled that the action of executive officers in matters of account and payment cannot be regarded as a conclusive determination when brought in question in a court of justice. (Wisconsin Cent. R. R. Co. v. U. S., 164 U. S., 205, citing U. S. v. Harmon, 43 Fed. Rep., 560, 147 U. S. 268; Hunter v. U. S., 5 Pet., 173; U. S. v. Jones, 8 Pet., 387; U. S. v. Bank of Metropolis, 15 Pet., 377.)

Accounts and balances stated and certified by the accounting officers are neither conclusive nor prima facie evidence of the indebtedness of the Government, in a judicial proceeding, nor can an action be brought upon them. (McKnight's case, 13 Ct. Cls., 292; affirmed 98 U. S., 179.)

A settlement of an account is not consummated and payment authorized until a warrant has been prepared and issued to the payee or his attorney; the different processes of accounting are not consummated beyond recall until the claimants receive the negotiable drafts of the Treasurer; such drafts are understood to constitute new contracts on the part of the Government, in which the previous claim, upon which they issue, are merged. The certificates and orders made previous to the issuing of the drafts are departmental proceedings. Parties gain no new rights thereby into which their former rights of action are merged, and upon which actions can and must be brought as upon an award. Accordingly, *held* that a certificate of the Comptroller of the Treasury, certifying the amount of a balance due to a Government contractor, and a warrant addressed to the Treasurer, duly countersigned and registered for payment of the same, did not constitute conclusive evidence in a suit in the Court of Claims to recover an unpaid balance of the original amount so certified to be due by the Comptroller, but which was withheld upon order of the Secretary of the Treasury as a set-off on account of a debt due the United States. Further, *held* that the decision of the accounting officers in favor of the claimant is not even prima facie evidence of indebtedness when suit is brought in the Court of Claims. The functions of that court are to hear and determine original claims and demands against the United States, founded on contract, statute, or Departmental regulation, and not upon the reports and action of accounting officers made for purposes altogether different from that of submission to any court. Claimants are required to establish their rights in the Court of Claims by original and legal evidence, and are not to rely upon reports and certificates of officers who pass upon claims without the formality of such evidence and proofs as are required in courts of justice; certificates made upon ex parte affidavits, often of claimants and interested parties; documents not proven under oath, and reports of other officers not sworn to, and other evidence satisfactory to them, and which under all the circumstances may be trustworthy to a greater or lesser extent, as is the unsworn and hearsay evidence on which most of the business of daily life outside of the courts is conducted, but which may be wholly incompetent in the Court of Claims. The statement of accounts upon such evidence, by accounting officers who have no other knowledge of the facts, would be an unsatisfactory foundation on which to rest a prima facie case against the United States when parties come into court to set up and enforce their legal rights. (McKnight v. U. S., 13 Ct. Cls., 292; affirmed 98 U. S., 179.)

[However, there are certain classes of claims, where the claimant's rights and the liability of the United States are not fixed until the discretion of some designated officer has been exercised thereon, and an allowance made by him; in all these cases, the officer charged by statute with the duty of allowing or disallowing the claim in his discretion, or according to his judgment, must first act before the claim-



ant's right is fixed. Then when claimant has obtained a decision of such officer in his favor his demand, of which that decision is a *prima facie* if not conclusive determination, if the officer acts within the scope of his authority and in accordance with the provisions of law, may be the foundation of an action in the Court of Claims or may pass the accounting officers and be paid by drafts upon warrant duly issued, as in other cases. (*McKnight v. U. S.*, 13 Ct. Cls., 308, 309 affirmed 98 U. S., 179; file 26543-66, Sept. 8, 1911.)

The idea that the Government is finally concluded by the result at which the accounting officers of the Government may arrive, would be regarded as a novelty within and without the several departments. (*Chorpenning v. U. S.*, 94 U. S., 397.)

In the case of an unliquidated claim against the United States, where such claim is settled by the accounting officers, and the claimant accepts payment under such settlement without objection, this is a complete discharge of his demand against the Government, and he can not thereafter recover a further sum by suit in the Court of Claims. [In this case, there was a contract by which the Government was bound to pay in accordance with the terms agreed upon, but the entire price to be paid was not fixed, a part being contingent and being made to depend upon a variety of circumstances.] (*Baird v. U. S.*, 96 U. S., 430.)

In case of a liquidated debt or demand, part payment of the amount due cannot discharge the liability of the Government for the balance, any more than in similar transactions between individuals. (*Baird v. U. S.*, 96 U. S., 430.)

For other cases, see "IV. Jurisdiction, Accounting Officers, and Federal Courts."

#### VIII. REOPENING OF ACCOUNTS.

- (A) *In general.*
- (B) *Mistake of fact.*
- (C) *Mistake of law.*
- (D) *Subsequent administration.*
- (E) *Same administration.*

See note to section 417, Revised Statutes, "Power of Secretary to review acts of predecessor."

The Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the reexamination of any account. (Act July 31, 1894, sec. 8, 28 Stat., 207.)

Any person whose accounts may have been settled, the head of the executive department, or of the board, commission, or establishment not under the jurisdiction of an executive department, to which the account pertains, or the Comptroller of the Treasury, may, within a year, obtain a revision of an account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the executive branch of the Government. (Act July 31, 1894, sec. 8, 28 Stat., 207.)

#### (A) *In general.*

After the expiration of a year from the date of an auditor's settlement of an account, which has not been revised by the Comptroller of the Treasury, under the established rules for reopening accounts the auditor would be authorized to reopen his previous settlement upon newly discovered material evidence. (4 Comp. Dec., 303; 8 Comp. Dec., 24.)

Where the account of a disbursing officer of the Navy has been settled by the accounting officers, it is not competent for the auditor at an after time, upon an allegation of error or omission, or for other cause, to open the account, restate it, and upon the account thus restated to institute proceedings by a warrant of distress against the debtor. If, after the account had once been stated and closed, the accounting officers could open it again, there would be no limitation either as to the length of time or the frequency with which such action might be taken. Also, if it be competent to open the account in favor of the United States, the converse of the proposition must be equally true, upon the principles of justice. A doctrine which leads to such consequences can not be sound. The Government is not without ample remedy though this power should be denied to the auditor, as it could recover in an action at law any sums of which it had been unjustly deprived. (*Ex parte Randolph*, 20 Fed. Cas. No. 11558, opinion of Barbour, J., concurred in by Marshall, Circuit Justice.)

The accounts of paymasters never being closed, the accounting officers may secure immediate payment of balances due from them and yet open and readjust their accounts at any time. (*Stevens v. U. S.*, 41 Ct. Cls., 344.)

Similarly, the account of a retired officer is never closed from the date of his retirement. Overpayments made at one time by mistake can be corrected and properly charged against credits coming in afterwards. (*U. S. v. Burchard*, 125 U. S., 176.)

No settlements are agreed upon as final between a contractor and the United States, where the contract relations still continue and have continued consecutively since the first overpayment; although it is true that accounts have been stated by the accounting officers and payments made quarterly. For the purpose of rectifying mistakes, the items of the several statements upon which the auditor certifies balances due for carrying the mails, ordinarily and in the absence of special circumstances, may be regarded as running accounts, at least while the parties continue in the same dealings between themselves. (*Duval's case*, 25 Ct. Cls., 46, 58; approved *Wisconsin Cent. R. R. Co. v. U. S.*, 164 U. S., 190, 211.)

#### (B) *Mistake of fact.*

It is established by numerous decisions on the subject that where payments are made by a public officer in violation of law, but through mistake of fact as distinguished from mistake or error of law, the Government has a clear right to recover back the overpayment. (*Duval's case*, 25 Ct. Cls., 58.)

(C) *Mistake of law.*

1. OPINIONS OF ATTORNEYS-GENERAL.
2. COURT OF CLAIMS DECISIONS.
3. DECISIONS OF SUPREME COURT.
4. MISCELLANEOUS DECISIONS.

[In private dealings between individuals the general rule has been established that money paid with full knowledge of all the facts involved, but through a mistaken view of the law applicable to such facts, can not be recovered back, the rule being founded on the legal maxim "*Ignorantia legis neminem excusat*". In some cases it has been broadly stated that this rule applies to overpayments made by a public officer, the same as in the case of private parties; while in others it has been stated that upon grounds of public policy the rule has no application whatever to the Government, which can not be bound by the mistakes of its officers, whether of fact or of law. However, an examination of the authorities will disclose that the question whether or not the rule shall be applied to overpayments made by public officers has been governed by the facts of the particular case. Thus, where the circumstances are such that the one receiving the overpayment could not, *ex aequo et bono*, be required to refund same to the Government, the general rule has been applied; while, on the other hand, when the situation was reversed, it has been held that the Government was entitled to recover back the amount of the overpayment. (See file 26254-2160:2, June 7, 1917, Sec. Navy to Comp. Treas.)

[It is also settled that where the one receiving the overpayment does not acquiesce in the settlement, but himself seeks to have the account reopened and corrected to his advantage, the Government has the right, at the same time, to have corrected errors committed in the settlement, to its prejudice, although due to mistake of law. (See 2 Ency. U. S. Rept., 515.)

[The decisions on this subject are set forth below.]

## 1. OPINIONS OF ATTORNEYS GENERAL.

Where the Government has voluntarily paid money in consequence of an erroneous construction of the law, adopted without due reflection and examination of the Treasury Department, I do not recommend that the claimant be called upon to refund the moneys he has received. I am accustomed to advise acquiescence in what is done as done. (6 Op. Atty. Gen., 568.)

But if claimant insists on having his accounts opened to readjust them, with a view to correcting errors committed to his prejudice, it would be right, and the duty of the accounting officers, to correct at the same time any error committed to the prejudice of the Government. The effect of this will be that if the accounts are reopened at the instance of the claimant, the readjustment must be complete and legal in all its parts, and he may be called upon to account for the money which he

has received heretofore by mistake of law. (6 Op. Atty. Gen., 576.)

Where an account has once been duly adjusted, settled, and closed by the proper officers, with full knowledge of all the facts and where no errors in calculation have been made, it has been repeatedly held that it can not be reopened without express authority of law, and must be regarded as final and conclusive. No subsequent decision upon a doubtful or controverted question of law, essentially modifying a prevailing rule which was applied to the settlement of an account, would authorize the reopening of it, with a view to a readjustment of it in accordance with such decision. (12 Op. Atty. Gen., 386.)

Upon principles of administrative policy which ought to be considered firmly established, settlements made between an officer of the Army and the accounting officers in the matter of his pay are conclusive upon the executive department of the Government; and such settlements can not be reopened years afterwards, upon the allegation that overpayments had been made to the officer with full knowledge of all the facts, but under a mistaken view of the law, and that such overpayments should be recovered by set-off against allowances coming due and to which he is legally entitled. (17 Op. Atty. Gen., 448; followed, 19 Op. Atty. Gen., 439.)

The principle that every one is assumed to know the law can be relied on by the citizen in his defense when sued by the Government for an overpayment made to him under a mistake of law; and the Government may equally rely on the same principle as a defense when sued by the citizen. Accordingly, a settlement of the accounting officers can not be reopened on application of claimant because of a subsequent decision of the Supreme Court holding the accounting officers' construction of the law to be erroneous. If it had happened that the claimant had, through a mistake of law of the accounting officers of the United States, been paid too much instead of too little, it would seem quite clear that the excess could not be recovered back, if the principle applicable to a similar case between individuals should govern; and the Supreme Court of the United States have said that, "with a few exceptions, growing out of considerations of public policy, rules of law which apply to the Government and to individuals are the same. There is not one law for the former and another for the latter." (19 Op. Atty. Gen., 439, citing *McKnight v. U. S.*, 98 U. S., 186.)

A voluntary payment made with full knowledge of all the facts and circumstances of the case, although made under a mistaken view of the law, can not be revoked and the money so paid can not be recovered back; this principle applies in the case where an officer of the Army was allowed a claim for service pay by the accounting officers, and the Supreme Court thereafter held all such allowances to be without authority of law. Afterwards the officer filed a claim for certain pay and allowances to which he was justly entitled, and it was proposed to set off against the amount of this claim the sum which had been improperly



paid him. In such case the settlement could not be reopened upon the ground that it proceeded on a mistaken view of the legislation covering the subject involved. (21 Op. Atty. Gen., 325, explaining 19 Op. Atty. Gen., 439.)

**In the case of an ignorant and unlettered private soldier** the rule of law should apply, a multo fortiori (for much stronger reasons), which has been invoked for the relief of educated and experienced officers of the Army, viz, that payments made by mistake of law can not be recovered by the Government. (21 Op. Atty. Gen., 323.)

**Navy pay officers are not responsible** for payments made by mistake of law, if such payments are made on certified pay rolls, as required by the Navy regulations, and the items are fair on their face. (Op. Atty. Gen., May 19, 1915, 171 S. and A. Memo., 3611.)

## 2. COURT OF CLAIMS DECISIONS.

**The rule that the Government can not be held responsible for the mistakes of its agents** includes mistakes of law as well as mistakes of fact, and extends to a mistake of law committed by the accounting officers in adjusting and allowing an account of one supposed to be but not an officer of the Government. (McElrath v. U. S., 12 Ct. Cls., 202.) (See decision of Supreme Court affirming this case, noted below under "3. Decisions of Supreme Court.")

**Where one has received money to which, ex aequo et bono, he is not entitled,** the general rule of law and equity is that an action lies for its recovery. The only exception to this rule is that where between individuals the money has been paid by a mistake of law it can not be recovered; and we think this exception is not applicable to the United States. (McElrath v. U. S., 12 Ct. Cls., 217.)

**The United States do not guarantee either the capacity, the integrity, or the care of their officers,** and are not responsible for their deficiencies in either. As the reason of this rule is the public protection, it overrules individual equities; and as this rule is founded on "a great public policy" established for the public protection, it does not admit of exceptions but includes mistakes of law as well as mistakes of fact, because the one may be as injurious to the public interests as the other. (McElrath v. U. S., 12 Ct. Cls., 216.)

**It is manifest the petitioner has no equitable claim to the money** he received by mistake of the accounting officers. He was legally dismissed as an officer of the Marine Corps, and seven years later there was an attempted revocation of the order of dismissal, and claimant then tendered his resignation, which was accepted. He rendered no service to the Government after his dismissal and he intended to render none. But the accounting officers allowed him half pay for this period, when he was not in law or in fact an officer of the Marine Corps, and he thereupon sued for the difference between half pay and full pay for said period. Under such circumstances the Government is entitled to recover the unauthorized payment by counterclaim. (McElrath v. U. S., 12 Ct. Cls., 217.) (The court gave judgment

against McElrath because the accounting officers exceeded their jurisdiction in allowing him pay when he was not in office and rendered no service, and therefore had no legal claim to the money paid him and could not in conscience retain it. McKee v. U. S., 12 Ct. Cls., 562, dissenting opinion Richardson, J.)

**The principles stated in McElrath's case might not apply** if the Comptroller were to give a construction to a statute different from that which the judiciary might subsequently give, whereby the officer would receive greater pay or larger allowances than the law intended. In such a case I am not prepared to say that the Government could reopen the transaction and recover back the overpayment as money paid without legal authority in its official agents. But in this case the claimant was an utter stranger to the Government. No business or official relations subsisted between him and the Government and he had no claim or account against the Government for the Comptroller to adjust. (McElrath v. U. S., 12 Ct. Cls., 218, concurring opinion, Nott, J.)

**McElrath was not an officer in the Navy,** nor had he been for any part of the period over which his pretended account extended; nor had he rendered any service as such; nor had any legal relations between him and the Government existed. The Comptroller therefore acted ab initio without authority; and his mistake, whether of law or of fact, that he had jurisdiction of the pretended account, gave him none. There is a very broad difference between that case and one in which the Comptroller has jurisdiction of the account, where the claimant is a veritable officer of the Navy, but through an incidental mistake of law in the settlement of the account, the officer is allowed some item of pay which in the judgment of the courts should have been disallowed. (McKee v. U. S., 12 Ct. Cls., 532.)

**In the case of disbursing officers the policy of the Government** has been to acknowledge no payments as made on its behalf save those which were authorized by law. If a disbursing officer makes a mistake of law, the payment is disallowed when his accounts come in for settlement and charged to him as if the money were still in his hands. But the Comptrollers of the Treasury are not disbursing officers. Within the proper functions of their offices, they are above the review of the highest executive authority and their decisions are subject only to judicial revision. (McKee v. U. S., 12 Ct. Cls., 532, 533.)

**Settlements made by the accounting officers of the Government** with its creditors, untainted by fraud, and free from mistake of fact, possess the element of finality. (McKee v. U. S., 12 Ct. Cls., 532.)

**A practical construction going back to the very beginning of the Government** is overwhelming, and can not be overturned with safety by anything short of statutory amendment. From the first day the Treasury did business until this case was brought (1876), it is safe to say that the Government has never gone into any court as plaintiff and sued the party to whom money was paid in mistake of law. The courts have been open to the Gov-



ernment ever since courts were established and it has never been supposed that such an action could be maintained. If the Government has such power, all the settlements which present and past comptrollers have ever made will be liable to be reopened, as no statute of limitations runs against the Government. Such a ruling can not promote the public welfare but would be prolific in public mischiefs. (*McKee v. U. S.*, 12 Ct. Cls., 533, 534.)

**The true rule to be laid down is this:** Where the accounting officers of the Treasury are authorized to settle an account or claim against the Government, a mistake of law committed incidentally in the adjustment will not, after payment of the balance found to be due, affect the finality of the settlement or entitle the Government to recover back the money paid in mistake of law *ex aequo et bono*. (*McKee v. U. S.*, 12 Ct. Cls., 534.) Reversed on other grounds (*U. S. v. McKee*, 97 U. S., 233).

**The question to be determined in these cases,** when public money is paid away by public officers with full knowledge of the facts but in mistake of law upon an honest interpretation and decision, is how far those officers have been intrusted by the Government with the authority to decide, because if they have no such authority, the Government would under no circumstances be bound by their decisions. (*McKee v. U. S.*, 12 Ct. Cls., 552; dissenting opinion, Richardson, J., concurred in by Drake, Ch. J.)

**The accounting officers stand in different relations to the Government from disbursing officers** who have only ministerial duties to perform; they must of necessity decide questions of law and fact which arise in the settlement of accounts. To some extent the Comptrollers are quasi judicial officers. (*McKee v. U. S.*, 12 Ct. Cls., 553, 554, opinion Richardson, J.)

**Public policy requires** that the Government should not be bound by the mistakes of its officers; it also requires that the settlements of the accounting officers, within the exact scope of their authority, when followed by payment and *acquiesced in by the claimants*, should be held final and conclusive on the Government unless impeached by fraud, or mistake of fact, as in like cases between individuals. Such settlements involve vast accounts of collectors and disbursing officers under heavy bonds; the complicated accounts of persons furnishing supplies to the Army, Navy, and other branches of the Government; the accounts of individuals dealing in thousands of ways with the constituted authorities, as well as accounts for the salaries of public officers to whom it is often of great importance to know exactly how much they can depend upon receiving. (*McKee v. U. S.*, 12 Ct. Cls., 557, opinion Richardson, J.)

**If nothing could be regarded as settled against the Government** in the adjustment of accounts except what is determined by the final judgment of the courts, it would follow that whenever a new construction is placed on a statute different from that which the same or a former comptroller adopted in the settlement of earlier accounts, although there were

no frauds, mistakes or concealments of facts, and the parties had dealt with the Government on the basis of the former rulings, and had long acquiesced in the settlement, the accounts might nevertheless be reopened and the parties brought into court upon a claim for money paid them in mistake of law. And as no statute of limitations bars actions brought by the United States, any account settled since the first organization of the Government might be so reopened. (*McKee v. U. S.*, 12 Ct. Cls., 559, opinion Richardson, J.)

**If claimant does not acquiesce in the settlement** but brings an action in the Court of Claims to recover an additional amount, he can not, in law or justice, well complain if the United States on their part no longer acquiesce in the payment, and, in defending themselves, have the account opened throughout, stated anew, and a balance found against him, when it appears that the officers of the department exceeded their powers in exercising jurisdiction over the claim and mistook the law applicable thereto, and the money paid was not legally due to the claimant and could not have been recovered by an action in the Court of Claims or otherwise, and can not in conscience be retained by him. Had claimant himself not disturbed the settlement by bringing suit, the United States would, no doubt, have abided by the action of their officers as they have done before in hundreds of similar cases where executive officers have acted upon a mistaken interpretation of statutes, honestly and fairly arrived at. And because the United States do not in their ordinary business disturb settlements in which the claimants acquiesce, it does not follow that they have no right to recover back payments illegally made on those which the claimants themselves reopen by actions bringing the Government into court. (*McKee v. U. S.*, 12 Ct. Cls., 560, 561, 564, opinion Richardson, J.; *Baxter v. U. S.*, 32 Ct. Cls., 75, 80.)

**The Government can no more recover back money paid under a mistake of law than an individual**, in a case where a settlement made by the parties in good faith, under a mistaken construction of the statute, is sought to be reopened by the United States without the consent of the other party for the purpose of recovering back money paid under it for services actually rendered at an honest valuation. [In this case it was decided that settlements made with a supervisor of internal revenue, crediting him with clerk hire paid to a person who was at the same time a gauger, and who could not, therefore, legally receive additional compensation as clerk, were conclusive on the judicial department of the Government; that there was nothing contrary to good morals or conscience in the payment or receipt of the money; and that in allowing the payments the Treasury officers acted strictly within the scope of official authority and discretion.] (*Hedrick's case*, 16 Ct. Cls., 88, distinguishing *McElrath's case*.)

**"No money shall be paid to any person for his compensation who is in arrears to the United States, until he has accounted for and paid into the Treasury all sums for which**

he is liable \* \* \* (Sec. 1766, R. S.) This section applies only to cases in which the party is liable to the United States. But the parties are not liable to the United States for moneys paid and received under the circumstances shown in this case (payments made in good faith, by mistake of law, for services actually rendered). (Hedrick's case, 16 Ct. Cls., 104.) (See "VI. SET-OFF" above.)

Where payments sought to be recovered back were made in good faith, with no improper purpose on either side, with full knowledge of all the facts but under a mistaken construction of the law, it is quite clear that, if the controversy were between private parties, the money under such circumstances could not be recovered back. The fact that the transactions took place with an agent of the Government does not change the rule. (Arthur v. U. S., 16 Ct. Cls., 433, citing and following U. S. v. Freeman, 3 How., 564.)

Salary paid by mistake of law can not be recovered back by the Government, even though the recipient was not, in law, a public officer; where both parties proceeded in good faith, and the claimant did occupy the position, in fact, of an officer on the retired list of the Army, and as such was subject to the disqualifications of law, and the performance of such duties as by law are incident to that relation. This case differs from McElrath's case in the essential particular that the claimant has made no effort to disturb the settlement; and also in that McElrath rendered no service and occupied no relation to the Government either in law or in fact. (Miller v. U. S., 19 Ct. Cls., 353.)

Where money is paid in mutual mistake of law, and the court can not restore the parties to their original position before the happening of their mutual error, it will leave them in statu quo. (Palen v. U. S., 19 Ct. Cls., 389; Bennett v. U. S., 19 Ct. Cls., 388.)

The doctrine does not have such general application to public officers as to individuals, that money paid can be recovered back when paid in mistake of fact and not of law. Public officers use the funds of the people, while individuals deal with their own money, where nobody but themselves suffer for their ignorance, carelessness, or indiscretion. In the former case, the elements of agency, and the authority and duty of officers and their obligations to the public, of which all persons dealing with them are bound to take notice, are always involved. (Barnes v. District of Columbia, 22 Ct. Cls., 336, 394; approved Wis. Cent. R. R. Co. v. U. S., 164 U. S., 212.)

A manifest wrong and injury will be caused by a subsequent judicial interpretation which leaves the party without redress in a case where an executive department charged with the administration of a statute has previously given to it an interpretation upon the faith of which the party acts. For if the construction afterwards adopted had been given the statute by the executive officers at the proper time, the claimant might have declined to enter into the contract and to perform the service. (Wis. Cent. R. R. Co. v. U. S., 27 Ct. Cls., 468; explaining and distinguishing U. S. v. Ala. R. R. Co., 142 U. S., 621, noted below.)

A different question is presented in a case where the claimant had no option but to render the service which formed the basis of the claim; as where a land-grant railroad had to perform the required service for the Government and to perform it under the terms prescribed by Congress. If the executive department in that case had originally given the statute the same construction afterwards given it by the court, the claimant could not have declined to perform. The only effect which the original interpretation of the department caused in this case was that the claimant, by reason of overpayment, had in its possession money which it was not entitled to have, and that it had the use of such money without the payment of interest. Therefore no injury was done the claimant in such a sense as to prevent the proper construction now being given the law. (Wis. Cent. R. R. Co. v. U. S., 27 Ct. Cls., 468.) (See decision of Supreme Court in this case, noted below.)

When money is paid after careful consideration by the proper officers of the Government, upon settlements made by the accounting officers, it can not be recovered back because paid in mistake of law. (Hillborn v. U. S., 27 Ct. Cls., 547; 28 Ct. Cls., 237.)

"Whatever doubt may have existed heretofore as to the right of the Government to maintain a counterclaim for money paid by its agents or officers without authority of law or paid through a misconstruction of the law has now been removed by the decision in the case of the Wisconsin Central Railroad Company v. United States, 164 U. S., 190, 210 (affirming the decision of this court)." (Baxter v. U. S., 32 Ct. Cls., 75, 81; Wis. Cent. R. Co. v. U. S., noted below.)

"It has been held in many cases that payments made in good faith through a mistaken interpretation of the law may not be recovered." (Downes v. U. S., 52 Ct. Cls., 327.)

### 3. DECISIONS OF SUPREME COURT.

The settlements of the accounting officers have always been considered as conclusive upon the Government, but not as against the individual. The law expressly provides that rejected items may be allowed by the court. Accounts amounting to many millions annually come under the action of these officers. It is therefore of great importance to the public and to individuals that the rules by which they exercise their powers should be fixed and known. (U. S. v. Jones, 8 Pet., 375.)

What has been done under an erroneous construction of the law is binding upon the Government and can not be recalled to the pecuniary disadvantage of any officer who may have received pay and emoluments under such erroneous practice. (U. S. v. Freeman, 3 How., 564; followed Arthur v. U. S., 16 Ct. Cls., 433.)

If a credit has been given or an allowance made by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to to construe the law under which the allow-



ance was made, and to settle the rights between the United States and the party to whom the credit was given. (*U. S. v. Bank of the Metropolis*, 15 Pet., 377.) ["The mistake referred to in this citation was assumed and expressed to be a mistake of law, for the resort to the judicial tribunals was to be had 'to construe the law under which the allowance was made.' And we think that the citation is an authoritative declaration of the Supreme Court that where a payment is made to an officer by a mistake of law in a department, a suit may be maintained by the United States for the recovery of the money paid." (*McElrath v. U. S.*, 12 Ct. Cls., 217.) "The view thus indicated that executive decisions in cases like the present are not binding on the courts, has been repeatedly affirmed and steadily adhered to." (*Wis. Cent. R. R. Co. v. U. S.*, 164 U. S., 207.)]

**Had the appellant rested upon the settlement of his account** by the proper officers of the Government, his right to invoke the general rule (that payments made under a mistake of law can not be recovered back) would have been entitled to more consideration than it can now receive. If the general rule applicable in such cases would preclude the Government from reclaiming money which had been paid under a mistake of law simply, that rule is inapplicable under the circumstances disclosed in the present case. Upon receiving the amount awarded to him by the representatives of the Government, he distinctly announced his purpose not to abide by their settlement of his accounts; but in disregard thereof to demand an additional sum upon the basis of full pay and allowances. \* \* \* This suit itself invites the court to go behind that settlement to reexamine all the questions arising out of appellant's claim for full pay and allowances and to correct the error which he insists was committed to his prejudice by the accounting officers of the Government. The Government, declining to plead the former settlement in bar of suit, meets him upon his own chosen ground, and insisting that its officers, misapprehending the law, paid to him out of the Treasury money to which he was not legally entitled, asks as we think it may rightfully do judgment for the amount thus improperly paid to him. (*McElrath v. U. S.*, 102 U. S., 441; distinguished *Hedrick's case*, 16 Ct. Cls., 88, *Miller's case*, 19 Ct. Cls., 353, *Walker v. U. S.*, 139 Fed. Rep., 409, 418; affirmed 148 Fed. Rep., 1022; followed *U. S. v. Dempsey*, 104 Fed. Rep., 197.)

**The Government is not bound by the action of the Navy Department** in delivering old materials to a contractor at an agreed price, considerably less than their real value. Such action was without warrant of law, and in a suit brought by the contractor for payment on his contract, it was held that, the material having been disposed of, he should be required to account for it at its true value. The fact that the account of appellant was settled by the officers of the Navy Department by charging him with the value of the old material at the agreed price is no bar to the recovery of its real value by the Government. The whole transaction was illegal and the appellant is chargeable with knowledge of the fact. (*Steele v. U. S.*, 113 U. S., 128.)

**When the remedy of the party against the Government is barred** by the statute of limitations, and the remedies of the United States on the other side are intact, owing to its not being subject to any statute of limitation, settled accounts, where the United States has paid the balance found due, can not be opened and set aside on account of technical irregularities in the allowance of expenses, or merely because some of the prescribed steps in the accounting, which it was the duty of a head of a department to see had been taken, have in fact been omitted. (*U. S. v. Johnston*, 124 U. S., 236, 254.) [This observation of the Supreme Court illustrates the danger of the doctrine which the Government pushes in a case where it attempts to recover back overpayments, years after final settlement, on the ground that such overpayments were made by mistake of law. (*Walker v. U. S.*, 139 Fed. Rep., 409, 417.)]

**When an officer brings suit in the Court of Claims to recover a balance claimed to be due him on his pay account**, the Government by counterclaim can recover overpayments made to him on that account. Whether the Government can in any case be precluded from reclaiming money which has been paid by its disbursing and accounting officers under a mistake of law is a question which it is not now necessary to decide any more than it was in *McElrath v. U. S.* (above). This is a case where the disbursing officer, supposing that a retired officer of the Navy was entitled to more than it turns out the law allowed, overpaid him. Certainly under such circumstances the mistake may be corrected. The action was brought to recover a balance claimed by the officer to be due him on pay account from the date of his retirement. In reality the account had never been closed and was always open to adjustment. His pay was fixed by law, and the disbursing officers of the department had no authority to allow him any more. If they did, it was in violation of law, and he has no right to keep what he has thus obtained. (*U. S. v. Burchard*, 125 U. S., 176.)

**Where money has been paid under a mistake of law it can not be recovered back.** It is denied that this rule is applicable to the United States upon the ground that the Government is not bound by the mistakes of its officers, whether of law or of fact; but inasmuch as the claimant's name was placed in the retired list of the Army by the Secretary of War in apparent compliance with the provisions of law, and as he acted as an officer de facto (in fact), we are not inclined to hold that he has received money as salary which, ex aequo et bono, he ought to return. (*Badeau v. U. S.*, 130 U. S., 439.)

Where payment was made by the United States in consequence of a misrepresentation by the defendant to the Secretary of the Treasury which created a misapprehension on his part of the nature of the defendant's services, the amount so paid ought in equity and good conscience to be returned to the United States. (*Sanborn v. U. S.*, 135 U. S., 271.)

**It is a settled doctrine of this court** that in case of ambiguity the judicial department will lean in favor of a construction given to a statute by the department charged with its

execution, and if such construction be acted upon for a number of years will look with disfavor upon any sudden change whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become *retroactive* and to require from him the repayment of moneys to which he had supposed himself entitled and upon the expectation of which he had made his contracts with the Government. (U. S. v. Ala. R. R. Co., 142 U. S., 621.)

Where a naval officer sues for a deficiency claimed to exist in his previous grade, and his contention is sustained, there may be deducted from the sum due him the amount of overpayments made in his present grade upon a difference of opinion as to the law. (U. S. v. Stahl, 151 U. S., 366.)

Where no peculiar circumstances appear to make such recovery inequitable and unjust, money paid in violation of law upon balances certified by the accounting officers generally may be recovered back by counterclaim or otherwise; the items of the several statements upon which the auditor certifies balances due for carrying the mails, ordinarily and in the absence of special circumstances, may be regarded as running accounts, at least while the parties continue the same dealings between themselves. This statement was made by the Court of Claims in a case in which the mistake was treated as one of fact, but the governing principle is the same in the present case which is one of misconstruction of law. (Wisconsin Cent. R. R. Co. v. U. S., 164 U. S., 211, quoting Duval v. U. S., 25 Ct. Cls., 46.)

As a general rule and on grounds of public policy the Government can not be bound by the action of its officers, who must be held to the performance of their duties within the strict limits of their legal authority, where, by misconstruction of the law under which they have assumed to act unauthorized payments are made. The question is not presented as between the Government and its officer, or between the officer and the recipient of such payments, but as between the Government and the recipient, and is then a question whether the latter can be allowed to retain the fruits of actions not authorized by law, resulting from an erroneous conclusion by the agent of the Government as to the legal effect of the particular statutory law under or in reference to which he is proceeding. (Wisconsin Cent. R. R. Co. v. U. S., 164 U. S. 210; followed U. S. v. Dempsey, 104 Fed. Rep., 197.) (In the decision of the Court of Claims in this case, noted above, it was pointed out that the claimant was not equitably entitled to retain the overpayments; and the Supreme Court's conclusion was, "that there is nothing on this record to take the case out of the scope of the principle that parties receiving moneys illegally paid by a public officer are liable, *ex aequo et bono*, to refund them.")

Where money has been paid without authority of law, and the Government has money of the same claimant in its hands, it is

not compelled to pay such money over and sue to recover the illegal payments; but may hold it subject to the decision of the court when the claimant sues. And in that way multiplicity of suits and circuity of action are avoided. (Wisconsin Cent. R. R. Co. v. U. S., 164 U. S., 211.) (See "VI. Set-Off" above.)

#### 4. MISCELLANEOUS DECISIONS.

Where the accounting officers have passed the account, and payment is made, it seems clear that the officer whose accounts are thus approved and paid can not afterwards be called upon for repayment. The Government's claim in such case could have no possible standing, except upon the ground of fraud or palpable mistake. (Tuthill v. U. S., 38 Fed. Rep., 538.) [This decision seems to approve the same doctrine which was applied by the Court of Claims in Hedrick's case, above noted. (19 Op. Atty. Gen., 441.)]

The United States may recover an overpayment made by mistake of law, with interest from the date when the officer's accounts were settled by the Treasury Department. (U. S. v. Dempsey, 104 Fed. Rep., 197.) [In this case an Army officer was, by mistake of law, paid commutation of quarters for a period during which he occupied a building provided by the United States for his occupancy and use, and which was suitable for an officer of his rank. The United States brought suit to recover the overpayment. The court said that the paymaster who paid the defendant the above sum of money could go no further in this matter than he was authorized by law. The law limited his powers. The Government was not bound when he exceeded the authority given him by the Federal statutes. The Government having provided the defendant with suitable quarters free of charge, the paymaster was not authorized to pay him this money. That under such circumstances, the following decisions maintain the rule that the Government may sue for and recover back this sum of money so paid—citing decisions of Supreme Court in McElrath v. U. S. and Wisconsin Cent. R. R. Co. v. U. S., noted above.] Compare U. S. v. Sanborn (135 U. S., 271).

Whatever may be the general rule, the United States stands upon no better footing than would a private citizen in a case where money has been paid by its officers under mistake of law, and the circumstances are such that the Government is not entitled, *ex aequo et bono*, to recover such money from the recipient. (Walker v. U. S., 139 Fed. Rep., 409; affirmed 148 Fed. Rep., 1022.) [In this case the money was paid to a United States marshal as fees, and in the course of his duty he "paid three-fourths of the amount of these fees to his deputies, from time to time as he made settlements, and retained the balance, as was his duty to do, under the law as then construed by every department of the Government which had acted or spoken on the subject." It was held that the Government could not recover either the amount paid to his deputies or the portion retained by the marshal, after years had elapsed



and the marshal had gone out of office, and was without remedy to recoup his losses, and during which time no objection had been made to such payments by the executive departments or by Congress, which continued to appropriate money therefor, even though the allowances may have been made under an erroneous construction of the law.]

Where, by mistake of law for which he was not responsible, an officer of the Navy was paid increased compensation as an appointee from civil life, when he was not, under the law as construed by the Supreme Court, entitled to such additional compensation, *held* that the Government could not recover the amount of the overpayment for the period from the date of his appointment until the time when his rating was corrected. (*U. S. v. U. S. Fidelity and Guaranty Co.*, 244 Fed. Rep., 310.)

The underlying principle of the decisions is that when the sovereign comes into court to assert a pecuniary demand against the citizen, the court has authority and is under the duty to withhold relief to the sovereign except upon terms which do justice to the citizen or subject as determined by the jurisprudence of the forum in like subject matter between man and man. (*Walker v. U. S.*, 139 Fed. Rep., 409, 413.)

It is not material whether the payments were in fact authorized by the existing statutes at the time they were made, if it appears that the transactions have been executed and closed, and Congress, the legislative power which could treat them as legal at that time and thereby make them legal, did treat them as legal at that time. (*Walker v. U. S.*, 139 Fed. Rep., 409, 416.)

It would seem the burden is on the Government to show that the accounts could be reopened without doing injustice to the citizen in a case where money has been paid to him as a public officer by mistake of law, and the settlements closed and executed before he went out of office, and he accepted them as finalities. (*Walker v. U. S.*, 139 Fed. Rep., 409, 417.)

When an officer accepts the final settlements made with the auditing department in full of his accounts, and does not commence suit against the Government to avoid its ruling as to any matters involved in those settled accounts, his conduct does not bring him within the principle of *McElrath v. U. S.* (noted above). His attitude does not, as did that of the plaintiff in *McElrath's* case, "invite the court to go behind the settlement." (*Walker v. U. S.*, 139 Fed. Rep., 409, 418.)

In general, the holding of the courts is that the Government is not bound by the acts of its officers or agents, but exceptions are made by the courts in cases where the circumstances are such that the refundment under compulsion of moneys so paid would be a violation of equity and good conscience. (Comp. Dec., July 17, 1914, 161 S. and A. Memo., 3303; Comp. Dec., Dec. 1, 1914, 165 S. and A. Memo., 3409; Comp. Dec., Mar. 26, 1915, file 26254-1748.)

Men who have furnished all the evidence of citizenship required by the administrative offi-

cers of the Navy, and who have accordingly been allowed the additional pay provided for citizens of the United States, have not received money "which in equity and good conscience they ought to be required to return to the United States." There is no principle of law which in such case requires the accounting officers to reopen, upon their own motion, accounts which have been settled and closed, although such payments would not be conclusive upon the Government if the men should seek, through the accounting officers or the courts, to reopen their pay accounts in order to secure something claimed to be due them under a new ruling or decision. (Comp. Dec., July 28, 1913, 149 S. and A. Memo., 2715. Where, contrary to these principles, the Comptroller holds an officer indebted for overpayments made by mistake of law, the Secretary of the Navy will not take any action tending to the collection of the amount from such officer, but should the Comptroller attempt to have suit brought against the officer the Secretary will present all facts in the case to the Department of Justice. (File 26254-2160:4, Aug. 7, 1917; see also 26254-2160:2, June 7, 1917.)

Where payments have been made under a long-continued practice of the administrative department, sanctioned by the accounting officers of the Treasury, payments so made by disbursing officers prior to the promulgation of a Comptroller's decision reversing the former construction of the law, if otherwise correct, will be passed to their official credit. (20 Comp. Dec. 182; 72 S. and A. Memo., 225; see also Comp. Dig., 295, 296.)

Errors of judgment in the application of legal rules to the facts which were before the accounting officers can not be corrected by any subsequent action of the accounting officers themselves. (Dec. of Second Comptroller, Sept. 9, 1885, quoted in 34 Ct. Cls., 490, 493, *Baltimore & Ohio R. Co. v. U. S.*) [In this case the accounts had been settled by a former administration.]

#### (D) Subsequent administration.

Can not generally reopen accounts settled by predecessors.—After a final settlement of a claimant's accounts by the Comptroller, the same can not be reopened by his successor in office, except to correct "mistakes in matters of fact arising upon errors in calculation, and in cases of rejected claims in which material testimony is afterwards discovered and produced." (*Balto. & Ohio R. R. Co. v. U. S.*, 34 Ct. Cls., 504; *U. S. v. Bank of the Metropolis*, 15 Pet., 377, 401; *Rollins and Presbrey v. U. S.*, 23 Ct. Cls., 123.) This has become the settled rule of administrative law. (*Balto. & Ohio R. R. Co. v. U. S.*, 34 Ct. Cls., 504, citing *Jackson v. U. S.*, 19 Ct. Cls., 505, 509.)

Except in cases of fraud, mistakes in calculation, or the filing of material new evidence, the disallowance of a claim by the Comptroller is final and conclusive and the case is *res judicata* (a thing adjudicated) in the department. (*Armstrong's case*, 29 Ct. Cls., 148, 169.)

The allowance of a claim by an auditor under a special act of Congress, followed by payment, can not be set aside by his successor. Where one auditor settles an account, his successors are bound by his decision. (5 Op. Atty. Gen., 97.)

It has repeatedly been held by the Court of Claims and by the Supreme Court that the final decision of a matter by a public officer is binding upon his successor, and that the right of an incumbent to review a predecessor's decision extends only to mistakes of fact arising from errors in calculation, and to cases of rejected claims in which material evidence is afterward discovered and produced. (Cotton case, 29 Ct. Cls., 207, 223.)

The right of a public officer to review a predecessor's decisions extends to mistakes in matters of fact arising from errors of calculation, and to cases of rejected claims in which material testimony is afterwards discovered and produced; but if a credit has been given or an allowance made by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to to construe the law under which the allowance was made and to settle the rights between the United States and the party to whom the credit was given. It is no longer a case between the correctness of one officer's judgment and that of his successor. A third party is interested, and he can not be deprived of a payment, on a credit so given, but by the intervention of a court to pass upon his right. (U. S. v. Bank of the Metropolis, 15 Pet., 401.)

It is well settled that the Comptroller has no right to review the decision of his predecessor upon a question of law, whether such decision be correct or erroneous. This principle has been so long recognized and exercised, as evidenced by numerous rulings of the Comptrollers, opinions of the Attorneys-General, and decisions of the courts, that citations are scarcely necessary. (20 Comp. Dec., 680, 687. See also 19 Comp. Dec. 110, and authorities there cited; compare 4 Comp. Dec., 697.)

By act of March 4, 1907 (34 Stat., 1356), relating to the payment of back pay and bounty in certain cases, it was provided that thereafter in all such cases, "the said accounting officers shall, in stating balances, follow the decisions of the United States Supreme Court or the Court of Claims of the United States after the time for appeal has expired, if no appeal be taken, without regard to former settlements or adjudications by their predecessors." (See *Leigh v. U. S.* 43 Ct. Cls., 387.)

(E) *Same administration.*

**May reopen accounts settled by themselves.**—"It has never been doubted that any public officer in the departments may correct his own errors, and open, reconsider, and reverse, in whole or in part, any case decided by himself." (Rollins and Presbrey's case, 23 Ct. Cls., 123.) [In this case, the officer's action did not purport to be a final settlement, and the case was treated by him as still pending.]

The accounting officers have a right to reopen accounts which have been settled by themselves, to correct errors either of law or fact, but they are not authorized to reopen accounts which had been settled by their predecessors except upon the production of newly discovered material evidence, or to correct mistakes of fact, or for fraud or collusion. (11 Comp. Dec., 459; followed 15 Comp. Dec., 584, 97 S. and A. Memo., 1004. But see above, "(C) *Mistake of Law.*") [Previously it had been decided by the Comptroller that the accounting officers of the Treasury are not authorized to reopen accounts for the purpose of correcting decisions upon questions of law subsequently held to be erroneous; and that to admit such a proposition would bring endless confusion into the settlement of accounts and substitute the judgment of one officer for that of another on doubtful questions of law (6 Comp. Dec., 91); and again, that it is an established rule that the accounting officers are not authorized to reopen accounts which have been settled, either by themselves or their predecessors, for the purpose of correcting decisions of law subsequently held to be erroneous (8 Comp. Dec. 24); but that "the Government has authority to withhold money due to an officer of the Navy to whom an erroneous payment has been made, notwithstanding that the payment was found to be erroneous only upon a construction of law made after the settlement of an account in which the payment was allowed; the burden is upon claimant to bring suit therefor and have the question of right determined by the courts. (8 Comp. Dec., 24, citing *Wis. Cent. R. R. Co. v. U. S.*, 164 U. S., 190, 211.)]

IX. MANDAMUS PROCEEDINGS TO COMPEL PAYMENTS.

**Mandamus will lie against an auditor** in the Treasury Department to compel the taking of such steps by him as may be necessary to accomplish the payment to a public officer of the salary of his office as fixed by law, where there is no dispute that the amount of such salary is lawfully due the officer, but its payment has been withheld in accordance with decisions of the Comptroller of the Treasury and contrary to an opinion of the Attorney General, on the ground that said officer was indebted to the United States, which alleged indebtedness was denied by the officer and had not been adjudicated in any court. (*Smith v. Jackson*, 241 Fed. Rep., 747; 246 U. S., 388.)

**The courts have no power to issue a writ of mandamus** commanding the Secretary of the Treasury to withdraw money from the Treasury to pay the claim of an individual. The only acts to which the power of the courts by mandamus extends are such as are purely ministerial—that is, which do not require the exercise of judgment or discretion—but whenever the right of judgment or discretion is left to an officer, he can not be controlled in its exercise by the courts. (U. S. v. Guthrie, 17 How., 284.)

The duties of the accounting officers are not merely ministerial. (20 Comp. Dec., 741.)



The suggestion that a court can command the withdrawal of a sum of money from the Treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States, is such that its simple statement must carry with it the most startling considerations and unavoidable negative; for it would occur, *a priori*, to every mind that a Treasury not fenced round and shielded by fixed and established modes and rules of administration but which could be subjected to any number or description of demands, assorted and sustained through the undefined and undefinable discretion of courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the Nation. The Government, under such a régime, or rather such an absence of all rule, would, if practicable at all, be administered not by the great departments ordained by the Constitution and laws, and guided by the modes therein prescribed, but by the uncertain, and perhaps contradictory, action of the courts in the enforcement of their views of private interest. (*U. S. v. Guthrie*, 17 How., 303; *State of Mississippi v. Durham*, 4 Mackey (D. C.), 238. See also *Kendall v. U. S.*, 12 Pet., 524; *Decatur v. Paulding*, 14 Pet., 497, 515; *Brashear v. Mason*, 6 How., 101.)

The Department of the Treasury seems fully equipped for the discharge of every fiscal duty and exigency; and therefore, independently of general considerations of abstract policy, the Government would seem to be justified in main-

taining, in all its integrity, the dogma that it can not by any form of process, base its rights of property subjected to the arbitrament of a judicial tribunal, without its explicit consent in due form of law. (*State of Mississippi v. Durham*, 4 Mackey (D. C.), 237.)

Mandamus will not lie against an officer of the Treasury Department who refuses to allow and pay a claim against the United States; for, however obviously without legal justification his refusal may be, mandamus against him to compel such allowance is none the less, in effect, a suit against the United States, and it is well settled that no action can be sustained against the Government itself, for any supposed debt, unless by its consent under some special statute allowing it. (*State of Mississippi v. Durham*, 4 Mackey (D. C.), 235.) [But in *Moser v. Meyer*, which was a mandamus proceeding against the Secretary of the Navy, the Court of Appeals of the District of Columbia said: "Nor are we prepared to give the opinion that the Secretary of the Navy, sued with respect to a matter lying entirely within the duties of his office, is the same defendant as the United States when sued for pay by an officer of the Navy." 38 App. (D. C.), 13, and see *Goldberg v. Daniels*, 231 U. S., 218, holding that the United States is not a party to mandamus proceedings against the Secretary of the Navy.]

For other decisions see note to section 417, Revised Statutes; and see *McElrath v. McIntosh* (16 Fed. Cas. No. 8781.)

**Sec. 237. [Commencement of fiscal year.]** The fiscal year of the Treasury of the United States in all matters of accounts, receipts, expenditures, estimates, and appropriations, except accounts of the Secretary of the Senate for compensation and traveling expenses of Senators, and accounts of the Sergeant-at-Arms of the House of Representatives for compensation and mileage of members and delegates shall commence on the first day of July in each year; and all accounts of receipts and expenditures required by law to be published annually shall be prepared and published for the fiscal year, as thus established. The fiscal year for the adjustment of the accounts of Secretary of the Senate for compensation and traveling expenses of Senators, and of the Sergeant-of-Arms of the House of Representatives for compensation and mileage of members and delegates shall extend to and include the third day of July.

This section was amended to read as above by act October 1, 1890 (26 Stat., 646). Originally it provided as follows:

"SEC. 237. The fiscal year of the Treasury of the United States in all matters of accounts, receipts, expenditures, estimates, and appropriations, except accounts of the Secretary of the Senate for compensation and traveling expenses of Senators, shall commence on the first day of July in each year; and all accounts of receipts and expenditures required by law to be published annually shall be prepared and published for the fiscal year, as thus established. The fiscal year for the adjustment of the ac-

counts of the Secretary of the Senate for compensation and traveling expenses of Senators shall extend to and include the third day of July."—(26 Aug., 1842, c. 207, ss. 1, 2, v. 5, p. 536; 8 May, 1872, c. 139, s. 1, v. 17, p. 61; 3 Mar., 1873, c. 226, s. 1, v. 17, p. 486.)

**Purpose and effect of law.**—Before the passage of the act of August 26, 1842 (5 Stat. 536), afterwards incorporated in section 237, Revised Statutes, the fiscal year commenced with and ended with the calendar year; but for the convenience of the public service, in the administration of the expense, accounts, and estimates of the Government, Congress

changed the law so as to make the first day of July the commencement of the fiscal year. (*Sweet v. U. S.*, 34 Ct. Cls., 377, 385.)

This section does not forbid a public officer to demand payment of fees due him at any time. It merely provides that the fiscal year shall commence on the first day of July, and that the annual accounts shall be for the fiscal year. There is not a word that bears even remotely upon the time when accounts or claims shall become due or when they shall be paid. No payments are hastened and none deferred by this law. It might be claimed with equal propriety that this enactment postpones to the

end of the fiscal year the liquidation of all claims which have no special day designated for payment. (*Patterson v. U. S.*, 21 Ct. Cls., 322.)

However, where officers are entitled to annual salaries, varying in amount according to the amount of business transacted in their offices during each current year, the maximum compensation to which they are entitled is an annual compensation, and is not due until the end of each fiscal year. (*Bachelor v. U. S.*, 8 Ct. Cls., 239; *Patterson v. U. S.*, 21 Ct. Cls., 324.)



## CHAPTER TWO.

### THE SECRETARY OF THE TREASURY.

**Sec. 248.** [Forms of keeping and rendering accounts; etc.] The Secretary of the Treasury shall, from time to time, digest and prepare plans for the improvement and management of the revenue, and for the support of the public credit; shall superintend the collection of the revenue; shall, from time to time, prescribe the forms of keeping and rendering all public accounts and making returns; shall grant, under the limitations herein established, or to be hereafter provided, all warrants for moneys to be issued from the Treasury in pursuance of appropriations by law; shall make report, and give information to either branch of the legislature in person or in writing, as may be required, respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office; and generally shall perform all such services relative to the finances as he shall be directed to perform. [See §§ 3660-3665, 3669, 3670, 3672].—(2 Sept., 1789, c. 12, s. 2, v. 1, p. 65; 8 May, 1792, c. 37, s. 9, v. 1, p. 281; 3 Mar., 1849, c. 108, s. 3, v. 9, p. 395, 20 June, 1874, c. 344, v. 18, p. 127; *Ex parte Hennen*, 13 Pet., 230; *Neilson v. Lagow*, 12 How., 98, (107).)

This section was amended by act of July 31, 1894, section 5 (28 Stat., 206), which provides that "The Comptroller of the Treasury shall, under the direction of the Secretary of the Treasury, prescribe the forms of keeping and rendering all public accounts, except those relating to the postal revenues and expenditures therefrom."

In the expenditure of all public moneys it is the invariable rule to require that accounts shall be furnished itemized as far as practicable, in order that the accounting officers may properly audit them. \* \* \* The law may permit the exercise of discretion in the use of public funds, without dispensing with the usual requirement of an itemized account showing fully for what purposes the money has been expended. (4 Comp. Dec., 159; 4 Comp. Dec., 271.)

The Comptroller of the Treasury has no

jurisdiction to approve or disapprove forms which are not accounting forms; as, for example, forms issued by the Secretary of the Navy for the use of the naval service in designating beneficiaries to receive death gratuity under the act May 13, 1908 (35 Stat., 128). (Comp. Dec., June 8, 1908, file 26254-44.)

The Secretary of the Treasury may impress his name with a stamp or copperplate upon a document, provided he keep the stamp or copperplate in his own possession and apply it himself or cause it to be applied in his presence; and this is a sufficient signing in law where a statute requires that certain documents be signed by him. The word "signing" does not necessarily imply, in legal acceptance at least, the use of pen and ink, held and guided by the hand of the person himself. (1 Op. Atty. Gen., 670.)

### Sec. 250. [Settlement of accounts within fiscal year. Repealed.]

This section provided as follows:

"SEC. 250. The Secretary of the Treasury shall cause all accounts of the expenditure of public money to be settled within each fiscal year, except where the distance of the places where such expenditure occurs may be such as to make further time necessary; and in respect

to expenditures at such places, the Secretary of the Treasury, with the assent of the President, shall establish fixed periods at which a settlement shall be required."—(3 Mar., 1817, c. 45, s. 13, v. 3, p. 368.)

It was superseded and repealed by act July 31, 1894, section 12 (28 Stat., 209).

**Sec. 251.** [Rules, regulations, and forms.] The Secretary of the Treasury shall make and issue from time to time such instructions and regulations to the several collectors, receivers, depositaries, officers, and others who may receive Treasury notes, United States notes, or other securities of the United

States, or who may be in any way engaged or employed in the preparation and issue of the same, as he shall deem best calculated to promote the public convenience and security, and to protect the United States, as well as individuals, from fraud and loss; he shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations, not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal-revenue laws, or in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports, or to warehousing; he shall give such directions to collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law; he shall also prescribe the forms of the annual statements to be submitted to Congress by him, showing the actual state of commerce and navigation between the United States and foreign countries, or coastwise between the collection districts of the United States, in each year.—(10 Feb., 1820, c. 11, ss. 14, 15, v. 3, p. 543; 6 Aug. 1846, c. 84, s. 5, v. 9, p. 55; 30 June, 1864, c. 172, s. 8, v. 13, p. 221; 14 July, 1870, c. 255, s. 34, v. 16, p. 271; 14 May, 1856, Res. 9, v. 11, p. 144; *Lennig v. Maxwell*, 3 Blatch., 125; *Munsell v. Maxwell*, 3 Blatch., 364.)

On general subject of regulations, see section 161, Revised Statutes, and note thereto. As to forms of keeping and rendering accounts, see section 248, Revised Statutes, and note thereto.

Persons connected with the Navy are forbidden to import in a public vessel any article which is liable to the payment of duty. (Sec. 1624, R. S., art. 12.)

Punishment by general court-martial is provided for transporting on naval vessels any goods or merchandise for freight, sale, or traffic, except gold, silver, or jewels for freight or safekeeping. (Sec. 1624, R. S., art. 8, clause 13.)

**The Naval Instructions, 1913, contain the following rules relative to customs inspections of naval vessels:**

"1321. (1) When any ship under the control of the Navy Department arrives within the territory of the United States, after having visited a foreign port or ports, the commanding officer thereof or, in the case of a number of ships in company, the senior officer present, shall inform the collector of such United States port of the arrival of the said ship or ships, and shall hold such ship or ships subject to such customs inspection as the collector of the port shall be directed to make by the Treasury Department. Commanding officers shall see that no dutiable articles are landed until after such action has been taken by the collector of the port. If the first port visited be not a port of entry, the provisions of this order shall be complied with at the first port of entry visited thereafter.

"(2) The commanding officer of each such ship shall cause each person on board who has purchased or otherwise acquired articles abroad which he intends to land from the ship to furnish a list of such articles and the prices paid therefor, separately stating articles of wear-

ing apparel and similar personal effects intended for their personal use and articles intended for others. All such articles shall be conveniently packed, ready for examination by the customs officials upon arrival.

"(3) The Secretary of the Treasury has instructed the customs officers to examine and appraise such articles and to collect the duties accruing thereon, after allowing the one hundred dollars exemption upon wearing apparel and similar personal effects intended for personal use. No customs examination of baggage other than that so listed and presented for examination will be made.

"(4) The provisions of this article shall not be construed to delay the movements of any naval vessel engaged in the performance of her duty."

**Treasury Regulations, scope and effect of.**—Where a statute is silent in matters of detail, the Secretary of the Treasury is doubtless vested with a certain discretion under the power given him by this section to make rules and regulations not inconsistent with law for carrying out the provisions of law relating to raising revenue from imports. In construing regulations so adopted, it must be borne in mind that the Secretary of the Treasury is an officer of the Government; that his powers are limited by law; that his duty is to protect the revenues of the Government and to prevent smuggling or other illegal practices whereby the Government may be defrauded of its revenue; and that he owes no duty to individuals beyond seeing that their rights are not prejudiced any further than is necessary by the action of customs officers. (*Constable v. National Steamship Co.*, 154 U. S., 75, 76.)

The contention that under the guise of regulations the Secretary of the Treasury has assumed legislative power confided by the Constitution solely to Congress, does not constitute a real and substantial dispute or controversy concerning the construction or application of



the Constitution, so as to authorize a direct appeal to the Supreme Court of the United States from a decision of the Circuit Court of Appeals. (*American Sugar Refining Co. v. U. S.*, 211 U. S., 161.)

Where regulations of the Treasury Department are such as are warranted by, and not inconsistent with, the law, they have the effect of law. (*Von Cotzhausen v. Nazro*, 15 Fed. Rep., 897.)

However extensive may be the general powers of the Secretary of the Treasury under this and other sections, they can not authorize any acts in conflict with the particular provisions of the law. (*U. S. v. Leng*, 18 Fed. Rep., 21.)

A regulation and circular which the Secretary of the Treasury was authorized to make and issue under this section, not being inconsistent with any provision of law, objections to their admission in evidence (their authentication being conceded) are unsound. (*U. S. v. Brendel*, 136 Fed. Rep., 740.)

Where regulations promulgated by the Secretary of the Treasury under this section are substantially followed by Government officers, the findings by those officers are conclusive. (*U. S. v. Lueder*, 154 Fed. Rep., 1.)

Congress may enact a law and delegate the power of finding some fact or state of things upon which the operation of the law is made to depend. Where Congress instead of including in a statute a matter of detail, left the determination of the fact to the Secretary of the Treasury, a regulation of the Secretary of the

Treasury pursuant thereto, determining the act, is as conclusive as if the standard fixed by the regulation had been named in the law itself. If in fixing the standard, the Secretary of the Treasury does not legislate by amending the law or altering it, nor act judicially by deciding a fact which was one which, in its intrinsic nature, required judicial determination, it is difficult to see, in the absence of fraud or bad faith, upon what theory a fact which Congress has submitted to his determination can be subject to review. (*Cooperville, etc., Co. v. Lemon*, 163 Fed. Rep., 145, decided by Circuit Court of Appeals for the Sixth Circuit.) [The Circuit Court of Appeals for the Eighth Circuit reached a directly opposite conclusion as to the validity of the particular regulation which was sustained in this case, holding that the legal effect of said regulation was to modify, radically, an act of Congress, and to bring under its penal provisions property and persons expressly excluded therefrom by the terms of the law, and therefore that the regulation was void, as the Secretary of the Treasury has no authority thus to create and punish crimes. (*U. S. v. Butter (Milton Dairy Co., Claimant)* 195 Fed. Rep., 657.)]

Regulations issued by the Secretary of the Treasury with reference to the internal revenue and for the government of the officers of the Revenue Department, have the force and effect of law and are as binding as if incorporated in the statute law of the United States. (*Stegall v. Thurman*, 175 Fed. Rep., 813.)

**Sec. 255. [Appointment of disbursing agents.]** The Secretary of the Treasury may designate any officer of the United States, who has given bonds for the faithful performance of his duties, to be disbursing agent for the payment of all moneys appropriated for the construction of public buildings authorized by law within the district of such officer.—(3 Mar., 1869, c. 122, s. 1, v. 15, pp. 301, 306.)

Employment of special disbursing agents by the Secretary of the Navy: See section 3614, Revised Statutes.

**The Secretary of the Treasury can not designate an officer in the city of Washington to be a disbursing agent in another place under this section; because, not being attached to any district, the buildings for which his disbursements would be made would not be within his district; nor can a special disbursing agent be designated at a place where there is a collector of customs, in view of the provisions of section 3658, Revised Statutes (*Bartlett v. U. S.*, 25 Ct. Cls., 389; affirmed 197 U. S., 230.)**

**This law is general and without limitation as to place.** It applies to "all moneys appropriated for the construction of public buildings authorized by law, within the district of such officer." (19 Op. Atty. Gen., 393.)

**Additional pay prohibited.**—An officer of the United States designated as disbursing agent within his district under this section, would not be entitled to any additional pay, because of the provisions of sections 1764, 1765, Revised Statutes. (*Bartlett v. U. S.*, 197 U. S., 234.)

**Sec. 260. [Reports upon appropriations for Departments of War and Navy.]** The Secretary of the Treasury shall lay before Congress at the commencement of each regular session, accompanying his annual statement of the public expenditure, the reports which may be made to him by the Auditors charged with the examination of the accounts of the Department of War and the Depart-

ment of the Navy, respectively, showing the application of the money appropriated for those Departments for the preceding year.—(3 Mar., 1817, c. 45, s. 6, v. 3, p. 367.)

By act of June 19, 1878 (20 Stat., 167) it was provided: "That from and after the passage of this act, it shall be the duty of the Secretary of the Treasury to transmit to Congress annually a tabular statement showing in detail the receipts and expenditures in the naval service under each appropriation, as made up and determined

by the proper officers of the Treasury Department, upon the accounts of disbursing officers rendered for settlement. Sec. 2. There shall be appended to this statement an account of balances in the hands of disbursing agents at the close of each fiscal year, and a report of any amounts lost or unaccounted for by vouchers."

**Sec. 264. [Report of Coast Survey expenditures.]** The Secretary of the Treasury shall report to Congress annually the number and names of the persons employed during the last preceding fiscal year upon the Coast Survey and business connected therewith; the amount of compensation of every kind respectively paid them, for what purpose, and the length of time employed; and shall report a full statement of all other expenditures made under the direction of the Superintendent of the Coast Survey.—(3 Mar., 1853, c. 97, s. 3, v. 10, p. 209; 15 Aug., 1876, c. 287, v. 19, p. 156.)

The Coast and Geodetic Survey was transferred from the Treasury Department to the Department of Commerce and Labor by acts of February 14, 1903 (32 Stat., 826), and March 3, 1903 (32 Stat. 1082). The name of the Department of Commerce and Labor was changed to Department of Commerce by act of March 4, 1913 (37 Stat., 736). Transfer to the War or Navy Department, in time of national emergency, of the Coast and Geodetic Survey, was authorized by act of May 22, 1917 (40 Stat., 87). The President was authorized to employ public vessels in Coast Survey by section 4686, Revised Statutes.

Employment of Navy officers in Coast Survey was provided for by sections 4684 and 4687, Revised Statutes.

Employment of enlisted men of the Navy in the Coast Survey was authorized by annual appropriations under "Pay of the Navy" prior to act of June 7, 1900 (31 Stat., 684). See Comp. Dec., Oct. 27, 1910 (116 S. and A. Memo., 1595); and file 3809-434, Nov. 17, 1914.

Officers of the Navy are entitled to sea pay while attached to and serving on board any ship in commission under the control of the Coast Survey. (Art. R-4405 (1), Navy Regs., 1913.)

Officers of the Navy ordered to report by letter to the Secretary of Commerce for duty in

the Coast Survey, are entitled to shore pay from the date they so report. (Art. R-4407 (4), Navy Regs., 1913.)

Members of the Naval Hospital Corps were required to perform all necessary hospital and ambulance service in vessels of the Coast Survey by act of June 17, 1898 (30 Stat., 475), superseded by other provisions contained in the act of August 29, 1916 (39 Stat., 573); see also art. I-3261, Naval Instructions, 1913.

Extra allowance for subsistence of officers and men of the Navy employed in Coast Survey was authorized by section 4688, Revised Statutes, which was amended by acts of August 4, 1886 (24 Stat., 233), and March 3, 1887 (24 Stat., 521), prohibiting allowance for subsistence to Navy officers attached to Coast and Geodetic Survey. Further amendment was contained in acts of March 2, 1889 (25 Stat., 952), and August 30, 1890 (26 Stat. 382), authorizing allowance for subsistence to detailed Navy officers, detached to do work away from their vessels under circumstances involving extra expenditures.

Annual reports were required of Coast Survey by section 4690, Revised Statutes; provisions for printing and distribution of reports were contained in acts of January 12, 1895 (28 Stat., 613), and April 20, 1896 (29 Stat., 471).

**Sec. 266. [Quarterly publication of receipts and expenditures.]** The Secretary of the Treasury, at the expiration of thirty days from the end of each quarter, shall cause to be published in some newspaper at the seat of government a statement of the whole receipts of such quarter, specifying the amount received from customs, from public lands, and from miscellaneous sources, and, also, the whole amount of payments made during the said quarter, specifying the general head of appropriation, whether for the civil list, the Army, the Navy, Indian Affairs, fortifications, or pensions.—(17 June, 1844, c. 105, s. 6, v. 5, p. 696.)



## CHAPTER THREE.

### THE COMPTROLLERS.

[FOR LAWS IN EFFECT MARCH 4, 1921, WITH REFERENCE TO THE POWERS AND DUTIES OF THE COMPTROLLER OF THE TREASURY AND THE AUDITOR FOR THE NAVY DEPARTMENT, SEE ACT OF JULY 31, 1894 (28 STAT., 205). SECTION 9 OF SAID ACT (28 STAT., 208) PROVIDED THAT "THIS ACT, IN SO FAR AS IT RELATES TO THE FIRST COMPTROLLER OF THE TREASURY AND THE SEVERAL AUDITORS AND DEPUTY AUDITORS OF THE TREASURY, SHALL BE HELD AND CONSTRUED TO OPERATE MERELY AS CHANGING THEIR DESIGNATION AND AS ADDING TO AND MODIFYING THEIR DUTIES AND POWERS, AND NOT AS CREATING NEW OFFICERS."]

**Sec. 268. [Comptrollers.]** There shall be in the Department of the Treasury a First Comptroller and a Second Comptroller, each of whom shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of five thousand dollars a year.—(2 Sept., 1789, c. 12, s. 1, v. 1, p. 65; 3 Mar., 1817, c. 45, s. 3, v. 3, p. 366; 18 May, 1872, c. 172, s. 1, v. 17, p. 127; 3 Mar., 1875, c. 130, s. 2, v. 18, p. 396.)

For modification of this section see act of July 31, 1894, section 4 (28 Stat., 206), which abolished the office of Second Comptroller and changed the designation of the First Comptroller to Comptroller of the Treasury.

### **Sec. 269. [Duties of First Comptroller. Repealed.]**

**This section provided as follows:**

"SEC. 269. It shall be the duty of the First Comptroller:

"First. To examine all accounts settled by the First Auditor, except those relating to receipts from customs, and all accounts settled by the Fifth Auditor, and by the Commissioner of the General Land-Office, and to certify the balances arising thereon to the Register.

"Second. To superintend the adjustment and preservation of the public accounts subject to his revision.

"Third. To countersign all warrants drawn by the Secretary of the Treasury, which shall be warranted by law.

"Fourth. To superintend the recovery of all debts certified by him to be due to the United States, and for that purpose to direct all such suits and legal proceedings, and to take such measures as may be authorized by law, and are adapted to enforce prompt payment thereof." [See § 1660.]—(2 Sept., 1789, c. 12, s. 3, v. 1, p. 66; 3 Mar., 1817, c. 45, ss. 8, 10, v. 3, p. 367; 3 Mar., 1849, c. 108, s. 12, v. 9, p. 396; Neilson v. Lagow, 12 How., 98.)

It was expressly repealed by act of July 31, 1894, section 11 (28 Stat., 209); the designation of the First Comptroller was changed to Comptroller of the Treasury by section 4 of the same act (28 Stat., 206).

### **Sec. 271. [Power to direct settlement of accounts. Superseded.]**

**This section provided as follows:**

"SEC. 271. The First Comptroller, in every case where, in his opinion, further delays would be injurious to the United States, shall direct the First and Fifth Auditors of the Treasury forthwith to audit and settle any particular account which such officers may be authorized to audit and settle, and to report such settlement

for revision and final decision by the First Comptroller."—(3 Mar., 1809, c. 28, s. 2, v. 2, p. 536.)

It was superseded by act of July 31, 1894, section 6 (28 Stat., 206), which authorized the Comptroller of the Treasury to direct any of the Auditors to audit and settle any particular account.

### **Sec. 272. [Report of officers failing to make settlement. Repealed.]**

**This section provided as follows:**

"SEC. 272. The First Comptroller shall make an annual report to Congress of such officers as shall have failed to make settlement of their accounts for the preceding fiscal year, within the year, or within such further time as may have been prescribed by the Secretary of the Treasury for such settlement." [See §§ 195, 196.]—(3 Mar., 1817, c. 45, s. 13, v. 3, p. 368.)

It was expressly repealed by act of July 31, 1894, section 12 (28 Stat., 209). Provision for annual report to Congress by the Secretary of the Treasury, of officers delinquent in rendering accounts, is contained in act of May 28, 1896, section 4 (29 Stat., 179).

**Sec. 273. [Duties of Second Comptroller. Repealed.]**

**This section provided as follows:**

"SEC. 273. It shall be the duty of the Second Comptroller:

"First. To examine all accounts settled by the Second, Third, and Fourth Auditors, and certify the balances arising thereon to the Secretary of the Department in which the expenditure has been incurred.

"Second. To countersign all warrants drawn by the Secretaries of War and of the Navy, which shall be warranted by law. [Sec § 3673.]

"Third. To report to the Secretaries of War and of the Navy the official forms to be issued

in the different offices for disbursing the public money in those Departments, and the manner and form of keeping and stating the accounts of the persons employed therein.

"Fourth. To superintend the preservation of the public accounts subject to his revision."—(3 Mar., 1817, c. 45, s. 9, v. 3, p. 367; 7 May, 1822, c. 90, s. 3, v. 3, p. 689.)

**It was expressly repealed** by act of July 31, 1894, section 7 (28 Stat., 206).

**Sec. 274. [Arrears of pay due deceased seamen.]** The Second Comptroller may prescribe rules to govern the payment of arrears of pay due to any petty officer, seaman, or other person not an officer, on board any vessel in the employ of the United States, which has been sunk or destroyed, in case of the death of such petty officer, seaman, or person, to the person designated by law to receive the same.—(4 July, 1864, c. 248, s. 3, v. 13, p. 390.)

The duties of the Second Comptroller were transferred to the Comptroller of the Treasury by act of July 31, 1894, section 4 (28 Stat., 205).

The manner of settling accounts of deceased officers and enlisted men in the Navy where the amount due is less than \$500, is provided for by act of May 27, 1908 (35 Stat., 373).

Disposition of pensions and other moneys due deceased beneficiaries of Naval Home is provided for by act of June 30, 1914 (38 Stat., 398).

Payment of pension money in case of death of pensioners in Government Hospital for the

Insane is provided for by section 4839, Revised Statutes, as amended by act of February 2, 1909 (35 Stat., 592).

Payment in case of death of persons in the Navy, entitled to reimbursement for losses at sea, was provided for by section 289, Revised Statutes, repealed by act of October 6, 1917 (40 Stat., 390).

Disposition of money and other effects of deceased persons in the naval service is regulated by act of March 29, 1918 (40 Stat., 499).

**Sec. 275. [Signing bounty certificates. Repealed.]**

**This section provided as follows:**

"SEC. 275. The Second Comptroller may detail one clerk to sign, in the place of the Comptroller, all certificates and papers issued under any provisions of law relating to bounties; but

the Comptroller shall be responsible for the official acts of such clerk."—(19 Mar., 1868, c. 31, s. 4, v. 15, p. 44.)

**It was expressly repealed** by act of July 31, 1894, section 7 (28 Stat., 206).



## CHAPTER FOUR.

### THE AUDITORS.

[FOR LAWS IN EFFECT MARCH 4, 1921, WITH REFERENCE TO THE POWERS AND DUTIES OF THE COMPTROLLER OF THE TREASURY AND AUDITOR FOR THE NAVY DEPARTMENT, SEE ACT OF JULY 31, 1894 (28 STAT., 205). SECTION 9 OF SAID ACT (28 STAT., 208) PROVIDED THAT "THIS ACT, IN SO FAR AS IT RELATES TO THE FIRST COMPTROLLER OF THE TREASURY AND THE SEVERAL AUDITORS AND DEPUTY AUDITORS OF THE TREASURY, SHALL BE HELD AND CONSTRUED TO OPERATE MERELY AS CHANGING THEIR DESIGNATION AND AS ADDING TO AND MODIFYING THEIR DUTIES AND POWERS, AND NOT AS CREATING NEW OFFICERS. ALL LAWS NOT INCONSISTENT WITH THIS ACT, RELATING TO THE AUDITORS OF THE TREASURY IN CONNECTION WITH ANY MATTER, SHALL BE UNDERSTOOD IN EACH CASE TO RELATE TO THE AUDITOR TO WHOM THIS ACT ASSIGNS THE BUSINESS OF THE EXECUTIVE DEPARTMENT OR OTHER ESTABLISHMENT CONCERNED IN THAT MATTER."]

**Sec. 276. [Auditors.]** There shall be connected with the Department of the Treasury six auditors of accounts, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be known as the First, Second, Third, Fourth, Fifth, and Sixth Auditors, respectively. Each Auditor is entitled to a salary of four thousand dollars a year.—(2 Sept., 1789, c. 12, s. 1, v. 1, p. 65; 3 Mar., 1817, c. 45, ss. 3, 15, v. 3, pp. 366, 368; 2 July, 1836, c. 270, s. 8, v. 5, p. 81; *Ibid.*, s. 44, p. 89; 8 June, 1872, c. 335, s. 21, v. 17, p. 287; 2 Mar., 1799, c. 38, s. 1, v. 1, p. 729; 3 Mar., 1873, c. 226, s. 3, v. 17, p. 508; 3 Mar., 1875, c. 130, s. 2, v. 18, p. 397.)

The designation of the Auditors was altered by act of July 31, 1894, section 3 (28 Stat., 205), which changed the title of "Fourth Au-	ditor" to "Auditor for the Navy Department."
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**Sec. 277. [Duties of Auditors.]** The duties of the auditors shall be as follows:

\*                      \*                      \*                      \*                      \*                      \*

Fifth. The Fourth Auditor shall receive and examine all accounts accruing in the Navy Department or relative thereto, and all accounts relating to Navy pensions; and, after examination of such accounts, he shall certify the balances, and shall transmit such accounts, with the vouchers and certificate, to the Second Comptroller for his decision thereon.

\*                      \*                      \*                      \*                      \*                      \*

The duties of the Auditor for the Navy Department, designated in the above section as Fourth Auditor, are prescribed by act of July 31, 1894, section 7 (28 Stat., 207). The	duties of the Second Comptroller were transferred to the Comptroller of the Treasury by section 4 of the same act (28 Stat., 205).
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**Sec. 283. [Accounts of Departments of War and the Navy.]** The Auditors charged with the examination of the accounts of the Departments of War and of the Navy, shall keep all accounts of the receipts and expenditures of the public money in regard to those Departments, and of all debts due to the United States on moneys advanced relative to those Departments; shall receive from the Second Comptroller the accounts which shall have been finally adjusted, and shall preserve such accounts, with their vouchers and certificates, and record all requisitions drawn by the Secretaries of those Departments, the examination of the accounts of which has been assigned to them. They shall

annually, on the first Monday in November, severally report to the Secretary of the Treasury the application of the money appropriated for the Department of War and the Department of the Navy, and they shall make such reports on the business assigned to them as the Secretaries of those Departments may deem necessary and require.—(3 Mar., 1817, c. 45, ss. 5, 6, v. 3, p. 367.)

So much of this section as requires accounts to be kept by certain auditors was repealed by act of July 31, 1894, section 10 (28 Stat., 208), which provides that all accounts of receipts and expenditures of public money, except those relating to the postal revenues and expenditures therefrom, shall be kept

in the Division of Bookkeeping and War-rants of the Treasury Department.

The office of Second Comptroller was abolished and his duties transferred to the Comptroller of the Treasury by section 4, act of July 31, 1894 (28 Stat., 205).

**Sec. 284. [Accounts of pay officer of lost vessel.]** In every case of the loss or capture of a vessel belonging to the Navy of the United States, the proper accounting officers of the Treasury, under the direction of the Secretary of the Navy, are authorized, in the settlement of the accounts of the [paymaster] [purser] of such vessel, to credit him with such portion of the amount of the provisions, clothing, small stores, and money, with which he stands charged on the books of the Fourth Auditor of the Treasury, as they shall be satisfied was inevitably lost by such capture or loss of a public vessel; and such purser shall be fully exonerated by such credit from all liability on account of the provisions, clothing, small stores, and money so proved to have been captured or lost.—(3 Mar., 1847, c. 48, s. 6, v. 9, p. 173; 18 Feb., 1875, c. 80, v. 18, p. 317.)

See note to section 287, Revised Statutes.

The title "Fourth Auditor of the Treasury" was changed to "Auditor for the Navy Department" by act of July 31, 1894, section 3 (28 Stat., 205).

By the Judicial Code, March 3, 1911, sections 145, 147 (36 Stat., 1136, 1137), it is provided that the Court of Claims shall have jurisdiction to relieve any disbursing officer of responsibility on account of loss, by capture or otherwise while in the line of his duty, of Government funds, vouchers, records or papers in his charge, where such loss occurred without fault or negligence on the part of the officer, but he has been held

responsible therefor. ["Capture or otherwise" means not only loss by capture and kindred ways, under the rule of ejusdem generis, but loss occurring in any other way while the officer was in line of duty and free from fault. (*Stevens v. U. S.*, 41 Ct. Cls., 344.)]

"In case of fire or shipwreck, it shall be the special duty of every officer of the Pay Corps to secure and preserve the accounts of officers and men, the public money, and such other public papers and property, in the order of their value, as circumstances permit." (Art. R-3004 (1), Navy Regs., 1913.)

**Sec. 285. [Disbursements by order of commanding officer.]** Every disbursement of public moneys, or disposal of public stores, made by a disbursing officer pursuant to an order of any commanding officer of the Navy, shall be allowed by the proper accounting officers of the Treasury, in the settlement of the accounts of the officer, upon satisfactory evidence of the making of such order, and of the payment of money or disposal of stores in conformity with it; and the commanding officer by whose order such disbursement or disposal was made, shall be held accountable for the same.—(3 Mar., 1849, Res. No. 17, s. 2, v. 19, p. 419. [This reference is in error in the Revised Statutes. Should be "v. 9, p. 419."])

**Order of Secretary of the Navy.**—An order by the Secretary of the Navy to an officer has been held to be within this section: If money is disbursed by an officer of the Navy in faithful compliance with the Secretary's order, under this law the Secretary and not the officer must account and answer to the United States. (*Opinion of Dunlop, Circuit Judge, in U. S. v. Jones*, 26 Fed. Cas. No. 15493a, p. 653.) [In this

case, on appeal to the Supreme Court, it was argued by the Attorney General that this law applies only to disbursements made "in pursuance of an order from an officer in command." For the defendant, it was argued that this law "requires the disbursement to be allowed and the commanding officer to be held responsible. In this case it would be the President." The Supreme Court affirmed the judgment of the



Circuit Court, which was for the defendant, without referring to this statute. (U. S. v. Jones, 18 How., 92.) Accordingly, the case must be deemed an authority for the proposition that the order of the Secretary of the Navy was the order of defendant's "commanding officer of the Navy" within the meaning of section 285, Revised Statutes. (File 26254-1451:11, Apr. 12, 1915, citing *Swaim v. U. S.*, 165 U. S., 557; Op. Atty. Gen., May 19, 1915, 171 S. and A. Memo., 3611.)

**Regulations adopted under this section.**—This section does not authorize an advance of public money by the pay officer to the commanding officer or to any other person by his order. The disbursement presupposes an indebtedness, and whether the objects for which the indebtedness accrued were sanctioned or not by law or regulation, the pay officer would be entitled to a credit for payment therefor, when made by order of the commanding officer; but the disbursement must be for some service or article furnished in accordance with law. (Art. R-4310 (2), Navy Regs., 1913.)

When ordered by his commanding officer to make an expenditure of money or stores which the pay officer believes to be illegal or contrary to regulations, the latter shall state in writing the grounds on which he objects to obeying the order, and request that the order be reiterated in writing. On receipt of such order, the expenditure shall be made. (Art. R-4309, Navy Regs., 1913.)

The commanding officer will be held accountable by the Navy Department for every expenditure of funds or property made by his authority; but in order to charge a commanding officer with pecuniary responsibility for a payment made by his order, it is necessary that there should be a compliance with the preceding paragraph, for in the absence of such written order from the commanding officer, after a statement of objections has been duly made, the pay officer and not the commanding officer will be held responsible. (Art. R-4310 (3) Navy Regs., 1913.)

**Regulations must be complied with.**—In order to charge a commanding officer of the Navy with a payment made by his order under this section, it is necessary that there should be a compliance with the Navy regulation as to an order in writing. This requirement is eminently proper and fair. (8 Comp. Dec., 756; 1 S. and A. Memo., June 1, 1902, p. 28.)

Neither the regulation nor the Comptroller's ruling alters fundamentally the scope of this section. The regulation relates merely to the responsibility of the *commanding* officer, and has nothing to do with the position of the *paying* officer; it also presupposes a belief on the part of the latter that the expenditure is illegal; it does not apply to any case in which the pay officer, *in good faith*, renders his obedience. (30 Op. Atty. Gen., 376, 171 S. and A. Memo., 3611.)

A pay officer making a payment assumes responsibility for its accuracy. Therefore, in withholding payment until the receipt of full information necessary to a correct settlement, the paymaster is doing no more than his duty and is acting strictly within his authority. If the commanding officer feels satisfied that a

payment should be made in advance of the receipt of full information, he is at liberty to order said payment, assuming the responsibility therefor in accordance with section 285, Revised Statutes. (3 Comp. Dec., 449.)

**Responsibility of pay officer.**—Whenever Congress has desired to relieve disbursing officers from liability for payments made on the authority of others, it has had no difficulty in finding language to express that intent. Examples of this are found in sections 285 and 846, Revised Statutes; act of March 3, 1879 (20 Stat., 419); and paragraph 6 of section 8, act of July 31, 1894 (28 Stat., 208). Under the last-mentioned act, general provision has been made by which disbursing officers can avoid responsibility by applying to the Comptroller of the Treasury for an advance decision in cases where they may have doubts. The enactment of the special provisions above mentioned is a clear indication that Congress intended that the general rules of accounting should apply in other cases, upon the well-known rule of construction, *expressio unius est exclusio alterius* [the expression of one thing is the exclusion of another]. (7 Comp. Dec., 271.)

The party to whom payment has not been made by a disbursing officer may present his demand, or claim, to such disbursing officer's superior, who, if he deems the claim to be a just one, may require the subordinate to make the payment. But in such a case, the pay officer is no longer responsible financially; the order of his superior has relieved him from danger of checkage, and the disallowance, if any, would fall upon the superior. In such cases it is not the accounting officers who have power to order payment, but the disbursing officer's superior. (File 26543-66, Sept. 8, 1911.)

Congress never intended that a Secretary of War should order a paymaster or quartermaster to make a payment, and then upon the requisition of the accounting officers of the Treasury, punish the officer for having made it by stopping his pay. (*Smith v. U. S.*, 24 Ct. Cls., 215.)

A disbursing officer is not responsible for illegal payments made by him in good faith and in accordance with the certificate of another officer as to the facts. An appropriation being under the control of the head of a department it is within the latter's power to prescribe rules governing the disbursing agent in making disbursements therefrom. (9 Comp. Dec., 545; see also, Maj. Smith's case, 23 Ct. Cls., 452; 21 Comp. Dec., 314; Comp. Dec., Nov. 21, 1914, file 26254-1672; 21 Comp. Dec., 357, file 26254-1451:5, Oct. 31, 1914; file 26254-1451:11, Apr. 12, 1915. But see Comp. Dec., Mar. 26, 1914, App. No. 23482, file 26254-1451:2; Comp. Dec., Oct. 9, 1914, App. No. 23482, file 26254-1451:12; 21 Comp. Dec. 245, reversed 21 Comp. Dec., 357.)

A Navy regulation (art. R-3991, 1913) requiring pay officers to disburse money under certain contingencies is an order of the Secretary of the Navy, and as such protects the pay officer from responsibility and is conclusive upon the accounting officers. (30 Op. Atty. Gen., 376, 171 S. and A. Memo., 3611, reversing 21 Comp. Dec., 554, 357, 245; see also file 26254-1451:11.)

**Sec. 286. [Fixing date of loss of missing vessels.]** The proper accounting officers of the Treasury are authorized, under the direction of the Secretary of the Navy, in settling the accounts of seamen, and others, not officers, borne on the books of any vessel in the Navy which shall have been wrecked, or which shall have been unheard from so long that her wreck may be presumed, or which shall have been destroyed or lost with the rolls and papers necessary to a regular and exact settlement of such accounts, to fix a day when such wreck, destruction, or loss shall be deemed to have occurred.—(4 July, 1864, c. 248, s. 1, v. 13, p. 389.)

The Secretary of the Navy issued orders on March 15, 1910, declaring the U. S. S. *Nina* to have been lost, and that the commanding officer and enlisted men attached to said vessel "will be regarded as having died on this date." (File 7054—136.)

**Jurisdiction of accounting officers.**—Under this section, the determination by the Secretary of the Navy of the day when the wreck, destruction, or loss shall be deemed to have occurred is binding upon the accounting officers of the Treasury in settling the accounts of seamen and others, not officers, borne on the books of the vessel. (32 Op. Atty. Gen., 427, file 26254—3048:2; contra, 26 Comp. Dec., 336.)

All presumptions of death, other than the legal presumption of death after seven years' unexplained absence, should be disregarded unless the evidence leaves no conclusion reasonable other than that, under the known facts, death must have resulted. Where it is possible that the men may have been picked up by a sailing vessel, payment of death gratuity under the act of May 13, 1908 (35 Stat., 128), should not be made to the designated beneficiaries of such men until further time has elapsed without their being heard from. (Comp. Dec., Mar. 15, 1910, file 26254—399, 109

S. and A. Memo., 1352.) In the same case, on January 20, 1911, nothing further having been heard from the men supposed to have been drowned by the capsizing of their boat, the Comptroller held that "the presumption of the existence of life for seven years after a person was last heard from, is not an absolute presumption, but is a disputable one, and is subject to be controlled by facts and circumstances and other legitimate evidence;" that so long a time had elapsed that, if the men had been picked up by a passing vessel, they doubtless would have been heard from; and it is improbable that they all agreed to desert. Accordingly, held that the men in question were drowned on November 27, 1909, and payment of death gratuity should be made. (File 26254—399:1; see also 17 Comp. Dec., 528; compare Dig. Comp. Dec. (1902), p. 144.)

"If I am to draw a conclusion at all, I should infer that a person in the position of a sergeant [U. S. Marine Corps] having nothing against his character would not desert, and that he died while on leave, and so was not heard of by the authorities." (In re Phené's Trusts, L. R. 5 ch. 139; Thayer's Cases on Evidence, 57.)

**"Vessel" defined.**—See section 3, Revised Statutes.

**Sec. 287. [Accounts of seamen on lost vessel.]** The proper accounting officers of the Treasury are authorized, in settling the accounts of the petty officers, seamen, and others, not officers, on board of any vessel in the employ of the United States, which by any casualty, or in action with the enemy, has been or may be sunk or otherwise destroyed, together with the rolls and papers necessary to the exact ascertainment of the several accounts of the same at the date of such loss, to assume the last quarterly return of the paymaster of any such vessel as the basis for the computation of the subsequent credits to those on board, to the date of such loss, if there be no official evidence to the contrary. Where such quarterly return has, from any cause, not been made, the accounting officers are authorized to adjust and settle such accounts on principles of equity and justice.—(4 July, 1864, c. 948, s. 2, v. 13, p. 390.)

See note to section 284, Revised Statutes.

The Navy Regulations, 1913, contain the following article:

"2042. (1) In case of the loss of the ship, her commanding officer shall remain by her with officers and crew as long as necessary and save as much Government property as possible. Every reasonable effort shall be made to save the log book, muster roll, accounts of officers and crew, and other valuable papers.

"(2) If it becomes necessary to abandon the ship, he should be the last person to leave her.

"(3) He shall make a report of the circumstances to the Secretary of the Navy as soon as possible and, if wrecked within the United States, shall repair to the nearest naval station with the crew of the ship.

"(4) He shall, if in a foreign country, lose no time, after making all efforts to save property, in returning with the officers and crew to



the fleet or squadron to which they belong or, if acting singly, to the United States. He shall take steps for the preservation of the Government property saved, until it shall be disposed of in such manner as the department may direct.

"(5) In the event of the loss of accounts of any person in the Navy, caused by wreck or otherwise, he shall proceed in accordance with article I-4924."

**The following article is from Naval Instructions, 1913:**

"4924. In the event of the loss of accounts occurring from the loss or capture of a ship of the

Navy, the pay officer, on receiving a written order from the commanding officer, shall open other accounts with the survivors, from the date of the disaster, giving to each person the rating he held at the time the accounts were lost; and the accounts so made out shall accompany the survivors on their transfer to a ship or station, the pay officer of which is to govern himself by these accounts in making payments or issues, until he receives further instructions from the Navy Department or the Auditor for the Navy Department."

### Sec. 288. [Compensation for personal effects lost. Repealed.]

**This section provided as follows:**

"The proper accounting officers of the Treasury Department are authorized, in settling the accounts of the petty officers, seamen, and others, not officers, on board of any vessel in the employ of the United States, which, by any casualty, or in action with the enemy, has been or may be sunk or otherwise destroyed, to allow and pay to each person, not an officer, employed on the vessel so sunk or destroyed, and whose personal effects have been lost, a sum not exceeding sixty dollars, as compensation for the loss of his personal effects."—(4 July, 1864, c. 248, s. 2, v. 13, p. 390.)

**It was repealed by act of October 6, 1917 (40 Stat., 390).**

See note to section 290, Revised Statutes.

A permanent annual appropriation is made by section 3689, Revised Statutes, for "indemnity to seamen and marines for lost clothing: To allow and pay to each person, not an officer, employed on a vessel of the United States sunk or otherwise destroyed, and whose personal effects have been lost, a sum not exceeding \$60. In the event of the death of the person, this sum is to be paid to his proper legal representatives."

### Sec. 289. [Payment in case of death. Repealed.]

**This section provided as follows:**

"In case of the death of any such petty officer, seaman, or other person, not an officer, such payment shall be made to the widow, child or children, father, mother, or brothers and sisters jointly, following that order of preference; such credits and gratuity to be paid out of any money in the Treasury not otherwise appropriated."—(4 July, 1864, c. 248, s. 3, v. 13, p. 390.)

**It was repealed by act of October 6, 1917 (40 Stat., 390).**

See notes to sections 286, 288, and 290, Revised Statutes.

The manner of settling accounts of deceased officers and enlisted men in the Navy and Marine Corps, where the amount due is less than

\$500, is provided for by act of May 27, 1908 (35 Stat., 373).

Payment of arrears due deceased enlisted men was provided for by section 274, Revised Statutes.

Payment of pension money in case of death of pensioners in Government Hospital for the Insane is provided for by section 4839, Revised Statutes, as amended by act of February 2, 1909 (35 Stat., 592).

Disposition of pensions and other moneys due deceased beneficiaries of Naval Home is provided for by act of June 30, 1914 (38 Stat., 398).

Disposition of money and effects of deceased persons in the naval service is regulated by act of March 29, 1918 (40 Stat., 499). See also 16 Op. Atty. Gen., 494.

### Sec. 290. [Allowance to officers for personal effects lost. Repealed.]

**This section provided as follows:**

"In case any officer of the Navy or Marine Corps on board a vessel in the employ of the United States which, by any casualty, or in action with the enemy, at any time since the nineteenth day of April, eighteen hundred and sixty-one, has been or may be sunk or destroyed, shall thereby have lost his personal effects, without negligence or want of skill or foresight on his part, the proper accounting officers are authorized, with the approval of the Secretary of the Navy, to allow to such officer a sum not exceeding the amount of his seapay for one month as compensation for such loss. But the accounting officers shall in all cases require a schedule and certificate from the officer making the claim for effects so lost."—(6 April, 1866, c. 27, s. 1, v. 14, p. 14.)

**It was repealed by act of October 6, 1917 (40 Stat., 390), which contained new and complete provisions on the subject.**

**Losses in time of peace.**—By act of March 2, 1895 (28 Stat. 962), provision was made for adjustment of losses of officers and men in the naval service, in time of peace, due to shipwreck or other marine disaster, limiting reimbursement to such articles of personal property as are required by the Navy Regulations, and requiring all claims to be submitted within two years from the occurrence of the loss; and stipulating that reimbursement shall be based on value of articles at the time of loss. Under this act it was made the duty of the accounting officers of the Treasury to determine the value of the property so lost, and the Secretary of the Treasury was required to certify all such losses

to the Speaker of the House of Representatives at the commencement of each regular session, who should lay same before Congress for consideration.

This act was repealed and new provisions substituted therefor by act of October 6, 1917 (40 Stat., 390).

**Destruction of U. S. S. "Maine."**—By act March 30, 1898 (30 Stat. 346), provision was made for relief of sufferers by the destruction of the U. S. S. *Maine*, as follows:

"That to reimburse the survivors of the officers and crew of the United States steamer *Maine*, destroyed by an explosion in the harbor of Havana, Cuba, on the fifteenth day of February, eighteen hundred and ninety-eight, for losses incurred by them, respectively, in the destruction of said vessel, there shall be paid to each of said survivors, out of any money in the Treasury of the United States not otherwise appropriated, a sum equal to the losses so sustained by them: *Provided*, That the accounting officers of the Treasury shall in all cases require a schedule and affidavit from each person making a claim under this act, such schedule to be approved by the Secretary of the Navy; and reimbursement shall be made for such articles of clothing, outfit, and for such personal effects only as are of a character and value and in quantity suitable and appropriate to the rank or rating and duty of the person by whom the claim is made: *Provided further*, That in no case shall the aggregate sum allowed for such losses exceed the amount of twelve months' sea pay (without rations) of the grade or rating held by such person at the time the losses were incurred.

"SEC. 2. That the widow, child, or children, and in case there be not such, that the parent or parents, and if there be no parent, the brothers and sisters, of the officers, enlisted men, and others who were lost in the destruction of said vessel, or who have died or who may die within one year from date of the disaster in consequence of injuries received in the destruction of said vessel, shall be entitled to and shall receive, out of any money in the Treasury of the United States not otherwise appropriated, to wit: The relative, in the order named, of the persons heretofore referred to, a sum equal to twelve months' sea pay of the grade or rating of each person deceased as aforesaid: *Provided*, That the legal representatives of the deceased persons hereinbefore referred to shall also be paid from the Treasury of the United States any arrears of pay due the deceased at the time of their death: *Provided further*, That if any person who shall receive reimbursement under this act, for losses incurred in said disaster, shall die within the year in consequence of injuries incurred in the destruction of said vessel, the amount so paid shall be deducted from the amount of twelve months' sea pay (without rations) allowed to such beneficiary by virtue of this act of relief.

"SEC. 3. That the accounting officers of the Treasury be, and they are hereby, authorized to continue for a period of three months any allotments which may have been made in favor of any relatives of the degrees hereinbefore enumerated by any of the officers and men attached to the United States ship *Maine*

who lost their lives in or in consequence of the disaster to that vessel: *Provided*, That the amount of the allotments so continued shall be deducted from the amount of twelve months' sea pay allowed to such beneficiaries by virtue of this act for their relief.

"SEC. 4. That the relief granted by the provisions of this act shall be in full satisfaction of any and all claims whatever against the United States on account of losses or death by the destruction of the United States steamer *Maine*, and any claim against the United States which shall be presented and acted upon under the authority of this act shall be held to be finally determined and shall not in any manner thereafter be reopened, reconsidered, supplemented nor be subject to appeal in any form; and the method of presenting and establishing said claims hereinbefore presented shall be followed in lieu of those prescribed by acts or parts of acts heretofore enacted relating to the presentation and allowance of similar claims: *Provided*, That nothing herein shall affect the right of any of the beneficiaries under this act to any pension to which they may be entitled under existing law after the expiration of one year from said fifteenth day of February, eighteen hundred and ninety-eight.

"SEC. 5. That no claims shall be allowed under the provisions of this act which shall not be presented within two years after the date of its passage.

"SEC. 6. That the Secretary of the Navy be, and he is hereby, authorized, whenever in his discretion it may be deemed practicable and expedient, to cause the remains of all or any of those who perished in consequence of said disaster to be removed to the United States cemetery at Arlington: *Provided*, That the relatives of any of such deceased officers and others mentioned in this act who prefer that the remains of such be taken to their homes within the United States shall have such privilege extended to them, and the expense thereof shall be borne by the United States; and the sum of ten thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to carry out the provisions of this section."

**Fires at Washington Navy Yard.**—The naval appropriation act, May 4, 1898 (30 Stat., 388), contained the following clause:

"To reimburse the enlisted men of the United States Marine Corps who incurred loss of clothing by the fires which occurred at the navy-yard, Washington, District of Columbia, on the twenty-second and twenty-ninth days of April, eighteen hundred and ninety-seven, fifty-one dollars and seventy-three cents: *Provided*, That the accounting officers of the Treasury shall in all cases require a schedule and certificate from each person making a claim under this act."

**Wreck of U. S. S. "Charleston."**—By act of February 7, 1903 (32 Stat., 804), provision was made for reimbursement of losses sustained in the wreck of the U. S. S. *Charleston*, as follows:

"That to reimburse the officers and crew of the United States steamship *Charleston*, destroyed on a coral reef off Camiguin Island, in the Phil-



ippines, November second, eighteen hundred and ninety-nine, for losses incurred by them, respectively, in the destruction of said vessel, there shall be paid to each of said officers and crew or to the personal representatives of any which may be deceased, out of any money in the Treasury of the United States not otherwise appropriated, a sum equal to the losses so sustained by them: *Provided*, That the accounting officers of the Treasury shall in all cases require a schedule and certificate from each person making a claim under this act, such schedule to be approved by the Secretary of the Navy, who may require other satisfactory proof of said losses, and reimbursements shall be made for such losses as are of a character and value suitable and appropriate to the rank, rating, or duty of the person suffering such loss: *Provided, however*, That in no case shall the aggregate sum allowed any claimant or person for such loss exceed the value of such articles of personal property as were required by the United States Naval Regulations in force at the time of such loss, and there shall be deducted therefrom any sum heretofore paid any of them under section two hundred and ninety of the Revised Statutes.

"Sec. 2. That the relief granted by the provisions of this act shall be in full satisfaction of any and all claims whatever against the United States on account of losses by the destruction of the United States steamship *Charleston*, and any claim which shall be presented and acted upon under the authority of this act shall be held to be finally determined, and shall not in any manner thereafter be reopened, reconsidered, supplemented, nor be subject to appeal in any form.

"Sec. 3. That no claim for losses by reason of the destruction of said vessel not heretofore presented shall be allowed under the provisions of this act which shall not be presented within two years after the date of its passage.

"Sec. 4. That any amounts that have been paid under sections two hundred and eighty-eight, two hundred and eighty-nine, and two hundred and ninety of the Revised Statutes shall be deducted in the settlement of all claims under this act."

**San Francisco fire.**—The naval appropriation act of June 29, 1906 (34 Stat., 554), contained the following:

"To reimburse officers and enlisted men of the Navy and Marine Corps who were on duty under orders in San Francisco during the recent fire in that city for losses of clothing and other personal effects sustained by them through said fire, seven thousand dollars, or so much thereof as may be necessary: *Provided*, That such reimbursement shall be made under regulations to be prescribed by the Secretary of the Navy and upon vouchers to be approved by him in each case."

**Effects destroyed to prevent spread of disease.**—The Naval Instructions, 1913, contain the following provisions:

"4750. (1) Should it become necessary to destroy clothing or other personal effects of officers or men to prevent the spread of disease, the commandant of the station or commanding officer of the ship shall direct a survey to be held on the articles, and the report, containing

a list of the articles, with an estimate of their value, approved by him, shall be transmitted to the Navy Department. The surveying officer shall base his estimate on the actual value of the articles destroyed and not on the original cost of the articles.

"(2) No issue shall be made to persons in lieu of their effects so destroyed. They can only be reimbursed for such loss by certificate from the Treasury Department after the approval of the report of survey by the Secretary of the Navy."

The annual deficiency appropriation acts contain appropriations under "Claims allowed by the Auditor for the Navy Department," for payment of claims "for destruction of clothing and bedding for sanitary reasons," certified to Congress under section 2, act of July 7, 1884 (23 Stat., 254), which reads in part as follows:

"That the Secretary of the Treasury shall, at the commencement of each session of Congress, report the amount due each claimant whose claim has been allowed in whole or in part to the Speaker of the House of Representatives and the presiding officer of the Senate, who shall lay the same before their respective Houses for consideration."

In the Army the Secretary of War is authorized to order gratuitous issues of clothing to soldiers who have had contagious diseases, and to hospital attendants who have nursed them, to replace any articles of their clothing destroyed by order of the proper medical officers to prevent contagion. (Sec. 1298, R. S.; 4 Comp. Dec., 26; see also act June 30, 1902, 32 Stat., 517.)

Where private property is destroyed by the Government for its own benefit, with the assent of the owner, a contract is implied to make compensation for its value. (7 Comp. Dec., 767.)

Payment of the value of a house belonging to an Indian and located on an Indian reservation, which was destroyed by officers of the Government to prevent the spread of disease, may be made from an appropriation providing for the support and civilization of Indians. (12 MSS. Comp. Dec., 1098.)

Reimbursement for articles of clothing belonging to Government employees, destroyed to prevent the spread of smallpox, may fairly be considered as coming within the scope of medical attendance to which such employees were entitled. (12 MSS., Comp. Dec. 462. See Comp. Dig., p. 610.)

**New statutory provisions superseding prior laws** and providing generally for the reimbursement of persons in the naval service for property lost or destroyed in such service, are contained in the act of October 6, 1917 (40 Stat., 389.)

#### CLAIMS FOR REIMBURSEMENT.

**Jurisdiction was not conferred upon the Court of Claims** by the act of March 2, 1895, and suit for such losses was not authorized under that act. (*Harlee v. U. S.*, 51 Ct. Cls., 342; see also *U. S. v. Babcock*, 250 U. S., 328.)

**Marine Corps.**—Officers and enlisted men of the Marine Corps are not entitled to reim-

bursement for loss of personal effects in accordance with laws relating to the Army; but are entitled to such reimbursement under the same circumstances as if they were in the Navy proper. (3 Comp. Dec., 659; *Harlee v. U. S.*, 51 Ct. Cls., 342; compare 4 Comp. Dec., 26.)

**Not a gratuity.**—The amount to which an officer or enlisted man is entitled under the law for private property lost or destroyed is by way of reimbursement, and is not a gratuity; and accordingly, where an officer died before receiving the amount due him for private property lost by the wreck of a vessel, *held* that such amount may be paid to the legal representatives of the deceased officer or to the persons entitled to take his personal property upon his decease. (8 Comp. Dec., 688.) [See note to section 289.]

**Losses in time of war.**—The act of March 2, 1895 (28 Stat., 962), above noted, which provided for reimbursement for private property belonging to officers or enlisted men of the Navy, lost or destroyed by shipwreck or other marine disaster, and which further provided "that this act shall not apply to losses sustained in time of war," was not applicable to private property lost on the U. S. S. *Charleston* while operating with the land forces of the United States in the suppression of the local insurrection in the Philippine Islands on November 2, 1899. While the United States was not at war with any recognized power, nevertheless, *held, for the purpose of this act* (Mar. 2, 1895), a state of war existed as to all the military forces of the United States directly engaged in the suppression of said insurrection. However, in such cases reimbursement was allowed under sections 288-290, Revised Statutes. (7 Comp. Dec., 345; see also, 9 Comp. Dec., 527.) [Special provision was subsequently made by Congress for the relief of officers and crew of the *Charleston*, as shown by act above quoted.]

**Prior laws enlarged by act of March 2, 1895.**—Sections 288-290 provided for certain limited payments to officers and men, only when they were "on board a vessel in the employ of the United States." Under the act of March 2, 1895, payment was authorized in any case where the property was lost in the naval service by shipwreck or marine disaster, without regard to the character of the vessel the goods were on at the time of the loss. The claimant, however, was required to show that such loss was without fault or negligence on his part, unless the property was shipped in an unseaworthy vessel by order of an officer authorized to give such order, in which case such proof was not required. (2 Comp. Dec., 30.)

The act of March 2, 1895, was intended to be an enlargement of previous laws providing for the reimbursement of officers and seamen for property lost or destroyed in the naval service, and therefore was to be liberally construed. It appeared from this act that sections 288-290, Revised Statutes, were directly under the consideration of Congress at the time of its enactment. (2 Comp. Dec., 30; 1 Comp. Dec., 441.)

The act of March 2, 1895, authorized payment in the case of petty officers and seamen who died prior to the passage of the said act. It has several times been held that acts making provision for the payment of additional compensation or bounty are personal and for the benefit

only of those living at the time the act takes effect, unless something therein clearly indicates that the intention of Congress was that others should receive the benefit of the provision. As section 289, Revised Statutes, provided for payment in the cases of persons, other than officers, who had died, and as the act of March 2, 1895, required any payment under section 289 to be deducted from the amount to be paid under the provisions of said act, an intention upon the part of Congress to make the act apply to petty officers, seamen, and others in the naval service, not officers, who were already dead when the act was passed, seems clear. Whether the act also applied to the cases of officers who had died before that date was not decided in this case. (1 Comp. Dec., 473.) [As to officers who die before receiving payment, see note above, "Not a gratuity."]

**"Shipwreck or other marine disaster,"** within the meaning of the act of March 2, 1895, was intended to cover shipwreck or marine disaster to the ship itself, involving a total or partial destruction or casting away of the ship, and not such a temporary disaster as waves washing over the ship's decks or like misfortune necessarily incident to sea service. (1 Comp. Dec. 441; followed Comp. Dec., Apr. 25, 1911, App. No. 19972, file 26254-692.)

#### JURISDICTION, ACCOUNTING OFFICERS AND SECRETARY OF THE NAVY.

See note to section 236, Revised Statutes, on general subject of jurisdiction of accounting officers and heads of executive departments.

**Secretary's approval not conclusive.**—In settlements under section 290, Revised Statutes, it was never regarded that the schedule and certificate of the officer, with the approval of the Secretary, were conclusive upon the accounting officers or relieved them from responsibility of making further investigations and disallowing any portion of a claim which to them seemed unwarranted by the law or the facts. (4 Comp. Dec., 590.)

Under the act of February 7, 1903, for reimbursing the officers and crew of the U. S. S. *Charleston*, an officer was not entitled to reimbursement of a greater amount than the aggregate value of the articles of personal property which were required by the naval regulations in force at the time of the loss, even though his claim for a greater amount had been approved by the Secretary of the Navy. (10 Comp. Dec., 456; see also *Little v. U. S.*, 41 Ct. Cls., 408.)

See act of October 6, 1917 (40 Stat., 389), and see *United States v. Babcock* (250 U. S., 328).

**Secretary's approval limits maximum amount to be allowed.**—Under the act of March 30, 1898 (quoted above), providing that "the accounting officers of the Treasury shall in all cases require a schedule and affidavit from each person making a claim" for losses incurred by them by the destruction of the U. S. S. *Maine*, "such schedule to be approved by the Secretary of the Navy," the approval by the Secretary of the Navy was not conclusive upon the accounting officers. The reasonable interpretation of the act was that the schedule was



required to be approved by the Secretary of the Navy as a safeguard against the allowance of unjust and exorbitant claims, arising from the fact that the accounting officers, without the advice and approval of the Navy Department, were not in a position to judge so intelligently as to what articles are suitable and appropriate for an officer or enlisted man of the rank or rating and duty of the claimant. The effect was to put a limitation upon the jurisdiction of the accounting officers, and to preclude the allowance of anything not having the approval of the Secretary of the Navy, but leaving their jurisdiction unimpaired as to items and amounts approved by him. While, therefore, the schedule and affidavit of an officer making claim under this act (Mar. 30, 1898), when approved by the Secretary, made out on their face a prima facie claim as contemplated by the act, they were by no means conclusive upon the accounting officers except to limit their jurisdiction to a consideration of items and amounts so presented. The approval of the Secretary of the Navy was required by the law before the claim could be considered by the accounting officers, and while the Auditor might be justified in allowing a claim upon such approval of the Secretary of the Navy, the Auditor was not concluded thereby if in his judgment additional proof was necessary and proper to a fair and just adjudication of the claim. In reaching his conclusions, great weight should, of course, be given to the decision of the Secretary, both as to what articles were necessary and appropriate for the rank of the claimant, and also as to the value of such articles. But within the limitations imposed by the Secretary's approval, the claim should be settled in the same manner as other claims of a similar nature. (4 Comp. Dec., 587.)

[It will be noted that the act of June 29, 1906, above quoted, relative to the San Francisco fire, was broader in its terms than that considered in the Comptroller's decision last above cited. No question of jurisdiction arose under the San Francisco act, which provided that "reimbursement shall be made under regulations to be prescribed by the Secretary of the Navy and upon vouchers to be approved by him in each case." Only one claim under this act was considered by the Comptroller of the Treasury, and was allowed as of course, the Comptroller saying: "The said claim was approved on August 27, 1907, by the Secretary of the Navy in the amount of \$47.44. Upon this revision, therefore, the claimant will be allowed \$47.44, the amount approved by the Secretary of the Navy." (Comp. Dec., Sept. 16, 1907, Appeal No. 12726, file 4753-95.)]

**Accounting officers bound by naval regulations.**—Under the act of March 2, 1895 (28 Stat. 962, above noted), the accounting officers were bound by the official statement of the Chief of the Bureau of Navigation as to what articles were a part of the necessary outfit required by the regulations. While the number required by the regulations might be below that with which the men were usually provided, still no discretion lay in the accounting officers to go behind the regulations fixed by the naval authorities who were familiar with the needs of the men. (2 Comp. Dec., 150.)

## LIMITATIONS UPON CLAIMS.

**Value at date of loss.**—In settling claims under the act of March 2, 1895 (above noted), it was held that the accounting officers must allow the actual value of private property at the date of the loss or destruction, when such actual value is proved by the claimant. As petty officers and seamen in the naval service are not required to procure their clothing and personal effects from the paymaster upon requisitions, they are not limited to the paymaster's issuing price, but may prove their claims by such evidence as is required to clearly establish the actual value of their property at the date of loss or destruction. In the absence of such proof, the "issuing price" may be accepted as a fair valuation. (2 Comp. Dec., 150.)

**Articles required by regulations.**—Officers and men presenting claims under the act of March 2, 1895 (above noted), could be reimbursed only for "such articles of personal property as are required by the U. S. Naval Regulations" both as to number and kind, and the accounting officers could not allow claims for articles in excess of the regulation requirements, which they were permitted to carry for their personal comfort or convenience. (2 Comp. Dec., 150; 1 Comp. Dec., 441.)

**Articles not required by regulations but within limit of amount.**—The act of February 7, 1903 (quoted above), did not limit reimbursement for losses on the *Charleston* to articles required by the regulations, but on the contrary permitted payment to be made for any article lost that was suitable and appropriate to the rank, rating, or duty of the person suffering such loss, though such article may not have been required by the regulations; but the whole amount which could be allowed was strictly limited to the total value of articles required by the Navy Regulations. To illustrate, if a special full dress suit was required, and it appeared that the officer did not lose such an article, the value of that article could be allowed him through reimbursement for the loss of some other article or articles which, while not required by the regulations, were nevertheless suitable to the rank or duty of the officer. It was possible under this law for an officer or enlisted man who had lost no article required by the regulations, to receive a large sum for the loss of other articles, but the sum allowed could be no greater than the total value of the articles required by the regulations. (Letter of Comptroller of the Treasury to the Secretary of the Navy, Nov. 5, 1903, Appeal No. 9569, file 9410, 2527, 1903; 1370-1903.)

**What articles required by regulations.**—An examination of the volume entitled "U. S. Navy Regulations" fails to disclose information as to what articles are required. Under these circumstances, not only have the Uniform Regulations been followed, but also, in order to ascertain what was required by the regulations of the Navy, an official itemized statement was obtained from the Chief of the Bureau of Navigation, giving the character and number of such articles. If this statement could not be accepted, then it appears that there were in fact

no Naval Regulations as contemplated in the act (Mar. 2, 1895). However, the expression "naval regulations" should be construed in accordance with the intention of Congress, and the manifest purpose of the act being to reimburse the officers and seamen for the loss of clothing required by the rules and regulations of the Navy, the statement of the Chief of the

Bureau of Navigation, transmitted by the Secretary of the Navy, giving the number and character of the articles required by the regulations, must be treated as the best evidence of what was required by the U. S. Naval Regulations referred to in the act. (2 Comp. Dec. 150.) [See note to section 161, Revised Statutes.]

**Sec. 297. [Auditors may administer oaths.]** The several Auditors are empowered to administer oaths to witnesses in any case in which they may deem it necessary for the due examination of the accounts with which they shall be charged.—(3 Mar., 1817, c. 45, s. 12, v. 3, p. 368. 8 June, 1872, c. 335, s. 24, v. 17, p. 228.)

See sections 184, 185, and 186, Revised Statutes, relative to securing attendance of witnesses.

See note to section 183, Revised Statutes, concerning oaths in cases arising in the Navy.

**Sec. 300. [Allowance of lost checks.]** Whenever the disbursing officer or agent by whom was issued any check which has been lost, destroyed, or stolen, is dead, or no longer in the service of the United States, the proper accounting officer shall, under such regulations as the Secretary of the Treasury may prescribe, state an account in favor of the owner of such original check for the amount thereof, and charge such amount to the account of such officer or agent.—(2 Feb., 1872, c. 12, ss. 1, 2, v. 17, p. 29.)

The substance of this provision is repeated in section 3647, Revised Statutes, which section was amended and reenacted by act of February 23, 1909 (35 Stat., 643.) Regulations prescribed by the Secretary of the

Treasury concerning lost checks are given in article 4337, Navy Regulations, 1913. See note to section 251, Revised Statutes, on general subject of regulations of the Treasury Department.



## CHAPTER FIVE.

### THE TREASURER.

**Sec. 301. [Treasurer.]** There shall be in the Department of the Treasury a Treasurer of the United States, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of six thousand five hundred dollars a year.—(2 Sept., 1789, c. 12, s. 1, v. 1, p. 65. 23 July, 1866, c. 208, s. 2, v. 14, p. 206. 3 Mar., 1875, c. 130, s. 2, v. 18, p. 397.)

The salary of the Treasurer of the United States was fixed at \$8,000 per annum by the act of March 4, 1909 (35 Stat., 1065).

**The rooms provided in the Treasury Building at the seat of government for the use of the Treasurer are by law the "Treasury of the United States"** (sec. 3591, R. S.); assistant treasurers are authorized and have been appointed to serve at New York and other cities (sec. 3595, R. S.); the rooms assigned by law to be occupied by them are appropriated to their use and for the safekeeping of the public money deposited with them (sec. 3598, R. S.); the assistant treasurers are to have the charge and care of the rooms, etc., assigned to them, and to perform the duties required of them relating to the receipt, safekeeping, and disbursement of public money (sec. 3599, R. S.); all collectors and receivers of public money of every description within the city of New York and other cities are required, as often as may be directed by the Secretary of the Treasury, to pay over to the assistant treasurer in their respective cities all public money collected by them or in their hands (sec. 3615, R. S.); the Treasurer of the United States and all assistant treasurers are required to keep all public money placed in their possession until the same is ordered by the proper department or officer of the Government to be transferred or paid out,

and when such orders are received, faithfully and promptly to comply with same; and to perform all other duties as fiscal agents of the Government that may be imposed by any law or by any regulation of the Treasury Department made in conformity with law (sec. 3639, R. S.); all money paid into the Treasury of the United States is subject to the draft of the Treasurer; and for the purpose of payment on the public account the Treasurer is authorized to draw on any of the depositories as he may think most conducive to the public interest and the convenience of public creditors. (Sec. 3644, R. S.) (Cooke v. U. S., 91 U. S., 398.)

**Adjustment of accounts.**—All claims against the United States are to be settled and adjusted in the Treasury Department, and that is located "at the seat of Government." The assistant treasurer in New York [or elsewhere] is a custodian of public money which he may pay out or transfer upon the order of the proper department or officer; but he has no authority to settle and adjust—that is to say, to determine upon the validity of, any claim against the Government. He can pay only after the adjustment has been made "in the Department of the Treasury," and then upon drafts drawn for that purpose by the Treasurer. (Cooke v. U. S., 91 U. S., 399.)

**Sec. 303. [Assistant Treasurer.]** There shall be in the Department of the Treasury an Assistant Treasurer of the United States, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of two thousand eight hundred dollars a year.—(3 Mar., 1863, c. 89, s. 1, v. 12, p. 761. 25 June, 1864, c. 147, s. 2, v. 13, p. 159.)

See note to preceding section.

The compensation of the Assistant Treasurer has been increased in annual appropriation acts to \$3,600 per annum. See act of March 4, 1913 (37 Stat., 755).

Additional "assistant treasurers of the United States," located in various cities, are provided for by sections 3594 and 3595, Revised Statutes.

**Sec. 305. [Duties of the Treasurer.]** The Treasurer shall receive and keep the moneys of the United States, and disburse the same upon warrants drawn

by the Secretary of the Treasury, countersigned by either Comptroller, and recorded by the Register, and not otherwise. He shall take receipts for all moneys paid by him, and shall give receipts for all moneys received by him; and all receipts for moneys received by him shall be indorsed upon warrants signed by the Secretary of the Treasury, without which warrant, so signed, no acknowledgment for money received into the public Treasury shall be valid. He shall render his accounts to the First Comptroller quarterly, or oftener if required, and shall transmit a copy thereof, when settled, to the Secretary of the Treasury. He shall at all times submit to the Secretary of the Treasury and the First Comptroller, or either of them, the inspection of the moneys in his hands.—(2 Sept., 1789, c. 12, s. 4, v. 1, p. 65.)

See note to section 301, Revised Statutes.

So much of this section as required the Register of the Treasury to record warrants was repealed by act of July 31, 1894, section 11 (28 Stat., 209).

The title "First Comptroller" was changed to "Comptroller of the Treasury" and the office of Second Comptroller was abolished by act of July 31, 1894, section 4 (28 Stat., 206).

The accounts of the Treasurer are to be received and examined by the Auditor for the Treasury Department. (Act July 31, 1894, sec. 7, 28 Stat., 206.)

**Payments upon warrants.**—The judgments of the Court of Claims, even when affirmed by the Supreme Court, and allowances made by the Secretary of the Treasury or other public officers under authority of law, can not be paid

by the Treasurer except upon a warrant drawn by the Secretary of the Treasury, countersigned by the Comptroller of the Treasury, in pursuance of appropriations made by law. (*Ravesies v. U. S.*, 21 Ct. Cls., 243.) [See note to section 236, Revised Statutes.]

All warrants are required to be countersigned by the Comptroller of the Treasury under section 11, act of July 31, 1894 (28 Stat., 209); under section 4 of the same act (28 Stat., 206), power is given to the Assistant Comptroller of the Treasury, under direction of the Comptroller of the Treasury, to countersign all warrants; and the chief clerk in the office of the Comptroller of the Treasury is empowered, in the name of the Comptroller of the Treasury, to countersign all warrants except accountable warrants.

**Sec. 306. [Liabilities outstanding three or more years.]** At the termination of each fiscal year all amounts of moneys that are represented by certificates, drafts, or checks, issued by the Treasurer, or by any disbursing officer of any Department of the Government, upon the Treasurer or any assistant treasurer, or designated depositary of the United States, or upon any national bank designated as a depositary of the United States, and which shall be represented on the books of either of such offices as standing to the credit of any disbursing officer, and which were issued to facilitate the payment of warrants, or for any other purpose in liquidation of a debt due from the United States, and which have for three years or more remained outstanding, unsatisfied, and unpaid, shall be deposited by the Treasurer, to be covered into the Treasury by warrant, and to be carried to the credit of the parties in whose favor such certificates, drafts, or checks were respectively issued, or to the persons who are entitled to receive pay therefor, and into an appropriation account to be denominated "outstanding liabilities."—(2 May, 1866, c. 70, ss. 1, 4, v. 14, pp. 41, 42.)

See sections of the Revised Statutes set forth below, and notes thereto.

**Regulations in pursuance of sections 306-310, Revised Statutes.**—The Navy Regulations, 1913, contain the following article:

"4334. The following regulations made by the Secretary of the Treasury, in pursuance of sections 306 to 310 of the Revised Statutes, shall be observed by all officers:

"(a) Any Treasury draft or any check drawn by a public disbursing officer still in service,

which shall be presented for payment before it shall have been issued three full fiscal years, will be paid in the usual manner by the officer or bank on which it is drawn, and from funds to the credit of the drawer. Thus, any such draft or check issued on or after July 1, 1909, will be paid as above stated until June 30, 1913, and the same rule will apply for subsequent years.

"(b) Any such draft or check which has been issued for a longer period than three full fiscal years will be paid only by the settlement of



an account in the Treasury Department, as provided in section 308, Revised Statutes, and for this purpose the draft or check will be transmitted to the Secretary of the Treasury for the necessary action.

“(c) At the close of each fiscal year, the Treasurer, the several assistant treasurers, and the national-bank depositaries will render to the Secretary of the Treasury, as required by section 310, a list of all disbursing officers' accounts still unclosed which have remained unchanged on the books of their respective offices or banks, either by debit or credit, more than three fiscal years, giving in each case the name and official designation of the officer, the date when the account with him was opened, the date of last debit and last credit, and the balance remaining to his credit.

“(d) Every disbursing officer will, on the 30th of June of each year, as also required by section 310, make a return to the Secretary of the Treasury of all checks drawn by him which have been outstanding and unpaid for three full fiscal years, stating the number of each check, its date, amount, in whose favor, on what office or bank, and for what purpose drawn, the number of the voucher in payment of which it was drawn, and, if known, the residence of the payee.

“(e) Whenever any disbursing officer of the United States shall cease to act in that capacity, he will at once inform the Secretary of the Treasury whether he has any public funds to his credit in any office or bank, and, if so, what checks, if any, he has drawn against the same which are still outstanding and unpaid. Until satisfactory information of this character shall have been furnished, the whole amount of such moneys will be held to meet the payment of his checks properly payable therefrom.

“(f) In case of the death, resignation, or removal of a public disbursing officer, any check previously drawn by him and not presented for payment within four months of its date will not be paid until its correctness shall have been attested by the Secretary or Assistant Secretary of the Treasury.

“(g) If the object or purpose for which any check of a public disbursing officer is drawn is not stated thereon, as required by the following article, or if any reason exists for suspecting fraud, the office or bank on which such check is drawn will refuse its payment.”

#### STATUTE OF LIMITATIONS.

**Does not run until demand and refusal.**—Where the amount of lost checks was covered into the Treasury in pursuance of this section, the promise of the Government, contained in the statute, to hold money so paid into the Treasury, was a continuing promise, available to the drawee or his administratrix at any time, to which full force should be given; when application was made by the administratrix to the Secretary of the Treasury for payment of the checks by the issue of Treasury warrants under the authority conferred by sections 306, 307, 308, Revised Statutes, and such application was refused, then for the first time a claim for the breach of the contract accrued, and the statute of limitations began to run from the

date of the refusal. (*U. S. v. Wardwell*, 172 U. S., 48; 26 Op. Atty. Gen., 194.)

Where it is established that funds in the hands of the Government are held in trust, it follows that no part of such funds is subject to the operation of the statute of limitations. (*State of Louisiana v. U. S.*, 23 Ct. Cls., 53.) The claim for such funds first accrues, within the meaning of the statute of limitations, when it is first presented to the Secretary of the Treasury. (*Harrison v. U. S.*, 20 Ct. Cls., 175.) [*In U. S. v. Taylor*, 104 U. S., 216, it was held that when the surplus proceeds of real estate, sold for a direct tax due the United States, is deposited in the Treasury to be there held for the use of the owner of the property, the statute of limitations runs from the date of his application to the Secretary of the Treasury for that surplus.]

**Analogous to trust fund.**—Where the amount of an unclaimed draft issued by the Government was covered into the Treasury, and about 16 years later demand for payment was made and refused; *held*, that after the draft was issued the Government held the fund in the nature of a trust, and that the statute of limitations as to claims cognizable by the Court of Claims did not begin to run until the date of demand. (*Ray v. U. S.*, 50 Fed. Rep., 166. See also *Ravenel et al. v. U. S.*, 23 Ct. Cls., 192.)

**Disavowal of trust.**—An act repealing an appropriation must be regarded as a disavowal of the trust; and it must be held that the statute of limitations began to run at the date of the repealing act. (*Russell v. U. S.*, 37 Ct. Cls., 113.)

Where money appropriated by Congress is not paid to the beneficiary but is covered into the Treasury under this section and carried to the credit of the party for whose benefit the appropriation was made, it may be regarded as an express trust, subject to the qualification that the statute of limitations will begin to run as soon as the trust is openly disavowed by the trustee. (*Russell v. U. S.*, 37 Ct. Cls., 113.)

The statute of limitations can not be set up against money credited to a claimant in the appropriation account of “outstanding liabilities.” Such money is held as a trust fund, payable on demand without limit of time. The statute of limitations does not run against it until the trustee disavows the trust. (*Wayne v. U. S.*, 26 Ct. Cls., 274.)

**Proof of identity sufficient.**—There is much indebtedness of the United States which no lapse of time in making application for payment renders stale, such as interest on registered bonds and other balances stated in favor of parties on the books of the Treasury Department, as to which the only proof to be made is the identity of the claimant or his right to represent the record creditor. (*Waddell v. U. S.*, 25 Ct. Cls., 323, citing secs. 306, 307, 308, R. S., and *Hall's Case*, 17 Ct. Cls., 39.)

**Merger of original claim.**—It has been held that an action may be maintained against the Government upon a Treasury draft issued in payment of an account which has been audited and certified at the Treasury, notwithstanding that the original cause of action is barred by the statute of limitations. (*Buffalo Bayou R. Co. v. U. S.*, 16 Ct. Cls., 238.)

When a claim passes into the form of checks, its legal character changes from that of a demand for goods sold and delivered to a claim represented by the checks given in liquidation of the original demand. It then becomes a legal obligation arising upon the new form of indebtedness. The fund established by section 306, Revised Statutes, bears upon it the impress of a trust, payable on demand without limit of time; and the statutes of limitations can not be set up against money so credited to the claimant in the permanent appropriation for outstanding liabilities. (*Wardwell v. U. S.*, 32 Ct. Cls., 30.)

**Jurisdiction of Court of Claims.**—Where a Government check is lost or stolen, the Revised Statutes (secs. 306-310, 3646) do not require that payment must be postponed for three years or preclude a suit. They simply

authorize disbursing officers to duplicate small checks in certain cases. The power given to the accounting officers to duplicate lost checks is not exclusive and does not affect the jurisdiction of the courts. (*Becker v. U. S.*, 26 Ct. Cls., 172, 177.)

**Character of outstanding draft.**—A Treasury draft outstanding for more than three years, the appropriation to pay it covered into the Treasury, has ceased to be negotiable paper. (*Harris v. U. S.*, 27 Ct. Cls., 177.)

A claimant having an amount rightly due to her, standing to her credit on the books of the Treasury under section 306, Revised Statutes, is entitled to recover though a draft more than three years outstanding for the same debt is in the hands of a third person. (*Harris v. U. S.*, 27 Ct. Cls., 177.)

**Sec. 307. [Vouchers for drafts remaining unpaid.]** The certificate of the Register of the Treasury, stating that the amount of any draft issued by the Treasurer, to facilitate the payment of a warrant directed to him for payment, has remained outstanding and unpaid for three years or more, and has been deposited and covered into the Treasury in the manner prescribed by the preceding section, shall be, when attached to any such warrant, a sufficient voucher in satisfaction of any such warrant or part of any warrant, the same as if the drafts correctly indorsed and fully satisfied were attached to such warrant or part of warrant. And all such moneys mentioned in this and in the preceding section shall remain as a permanent appropriation for the redemption and payment of all such outstanding and unpaid certificates, drafts, and checks.—(2 May, 1866, c. 70, s. 2, v. 14, p. 41.)

This section was amended by act of July 31, 1894, section 16 (28 Stat., 210); by substituting the words "Secretary of the Treasury" for

the words "Register of the Treasury" as given above.

See note to preceding section.

**Sec. 308. [Payment upon presentation of outstanding drafts.]** The payee or the bona-fide holder of any draft or check the amount of which has been deposited and covered into the Treasury pursuant to the preceding sections, shall, on presenting the same to the proper officer of the Treasury, be entitled to have it paid by the settlement of an account and the issuing of a warrant in his favor, according to the practice in other cases of authorized and liquidated claims against the United States.—(2 May, 1866, c. 70, s. 3, v. 14, p. 42.)

See note to section 306, Revised Statutes.

**Not merely matter of bookkeeping.**—If bookkeeping was the only matter sought to be provided for by sections 306, 307, and 308, Revised Statutes, there were no need of section 308. That prescribes payment, and payment in a particular way. The payee does not simply surrender his check and receive money; but "on presenting the same to the proper officer" he is "entitled to have it paid by the settlement of an account and the issuing of a warrant in his favor." This may be mere machinery for payment, but it is machinery not used or required until after the money has been "covered into the Treasury by warrant" and "carried to the credit" of the payee. The right given is the right to surrender the check and receive a warrant on the Treasury. It will

also be noticed that the purpose of the act of 1866 upon which these sections are based was, as expressed in its title, not merely to "facilitate the settlement of the accounts of the Treasurer of the United States," not merely to perfect a system of bookkeeping, but also "to secure certain moneys \* \* \* to persons to whom they are due and who are entitled to receive the same." In other words, the purpose of the Government by this statute is to secure to each party who holds Government paper the amount thereof, to place it in the Treasury to his credit, and to prescribe a method by which, whenever he wishes, he can obtain it. No time is mentioned in which he must apply for a warrant or after which the money is forfeited to the Government. When the contract created by the promise made in



section 308 is broken, then a claim for the breach of such contract first accrues and the limitation begins to run. (*U. S. v. Wardwell*, 172 U. S., 48; see also *Ray v. U. S.*, 50 Fed. Rep., 166.)

**Payment without bond.**—The nonproduction of a Treasury draft is sufficiently accounted

for by proof that it was stolen and has not been heard of for more than seventeen years. In such a case it is not necessary for the claimant to give a bond of indemnity. (*Wayne v. U. S.*, 26 Ct. Cls., 274. See also *U. S. v. Wardwell*, 172 U. S., 48.)

**Sec. 309. [Accounts of disbursing officers unchanged for three years.]** The amounts, except such as are provided for in section three hundred and six, of the accounts of every kind of disbursing officer, which shall have remained unchanged, or which shall not have been increased by any new deposit thereto, nor decreased by drafts drawn thereon, for the space of three years, shall in like manner be covered into the Treasury, to the proper appropriation to which they belong; and the amounts thereof shall, on the certificate of the Treasurer that such amount has been deposited in the Treasury, be credited by the proper accounting officer of the Department of the Treasury on the books of the Department, to the officer in whose name it had stood on the books of any agency of the Treasury, if it appears that he is entitled to such credit.—(2 May, 1866, c. 70, s. 5, v. 14, p. 42.)

See notes to sections 306–308, Revised Statutes.

**Sec. 310. [Annual reports of disbursing officers, etc.]** The Treasurer, each assistant treasurer, and each designated depositary of the United States, and the cashier of each of the national banks designated as such depositaries, shall, at the close of business on every thirtieth day of June, report to the Secretary of the Treasury the condition of every account standing, as in the preceding section specified, on the books of their respective offices, stating the name of each depositor, with his official designation, the total amount remaining on deposit to his credit, and the dates, respectively, of the last credit and the last debit made to each account. And each disbursing officer shall make a like return of all checks issued by him, and which may then have been outstanding and unpaid for three years and more, stating fully in such report the name of the payee, for what purpose each check was given, the office on which drawn, the number of the voucher received therefor, the date, number, and amount for which it was drawn, and, when known, the residence of the payee.—(2 May, 1866, c. 70, s. 6, v. 14, p. 42.)

For modification of this section, see act of July 1, 1916, section 5 (39 Stat., 336).  
Disbursing officers are required to furnish

heads of departments with certain information for annual report to Congress (sec. 193, R. S.)





## TITLE VIII.

### THE DEPARTMENT OF JUSTICE.

Sec.

- 346. Establishment of Department of Justice.
- 347. Solicitor General.
- 349. Naval solicitor, etc.
- 354. Opinions of Attorney General required by the President.
- 355. Title to and jurisdiction over land purchased by the United States.
- 356. Opinions of Attorney General required by heads of departments.
- 357. Legal advice to Departments of War and Navy.
- 358. Reference of questions by Attorney General to subordinates.
- 359. Conduct and argument of cases.
- 360. Performance of duty by officers of Department of Justice.

Sec.

- 361. Legal services required by the President, heads of departments, and subordinates.
- 362. Superintendence of district attorneys and marshals.
- 363. Retaining counsel to aid district attorneys.
- 364. Attendance of counsel to be provided by Attorney General.
- 365. Counsel fees restricted.
- 366. Appointment and oath of special attorneys or counsel.
- 367. Interest of United States in pending suits, who may attend to.
- 383. Publication of opinions.

**Sec. 346. [Establishment of Department of Justice.]** There shall be at the seat of Government an Executive Department to be known as the Department of Justice, and an Attorney-General, who shall be the head thereof.—(24 Sept., 1789, c. 20, s. 35, v. 1, p. 92. 22 June, 1870, c. 150, s. 1, v. 16, p. 162.)

See sections 187, 188 and 189, Revised Statutes, and sections 180, 185, Judicial Code, act of March 3, 1911 (36 Stat., 1142), as to duties of the Attorney General.

See note to section 158, Revised Statutes, as to organization and growth of executive departments, etc.

There is no very specific statement of the general duties of the Attorney General, but it is seen from the whole chapter that he has authority, and it is made his duty, to supervise the conduct of all suits brought by or against the United States, and to give advice to the President and the heads of other departments of the Government. He is invested with the general superintendence of all suits to be brought against the debtors of the Government, or upon bonds, or to begin criminal prosecutions or to institute proceedings in any of the numerous cases in which the United States is plaintiff. All the district attorneys who do bring them in the various courts in the country are placed under his immediate direction and control. He is undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States and of the litigation which is necessary to establish the rights of the Government. He is the officer to determine when the United States shall sue, for what it shall sue, and to be responsible that such suits are brought in appropriate cases. In all this, however, the Attorney General acts as the head of one of the executive departments, representing the authority of the President in the class of subjects within the domain of that department and under his control. (U. S. v. San Jacinto Tin Co., 125 U. S., 273.)

The Attorney General is given "general superintendence and direction" of the district attorneys, in whom Congress has vested the initial power of prosecution. (In re Beavers, 131 Fed. Rep., 366.)

The provisions of law concerning the Department of Justice "are too conclusive and too specific to leave any doubt that Congress intended to gather into the Department of Justice, under the supervision and control of the Attorney General, all the litigation and all the law business in which the United States are interested, and which previously had been scattered among different public officers, departments, and branches of the Government, and to break up the practice of frequently employing unofficial attorneys for the public service." (Perry v. U. S., 28 Ct. Cls., 491.)

**Proceedings before grand jury.**—Neither the Attorney General, the Solicitor General, nor any officer of the Department of Justice is authorized by sections 359, 367, or other provisions of the Revised Statutes of the United States, to conduct or to aid in the conduct of proceedings before a grand jury, nor has a special assistant to the Attorney General such power. (U. S. v. Rosenthal, 121 Fed. Rep., 862.) [This is now authorized by act of June 30, 1906, noted under section 359, Revised Statutes.]

**Relation of Attorney General to Congress.**—The Attorney General is not authorized to give his official opinion upon a call of either House of Congress or any committee or Member thereof. (17 Op. Atty. Gen., 358. For other cases, see note to sec. 356, R. S.)

**Sec. 347. [Solicitor General.]** There shall be in the Department of Justice an officer learned in the law, to assist the Attorney-General in the performance of his duties, called the Solicitor-General, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of seven thousand five hundred dollars a year. In case of a vacancy in the office of Attorney-General, or of his absence or disability, the Solicitor General shall have power to exercise all the duties of that office.—(22 June, 1870, c. 150, s. 2, v. 16, p. 162.)

See sections 177–182 Revised Statutes, as to officers authorized to act temporarily in cases of death, resignation, absence, or sickness of heads of Departments, generally.  
The salary of the Solicitor-General has been increased to \$10,000 per annum.

Where the Solicitor General signs a document as “Acting Attorney General,” the absence of the Attorney General will be presumed in support of the legality of the document so signed. (U. S. v. Twining, 132 Fed. Rep., 129. For other decisions, see notes to secs. 161 and 177, Revised Statutes.)

**Sec. 349. [Naval Solicitor, etc.]** There shall be in the Department of Justice a Solicitor of the Treasury, an Assistant Solicitor of the Treasury, a Solicitor of Internal Revenue, a Naval Solicitor, and an Examiner of Claims for the Department of State, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to the following salaries: The Solicitor of the Treasury to four thousand dollars a year, the Assistant Solicitor of the Treasury to three thousand dollars a year, the Solicitor of Internal Revenue to five thousand dollars a year, the Naval Solicitor to three thousand five hundred dollars a year, and the Examiner of Claims for the Department of State four thousand dollars a year.—(22 June, 1870, c. 150, ss. 3, 9, 10, v. 16, pp. 162, 3. 29 May, 1830, c. 153, s. 1, v. 4, p. 414. 3 Mar., 1865, c. 76, s. 1, v. 13, p. 468. 23 July, 1866, c. 208, s. 5, v. 14, p. 207. 13 July, 1866, c. 184, s. 64, v. 14, p. 170. 23 July, 1866, c. 208, s. 5, v. 14, p. 207. 27 May, 1870, Res. 66, s. 1, v. 16, p. 378. 3 Mar., 1873, c. 226, s. 3, v. 17, p. 508.)

So much of the above section as provided for the appointment of, and payment of a salary to, a “naval solicitor,” was repealed and that office abolished by act June 19, 1878 (20 Stat., 205).

The office of the Judge Advocate General of the

Navy was established by act of June 8, 1880 (21 Stat., 164). And see act of May 22, 1908 (35 Stat., 218), noted under section 419, Revised Statutes, as to office of the solicitor in the Navy Department.

Other amendments to this section do not relate to the Navy, and are not noted.

**Sec. 354. [Opinions of Attorney General required by the President.]** The Attorney General shall give his advice and opinion upon questions [of] law, whenever required by the President.—(24 Sept., 1789, c. 20, s. 35, v. 1, p. 92. 27 Feb., 1877, c. 69, v. 19, p. 241.)

The President's right to call for an opinion from the Attorney General is not limited to questions of law. Article II, section 2, clause 1, of the Constitution, provides that he “may require the opinion of the principal

officer of each of the executive departments upon any subject relating to the duties of their respective offices.” (23 Op. Atty. Gen., 360. For other cases see note to section 356, Revised Statutes.)

**Sec. 355. [Title to, and jurisdiction over, land purchased by United States.]** No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy-yard, custom-house, light-house, or other public building, of any kind whatever, until the written opinion of the Attorney-General shall be had in favor of the validity of the title, nor until the consent of the legis-

lature of the State in which the land or site may be, to such purchase, has been given. The district attorneys of the United States, upon the application of the Attorney-General, shall furnish any assistance or information in their power in relation to the titles of the public property lying within their respective districts. And the Secretaries of the Departments, upon the application of the Attorney-General, shall procure any additional evidence of title which he may deem necessary, and which may not be in the possession of the officers of the Government, and the expense of procuring it shall be paid out of the appropriations made for the contingencies of the Departments respectively.—(11 Sept., 1841, Res. No. 6, v. 5, p. 468.)

Art. R-117 (1) Navy Regulations, 1913, provides that the solicitor in the Navy Department "shall be charged, under the special instructions of the Secretary of the Navy, with the searching of titles, purchase, sale, transfer, and other questions affecting lands and buildings pertaining to the Navy, and with the care and preservation of all muniments of title to land acquired for naval uses."

By act of February 27, 1877, it was provided that "it shall be the duty of all officers of the United States having any of the title papers (of property purchased, or about to be purchased, for the erection of public buildings) in their possession, to furnish them, forthwith, to the Attorney General. No public money shall be expended until the written opinion of the Attorney General shall be had." (19 Stat., 242. This act was amendatory of sec. 1136, R. S., relating to the Army.)

By act of March 2, 1889 (25 Stat., 941) it was provided that "Hereafter all legal services connected with the procurement of titles to sites for public buildings, other than for life-saving stations and pierhead lights, shall be rendered by United States district attorneys: *Provided further*, That hereafter, in the procurement of sites for such public buildings, it shall be the duty of the Attorney General to require the grantors in each case to furnish free of all expense to the Government, all requisite abstracts, official certificates, and evidences of title that the Attorney General may deem necessary."

By joint resolution, April 11, 1898, it was provided that the requirements of this section shall not be applicable to cases in which a temporary fort or fortification may be constructed upon the written consent of the owner of the land in an emergency in which, in the opinion of the President, the immediate erection of such temporary fort or fortification is deemed important and urgent. (30 Stat. 737.)

By act of October 6, 1917 (40 Stat., 427), it was provided that this section "shall not apply to the expenditure of appropriations for the Ordnance Department of the Army now available for the purchase of land and for improvements upon such land."

By act of March 30, 1900, the provisions of this section were "waived" in a case in which it was impracticable to apply to the State legislature for consent to the purchase until

its next session, and the buildings were urgently required for the shelter of troops. (31 Stat., 55.)

Other statutes making exception to the provisions of this section in specific cases include the following: July 2, 1917 (40 Stat., 241); October 6, 1917 (40 Stat., 353); March 1, 1918 (40 Stat., 439); March 28, 1918 (40 Stat., 460); April 11, 1918 (40 Stat., 519); May 6, 1918 (40 Stat., 552); July 8, 1918 (40 Stat., 818); July 9, 1918 (40 Stat., 860, 888); July 18, 1918 (40 Stat., 916).

By act of June 20, 1878, it was provided that the provisions of this section and section 4661, Revised Statutes, should not apply to the erection of a small pierhead light. (20 Stat., 214.) Exception has also been made in the case of a lighthouse and fog signal. (See 2 Comp. Dec., 626.)

The acquisition of land by condemnation for public use is provided for by act of August 1, 1888 (25 Stat., 357).

The President is authorized to procure assent of the legislature of any State in which lands have been purchased for the erection of forts, etc., without such consent having been obtained. (Sec. 1838, R. S.) ["Have been purchased" construed: 10 Op. Atty. Gen. 34.]

The President is authorized to obtain a release to the United States from any person to whom lands are conveyed for the use of the United States. (Sec. 3752, R. S.)

The Constitution provides that Congress shall have power "to exercise exclusive legislation in all cases whatsoever \* \* \* over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." (Art. I, sec. 8, clause 17.)

The punishment of offenses committed on lands used for public purposes, the punishment of which is not provided for by any law of the United States, shall be the same as provided by laws of the State in which situated. (Sec. 239, Criminal Code, act Mar. 4, 1909, 35 Stat., 1145; file 4143-04; 5103-164:4.)

The punishment for cutting or injuring trees, breaking fences, etc., on lands of the United States reserved or purchased for public use, is governed by Criminal Code, act of March 4, 1909, sections 49-58 (35 Stat., 1098, 1099).

Private persons prohibited from asserting a right to the exclusive use and occupancy of pub-



lic lands; civil proceedings to be instituted by United States in such cases; and President authorized to employ civil or military force to remove and destroy any unlawful inclosure of said lands; etc. (Act Feb. 25, 1885, 23 Stat., 321.)

No contract shall be made for the erection of any public building or for any improvement in excess of the amount specifically appropriated therefor. (Sec. 3733, R. S.; Criminal Code, act Mar. 4, 1909, sec. 98, 35 Stat., 1106.)

No land shall be purchased on account of the United States, except under a law authorizing such purchase. (Sec. 3736, R. S.)

Authority to purchase a site and erect a public building thereon is not appropriation therefor. (Act Aug. 7, 1882, 22 Stat., 305.)

#### I. EFFECT OF SECTION.

##### II. WHAT LANDS INCLUDED.

##### III. VALIDITY OF TITLE.

##### IV. CONSENT OF LEGISLATURE.

##### V. JURISDICTION OF THE UNITED STATES.

##### VI. JURISDICTION, NAVAL RESERVATIONS.

##### VII. MISCELLANEOUS.

#### I. EFFECT OF SECTION.

It is clear this section was drafted with a view to the language of the Constitution, Article I, section 8, clause 17, although section 355 says nothing about a cession of jurisdiction. (26 Op. Atty. Gen., 12.)

This section demands that a transfer of jurisdiction, in order to satisfy its requirements, must be coextensive with that contemplated by the Constitution. (20 Op. Atty. Gen., 611.)

The prohibition seems to be against expenditures for improvements or structures upon land purchased, that is, already acquired, by the Government until the consent is obtained, and not against the expenditure of money for the purchase of the land. Section 1838, Revised Statutes, appears to contemplate, as something permissible under the existing law, that land may be purchased for the Government without the consent of the State thereto previously being given. (15 Op. Atty. Gen., 212.)

The payment of the purchase money for land before the consent of the legislature of the State is given to the purchase is not forbidden by the law embodied in this section; but it does prohibit the expenditure of public money upon the improvement of the land by the erection of needful buildings thereon until consent is given to the purchase. (10 Op. Atty. Gen., 34; 15 Op. Atty. Gen., 212; 3 Comp. Dec., 530; 17 Comp. Dec., 242; Op. Atty. Gen., Mar. 3, 1908, file 7101-6. See below, "Validity of title.")

The Government has tied its own hands if the State legislature for any or no assigned reason withholds its consent to a purchase of the site. It may purchase and hold the land, yet it can not spend a dollar of money upon the

site for the erection of the necessary buildings thereon. (10 Op. Atty. Gen., 34.)

The public money expended on such places, and the public property deposited in them, require that they shall be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend to be in any degree dependent on a particular member of it. (Fort Leavenworth R. R. Co. v. Lowe, 114 U. S., 525, quoting the Federalist.)

It is at the option of every State to give or withhold its consent at its own pleasure. The United States has no power and ought not to have a desire to compel a State to cede exclusive jurisdiction over any part of its soil. (10 Op. Atty. Gen., 34.)

Congress can not acquire or assert exclusive jurisdiction over any part of the territory of a State without the consent of the State legislature. Hence before such jurisdiction can become vested in the United States the consent of the legislature of the State must be obtained, notwithstanding an enactment of Congress that upon purchase of real estate suitable and necessary for the purposes of the act the fee simple shall "be vested in the United States and its jurisdiction over said real estate shall be exclusive and the same as its jurisdiction over real estate purchased, ceded, or appropriated for the purposes of navy yards, forts, and arsenals." (13 Op. Atty. Gen., 131. See *In re Kelly*, 71 Fed. Rep., 545; see also sec. 4882, R. S.)

Where compensation has been paid for land without consent of the legislature of the State to its acquisition, the proper course to be pursued is for the head of the department to apply to such legislature for its consent. (13 Op. Atty. Gen., 131. See also sec. 1838, R. S.)

#### II. WHAT LANDS INCLUDED.

This section includes lands located under navigable waters of the United States, to be used as a site for a lighthouse for the establishment of which provision is made by statute. Accordingly, it is not competent for the Lighthouse Board to erect a structure on such site until title thereto has been obtained by the Government. (16 Op. Atty. Gen., 369.)

**Lands acquired by condemnation.**—This law refers only to lands to be purchased by the United States, and does not apply to a case where the law contemplates not only purchase but appropriation under the right of eminent domain. (13 Op. Atty. Gen., 131, 134; 23 Comp. Dec., 53, 56.)

In common parlance "purchase" imports the buying of property by contract, and therefore would not include the case of acquisition by statute or by condemnation and expropriation. But the legal meaning of "purchase" applied to real estate goes much beyond this, for the phrase "title by purchase" is often employed to embrace all the forms of acquisition except that by "descent." When accurately defined, the distinction is between titles acquired through some agreement or other act of the party acquiring, which is "purchase;" and titles acquired by the mere devolution of law without any act of the party, which is "de-

scent." Undoubtedly title acquired by the United States by expropriation is "purchase" within the scope of this section, such as, if done in strict accordance with the form of the statute, may be certified by the Attorney General as vesting a valid title in the United States. (7 Op. Atty. Gen., 114, 121.)

**Lands acquired by donation.**—The word "purchased" does not include lands or interests in lands acquired by the United States without consideration or for a mere nominal sum; and such cases are not included within the terms of section 355. (28 Op. Atty. Gen., 413.)

Under the law now embodied in section 355, Revised Statutes, before any money could lawfully be expended upon land donated to the United States it would be necessary to obtain a cession of jurisdiction from the State. (13 Op. Atty. Gen., 465.)

The ceding of land by a State to the United States probably constitutes a "purchase" thereof by the United States in the broad sense of that word. (*U. S. v. Tucker*, 122 Fed. Rep., 518.)

If the site were acquired by donation, section 355 would require the opinion of the Attorney General in favor of the validity of the title before any money could be expended thereon. (5 Comp. Dec., 682.)

Where land is donated to the United States for the purpose of a site for a certain public building, for the construction of which an appropriation has been made by Congress, the consent of the legislature of the State to the grant is required by section 355 before any part of the appropriation can be lawfully expended in the erection of the building. (16 Op. Atty. Gen., 414.)

**Land rented to the United States**, to be used temporarily as a camp, is not a "place" within the terms of the Constitution, over which the United States have "sole and exclusive jurisdiction." (*U. S. v. Tierney*, 28 Fed. Cas. No. 16517.)

Neither section 355 nor section 1136, Revised Statutes, applies to the erection of public buildings or other structures upon land leased to the United States. By their terms they are restricted to the expenditure of public money upon or in connection with land purchased by the United States for the erection of such buildings or structures. (6 Comp. Dec., 877. See below, "Lands acquired in foreign country.")

The law embodied in this section contemplates purchases of lands for all public purposes and establishes as a general rule applicable to them that no public money shall be expended in the purchase until the opinion of the Attorney General on the validity of the title shall be obtained and the consent of the legislature of the State in which the lands are situated is given. (13 Op. Atty. Gen., 131, 133; but see above, "Effect of section.")

**Locks and dams.**—The cases seem to leave no doubt that the broadest construction has been wisely put upon the language of the Constitution, "for the erection of forts, magazines, arsenals, dockyards, and other needful buildings," a construction which makes it cover all structures and all places necessary for carrying on the business of the National Government. Specifically held to include locks and dams.

(*U. S. v. Tucker*, 122 Fed. Rep., 518; but see *In re Kelly*, 71 Fed. Rep., 545.)

A lock and dam to be erected by the War Department, not a public building within the meaning of this section, and may be erected on land belonging to the United States although consent of the legislature to the purchase has not been given. (6 Comp. Dec., 843.)

**The erection of a monument** from an appropriation under the War Department is not included in this section. Not necessary that title to the land should be conveyed to the United States. (6 Comp. Dec., 791.) [In this case the Attorney General had decided that a deed to such land "vests in the United States a valid title," but the Comptroller decided there was no authority to purchase the land and payment therefor could not be made.]

**Wharf not public building.**—The term "building" in its broadest sense includes any artificial structure erected on land, but it is not used in this broad sense in the statutes relating to public buildings under the control of the Treasury Department (citing 6 Comp. Dec., 877). A wharf, however extensive or permanent in its nature, can not properly be regarded as a public building within such statutes, which contemplate only such buildings as are designed for occupation by Government officials or for use in affording shelter to and protection of movable public property. (7 Comp. Dec., 533, distinguishing a contrary decision of the First Comptroller, May 22, 1894.)

**Land acquired for construction of irrigation works.**—This section does not apply as to manner in which the validity of title to lands acquired by the Secretary of the Interior under the act June 17, 1902 (32 Stat., 388), shall be evidenced. Question of validity of title is one for the determination of the Secretary of the Interior, whose decision has the same force as would an opinion of the Attorney General under this section, and is conclusive on the accounting officers. (12 Comp. Dec., 691, citing letter of Acting Attorney General.)

**Land for use of militia.**—The purchase of property for shooting galleries and target ranges in the several States and Territories and the District of Columbia is made upon the recommendation of the governors of the States or Territories or the commanding general of the District of Columbia, approved by the Secretary of War. The title to the property is conveyed to and vested in the United States. Before payment for the same is made, the title must be approved by the Attorney General of the United States as required by this section, to whom all necessary papers to prove title shall be transmitted by the Secretary of War. The relation of the States and Territories, and District of Columbia to such property is that of trustees, vested with the use and charged with the administration of it for the purpose for which it is acquired. (17 Comp. Dec., 242.)

**Lands acquired for cemeteries.**—The purposes enumerated in the law now embodied in this section do not distinctly embrace national cemeteries. Question whether such cemeteries are included, not decided. (12 Op. Atty. Gen., 428.)

Before jurisdiction over a national cemetery can become vested in the United States the



consent of the legislature of the State in which the cemetery is situated must be obtained. (13 Op. Atty. Gen., 131.)

To authorize payment for land appropriated for the purpose of a national cemetery, the consent of the legislature of the State in which the land lies is not necessary; nor in such case is the opinion of the Attorney General as to the validity of the title required. (13 Op. Atty. Gen., 131.)

If the consent of the legislature of a State in which a cemetery is situated can be obtained, it might well be held to be included under the terms of the constitutional provision vesting exclusive legislation in Congress. (13 Op. Atty. Gen., 131.)

See section 4882, Revised Statutes, providing for exercise of exclusive jurisdiction by the United States over national cemeteries purchased with consent of the State.

**Temporary building.**—It is the general policy of Congress that no public building shall be erected on ground not owned by the United States. But a small temporary building for the shelter of a light keeper is not a "public building" within the meaning of sections 355 and 1136, Revised Statutes. (6 Comp. Dec., 877.)

**Lands acquired for temporary purpose.**—In practice the requirements of section 355 have not been regarded as applicable to reservations deemed to be temporary properties of the Government, temporarily used. (Lee v. Kaufman, 15 Fed. Cas., 191. See also U. S. v. World's Columbian Exposition, 56 Fed. Rep., 630.)

**Lands acquired in foreign country.**—The word "State" as used in this section signifies a State of the Union and has no application to the erection of improvements to the naval hospital, Yokohama, Japan, upon land to which the United States purchases a lease in perpetuity, subject to an annual rental to the Japanese Government. (26 Op. Atty. Gen., 12.)

This section does not apply to the purchase of lands with buildings thereon at Constantinople, Turkey, since no erection of a building is contemplated or provided for by the appropriation for such purchase. (26 Op. Atty. Gen., 380.)

The provisions of this section are not applicable to the expenditures authorized by the act of March 3, 1903 (32 Stat., 1188), for the erection of necessary improvements on lands at Guantanamo, Cuba, leased by the United States from the Republic of Cuba for the purposes of a naval station. (25 Op. Atty. Gen., 160.)

### III. VALIDITY OF TITLE.

**Attorney General must certify title before purchase.**—The contract of a head of department to purchase land can not be carried out unless the Attorney General shall examine the title and certify to its validity. Property bargained for by the Government is always to be taken and paid for if the title shall be pronounced valid by the Attorney General and not otherwise. This law enters into and forms part of every such contract. (9 Op. Atty. Gen., 100.)

Under this section it has been held that no money can be expended for the purchase of

land until the Attorney General's opinion as to the validity of the title has been given (citing 10 Op. Atty. Gen., 353, 354); although it has been held that such purchase can be made notwithstanding the consent of the legislature thereto has not been given. (3 Comp. Dec., 531, citing 10 Op. Atty. Gen., 35; 15 Op. Atty. Gen., 212; 4 Lawrence's Comp. Dec., 152.)

This section prohibits payment for land to be used for the purposes therein enumerated until the Attorney General shall have certified as to the validity of the title. It was also intended to make the opinion of the Attorney General conclusive upon that question. The Comptroller has not jurisdiction to pass upon question of payment until written opinion of Attorney General has been had in favor of the validity of the title. (3 Comp. Dec., 195.)

See above, "I. Effect of Section."

**If title bad, purchase can not be completed.**—Where the Attorney General has officially refused to certify the title, the head of the department through which the negotiation is conducted ought at once to declare the contract rescinded; and when he does so, the end of that contract has come. It can have no more force afterwards than if it had never been made. (9 Op. Atty. Gen., 100.)

Section 355, Revised Statutes, forbids the acquisition of real estate by the Government for any permanent military purpose until a perfect legal title and cession of State jurisdiction shall first have been obtained. (Lee v. Kaufman, 15 Fed. Cas., 191.)

**If title good, purchase must be completed.**—Where the head of a department under authority of an act of Congress made a contract for the purchase of land which stipulated for payment of the agreed price when the Attorney General approved the title and the conveyance was executed, held that, after the execution of the deed by the vendors and the Attorney General certified that a valid title to the land had been thereby vested in the United States, the head of the department had no power to make any new contract of purchase for the same or other property, and the vendors were entitled to receive the purchase money. (10 Op. Atty. Gen., 34.)

**Duty of the Attorney General.**—This law does not require the Attorney General to inquire into and report upon the fact or question, whether the State in which the land lies has consented to the purchase. That was supposed to be a patent fact which needed no examination; yet it is obvious that difficulties may arise upon that point of fact, requiring a nice and hypercritical examination of the State's act of consent, which is often incumbered with conditions and reservations. (10 Op. Atty. Gen., 34.)

The Attorney General, in certifying the title of land purchased by the Government, must look at the question as one of pure law, and can not relax the rule on account either of desirableness of the object or the smallness of the value of the land. (6 Op. Atty. Gen., 432.) The validity of title is a question of law. (12 Comp. Dec., 691.)

When the Attorney General, in passing upon the validity of titles to property purchased by



the United States, certifies that the title will be good upon the release of certain mortgages, it is proper that the sufficiency of the releases should be decided by him, and not by the Comptroller of the Treasury upon the question of payment for the land. (1 Comp. Dec., 348.)

Where question is submitted to the Comptroller of the Treasury as to legality of a proposed payment for certain buildings and outfit, but back of the question of expenditure of the money is that of the acquisition of the site, this involves questions of law unconnected with any expenditure of public moneys, and hence not within the comptroller's jurisdiction. Therefore suggested that the opinion of the Attorney General should be obtained upon the primary question involved in the acquisition of the site. (5 Comp. Dec., 682. But see 6 Comp. Dec., 791.)

Regardless of whether this section be applicable or not, the validity of titles to lands proposed to be acquired should be submitted to the Attorney General as a wise precaution, before erecting structures thereon. (28 Op. Atty. Gen., 413, 463.)

Though the opinion of the Attorney General is not required in a particular case as to the validity of the title, as a prudential measure, for the security of the Government, it would seem to be highly expedient to obtain his opinion. (13 Op. Atty. Gen., 131. But see 12 Comp. Dec., 691.)

**Lands incumbered by outstanding liens.**—There is nothing in this law that forbids the purchase of land incumbered by outstanding liens which have not yet matured; but in such case the department making the purchase should stipulate with the vendors that the amount of the purchase money necessary to pay off the incumbrances shall be withheld until they are due, when, if they are discharged by the vendors the purchase money so withheld shall be paid, or if not then discharged by the vendors, that the retained purchase money shall be applied by the Government to their payment. (10 Op. Atty. Gen., 353.)

There is no law which prohibits the United States from purchasing property incumbered by liens. (12 Comp. Dec., 691, 697. See also 1 Comp. Dec., 348.)

#### IV. CONSENT OF LEGISLATURE.

**Consent of constitutional convention not sufficient.**—An ordinance passed by the constitutional convention of a State, purporting to cede jurisdiction over land purchased by the United States, is not a consent to the purchase by the legislature of the State, within the sense of the Constitution and this section. Such a body is not "the legislature of the State." (12 Op. Atty. Gen., 428.)

**Consent to use of land not consent to purchase.**—The provisions of this section are not satisfied by an act which contains neither an assent to the purchase nor a grant of jurisdiction. It merely gives the consent of the State to the use of the land for a specific purpose, which consent is declared to be "as provided in the 16th clause of the 8th section of the 1st article of the Constitution of the United States and in the acts of Congress in such case made and provided." I find nothing in that

clause of the Constitution which is applicable to the subject, and am unable to determine what particular statute is referred to by the words "acts of Congress in such case made and provided." (13 Op. Atty. Gen., 460; compare file 14560-174, Apr. 19, 1916, with reference to statute of Illinois in which same error was made.)

**Consent not necessary before purchase.**—There is nothing in the Constitution nor in this section which prohibits the United States purchasing land within a State without the consent of the State legislature; but when land is purchased by them in a State without such consent, the United States can not exercise "exclusive legislation" over the place. (10 Op. Atty. Gen., 34; 15 Op. Atty. Gen., 212; 3 Comp. Dec., 530. Compare *Lee v. Kaufman*, 15 Fed. Cas., 191.)

The Comptroller of the Treasury will not render a decision as to the sufficiency of a general statute of a State consenting to purchases of lands by the United States when it appears that purchase of the particular land in question had not been authorized by Congress, as required by section 3736, Revised Statutes, (7 Comp. Dec., 524.)

**Consent necessary before improvements are made.**—Under this section, no money can be expended upon the lands mentioned therein, for any purpose whatever, until consent of the legislature has been given. It is hardly to be presumed that Congress would authorize the expenditure of money for the preparation of a lot for the erection of a building and not for the erection of the building itself. (3 Comp. Dec., 530. See also 10 Op. Atty. Gen., 34; 15 Op. Atty. Gen., 212; 17 Comp. Dec., 242.)

**Consent sufficient although certain rights reserved.**—In acts of the different State legislatures giving consent to the purchase of land by the United States, as well as in their acts expressly ceding jurisdiction over such lands, it is usual to reserve to the State the right to serve on the land purchased its civil and criminal process, and a reservation of jurisdiction to that extent has always been regarded as consistent with the requirements of the provision in section 355. (20 Op. Atty. Gen., 611; 23 Op. Atty. Gen., 254; 24 Op. Atty. Gen., 617; *Railroad Co. v. Lowe*, 114 U. S., 525.)

Where law of State contains a proviso that all civil and criminal process issued under authority of the State or any officer thereof may be executed on the lands so ceded, and within the fortifications which may be erected thereon, in the same way and manner as if such lands had not been ceded, such process must, of course, be for acts done within and cognizable by the State. It can not be inferred from such proviso that it was intended that the State should have a right to punish for acts done within the ceded lands. The whole apparent object is answered by considering the clause as meant to prevent these lands from becoming a sanctuary for fugitives from justice for acts done within the acknowledged jurisdiction of the State. This proviso leaves the sole and exclusive jurisdiction of the lands in question in the United States. (*U. S. v. Cornell*, 25 Fed. Cas. No. 14867, per Story, Circuit Justice; *U. S. v. Meagher*, 37 Fed. Rep., 875; *U. S. v. Travers*,

28 Fed. Cas. No. 16537; U. S. v. Davis, 25 Fed. Cas. No. 14930, cited in *Lasher v. State*, 30 Tex. App., 387, 17 S. W., 1065; *Sinks v. Reese*, 19 Ohio St., 318.)

The reservation which has usually accompanied the consent of the States, that civil and criminal process of the State courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them; but is admitted to prevent them from becoming an asylum for fugitives from justice. (*Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S., 525.)

The expression reserving to the State its jurisdiction, so far as to have a right to execute all civil and criminal process lawfully issued under the authority of the State, means, as may not be incompatible with Federal jurisdiction. (7 Op. Atty. Gen., 628, 632.)

An act providing that "nothing herein contained shall be so construed as to prevent the officers of this State from executing *any process whatever* within the jurisdiction hereby directed to be ceded to the United States," must be understood to embrace only such process as may lawfully run within such premises, notwithstanding and without derogation of or conflict with the jurisdiction acquired by the United States. (7 Op. Atty. Gen., 628, 635.)

By legislative as well as judicial construction the right retained by States to serve civil and criminal process has been regarded as consistent with exclusive Federal jurisdiction. This is shown by act March 2, 1795 (1 Stat., 426), providing that "Where cessions have been or hereafter may be made by any State of jurisdiction of places where lighthouses, beacons, buoys, or public piers have been erected and fixed or may by law be provided to be erected or fixed, with reservation that process, civil and criminal, issuing under the authority of such State may be executed and served therein, such cessions shall be deemed sufficient under the laws of the United States providing for the supporting or erecting of lighthouses, beacons, buoys, and public piers. \* \* \* Where any State hath made or shall make a cession of jurisdiction for the purposes aforesaid without reservation, all process, civil and criminal, issuing under the authority of such State or the United States may be served and executed within the places the jurisdiction of which has been so ceded, in the same manner as if no such cession had been made." (9 Op. Atty. Gen., 263.)

**Consent insufficient where reservations incompatible with Federal jurisdiction.**—The settled construction of the Department of Justice is that the "consent" of the legislature of a State to the purchase of lands therein by the United States, required by section 355, Revised Statutes, must be free from any conditions or reservations inconsistent with the exercise by Congress of "exclusive legislation" thereover. (24 Op. Atty. Gen., 617.)

It is manifest that a reservation to the State of the right to administer its criminal laws in the place purchased, is inconsistent with the exercise of "exclusive legislation" thereover by Congress, as it leaves to the State the cognizance of offenses against its laws committed

thereon as fully as the same existed before such acquisition. (24 Op. Atty. Gen., 617.)

A condition that, "if the purposes of this grant should cease, or there should be for five years consecutively a failure upon the part of the United States to use the said place for any of the purposes aforesaid, then the jurisdiction hereby granted shall cease and determine," is not objectionable. (7 Op. Atty. Gen., 628.)

Where a State's consent to the purchase of land by the United States provides that the State shall forever retain concurrent jurisdiction over any such place to the extent that all legal and military process issued under the authority of the State may be executed anywhere on such place or in any building thereon or any part thereof, and that any offense against the laws of the State committed on such place may be tried and punished by any competent court or magistrate of the State, it does not satisfy the provisions of section 355, Revised Statutes (20 Op. Atty. Gen., 611, quoting and following 8 Op. Atty. Gen., 419, holding that it is impossible to allow the courts of the State jurisdiction of crimes committed on such sites, to the exclusion of, or even in concurrence with, the proper jurisdiction of the United States. But see file 7101-10, Apr. 17, 1908, authorizing expenditures of public moneys on improvements at naval proving ground, Indianhead, Md., although the State expressly retained jurisdiction to execute its criminal process therein against persons charged with offenses committed "within or without" the limits of said lands. See below, "VI. Jurisdiction Naval Reservations.")

As the State's consent "is coupled with an express retention of jurisdiction over offenses against its laws committed on the premises, this qualification of the consent is such as, in my opinion, renders it insufficient to satisfy that provision," viz, section 355, Revised Statutes. (20 Op. Atty. Gen., 611.)

I should hesitate to advise the United States to accept a cession which in terms reserved the full concurrent jurisdiction of the State in order to guard against controversy as to whether the consent would be legally inoperative, or whether the condition and reservation would be void, or whether the jurisdiction would be deemed concurrent. (7 Op. Atty. Gen., 628.)

**Effect of consent coupled with incompatible reservation.**—It is not perfectly clear from the authorities what is the effect of such a reservation; that is, whether the consent expressed would be legally [in]operative, or the reservation alone void. (24 Op. Atty. Gen., 617.)

If the legislative act of the State wherein the land lies amounts to a consent to the purchase of the property by the United States, any exceptions, reservations, or qualifications contained in the act are void, because the consent being given by the legislature the Constitution vests in Congress exclusive legislation over the place, beyond the reach both of Congress and the legislature. If the act does not amount to a consent to the purchase, it is null. (10 Op. Atty. Gen., 34.)

If the State had simply passed an act consenting to the purchase, the constitutional



consequences would certainly have ensued and jurisdiction might have been assumed. As it is, however, the conclusion seems to me questionable. The declared retention of jurisdiction is an express qualification of the assent, and such a qualification as causes it to fail to satisfy the act of Congress, if it does the Constitution. (8 Op. Atty. Gen., 102; see also 8 Op. Atty. Gen., 30.)

There is a clear distinction between acts in which the reservation of jurisdiction is made an *express condition* of the consent, and an act which unequivocally expresses the consent of the legislature and does not make any objectionable reservation which may contain an absolute and inseparable condition of the consent. In the former case it has been decided that such consent does not satisfy the law (citing 8 Op. Atty. Gen., 102; 8 Op. Atty. Gen., 418; 20 Op. Atty. Gen., 611). In the latter case, there seems to be no good reason for holding that the reservation invalidates the entire act. (24 Op. Atty. Gen., 617.)

Where the consent of the legislature to the purchase or condemnation of lands within the State by the United States for public purposes is plainly and unequivocally given, and there is nothing whatever in any other part of the act to indicate that the reservation of jurisdiction which it contains is made an *express condition* of the consent, the act may be taken as satisfying the requirements of section 355, Revised Statutes, and no further cession of jurisdiction is legally required. (24 Op. Atty. Gen., 617.)

It may well be doubted whether Congress is, by the terms of the Constitution, at liberty to purchase lands for forts, dockyards, etc., with the consent of the State legislature, where such consent is so qualified that it will not justify the exclusive legislation of Congress there. It may well be doubted if such consent be not utterly void. (Fort Leavenworth R. R. Co. v. Lowe, 114 U. S., 534, quoting U. S. v. Cornell, 2 Mason, 60, 25 Fed. Cas. No. 14867.)

The Executive can not lawfully expend money on a site for public uses, purchased with assent of the State in which it lies, if such assent be coupled with express refusal of the State to cede jurisdiction to the United States. (8 Op. Atty. Gen., 102; see also 8 Op. Atty. Gen., 30; 30 Op. Atty. Gen., Mar. 3, 1908, file 7101-6.)

**In order to guard against controversies,** I should hesitate to advise the United States to accept a cession which in terms reserved the full concurrent jurisdiction of the State. (7 Op. Atty. Gen., 628.)

In such cases, the Government would enter upon the land with explicit notice of controversy on the part of the State. Other States might follow the example, greatly to the inconvenience of the United States. (8 Op. Atty. Gen., 102; see also 8 Op. Atty. Gen., 30.)

If any conflicting claims of jurisdiction should arise after the purchase between the two Governments, they would be judicial questions. (10 Op. Atty. Gen., 34.)

#### V. JURISDICTION OF THE UNITED STATES.

**Where State consents to purchase.—**  
When the United States acquire lands within

the limits of a State by purchase, with the consent of the legislature of the State, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, the Constitution confers upon them exclusive jurisdiction of the tract so acquired. (Fort Leavenworth R. R. Co. v. Lowe, 114 U. S., 525, 539; Chicago & Pacific Ry. Co. v. McGlinn, 114 U. S., 542; Benson v. U. S., 146 U. S., 325.)

The purchase of land in a State by the General Government, with legislative consent, does not, *ipso facto* confer upon the General Government exclusive jurisdiction, unless the purchase is for a fort or for some other purpose distinctly named in Article I, section 8, of the Constitution. (In re Kelly, 71 Fed. Rep., 545.)

Cession of jurisdiction by the State may take place in two ways; indirectly, by an act of the State legislature consenting to the purchase of the land by the United States; and directly, by an act of the State legislature granting the jurisdiction to the United States. (13 Op. Atty. Gen., 460; U. S. v. Tucker, 122 Fed. Rep., 520.)

It is thoroughly settled by numerous adjudications that all such Federal jurisdiction as the Constitution contemplates is acquired by the United States in the mere consent of the State to the purchase; and that upon such consent the jurisdiction of the State ceases and that of Congress comes in, by virtue of the Constitution. (7 Op. Atty. Gen., 628.)

This law does not require the cession of jurisdiction, exclusive or otherwise. When the legislature consents to the purchase, the Constitution provides for exercising exclusive legislation, which is full jurisdiction, over all places so purchased for the erection of dockyards, etc. (9 Op. Atty. Gen., 129.)

“‘Exclusive legislation’ signifies exclusive jurisdiction.” (6 Op. Atty. Gen., 578.)

Section 355 prohibits the expenditure of money only upon any site or land purchased by the United States until the written opinion of the Attorney General shall be had in favor of the validity of the title and until the consent of the legislature of the State in which the land or site may be to such purchase has been given. It does not limit the expenditure of money to cession of jurisdiction. (Op. Atty. Gen., Mar. 3, 1908, file 7101-6.)

The purchase of lands by the United States for public purposes within the territorial limits of a State does not of itself oust the jurisdiction of sovereignty of such State over lands so purchased. But when a purchase of lands for any of the Constitutional purposes is made by the National Government, and the State legislature has given its consent to the purchase, the land so purchased by the very terms of the Constitution, *ipso facto* falls within the exclusive legislation of Congress, and the State jurisdiction is completely ousted. Exclusive jurisdiction is the necessary attendant upon exclusive legislation. (U. S. v. Cornell, 25 Fed. Cas. No. 14867, per Story, Circuit Justice.)

Where the State consents to the purchase, with reservation of power to serve civil and criminal process, and the United States accepts such condition, it follows that the officers of the State, in executing such process, act under the authority of the United States. No offenses



committed within the territory so purchased are committed against the laws of the State, nor can such offenses be punishable by the courts of the State unless the Congress of the United States should give said courts jurisdiction thereof. (*Commonwealth v. Clary*, 8 Mass., 72; *U. S. v. Travers*, 28 Fed. Cas. No. 16537; file 6769-21, July 19, 1911.)

**Where jurisdiction expressly ceded.**—The law from which section 355 is taken required "the consent of the legislature" and provided in another section that application should be made to the State for "a cession of jurisdiction." Thus it appears that Congress understood "consent to the purchase" and "cession of jurisdiction" as concurrent, if not identical facts, and rightfully. (7 Op. Atty. Gen., 628.)

It has become usual in the action of the legislatures of the States in these cases not to stop at consent to the purchase, but to add cession of jurisdiction in express terms, but most frequently with reservation of certain concurrent jurisdiction to the State. (7 Op. Atty. Gen., 628; 9 Op. Atty. Gen., 129.)

The effect of all such actions is to confer on the United States the whole jurisdiction of the Constitution—that is, rights of Federal legislation coextensive with the subject matter. (7 Op. Atty. Gen., 628; *U. S. v. Carter*, 84 Fed. Rep., 622; *In re Ladd*, 74 Fed. Rep., 31; *Western Union Tel. Co. v. Chiles*, 214 U. S., 274; *U. S. v. Tucker*, 122 Fed. Rep., 518, citing *Palmer v. Barrett*, 162 U. S., 402; *Sharon v. Hill*, 24 Fed. Rep., 729; *Martin v. House*, 39 Fed. Rep., 694; *Bannon v. Burnes*, 39 Fed. Rep., 899; *State v. Mack*, 23 Nev., 359, 47 Pac., 763; *Foley v. Shriver*, 81 Va., 572.)

Of course the property of the United States in such places is not subject to the jurisdiction of the State. Civil acts done there will be of Federal resort; and crimes committed there must be justiciable by the courts of the United States. On the other hand, such ceded lands within a State are not to be made places of refuge from its civil or criminal jurisdiction or of escape from civil obligations due to any of its inhabitants. (7 Op. Atty. Gen., 628.)

It is competent for the State in relinquishing its sovereignty and ceding it to the United States to reserve the right to serve civil and criminal process; but where such a reservation was not made the United States has exclusive jurisdiction over the reservation, and the sheriff of the county within which it is situated has no power to serve thereon any process whatsoever issued by a court of that State, for it is an elementary principle of law that a judicial officer can not serve process beyond his jurisdiction. (23 Op. Atty. Gen., 254.)

**Where neither consent nor cession of jurisdiction.**—Where lands are acquired in any other way by the United States within the limits of a State than by purchase with its consent [and jurisdiction is not ceded by the State], they will hold the lands subject to this qualification: That if upon them forts, arsenals, or other public buildings are erected for the use of the General Government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the

State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the General Government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers; but when not used as such instrumentalities the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits. (*Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S., 525, 539; *Chicago & Pacific Ry. Co. v. McGlinn*, 114 U. S., 542; *Benson v. U. S.*, 146 U. S., 325; *U. S. v. Tierney*, 28 Fed. Cas. No. 16517; *U. S. v. Tucker*, 122 Fed. Rep., 518.)

Where the State has neither consented to the purchase nor ceded jurisdiction to the United States, the State retains complete and exclusive political jurisdiction over such land, and there can be no question that persons there committing crime are subject to trial and punishment by the State and not by the United States. (*U. S. v. San Francisco Bridge Co.*, 88 Fed. Rep., 891, 894; *U. S. v. Penn.*, 48 Fed. Rep., 669; *In re O'Connor*, 37 Wis., 384.)

Mere ownership and occupancy by the United States of land within a State do not suffice to oust the jurisdiction of the State, even when such occupancy is with the full knowledge and tacit consent of such State, and even though the title of the United States antedates the existence of the State (7 Op. Atty. Gen., 573); where no reservation was made by Congress, either in an act giving existence to a new Territory, or in the act admitting the Territory as a State. (*Cary v. State*, 4 Kans., 49; *U. S. v. Stahl*, 27 Fed. Cas. No. 16373.)

**Status of residents.**—Persons residing in places so ceded are in many respects extritorialized, so as not to be subject to personal taxation by the State, not to acquire a pauper settlement therein, not to be entitled to the benefit of its public schools, nor to the enjoyment of its elective franchise. (7 Op. Atty. Gen., 628.)

When Congress possesses exclusive legislative power over a naval reservation, the laws of the State can not be allowed any operation or effect within the limits thereof. (*Western Union Tel. Co. v. Chiles*, 214 U. S., 274—suit to recover penalty provided by laws of Virginia for non-receipt of a telegram.)

Where the general consent of the State is given to the purchase and where there is no other condition or reservation in the act granting such consent but that of a concurrent jurisdiction of the State for the serving of civil process and criminal process against persons charged with crimes committed out of such territory, the Government of the United States has the sole and exclusive jurisdiction over such territory for all purposes of legislation and jurisprudence with the single exception expressed, and consequently no persons are amenable to the laws of the State for crimes and offenses committed within said territory, and persons residing within the same do not acquire the civil and political privileges nor do they become subject to the civil duties and obligations of inhabitants of the towns within which such territory is situated. (*Fort Leavenworth*

R. R. Co. v. Lowe, 114 U. S., 536, citing 1 Met., 580.)

Persons in the employment of the United States actually residing in the limits of the armory at Harpers Ferry do not possess the civil and political rights, nor are they subject to taxation and other obligations of citizens of the State of Virginia. The privilege of not paying taxes in such a case is a personal one of the party claiming it and not, like the exemption of property of the United States from taxation, a right of the Government as such which it would be the duty of the Government to maintain. (6 Op. Atty. Gen., 577.)

A State may cede to the United States exclusive jurisdiction over a tract of land within its limits and may prescribe conditions to the cession if they are not inconsistent with the effective use of the property for the purposes intended. If a State thus ceding to the United States exclusive jurisdiction over a tract within its limits reserves to itself the right to tax private property therein, and the United States do not dissent, their acceptance of the grant with the reservation will be implied. (Fort Leavenworth R. R. Co. v. Lowe, 114 U. S., 525.)

Where an act of Ohio ceding to the United States its jurisdiction over lands within that State for the purposes of a National Asylum for Disabled Volunteer Soldiers, provided that nothing in said act should be construed to prevent the officers, employees, and inmates of the asylum who were qualified voters of the State from exercising the right of suffrage at all township, county, and State elections in the township in which the national asylum should be located, it was held that, upon the purchase of the territory by the United States with the consent of the legislature of the State, the General Government became invested with exclusive jurisdiction over it and its appurtenances in all cases whatsoever; and that the inmates of such asylum resident within the territory, being within such exclusive jurisdiction, were not residents of the State so as to entitle them to vote within the meaning of the State constitution, which conferred the elective franchise upon its residents alone. (Sinks v. Reese, 19 Ohio St., 306; Ft. Leavenworth R. R. Co. v. Lowe, 114 U. S., 536.) [The case of Sinks v. Reese was disapproved in *In re O'Connor*, 37 Wis., 379, which latter case was in effect reaffirmed in *Clarke v. Milwaukee Co.*, 53 Wis., 65, 9 N. W., 782. The *O'Connor* case held that act of State legislature purporting to cede jurisdiction to the United States was void, as it is not competent for the legislature to abdicate its jurisdiction over its territory except where the lands are purchased by the United States for the specific purposes contemplated by the Constitution. The cases were reviewed in *In re Kelly*, 71 Fed. Rep., 545, concerning jurisdiction of Northwestern Branch National Home for Disabled Volunteer Soldiers.]

**Right of Secretary to grant revocable license for use of Government land.**—The Secretary of War has authority to grant a revocable license to a railway company to lay a single track on a Government reservation. Long-continued exercise of a power of this kind, and the open and notorious use of Government reservations by such licensees with-

out legislative objection from Congress and without the adoption of any legislative rule upon the subject, implies the tacit assent of Congress to this custom. At the same time this custom can not be maintained upon any ground except benefit to the public interests, either directly or indirectly. It can not be used as a basis for granting, under the guise of a temporary license, a substantially permanent right to maintain a railroad. (22 Op. Atty. Gen., 245; see also 21 Op. Atty. Gen., 537, 565; 22 Op. Atty. Gen., 544.)

While the opinions cited were confined to the question of granting a license to a private person for the use of Government reservations, yet the same principles apply wherever the proposal is to permit the use of the property of the United States Government by persons or agencies other than its own departments. Specifically, held applicable to use of naval reservations by government of Porto Rico. (29 Op. Atty. Gen., 205.)

**Power of Congress to limit or surrender its jurisdiction.**—In numerous cases, especially in acts authorizing the acquisition of sites for public buildings, Congress has latterly required from the States a cession of jurisdiction for all purposes excepting "the administration of the criminal laws of the State and the service of civil process therein." (See 21 Stat., 142; 22 Stat., 94, 152, 161; 23 Stat., 282; 24 Stat., 544; 25 Stat., 444; 26 Stat., 724.) "In these cases, by force of the exception, there is left to the State the administration of its criminal laws over the premises acquired by the General Government, and consequently the cognizance of offenses against its laws committed thereon, as fully as the same existed before such acquisition." (20 Op. Atty. Gen., 611.)

Where the State assents to the purchase, no offenses committed within the territory so purchased can be punishable by the courts of the State "unless the Congress of the United States shall give to said courts jurisdiction thereof." (Commonwealth v. Clary, 8 Mass., 72; file 6769-21, July 19, 1911.)

In this connection, consult *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S., 534, quoting *U. S. v. Cornell*, 25 Fed. Cas. No. 14867, to the effect that "It may well be doubted whether Congress is, by the terms of the Constitution, at liberty to purchase lands for forts, dockyards, etc., with the consent of the State legislature, where such consent is so qualified that it will not justify the exclusive legislation of Congress there." See also 10 Op. Atty. Gen., 34, holding that, if the act of the State legislature amount to consent, any exceptions, reservations, or qualifications contained in the act are void, because the consent being given by the legislature, the Constitution vests in Congress exclusive legislation over the place beyond the reach both of Congress and the legislature, and in *In re Ladd*, 74 Fed. Rep., 31, holding that jurisdiction having once been ceded by the State and accepted by the United States, it "could not be recaptured by the action of the State alone."

By joint resolution, approved October 22, 1914, Congress ceded jurisdiction to the State of California over certain lands in the Presidio of San Francisco and Fort Mason Military Res-



ervations during their occupancy by the Panama-Pacific International Exposition Co., the United States having possessed exclusive jurisdiction over said reservations. (See also act Jan. 21, 1871 (16 Stat., 399), and in *In re Kelly*, 71 Fed. Rep., 545.)

#### VI. JURISDICTION, NAVAL RESERVATIONS.

**Miscellaneous decisions.**—*U. S. v. Travers*, 28 Fed. Cas. No. 16537 (navy yard, Boston, Mass.); *U. S. v. Carter*, 84 Fed. Rep., 622 (naval vessel in Wallabout Bay, at Cob Dock, navy yard, New York); *Western Union Tel. Co. v. Chiles*, 214 U. S., 274 (naval vessel at navy yard, Norfolk, Va.); *U. S. v. Davis*, 25 Fed. Cas. No. 14930 (marine hospital, Chelsea, Mass.); *U. S. v. Dolan*, 25 Fed. Cas. No. 14978, 5 Blatch., 284 (navy yard, New York); *U. S. v. Bevans*, 3 Wheat., 336 (naval vessel in Boston Harbor); 7 Op. Atty. Gen., 573 (navy yard, Pensacola, Fla.); file 5716-486 (Pensacola); file 6769-21 (navy yard, New York); file 6807 (navy yard, New York); file 6769-21 (naval proving ground, Indianhead, Md.); Op. Atty. Gen., Mar. 3, 1908, file 7101-6 (naval proving ground, Indianhead, Md.); file 7101-10, Apr. 17, 1908 (naval proving ground, Indianhead, Md.); file 26524-57 (navy yard, Philadelphia, Pa.); files 14560-174, Apr. 19, 1916, and 26250-331, Feb. 24, 1912, naval training station, Great Lakes, Ill. *Ex parte Tatem*, 23 Fed. Cas. No. 13759 (naval vessel at navy yard, Norfolk, Va.); file 26283-988:2 (navy yard, New York); General Order No. 121, September 17, 1914 (general instructions relative to jurisdiction, civil and naval authorities). As to naval reservations in State of Maryland and particularly Indianhead, see below "Right of coroners to hold inquests on reservations."

**Service of process on persons in naval or civil service.**—The reservation of power to the State to serve civil or criminal process within the limits of a naval reservation empowers the State or municipal authorities forcibly to take possession of persons in the naval or civil service within such limits, whether on shore or on vessels permanently stationed at the yard, subject to the qualification that, in order that such service of process may not interfere with the operations of the Federal Government, the person deputed to perform that duty should first obtain the permission of the commandant, and such permission should only be withheld upon the most forcible and cogent reasons of public necessity. (File 6769-21, July 19, 1911.)

The principle that no State has the right to interfere with the instrumentalities of the Federal Government has been recognized from the earliest days of our Government. (File 6769-21, July 19, 1911, citing *Railroad Co. v. Lowe*, 114 U. S., 525; *Railway Co. v. McGlinn*, 114 U. S., 542, 545; *McCulloch v. Maryland*, 4 Wheat., 316; *Osborn v. The Bank*, 9 Wheat., 738; *Dobbins v. Erie Co.*, 16 Pet., 435; see also file 26524-57, Feb. 12, 1914.)

There is no act of Congress authorizing a call by a governor for the surrender of an officer of the Navy charged with having broken the peace of a State, nor any law authorizing an arrest by the executive with a view to a forcible surrender of him for the purposes of

trial. However, advised that the accused be ordered by the Navy Department to surrender himself. (1 Op. Atty. Gen., 244.)

The civil authorities are not empowered to arrest persons, either in the naval or the civil service of the United States, within the limits of a navy yard, whether on shore or on board vessels at the yard, even where jurisdiction has been retained by the State to serve process, without first obtaining the permission of the commandant, to the end that such service of process shall not interfere with or obstruct the operations of the United States Government. (File 6769-21, July 19, 1911.) However, the application to the commanding officer is not jurisdictional, the matter being one that does not go to the jurisdiction of the civil court issuing the process. Accordingly the want of an application to the commanding officer would be a mere informality which might make the warrant of arrest irregular but would not make it void or liable to be attacked upon a habeas corpus proceeding. (Attorney General to Secretary of the Navy, Nov. 14, 1914, file 7657-261:1.)

It is not intended that there should be any friction between the civil and naval authorities in this matter. Should a question arise at any time the commandant should inform the local authorities that the Navy Department has no desire to obstruct the operation of State laws by preventing the punishment of persons in the Navy or of persons in the civil service for violation of such laws; and that upon presentation of lawful process in proper hands the person wanted will invariably be delivered to the civil officer or such officer will be allowed to serve the process himself, whichever course appears the more advisable, provided that the case is not one in which, by reason of any Federal interest involved, the United States should intervene. (File 6769-21, July 19, 1911.)

Commanding officers of vessels and shore stations of the Navy or Marine Corps must communicate with the Secretary of the Navy and await his instructions before delivering to civil authorities, State or Federal, any person in their custody or under their control. (G. O. No. 121, Sept. 17, 1914.)

Before delivering any such person to State authorities for trial assurance must be obtained from the State authorities that the person so delivered will be returned to the naval authorities at the place of his delivery without expense to the United States, if the naval authorities shall desire his return. (G. O. No. 121, Sept. 17, 1914.)

The preceding paragraph applies even though the State authorities have expressly retained jurisdiction to serve civil or criminal process. (G. O. No. 121, Sept. 17, 1914.) Otherwise there would be an interference with instrumentalities of the Federal Government, no appropriation being available for the return of men to naval jurisdiction under such circumstances. (File 26524-57, Feb. 12, 1914.)

Even where land is purchased for use as a military post without the consent of the legislature, neither the State nor any county of the State would have the right to interfere with any instrumentalities necessary to the proper use of such lands as a military post, and to



render that use effective and complete. (Pundt v. Pendleton, 167 Fed. Rep., 1001.)

Requisition must be made by the governor, addressed to the Secretary of the Navy and complying with the rules governing interstate extradition of criminals in civil life, in all cases in which the person whose delivery is desired is in the naval service and is not serving at a navy yard or other place within the territorial limits of the State making the request. (G. O. No. 121, Sept. 17, 1914; 2 Op. Atty. Gen., 10.)

Before delivering to the civil authorities of a State any person in the naval service, "the convenience of the public service requires that we should know at what time his trial will come on." The man may be indicted in his absence, and if this is done the governor will be able to inform the Navy Department at what time the trial will take place. (See 1 Op. Atty. Gen., 244; see also file 26524-126, May 17, 1915.)

A naval prisoner will not be delivered to the civil authorities, Federal or State, for trial until his case has been finally disposed of by the naval authorities except in certain cases where his surrender is desired upon a serious charge, such as felonious homicide. (G. O. No. 121, Sept. 17, 1914.)

The expression "naval prisoner" includes any person serving sentence of court-martial, or in custody awaiting trial by court-martial, or disposition of charges against him. (G. O. No. 121, Sept. 17, 1914. As to definition of "custody" see *Wales v. Whitney*, 114 U. S., 564.)

Service of subpoenas by the civil authorities on persons in the naval service, afloat or ashore, will not be allowed until the permission of the commanding officer has first been obtained. (G. O. No. 121, Sept. 17, 1914.)

Where an enlisted man was charged with a crime against a civilian, alleged to have been committed on a vessel of the Atlantic Reserve Fleet at the navy yard, Philadelphia, the department declined to deliver him to the civil authorities of Pennsylvania on the ground that the latter were without jurisdiction. (File 26524-127, Mar. 23, 1915.)

**Right of coroners to hold inquests on reservations.**—In places over which Congress has exclusive power of legislation, it may undoubtedly exclude coroners and all other State officers from exercising their functions upon such premises; but where Congress not having exercised this right, a coroner enters the reservation to investigate an accident, and no government official attempts to keep him out, and the Federal Government does not complain of an invasion of its exclusive jurisdiction: *Held*, that the coroner's presence and proceedings were attended with the implied if not the express sanction of both governments and were demanded by the exigencies of the occasion; and that he was entitled to recover his usual fees from the county for holding such inquest. (*County of Allegheny v. McClung*, 53 Pa. St., 482.)

A coroner is not authorized to hold inquests on the bodies of persons dying at a place within the exclusive jurisdiction of the United States; but he may be permitted to enter such place to hold inquests on the bodies of unknown persons

found washed upon its shores or floating in the neighboring waters (*McClure's Dig.*, 1901, par. 639); or upon the bodies of persons dying as a result of criminal acts committed upon them outside the reservation (*Army Dig.*, 1912, p. 270).

If a death occurs upon lands over which the United States has exclusive jurisdiction, and such death was not caused by any act within the acknowledged jurisdiction of the State within whose boundaries such land is situated, then a coroner could have no jurisdiction in the matter and could not, under the reserved right of the State to serve process upon such lands, come upon them and hold an inquest. Furthermore, such a proceeding would be of no use as a step in the criminal procedure of the State, because the State would have no jurisdiction to try the offender. (File 6769-21, July 19, 1911; see also file 26283-988:2, Jan. 18, 27, 1916.)

But if the body of a drowned person were found in waters within the limits of a navy yard, and no drowning had occurred at the yard, it would be proper to allow the coroner to hold an inquest. (File 6769-21, July 19, 1911.)

Where a person in the naval service who has been injured outside the navy yard, returns thereto and dies from the injury, the coroner if he should so desire should be permitted to hold an inquest, because the injury was inflicted or occurred while the deceased was within the jurisdiction of the State. (File 6769-21, July 19, 1911.)

In proper cases, and when thought advisable, but as not establishing a precedent or as acknowledging any jurisdiction of the State to do so, a coroner might be allowed, as a matter of courtesy, to come into a navy yard to hold an inquest; but before permitting such action, the commanding officer or commandant should feel convinced that such a course would be advisable or accomplish some desirable end. (File 6769-21, July 19, 1911.)

A coroner has the right to hold an inquest in case of accident resulting in death, occurring within the limits of a naval reservation where concurrent jurisdiction exists. (File 3727-97.)

In the case of an enlisted man of the Navy killed on board a battleship at the navy yard, Philadelphia, the coroner attempted to hold an inquest outside the yard and applied for delivery of the enlisted man charged with the homicide and against whom court-martial proceedings had been commenced. On advice of the Department of Justice this application was denied. (File 6674-29, Apr., 1907.)

**By laws of Maryland** (act Apr. 8, 1902, amended Mar. 30, 1908) the State retained concurrent jurisdiction with the United States so far as that " \* \* \* such criminal or other process as shall issue under the authority of the State of Maryland against any person or persons charged with crimes or misdemeanors committed *within or without* the limits of the said lands may be executed therein, in the same manner as if no jurisdiction had been hereby ceded." It appears extremely doubtful whether the right of the State to serve criminal process in the case of an offense committed within Government land would be of much avail, since the courts of Maryland would

certainly have no jurisdiction to try a person for a crime committed within the limits of the naval proving ground at Indianhead or on any other naval reservation in that State. Nevertheless, the law gives the State the right to serve its criminal process thereon, and such right should be respected. An offender under such circumstances, when called upon to plead to the indictment in a State court, might interpose a plea to the jurisdiction of such court, and it is believed that such plea would be sustained. It would seem further that a coroner should be allowed to hold his inquest if he so desires within the limits of any naval reservation in the State of Maryland; but that the result would be as stated, if it should be found that any crime had been committed on the reservation. (File 6769-21, July 19, 1911.)

*Indianhead.*—The land purchased for the naval proving ground was acquired at three different times, to wit: May, 1890, September, 1891, and August, 1901. In 1900 there was an act passed by the General Assembly of Maryland giving consent to the purchase, generally, by the United States of lands for the purpose of forts, magazines, arsenals, coast defenses, etc., and the erection of barracks, garrisons, and other needful buildings. Before 1900 there was no law authorizing the purchase of land in Maryland except for special purposes (lighthouse stations, buoys, etc.), and the acquisition of lands under certain circumstances by condemnation. The act of 1900 must be taken as operating prospectively only, and therefore does not cover the purchases of 1890 and 1891. The land acquired in 1901 would come within the act of 1900 giving consent to the purchase. There was also an act passed April 5, 1906, ceding jurisdiction to the United States over lands acquired in Maryland, which act apparently had reference to lands to be acquired after its passage, and did not operate retroactively. The act April 8, 1902, had relation to lands which had been theretofore or were afterwards to be acquired, but expressly excepted from its operation Charles County, in which Indianhead is located. (Op. Atty. Gen., Mar. 3, 1908, file 7101-6.) This exception as to Charles County was repealed by act Mar. 30, 1908. See file 7101-10, Apr. 17, 1908, and 7101-9.)

In an opinion rendered by the Attorney General of the State of Maryland, February 7, 1916, it was held that the United States unquestionably have exclusive jurisdiction over the Naval Proving Ground, Indianhead, except for the right of the State to execute process upon the reservation for offenses committed outside, but the State has no right to punish offenses committed on the reservation. (See file 6692-233-7.)

#### VII. MISCELLANEOUS.

**Use of appropriations.**—When in an act appropriating for the purchase of additional land for a public building the piece of ground to be purchased is particularly described, the appropriation can not be used for the purchase of another tract equally suitable for the purpose and at a price within the sum provided, although the piece named in the act can not be

secured within the amount appropriated. (2 Comp. Dec., 77.)

An appropriation for construction of a dam impliedly authorizes the purchase of necessary land. (15 Op. Atty. Gen., 212. See also 22 Op. Atty. Gen., 665.)

An appropriation under the War Department for erection of a monument is not authority for purchase of land. (6 Comp. Dec., 791; see also 7 Comp. Dec., 524.)

**The expense of procuring an abstract of title** to land to be used as a site for a fortification is a proper charge against the appropriation made for the purchase of the site, if the abstract is needed by the United States attorney to assist him in examining the title, provided the land is to be purchased and not condemned. (3 Comp. Dec., 216; compare 23 Comp. Dec., 53.)

Payment for the services of a special assistant United States attorney in examining titles to land can not be made from the appropriation available for the work in connection with which the land was needed, the appropriation under the Department of Justice for pay of such assistants being exclusive. (1 Comp. Dec., 317; compare 9 Comp. Dec., 793.)

Where an abstract of title is furnished as a preliminary to the purchase of the land, the expense is properly chargeable to the appropriation provided to pay for the land, the expense being regarded as part of the cost of the property. (Citing 3 Comp. Dec., 216, 217.) But the expense of procuring an abstract of title to land already acquired by the United States is payable from the appropriation for contingencies of the department procuring the abstract and not against an appropriation made specifically for improvements on the land. (4 Comp. Dec., 62.)

By act of March 2, 1889 (25 Stat. 941), it was provided that in the procurement of sites for public buildings the grantors must furnish, free of charge, all requisite abstracts, official certificates, and evidences of title. Referring to this law the Comptroller said: "The exact public buildings to which it refers is not entirely free from doubt, but I am clearly of the opinion that it has no relation whatever to sites for fortifications under the War Department." (3 Comp. Dec., 218.)

By necessary implication the latter proviso of the act of March 2, 1889 (25 Stat., 941), positively prohibits the payment for an abstract of title to land purchased by the United States as a site for any public building. If such an abstract could be procured and paid for prior to the agreement for the purchase of the site, the purpose of this provision would be entirely defeated. The provision must therefore be construed as prohibiting payment for an abstract procured prior to, as well as for one procured at the time of, the purchase. (7 Comp. Dec., 51.)

Payment for abstract of title for land not purchased as a site for a public building may be made from the appropriation for purchase of the land and the making of the improvement thereby authorized. The act of March 2, 1889 (25 Stat., 941), does not apply to such case. (8 Comp. Dec., 212.)

It is well settled that in the purchase of land on account of the United States the preliminary



expenses of such purchase, as procuring abstracts of title, etc., and such other services as are not legal services, are payable from the appropriation for the purchase of the land; but that the expense of any legal proceedings taken by the Department of Justice in connection therewith are payable from an appropriation of that department. (9 Comp. Dec., 793, citing 3 Comp. Dec., 216.)

Section 355 has been modified by the provisions of the act of March 2, 1889 (25 Stat., 941). It has been held that this act prohibits the payment by the Government of the expense of an abstract of title to land purchased by the United States as a site for a public building, and that this prohibition applies to an abstract procured either prior to or at the time of the purchase of such land. (14 Comp. Dec., 579, citing 7 Comp. Dec., 51.)

**When a suit for condemnation is brought** the expense of such suit, like all other suits in which the United States is a party, is payable from the appropriations made for the Department of Justice. (3 Comp. Dec., 216; see also 1 Comp. Dec., 317; 2 Comp. Dec., 201.)

**Transfer of public lands.**—Lands reserved for military purposes can not be restored to the public domain without an act of Congress; and it would also seem that they can not be transferred to another department. (28 Op. Atty. Gen., 143; 21 Op. Atty. Gen., 120; file 984-3, Oct., 1905. See also note to sec. 161, R. S., "Custody of Property and Records.")

The President has authority to transfer the use and control of lands in the Philippine Islands, reserved by Executive Order for naval purposes, to the War Department for military purposes. (28 Op. Atty. Gen., 262.)

Any part or parts of the naval stations in Porto Rico no longer needed for the purposes of the Navy Department may be transferred to the control of the War Department or of any other department, either by formal Executive Order or by arrangement between the Secretary of the Navy and the head of the other department. (29 Op. Atty. Gen., 205, citing 25 Op. Atty. Gen., 269; 28 Op. Atty. Gen., 262; 16 Op. Atty. Gen., 124.)

Any part of the naval stations in Porto Rico may be transferred to the Government of Porto Rico under express authority contained in the act June 14, 1910 (36 Stat., 467), provided it is embraced within the terms of that act. While this transfer may be made by the Secretary of the Navy, it would be preferable to have the formal transfer effected by presidential proclamation. (29 Op. Atty. Gen., 205.)

As to those parts of the naval stations in Porto Rico which are not within the provisions of the act of 1910, there is no warrant of law for their formal transfer or cession to the Government of Porto Rico. Permission, however, may be given to the Insular Government through a letter or instrument in the nature of a revocable license for the use of these parts of the stations and the buildings thereon and for the construction of improvements temporary in their nature. (29 Op. Atty. Gen., 205.)

It would be difficult to lay down complete rules in regard to these reservations. They are made under such a variety of circumstances, for such various purposes, and under such different laws that each case is more conveniently considered and discussed as it arises in connection with the facts relating to it. (16 Op. Atty. Gen., 124.)

### Sec. 356. [Opinions of Attorney-General required by heads of Departments.]

The head of any Executive Department may require the opinion of the Attorney-General on any questions of law arising in the administration of his Department.—(22 June, 1870, c. 150, s. 6, v. 16, p. 163.)

#### I. WHO MAY REQUEST OPINION.

#### II. MUST BE QUESTION OF LAW.

#### III. MUST ARISE IN ADMINISTRATION OF DEPARTMENT.

#### IV. FORM OF REQUEST.

#### V. WEIGHT OF OPINIONS.

#### VI. JURISDICTION, ATTORNEY GENERAL AND COMPTROLLER OF THE TREASURY.

#### VII. MISCELLANEOUS.

#### I. WHO MAY REQUEST OPINION.

**President or head of department.**—It has repeatedly been held that the Attorney General is not authorized to give his official opinion upon a question of law where it is not called for by the President or by the head of a department. (14 Op. Atty. Gen., 21.)

The Attorney General is not authorized to give an official opinion in any case except on the call of the President or some one of the heads of departments. (1 Op. Atty. Gen., 211.)

By long and unbroken construction and practice it has been settled that the Attorney General

acts, in performing this legal duty, simply as the law adviser of the President and heads of departments. He is bound upon points of law and facts stated by them to give legal opinions in aid of their judgment in matters for their decision. (11 Op. Atty. Gen., 4.)

When in the course of discharging the duties of their departments, a question of law shall arise, whose solution is a prerequisite to the discharge of those duties, the head of any department has a right to request the opinion of the Attorney General on such question of law and he is bound by his oath to answer it. (1 Op. Atty. Gen., 608, 611.)

The Attorney General is not authorized or required to give an official opinion except to the President or to the head of an Executive Department, and the opinion must be needed for the guidance of the head of the department and should relate to some matter calling for action or decision on his part. (21 Op. Atty. Gen., 174; 20 Op. Atty. Gen., 609, 723.)

An opinion of the Attorney General may be requested by two or more heads of departments jointly, and will be rendered to all who joined in the request. (See 29 Op. Atty. Gen., 303; 29 Op. Atty. Gen., 494.)

When a "difference of opinion" arises between several executive departments as to the construction of the law, the primary question is as to which is vested with the determination and responsibility of the question. That one only can have jurisdiction over the subject-matter is plain. (20 Op. Att'y. Gen., 178, 180.)

As to opinions which may be required of the Attorney General by the President, see section 354, Revised Statutes.

**Subordinate officers of the Government** who desire an official opinion must seek it through the head of the department to which such subordinate is accountable. (1 Op. Att'y. Gen., 211.) [Where an opinion was requested by a subordinate officer of a department, the Attorney General has replied to the head of the department. (20 Op. Att'y. Gen., 220.) In another case the Attorney General addressed his opinion to a subordinate officer of a department, it appearing that he requested the opinion "By direction of the President." (27 Op. Att'y. Gen., 150.) An opinion was rendered to the Secretary of the Navy in response to a request from the latter's aid. (28 Op. Att'y. Gen., 531.)]

For the guidance of the heads of bureaus and other officers of the departments in the discharge of their duties provision is made by section 361, Revised Statutes, for assistance from the officers of the Department of Justice, under the direction of the Attorney General. The Attorney General can not render an opinion in such cases, even though it be requested through the head of the department, where the matter is not one calling for action or decision of the latter. (21 Op. Att'y. Gen., 174; 20 Op. Att'y. Gen., 609, 723.)

Question suggested but not decided whether law allows questions in the War and Navy Departments to be sent to the Attorney General by somebody else than the Secretary. (18 Op. Att'y. Gen., 59. See sec. 357, R. S., and note.)

It is true that the Attorneys General have given to heads of departments advice and opinion upon questions arising in the bureaus of their respective departments; but such advice and opinion are intended to aid only the judgment of the Secretary himself in deciding such questions. (11 Op. Att'y. Gen., 4.)

The Attorney General is not, in general, to give official opinions to subordinate officers of the Government. (6 Op. Att'y. Gen., 326, 334.)

An opinion of the Attorney General upon any question arising in the administration of the Treasury Department can only be had at the instance of the Secretary. (18 Op. Att'y. Gen., 59.)

**Legislative Department.**—In the absence of any statutory authority to give official opinions to the legislative department of the Government, the assumption of such a power by the Attorney General would be in violation of his oath of office and of dangerous example. (10 Op. Att'y. Gen., 164.)

The Attorney General is not authorized to give his official opinion upon a call of either House of Congress or any committee or Member thereof. (17 Op. Att'y. Gen., 358.)

The Attorney General can not, without violating his oath, render an opinion to the Speaker upon the order of the House of Representatives. (1 Op. Att'y. Gen., 335.)

The Attorney General is not authorized by law to give an official opinion to the House of Representatives in response to a resolution thereof. (18 Op. Att'y. Gen., 87; citing 2 Op. Att'y. Gen., 499; 5 Op. Att'y. Gen., 561; 10 Op. Att'y. Gen., 164; 12 Op. Att'y. Gen., 544; 12 Op. Att'y. Gen., 546; 14 Op. Att'y. Gen., 17; 14 Op. Att'y. Gen., 177; 15 Op. Att'y. Gen., 475.)

It is not within the province of the Attorney General to advise committees of Congress upon questions of law occurring in matters before them. (14 Op. Att'y. Gen., 17.)

[The Attorney General rendered a lengthy opinion to the Senate Committee on Interstate Commerce, May 5, 1905, which is published with the following note: "This opinion, properly speaking, is not an official one, but is to be regarded as a letter of advice. It is printed with the official opinions solely because of the importance of the subject considered." (25 Op. Att'y. Gen., 422.) The Attorney General has also rendered an opinion to the House of Representatives. (1 Op. Att'y. Gen., 253.) Compare 30 Op. Att'y. Gen., 88.]

## II. MUST BE QUESTION OF LAW.

**In General.**—The authority of the Attorney General to give opinions is limited by Congress to "questions of law." (20 Op. Att'y. Gen., 590.)

The Attorney General can not give official opinions except upon questions of law. (21 Op. Att'y. Gen., 36.)

Being thus limited to questions of law, the Attorney General has not been clothed with power to investigate matters of fact. He has no authority to compel the attendance of witnesses, or to administer oaths to them; and in short has none of the machinery by which, through the control of persons and papers, truth may be elicited and falsehood exposed. Thus deficient in the means of ascertaining the facts, his conclusions upon the law would necessarily be valueless, since their accuracy would depend on the fullness and certainty with which the facts were established. (10 Op. Att'y. Gen., 164.)

**Can not decide questions of fact.**—The Attorney General has no power to investigate or decide questions of fact, but only to give advice on questions of law as they arise out of facts authoritatively laid before him by the head of a department. (10 Op. Att'y. Gen., 267.)

It is not the province of the Attorney General to settle a controversy involving matters of fact. He can only give his opinion on questions of law. (12 Op. Att'y. Gen., 206.)

It is not within the competency of the Attorney General to make a finding of facts in any case, but he can only give an opinion on questions of law arising upon a statement of facts presented to him by the officer requesting an opinion. (19 Op. Att'y. Gen., 696.)

The Attorney General only has jurisdiction of questions of law, and must be furnished with a definite statement of the facts. (21 Op. Att'y. Gen., 36; see also 1 Op. Att'y. Gen., 253.)

As the Attorney General is not at liberty under the law to make a finding of facts, he will lay aside the evidence submitted for his consideration with request for an opinion, and take as the case for opinion the statement contained



in the communication from the head of the department. (19 Op. Att'y. Gen., 547.)

The Attorney General is not permitted by law to render an official opinion to the head of a department upon questions of fact. (21 Op. Att'y. Gen., 174; citing 20 Op. Att'y. Gen., 697, 711, 717, 740.)

The Attorney General is under no obligation to render an award, or to determine a question of fact in cases referred to him. (6 Op. Att'y. Gen., 326, 334.)

The law is settled that the Attorney General can not properly decide questions of fact. Such questions must be determined by the head of the department in which they arise. (20 Op. Att'y. Gen., 384.)

The Attorney General, in discharging the duties imposed upon him by section 356, Revised Statutes, is required only to answer questions of law and can not consider questions of fact upon evidence submitted. Where papers containing evidence accompany the request for the Attorney General's opinion, he will not examine same, but will assume that all the facts have been found in favor of the applicant. (20 Op. Att'y. Gen., 253.)

The Attorney General has no authority to give an official opinion upon questions of fact submitted by the head of a department. (3 Op. Att'y. Gen., 1.)

It is obvious that when the Attorney General proceeds to give his opinion and advice on any question of law the facts giving rise to such question must be either stated to or assumed by him; and when the head of the department calling for his opinion gives him those facts, he must necessarily adopt them as the bases of his reflections and judgment. Whether they are presented in the form of a direct statement or of an argumentative examination of the circumstances can make no difference. In either case it would be manifestly improper to receive from any other source statements or inferences conflicting with those which are put before him by the only authority legally known to him in the premises. To act otherwise would involve a usurpation of power; for it would be converting an office created for the sole purpose of assisting and advising the executive departments on questions of law into an appellate tribunal for the reexamination of their decisions on matters of fact. (3 Op. Att'y. Gen., 1.)

The Attorney General has no authority to settle questions of fact. He is obliged to take the facts of a case as they are stated to him and to predicate his opinion thereon. (3 Op. Att'y. Gen., 309.)

It has been held from a very early date that an official opinion can be required and given only when the question submitted is a question of law. (20 Op. Att'y. Gen., 614.)

The Attorney General can not undertake to settle conflicting questions of fact raised by various papers submitted, but will look to the submitted statement of facts alone. (22 Op. Att'y. Gen., 156.)

The Attorney General's duty is limited to questions of law arising in the administration of the respective departments. Where the subject matter is not of that character, and consequently not within the scope of duty thus

marked out, he is without authority to officially advise thereon. (18 Op. Att'y. Gen., 365.)

What constitutes prompt delivery by a contractor is a question of fact, in regard to which the Attorney General is not required to express an opinion. (28 Op. Att'y. Gen., 47.)

The Attorney General declines to render an opinion upon a matter submitted which involves the determination of questions of fact. (26 Op. Att'y. Gen., 604.)

The advisory powers of the Attorney General do not extend to an examination of evidence to ascertain what is established by a preponderance of the testimony (citing 17 Op. Att'y. Gen., 172); nor can he settle facts from papers submitted, and then proceed to give an opinion thereon (citing 18 Op. Att'y. Gen., 487; 19 Op. Att'y. Gen., 672). (28 Op. Att'y. Gen., 218.)

The Attorney General will not enter into the consideration of disputed questions of evidence. (28 Op. Att'y. Gen., 239.)

The Attorney General will not undertake to find the facts involved in a request for an opinion. (28 Op. Att'y. Gen., 393.)

Where the record of a court-martial trial was sent to the Attorney General by the President for a report, among other things, upon the question whether it contained any "unjustified conclusion of fact" which would render it the duty of the President to withhold approval of the findings of the court-martial, or any part thereof, and generally to advise the President as to the action he should take upon the record as transmitted to him from the court-martial; the Attorney General rendered an opinion upon the questions of fact thus presented, as well as upon the questions of law involved. (Case of Capt. Oberlin M. Carter, U. S. A., 22 Op. Att'y. Gen., 589.)

In general, the Attorney General will render an opinion to the Secretary of the Navy upon questions of law presented by the records of court-martial proceedings (28 Op. Att'y. Gen., 286; 29 Op. Att'y. Gen., 563; C. M. O. No. 4—1913); but will not render an opinion to the Secretary of the Navy upon questions of fact connected therewith nor review the proceedings of a court-martial in search of questions of law. (5 Op. Att'y. Gen., 626.)

**Can not decide questions of expediency, administrative discretion, etc.**—The advisability of bringing a suit is not a question of law upon which the Attorney General's opinion may be asked. (20 Op. Att'y. Gen., 702.)

The Attorney General can not with propriety express any judgment concerning the *disposition* of the matter to which his opinion relates, that being something wholly within the administrative sphere and direction of the head of the department. The Attorney General's duty ends with the rendition of the opinion. (17 Op. Att'y. Gen., 332.)

The Attorney General's opinion upon a purely administrative matter entirely within the discretion of the head of a department must be considered extra-official and as coming from one whose lack of practical knowledge of the administration of the department makes his opinion on this point far inferior in value to that of the head of the department to whom it is addressed. (20 Op. Att'y. Gen., 654, 658.)

The Attorney General is not authorized to give an official opinion upon a question which proposes for his consideration nothing more than a subject of controversy between subordinates of a department and private parties. (18 Op. Att'y. Gen., 365.)

Inquiries involving considerations of administrative discretion and judgment, of practicability and advisability, must be solely determined by the head of the department in his discretion. (24 Op. Att'y. Gen., 118.)

Where there is no doubt that terms are used in a statute in their ordinary acceptation, the duty of applying the statute to a particular state of facts is one of administration merely, involving the determination of questions of fact, and the duty of applying the statute to the facts can not be devolved upon the Attorney General. (20 Op. Att'y. Gen., 487.)

The Attorney General can not, with propriety, give an official opinion to the head of a department upon the question whether it is expedient for him to prosecute an appeal from the decision of a chief of bureau in another department to the latter's superior in the same department. The question is not necessarily one of law, but may involve merely official discretion. Any questions of law which arise may be presented to the Attorney General by the head of the department in which the appeal is pending. (15 Op. Att'y. Gen., 574.)

The Attorney General is not authorized to express any views upon a matter of propriety lying within the executive judgment and discretion of the head of the department requesting the opinion. (25 Op. Att'y. Gen., 93.)

It is not within the province of the Attorney General to construe the reasons, affecting his administrative judgment and discretion, which might impel the head of a department to take any action one way or the other in a matter pending before him for decision; he is neither empowered nor required to pass upon the propriety of the exercise by the head of a department of an official discretion. (25 Op. Att'y. Gen., 524.)

Whether charges proposed to be made by the Secretary of Agriculture for the use of lands or resources within the limits of the national-forest reserves would or would not be reasonable is a matter left by law entirely to the Secretary's discretion. The responsibility, as well as the power, rests with the Secretary. It is not, therefore, a question which can properly be determined by the Attorney General. (26 Op. Att'y. Gen., 421.)

An inquiry which raises a question of propriety and expediency, rather than a question of law, is one to be determined by the head of the department only, and upon which the Attorney General can not advise. [In this case, however, the Attorney General stated that he agreed with the officer requesting his opinion, that the action proposed was of very doubtful expediency.] (26 Op. Att'y. Gen., 579.)

The Attorney General declines to express an opinion to the Secretary of the Treasury as to the propriety of a proposed instruction to customs officials, as he is not authorized to express his views upon matters of propriety involving executive judgment and discretion. (25 Op. Att'y. Gen., 94.)

The advisory powers of the Attorney General do not extend to a question which would appear to turn wholly upon a conclusion of fact as to the status of a bidder, and to involve, therefore, the exercise of judgment and discretion by the head of the department, with which the Attorney General can not under the law or with propriety interfere. (28 Op. Att'y. Gen., 218.)

The Attorney General refrains from advising as to the propriety of issuing a regulation. (25 Op. Att'y. Gen., 93.)

**Can not construe executive regulations.**—It is the province of the head of a department, rather than of the Attorney General, to construe regulations issued by the former. (21 Op. Att'y. Gen., 36.)

The Attorney General will not interpret a regulation of practice made by the Commissioner of Patents for his own guidance and that of his subordinates for the convenient, intelligent, and orderly disposal of the business of his office. Such regulations, which the heads of bureaus and departments can make, modify, or annul at will, or enforce or waive, as seems expedient, may well be left for their interpretation to the head of the department or bureau to which they pertain. (18 Op. Att'y. Gen., 521.)

A regulation, when not specially authorized or demanded by law, is not law in the sense in which that term is used in this section. It is simply a rule of administrative practice in the present instance with reference to the classification and order of precedence in the consideration of cases in the Patent Office. (18 Op. Att'y. Gen., 521.)

The construction of regulations of the Civil Service Commission is a matter entirely within the province of the commission, and should not be attempted by the Attorney General. Where the question presented is whether the regulation is one that was within the power of the commission to make, the Attorney General's answer will be, that if the regulation is construed to mean thus and so, it is a lawful regulation; otherwise, it is unauthorized. (20 Op. Att'y. Gen., 649.)

The Attorney General can not give an official opinion upon the construction of customs regulations, which may be modified, at any time by the Secretary of the Treasury. (21 Op. Att'y. Gen., 255.)

A departmental regulation which is not demanded by law is not law in the sense in which that term is used in section 356. It may more properly be left for interpretation by the head of the department or bureau to which it pertains, and which is responsible for its existence and execution. As the basis of the regulation is to be found only in the will of its maker, to advise him what meaning his language conveys would be useless, since an interpretation unsuitable to him could only result in a revision. (25 Op. Att'y. Gen., 183.)

**Will decide whether proposed or existing regulation is legal.**—The question as to the power of an executive officer to issue a rule or regulation or as to its legality, is distinguished from a question as to the proper interpretation of a regulation, which latter question the Attorney General will not answer. (18 Op. Att'y. Gen., 521; 20 Op. Att'y. Gen., 649.)



The Attorney General will examine regulations proposed to be issued by the Secretary of the Treasury for the information of residents of the United States returning from foreign countries, and decide whether or not same are in harmony with the tariff act, and legal. (25 Op. Atty. Gen., 93.)

Similarly, the Attorney General will render an opinion to the Secretary of the Navy as to the latter's authority to make certain proposed changes in Navy Regulations. (29 Op. Atty. Gen., 264; also unpublished opinion, Oct. 27, 1909, file 3980-530.)

The Attorney General will examine a proposed regulation of the State Department with reference to the compensation of consular agents, and decide that such regulation, "being consistent with the provisions of law, may be carried into effect." (22 Op. Atty. Gen., 163.)

The Attorney General will not render an opinion as to whether or not certain proposed regulations may be adopted and put into effect by the head of a Department, unless it affirmatively appear that such head of Department, as a matter of policy and administrative discretion, is prepared or intends to adopt such regulations or any modification thereof, provided such action would be legal on his part; as it is only then that a question of this character can be said to have so arisen in the administration of the department as to come within the terms of section 356, Revised Statutes. (27 Op. Atty. Gen., 49.)

The Attorney General can not answer the question whether a regulation if issued could be enforced, as it is hypothetical as well as judicial. (25 Op. Atty. Gen., 93.) (However, in this case, in view of the special object of the proposed regulation, the Attorney General states that, while refraining from advising as to the propriety of issuing the regulation, or as to its fate if it should come before the courts, "it does not seem to me, speaking from the present standpoint, that its general legality can be seriously questioned.")

The validity of a Navy regulation, as applied to cases that might arise in the future, is hardly a proper subject for the Attorney General to pass upon. (28 Op. Atty. Gen., 129, citing 20 Op. Atty. Gen., 738.)

The law does not require the Attorney General to undertake the task of examining codes of rules adopted to meet future cases. The establishment of such a practice would require his entire time, and necessitate the imagining of the various contingencies in which their validity might in future cases be questioned, and passing judgment on these possible future problems. (20 Op. Atty. Gen., 738.)

The Attorney General will render an opinion as to whether or not an existing regulation is legal. (20 Op. Atty. Gen. 649; 30 Op. Atty. Gen., 234.)

The Attorney General will determine that a Navy regulation is valid and "has binding force upon the accounting officers of the Government." (Op. Atty. Gen., May 19, 1915, 171 S. and A. Memo., 8611.)

**Will not advise as to foreign law.**—The existence of a foreign law is a question of fact to be proved by competent evidence. The Attorney General can not give an opinion as

to the law of a foreign nation. Whether the statements of a foreign ambassador as to the true construction of the legislation of his own Government and the practice thereunder should be accepted as true is a question to be decided by the Secretary of State and not by the Attorney General. (21 Op. Atty. Gen., 377; 21 Op. Atty. Gen., 80; file 26543-124, Aug. 4, 1914. In this connection, see 7 Op. Atty. Gen., 9.)

**Will not examine and approve blank forms.**—The law does not require the Attorney General to examine and approve forms of obligations, permits, bonds, and affidavits for future use in the other departments. The establishment of such a practice would require his entire time and necessitate the imagining of the various contingencies in which their validity might in future be questioned and passing judgment on these possible future problems. (20 Op. Atty. Gen., 738. But see 27 Op. Atty. Gen., 173; and file 3355-88, Nov. 7, 1906.)

**Questions as to desirability of changing the law.**—This section limits the functions of the Attorney General, in the matter of opinions requested by the heads of departments, to questions arising out of the law as it is, and does not seem to call upon him to give his views and opinions upon the advisability of making changes by treaty in any department of jurisprudence. (19 Op. Atty. Gen., 593.)

[However, in 6 Opinions Attorney General, 432, the Attorney General expressed the view that "Congress may undoubtedly relax the law in this case," but that it seemed to him "premature" to do so in the existing status of the matter. In 22 Opinions Attorney General, 512, he suggested "that relief be had through Congressional action;" in 24 Opinions Attorney General, 69, he stated, "I have the honor to say, responding to your alternative suggestion, that it may be well to propose to Congress legislation which shall explicitly authorize the issue of letters rogatory by the Patent Office of the United States, and shall clothe Federal courts with the power to execute letters issued by those patent offices of recognized powers which possess and exercise well defined judicial functions;" in 25 Opinions Attorney General, 98, he suggested "that Congressional action be sought to provide for the various features of expense, compensation to the Government or its officers, official liability for the faithful performance of the trust," etc.; on May 27, 1909, he submitted draft of a bill to the Secretary of the Navy, with suggestion that it be introduced in Congress for the purpose of curing defects in a law considered by him in an official opinion. File 22724-7i. See also 26 Op. Atty. Gen., 70, 74.]

### III. MUST ARISE IN ADMINISTRATION OF DEPARTMENT.

**Will not answer hypothetical question.**—The Attorney General will not give a speculative opinion on an abstract question of law which does not arise in any case presented for the action of an executive department. (11 Op. Atty. Gen., 189; 20 Op. Atty. Gen., 288, 440; 28 Op. Atty. Gen., 129, 239, 417; 29 Op. Atty. Gen., 99; 22 Op. Atty. Gen., 77; compare 28 Op. Atty. Gen., 34, 38.)

It has been held from a very early day that an official opinion can be required and given only when the question for decision is one which has already actually arisen, and not a question upon a hypothetical case which may or may not arise in the future. (20 Op. Atty. Gen., 614.)

The opinion of the Attorney General may be required on questions of law arising in the administration of a department, but not upon hypothetical cases merely. (13 Op. Atty. Gen., 531; 19 Op. Atty. Gen., 414.)

It is not the duty or practice of the Attorney General to officially answer abstract or hypothetical questions of law. (13 Op. Atty. Gen., 568; 19 Op. Atty. Gen., 414.)

To attempt in advance to settle such questions is to anticipate trouble, and it may well be added, to promote trouble. (19 Op. Atty. Gen., 414; 13 Op. Atty. Gen., 531; 9 Op. Atty. Gen., 421; 20 Op. Atty. Gen., 440.)

The Attorney General is not required to write abstract essays on any subject. (20 Op. Atty. Gen., 440; 9 Op. Atty. Gen., 82.)

The inconvenience will be readily perceived of giving, upon a hypothetical case, an opinion which, upon the consideration of an actual case, may require modification on account of circumstances not imagined, and therefore not considered in the preparation of the opinion. (13 Op. Atty. Gen., 531; 19 Op. Atty. Gen., 414; 20 Op. Atty. Gen., 440.)

The Attorney General is not permitted, by statute or precedent, to give an opinion upon a question which does not spring out of any present, actually existing case arising in the administration of the department requesting the opinion, but which is a question in a hypothetical case, and one, indeed, which may never arise, and calls in advance for an opinion as to what the department would hold in the future upon a somewhat indefinite state of facts. (19 Op. Atty. Gen., 414.)

The Attorney General, for obvious reasons, must decline to answer a hypothetical question. He will not, therefore, render an opinion upon a question which is not actually pending at the time before the head of the department requesting it. (20 Op. Atty. Gen., 251.)

The inquiry must relate not to a mere moot question but to one which requires immediate action. The answer must be necessary for the protection of the officer making the inquiry, or to insure the lawfulness of the action which he is about to take. (21 Op. Atty. Gen., 509.)

It has been the uniform practice of the Department of Justice, established by an unbroken line of opinions, to decline to give an opinion upon a question of law which will be of no assistance to the head of a department or the officers under him in the proper and complete performance of their duties; the necessity for such a practice is at once apparent, and unless it be rigorously adhered to, the Attorney General will frequently find himself placed in the embarrassing situation of being called upon to render opinions upon mere moot questions of law. (25 Op. Atty. Gen., 543.)

It is beyond the competency of the Attorney General to give an official opinion upon a question which is purely abstract and hypothetical,

and not arising out of an actual case calling for official action. (19 Op. Atty. Gen., 559, 564.)

It is impossible to reply to mere speculative points or supposed cases. It has always been the rule of the Attorney General to give opinions only in *actual* cases. (9 Op. Atty. Gen., 82; 19 Op. Atty. Gen., 414; 25 Op. Atty. Gen., 440.)

Whether the head of a department should enter into a certain contract, is hypothetical in its nature, unless it should be affirmatively stated, in substance, that the acceptance of the proposal having been determined to be proper and advisable from the administrative point of view, and the head of the department being ready, accordingly, to enter into a contract, desired to know whether that step was justified by existing provisions of law. (24 Op. Atty. Gen., 118.)

Whether a regulation, if issued, could be enforced, is hypothetical as well as judicial; involving speculation, as if the requirement is adopted, proceedings in court to enforce it may or may not be successful. (25 Op. Atty. Gen., 93.)

Whether certain regulations may be adopted and put into effect by the head of a department is hypothetical, unless the head of the department has decided to adopt such regulations or any modification thereof, provided such action would be legal on his part; and it is only under these circumstances that the Attorney General can render an opinion on the subject, as it is only then that a question of this character can be said to have so arisen in the administration of the department as to come within the terms of section 356. (27 Op. Atty. Gen., 49.)

The Attorney General is prohibited by the restriction contained in section 356, Revised Statutes, from giving an opinion unless an occasion has actually arisen requiring the action of the head of the department submitting it. (20 Op. Atty. Gen., 533.)

The established practice of the Department of Justice has been to consider this section as containing an implied prohibition against the rendering of an opinion by the Attorney General unless upon a question of law which has actually arisen, and not upon one which might or could, under certain contingencies, arise in the administration of the department requesting the opinion. (27 Op. Atty. Gen., 49.)

The settled policy of the Attorney General is that no opinion should be rendered upon any question of law unless it is specifically formulated in a case actually arising in the administration of a department. (24 Op. Atty. Gen., 59.)

The Attorney General declines to give an opinion as to the meaning of a statute, where the question does not appear to have arisen in the administration of the department proposing it. (19 Op. Atty. Gen., 695.)

In accordance with the well-established rule, declines to answer the question whether citizens of the Philippine Islands are entitled to the benefits of the patent laws of the United States, there being no case involving that question pending before the department-making the inquiry. (25 Op. Atty. Gen., 179.)

Declines to express an opinion as to whether a joint resolution has any retroactive force, for



the reason that the question is not predicated upon any actual case arising in the department requesting it. (24 Op. Atty. Gen., 556.)

Where no occasion has arisen for the official action of a head of department, the Attorney General will not give an opinion upon a question proposed by him. (21 Op. Atty. Gen., 457.)

**Will not answer question which is not "pending," has already been decided, etc.**—It is required not only that the question must be one arising in the administration of a department, but it must be one which is still pending. A matter which has been considered and decided is not now a "question" upon which the head of a department may require an opinion of the Department of Justice. (20 Op. Atty. Gen., 440; 28 Op. Atty. Gen., 596.)

Where a claim has already been administered by the head of a department, and consequently no question remains, the Attorney General will not render an opinion even though the head of the department submits the question to him at the request of a committee of Congress. (15 Op. Atty. Gen., 138.)

To authorize the Attorney General to express an opinion upon a question of law propounded, it is necessary that a statement of facts should be submitted showing that the question has actually arisen in the administration of a department, in an existing case calling for action. He is not authorized to answer an inquiry with reference to action already taken, whether regarded as an abstract question of law or an inquiry into the legality of the course of a predecessor in office in matters not now demanding official action. (22 Op. Atty. Gen., 85.)

The Attorney General declines to give an opinion upon a question submitted which appears to have been decided and definitively disposed of by the department. (3 Op. Atty. Gen., 39; 20 Op. Atty. Gen., 440.)

A question is not practically raised in a case where the Attorney General's opinion is desired only because the same difficulty which has previously arisen may occur again; but it may not, and to settle it in advance is to anticipate trouble. (9 Op. Atty. Gen., 421; 20 Op. Atty. Gen., 440.)

The Attorney General can give official opinions only upon questions of law actually arising in the administration of the department, which are at the time pending, and which must be determined in order that the work of the department may be properly administered. (20 Op. Atty. Gen., 618.)

The Attorney General will not give an opinion upon a question where it appears that the department has reached a decision thereupon, and that an opinion is desired as to the "correctness of the interpretations and applications of said law." (28 Op. Atty. Gen., 596; 20 Op. Atty. Gen., 440.)

The Attorney General declines to give an opinion to the head of a department upon a question where no case involving that question is now pending before that department. (29 Op. Atty. Gen., 46; 29 Op. Atty. Gen., 99.)

An opinion will not be given by the Attorney General where it does not appear that some question exists calling for the action of the department requesting it. (20 Op. Atty. Gen., 383.)

The Attorney General is not permitted by statute to respond to a request for an opinion by the head of a department which does not show that a case has presently arisen in the administration of the department. (21 Op. Atty. Gen., 506.)

The Attorney General will not give an opinion upon an important legal question when it is not practically presented by an existing case before a department. (21 Op. Atty. Gen., 506, citing 9 Op. Atty. Gen., 421; 10 Op. Atty. Gen., 50; 13 Op. Atty. Gen., 531; 19 Op. Atty. Gen., 332.)

From the foundation of the Government it has been held that the Attorney General is neither required nor authorized to give an opinion upon the request of the head of a department except in cases actually pending for decision by him in such department. (20 Op. Atty. Gen., 536, citing 19 Op. Atty. Gen., 7; 19 Op. Atty. Gen., 331.)

The Attorney General is not authorized by statute or precedent to respond by an official opinion as to a question of law not shown to be pending and of present executive consequence. (20 Op. Atty. Gen., 50.)

An opinion will not be given by the Attorney General where it does not appear that some question exists calling for the action of the department requesting it. (20 Op. Atty. Gen., 383; 19 Op. Atty. Gen., 342; 19 Op. Atty. Gen., 439.)

The cases in which the Attorney General is authorized to give opinions to the heads of executive departments are such as are actually pending in such departments and involve the legal questions submitted. A convicted deserter from the Army, undergoing sentence, must become the recipient of executive clemency and must make application for reenlistment, before the question of the effect of the President's pardon upon his right to reenlist can arise. (21 Op. Atty. Gen., 568.)

The question whether a Chinaman resident of the United States could lawfully return if he should revisit his native country, is not a question arising in the administration of the Treasury Department, and can not arise until this Chinaman's return to this country, if he shall decide to depart. Therefore the Attorney General could not properly give the opinion requested. (20 Op. Atty. Gen., 667.)

Whether a certain American steamer, if rebuilt in Canada, can be reregistered on her return as a vessel built in the United States, is not a question for the present action of the Secretary of the Treasury, and the Attorney General can not properly give an opinion thereon. (20 Op. Atty. Gen., 723; following 20 Op. Atty. Gen., 667.)

When the solution of the question is not necessary to the discharge of any duty properly belonging to the department, it is not the duty of the Attorney General to give an opinion thereon, and such opinion would consequently be extra-official and unauthorized. (10 Op. Atty. Gen., 220; 19 Op. Atty. Gen., 7; 20 Op. Atty. Gen., 724; see also, 1 Op. Atty. Gen., 611; 1 Op. Atty. Gen., 575; 2 Op. Atty. Gen., 311; 2 Op. Atty. Gen., 513; 3 Op. Atty. Gen., 368; 6 Op. Atty. Gen., 325.)

Will not review decision of a department.—The Attorney General does not possess the power to revise the decisions of an executive department, deliberately made, and entirely satisfactory to the Secretary thereof. (28 Op. Att'y. Gen., 596; 3 Op. Att'y. Gen., 39.)

The Attorney General can not properly express an official opinion upon a question which has been decided by a department and is presented merely because of the request of counsel for parties interested. (28 Op. Att'y. Gen., 596.)

Where a question appears to have been decided and definitively disposed of by a department, after very full consideration, upon grounds then and still believed by it to be indisputable, and to be referred to the Attorney General solely in compliance with request of the claimant, the Attorney General can not undertake to give an official opinion thereon without assuming that his office possesses a revisory jurisdiction not conferred upon it by law. (3 Op. Att'y. Gen., 39; 20 Op. Att'y. Gen., 440; file 11130-2; C. Mar. 26, 1910.)

An appeal does not lie to the Attorney General from another department by any party assuming to be aggrieved by its action and seeking to have it reviewed. (6 Op. Att'y. Gen., 326, 334.)

The Attorney General is not an appellate tribunal for the reexamination of decisions of the executive departments on matters of fact. In rendering an opinion he must accept the facts given him by the head of the department calling for his opinion. To act otherwise would involve a usurpation of power. (3 Op. Att'y. Gen., 1.) The Attorney General is obliged to take the facts of a case as they are stated to him by the head of the department requesting his opinion, and to predicate his opinion thereon. (3 Op. Att'y. Gen., 309.)

It is not within the authority of the Attorney General to reverse a decision of the Civil Service Commission or to require it to issue a certificate of reinstatement; as the Civil Service Commission is vested with authority in the matter of certification, and when it has exercised that authority it is not apparent that any question in the premises remains upon which the statute permits the head of a department to require the opinion of the Attorney General. (20 Op. Att'y. Gen., 270.)

No statute exists which authorizes the head of a department, or the Attorney General at his suggestion, to reverse or review the decision of the Civil Service Commission that a person is not entitled to reinstatement. Accordingly the Attorney General declines to render an opinion, upon request of the head of a department, as to whether or not the commission interpreted the law correctly. (20 Op. Att'y. Gen., 158.)

The Attorney General is not permitted to give an opinion where he is asked to review and express his conclusions upon the correctness of the interpretation and application of the law previously made by the head of a department and not upon a question pending and undetermined. (20 Op. Att'y. Gen., 440.)

The Attorney General will not render an opinion where it appears that the department has reached conclusions thereupon, and that an opinion is desired as to the correctness of its

interpretation and application of the law. (28 Op. Att'y. Gen., 596.)

A matter which has been considered and decided is not now a "question" upon which the head of the department may require an opinion of the Attorney General. (28 Op. Att'y. Gen., 596; 20 Op. Att'y. Gen., 441, 442.)

The Attorney General will not, at the request of a head of a department, review the decision of the head of another department, which latter department had complete and lawful jurisdiction. (11 Op. Att'y. Gen., 189.)

Will not answer question submitted by head of a department merely for information of subordinate.—The Attorney General is not authorized or required to give an official opinion to the head of a department, except where it is needed for the latter's guidance in some matter calling for action or decision on his part. Accordingly he can not render an opinion to the Secretary of the Interior upon a question which arose in the administration of the office of Commissioner of Patents, and relates to his duties under the law; as to do so would be to overstep the boundaries prescribed for him by a long line of decisions and uniform practice, and to commit himself upon a question which might properly be submitted to him thereafter by the Secretary of the Interior. (21 Op. Att'y. Gen., 174; 20 Op. Att'y. Gen., 609, 723.)

The Attorney General's opinion can not be asked upon questions relating only to the duties of the Commission to the Five Civilized Tribes; advice which can not be asked directly by the Commissioners the Attorney General is not authorized to furnish even when they put the question through the head of a department. His opinion should be needed for the guidance of the head of a department, and should relate to some matter calling for the latter's action or decision. (20 Op. Att'y. Gen., 724.)

The Attorney General is not the official legal adviser of subordinate officers in the departments. It is true that he often gives the heads of departments advice and opinions upon questions arising in the bureaus of their respective departments, but such advice and opinions are intended to aid only the judgment of the Secretary himself in deciding such questions. To enlarge the rule beyond this extent would not only be unwarranted by law, but would convert the Attorney General into a sort of general appellate court, where dissatisfied claimants might seek relief from adverse decisions and subordinate executive officers find a way of escaping from official labor and responsibility. (11 Op. Att'y. Gen., 4.) As to whether an exception exists in the special cases of questions arising in the War and Navy Departments, see 18 Op. Att'y. Gen., 59, noted under sec. 357, R. S.)

The Attorney General is not required to give an opinion except on such questions as are necessary to guide the heads of departments in their actions. Accordingly he has no power to give an official opinion upon questions referred to him by the Secretary of the Treasury for the guidance not of the Secretary but of an auditor. (20 Op. Att'y. Gen., 251.)

The questions which the Attorney General is required to answer are only those the decision of which is needed to govern the action of the



head of a department in cases actually arising therein, and the Attorney General must decline to answer a question asked by the head of a department which pertains only to the powers and duties of a commission, although such a commission is properly to be regarded as within the department. (19 Op. Atty. Gen., 673.)

The Attorney General has no power to give an official opinion on questions referred by the Secretary of the Treasury at the request of an auditor for the guidance of the latter, in a case where, under the law, no appeal could be taken from the auditor's action to the head of the Treasury Department. The question therefore was not pending before the Secretary of the Treasury and evidently could not reach him. (11 Op. Atty. Gen., 4.)

The Attorney General has no authority to give an opinion to the Secretary of the Treasury upon questions relating to the past action of the Board of Supervising Inspectors, which is not reviewable by the Secretary. (18 Op. Atty. Gen., 77.)

The Attorney General declines to express an opinion upon a question asked him by the Secretary of the Interior for the reason that it is not predicated upon an actual case arising in the department; and also because that department has an officer clothed with authority to determine questions of that nature in the first instance, coming up on appeal from the Pension Bureau. (24 Op. Atty. Gen., 556.)

Where the question is one within the exclusive jurisdiction of the Comptroller of the Treasury, the Attorney General will not render an opinion upon the request of the Secretary of the Treasury. If, however, the matter is one upon which the Secretary's action will be necessary, an opinion will be rendered on it. (20 Op. Atty. Gen., 279.) [In 23 Op. Atty. Gen., 30, the Attorney General rendered an opinion with reference to the question of pay of certain naval officers on promotion, which was pending before the Comptroller of the Treasury; in this case the Secretary of the Treasury requested the opinion of the Attorney General upon certain questions proposed by the Comptroller of the Treasury and transmitted with the Secretary's note. The opinion was for the guidance of the Comptroller. See also below, "Jurisdiction, Attorney General and Comptroller of the Treasury."]

With reference to the question whether the accounting officers of the Treasury may legally allow claims for transportation upon requests fraudulently issued by an officer of the Army, which question was transmitted to the Attorney General by indorsement of the Secretary of the Treasury on a letter of the Comptroller of the Treasury, the Attorney General rendered an opinion to the Secretary. (23 Op. Atty. Gen., 161.)

Upon request of the Secretary of the Treasury, the Attorney General rendered an opinion upon questions proposed by the Comptroller of the Currency. (27 Op. Atty. Gen., 324.) [In 27 Op. Atty. Gen., 38, the Attorney General expressed doubt as to whether he was required to render an opinion to the Secretary of the Treasury upon questions referred to him at the instance of the Comptroller of the Currency, requiring action by the latter, although the

comptroller could perform the duty only under the general direction of the Secretary. However, as a matter of courtesy and public policy, the doubt was resolved in favor of the propriety of rendering the opinion requested.]

**Will not answer question submitted by head of department merely for information of Congress.**—The Attorney General will not render an opinion upon a claim which has already been administered by the head of a department, who submits the question to him at the request of a committee of Congress. (15 Op. Atty. Gen., 138.)

Congress has not thought proper to empower its committees to require the Attorney General's opinion directly, and he will not render an opinion upon the request of the head of a department at the suggestion of a congressional committee where it is not required for the guidance of the head of the department. (15 Op. Atty. Gen., 138.)

Where a call for an opinion from the Attorney General was made by the head of a department in compliance with a resolution of the House of Representatives, for the information of the latter, without reference to any question of law arising in the administration of such department, the Attorney General is without authority to give an official opinion in such case. (18 Op. Atty. Gen., 107.) (In this case the Attorney General's opinion had previously been directly requested by resolution of the House of Representatives and declined. (See 18 Op. Atty. Gen., 87.)

The Attorney General is not authorized to give his official opinion to the head of a department upon a question not involving departmental administration but referred to him at the request of a Senator in order that such opinion might be laid before a committee of the Senate. (17 Op. Atty. Gen., 358.)

The Attorney General is not authorized to render an opinion upon the request of a head of department, upon a question not demanding any present official action by the latter but intended for the information of a congressional committee. (22 Op. Atty. Gen., 85.)

**Will not answer question submitted by head of department merely for information of contractors.**—It is not the duty of the Attorney General, nor has he a right, to give an official opinion with a view to the guidance of persons who may propose to enter into contract relations with the United States. It is not permissible for the Attorney General to give an opinion except in a case actually arising in the administration of one of the departments. (20 Op. Atty. Gen., 465.)

The function of the Attorney General is to advise the several heads of the other executive departments upon the questions of law which, in the administration of their respective departments, they are required to decide. But the head of a department is not required by law to become the legal adviser of a party proposing to enter into a contract with the Government. Where the Attorney General's opinion is requested by the head of a department to enable the latter to advise contractors, the Attorney General is not authorized to give an opinion. (20 Op. Atty. Gen., 463.)

It is clear that a question propounded by a Government contractor is one which the Secretary of the Treasury is not called upon to answer; hence it is not, within the language of this section, "a question of law arising in the administration of his department." (20 Op. Atty. Gen., 500, 502.)

The Attorney General is not authorized to render an official opinion at the request of the head of a department where the information is desired for the guidance of certain prospective bidders, as the question is not one which such head of department is called upon to decide in the administration of his department. (28 Op. Atty. Gen., 534.)

**Will not answer question submitted by head of department in which United States has no interest.**—The Attorney General will not render an opinion upon a question where it appears upon a perusal of the papers that the United States have no interest in the inquiry, and consequently that any opinion on his part would be not only gratuitous but unauthorized. (2 Op. Atty. Gen., 311.)

It is not the duty of the Attorney General to give official opinions except in cases in which the Government is interested. Nor will the Attorney General render an unofficial opinion in such a case, even as an individual, because in the relation he stands to the Government an opinion from him on the subject might be looked upon as an official one, and thus connect the Government with an individual controversy in which it has no concern and with which it ought not to interfere. (2 Op. Atty. Gen., 531.)

The question whether a bond taken by the collector of a port from one of his subordinates, for his own protection, is valid in the absence of a statute authorizing it, not appearing to be a question in which the United States are concerned, or one arising in the administration of a department, the Attorney General declines to give an official opinion thereon. (19 Op. Atty. Gen., 556.)

Questions of law, of concern to private parties, and in which the Government has no interest, are to be settled by courts and juries. The individuals may, if they choose, consult counsel on such questions for their own guidance; but the law gives them no authority to bring such questions to the head of a department, nor will the Attorney General render his opinion thereon upon request of the latter. (1 Op. Atty. Gen., 575.)

The Attorney General is not to give advice to heads of departments on matters which do not concern their departments, and in which the United States have no interest; nor is he authorized to give official opinions in any case not falling within the scope of his duties, so as to connect the Government with individual controversies in which it has no concern and with which it ought not to interfere; nor ought he to advise individuals in regard to any question of legal right depending between them and the Government. (6 Op. Atty. Gen., 326, 334.)

It is not the duty of the Attorney General to give an opinion on a question with which the Government has no present concern. (9 Op. Atty. Gen., 355; 19 Op. Atty. Gen., 414.) He has no authority to give any opinion or advice

on questions of law except for the assistance of the officer calling for his opinion. (3 Op. Atty. Gen., 309.)

The Attorney General is not authorized to answer questions of law submitted to him by the Secretary of the Interior only at the request of the Cherokee Nation and which do not concern the "administration" of the Interior Department. (16 Op. Atty. Gen., 404.)

The question whether, if a certain American steamer shall be rebuilt in Canada, she can be reregistered on her return as a vessel built in the United States is not for the present action of the Secretary of the Treasury, but that the owners of the vessel may know what his future action would be in case they decided to have the repairs done in Canada. It would not be proper for the Attorney General to give the opinion requested. (20 Op. Atty. Gen., 723; following 20 Op. Atty. Gen., 667, as to whether a Chinaman resident of the United States could lawfully return if he should revisit his native country.)

Where a question presented to the Attorney General by the Secretary of War is one of strictly private concern to certain officers of the Army and in no sense of public interest, it is not a question arising in the administration of the War Department on which the Attorney General will render an opinion. The obvious course for such officers to pursue is that which is open to every person inclined to pursue a course as to the legal consequences of which he is in ignorance or doubt. He should seek the advice of private counsel learned in the law and obtain their opinion, for which if given without due care such counsel can be held to a personal accountability. (21 Op. Atty. Gen., 510.)

The question whether a retired officer of the Army can accept another public office is not a subject with which the United States can be concerned until some action has been taken by such officer contrary to law. Manifestly, the solution of that question by any retired officer of the Army and the course of conduct which he may adopt in pursuance of that solution, is a matter of his private concern only. The Attorney General can not, therefore, render an opinion upon the question at the request of the Secretary of War, as the Attorney General is not permitted to give an opinion as to the construction or interpretation of a statute except in an actual case which has arisen before one of the executive departments calling for its action in the regular course of its affairs. (21 Op. Atty. Gen., 510; but see 29 Op. Atty. Gen., 397, where the Attorney General rendered an opinion to the Secretary of the Navy upon a somewhat analogous question, viz, whether a retired officer of the Marine Corps could accept compensation for appearing as counsel before any department, court-martial, etc.; and in 29 Op. Atty. Gen., 503, the Attorney General rendered an opinion concerning the legality of appointing a retired officer of the Navy as a clerk in the civil service, but in this case the appointment had already been made, and the opinion was requested by the President.)

**Will not answer question unless it arises in the department which requests opinion.**—The Attorney General is not authorized



by statute or precedent to respond by an official opinion as to a question of law not arising in the department from which the inquiry is sent. (20 Op. Atty. Gen., 50.)

Where there is no way of enforcing a statute except through the courts, the question is one arising in the Department of Justice, and the official opinion of the Attorney General can not be required thereon by the head of another department. (21 Op. Atty. Gen., 6.)

The question whether or not to commence a civil action or a criminal prosecution is one which must ordinarily be decided by some officer of the Department of Justice, and is not, therefore, a question upon which the opinion of the Attorney General can be requested by the head of another department. If any other department of the Government is informed of facts which seem to require such action to be taken, its duty is to communicate them, together with any suggestion which it desires to make, to the Department of Justice, whose duty it is to decide whether proceedings shall be instituted, and if so, against whom. (21 Op. Atty. Gen., 509.)

The Attorney General will not, at the request of the head of a department, review the decision of the head of another department, which latter department had complete and lawful jurisdiction. (11 Op. Atty. Gen., 189; Op. Atty. Gen., Nov. 7, 1917, file 26510-1022:11, C. M. O. 37-1918, p. 21.)

The power of the Attorney General to give an opinion on request of the head of a department is confined to questions arising in the administration of the department calling for the opinion. Where a question had been finally disposed of by the War Department, but the accounting officers had gone behind the Secretary's action and decided the case against the claimant, it is quite evident that the questions involved have no relation to a matter before the War Department for action. (20 Op. Atty. Gen., 588.)

The question whether a former employee can be reinstated in a department is not a question pending in that department, but in the Civil Service Commission, which is vested with authority in the matter of certification. Accordingly, when the commission has exercised that authority, no question remains with the department upon which the statute permits the Attorney General to render an opinion upon request of the Secretary. (20 Op. Atty. Gen., 270; 20 Op. Atty. Gen., 158.)

The eligibility of a person for appointment in a department under the civil service is not a question arising in the department, but is one under the jurisdiction of the Civil Service Commission. The Attorney General can not, therefore, render an opinion upon request of the head of the department. (28 Op. Atty. Gen., 393.) The law and uniform practice of the Attorney General precludes him from responding. (28 Op. Atty. Gen., 431.)

Where a law provides for indemnity to officers and enlisted men of the Army, and vests the accounting officers of the Treasury with jurisdiction to determine whether the loss occurred under the circumstances set forth in the act, the Attorney General will not render an opinion

to the Secretary of War upon the question, as it does not appertain to the administration of the War Department. (19 Op. Atty. Gen., 693.)

Where an auditor directs a suspension against an officer of the Army, the same being the amount of an alleged excessive allowance made to him by the Deputy Paymaster General, such action of the auditor does not relate in any way to a matter which requires the action of the Secretary of War as falling within the scope of his official duties. The Attorney General will express no opinion where the matter is not one requiring the official action of the head of the department. (20 Op. Atty. Gen., 420.)

The Attorney General is not authorized to give an opinion to the Secretary of the Treasury as to the proper construction of a pension appropriation act, inasmuch as it appears that the Treasury Department is bound by the rulings of the Department of the Interior in construing that law, and therefore no question is pending in the Treasury Department arising in the administration of that department. (20 Op. Atty. Gen., 178.)

The propriety of keeping every branch of the executive Government within its legal sphere is clear. The confusion which would unavoidably arise if one branch was permitted to usurp the functions of another would be disastrous to the proper work of the whole. When, therefore, a "difference of opinion" arises between several executive departments as to the construction of the law, the primary question is as to which is vested with the determination and responsibility of the question. That only one can have jurisdiction over the subject matter is plain. (20 Op. Atty. Gen., 178, 180.)

The Attorney General, upon request of the Secretary of the Navy, will render an opinion as to the validity of a Navy regulation, and whether it is binding upon the accounting officers, in a case where the Comptroller of the Treasury had previously held the regulation to be void, and declined to concur in a reference of the question to the Attorney General. (30 Op. Atty. Gen., 376, 171 S. and A. Memo., 3611, reversing 21 Comp. Dec., 554, 357, 245.)

Where a claim pending in the Department of State was referred by the Secretary of State to the Secretary of the Treasury for the latter's opinion, this did not make the question one arising in the Treasury Department and authorize the Secretary of the Treasury to require an opinion of the Attorney General on it. The whole subject belonged and still belongs to the State Department. The Attorney General can not give an opinion upon a matter referred to him by the head of a department who is not authorized to act on such matter. (20 Op. Atty. Gen., 249.)

The Attorney General can not render an opinion to the Secretary of the Treasury upon a question concerning the Board of Health of the District of Columbia, such question not arising in the administration of any of the Executive Departments. (13 Op. Atty. Gen., 535.)

The Attorney General declines to render an opinion upon a question not arising in the administration of the department asking the opinion. (29 Op. Atty. Gen., 226.)

The Attorney General will not render an opinion upon the request of the head of a department where it is intended for the information of a commission appointed to revise the laws of the United States. The commission was invested by Congress with discretion to determine what existing laws are of a permanent and general nature. Where the chairman of the commission asked the head of a department whether a portion of the revision correctly embodied the provisions of existing law upon that subject, that did not make the question one arising in the department requiring a determination thereof. The question was one essentially arising in the commission, and not therefore one upon which it was the duty or province of the head of the department to act. (25 Op. Atty. Gen., 584.)

[The Attorney General rendered an opinion to the Secretary of the Interior upon a question not pending before that department, viz, as to the sufficiency of the return of a public contract made by the Secretary of the Navy; because, while the question was not pending before the Interior Department, it was proper that the Secretary of the Interior should be advised whether the case submitted presented a violation of the statute, since it is his duty to call apparent violations of the statute to the attention of the Department of Justice. (29 Op. Atty. Gen., 293.)]

**Will not answer a judicial question.—**

Where questions propounded are judicial in character and must be decided by the courts, if decided at all, an expression of an opinion on them by the Attorney General would have no more weight than the opinion of any unofficial person. The Attorney General must confine his opinions to questions strictly appertaining to executive administration. (20 Op. Atty. Gen., 383.)

The Department of Justice has always been reluctant to pass upon questions which properly belong to the judicial rather than to the executive branch of the Government. (20 Op. Atty. Gen., 673; 19 Op. Atty. Gen., 56.)

The Attorney General declines to render an opinion upon a question judicial in character. (29 Op. Atty. Gen., 226.)

The statutes in providing for official opinions by the Attorney General did not intend to cover questions which are substantially a request for advice as to whether or not a prosecution had better be instituted. The Attorney General's opinion on such a question would not bind a court in any way. It could as well be asked before instituting every civil suit or prosecution for crime. (20 Op. Atty. Gen., 673.)

The organic distinctions between the three great divisions of Government established by the Constitution must be respected or collisions and discords inimical to good government will inevitably take place. The executive department of the Government is not warranted in assuming to determine a controversy properly cognizable by the judicial department of the Government. For the Attorney General to render an opinion might be regarded as an attempt of the executive branch of the Government to forestall judicial proceedings. (19 Op. Atty. Gen., 56.)

[This case involved the power of the State of California to divest certain rights claimed by the Indians.]

The Attorney General has always exhibited great and proper reluctance to pass upon any question whose answer might bring the Department of Justice into conflict with a judicial tribunal. (20 Op. Atty. Gen., 618.)

The Department of Justice will not consider any question committed to judicial review. To do so might bring it in conflict with a judicial tribunal. (24 Op. Atty. Gen., 59; 23 Op. Atty. Gen., 221.)

The Attorney General can not give an opinion upon a judicial question, such as whether or not the head of a department has any remedy at law against private parties who have had dealings with the Government. (21 Op. Atty. Gen., 369.)

The Attorney General declines to give an opinion where the question presented is a judicial one (whether an objection made to the naturalization of an alien should have been sustained). (29 Op. Atty. Gen., 99.)

It is not the practice of the Department of Justice to give an opinion in a matter where the question involved is disputable and is the subject of a pending suit, as such action would be equivalent to expressing an opinion as to whether the question ought to be decided in favor of the Government and might bring the department into conflict with a judicial tribunal. (23 Op. Atty. Gen., 221.)

The question whether a proceeding under any law would or would not be successful is a judicial question, on which it is not necessary or proper for the Attorney General to give an official opinion. (22 Op. Atty. Gen., 181.)

It is inexpedient for the Attorney General to render an official opinion as to whether a civil suit or criminal prosecution, if brought by the Government, ought to be decided by the courts in its favor, such question being essentially judicial in character. (20 Op. Atty. Gen., 702.)

Whether or not an express company or its agents in carrying unmailable matter is guilty of a crime for which the statutes impose a penalty is essentially judicial in character, and one which must ultimately be decided by the judicial department of the Government. The Attorney General will not decide such question further than to say that the facts stated seem to make a *prima facie* case, and to render it proper that the Postmaster General should direct a prosecution of the guilty parties. Such prosecution will result in a judicial construction of the law. (19 Op. Atty. Gen., 670.)

The question of the right of a State to tax lands in an Indian reservation is judicial and not administrative. The Attorney General ought not to express an opinion upon it. The better course would be to make a test case, with a view to the determination of the Federal question by the Supreme Court of the United States. The Attorney General will be glad to cooperate with the officer requesting his opinion in the proper measures to get a judicial determination of the important question involved. (20 Op. Atty. Gen., 277.)



Whether any given acts or practices constitute a crime is a question for the determination of the courts, not of the Executive Departments, except where some executive action depends upon that determination. Such are not questions of law arising in the administration of the department asking an opinion. (20 Op. Att. Gen., 210.) [The question in this case was whether or not pictures of coins constitute a violation of an act defining a criminal offense and prescribing the penalty upon conviction thereof.]

Statutes of limitation apply to the legal remedies and not to the rights of the parties. Whether the statute of limitations does or does not bar a claim on behalf of the Government is, therefore, a judicial question to be determined by the courts and not by the Attorney General. (21 Op. Att. Gen., 557, 564.)

The matters covered by certain questions submitted for opinion held clearly justiciable in the appropriate courts at the suit of the parties themselves who are interested in them. They are essentially judicial in their character, and as each is readily resolvable into a case at law or in equity it can not be said to be a question arising in a course of executive administration. (19 Op. Att. Gen., 56.)

The jurisdiction of consuls as courts is a judicial question, subject to review by regular appeal provided by statute, and any opinion thereon would be beyond the power conferred upon the Attorney General and might be regarded as an invasion by the executive branch of the Government of another and independent branch, so far as judicial functions are exercised. [Also, in this case the question was purely hypothetical.] (20 Op. Att. Gen., 391, 393.)

The Attorney General can not properly express an official opinion upon a question which must ultimately be decided by the courts. [Also in this case the question had already been decided by the department and was presented to the Attorney General merely because of the request of counsel for parties interested.] (28 Op. Att. Gen., 596.)

The Attorney General can not answer the question whether a regulation if issued under the tariff act could be enforced, as the question is both hypothetical and judicial; involving speculation as if the requirement is adopted, proceedings in court to enforce it may or may not be successful. (25 Op. Att. Gen., 93.)

The Attorney General can not properly pass upon the question whether the courts in this country have authority to execute letters rogatory issued out of the German Patent Office, as that is a matter for judicial and not for executive determination. "I can not speak for the courts. It is for the different courts of the various jurisdictions, Federal and State, to say when the motion comes before them for decision, whether or not they have the necessary authority in the premises." (24 Op. Att. Gen., 69.)

Declines to express an opinion as to the liability of the postmaster at Baltimore, Md., for a sum of money paid by him to a former clerk in the Baltimore post office and for which no service was performed, for the reason that the question is essentially a judicial one, amount-

ing to an inquiry whether in regular legal proceedings a court and jury would hold that officer liable. Advised, however, that the circumstances may be regarded as showing a prima facie case of liability, calling for action in the way of securing a judicial determination of the question of liability. (25 Op. Att. Gen., 97.)

Declines to express an opinion upon question whether a willful refusal to give true answers to inquiries concerning census statistics would subject a person to the penalties prescribed by a certain law, for the reason that the question is preeminently one for judicial and not executive determination. Whatever the proper construction of the law may be, the punishment referred to could be inflicted in no other way than by proceedings in court. (25 Op. Att. Gen., 369.)

Whether proceedings by court-martial would bar proceedings in the civil courts for an assault or other crime involved in the offense of hazing, not answered, for the reason that it would be of no assistance to the Secretary of the Navy or the Superintendent of the Naval Academy in the proper discharge of their duties; and should such action be taken the matter would peculiarly be one for the consideration of the Department of Justice. (25 Op. Att. Gen., 543.)

Whether a suit by the Government to enforce recovery from the owners of a vessel of amounts expended by the United States in the transportation back to this country of destitute seamen would be successful is speculative and hypothetical, and beyond the powers and functions of the Attorney General under the statutes to answer. The question of the actual liability of the vessel owners is judicial in its nature, and must be determined by the courts. (26 Op. Att. Gen., 631.)

If any conflicting claims should arise between the Federal and State governments as to jurisdiction over lands owned by the United States, they will be judicial questions. (10 Op. Att. Gen., 34.)

#### IV. FORM OF REQUEST FOR OPINION.

**Facts must be definitely stated.**—When an opinion is requested of the Department of Justice on behalf of the head of another Executive Department, the facts must be definitely formulated and clearly stated by the person asking the opinion. The Attorney General can not be required to extract a finding of facts from correspondence or reports. (22 Op. Att. Gen., 342.)

The Attorney General can not give official opinions without a definite statement of the facts upon which the question is submitted. (21 Op. Att. Gen., 36; 23 Op. Att. Gen., 393.)

The Attorney General can not properly make a statement of the facts for his own use out of the correspondence submitted to him for an opinion. "The facts upon which the question is submitted should be agreed and stated as facts established." (21 Op. Att. Gen., 36; 12 Op. Att. Gen., 206; 20 Op. Att. Gen., 440; 18 Op. Att. Gen., 488; 9 Op. Att. Gen., 82.)

The reason for this is that if the Attorney General should render an opinion upon such a case as he might collect from the papers, he might not see the case in all its parts in the same light as that in which it is seen by the officer

requesting his opinion. (21 Op. Atty. Gen., 36; 19 Op. Atty. Gen., 396.)

Also, by observing the simple rule of stating the material facts of the case and the precise questions on which advice is wanted, "the real point of difficulty in the case will be at once perceived, much inconvenience avoided, and more practicable and satisfactory results obtained." (21 Op. Atty. Gen., 36; 14 Op. Atty. Gen., 367, 368.)

The head of the department requesting an opinion need not himself state the facts, but it is essential that the facts should be laid before the Attorney General with the assurance of the head of the department that they are accurate and trustworthy. The Attorney General is willing to disregard any informality in the manner of presenting such facts. (10 Op. Atty. Gen., 267.)

It is not within the competency of the Attorney General to make a finding of facts in any case; he can only give his opinion on questions of law arising upon a statement of facts presented by the officer requesting his opinion. (19 Op. Atty. Gen., 696.)

The Attorney General must have a definite statement of the facts before responding to a request for his opinion. (21 Op. Atty. Gen., 36; 18 Op. Atty. Gen., 487.)

The Attorney General will lay aside the evidence submitted for his consideration with request for an opinion, and take as the case for opinion the statement contained in the communication from the head of the department. (19 Op. Atty. Gen., 547.)

Where papers containing evidence accompany request for an opinion, the Attorney General will not examine same but will assume that all the facts have been found in favor of the applicant. He can not consider questions of fact upon evidence submitted. (20 Op. Atty. Gen., 253, 256.)

Whether the facts are presented by the head of a department in the form of a direct statement or of an argumentative examination of the circumstances can make no difference; they must be accepted by the Attorney General as the bases of his reflections and judgment in rendering his opinion. (3 Op. Atty. Gen., 1.)

It is inappropriate for the Attorney General to review certain briefs and correspondence submitted to him by the head of a department with request for an opinion thereon, as to do so would require him to consider questions of fact and some questions of law which clearly have not arisen in the administration of the department. (27 Op. Atty. Gen., 49.)

It has been held from a very early date that to obtain an official opinion of the Attorney General, the request therefor should embody a statement of facts in the nature of an agreed case in an action at law, and not leave it to the Attorney General to draw inferences of fact from correspondence or documents. (20 Op. Atty. Gen., 614.)

Where no statement of the facts is presented, the Attorney General can not render an opinion. "Without, so far as I know a single exception, it has been held that under section 356, Revised Statutes, it is permissible for the Attorney General to give an opinion only upon a case succinctly stated—that is, to answer specific

questions of law upon facts set forth." (20 Op. Atty. Gen., 526, citing 19 Op. Atty. Gen., 396, 465; 18 Op. Atty. Gen., 487. See also 20 Op. Atty. Gen., 493.)

"Accompanying the letter [requesting opinion] is a considerable bundle of papers from which it is apparently expected I will glean the facts and then communicate the desired information. I am very sorry that under the uniform rulings of this office I am unable to comply with this request." (20 Op. Atty. Gen., 526.)

The Attorney General is not permitted by statute to respond to a request for an opinion by the head of a department which does not show what the facts are. (21 Op. Atty. Gen., 506.)

It must be deemed settled that the Attorney General can only act upon a determinate statement of the facts furnished by the officer asking his opinion. (10 Op. Atty. Gen., 267; 11 Op. Atty. Gen., 189; 21 Op. Atty. Gen., 506.)

Where an official opinion from the Attorney General is desired on questions of law arising in any case, the request should be accompanied with a statement of the material facts of the case. (21 Op. Atty. Gen., 506; 14 Op. Atty. Gen., 367.)

To authorize the Attorney General to express an opinion upon a question of law propounded, it is necessary that a statement of the facts be submitted showing that the question has actually arisen in the administration of a department in an existing case calling for action. (22 Op. Atty. Gen., 85.)

The settled policy of the Department of Justice is that no opinion should be rendered upon any question of law unless it is accompanied by a statement or finding of the facts involved. (24 Op. Atty. Gen., 59.)

"You do not give me as the basis for an opinion any agreed statement of facts, but on the contrary ask for an expression of my opinion upon facts to be gathered from the inclosures of your letter. It has been the invariable rule of this department to decline to give an opinion except when the request is 'accompanied by a statement or findings of the facts involved.'" (24 Op. Atty. Gen., 102, citing 23 Op. Atty. Gen., 331.)

The Attorney General can not properly review a record and memorandum submitted, and render his opinion, based upon facts deduced therefrom. (26 Op. Atty. Gen., 378.)

It has been the invariable rule of the Department of Justice to decline to give an opinion upon any question of law unless it is accompanied by a statement or finding of the facts involved. (26 Op. Atty. Gen., 378, citing 23 Op. Atty. Gen., 330; 23 Op. Atty. Gen., 473; 24 Op. Atty. Gen., 59; 24 Op. Atty. Gen., 102.)

The facts upon which the question of law arises must be found and definitely stated in the request for an opinion, and not left for the Attorney General to extract from the papers submitted. (26 Op. Atty. Gen., 609.)

The Attorney General must express his regret that the request of the Department of Justice, so often made, which requires that a request for an official opinion shall be accompanied by a statement of the facts, should have been disregarded. (26 Op. Atty. Gen., 579.)

When the opinion of the Attorney General is required by the head of an Executive Depart-



ment, it is necessary that the facts should be plainly stated, and the question upon which the opinion is desired should be specifically propounded. The Attorney General can not take the responsibility of examining all the papers in the case, and gathering therefrom a conclusion as to what particular matters he shall pass upon. [In this case the Secretary of War referred papers to the Attorney General by indorsement "with request for opinion on the questions presented by the Judge Advocate General of the Army."] (22 Op. Atty. Gen., 498.)

**Question of law must be specifically formulated.**—The settled policy of the Attorney General is that no opinion should be rendered upon any question of law unless it is specifically formulated in a case actually arising in the administration of a department. [In this case the head of the department did not request an opinion upon any specific question, but referred to a communication inclosed.] (24 Op. Atty. Gen., 59.)

It has been the invariable rule of the Attorney General to decline to give an opinion upon any question of law unless it is "specifically formulated." (26 Op. Atty. Gen., 378.)

The question of law upon which the opinion of the Attorney General is desired must be clearly and definitely formulated. (26 Op. Atty. Gen., 609.)

The Attorney General can not give an opinion upon a general subject but only on one or more specific questions of law based on a case stated. (20 Op. Atty. Gen., 249.)

The precise question on which advice is wanted must be stated. The omission to specify any particular points of law for an opinion would alone prevent the Attorney General acting on the case. (21 Op. Atty. Gen., 36; 19 Op. Atty. Gen., 396; 14 Op. Atty. Gen., 367, 368; 18 Op. Atty. Gen., 487.)

It is inappropriate for the Attorney General to review certain briefs and correspondence submitted to him by the head of a department with request for an opinion thereon, as to do so would require him to consider questions of law which clearly have not arisen in the administration of the department. (27 Op. Atty. Gen., 49.)

It is permissible for the Attorney General to give an opinion only upon a case succinctly stated—that is, to answer specific questions of law arising upon facts set forth. (20 Op. Atty. Gen., 526; 19 Op. Atty. Gen., 396; 19 Op. Atty. Gen., 465; 18 Op. Atty. Gen., 487.)

Where an official opinion of the Attorney General is desired on questions of law arising in any case, the request should be accompanied with a statement of the precise questions on which advice is wanted. (21 Op. Atty. Gen., 506; 14 Op. Atty. Gen., 367.)

When the opinion of the Attorney General is requested by the head of a department it is necessary that the question upon which the opinion is desired should be specifically propounded. The Attorney General can not take the responsibility of examining all the papers in the case and gathering therefrom a conclusion as to what particular matters he shall pass upon. (22 Op. Atty. Gen., 498.)

The Attorney General must express his regret that the request of his department, so often

made, which requires that a request for an official opinion shall so formulate a precise question that it may be answered as a question of law, should have been disregarded. (26 Op. Atty. Gen., 579.)

**Should be accompanied by opinion of law officer of department making inquiry.**—In a communication addressed by the Attorney General to the heads of all the Executive Departments under date of October 15, 1906, it was suggested "that Executive Departments having a law officer, for example, the Judge Advocate General of the Army or of the Navy, the Comptroller or Solicitor of the Treasury, the Assistant Attorney General for a department, when desiring an opinion of the Attorney General, accompany the request thereof with the written opinion of such law officer; referring to all legislation or decisions or any ruling, usage, or practice of the department, affecting the question; and with a brief statement of such reasons, for and against such opinion, as may occur or be presented to him." (File 49-38; file 22724-16:1, Jan. 25, 1911; file 22991-1, Dec. 29, 1914.)

"It does not appear from your letter that an opinion upon these questions by the law officer of your department has been obtained. \* \* \* It seems to me that, before attempting to answer the questions submitted, I should have the benefit and assistance of such an opinion by the Judge Advocate General, or at least a memorandum by him 'referring to all legislation or decisions or any ruling, usage, or practice' of your department affecting these questions. If, after such an opinion or memorandum has been prepared by that officer, you still desire my advice in the premises, I shall be pleased to respond to your request for my opinion upon the questions presented." (Attorney General to Secretary of the Navy, Jan. 25, 1911, file 22724-16:1; see also letter from Attorney General to Secretary of the Navy, Jan. 20, 1915, file 27223-12.) [In the latter case, after obtaining the opinion of the Judge Advocate General, the Secretary of the Navy withdrew his request for the Attorney General's opinion, stating that he no longer entertained doubt upon the question presented. File 27223-12, Jan. 27, 1915.]

"I beg leave respectfully to suggest that it would very much tend to facilitate my inquiries in references made from your department, and probably to promote the public interest, if these were accompanied by a statement showing the views of the department in relation to the several acts which are supposed to be involved in the inquiry, and the precedents, if any, which are to be found in its archives." (2 Op. Atty. Gen., 311, to the Secretary of the Navy.)

"It is directed that all requests for opinions of the Attorney General be accompanied by the written opinion of the Judge Advocate General or the solicitor, who will also prepare the request for the Attorney General's opinion in accordance with articles R-117 (1) and 134 (2), Navy Regulations, 1913." (Order Sec. Nav., Jan. 15, 1915, file 22991-1. See also file 20400-200, Op. 13, Sept. 25, 1920, quoting letter from Atty. Gen. to Sec. Navy, Sept. 13, 1920, file 204625.)

## V. WEIGHT OF OPINIONS.

**Are conclusive on administrative officers.**—The law intends that the opinions of the Attorney General should have *authority*. (20 Op. Att'y. Gen., 383.)

Congress evidently contemplated that the official opinions, signed or indorsed by the Attorney General, should have some actual and practical force. (See sec. 358, R. S.) Congress's intention can not be doubted that administrative officers should regard them as law until withdrawn by the Attorney General or overruled by the courts, thus confirming the view which generally prevailed, though sometimes hesitatingly expressed, previous to the establishment of the Department of Justice. (20 Op. Att'y. Gen., 654, 659 quoted with approval in *Smith v. Jackson*, 241 Fed. Rep., 747; affirmed 246 U. S., 388; 20 Op. Att'y. Gen., 719, 722.)

The ruling of the Attorney General upon a question submitted by the Secretary of the Navy, although the validity of a disbursement was involved which had been otherwise decided by the Comptroller of the Treasury is binding upon the Department of Justice and upon other departments of the Government. (Attorney General to the Solicitor of the Treasury, Apr. 30, 1918, W. C. F. 191681-1 W. C. H., Navy Dept. file 26254-1451: 15, citing *Smith v. Jackson*, 246 U. S., 388, 241 Fed. Rep., 747, instructing the Solicitor not to institute suit against the officer making the payment although requested so to do by the Comptroller.)

Of course the opinion of the Attorney General, when rendered in a proper case—as must be the presumption always from the fact that it is rendered—must be controlling and conclusive, establishing a rule for the guidance of other officers of the Government, and must not be treated as nugatory and ineffective. (25 Op. Att'y. Gen., 301; citing 20 Op. Att'y. Gen., 648, 5 Op. Att'y. Gen., 97, 6 Op. Att'y. Gen., 334, 7 Op. Att'y. Gen., 699, 9 Op. Att'y. Gen., 37.)

If a question is presented to the Attorney General in accordance with law—that is, if it is submitted by the President or the head of a department—his opinion thereon is final and authoritative under the law, and should be so treated by the accounting officers, even if the question involves a payment to be made. Congress in establishing the office of the Comptroller of the Treasury did not intend to shorten the reach of sections 354 and 356, Revised Statutes, as construed to give the opinions of the Attorney General controlling authority. (25 Op. Att'y. Gen., 301.)

For other cases, see below, “VI Jurisdiction Attorney General and Comptroller of the Treasury.”

**Are generally followed in practice.**—It is true the law does not say what effect shall be given to the opinions of the Attorney General, yet the general practice of the Government has been to follow it, and this for the reasons stated by Attorney General Cushing, viz, that an officer going against it “would be subject to the imputation of disregarding the law as officially pronounced,” and that, without “the guidance of a single department of assumed special qualifications and official authority,” uniformity and

stability in the application of the laws would be hardly attainable. (20 Op. Att'y. Gen., 383, citing 6 Op. Att'y. Gen., 334.)

In rendering opinions to the President and heads of departments, the action of the Attorney General is quasi judicial. His opinions officially define the law in a multitude of cases, where his decision is in practice final and conclusive. Accordingly, the opinions of successive Attorneys General, possessed of greater or less amount of legal acumen, acquirement, and experience, have come to constitute a body of legal precedents and exposition, having authority the same in kind if not the same in degree, with decisions of the courts of justice. Although the act requiring this duty of the Attorney General does not expressly declare what effect shall be given to his opinion, yet the general practice of the Government has been to follow it; partly for the reason suggested, that an officer going against it would be subject to the imputation of disregarding the law as officially pronounced, and partly from the great advantage and almost necessity of acting according to uniform rules of law in the management of the public business; a result only attainable under the guidance of a single department of assumed special qualifications and official authority. (6 Op. Att'y. Gen., 326, 334.)

The law does not declare what effect shall be given to the advice and opinion of the Attorney General, but it is believed that the practice of the Government has invariably been to follow it. This has been done from the great advantage and almost absolute necessity of having uniform rules of decision for all questions of law in analogous cases, a result much more certain under the guidance and decision of a single department constituted for the very purpose of advising upon all questions and with supposed special qualifications for such a duty. In my opinion this practice should be considered as law. (5 Op. Att'y. Gen., 97.)

**Have been held not conclusive.**—It must be conceded that an opinion of the Attorney General is not conclusive; that is, it is not compulsory on the President or even on the head of a department. It is *inconvenient*, however, to have a conflict of opinion between the Attorney General and a head of department; and that inconvenience is placed in the strongest light by the facts of this case, where the affirmative opinion of one Attorney General went disregarded by one Secretary, and a negative opinion of another Attorney General, by the succeeding Secretary. There can be no more flagrant example of confusion of opinion and action. (7 Op. Att'y. Gen. 691, 699.)

Though opinions of the Attorney General have technically no binding effect, it is suggested that it is generally safer and better to adopt them. Uniformity of decision in the different departments on similar subjects is necessary and can not be secured otherwise. (9 Op. Att'y. Gen., 33, 36.)

While the Attorneys General have never claimed for their official opinions the force of law, it has always been regarded as the proper practice to follow their guidance. And Congress, while never legislating on this point, seems to contemplate that they are to be given practical effect. (20 Op. Att'y. Gen., 648.)



**View that opinions are advisory only.**—The duty of the Attorney General is to advise, not to decide. A thing is not to be considered as done by the head of a department merely because the Attorney General has advised him to do it. The heads of departments may disregard his opinion if sure it is wrong. The Attorney General aids them in forming a judgment on questions of law; but still the judgment is theirs, not his. They are not bound to see with his eyes, but only to use the light which he furnishes, in order to see the better with their own. (9 Op. Atty. Gen., 33, 36; see also 10 Op. Atty. Gen., 48.)

By long and unbroken construction and practice, it has been settled that the Attorney General acts, in performing this legal duty, simply as the law adviser of the President and heads of departments. He is bound, upon points of law and facts stated by them, to give legal opinions in aid of their judgment, in matters for their decision. (11 Op. Atty. Gen., 4, quoting opinion of Oct. 23, 1863.)

The opinion of the Attorney General is advisory only. The Attorney General has no control over the action of the head of the department to whom the opinion is addressed, nor could he with propriety express any judgment concerning the *disposition* of the matter to which the opinion relates, that being something wholly within the administrative sphere and direction of such head of department. (17 Op. Atty. Gen., 332.)

The Court of Claims, in holding that its findings and opinions are binding upon heads of departments in cases referred to it by the latter, pursuant to act of Congress, remarked that to hold otherwise, "would be construing the act as requiring a useless procedure; and that if it be contended that the report of the court is only advisory, then the answer is that the Attorney-General is the law officer of the Government and under the Revised Statutes the head of any Executive Department may require his opinion on any questions of law arising in the administration of his department." The conclusion of the court, as stated in the syllabus, was that "the findings and decisions of the court are not open to revision in the department. Legal opinions for the guidance of the head of a department, *not obligatory*, are to be given by the Attorney General, pursuant to Revised Statutes, section 356, and not by the judiciary." (*Berger v. U. S.*, 36 Ct. Cls., 243, 247.)

**In case of conflict, should be submitted to President.**—A Secretary undoubtedly is entitled to have and to act upon his conscientious opinion of a question, even after he has taken the opinion of the Attorney General; but it would seem that any such conflict of opinion between the Secretary asking and the Attorney General giving official advice should be referred at once to their common superior, the President, in order that the particular question of administration itself may receive the authoritative decision of the executive Government. (7 Op. Atty. Gen., 691, 699.) [In this case the Attorney General remarked that its history exhibits a spectacle of vacillation and contradiction of opinion on the part of the Government which it is humiliating to contemplate.]

**Unofficial opinion.**—An expression of opinion by the Attorney General on a question which it is not his official duty to answer would have no more weight than the opinions of any unofficial person. (20 Op. Atty. Gen., 383; 17 Op. Atty. Gen., 357; 20 Op. Atty. Gen., 667; 20 Op. Atty. Gen., 440; 2 Op. Atty. Gen., 531.)

**Obiter dicta.**—Remarks in an opinion of the Attorney General which are merely obiter do not have the force and effect of an official opinion. (21 Op. Atty. Gen., 25.)

#### VI. JURISDICTION, ATTORNEY GENERAL AND COMPTROLLER OF THE TREASURY.

- (A) *In general.*
- (B) *Questions which should be asked comptroller.*
- (C) *When Attorney General will render opinion.*
- (D) *Effect of Attorney General's opinion.*
- (E) *Views of Comptroller of the Treasury as to jurisdiction.*

##### A. *In general.*

**The Attorney General's office should not be allowed to become a refuge for doubtful claims** from the more thorough and searching investigations of the accounting officers and the Court of Claims. The Attorney General has no machinery to ascertain and test the trustworthiness of alleged facts. (11 Op. Atty. Gen., 4.)

**Opinions of Comptroller on questions of law.**—Prior to the act of July 31, 1894, section 8 (28 Stat., 208), the Comptroller of the Treasury had no legal status as an adviser upon legal questions. He was an accounting officer holding great power, but his function was to take action, not to advise others how to act. (20 Op. Atty. Gen., 654.)

The act of July 31, 1894, makes it obligatory upon the Comptroller of the Treasury to make a decision upon any question involving a payment to be made by or under the head of any executive department, and it contemplates the construction by him of statutes. (21 Op. Atty. Gen., 181.)

In form the Comptroller is asked for legal advice; in fact, what is desired is information as to his future action. Even prior to the act of July 31, 1894, it was customary to ask his opinion on questions of law and this custom was a convenient and proper and even necessary one, within certain limits. The custom doubtless arose from the importance of knowing beforehand, when expenses were to be incurred, what the decision of the comptroller would be afterwards when the question of legality came up upon the settlement of the accounts. (20 Op. Atty. Gen., 654.)

Where the Comptroller gives advice upon questions of law which are *not* anticipatory of future decisions by himself, such advice is, of course, purely extraofficial. The advice thus given is doubtless intrinsically most valuable, but otherwise it differs in no way from advice on the same subject by any outsider. (20 Op. Atty. Gen., 654.)

The view that the opinions of the Comptroller, rendered to the head of a department upon legal questions, are purely extraofficial and

rendered by courtesy only, is no longer tenable in view of the act of July 31, 1894, section 8 (28 Stat., 208), which authorizes the Comptroller to render an advance decision upon "any question involving a payment." (22 Op. Atty. Gen., 581.)

Whether a Navy regulation has binding force as law on the accounting officers of the Government, is a question of law and not one of accounting, and the Attorney-General will render an opinion thereon upon request of the Secretary of the Navy, although the Comptroller claims his jurisdiction to be conclusive and declines to concur in the submission to the Attorney General. (30 Op. Atty. Gen., 376, 171 S. and A. Memo., 3611; file 26254-1451:11, Apr. 13, 1915; 21 Comp. Dec., 554, 560.)

**Attorney General's jurisdiction not curtailed by powers given Comptroller.**—Congress intended to confine the power of the Comptroller within a relatively narrow range and did not mean to curtail the occasions for the rendering of opinions by the Attorney General or to diminish their scope and weight. The act of 1894 does not establish a rule which is universal and without exception under all circumstances. Congress did not by that enactment intend to shorten the reach of sections 354 and 356, Revised Statutes, as construed to give the opinions of the Attorney General controlling authority; or to repeal pro tanto [for so much] those sections. (25 Op. Atty. Gen., 301.)

"Shortly after the act of July 31, 1894, was enacted, the question arose as to its effect upon the Attorney General's jurisdiction under section 356 of the Revised Statutes, and the rule was established by the Attorney General that he was not to render an opinion upon questions which might be referred to the Comptroller of the Treasury except in cases of great importance, or where the Comptroller of the Treasury concurred in the reference, but that in such cases he was authorized to render an opinion. In other words, that the jurisdiction of the Attorney General was not restricted by the act of 1894, but that the occasions for the exercise of such jurisdiction, in cases involving disbursements, would be infrequent in view of the latter act. The Comptroller of the Treasury fully concurred in the ruling that the Attorney General's jurisdiction continued under section 356 of the Revised Statutes even in cases covered by the act of 1894, and encouraged the Attorney General to exercise his jurisdiction in such cases by frequently suggesting to heads of departments that they refer questions of law to the Attorney General for opinion. \* \* \* The Comptroller of the Treasury has thus uniformly recognized the superior facilities of the Department of Justice to decide important questions of law, even where disbursements are involved; while on the other hand the Attorney General has repeatedly recognized the superior qualifications of the Comptroller of the Treasury to decide certain classes of questions which involve the use of appropriations and technical questions of accounting." (File 26254-1451:11, Apr. 12, 1915.)

**Question one of etiquette.**—There is, of course, in this matter a large element of propriety and etiquette, which has led Attorneys General to decline to pass upon many questions, however important in their essential and

abstract bearings, because payments are also involved. (25 Op. Atty. Gen., 301.)

**Reference to Comptroller not required.**—The law permits, but does not require the reference of any question involving a payment to the Comptroller of the Treasury; and it is thus suggested that, whatever the final action of the auditor and Comptroller may be upon the account, the reference of every question to the Comptroller for decision is not demanded by the law simply because such a question may ultimately reach the accounting stage. (26 Op. Atty. Gen., 81.)

#### B. Questions which should be asked the Comptroller.

Except in matters of great importance, or where the question is a general one, applicable to all the departments, the opinion of the Attorney General should no longer be asked upon questions which the Comptroller of the Treasury was authorized to decide upon request of the head of any department, by the act of July 31, 1894; they are questions which the Comptroller, by his greater experience is better qualified to pass upon, and it is desirable to avoid any possible conflict of precedents. An opinion of the Comptroller of the Treasury forms a complete protection. (21 Op. Atty. Gen., 178; 21 Op. Atty. Gen., 181; 26 Op. Atty. Gen., 81.)

**Upon questions of the disbursement of money and payment of claims,** which have been relegated by law to the Comptroller of the Treasury, the Attorney General should not render opinions, especially in view of the fact that if the matter is doubtful it can be referred to the Court of Claims for authoritative decision. (21 Op. Atty. Gen., 530.)

Except in matters of great importance, the Attorney General will not express an opinion upon any question involving a payment to be made by or under the head of an executive department. That duty under the law is imposed upon the Comptroller of the Treasury, whose opinion is binding and conclusive. (23 Op. Atty. Gen., 1.)

**The authority of the Comptroller is complete** to decide a question involving a payment to be made from the Treasury, so as to govern the auditing officers and himself in passing upon accounts. Accordingly, in various instances the Attorneys General have declined to give an opinion upon a question of this nature. (25 Op. Atty. Gen., 301; citing 21 Op. Atty. Gen., 178, 530; 22 Op. Atty. Gen., 581; 23 Op. Atty. Gen., 468; 24 Op. Atty. Gen., 553. See also 26 Op. Atty. Gen., 609.)

**To which of two appropriations certain expenses should be charged** is a question which may be asked of the Comptroller of the Treasury. It belongs to a class of questions which require for their decision a superior knowledge of our appropriation acts and the course of decisions thereunder. They are questions which the Comptroller, by his great experience, is better qualified to pass upon, and it is desirable to avoid any possible conflict of precedents. Therefore it seems inadvisable for the Attorney General to attempt to pass upon these inquiries. (21 Op. Atty. Gen., 405.)



[Later the Attorney General rendered an opinion on this question, it appearing that it did not belong to the Comptroller of the Treasury. Question concerned appropriation for public printing. (21 Op. Atty. Gen., 423.)]

**Specific questions which Attorney General has declined to answer.**—Whether certain expenses of Department of Agriculture are payable from a certain appropriation for that department. (21 Op. Atty. Gen., 221.)

Use of appropriation by Secretary of War for "transportation of the Army and its supplies." (22 Op. Atty. Gen., 665.)

Whether expense of preparing certain blank forms and furnishing them to collectors can be paid out of appropriation for defraying the expenses of collecting the revenue from customs. (25 Op. Atty. Gen., 50.)

Allowance of extra compensation, in lieu of annual leave, to certain former employees of Census Office; which question, in its ultimate effect, relates solely to payments out of the Treasury. (24 Op. Atty. Gen., 85.)

Whether a retired officer advanced in rank and pay by the Executive, may be paid at the advanced rate before the Senate has consented to the advancement; which question had already been decided by the Comptroller of the Treasury. (25 Op. Atty. Gen., 185.)

Questions of disbursement of money or payment of claims. (22 Op. Atty. Gen., 581.)

Question involved in and arising out of a claim for payment of money which is pending before the Treasury Department. (23 Op. Atty. Gen., 2.)

Claim for payment of a sum of money by the War Department, as compensation for the cancellation of a contract. (23 Op. Atty. Gen., 86.)

Payment for rent of a letter box in a post office for use of an Army officer; where comptroller decided that the rent could not be paid in advance, and the Postmaster General decided that such boxes can not be rented to an officer of the Government unless payment is made before they are used. The Comptroller has passed upon the precise question submitted; he does not request any review of that decision; and the question is not one of sufficient importance to bring it within the class of cases which, while concerning disbursements of money, nevertheless by reason of their great importance or general character have been held to warrant an expression of opinion by the Attorney General. (25 Op. Atty. Gen., 614; 25 Op. Atty. Gen., 185. But see below "Where Comptroller does not join in request.")

Whether, under the annual appropriation for the care of patients in a designated hospital, the Surgeon General, United States Army, may contract with the institution to pay a stipulated sum per month for keeping in a state of preparedness for a specified number of patients; there not being in every month an average of that number of patients in the hospital, but where the monthly average per year equals or exceeds that number. The Attorney General deems it inexpedient to give an opinion upon this question, which is clearly proper for the Comptroller to decide. (26 Op. Atty. Gen., 431.)

Authority to refund duties and appropriation to which chargeable; especially where such

questions have already been decided by the Comptroller of the Treasury. (23 Op. Atty. Gen., 468; affirmed 23 Op. Atty. Gen., 586; 24 Op. Atty. Gen., 553; cited 25 Op. Atty. Gen., 50.)

Manner of drawing funds from the Treasury, and the administrative examination of accounts of officers disbursing them. (22 Op. Atty. Gen., 414.)

Questions which involve the payment of money by the Treasury Department. (23 Op. Atty. Gen., 431.)

Question involving the pay to which an officer of the Navy is entitled under certain conditions, where this question has been decided by the Comptroller, who does not concur in its reference to the Attorney General, and the question is not of sufficient importance to justify a departure from the general rule. (28 Op. Atty. Gen., 129.)

#### C. When Attorney General will render an opinion.

**Questions of general and great importance, where Comptroller concurs in request.**—When the question is of general and great importance, and especially when the Comptroller, in advance of decision by himself, requests or suggests that the matter be referred to the Attorney General, and states that the opinion of the Attorney General will be followed by him, the question may properly be answered by the Attorney General, although a disbursement may be involved. (25 Op. Atty. Gen., 301, citing 21 Op. Atty. Gen., 181, 224, 402.)

If the Attorney General considers the question presented one of great importance in other directions than disbursements, and especially when the Comptroller suggests an examination of the matter by him, an opinion on his part will be proper and the decision final and authoritative. (25 Op. Atty. Gen., 601.)

Generally speaking, the decision of the Comptroller of the Treasury is conclusive in cases involving the application of an appropriation and the expenditure of public moneys. However, when the disbursement is a question of general and great importance, and especially when the comptroller, in advance of a decision by himself, requests that the matter be referred to the Attorney General for opinion, and states that he will be guided by such opinion, the question may properly be answered by the Attorney General. (26 Op. Atty. Gen., 609.)

Where the Comptroller of the Treasury states that the opinion of the Attorney General will be followed by him, the Attorney General will comply with the request of the head of a department for his opinion in the premises, the question being one of importance, and the Comptroller thus joining in asking that it be answered. (21 Op. Atty. Gen., 224. But see 21 Op. Atty. Gen., 251, and 21 Op. Atty. Gen., 320, where opinions upon similar questions were rendered, although it did not appear that the Comptroller joined in the reference.)

A question which was referred to the Comptroller of the Treasury, and at his request referred to the Attorney General, was answered by the latter because it was an important one. (21 Op. Atty. Gen., 402.)

With reference to the question of pay of certain Navy officers on promotion, which was pending before the Comptroller of the Treasury, the Secretary of the Treasury requested the opinion of the Attorney General upon certain questions proposed by the Comptroller of the Treasury, and transmitted with the Secretary's note. An opinion was rendered upon such questions for the guidance of the Comptroller. (23 Op. Att'y. Gen., 30.)

With reference to the question whether the accounting officers of the Treasury may legally allow claims for transportation upon requests fraudulently issued by an officer of the Army, which question was submitted to the Attorney General by indorsement of the Secretary of the Treasury on a letter of the Comptroller of the Treasury, the Attorney General rendered an opinion to the Secretary. (23 Op. Att'y. Gen., 161.)

The Secretary of War, in accordance with the suggestion of the Comptroller of the Treasury, requested and received an opinion of the Attorney General as to use of an appropriation for installation of range and position finders in Porto Rico. (23 Op. Att'y. Gen., 390.)

Concerning the pay of retired officers of the Army, the Attorney General rendered an opinion to the Secretary of War, remarking: "The Comptroller of the Treasury requests or concurs in the reference of the question to me, and it is proper, therefore, that I should respond." (25 Op. Att'y. Gen., 299.)

The Secretary of the Navy, with the concurrence of the Comptroller of the Treasury, requested an opinion which was rendered by the Attorney General, concerning the pay of a certain retired mate in the Navy. (26 Op. Att'y. Gen., 599; file 3031-34.)

The Attorney General refrains from rendering an opinion upon a question submitted to him by the Secretary of the Treasury, for the reason that the question can be asked of the Comptroller of the Treasury. (21 Op. Att'y. Gen., 188.) Opinion rendered later by the Attorney General upon same question, the Comptroller joining in the request and the question being of importance. (21 Op. Att'y. Gen., 224.)

**Where Comptroller does not join in request.**—Unless the Comptroller joins in the request, the Attorney General has hesitated to express an opinion even as to questions of great importance, or of general application to all departments. (26 Op. Att'y. Gen., 81, citing 21 Op. Att'y. Gen., 181.) However, where the question is general in its bearings, and of great importance, the Attorney General may properly express an opinion notwithstanding the statutory authority of the Comptroller of the Treasury, and notwithstanding the fact that the question comes to him in the first instance and not after reference to the Comptroller and by his request. (26 Op. Att'y. Gen., 81, re use of appropriation under the Secretary of War for the erection of marine barracks at the Canal Zone. See also 24 Op. Att'y. Gen., 699; 25 Op. Att'y. Gen., 127.)

Upon request of the Secretary of the Navy the Attorney General reviewed several decisions rendered by the Comptroller of the Treasury concerning the leave pay of officers of the construction corps, professors of mathematics,

and civil engineers. No reference was made in the opinion to the question of jurisdiction. (27 Op. Att'y. Gen., 261.) [Before referring this question to the Attorney General, the Navy Department suggested to the Comptroller that the matter be submitted to the Attorney General for opinion, in order thereby to obviate delay and expense, both to the Government and the officers concerned, that would result from the placing of the matter before the Court of Claims for decision. In response the Comptroller stated that he preferred that the Navy Department use its own judgment relative to the submission of the legal question involved to the Attorney General, and that the Attorney General determine, without suggestion from him, whether he would entertain such submission; but added that, if the question were submitted and the Attorney General rendered an opinion thereon, such opinion would be treated with that respect due to the opinion of the chief legal adviser of the Government. This statement of the Comptroller's attitude was communicated to the Attorney General in the Navy Department's request for opinion. (File 26254-155:e, Dec. 15, 1908.) The Attorney General, in the opinion cited, dissented from the decision of the Comptroller of the Treasury upon the questions presented, and concurred in the views of the Navy Department thereon. The Comptroller of the Treasury thereupon reopened and reversed his former decision, and followed the opinion of the Attorney General. (Comp. Dec., Apr. 16, 1909, 98 S. & A. Memo., 1036.)]

Upon request of the Secretary of the Navy the Attorney General reviewed and reversed several decisions of the Comptroller of the Treasury concerning the legality of a Navy regulation, although the Comptroller declined to concur in a reference of the matter to the Attorney General, holding that his decisions were final and conclusive upon the executive branch of the Government. (Op. Att'y. Gen., May 19, 1915, 171 S. & A. Memo., 3611; 21 Comp. Dec., 554, 357, 245; file 26254-1451:11.)

Upon request of the Secretary of the Navy the Attorney General reviewed the decision of the Comptroller of the Treasury that the designation of a Navy mail clerk was not valid, and held that said decision of the Comptroller was extraofficial and that the mail clerk in question had been validly designated as such. (31 Op. Att'y. Gen., 320. See also 32 Op. Att'y. Gen., 427 reviewing and dissenting from 26 Comp. Dec., 336.)

The Comptroller of the Treasury held that the cost of transporting certain destitute seamen to this country was a proper charge against the Government (14 Comp. Dec., 867), and suggested that the Attorney General's opinion be requested as to whether the owners of the vessel to which such seamen belonged should refund to the Government the amount so expended. This latter question was referred to the Attorney-General with request for his opinion upon that specific question. However, the Attorney-General, in his opinion, considered the whole subject, and held, among other things, that "the cost of transportation furnished by the Government is a proper charge against the appropria-



tion for 'relief and protection of American seamen in foreign countries,' which question had already been decided by the Comptroller. (26 Op. Atty. Gen., 631. In this connection see 29 Op. Atty. Gen., 54.)

In the case of a retired officer of the Navy, the Comptroller of the Treasury held that under the law and facts of the case he was entitled to the rank and retired pay of the next higher grade. (14 Comp. Dec., 167.) In the case of another retired officer, involving precisely the same question, the Navy Department requested an opinion of the Attorney General, who held that the officer in question was not entitled to the rank and retired pay of the next higher grade, expressly dissenting from the Comptroller's decision above cited and concurring in the opinion of the Navy Department. [This question was referred to the Attorney General by the Secretary of the Navy without the suggestion or concurrence of the Comptroller.] (27 Op. Atty. Gen., 221.) The Comptroller of the Treasury reopened and reversed his former decision and followed the opinion of the Attorney General. (15 Comp. Dec., 584.)

Where the Comptroller has passed upon the precise question submitted and does not request any review of his decision, the Attorney General will not render an opinion where the matter, in his judgment, is not one of sufficient importance to bring it within the class of cases which, while concerning disbursements of money, nevertheless, by reason of their great importance or general character, have been held to warrant an expression of opinion by the Attorney General. (25 Op. Atty. Gen., 614.) In such a case, before rendering an opinion, the Attorney General requires a presentation of the reasons of the head of the department for referring the matter to him and not accepting the opinion of the Comptroller. (26 Op. Atty. Gen., 609.)

In no case, so far as I am advised, has the Attorney General undertaken to review a matter which has been before the Comptroller without being advised that it would be entirely agreeable to the latter to do so. (28 Op. Atty. Gen., 129. But see cases noted above.)

Where the Comptroller of the Treasury has decided the question (pay of a retired officer of the Army, advanced in rank by the Executive), his decision is conclusive, and the question will not be answered by the Attorney General. It is true that an exception has been noted in the opinions of the Attorneys General, where a question is of great importance and general application and a conflict of precedents might ensue, and especially where the Comptroller joins in the request and states that he will be guided by the opinion of the Attorney General. But here the Comptroller has already acted and has rendered his decision upon the reference to him of the real question involved in its practical aspect, and this decision under the law must govern him in determining the matter whenever it is presented to him in his function of passing upon accounts, unless, indeed, he himself should see fit to reconsider and revise or reverse his ruling. (25 Op. Atty. Gen., 185. But see cases noted above.)

**Questions which have been held of general and great importance.**—Upon a question relating to the purchase of envelopes by

executive departments in cases of public exigency, it appeared from papers transmitted to the Attorney General that the Comptroller of the Treasury stated: "As the question in the form presented is a general one, applicable to all the departments, it is respectfully suggested that it would be expedient to have the matter determined by an opinion from the Attorney General." Accordingly the Attorney General rendered an opinion upon the question, saying: "This case falls within the exception stated in my previous opinion (21 Op. Atty. Gen., 178) concerning matters of great importance, and I therefore, without departing from the precedent therein established, comply with your request." (21 Op. Atty. Gen., 181.)

*Availability of appropriation.*—Respecting the availability for census purposes of the unexpended balance of a previous appropriation, the Attorney General rendered an opinion to the Secretary of the Interior, stating: "This question might have been presented to the Comptroller of the Treasury, under the act of July 31, 1894, section 8. \* \* \* Upon the passage of that act this department assumed the position, which it has ever since maintained, that except in matters of great importance, questions of the character referred to therein should be submitted to the Comptroller, whose opinion is binding and conclusive and affords complete protection. (21 Op. Atty. Gen., 178, 188, 530; 22 Op. Atty. Gen., 413, 581; 23 Op. Atty. Gen., 1, 2, 86, 431, 468, 586; 24 Op. Atty. Gen., 85.) The present question, however, is administrative in its nature and of sufficient importance to come within the exception stated. Its gravity is more than commensurate with that of the question considered by Mr. Olney (who first announced the rule referred to) in his opinion of May 23, 1895 (21 Op. Atty. Gen., 181), and which related to the power of the several executive departments to purchase envelopes in cases of public exigency. Upon the availability of the balance referred to by the proviso in the act of March 3, 1903, as the letter of the director indicates, depends the execution of a great deal of census work now in progress or contemplation, and the retention or discharge of a considerable portion of his present force." (24 Op. Atty. Gen., 699.)

*Pay of employees in Philippines.*—Concerning compensation on holidays of navy yard employees in the Philippine Islands, the Attorney General rendered an opinion to the Secretary of the Navy, stating: "This question might have been submitted to the Comptroller of the Treasury, but in view of the importance of determining whether or not such statutes apply in the Philippine Islands, I shall endeavor to answer it." (25 Op. Atty. Gen., 127.)

*Validity of Navy regulation.*—In rendering an opinion requested by the Secretary of the Treasury at the suggestion of the Comptroller, concerning refund of bounty required of enlisted men of the Navy discharged within a year after enlistment, for disability not incurred in the line of duty, the Attorney General said: "I should hesitate to render you my opinion upon this subject, in view of the well-established rule holding the opinions of the Comp-

troller of the Treasury, upon a question involving the payment of money by any executive department of the Government to be final and conclusive, were it not for the fact that the present case is unusually important, since it involves the validity of the regulations issued by the head of an executive department and therefore appears to fall within the exception to that rule recognized by the Attorney General when he is duly asked for his opinion before the Comptroller has passed upon the question, and the Comptroller himself joins in the request." (25 Op. Atty. Gen., 271; see also Op. Atty. Gen., May 19, 1915, 171 S. & A. Memo., 3611, reviewing and reversing decisions of the Comptroller of the Treasury as to the validity of a Navy regulation, although the Comptroller declined to concur with the Secretary of the Navy in the submission of the question to the Attorney General.)

*Use of appropriation for construction of marine barracks at the Canal Zone* is a question of general and great importance, upon which the Attorney General will render an opinion notwithstanding the fact that the question comes to him in the first instance and not after reference to the comptroller and by his request. (26 Op. Atty. Gen., 81.)

**Where opinion is requested by the President.**—Upon instructions to him by the President, the Attorney General reviewed two decisions rendered by the Comptroller of the Treasury concerning expenditures from appropriations for the Agricultural Department, and submitted his opinion to the President upon the questions of law discussed therein. (26 Op. Atty. Gen., 269.)

Upon reference to him by the President, the Attorney General rendered an opinion upon a question raised by a decision of the Comptroller of the Treasury as to authority of the Secretary of the Treasury to purchase land from the State of Texas for a life-saving station and to pay the consideration fixed therefor (29 Op. Atty. Gen., 48); and later, in the same case, the Attorney General addressed a supplementary opinion to the President as to the appropriation available for payment for the land so acquired. (29 Op. Atty. Gen., 51.)

Opinion rendered to the President concerning his authority to allot funds appropriated by Congress for the purpose of equipping and building schoolhouses in the island of Porto Rico. (23 Op. Atty. Gen., 329.)

That Commissioner of Labor could be appointed a member of the immigration commission and receive compensation for his services on that commission, in addition to the salary attached to his office as Commissioner of Labor. (26 Op. Atty. Gen., 247.)

Authority to grant leave of absence with pay to members of the Grand Army of the Republic in Government service who attend annual encampment of that order. (26 Op. Atty. Gen., 336.)

That a retired officer of the Revenue-Cutter Service could be employed to superintend the construction of life-saving apparatus for such period as his services might be required, at a rate of compensation to be fixed by the Secretary of the Treasury. (26 Op. Atty. Gen., 460.)

Use of appropriations to pay contractors for

material to be used in constructing a public building. (26 Op. Atty. Gen., 572.)

That the Secretary of the Navy has no power, after exhausting an appropriation for the erection of a dry dock, to use funds from other appropriations not strictly applicable to that work in order to meet the payments to be made on the contract until a deficiency appropriation should be made. (28 Op. Atty. Gen., 466.)

**Specific questions answered by the Attorney General without reference to Comptroller's jurisdiction.**—In the following specific cases the Attorney General rendered opinions without making any reference to the question of jurisdiction:

*Payment of damages.*—That the Secretary of War is authorized to pay \$15,000, as recommended by a commission and the Chief of Engineers, for raising the height of the dam at Great Falls and for damages on account of the flooding of land and other damages. (21 Op. Atty. Gen., 223.)

Use of appropriation for reimbursement of militia for stores taken in war with Spain. (22 Op. Atty. Gen., 372.)

Use of appropriation by Secretary of War for payment of compensation to parties after a breach of contract by the Secretary. (22 Op. Atty. Gen., 437.)

Payment of money to contractors for damages sustained by delay. (23 Op. Atty. Gen., 106.)

*Use of appropriations.*—Concerning the use of an appropriation for expenses of the Agricultural Department. (21 Op. Atty. Gen., 321; 21 Op. Atty. Gen., 372; 22 Op. Atty. Gen., 470.)

Use of appropriations, and to what appropriation certain expenses are chargeable. (21 Op. Atty. Gen., 414.)

Construction of an appropriation; whether language mandatory or directory. (22 Op. Atty. Gen., 295.)

Expenditure of \$3,000,000 appropriation for emergencies arising in military administration of Cuba. (22 Op. Atty. Gen., 301.)

Use of appropriation for rivers and harbors. (22 Op. Atty. Gen., 489; 22 Op. Atty. Gen., 519; 25 Op. Atty. Gen., 145; 29 Op. Atty. Gen., 173.)

Use of an appropriation under the Secretary of State and its availability for paying expenses or compensation of counsel for the delegation to the Pan-American conference. Question was, first, as to legality of appointing counsel; and second, as to question of pay. (23 Op. Atty. Gen., 533.)

Opinion to Secretary of State which "relates wholly to the legality of the expenditures recommended"—that is, certain expenditures out of an appropriation made in connection with the Panama Canal project. (25 Op. Atty. Gen., 54.)

Advised Secretary of War that he was authorized to enter into a contract for the payment of royalty on account of the construction of certain guns, carriages, etc., payable out of appropriations "for the armament of fortifications and for other purposes;" notwithstanding the fact that the fulfillment of such contract might extend over a period of more than two years. (25 Op. Atty. Gen., 105.)

That appropriation for purchase of land may properly be expended for the purchase of a



lease in perpetuity to said land. (26 Op. Atty. Gen., 12.)

That Secretary of the Treasury is authorized to acquire a certain site and erect a public building thereon, at total cost of \$125,000; that the Secretary is not limited as to the cost of the site, but a sufficient amount should be reserved to properly erect the building. (26 Op. Atty. Gen., 20.)

Opinion to Secretary of the Navy in answer to following questions: (1) Whether, upon the facts presented, the Navy Department is authorized to expend any portion of the moneys appropriated by the acts in question for the construction or purchase of a submarine boat or boats of the Lake type; (2) whether under the facts as stated the Secretary of the Navy is authorized to expend any portion of the appropriations referred to, for the purchase of sub-surface boats of the type subjected to trial, as above set forth. (26 Op. Atty. Gen., 321.)

Appropriation available for payment of expense of maintenance and treatment of an inmate of the National Soldiers' Home who is transferred to the Government Hospital for the Insane. (26 Op. Atty. Gen., 512.)

That Secretary of the Navy has authority to acquire and pay for the right to manufacture and install patented forms of turbine machinery on board a ship under construction, and this authority extends to the license fee, royalties, and preparation of drawings. (27 Op. Atty. Gen., 173.)

Use of appropriation to defray expenses of a board under the Secretary of War. (27 Op. Atty. Gen., 459.)

Use of Naval Hospital fund to supplement appropriation for construction of hospital at Norfolk, Va. (27 Op. Atty. Gen., 30.)

That moneys appropriated for the maintenance of the Bureau of Mines may be used for erection of certain temporary structures. (28 Op. Atty. Gen., 413.)

Use of appropriation for construction of battleship, where not sufficient for completion of the vessel. (28 Op. Atty. Gen., 477.)

Use of naval appropriation for purchases from combinations or monopolies. (29 Op. Atty. Gen., 14, 35, 44.)

That in absence of statutory prohibition, partial payments may be made on account of work done in construction of vessels for the Navy. (29 Op. Atty. Gen., 46.)

Use of appropriation under Secretary of War for purchase and partial construction of canal and locks, where not sufficient for total cost. (29 Op. Atty. Gen., 236.)

Use of appropriation by the Secretary of the Treasury for rental of building in District of Columbia and construction of vault. (27 Op. Atty. Gen., 270.)

*Pay of Army, Navy, etc.*—Stoppage of pay against the account of soldier in Army. (21 Op. Atty. Gen., 323.)

That the Secretary of the Navy is authorized to employ a retired officer to supervise the completion of certain tables of planets, at a compensation of \$2,500 per annum. (21 Op. Atty. Gen., 507.)

Concerning extra pay of Army officers. (22 Op. Atty. Gen., 95.)

That a proposed regulation of the State Department, with reference to the compensation of consular agents, being consistent with law, may be carried into effect. (22 Op. Atty. Gen., 163.)

Extra compensation of a United States judge appointed as a commissioner under a convention with Great Britain. (22 Op. Atty. Gen., 184.)

Increased pay and allowances of Army officers. (22 Op. Atty. Gen., 258.)

Compensation of per diem employees at Washington navy yard for half day when yard was closed on account of ceremonies attending the interment of the bodies of soldiers and sailors whose lives were lost in the war with Spain. (22 Op. Atty. Gen., 472.)

Date from which officer of Navy is entitled to rank and pay of higher grade on promotion. (22 Op. Atty. Gen., 657.)

Rank and pay of retired officers of the Marine Corps having Civil War service. (24 Op. Atty. Gen., 709.)

Pay of a retired officer of the Navy. "He now claims that he is entitled to the additional pay provided in the provision before quoted, and your question is in substance whether he is so entitled. \* \* \* I am, therefore, of opinion \* \* \* that he is entitled to the increased pay provided for in said act." (26 Op. Atty. Gen., 57.)

That the salary of a clerk in a pension agency might legally be paid, and need not be withheld by the Secretary of the Interior because of his indebtedness to the United States; and that section 1766, Revised Statutes, is not applicable to such clerk. (26 Op. Atty. Gen., 77.)

That the salary of a naval officer appointed during a recess of the Senate can not be paid until confirmed by the Senate, where the vacancy existed while the Senate was in session. (26 Op. Atty. Gen., 234.)

Rank and pay of retired officers of the Navy having Civil War service. (27 Op. Atty. Gen., 221.)

Compensation of certain officers employed under the Department of Agriculture. (27 Op. Atty. Gen., 358.)

Payment of compensation and expenses of board on life-saving appliances. (27 Op. Atty. Gen., 406.)

Compensation and expenses of a committee under the Secretary of War. (27 Op. Atty. Gen., 432, 437.)

Leave of absence of per diem employees under the Secretary of War. (27 Op. Atty. Gen., 613.)

Payment of compensation to expert witness employed by the Government in cases arising under the food and drugs act. (28 Op. Atty. Gen., 75.)

Leave of absence to certain employees under the War Department. (28 Op. Atty. Gen., 339.)

Pay of chief of bureau, Navy Department, after resignation or removal from office. (28 Op. Atty. Gen., 429.)

Rank and pay of naval officers serving as bureau chiefs. (28 Op. Atty. Gen., 531.)

*Payment of miscellaneous claims.*—Claim for arrears in pension. (21 Op. Atty. Gen., 408; 21 Op. Atty. Gen., 453.)

That unexpended balance of an appropriation should be used to reimburse a claimant against the United States. (21 Op. Atty. Gen., 523.)

Claims of officers and men in the Navy for payment of prize money. (22 Op. Atty. Gen., 171.)

Legality of bills submitted to the Secretary of War for State tolls on property of the United States passing to or over the wharves at San Francisco. (23 Op. Atty. Gen., 299.)

Whether Navy Department may rightfully withhold its approval of vouchers providing for payment of a bill presented to that department by the Carnegie Steel Co. until decision of a suit pending in the Court of Claims. (23 Op. Atty. Gen., 422; affirmed 23 Op. Atty. Gen., 495.)

Authority of Secretary of the Treasury to pay claim of a municipal corporation for reimbursement on account of burial expenses of a pensioner from accrued pension. (23 Op. Atty. Gen., 428.)

Validity of claim made for rent of a building occupied as a post-office. (23 Op. Atty. Gen., 571.)

Authority of Secretary of the Treasury to allow claim for compensation as informer. *Held* that the Treasury Department is authorized to award compensation in the case submitted. (24 Op. Atty. Gen., 61.)

Use of an appropriation for payment of attorneys' claims for fees on account of services rendered to Indians. (24 Op. Atty. Gen., 624; 25 Op. Atty. Gen., 308; 25 Op. Atty. Gen., 320.)

Distribution of fund appropriated for the payment of the so-called "loyal Creek claims" in cases of deceased claimants. (25 Op. Atty. Gen., 163.)

Payment of claim of Government employee for compensation on account of disability sustained in the course of his employment. (27 Op. Atty. Gen., 346.)

Settlement of claim on Secretary of the Treasury, made by an officer of the Government for an award for detecting fraudulent weighing of sugars. (28 Op. Atty. Gen., 329.)

Use of appropriations for payment of claims of a wrecking company in connection with the removal of an obstruction to navigation. (28 Op. Atty. Gen., 626, 633.)

Whether the claim of a wrecking company against the Government for services in removing an obstruction to navigation, which claim was pending before the War Department, could be paid. Answered in the affirmative, but held that interest could not be paid. (29 Op. Atty. Gen., 277.)

Payment of claim for compensation on account of a fatal accident to a laborer employed by the United States. (29 Op. Atty. Gen., 415.)

*Refund of duties, taxes, etc.*—Authority of Secretary of the Treasury to refund duties out of an appropriation for that purpose. (23 Op. Atty. Gen., 442; 21 Op. Atty. Gen., 454. Claims for refund of taxes. 26 Op. Atty. Gen., 472.)

Payment of claims for refund of moneys collected by the United States for taxes. Question submitted by the Secretary of the Treasury, "is there any legal objection to now paying that part of the claim of \* \* \* which comes

under the decision of the Supreme Court in the \* \* \* case, allowing the balance to remain in the Treasury pending the decision of the court in the \* \* \* case?" Answered in the negative. (26 Op. Atty. Gen., 194.)

*Miscellaneous.*—Making of final payment to a contractor by the Secretary of War under a certain contract. (22 Op. Atty. Gen., 465.)

Payment from the naval pension fund to personal representatives of a deceased beneficiary or to the Naval Home. (25 Op. Atty. Gen., 85.)

Authority of Director of the Mint, with approval of the Secretary of the Treasury, to purchase bullion for subsidiary coinage without limitation. (25 Op. Atty. Gen., 170.)

#### (D) *Effect of Attorney General's opinion.*

**Binding on Comptroller.**—Without touching upon the question whether a Comptroller of the Treasury may delegate his authority, when he waives his right to determine a matter involving disbursements, within the scope of his authority under the law and regulations, or suggests a ruling by the Attorney General, there is no doubt that the Attorney General's opinion should not only be justly persuasive to the accounting officers, but should be controlling; and should be followed by them unless contrary to some authoritative judicial decision which puts the matter at rest. It is always to be assumed that the Attorney General would not overlook or ignore such a decision in announcing his own conclusion. (25 Op. Atty. Gen., 301.)

Of course the opinion of the Attorney General when rendered in a proper case—as must be the presumption always from the fact that it is rendered—must be controlling and conclusive, establishing a rule for the guidance of other officers of the Government, and must not be treated as nugatory and ineffective. (25 Op. Atty. Gen., 301, citing 20 Op. Atty. Gen., 648; 9 Op. Atty. Gen., 37, 7 Op. Atty. Gen., 699, 6 Op. Atty. Gen., 334, 5 Op. Atty. Gen., 97.)

Where the question is general and important in other directions than disbursements, and is presented to the Attorney General in accordance with law—that is, if it is submitted by the President or the head of a department; if it is a question of law and actually arises in the administration of a department; and the Attorney General conceives that it is proper for him to deliver his opinion, it is final and authoritative under the law, and should be so treated by the accounting officers, even if the question involves a payment to be made. (25 Op. Atty. Gen., 301.)

If the Attorney General considers the question presented one of great importance in other directions than disbursements, and especially when the Comptroller suggests an examination of the matter by him, an opinion on his part will be proper and the decision final and authoritative. (25 Op. Atty. Gen., 601.)

Where an opinion was rendered by the Attorney General upon a question which was afterwards considered and otherwise decided by the Comptroller of the Treasury, it was *held* by the Supreme Court that any doubt which the Auditor might have had should have been sub-



ordinated to the ruling of the Attorney General; affirming the decision of the lower court in which there was quoted with approval the Attorney General's opinion of September 8, 1893, to the Secretary of the Treasury (20 Op. Atty. Gen. 659), digested above under "V. Weight of Opinions" (Smith v. Jackson, 246 U. S., 388, 241 Fed. Rep., 747; C. M. O. 50, 1918, p. 20.)

(E) *Views of Comptroller of the Treasury as to jurisdiction.*

**Test is whether main question involved is one of payment.**—The question was submitted to the Comptroller of the Treasury whether the Interstate Commerce Commission is authorized to purchase furniture and office equipment from dealers not parties to the common supply contract. This question had previously been passed upon by the Attorney General in an opinion rendered to the President under section 354, Revised Statutes. (Op. Atty. Gen., Feb. 27, 1913.) The Comptroller held that the question was one for him to decide, under the act of July 31, 1894 (28 Stat., 208), saying: "I have no discretion in the matter and must render a decision, and such decision as my conscience dictates, notwithstanding this opinion by the Attorney General." Upon the general subject of jurisdiction in such cases, the Comptroller said:

"If there is sometimes conflict of jurisdiction between the Attorney General and the Comptroller of the Treasury, it is by reason of the different constructions which are given these two provisions of the statutes. I have never brought myself to the view that my jurisdiction depended upon the magnitude of the question submitted. I have always thought that the primary question to be determined was, whether the main question involved the payment of money out of an appropriation, and if so the jurisdiction was with the Comptroller; if, on the contrary, the main question was the authority of the President, the head of an executive department, or other Government official to perform a certain act regardless of the use of an appropriation, then the jurisdiction is with the Attorney General.

"If the President or the Secretary of the Treasury had in this case submitted the question whether he, the Secretary, was authorized to schedule and contract for, under the act of June 17, 1910 (36 Stat., 468, 531), such articles as desks, tables, or sectional filing cases to be used by the Interstate Commerce Commission, and the Attorney General upon such request had rendered the opinion he has rendered, I have no doubt that the Secretary of the Treasury would have acquiesced in such opinion, and not scheduled and contracted for such articles. Under such circumstances, I would have felt myself morally bound to follow the opinion of the Attorney General, notwithstanding my own personal views as to its correctness. But the Secretary of the Treasury has, and had before the date of the opinion of the Attorney General, scheduled and contracted for such articles under the said act \* \* \*.

"The articles here in question are purchased on a considerable scale, and used alike by all departments of the Government \* \* \* I

am unable to agree with the Attorney General in his narrow and nonbeneficial construction of this law."

This decision of the Comptroller of the Treasury, under date of March 31, 1913, was published with the following note: "The above decision was prepared on the 12th day of March, 1913, but withheld pending the action of the Attorney General on a submission by the Secretary of the Treasury relative to a reconsideration of the opinion of February 27, 1913, the one mentioned in the submission to this office and referred to in the above decision. Said submission resulted in a withdrawal of the opinion, *supra*, of the Attorney General, under date of March 26, 1913, in which he held that the question involved in said withdrawn opinion was one involving a payment by the head of a Government establishment, and hence for the Comptroller of the Treasury to decide." (19 Comp. Dec., 617. But see above, VI (A), "Attorney General's jurisdiction not curtailed by the powers given Comptroller; and VI (C), "When Attorney General will render an opinion.")

**Will not concur in referring question of law to Attorney General.**—"With reference to your further suggestion that I concur in a submission of the question with reference to the validity of this regulation to the Attorney General, permit me to say that I can see no propriety in or reason for my so doing. The law has cast upon the Comptroller of the Treasury the duty not only of deciding upon the facts but also of construing the law in connection with the settlement of the public accounts and particularly those accounts that involve the expenditure of public moneys." (21 Comp. Dec., 554, 560. But see cases noted above, in which Comptroller of the Treasury has acquiesced in the submission to the Attorney General by the head of a department of questions involving payments; and has, in a number of instances, himself suggested such reference.)

**The Comptroller of the Treasury is not authorized to render an advance decision upon a question not involving a payment to be made by or under the officer requesting the opinion.** It is one of the functions of the Attorney General to give his opinion at the request of a head of a department upon questions of law arising in the administration of his department; which is to be distinguished from the duty of the Comptroller of the Treasury to render decisions upon questions involving payments, which decisions govern the settlement of accounts therefor. (10 Comp. Dec., 812.) (The question in this case was whether the chief clerk of the Railway Mail Service is competent to administer the oath of office to appointees.)

Where the disbursement of an appropriation was under the charge of the Secretary of the Interior, and the question arose whether under said appropriation the Secretary of the Interior had authority to authorize the United States attorney to employ witnesses and incur costs contemplated by him in connection with certain condemnation proceedings, the comptroller stated that in his opinion "all such expenses should be ordered and approved by the Attorney General and paid from an appropria-

tion under the Department of Justice;" but that the question presented "appears to be one of administration," which the Secretary of the Interior, if he so desired, might submit to the Attorney General for an advisory opinion under section 356, Revised Statutes. (9 Comp. Dec., 793; see also 9 Comp. Dec., 446, 451.)

Where the question submitted is one as to the legality of a proposed payment for certain buildings and outfit, but lack of the question of the expenditure of the money is that of the acquisition of the site, this involves questions of law unconnected with any expenditure of public money, and hence not within the Comptroller's jurisdiction. Therefore suggested that the opinion of the Attorney General should be obtained upon the primary question involved in the acquisition of the site. (5 Comp. Dec., 682; see also 3 Comp. Dec., 730.)

#### VII. MISCELLANEOUS.

The Attorney General will not review the opinion of a former Attorney General unless a proper case is presented therefor and submitted by the head of a department. (11 Op. Att'y. Gen., 189.)

A question once definitely answered by the Attorney General and left at rest for a long term of years should be reconsidered by one of his successors only in a very exceptional case. (21 Op. Att'y. Gen., 24; affirmed 24 Op. Att'y. Gen., 53; 24 Op. Att'y. Gen. 127, 132; compare 27 Op. Att'y. Gen. 212, 215. See also 17 Op. Att'y. Gen. 193.)

The conclusions of a Federal court are binding upon the Attorney General until reversed by a higher court. (24 Op. Att'y. Gen., 59.) [The Attorney General has not always followed decisions of the Court of Claims. Thus, the Court of Claims held that a vacancy occurring while the Senate was temporarily adjourned was legally filled by the President as a "recess" appointment. (*Gould v. U. S.*, 19 Ct. Cls., 593, 595.) Thereafter the Attorney General, with knowledge of this decision, advised the President that a vacancy occurring during a temporary adjournment could not be filled by him as a "recess" appointment. (23 Op. Att'y. Gen., 599; but see 33 Op. Att'y. Gen., 20.) Also in 29 Op. Att'y. Gen., 397, 407, the Attorney General quoted from the decision of the Court of Claims in *Geddes v. U. S.*, 38 Ct. Cls., 428, 445, and then said: "This reasoning, as the minority hold, is in direct conflict with that of *United States v. Tyler*, supra, and can not be accepted as a correct statement of the law." It will be noted that here the Attorney General declined to accept the "reasoning" and not the conclusions of the Court of Claims.]

The Attorney General's opinions should be followed unless contrary to some authoritative judicial decision which puts the matter at rest. (25 Op. Att'y. Gen., 301.)

The opinions of the Attorney General should be regarded by the heads of departments as law until withdrawn by him or overruled by the courts. (20 Op. Att'y. Gen., 654, 659; 20 Op. Att'y. Gen., 719, 722.)

**Reasons for declining to render opinions except when required by law.**—The Attorney General has no right to give an official opin-

ion except in those cases in which it is required of him by law. (6 Op. Att'y. Gen., 24.)

To step beyond the circle of his duties as defined by law would in itself be a violation of law, independently of other relations of the subject. (6 Op. Att'y. Gen., 25.)

I should consider myself as transcending the limits of my commission in a very unjustifiable manner in attempting to attach the weight of *my office* to any opinion not authorized by the law which prescribes my duties. (1 Op. Att'y. Gen., 211.)

The Attorney General is sworn to discharge the duties of his office *according to law*. To be instrumental in enlarging the sphere of his official duties beyond that which is prescribed by law would, in my opinion, be a violation of his oath. It would be incalculably dangerous to permit an officer to act, under color of his office, beyond the pale of the law. The precedent would not be the less dangerous on account of the purity of motives in which it originated. (1 Op. Att'y. Gen., 335.)

The Attorney General should not feel at liberty to augment the duties of his office, already sufficiently laborious, by setting a precedent by the voluntary assumption of others which do not belong to the office. (1 Op. Att'y. Gen., 608, 609.)

Is very unwilling to create a precedent which shall incumber his burdensome office with duties foreign to it. (1 Op. Att'y. Gen., 608, 613.)

His opinion would not only be gratuitous, but unauthorized. (2 Op. Att'y. Gen., 311.)

Nor will the Attorney General render an unofficial opinion in such a case, even as an individual, because in the relation he stands to the Government an opinion from him might be looked upon as an official one, and thus connect the Government with an individual controversy in which it has no concern and with which it ought not to interfere. (2 Op. Att'y. Gen., 531.)

For the Attorney General to render an opinion in such a case would be to lend the name of the Government to matters of controversy with which it is not connected by law, and would thus involve unauthorized interference with private rights. (6 Op. Att'y. Gen., 24.)

He has no warrant to act outside of the statutes which define his office. (15 Op. Att'y. Gen., 138; 18 Op. Att'y. Gen., 365.)

He is not authorized or required to give an official opinion except in the cases specified by law. If he should do so, he would overstep the boundaries which appear to be prescribed for him by a long line of decisions and uniform practice, and would commit himself upon a question which might be properly submitted to him thereafter in accordance with law. (21 Op. Att'y. Gen., 174; 20 Op. Att'y. Gen., 609, 723.)

His opinion, where not required by law, would be extraofficial and unauthorized. (10 Op. Att'y. Gen., 220; 19 Op. Att'y. Gen., 7; 20 Op. Att'y. Gen., 724.)

He is not permitted by law to render an official opinion upon questions not covered by the statute. (21 Op. Att'y. Gen., 174.)

His opinion, if rendered in a case not specified by law, would be entitled to no more consideration than the opinion of any person



presumed to have some knowledge of the point in question. (17 Op. Atty. Gen., 357; 20 Op. Atty. Gen., 333, 667, 440; 2 Op. Atty. Gen., 531.)

He is not authorized to give an official opinion in any case not falling within the scope of his duties, so as to connect the Government with individual controversies in which it has no concern and with which it ought not to interfere. (6 Op. Atty. Gen., 326, 334.)

Such opinions would be in violation of his oath of office and of dangerous example. (10 Op. Atty. Gen., 164.)

Would make it impossible for the Attorney General to attend to his duties as prescribed by law. (5 Op. Atty. Gen., 165.)

Would be unwarranted by law (11 Op. Atty. Gen., 4); not the duty or practice of the

Attorney General (13 Op. Atty. Gen., 568; 19 Op. Atty. Gen., 414); not permitted by statute or precedent (19 Op. Atty. Gen., 414); would be inexpedient. (13 Op. Atty. Gen., 535.)

No officer should be permitted to stretch his authority and carry the influence of his office beyond the circle which the positive law of the land has drawn around him. (1 Op. Atty. Gen., 493; 20 Op. Atty. Gen., 440.)

**Will render opinion where jurisdiction is doubtful.**—Where the Attorney General entertains a doubt as to whether a case presented constitutes one of a character prescribed by statute as justifying and requiring the expression of an opinion by him, he will as a matter of public policy as well as of courtesy determine such doubt in favor of the propriety of such advice. (27 Op. Atty. Gen., 38.)

**Sec. 357. [Legal advice to Departments of War and Navy.]** Whenever a question of law arises in the administration of the Department of War or the Department of the Navy, the cognizance of which is not given by statute to some other officer from whom the head of the Department may require advice, it shall be sent to the Attorney-General, to be by him referred to the proper officer in his Department, or otherwise disposed of as he may deem proper.—(22 June, 1870, c. 150, s. 6, v. 16, p. 163.)

**Whether subordinate officers of the War and Navy Departments may refer questions to the Attorney General,** as well as the heads of those departments, has been suggested but not decided by the Attorney General. If this section allows such action, "it is evident that it makes a distinction therein betwixt these departments and all others, and that for a reason which upon its face it suggests." (18 Op. Atty. Gen., 59. See decisions noted under section 356, holding that the opinion of the Attorney General may be required under that section only by the President or the head of a department, and will not be rendered to subordinate officers; see also file No. 20400-200 Op. 13, Sept. 25, 1920, quoting Atty. Gen.'s letter of Sept. 13, 1920, file No. 204625, requesting that all references from the Navy Dept. come directly through or by direction of the Secretary of the Navy.)

**Questions of law arising in the Navy Department.**—In the Navy Department the law authorizes a Judge Advocate General who is by statute given cognizance, among other things, of such duties "as have heretofore been performed by the Solicitor and Naval Judge Advocate General." (Act June 8, 1880, 21 Stat., 164). The duties of the Judge Advocate General, as defined by the Navy Regulations, 1920, include "all matters of law arising in the Navy Department." (Art. 469 C. N. R. 2; art. 393

(3), C. N. R. 2.) Provision has also been made in annual appropriation acts for a Solicitor in the Navy Department, whose duties are not defined by statute. (See legislative, executive and judicial appropriation act, May 22, 1908, 35 Stat. 218, and subsequent years.) By Navy Regulations, 1920, it is provided that "the Solicitor shall perform such duties as may be assigned by the Judge Advocate General of the Navy." (Art. 393 (4), C. N. R. 2.)

**The Attorney General has requested** that the opinion of the law officer of a department accompany request for his opinion by the head of such department; and has declined to render an opinion upon a question of law involving the personnel of the Navy until an opinion on such question had been prepared by the Judge Advocate General of the Navy. (File 22724-16:1, Jan. 25, 1911; file 27223-12, Jan. 20, 1915. See note to sec. 356, R. S.)

**Suits in foreign countries.**—In view of sections 189, 357, and 365, Revised Statutes, the Secretary of the Navy is not authorized to employ counsel in foreign countries to institute suit in behalf of the United States to recover for damages caused to a vessel of the United States; but the case should be referred to the Department of Justice for attention. (21 Op. Atty. Gen. 195. For other cases, see note to sec. 189, R. S.)

**Sec. 358. [Reference of questions by Attorney-General to subordinates.]** Any question of law submitted to the Attorney-General for his opinion, except questions involving a construction of the Constitution of the United States, may be by him referred to such of his subordinates as he may deem appropriate, and he may require the written opinion thereon of the officer to whom

the same may be referred. If the opinion given by such officer is approved by the Attorney-General, such approval indorsed thereon shall give the opinion the same force and effect as belong to the opinions of the Attorney-General.—(22 June, 1870, c. 170, s. 4, v. 16, p. 162.)

As to "force and effect" of opinions rendered by Attorney General, see note to section 356, Revised Statutes.

The Attorney General must personally pass upon every question submitted to him for opinion; for although he may under this section refer the question to a subordinate for a written opinion, the action of the subordinate must be examined and approved by the Attorney General to give it effect. (21 Op. Atty. Gen., 174, 176.)

Questions involving the construction of the Constitution should be submitted to the Attorney General for his personal opinion. The advice of the Solicitor of the Treasury may be asked upon any other question of law arising in the Treasury Department, and such advice is regarded as rendered by him in his character as assistant to the Attorney General. (20 Op. Atty. Gen., 656, 657.)

**Sec. 359. [Conduct and argument of cases.]** Except when the Attorney-General in particular cases otherwise directs, the Attorney-General and Solicitor-General shall conduct and argue suits and writs of error and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested, and the Attorney-General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor-General or any officer of the Department of Justice to do so.—(24 Sept., 1789, c. 20, s. 35, v. 1, p. 92. 25 June, 1868, c. 71, s. 5, v. 15, p. 75. 22 June, 1870, c. 150, s. 5, v. 16, p. 162. U. S. v. Lawrence, 13 Blatch., 295.)

This section is modified by act of June 30, 1906 (34 Stat., 816), which authorizes the Attorney General or any attorney appointed by him to conduct any kind of legal proceeding which district attorneys are authorized to conduct, including grand jury proceedings.

As to duty of Attorney General in connection with proceedings in Court of Claims, see sections 180, 185, Judicial Code, act March 3, 1911 (36 Stat., 1142).

Attorney General may require certain information to be furnished him by departments in connection with suits in the Court of Claims. (Sec. 188, R. S.)

**Suits in the Court of Claims.**—The Attorney General is the only officer of the Government, except his assistants authorized by him, who has any right to represent the United States in suits in the Court of Claims. (Campbell v. U. S., 19 Ct. Cls., 426, 429.)

The authority of the Attorney General to "conduct suits" in the Court of Claims on behalf of the Government may fairly be held to include at least every act in the conduct of such suits which an attorney at law in a suit between individuals might lawfully do, with this reservation, as has uniformly been held by the Court of Claims, that he can not on the trial of a cause bind the Government by admitting facts adverse to it unless they are such as it is his official duty to know and as have become known to him officially in the course of the discharge of such duty. (Campbell v. U. S., 19 Ct. Cls., 426, 429.)

**Proceedings in Supreme Court.**—When a case in which the Government is interested comes to the Supreme Court from any lower court, it passes beyond the limits within which a district attorney has jurisdiction and exercises his powers and falls by the terms of this section within the special care of the Attorney General. The Attorney General may in his discretion make other arrangements for the management of such a case, but this discretion does not abridge the fact that full responsibility and control are imposed directly upon him as the head of the Department of Justice. (U. S. v. Winston, 170 U. S., 522, 524.)

The solicitor in the office of the Judge Advocate General of the Navy has represented the United States in the Supreme Court (U. S. v. Smith, 197 U. S., 386; file 469-1904); as has also a commissioned officer of the Marine Corps, who appeared in behalf of the United States "by special leave of the court." (Johnson v. Sayre, 158 U. S., 113; file 5728-1894. See also U. S. v. Freeman, 3 How., 560, in which defendant, an officer of the Marine Corps, submitted printed argument for himself and was not represented by counsel.)

**Proceedings in inferior Federal courts.**—It is at least doubtful whether the authority given the Attorney General to "conduct and argue any case in any court of the United States in which the United States is interested" confers upon him any authority to commence and institute proceedings except through the district attorneys. (Attorney General v. Rumford Chemical Works, 32 Fed. Rep., 608, 623. But see act June 30, 1906, noted above.)



It is probable that the intention of this section was to settle the right of the highest law officer of the United States and the Solicitor General and the officers of the Department of Justice to "conduct and argue" cases "in any court" as they had been permitted to do in the Supreme Court and in the Court of Claims, and to leave public prosecutions until they come before the court to which they are returnable within the exclusive direction of the district attorney as theretofore declared. (*U. S. v. Rosenthal*, 121 Fed. Rep., 866. But see act June 30, 1906, noted above.)

**Proceedings before grand jury.**—The Attorney General, the Solicitor General, nor any

officer of the Department of Justice is authorized by sections 359, 367, or other provisions of the Revised Statutes to conduct or to aid in the conduct of proceedings before a grand jury, nor has a special assistant to the Attorney General such power. (*U. S. v. Rosenthal*, 121 Fed. Rep., 862.) [This is now authorized by act June 30, 1906, above noted.]

**Suits in State courts.**—It should be observed that by section 359 the Attorney General may not "conduct and argue any case" in a State court. Section 367 gives that power. (*U. S. v. Rosenthal*, 121 Fed. Rep., 867.)

**Sec. 360.** [Performance of duty by officers of the Department of Justice.] The Attorney-General may require any solicitor or officer of the Department of Justice to perform any duty required of the Department or any officer thereof.—(22 June, 1870, c. 150, s. 14, v. 16, p. 164.)

The Attorney General has express authority under this section and section 367 to send an officer of the Department of Justice to any State in the United States to attend to the

taking of a deposition in a suit in which the United States is interested and which is pending in another State. (*U. S. v. Ady*, 76 Fed. Rep., 359, 363.)

**Sec. 361.** [Legal services required by the President, heads of departments and subordinates.] The officers of the Department of Justice, under the direction of the Attorney-General, shall give all opinions and render all services requiring the skill of persons learned in the law necessary to enable the President and heads of Departments, and the heads of Bureaus and other officers in the Departments, to discharge their respective duties; and shall, on behalf of the United States, procure the proper evidence for, and conduct, prosecute, or defend all suits and proceedings in the Supreme Court and in the Court of Claims, in which the United States, or any officer thereof, as such officer, is a party or may be interested; and no fees shall be allowed or paid to any other attorney or counselor at law for any service herein required of the officers of the Department of Justice, except in the cases provided by section three hundred and sixty-three.—(22 June, 1870, c. 150, s. 14, v. 16, p. 164.)

See section 188, Revised Statutes, concerning evidence to be furnished Attorney General to defend suits in Court of Claims.

See section 189, Revised Statutes, and note, as to employment of attorneys or counsel by the heads of departments generally, employment of counsel to serve as judge advocate or to assist the judge advocate of a naval court-martial, employment and payment of counsel in foreign countries, etc. See also note to section 362, Revised Statutes.

**Legal assistance to subordinate officers.**—For the guidance of the heads of bureaus and other officers of the departments in the discharge of their duties, provision is made by this section for assistance from the officers of the Department of Justice under the direction of the Attorney General. (20 Op. Atty. Gen., 608, 609. See also note to secs. 356 and 357, R. S.)

**Sec. 362.** [Superintendence of district attorneys and marshals.] The Attorney-General shall exercise general superintendence and direction over the attorneys and marshals of all the districts in the United States and the Territories as to the manner of discharging their respective duties; and the several district attorneys and marshals are required to report to the Attorney-General an account of their official proceedings, and of the state and condition of their respective offices, in such time and manner as the Attorney-General may direct.—(2 Aug., 1861, c. 37, s. 1, v. 12, p. 285. 22 June, 1870, c. 150, ss. 16, 17, v. 16, p. 164.)

**Purpose of section.**—The Attorney General being the chief law officer of the Government, Congress deemed it proper to subject to his general superintendence these subordinate law officers to the end that the legal business of the United States in their hands, whether civil or criminal, should be placed more directly under the eye and within the control of the Government. (10 Op. Atty. Gen., 95.)

**This section does not authorize the Attorney General to control the action of the district attorneys in criminal cases by general regulation.** His power must be exercised by giving particular instructions in particular cases and based on the facts of such cases. (*Fish v. U. S.*, 36 Fed. Rep., 677.)

**Instructions to district attorneys in naval cases.**—In cases in which persons in the naval service apply for writs of habeas corpus, it is the practice of the Attorney General, upon request of the Secretary of the Navy, to instruct the United States attorney for the district in which the proceeding is instituted, to render all necessary assistance to the officer upon whom the writ is served in order to protect the interests of the Government. (File 26522; G. O. 121, Sept. 17, 1914.)

Similar instructions are issued by the Attorney General in other cases of legal proceedings instituted against officers of the Navy as the result of official acts performed by them. (File 204-04, Jan. 15, 1904, suit of Paymaster Robt. B. Rodney, retired, against Capt. Sam. C. Lemly, Judge Advocate General; file 27231-8:6, Feb. 6, 1911, mandamus proceeding by Capt. Jefferson F. Moser, U. S. N., retired, against Hon. George von L. Meyer, Secretary of the Navy; file 26522-19:4, December 3, 1912, suit of W. W. Dickey, chief commissary steward, against Rear Admiral Doyle, Capt. Huse, Capt. Welles, Capt. Quimby, U. S. N., and Capt. Marix, U. S. M. C.; file 28478-2:1, suit of Benj. B. Abrahams against First Lieut. Howard C. Judson, U. S. M. C.; see also, 9 Op. Atty. Gen., 51.)

In cases in which persons fraudulently impersonate officers or enlisted men of the Navy, the Attorney General causes criminal prosecutions to be instituted by the United States attorneys where the matter is brought to his attention by the Secretary of the Navy (file 21355); and appropriate instructions are issued by him to district attorneys in other classes of cases concerning the Navy Department, such as reported violations of the 8-hour law by contractors (file 10107), etc.

In trials before courts-martial the Attorney General, upon request of the Secretary of the Navy in special cases, has instructed a United States attorney to assist the judge advocate (file 26251-5816:2); and has issued similar instructions in cases under investigation by courts of inquiry (file 14625-183:1; 9608-44:4. See also note to sec. 189, R. S.).

The Attorney General, upon request of the Secretary of the Navy, has instructed a United

States attorney to assist in the prosecution of a civil suit brought by a chief petty officer against private parties for discrimination against the naval uniform. (File 5421-3; see also file 7657-330.)

The Secretary of the Navy will not request the Attorney General to instruct United States attorneys to institute criminal proceedings against applicants for enlistment in the Marine Corps alleged to have fraudulently obtained Government transportation, it appearing that such attorneys have declined to prosecute these cases, and that the necessity for proceedings in the civil courts might be obviated by enlisting the men before furnishing them with transportation, thereby subjecting them to the jurisdiction of naval courts-martial. (File 7657-180.)

Where an officer asking that legal assistance be furnished him has failed to give the full facts of the case to the Navy Department, although afforded ample opportunity to do so, and in consequence the department has not sufficient information to enable it to act intelligently upon the request, the case is not a proper one for reference to the Attorney General. (File 26262-1705:3, May 21, 1915.)

The Attorney General can not instruct a United States attorney to appear in a State court to assist in the prosecution of a private citizen charged with killing a person in the naval service; it must be assumed in the absence of facts tending to show the contrary that the State authorities will do their full duty in the matter; and attempted interference with the State authorities would be improper. (File 26250-340:3, June 11, 1912, following letter of Attorney General, Apr. 18, 1912, file 26250-340:2; 7657-374.)

Although the Attorney General may entertain doubt whether, in view of the peculiar circumstances of hardship in a particular case, it is desirable to proceed with a criminal prosecution instituted at the instance of the Navy Department, he will nevertheless direct the United States attorney to proceed with the case if in the opinion of the Secretary of the Navy the interests of the Navy Department render it desirable that such a prosecution be had. (File 5939-6, Feb. 12, 1907.) [The Secretary of the Navy concurring in the recommendation of the United States attorney in this case, the Attorney General authorized the latter to dismiss the case, which was a prosecution for perjury against a former enlisted man who had been discharged from the Marine Corps upon writ of habeas corpus on account of fraudulent enlistment. (File 5939-7, Feb. 18, 1907.)]

**Instructions to marshals.**—The Attorney General declines to instruct United States marshals to apprehend and return deserters from the Navy where Congress has not seen fit to confer such authority upon civil officers. (File 5621-1, Nov. 17, 1906. For subsequent legislation on this subject see act Feb. 16, 1909, sec. 15, 35 Stat., 622.)

**Sec. 363. [Retaining counsel to aid district attorneys.]** The Attorney-General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of



their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings.—(2 Aug., 1861, c. 37, s. 2, v. 12, p. 285. 3 Mar., 1869, c. 121, s. 1, v. 15, pp. 283, 294. 10 April, 1869, c. 25, v. 16, p. 46. 22 June, 1870, c. 150, s. 16, v. 16, p. 164.)

See note to section 366, Revised Statutes.

**Sec. 364. [Attendance of counsel to be provided by Attorney-General.]** Whenever the head of a Department or Bureau gives the Attorney-General due notice that the interests of the United States require the service of counsel upon the examination of witnesses touching any claim, or upon the legal investigation of any claim, pending in such Department or Bureau, the Attorney-General shall provide for such service.—14 Feb., 1871, c. 51, s. 3, v. 16, p. 412.)

A similar provision is contained in section 187, Revised Statutes.

The object of these statutory provisions (secs. 363, 364, and 365, R. S.) is manifest. While giving the Attorney General full power to employ counsel for the United States to assist those upon whom regularly devolve the duty of representing the Government in the courts without special compensation, Congress intended to restrict the exercise of that power to the extent indicated in section 365. It was left to that officer to determine whether the public interests required the employment of special counsel, but that the discretion given

him might not be abused and that unnecessary expense might be avoided it was declared (sec. 365) that except in the cases of the respective district attorneys and assistant district attorneys no compensation should be allowed to any person as an attorney or counsel for the United States unless specially authorized by law, and then *only* on the certificate of the Attorney General that such services were actually rendered and that the same could not have been performed by the Attorney General or by the Solicitor General or by the officers of the Department of Justice or by the district attorneys. (U. S. v. Crosthwaite, 168 U. S., 375, 379.)

**Sec. 365. [Counsel fees restricted.]** No compensation shall hereafter be allowed to any person, besides the respective district attorneys and assistant district attorneys for services as an attorney or counselor to the United States, or to any branch or Department of the Government thereof, except in cases specially authorized by law, and then only on the certificate of the Attorney-General that such services were actually rendered, and that the same could not be performed by the Attorney-General, or Solicitor-General, or the officers of the Department of Justice, or by the district attorneys.—(22 June, 1870, c. 150, s. 17, v. 16, p. 164.)

See note to section 364, Revised Statutes.

**Sec. 366. [Appointment and oath of special attorneys or counsel.]** Every attorney or counselor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such Department, as a special assistant to the Attorney-General, or to some one of the district attorneys, as the nature of the appointment may require; and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law.—(22 June, 1870, c. 150, s. 17, v. 16, p. 164.)

See section 189, Revised Statutes, and note thereto.

**Counsel employed in foreign country** to defend master of a United States naval auxiliary in suit for collision, not required to take oath of office. File 4729-18. (See note to sec. 189, R. S.)

**Sections 363 and 366 must be construed together** and as referring to the same class of

special assistants. They do not authorize the Attorney General to appoint special assistants to a district attorney having the authority or right to appear before and participate in the proceedings of a grand jury. (U. S. v. Chemical Co., 163 Fed. Rep., 66; but see note to sec. 359, R. S.)

**Sec. 367. [Interest of United States in pending suits—who may attend to.]** The Solicitor-General, or any officer of the Department of Justice, may be sent by the Attorney-General to any State or District in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States.—(22 June, 1870, c. 150, s. 5, v. 16, p. 162.)

See note to section 360, Revised Statutes.

**Sec. 383. [Publication of opinions.]** The Attorney-General shall from time to time cause to be edited, and printed at the Government Printing-Office, an edition of one thousand copies of such of the opinions of the law-officers herein authorized to be given as he may deem valuable for preservation in volumes, which shall be, as to size, quality of paper, printing, and binding, of uniform style and appearance, as nearly as practicable, with volume eight of such opinions, published, by Robert Farnham, in the year eighteen hundred and sixty-eight. Each volume shall contain proper head-notes, a complete and full index, and such foot-notes as the Attorney-General may approve. Such volumes shall be distributed in such manner as the Attorney-General may from time to time prescribe.—(22 June, 1870, c. 150, s. 18, v. 16, p. 165.)

<p>The opinions of the successive Attorneys General, possessed of greater or less amount of legal acumen, acquirement, and experience, have come to constitute a body of legal precedents and exposition, having author-</p>	<p>ity the same in kind if not the same in degree with decisions of the courts of justice. (6 Op. Atty. Gen., 326, 334. See note to sec. 356, R. S., as to weight of Attorney General's opinions.)</p>
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# TITLE IX.

## THE POST-OFFICE DEPARTMENT.

Sec.

- 388. Establishment of Post-Office Department.
- 391. Oath of office.
- 392. Oath, before whom taken.

Sec.

- 396. Duties of Postmaster-General.
- 398. Postal arrangements with foreign countries.

**Sec. 388. [Establishment of Post-Office Department.]** There shall be at the seat of Government an Executive Department to be known as the Post-Office Department, and a Postmaster-General, who shall be the head thereof, and who shall be appointed by the President, by and with the advice and consent of the Senate, and who may be removed in the same manner; and the term of the Postmaster-General shall be for and during the term of the President by whom he is appointed, and for one month thereafter, unless sooner removed.—(8 May, 1794, c. 23, s. 3, v. 1, p. 357; 8 June, 1872, c. 335, ss. 1, 2, v. 17, p. 283.)

Envelopes for use by all executive departments and branches of the service under their jurisdiction shall be contracted for by the Postmaster General for periods not exceeding four years, such envelopes to be plain or printed as may be prescribed by the department making the requisition. (Act June 26, 1906, 34 Stat., 476.)

History and growth of executive departments—see note to section 158, Revised Statutes.

Navy mail clerks and assistant navy mail clerks, appointed from enlisted men of the Navy and Marine Corps, as to their duties as such clerks shall be “governed by the postal laws and regulations of the United States.” (Act May 27, 1908, 35 Stat., 417, as amended by acts Aug. 24, 1912, 37 Stat., 554, Aug. 24, 1912, sec. 11, 37 Stat., 560, Mar. 4, 1917, 39 Stat., 1188, and July 1, 1918, 40 Stat., 718.)

Ocean mail vessels are to be constructed according to plans approved by the Secretary of the Navy with reference to their conversion into naval auxiliary cruisers; no vessel to be employed by the Postmaster General in such service which is not approved by the Secretary of the Navy. (Act Mar. 3, 1891, sec. 4, 26 Stat., 831.)

Ocean mail vessels may be taken by the United States and used as transports or cruisers, upon payment to owners of the full actual value. (Act Mar. 3, 1891, sec. 9, 26 Stat., 832.)

Officers of the Navy may be detailed by Secretary of the Navy for duty on ocean mail vessels, if accepted by the contractor, and while so employed they shall receive furlough pay from the Government. (Act Mar. 3, 1891, sec. 7, 26 Stat., 832.)

Penalty envelopes: Letters, packages, etc., relating exclusively to business of the Gov-

ernment of the United States may be transmitted free through the mail (act Mar. 3, 1877, sec. 5, 19 Stat., 335). The envelopes of such matter in all cases shall bear appropriate indorsements containing the proper designation of the office from which or officer from whom the same are transmitted, with a statement of the penalty for their misuse. (Act Mar. 3, 1879, sec. 29, 20 Stat., 362, amended by act July 5, 1884, sec. 3, 23 Stat., 158. See Art. 5481, Naval Instructions, 1913. See also note to sec. 398, R. S., file 25885-6, and file 10726-15, May 1, 1914.)

Penalty envelopes: Any department or officer authorized to use penalty envelopes may inclose them with return address to persons from whom official information is desired. (Act Mar. 3, 1879, sec. 29, 20 Stat., 362, amended by act July 5, 1884, sec. 3, 23 Stat., 158.) But such envelopes shall not be furnished for use to contractors with the Government or to enable private persons or concerns to send free reports, etc., which they are required by law to make. (Sec. 500, “Postal Laws and Regulations,” 1913.)

Penalty envelopes: No article or package shall be admitted to the mails under the penalty privilege unless it would be entitled to admission to the mails under laws requiring payment of postage. (Act June 26, 1906, 34 Stat., 477.)

Penalty envelopes: Lending or permitting use of frank by or for benefit of any committee, organization, or association, other than committees composed of members of Congress, declared unlawful. (Act June 26, 1906, 34 Stat., 477.) Fraudulent use of official envelopes punishable by fine of not more than \$300. (Criminal Code, act Mar. 4, 1909, sec. 227, 35 Stat., 1134.)

President authorized to use armed forces to prevent obstruction of mails during existing war. (Act Aug. 10, 1917, 40 Stat., 272.)

Registered mail: Letters or packages may be registered by executive departments and bureaus without payment of registry fee. (Act Mar. 3, 1879, sec. 29, 20 Stat., 362, amended by act July 5, 1884, sec. 3, 23 Stat., 158.)

Soldiers, sailors, and marines in service of the United States, may transmit unpaid and duly certified letters to their destination, under regulations prescribed by the Postmaster General, to be paid for on delivery. (Act Mar. 3, 1879, sec. 9, 20 Stat., 358.) During the present war such letters written by soldiers, sailors and marines in a foreign country may be mailed free of postage. (Act Oct. 3, 1917, 40 Stat., 327.)

**Sec. 391. [Oath of office.]** Before entering upon the duties of his office, and before he shall receive any salary, the Postmaster-General and each of the persons employed in the postal service shall respectively take and subscribe, before some magistrate or other competent officer, the following oath: "I, A. B., do solemnly swear (or affirm) that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of post-offices and post-roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control: So help me, God."—(8 June, 1872, c. 335, s. 15, v. 17, p. 287; 5 Mar., 1874, c. 46, v. 18, p. 19.)

Enlisted men of the Navy or Marine Corps, designated as navy mail clerks or assistant navy mail clerks, are required by law to "take the oath of office prescribed for employees of the Postal Service." (Act May 27, 1908, 35 Stat., 417, as amended by acts Aug. 24, 1912, 37 Stat., 554, Aug. 24, 1912, sec. 11, 37 Stat., 560, Mar. 4, 1917, 39 Stat., 1188, and July 1, 1918, 40 Stat., 718.) By Naval Instructions, 1913 (art. 5401 (4)), navy mail clerks and assistant navy mail clerks are required to take an oath of office which combines that prescribed in

section 1757, Revised Statutes, with that prescribed for the Postal Service. (See 18 Op. Att'y. Gen., 181. See also "Postal Laws and Regulations, sec. 153;" and see file 3980-1185, Jan. 15, 1916.)

"Every person employed in the Postal Service shall be subject to all penalties and forfeitures for the violation of the laws relating to such service, whether he has taken the oath of office or not." (Criminal Code, act Mar. 4, 1909, sec. 230, 35 Stat., 1134.)

For modification of this section, see note to section 392, Revised Statutes.

**Sec. 392. [Oath, before whom taken.]** Any officer, civil or military, holding a commission under the United States, is authorized to administer and certify the oath prescribed by the preceding section.—(8 June, 1872, c. 335, s. 15, v. 17, p. 287; 5 Mar., 1874, c. 46, v. 18, p. 19.)

As to persons in the naval service authorized to administer oaths, see section 183, Revised Statutes, and note thereto.

Naval Instructions, 1913, article 5401 (4), provides that the oath administered to navy mail clerks and assistant navy mail clerks shall be taken and subscribed "before a magistrate or commissioned officer of the Navy."

**Sections 391 and 392**, as printed above, are in the same language as these sections appear in the second edition of the Revised Statutes. However, by act of March 5, 1874 (18 Stat., 19), it was provided as follows: "That before entering upon the duties, and before they shall receive any salary, the Postmaster General, and all persons employed in the postal service, shall respectively take and subscribe before some magistrate or other competent officer authorized to administer oaths by the laws of the United States, or of any State or Territory, the following oath or affirmation: 'I, A. B. do solemnly swear (or affirm, as the case may be,) that I will faithfully perform all the duties required of me and abstain from everything

forbidden by the laws in relation to the establishment of post-offices and post-roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control; and I also further swear (or affirm) that I will support the Constitution of the United States; so help me God.' And this oath or affirmation may be taken before any officer civil or military holding a commission under the United States, and such officer is hereby authorized to administer and certify such oath or affirmation."

This act of March 5, 1874, is amendatory of sections 391 and 392, in so far as said act varies from those sections, this being provided for by section 5601, Revised Statutes. Also, by act of March 2, 1877 (19 Stat., 268), as amended by act of March 9, 1878 (20 Stat., 27), it was provided that the second edition of the Revised Statutes shall "not control, in case of any discrepancy, the effect of any original act as passed by Congress since the first day of December, eighteen hundred and seventy-three."



**Sec. 396. [Duties of Postmaster-General.]** It shall be the duty of the Postmaster-General:

First. To establish and discontinue post-offices.

Second. To instruct all persons in the postal service with reference to their duties.

Third. To decide on the forms of all official papers.

Fourth. To prescribe the manner of keeping and stating accounts.

Fifth. To enforce the prompt rendition of returns relative to accounts.

Sixth. To control, according to law, and subject to the settlement of the Sixth Auditor, all expenses incident to the service of the Department.

Seventh. To superintend the disposal of the moneys of the Department.

Eighth. To direct the manner in which balances shall be paid over; issue warrants to cover money into the Treasury; and to pay out the same.

Ninth. To superintend generally the business of the department, and execute all laws relative to the postal service. [See secs. 3660–3665, 3668, 3669.]—(8 June, 1872, c. 335, s. 6, v. 17, p. 285; 3 Mar., 1877, c. 103, s. 2, v. 19, p. 335; *Locke v. U. S.* 3 Mas., 446.)

The title of the “Sixth Auditor” was changed to “Auditor for the Post Office Department,” by act of July 31, 1894, section 3 (28 Stat., 205).

Navy mail clerks and assistant Navy mail clerks are to perform such postal duties as may

be authorized by the Postmaster-General, and to give bond in such penal sum as the Postmaster-General may prescribe. (Act May 27, 1908, 34 Stat., 417, as amended by act Aug. 24, 1912, secs. 3 and 11, 37 Stat., 554, 560.)

**Sec. 398. [Postal arrangements with foreign countries.]** For the purpose of making better postal arrangements with foreign countries, or to counteract their adverse measures affecting our postal intercourse with them, the Postmaster-General, by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions, and may reduce or increase the rates of postage on mail-matter conveyed between the United States and foreign countries.—(8 June, 1872, c. 335, s. 167, v. 17, p. 304.)

Articles 25 and 26 of the Universal Postal Convention, concerning the handling of closed mails to and from vessels of the Navy, are published in Naval Instructions, 1913, article 5442.

Customs regulations relating to mails are published in articles 5421 and 5423, Naval Instructions, 1913.

**Under the Universal Postal Convention** “official correspondence which is admissible to the domestic mails under penalty envelope or

label may also be dispatched in the same manner to Canada, Cuba, Mexico, the Republic of Panama, and to the city of Shanghai, China.” (Sec. 518, Postal Laws and Regulations, 1913; see also file 3980–1185, Jan. 15, 1916.)

Newfoundland is not a part of Canada, but a separate province of the British Empire; and official letters to Newfoundland are required to be prepaid. (File 7538–176, Aug. 2, 1915.)

See section 388, Revised Statutes, and laws noted thereunder.





## TITLE X.

### THE DEPARTMENT OF THE NAVY.

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Sec.  
 415. Establishment of the Department of the Navy.  
 416. Clerks and employees.  
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 423. Bureau of Construction and Repair.  
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Sec.  
 426. Bureau of Medicine and Surgery.  
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 434. Naval Observatory.  
 435. Meridians.  
 436. Nautical Almanac.

**Sec. 415. [Establishment of the Department of the Navy.]** There shall be at the seat of Government an Executive Department, to be known as the Department of the Navy, and a Secretary of the Navy, who shall be the head thereof.—(30 Apr., 1798, c. 35, s. 1, v. 1, p. 553.)

As to "origin and growth of executive departments," see note to section 158, Revised Statutes.

For "provisions applicable to all the executive departments," see Title IV, sections 158-198, Revised Statutes.

**The permanent "seat of Government"** is the District of Columbia (sec. 1795, R. S.). "All offices attached to the seat of Government shall be exercised in the District of Columbia, and not elsewhere, except as otherwise expressly provided by law" (sec. 1796, R. S.). In case of a contagious or epidemic disease at the seat of Government, the President is authorized to remove the public offices therefrom. (Sec. 4798, R. S.; see also secs. 34, 1776, 4797, and 4799, R. S.)

**The term "executive department"** refers only to what may be called the department proper located at Washington, and does not include those adjuncts of a department engaged wholly in field service. (4 Comp. Dec., 551; see also 5 Comp. Dec., 667; 7 Comp. Dec., 126.)

The several executive departments are by law established at the seat of Government; they have no existence elsewhere. Only those bureaus and offices can be deemed bureaus and offices in any of these departments which are constituted such by law of its organization. The department, with its bureaus or offices, is in the contemplation of the law an establishment distinct from the branches of the public service and the offices thereof which are under its supervision. (15 Op. Atty. Gen., 262, 267; 26 Op. Atty. Gen., 254.)

The Marine Corps headquarters is a part of the Naval Establishment, but it is not a part of the Navy Department as established at the seat of Government; it is under the supervision of the executive department, but that relation to the department is not the same as being a part of it. (11 Comp. Dec., 558; file 4600, Apr. 10, 1906; file 21686, Apr. 11, 1906.)

A clerk in a navy yard is not a clerk in an executive department, although the navy yard is under the supervision of one of the executive departments. (26 Op. Atty. Gen., 254.)

Employees of the navy yard and gun factory in Washington are under the Navy Department, but are not a part of an executive department. (11 Comp. Dec., 97.)

For other cases, see note to section 159, Revised Statutes.

**State, War, and Navy Building.**—The Navy Department was to occupy such rooms in the State, War, and Navy Building as were assigned for its use by a joint committee of Congress, pursuant to act of August 5, 1882, section 6 (22 Stat., 256). Reapportionment at any time of space in said building was authorized by act of May 10, 1916 (39 Stat., 94).

**Navy Department Annex.**—Additional quarters to be rented for the Navy Department, for a period not exceeding 10 years from July 1, 1913, at an annual rental of not exceeding \$30,000, were authorized to be contracted for by the Secretary of the Navy by act of March 4, 1913 (37 Stat., 771). [Such additional quarters, designated by law as the "Navy Department Annex, New York Avenue near Seventeenth Street Northwest," were occupied by the Navy

Department pursuant to the act cited, in lieu of quarters formerly used as an annex by the Navy Department and known as the "Mills Building."]

Temporary office buildings for use of the War and Navy Departments in Henry Park were authorized by act of October 6, 1917 (39 Stat., 368) and in Potomac Park by act of March 28, 1918 (40 Stat., 483).

A superintendent of the State, War, and Navy Department Building, to be detailed from the Engineer Corps of the Army or Navy, was authorized by act of March 3, 1883 (22 Stat., 553); and his duties were extended to include the "Navy Department Annex, or Mills Building," by act May 22, 1908 (35 Stat., 218), and to include temporary additional buildings by act of March 28, 1918 (40 Stat., 482, 483). (See notes to secs. 1390, 1413, and 1462, R. S.; and see act June 4, 1918, 40 Stat., 598).

The Secretaries of State, War, and Navy constitute a commission for the care and supervision of the State, War, and Navy Department Building; the duties of the superintendent of the building being discharged under their direction. (Act Mar. 3, 1883, 22 Stat., 553.)

Laws and regulations within the District of Columbia for protection of property and preservation of peace and order were extended to all public buildings and grounds belonging to the United States within the said district, by act of July 29, 1892, section 15 (27 Stat., 325).

Disorderly and unlawful conduct in public buildings within the District of Columbia, or the injury of pipes, hydrants, etc., therein, is punishable by fine of not more than \$50. (Act July 29, 1892, sec. 15, 27 Stat., 325.)

Public buildings not to be closed as mark of respect for deceased exofficials (act Mar. 3, 1893, sec. 4, 27 Stat., 715); nor to be draped in mourning (same act, sec. 3).

The Navy Department is required to be kept open during stated hours for the transaction of public business. (See sec. 162, R. S.)

**Buildings rented.**—Annual report to Congress of buildings rented is required of heads of departments by act of March 3, 1883 (22 Stat., 552); act of July 16, 1892 (27 Stat., 199); and act of May 1, 1913, section 3 (38 Stat., 3).

Contracts for the renting of buildings in Washington are prohibited in the absence of specific authority (Act Mar. 3, 1877, 19 Stat., 370).

"Whenever buildings are rented for public use in the District of Columbia, the executive departments are authorized, whenever it shall be advantageous to the public interest, to rent others in their stead: *Provided*, That no increase in the number of buildings now in use, nor in the amounts paid for rent, shall result therefrom." (Act Aug. 5, 1882, 22 Stat., 241.)

Heads of departments are authorized to contract for the lease of modern fireproof storage accommodations in the District of Columbia payable from appropriations for rent of buildings for their departments. (Act Mar. 2, 1913, 37 Stat., 718.)

The Department of the Navy was originally established by act of April 30, 1798 (1 Stat., 553). Prior to that date its duties were discharged by the Secretary of War. (See note to sec. 158, R. S.)

The designation, "Navy Department," instead of "Department of the Navy," is now exclusively used by Congress in legislation relating to this department.

The Department of the Navy is sixth in order of precedence among the executive departments. (Sec. 158, R. S.)

**Not a naval station.**—The Navy Department, Washington, D. C., is not a naval station within the meaning of section 1386, Revised Statutes [now repealed] allowing clerks to "paymasters at stations." The word "station" as used in that section means "naval station." (13 Comp. Dec., 693.)

**Secretary of the Navy.**—The compensation of the Secretary of the Navy is fixed at \$12,000 a year, by act of February 26, 1907 (34 Stat., 993). (See note to section 160, R. S.)

The statutes do not provide by whom the Secretary of the Navy is to be appointed. In the absence of such a provision, his appointment is vested in the President, by and with the advice and consent of the Senate. (See note to Constitution, Art. II, sec. 2, clause 2. In the cases of the Postmaster General, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor, it is specifically provided by statute that they are to be appointed by the President, by and with the advice and consent of the Senate. See sec. 388, R. S., and acts of Feb. 9, 1889, 25 Stat., 659; Feb. 14, 1903, 32 Stat., 825; and Mar. 4, 1913, 37 Stat., 736.)

The Secretary of the Navy is required to take the oath of office prescribed by section 1757, Revised Statutes, which applies to all persons appointed to any office of honor or profit in the civil, military, or naval service. (See act May 13, 1884, sec. 2, 23 Stat., 22.)

The term for which the Secretary of the Navy is appointed is not fixed by statute. [The law establishing the Department of Commerce and Labor (now Department of Commerce) provided for the appointment of a head of that department, "whose term and tenure of office shall be like that of the heads of the other executive departments." (Act Feb. 14, 1903, 32 Stat., 825). A similar provision was embodied in the act creating the Department of Labor. (Act Mar. 4, 1913, 37 Stat., 736.) Section 388, Revised Statutes, provided that the term of the Postmaster General shall be for and during the term of the President by whom appointed, and one month thereafter, unless sooner removed.]

The Secretary of the Navy is removable by the President: "When the Navy Department was established in the year 1798 (1 Stat., 553), provision is made for the charge and custody of the books, records, and documents of the department in case of vacancy in the office of Secretary by removal or otherwise. It is not here said by removal by the President, as is done with respect to the heads of the other departments; and yet there can be no doubt that he holds his office by the same tenure as the other Secretaries and is removable by the President. The change of phraseology arose, probably, from its having become the settled and well understood construction of the Constitution that the power of removal was vested in the President alone in such cases, although the appointment of the officer was by the President and Senate."



(Matter of Hennen, 13 Pet., 259. See also note to Constitution, Art. II, sec. 2, clause 2.)

In case of the death, resignation, absence, or sickness of the Secretary of the Navy, unless otherwise directed by the President, the duties of the office devolve upon the Assistant Secretary of the Navy (sec. 177, R. S.). During the temporary absence of the Secretary and the Assistant Secretary of the Navy, the Chief of Naval Operations shall be next in succession to act as Secretary of the Navy. (Act Mar. 3, 1915, 38 Stat., 929, amended by act Aug. 29, 1916, 39 Stat., 558.) The President, however, may direct some other officer in the Navy Department, or in some other department, to perform the duties of the Secretary of the Navy (sec. 179, R. S.). But neither the Assistant Secretary of the Navy nor any other officer designated by the President, may perform the duties of the Secretary of the Navy, in case of the latter's death or resignation, for a longer period than 30 days (sec. 180, R. S.); except where the vacancy happens during a recess of the Senate (sec. 181, R. S.). The officer temporarily performing the duties of the Secretary of the Navy is not thereby entitled to additional compensation (sec. 182, R. S.).

During the temporary absence of the Secretary and Assistant Secretary of the Navy and the Chief of Naval Operations the duties of the Secretary of the Navy, by direction of the President, are to be performed by the following designated persons, in the order named: The Chief of the Bureau of Navigation; in his absence, the Chief of the Bureau of Ordnance; and in the absence of those two, the Chief of the Bureau of Engineering. (File 1159-765, Bu. Nav., July 2, 1915; Navy Regs., 1920, art. 392, as amended; see also file 22724-40, Apr. 24, 1919.)

Officers of the Navy on duty in the Navy Department as aids or advisers of the Secretary of the Navy, but who do not hold any office *in the department* to which they have been appointed pursuant to law, can not be legally designated by the President to act as Secretary of the Navy during the latter's absence. While these aids, as rear admirals, captains, or commanders, are officers in the public service of the Government, they are not officers in the department eligible for these temporary appointments, and do not come within the class designated in section 179, Revised Statutes. They perform no duties imposed upon them by law; they hold no office in the department created by act of Congress; they are agents appointed by the Secretary, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. There is no more authority to authorize them to perform the duties of the Secretary of the Navy than there is to authorize any officer of the Navy not connected directly with the business of the department. (28 Op. Atty. Gen., 95.) [The "aids" referred to in this opinion, namely, "Aid for Operations," "Aid for Personnel," "Aid for Material," and "Aid for Inspections," were authorized by Changes in Navy Regulations No. 6, of November 18, 1909, revoked by Changes in Navy Regulations No. 5, July 15, 1915 by which latter Changes their duties were transferred to other officers.]

Officers of the Navy are appointed, by provision of law, to perform duties in the Navy Department which constitute them officers in the department, as, for example, the chiefs of bureaus provided for by section 421, Revised Statutes. These bureau chiefs are officers holding offices in the Navy Department which have been created by law, and are within the class designated in section 179, Revised Statutes, as eligible for appointment to temporary vacancies in the office of the Secretary of the Navy. (28 Op. Atty. Gen., 95.)

For other decisions concerning officers temporarily acting as Secretary of the Navy, see notes to sections 177-182 and 868, Revised Statutes.

"It is very clear that the office of Secretary of the Navy is a civil office. Congress has not attempted to confine the appointing power to any class or profession in choosing the incumbent for that position." (18 Op. Atty. Gen., 176. See also *U. S. v. Burns*, 12 Wall., 246, holding that the Secretary of War "is not in the military service," but, "on the contrary, is a civil officer"; and see 1 Op. Atty. Gen., 457, holding that the Secretary of War is not required to perform duties in the field, does not compose any part of the Army, and has no service to perform that may not be done at the seat of government.)

The Secretary of the Navy is sixth in order of succession to the powers and duties of the Presidency, in case of the removal, death, resignation, or inability of both the President and Vice President (act of Jan. 19, 1886, 24 Stat., 1); he is ex officio a member of the Smithsonian Institution (sec. 5579, R. S., as amended); is a member of the Council of National Defense (act Aug. 29, 1916, 39 Stat., 649), and of the Commission for Memorial to John Ericsson (act Aug. 31, 1916, 39 Stat., 671); is to exercise control of the Aircraft Board (act Oct. 1, 1917, 40 Stat., 296); is privileged to draw books from the Library of Congress (sec. 94, R. S.); and is entitled to a set of the Supreme Court Reports for official use, to be preserved and turned over to his successor in office (sec. 227, Judicial Code, act Mar. 3, 1911, 36 Stat., 1154.)

As to duties of the Secretary of the Navy, see sections 417 and 418, Revised Statutes, and notes thereto.

For decisions relating generally to heads of departments, see notes to Constitution, Article II, section 2, clause 1; Article II, section 1, clause 1; and section 158, Revised Statutes.

**Assistant Secretary of the Navy.**—The office of "Assistant Secretary of the Navy" was created by act of July 31, 1861 (12 Stat., 282), the duties thereof to be such as were prescribed by the Secretary of the Navy or required by law. An additional Assistant Secretary of the Navy was authorized, to serve for a period of six months, by act of May 26, 1866 (14 Stat., 54). The office of Assistant Secretary of the Navy was abolished by act of March 3, 1869 (15 Stat., 296). An Assistant Secretary of the Navy was again authorized by act of August 5, 1882 (22 Stat., 243), which was repealed by act of March 3, 1883 (22 Stat., 550) [no appointment having in the meantime been made].

The present law is contained in the act of July 11, 1890 (26 Stat., 254), which provides for

"an Assistant Secretary of the Navy, to be appointed from civil life by the President, by and with the advice and consent of the Senate"; and the act of March 3, 1891 (26 Stat., 934), which provides that the Assistant Secretary of the Navy shall "perform such duties as may be prescribed by the Secretary of the Navy or required by law."

It has been found in regard to the heads of departments that it is impossible for a single individual to perform in person all the duties imposed on him by his office. Hence, statutes have been made creating the office of assistant secretaries for all the heads of departments. It would be a very singular doctrine, and subversive of the purposes for which these latter offices were created, if their acts are to be held of no force until ratified by the principal Secretary or head of the department. It was to relieve the overburdened principal of some part of those duties that the office of assistant was created. (*Parish v. U. S.*, 100 U. S., 504; *McCullum v. U. S.*, 17 Ct. Cls., 101.)

The duties of these assistants are generally not specifically defined by law, but are left to the direction and regulation of superior officers. Such assistants are supposed to have the confidence of those immediately above them and to be officially engaged in carrying out the will of their principals in the details of the work of the department in which they are employed. When their acts, decisions, or directions are reduced to writing, signed by them in their official capacity, filed or recorded among the archives of the department, and do not appear to have been revoked, annulled, or modified by the head of the department, they must be held, in the absence of fraud, mistake, or irregularity, to have been done within the scope of the authority of the assistant, and to be as binding on the Government as though expressly ordered by the superior. Especially will this be held when copies of such written documents are sent out by the head of the department in which they are found, without objection on his part to their having been made in the due and regular course of business under his control. (*McCullum v. U. S.*, 17 Ct. Cls., 101.)

A statute (sec. 245, R. S.) providing that the Assistant Secretary of a department shall perform certain specified duties, and such other duties as may be prescribed by the Secretary or by law, does not confine the powers of the assistant to duties of a like nature with those

enumerated, especially when read in connection with sections 161 and 177, Revised Statutes, which impose more enlarged duties in certain contingencies. (*Shillito Co. v. McClung*, 51 Fed. Rep., 868.)

Where the law provides that the Assistant Secretary in a department is to perform such duties "as shall be prescribed by the Secretary, or may be required by law," it empowers the Secretary to make the assistant, as it were, his deputy in all things. So long as the powers delegated to the assistant by his superior remain unrevoked, the authority of the former is coordinate and concurrent with that of the latter. As to the authority so prescribed the Assistant Secretary has the full power of the Secretary himself. Accordingly, the Assistant Secretary, while in the exercise of authority prescribed for him by the Secretary, is authorized to give orders for purchases payable from the contingent fund and to approve vouchers therefor, although under section 3683, Revised Statutes, heads of departments are alone authorized to give such orders and approve such vouchers. (18 Op. Atty. Gen., 432, modifying 18 Op. Atty. Gen., 424.)

So long as the powers delegated to the Assistant Secretary by his superior remain unrevoked, the authority of the former is coordinate and concurrent with that of the latter. When the assistant acts at a time the Secretary is not absent or sick, under a regulation made by the Secretary prescribing his powers and duties, he should sign with his own proper official designation. When the Secretary is absent or sick, if the assistant is in charge of the department in pursuance of sections 177 or 179, Revised Statutes, he should sign as *Acting Secretary*. (19 Op. Atty. Gen., 133.)

As to legal proceedings which may be instituted in the case of an officer who signs as "Acting Secretary" while the Secretary is at the department, see note to section 868, Revised Statutes.

An officer temporarily performing the duties of his superior in accordance with law is authorized to serve as member of a board which by statute included his superior in its membership. (20 Op. Atty. Gen., 483; see also file 22724-40, Apr. 24, 1919.)

For other decisions as to authority of Assistant Secretary, see note to section 177, Revised Statutes.

#### Sec. 416. [Clerks and Employees.

This section provided as follows:

"Sec. 416. There shall be in the Department of the Navy:

"One chief clerk, at a salary of two thousand five hundred dollars a year, so long as there is no Assistant Secretary of the Navy, and at a salary of two thousand two hundred dollars a year when there is an Assistant Secretary of the Navy.

"One disbursing clerk.

"One superintendent of the Navy Department building, at a salary of two hundred and fifty dollars a year.

"In the Bureau of Yards and Docks:

"One civil engineer, at a salary of three thousand dollars a year.

#### Repealed.]

"One chief clerk, at a salary of one thousand eight hundred dollars a year.

"One draughtsman, at a salary of one thousand eight hundred dollars a year.

"In the Bureau of Equipment and Recruiting:

"One chief clerk, at a salary of one thousand eight hundred dollars a year.

"In the Bureau of Construction and Repair:

"One chief clerk, at a salary of one thousand eight hundred dollars a year.

"One draughtsman, at a salary of one thousand eight hundred dollars a year.

"In the Bureau of Steam Engineering:

"One chief clerk, at a salary of one thousand eight hundred dollars a year.



"One draughtsman, at a salary of one thousand eight hundred dollars a year.

"One assistant draughtsman, at a salary of one thousand two hundred dollars a year.

"In the Bureau of Navigation:

"One chief clerk, at a salary of one thousand eight hundred dollars a year.

"In the Bureau of Ordnance:

"One chief clerk, at a salary of one thousand eight hundred dollars a year.

"One draughtsman, at a salary of one thousand eight hundred dollars a year.

"In the Bureau of Provisions and Clothing:

"One chief clerk, at a salary of one thousand eight hundred dollars a year.

"In the Bureau of Medicine and Surgery:

"One chief clerk, at a salary of one thousand eight hundred dollars a year." 5 July, 1862, c. 134, v. 12, p. 510; 2 July, 1864, c. 219, s. 4, v. 13, p. 373; 23 July, 1866, c. 208, s. 8, v. 14, p. 207; 3 Mar., 1871, c. 113, s. 3, v. 16, p. 494; 3 Mar., 1873, c. 226, s. 1, v. 17, pp. 501, 502.

**It is superseded and repealed** by the following laws:

Act August 5, 1882, section 4 (22 Stat., 255): "That no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employee shall after the first day of October next be employed in any of the executive departments, or subordinate bureaus or offices thereof at the seat of government, except only at such rates and in such numbers, respectively, as may be specifically appropriated for by Congress for such clerical and other personal services for each fiscal year; \* \* \* and after the first day of October next \* \* \* all laws and parts of laws authorizing the employment of officers, clerks, draughtsmen, copyists, messengers, assistant messengers, mechanics, watchmen, laborers, or other employees at a different rate of pay or in excess of the numbers authorized by appropriations made by Congress, be and they are hereby, repealed \* \* \*."

Act of August 23, 1912, section 5 (37 Stat., 414): "Any person violating section four of the legislative, executive, and judicial appropriation Act approved August fifth, eighteen hundred and eighty-two (Statutes at Large, volume twenty-two, page two hundred and fifty-five), shall be summarily removed from office, and may also upon conviction thereof be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year."

Act of July 16, 1914 (38 Stat., 509), making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year 1915: "That all laws or parts of laws to the extent they are inconsistent with rates of salaries or compensation appropriated by this Act are repealed, and the rates of salaries or compensation of officers or employees herein appropriated shall constitute the rate of salary or compensation of such officers or employees, respectively, until otherwise fixed by annual rate of appropriation or other law."

Act of March 4, 1915 (38 Stat., 1049, sec. 6), making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year 1916: "The officers and employees of the United States whose salaries are herein appropriated for are established and shall

continue from year to year to the extent they shall be appropriated for by Congress."

**Specific changes made by existing law** in this section of the Revised Statutes are as follows:

The position of "superintendent of the Navy Department building, at a salary of \$250 a year," is abolished, and an officer of the Army or Navy is detailed as superintendent of the State, War, and Navy Department Building, pursuant to act of March 3, 1883 (22 Stat., 553), his duties being performed under the supervision of a commission consisting of the Secretaries of State, War, and Navy (same act), and embracing the "Navy Department Annex," pursuant to act of May 22, 1908 (35 Stat., 218), and subsequent appropriations in the annual legislative, executive, and judicial appropriation act.

The Bureau of Equipment and Recruiting was designated as Bureau of Equipment in annual appropriation acts commencing with the fiscal year 1892. By naval appropriation acts for the fiscal years 1912, 1913, and 1914 provision was made for distribution of the duties, funds, and employees of the Bureau of Equipment among the other bureaus and offices of the Navy Department, and by act of June 30, 1914 (38 Stat., 408), the Bureau of Equipment was abolished.

The Bureau of Provisions and Clothing was designated as Bureau of Supplies and Accounts by act of July 19, 1892 (27 Stat., 243, 245).

The Bureau of Steam Engineering was designated as the Bureau of Engineering by act of June 4, 1920 (41 Stat., 828).

The position of civil engineer in the Bureau of Yards and Docks, at \$3,000 per annum, was appropriated for in the legislative, executive, and judicial appropriation acts, including the act of March 3, 1873 (17 Stat., 501), but was omitted from the legislative, executive, and judicial appropriation act of June 20, 1874 (18 Stat., 102), and subsequent years. (See sec. 1413, R. S., and note thereto, concerning Civil Engineer Corps of the Navy.)

The chief clerk in the office of the Secretary of the Navy receives an annual salary of \$3,000, this increased compensation being first provided for by act of March 3, 1901 (31 Stat., 992). Prior to that act his salary was \$2,500 a year, although an Assistant Secretary of the Navy had been authorized, without interruption, since the act of July 11, 1890 (26 Stat., 254). Thus his salary was not reduced to \$2,200 a year "when there is an Assistant Secretary of the Navy," as provided in this section.

The disbursing clerk in the Navy Department received an annual salary of \$2,250 by the act of March 3, 1883 (22 Stat., 553) and subsequent acts, including the act of May 29, 1920 (41 Stat., 663). Specific provision for salary of a disbursing clerk in the Navy Department was omitted in the appropriation act of March 3, 1921 (41 Stat., 1282), the position of "disbursing officer," at \$3,000 per annum having in the meantime been created from lump sum appropriations. (See estimates of appropriations, 1922, p. 102.) As to appointment and compensation of disbursing clerks in the several departments, see section 176, Revised Statutes, and note thereto.

The chief clerks in the Bureaus of Yards and Docks, Construction and Repair, Engi-

neering, Navigation, Ordnance, and Medicine and Surgery have received an annual salary of \$2,250 since the act of March 4, 1913 (37 Stat., 768, 771).

The chief clerk in the Bureau of Supplies and Accounts was designated as "civilian assistant" and his compensation increased to \$2,500 by act of February 25, 1903 (32 Stat., 890).

An "appointment clerk," at \$1,800 per annum, was provided for in the office of the Secretary, Navy Department, by act of May 28, 1896 (29 Stat., 164), which was amended by act of June 8, 1896 (29 Stat., 285), providing for a "clerk in charge of civil employments and labor regulations at navy yards, who shall also perform the duties of appointment clerk of the Navy Department," at \$2,250 per annum. This latter provision was repeated, with an immaterial modification in language, in the acts of February 19, 1897, and March 15, 1898, but has since been omitted and is not now in force. An "appointment clerk," at \$2,000 per annum was appropriated for by act of May 10, 1916 (39 Stat., 94), and following years, until the act of March 1, 1919, (40 Stat., 1241), which increased the salary of the appointment clerk to \$2,250.

The following additional positions are specifically authorized in the Navy Department, at annual salaries in excess of \$1,800, by the legislative, executive, and judicial appropriation act of March 3, 1921 (41 Stat., 1282):

Office of the Secretary: Private secretary to Secretary, \$2,500; clerk to Secretary, \$2,250; private secretary to Assistant Secretary, \$2,400; clerk to Assistant Secretary, \$2,000; printing clerk, \$2,000.

Office of Solicitor: Solicitor, \$4,000; law clerks, one at \$2,500, one at \$2,400, one at \$2,250, and two at \$2,000 each.

Office of Naval Records and Library: Chief clerk, \$2,000.

Office of Judge Advocate General: Attorneys, two at \$2,500 each; chief law clerk, \$2,250; law clerks, one at \$2,200 and one at \$2,000.

Office of Chief of Naval Operations: Chief clerk, \$2,250.

Office of Director of Naval Communications, one at \$4,000, two at \$3,000 each, one at \$2,500, and three at \$1,900 each.

Bureau of Navigation: Clerks, one at \$2,200, two at \$2,000 each.

Hydrographic Office: Hydrographic engineer, \$3,000; assistants, one at \$2,200 and one at \$2,000; chief engraver, \$2,000.

Naval Observatory: Astronomers, one at \$3,200 and one at \$2,800; assistant astronomers, one at \$2,400 and one at \$2,000.

Nautical Almanac Office: Assistants in preparing for publication the American Ephemeris and Nautical Almanac, one at \$2,500 and one at \$2,000.

Bureau of Construction and Repair: Chief of section, \$2,000.

Bureau of Supplies and Accounts: Principal clerk, \$2,250; two chief bookkeepers, at \$2,000 each.

The minor positions specifically authorized in the various bureaus and offices of the Navy Department are set forth in detail in the annual legislative, executive, and judicial appropriation act. The same act, in addition, authorizes the employment of draftsmen and other

technical services in the Bureaus of Engineering, Construction and Repair, Ordnance, and Yards and Docks, to be paid for from the annual appropriations made by the naval appropriation act for "Engineering," "Construction and repair," "Ordnance and ordnance stores," and various appropriations and allotments under the Bureau of Yards and Docks. The number of employees so authorized from "lump-sum" appropriations is not specified, but it is provided that the rates of compensation to be paid such employees in the Bureaus of Engineering, Construction and Repair, and Ordnance shall not exceed those paid under similar authorization prior to January 1, 1920. The total amounts to be paid for this purpose are fixed at a definite sum each year, the amounts authorized for the fiscal year 1922 by the legislative, executive, and judicial appropriation act of March 3, 1921 (41 Stat., 1285, 1286), being as follows: Bureau of Engineering, \$190,000; Bureau of Construction and Repair, \$275,000; Bureau of Ordnance, \$70,000; Bureau of Yards and Docks, \$200,000. A statement of the persons employed from such lump-sum appropriations, their duties, and the compensation paid to each is required by a provision contained in the authorization therefor to "be made to Congress each year in the annual estimates." (See also Act Aug. 29, 1916, 39 Stat., 558.)

**Additional civil force in the Navy Department** "on account of the existing emergency," was authorized in various appropriation acts, commencing with the act of June 15, 1917 (40 Stat., 202).

**Lump-sum appropriations** are not available for payment of personal services at a rate of compensation in excess of that paid for the same or similar services during the preceding fiscal year; and no person employed at a specific salary can be transferred and paid from a lump-sum appropriation a rate of compensation greater than such specific salary. These restrictions are not applicable to mechanics, artisans, their helpers and assistants, laborers, or any other employees whose duties are of similar character and required in carrying on the various manufacturing or constructing operations of the Government. (Act Aug. 26, 1912, sec. 7, 37 Stat., 626, amended by act Mar. 4, 1913, sec. 4, 37 Stat., 790; see 20 Comp. Dec., 128; 20 Comp. Dec., 131; 20 Comp. Dec., 10; 19 Comp. Dec., 248. See also acts Oct. 6, 1917, 40 Stat., 383 and Mar. 28, 1918, 40 Stat., 498.)

**Restrictions on employment of clerical services.**—It is provided in the annual legislative, executive, and judicial appropriation act that "no part of any appropriations made for the naval service shall be expended for any of the purposes, including freight, herein provided for on account of the Navy Department in the District of Columbia, except for personal services in certain bureaus, as herein expressly authorized" (namely, the services of draftsmen and other technical services, as above mentioned, in the Bureaus of Engineering, Construction and Repair, Ordnance, and Yards and Docks). See, for example, act of March 3, 1921 (41 Stat., 1287).

It is also provided by the annual legislative, executive, and judicial appropriation act that personal services or other expenditures are not



to be authorized under the Hydrographic Office in the District of Columbia, except as appropriated for under the Navy Department in that act, or under appropriations for the public printing and binding. See, for example, act of March 3, 1921 (41 Stat., 1285).

It is also provided by the annual naval appropriation act "that no part of any sum appropriated by this act shall be used for any expense of the Navy Department at Washington, District of Columbia, unless specific authority is given by law for such expenditure." See, for example, act of June 4, 1920 (40 Stat., 833).

It is not lawful for the Secretary of the Navy to employ in the Navy Department at Washington, D. C., and pay out of appropriations for new ships, any civilian expert aids, additional draftsmen, writers, copyists, and model makers, except as specifically authorized. (Act Mar. 18, 1904, sec. 1, 33 Stat., 117.)

Civil employees paid from appropriations for the Naval Establishment or other branch of the public service outside of the District of Columbia, can not be detailed for duty in any division of any executive department in the District of Columbia. (Act June 22, 1906, sec. 6, 34 Stat., 449; similar provision is contained in act Aug. 5, 1882, sec. 4, 22 Stat., 255.) [But Washington may be chosen as a local headquarters by the "field force" of an executive department, provided such force is not used to augment the "departmental establishment" by engaging in departmental activities (21 Comp. Dec., 709).]

Persons in the classified service at Washington, District of Columbia (except the Department of Justice in certain cases), shall not be detailed for service outside of the District of Columbia, except for or in connection with work pertaining directly to the service at the seat of government of the Department or other Government establishment from which the detail is made. (Act Mar. 3, 1917, 39 Stat., 1121, repeated in legislative, executive and judicial appropriation acts for subsequent years.)

**As to detail of enlisted men for duty in an executive department,** see statutes cited above under "Restrictions on employment of clerical services," and see act of June 19, 1878, (20 Stat., 196), authorizing the employment of "not exceeding 10 enlisted men" in the office of the Chief of Ordnance, War Department. See also act of June 3, 1916 (39 Stat., 188, sec. 35), regarding employment of enlisted men in civil occupations.

**Officers of the Navy may be detailed for duty in the Navy Department,** but where such an officer on the active list is appointed to the office of draftsman in the Hydrographic Office he is not entitled to both salaries, although he holds both offices. In such case he is entitled to the larger salary when different salaries are attached to the two offices. (*Winchell v. U. S.*, 28 Ct. Cls., 30; 5 Comp. Dec., 885. See note to sec. 431 R. S.; and see 19 Op. Atty. Gen., 503; 28 Op. Atty. Gen., 95.)

Not exceeding four naval officers may be detailed as necessary to the Hydrographic Office by the Secretary of the Navy. (Act Mar. 4, 1917, 39 Stat., 1172. See note to sec. 431, R. S.)

"The Secretary of the Navy is authorized to detail such naval officers as may be neces-

sary to the Hydrographic Office". (Act July 1, 1918, 40 Stat., 708.)

**An officer on the retired list of the Navy** may take the civil-service examination, and his status on the retired list does not preclude him from accepting a clerical position, assuming the compensation of such position to be less than \$2,500 per annum, subject to possible recall to active duty. (File 4901-1904; 5650-1900; 4642-1903.)

A retired officer of the Navy whose retired pay amounts to \$2,500 per annum is within the prohibition of section 2 of the act of July 31, 1894 (28 Stat., 205), and is ineligible to hold office as clerk of class 3 under the Civil Service Commission. (29 Op. Atty. Gen., 503.)

A retired officer can not hold an office in the diplomatic or consular service. (Sec. 1440, R. S.; 15 Op. Atty. Gen., 306; *Badeau v. U. S.*, 130 U. S., 439.)

**The employment of retired enlisted men** of the Navy in civil positions under the United States is not contrary to any Federal law or Navy regulation. (File 7657-123, Dec. 29, 1911; file 7657-57.)

**See "Provisions applicable to all the executive departments,"** Title IV, sections 158-198, Revised Statutes, and particularly sections 166-170 relating to appointment, compensation, and distribution of clerks.

**Civilian employees at navy yards.**—For laws applicable to, see sections 1542 to 1546, Revised Statutes.

**Appointments made by Secretary of the Navy.**—"No person shall be employed at a per diem, monthly, or annual compensation and paid from the appropriation for the legislative, executive, and judicial expenses of the Government to do any kind of clerical, drafting, technical, messengers' or laborers' work, except after a written appointment by the Secretary of the Navy or with his approval in writing. Nor shall a civilian be employed to perform work of any character in the bureaus and offices of the department except by written authority of the Secretary of the Navy." (Naval Instructions, 1913, art. 52.)

**Appointments to office under the United States** may be made only by the President, by and with the advice and consent of the Senate, the President alone, the courts of law, or the heads of departments. (See Constitution, Art. II, sec. 2, clause 2, and note thereto.)

Congress has vested in the heads of departments the appointment of clerks, laborers, and other employees in their departments, and this power can not be delegated. (See sec. 169, R. S., and note thereto.)

**Oath of office.**—The oath to be taken by all persons elected or appointed to any office of honor or profit in the civil, military, or naval service, except the President, is that prescribed by section 1757, Revised Statutes. (See act May 13, 1884, sec. 2, 23 Stat., 22.) [A special oath of office is required to be taken by all persons employed in the postal service, by sections 391 and 392, Revised Statutes, as amended by act of Mar. 5, 1874 (18 Stat., 19).]

The oath of office may be taken before any officer who is authorized either by the laws of the United States or by local laws to administer oaths (sec. 1758, R. S.). The chief clerks

of the executive departments, and of the bureaus and offices thereof in Washington, D. C., are required, on application, to administer oaths to employees on appointment and promotion without charging therefor (act Aug. 29, 1890, 26 Stat., 371); and no officer or employee of any executive department who is also a notary public or otherwise authorized to administer oaths shall charge or accept any fee for administering the oath of office to employees in the same department on appointment or promotion (same act).

The oaths of office taken by persons appointed to office in any department shall be preserved among the files of such department (sec. 1759, R. S.).

As to persons authorized by law to administer oaths in connection with naval matters, see note to section 183, Revised Statutes.

**Judicial decisions concerning appointment and removal of employees.**—"The power to appoint carries the power to dismiss. The authorities on this proposition are too numerous to cite. \* \* \* The Government does not contract to keep its employees in its service if their services are not needed, and the right of the appointing power to dismiss at discretion exists with no general supervising power in the courts to review the exercise of such authority. \* \* \* This power of appointment and removal is discretionary in character, and without specific authority such power cannot be delegated. \* \* \* The interposition of the courts with the performance of the ordinary duties of an executive department is not within the power of the court." (Wheelock v. U. S., 46 Ct. Cls., 1.)

A court of equity has no jurisdiction over the appointment and removal of public officers. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law and is exercised either by certiorari, error, or appeal, or by mandamus, prohibition, quo warranto, or information in the nature of a writ of quo warranto, according to the circumstances of the case and the mode of procedure established by common law or by statute. (White v. Berry, 171 U. S., 366; see also Sawyer's case, 124 U. S., 200; Morgan v. Nunn, 84 Fed. Rep., 551; Couper v. Smyth, 84 Fed. Rep., 757; Page v. Moffett, 85 Fed. Rep., 38; Carr v. Gordon, 82 Fed. Rep., 373, 379; Taylor v. Kercheval, 82 Fed. Rep., 497, 499.)

A court of equity will not by injunction restrain an executive officer from making a wrongful removal of a subordinate appointee nor restrain the appointment of another. (Morgan v. Nunn, 84 Fed. Rep., 551.)

The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power. In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment. \* \* \* Unless therefore there be some specific provision to the contrary, the action of the Secretary of the

Interior in removing the petitioner from office on account of inefficiency is beyond review in the courts, either by mandamus to reinstate him or by compelling payment of salary as though he had not been removed. (Keim v. U. S., 177 U. S., 290.)

The courts have no power, by mandamus or otherwise, to review the action of the head of an executive department of the Government in removing a clerk from office, on the ground that the removal was not in accordance with civil-service rules requiring notice to be given and an opportunity to reply to charges, where the charge is that the clerk wrote and caused to be published a newspaper article derogatory to the President. (U. S. v. Taft, 24 App. D. C., 95.)

The power of appointment to the classified civil service of the United States carries with it the power of removal, which is unrestricted except as controlled by the civil-service act of January 16, 1883 (22 Stat., 403), which does not limit the power of removal except for the single cause of failure to contribute money or services to a political party. (U. S. v. Taft, 24 App. D. C., 95.—See other statutes relating to removal, noted below.)

**Honorably discharged soldiers or sailors.**—Section 1754, Revised Statutes, gives preference for appointment to persons honorably discharged from the military or naval service. The act of August 15, 1876 (19 Stat., 169, sec. 3), provides for preference in retention, when force is reduced, of "those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors." The legislative, executive, and judicial appropriation act of August 23, 1912, section 4 (37 Stat., 413), provides for a system of efficiency ratings to be established by the Civil Service Commission, and that no honorably discharged soldier or sailor whose record is rated good is to be discharged or dropped, or reduced in rank or salary in the event of reductions being made. The legislative, executive, and judicial appropriation act of March 4, 1915 (38 Stat., 1007), provides for the establishment of a Division of Efficiency for the purpose of carrying into effect the provisions of the act of 1912. The Army appropriation act of May 12, 1917 (40 Stat., 72), provides that employees of the Government who are members of the Officers' Reserve Corps shall, when relieved from duty, be restored to the positions held by them when ordered to duty.

The act of March 3, 1919, section 6 (40 Stat., 1293) provides that "hereafter in making appointments to clerical and other positions in the executive departments and in independent governmental establishments, preference shall be given to honorably discharged soldiers, sailors, and marines, and widows of such, if they are qualified to hold such positions." The act of March 1, 1919 (40 Stat., 1224) provides that "the period of time during which soldiers, sailors, and marines, both enlisted and drafted men, who prior to entering the service of their country, had a civil service status, and whose names appear upon the eligible list of the Civil Service Commission, shall not be counted against them in the determination of



their eligibility for appointment under the law, rules and regulations of the Civil Service Commission now in effect, and at the time of demobilization their civil-service status shall be the same as when they entered the service."

The act of February 25, 1919 (40 Stat., 1164), provided that "all former Government employees who have been drafted or enlisted in the military service of the United States in the war with Germany shall be reinstated on application to their former positions, if they have received an honorable discharge and are qualified to perform the duties of the position."

The act of July 11, 1919 (41 Stat., 142), provided that "all former Government employees who have entered the military or naval service of the United States in the war with the German Government shall be reinstated on application to their former positions if they have received an honorable discharge and are qualified to perform the duties of the position."

No thoughtful person questions the obligations which the Nation is under to those who have done faithful service in its Army or Navy. Congress has generously provided for the discharge of those obligations in a system of pensions more munificent than has ever before been known in the history of the world. But it would be an insult to the intelligence of Congress to suppose that it contemplated any degradation of the civil service by the appointment to or continuance in office of incompetent or inefficient clerks, simply because they had been honorably discharged from the military or naval service. (*Keim v. U. S.*, 177 U. S., 295.)

The act of 1876 provides for the retention of veterans who may be "equally qualified." Under this law a court could not enter an executive department, examine the acts of its head, inquire into the exercise of his discretion, and investigate as to causes of its exercise. (*Keim v. U. S.*, 33 Ct. Cls., 174; 177 U. S., 290.) The power of removal is a purely executive power, which is not intrusted to the judicial branch of the Government (same case).

The enactment of 1876 is not mandatory, and the courts can not review the action of the executive officers when they reduce the force of a department. The administrative officers charged with the authority must investigate and settle for themselves the matter of actual work done by various employees, by a comparison of one with another as to competency and attention to duty. (*Wheelock v. U. S.*, 46 Ct. Cls., 1, citing *Keim v. U. S.*, above; see also *Medrick v. U. S.*, 44 Ct. Cls., 469.)

Under former laws the courts had no power to review the action of the head of a department in discharging an employee for inefficiency. Whether that rule is changed by the act of August 23, 1912 (37 Stat., 413), not decided, as that act has not been made effective by the action of the Civil Service Commission as therein provided. (*Persing v. Daniels*, 43 App. D. C., 470. [In this connection, see act of March 4, 1915 (38 Stat. 1007), noted above.]

**Civil-service law and regulations.**—The civil-service law (act Jan. 16, 1883, 22 Stat., 403) was intended to provide a body of civil officers selected solely for competency and fitness, protect them against accountability to any political party, and prevent their discharge,

promotion, or degradation for giving or withholding political contributions; but it did not deprive the appointing power of any existing rights to remove or change in rank for other reasons. (*Carr v. Gordon*, 82 Fed. Rep., 373.)

An Executive order dated July 27, 1897, contained the following: "No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the department or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense." [Similar provisions since embodied in act of Aug. 24, 1912, section 6, 37 Stat., 555.] Notwithstanding this order an employee was removed by the Commissioner of Pensions without written charges filed against him and without notice or opportunity to make defense, but in consequence of the reduction of the clerical force required by law. *Held* that in legal contemplation the head of a department is an arm of the Executive, and the Pension Office is a branch of the Interior Department; an order sent out in the regular course of business from the appropriate executive department is the legal equivalent of the President's own order. The order which discontinued plaintiff's services was special in character and superseded the general order for the purposes of this case. When the head of the Pension Office exercises discretion as to capacity between clerks in his office, the exercise of his discretion can not be reviewed in the courts. (*Medrick v. U. S.*, 44 Ct. Cls., 469.)

The protection of the President's order of July 27, 1897, against removals from the civil service except upon written charges with opportunity for defense extends to an employee in the office of the United States Surveyor General in the State of Idaho. (*U. S. v. Wickersham*, 201 U. S., 390.)

The order of the President of July 27, 1897, prohibiting removals from positions subject to competitive examination except upon written charges and notice, is an administrative order regulating the conduct of the President's subordinates; but it has not the force of law and confers upon an incumbent no right to hold indefinitely, and no right of which a court of equity can take cognizance. (*Carr v. Gordon*, 82 Fed. Rep., 373.)

Neither Revised Statutes, section 1753, nor the civil-service act of January 16, 1883, puts any restrictions upon the power of removal from appointive offices, except for refusal to contribute to political funds or neglect to render political services; hence presidential rule 11, relating to the civil service and providing, as amended July 27, 1897, that no removal shall be made without giving the accused notice and an opportunity to make defense, has not such authority as law as confers upon the holder of an office a vested right thereto, with the right to invoke the equitable power of the courts to restrain his removal for violation of such rule. (*Page v. Moffett*, 85 Fed. Rep., 38.)

The civil-service law does not prohibit removal or discharge except for giving, withholding, or neglecting to make contributions of money for political purposes. (*Morgan v. Nunn*, 84 Fed. Rep., 551.)

**Removal of employee on probation.**—Neither the statutes nor the rules promulgated cast upon the Government the obligation of employing men on probation or in the permanent service whose services are not needed; and a probationer has no right to be retained for the full period of six months if his services are not needed. (*Brown v. U. S.*, 39 Ct. Cls., 255.)

In the absence of a statute or express contract binding the Government to employ a person for a definite period, his employment comes under the general rule of master and servant, that a person who is not hired for a specified time may be discharged when his services are no longer needed. (*Brown v. U. S.*, 39 Ct. Cls., 255.)

The civil-service laws and rules were enacted and promulgated to prevent the discharge of employees whose services are needed but who may be discharged because of other considerations than the welfare of the public service. (*Brown v. U. S.*, 39 Ct. Cls., 255.)

**Status of employee who refuses to resign.**—Where the head of a department makes a request for a resignation and it is not handed in, the officer forfeits no right either because of his failure to resign or because requested to do so. (*Knight v. U. S.*, 35 Ct. Cls., 129.)

**Neglect of duty as ground for removal.**—“A neglected duty often works as much against the interests of the Government as a duty wrongfully performed, and the Government has a right to demand and expect of its employees not merely competency but fidelity and attention to the duties of their positions.” (*Keim v. U. S.*, 177 U. S., 295.)

**Suspension of employees.**—The power to suspend an officer without compensation is incidental to the power to appoint and discharge. The exercise of this power enables the head of a department to retain an officer who otherwise would have to be discharged. (*Wertz v. U. S.*, 40 Ct. Cls., 397; 11 Comp. Dec., 570; see also file 2704-04; file 103-98.)

An order directing an officer appointed by the President to proceed to his home, notifying him that his daily pay will cease from and after the date of his arrival, does not discharge him from service. His status is that of an officer awaiting employment, and not entitled to his per diem compensation until employed. (*Wertz v. U. S.*, 40 Ct. Cls., 397.)

An employee can not recover compensation from the time the appointing power furloughs him, if the furlough be without pay, to the time the employee is restored to duty. There is nothing to prevent the head of a department from putting an employee on furlough without pay at any time when the exigencies of the service require it. (*Wheelock v. U. S.*, 46 Ct. Cls., 1, citing *Stillings v. U. S.*, 41 Ct. Cls., 61, and *U. S. v. Murray*, 100 U. S., 536.)

The head of a department may put an employee on furlough without pay at any time if the exigencies of the service require it. He may be dismissed absolutely, and it is difficult to see why, if this can be done, he may not be furloughed without pay, which is the effect of a partial dismissal. (*U. S. v. Murray*, 100 U. S., 536; see also 11 Comp. Dec., 560.)

The head of a department is authorized to suspend an employee from duty without pay, pending the investigation of charges against him, whether said employee is paid from lump-sum appropriations or is specifically appropriated for by law. (11 Comp. Dec., 560; 21 Comp. Dec., 478; see also 10 Comp. Dec., 361, 11 Comp. Dec., 665, 20 Comp. Dec., 505; file 6696-212:4.)

Where the suspension of an employee from duty is clearly wrongful, he is entitled to recover salary for the time of the suspension. (*Lellmann's case*, 37 Ct. Cls., 128; *Wickersham's case*, 201 U. S., 390, affirming 39 Ct. Cls., 558; see also *Medrick v. U. S.*, 44 Ct. Cls., 479.) But where there was probable cause for the suspension, the fact that the employee is restored to duty because on investigation the evidence is found insufficient to support the charges does not entitle him to recover pay for the period of the suspension. (11 Comp. Dec., 560; 11 Comp. Dec., 661; see also 11 Comp. Dec., 776.)

Where a clerk in the classified service was suspended and charges were preferred against him by a surveyor general, and the commissioner investigated the charges and ordered that the suspension be permanent, the action of the commissioner was in legal effect a dismissal and can not be reviewed by the judiciary. (*Lellmann v. U. S.*, 37 Ct. Cls., 128.)

**Investigation of charges.**—The head of any department is authorized to detail any officer or clerk in his department to investigate any irregularity or misconduct of any officer or agent of the United States under his jurisdiction; and such officer or clerk so detailed, or any officer of the Navy or Marine Corps detailed to conduct an investigation, is authorized to administer oaths to witnesses. (See sec. 183, R. S., as amended by act Feb. 13, 1911, 36 Stat. 898.)

Perjury committed by a witness in such investigation is punishable by fine and imprisonment. (Sec. 1251, Criminal Code, act Mar. 4, 1909, 35 Stat 1111.)

In the Navy Department investigations of employees have been conducted under section 183, Revised Statutes, as amended (see file 26263); while investigations of misconduct by employees at naval stations have been conducted by court of inquiry authorized by section 1624, Revised Statutes, articles 56-60 (see file 6692-212:3) or by a naval board of investigation (see file 26283-166; Ct. Inq. No. 6171).

No examination of witnesses, nor any trial or hearing is required by law prior to removal of an employee, except in the discretion of the officer making the removal (act Aug. 24, 1912, sec. 6, 37 Stat., 555), but the person accused is entitled to notice and copy of the charges, with reasonable time to answer same prior to his removal. (Same act.)

**Political contributions.**—A statute (act Aug. 15, 1876, 19 Stat., 169) prohibiting executive officers or employees of the United States from giving to or receiving from each other contributions for political purposes, was designed to promote efficiency and integrity in the discharge of official duties and is constitutional. (Ex



parte Curtis, 106 U. S., 371; affirming U. S. v. Curtis, 12 Fed. Rep., 824.)

**Increases in pay not promotion to new office.**—Where a clerk takes but one oath of office, receives but one letter of appointment, and during his whole period of service acts as a clerk in the same office, promotions, so-called, are but increases in pay and in no sense a promotion to a different office. (*Butler v. U. S.*, 47 Ct. Cls., 39.)

A new appointment is not made necessary merely by reason of an increase in the salary of an office. (29 Op. Atty. Gen., 116, citing 1 Comp. Dec., 267, 1 Comp. Dec., 313, 3 Comp. Dec., 336.)

Where a civilian dentist employed at the Naval Academy was by act of Congress given "the same official status, pay, and allowances" as an officer of the Army serving as dental surgeon at the Military Academy, it was held that the law was self-operative, and did not require any action by the appointing power or the Navy Department to give it effect; that it did not create a new office and accordingly that no appointment or commission was necessary or could properly be issued to the dentist in question under its provisions. (File 13707-25, Oct. 24, 1915, construing proviso in act Aug. 22, 1912, 37 Stat. 345. The following year Congress specifically provided for the appointment of this civilian dentist as "a dental surgeon in the Navy," (act Mar. 4, 1913, 37 Stat. 891), and a new appointment was issued to him accordingly.)

**Assignment of employees to duty.**—A court of equity ought not to control the discretion which, under existing statutes, the executive department has in all such matters as the assignment and detachment of employees from duty. Interference by the judicial department in such cases would lead to the utmost confusion in the management of executive affairs. (*White v. Berry*, 171 U. S., 366.)

**Employees doing duty at their homes.**—Where a female clerk in an executive department, in consideration of the sickness of her husband, is excused from attendance and is to have her work sent to her residence, if it be not sent she is bound to report to the department; if she neglects to report, her tenure can not be deemed to extend beyond the current month. (*Palmer v. U. S.*, 17 Ct. Cls., 230.)

**Extra pay on discharge.**—Clerks discharged without fault on their part, by reason of reductions in force made necessary at the close of a fiscal year, by special authority of Congress have been allowed two months' pay as a gratuity on discharge. (See joint resolution, June 23, 1874, 18 Stat., pt. 3, p. 289; *U. S. v. Murray*, 100 U. S., 536; *Schaeffer v. U. S.*, 11 Ct. Cls., 730.)

**Employees incapacitated for duty.**—The annual legislative, executive, and judicial appropriation act contains the following provision: "That the appropriations herein made for the officers, clerks, and persons employed in the public service shall not be available for the compensation of any persons incapacitated otherwise than temporarily for performing such service." (See, for example, act Mar. 3, 1917,

sec. 3, 39 Stat., 1121.) However, compensation may be paid in certain cases where employees are injured in course of employment. (Act Sept. 7, 1916, 39 Stat., 742.)

**As to distribution of clerks, temporary details, transfers between departments, etc.,** see sections 166 and 169, Revised Statutes, and references thereunder.

Under the provisions of the act of March 4, 1915 (33 Stat., 1084), when one bureau of the War or Navy Departments performs any service for another bureau of such departments, the head of the department for which the service is to be performed may cause its funds to be transferred on the books of the Treasury Department to the procuring department for direct expenditure by it. The funds so transferred are to be expended and accounted for under the rules and regulations of the department to which they are advanced. (21 Comp. Dec. 819; see also 22 Comp. Dec. 145, and sec. 3678, R. S.)

**Voluntary services** shall not be accepted, nor personal service employed in excess of that authorized by law, except in cases of sudden emergency involving loss of life or destruction of property. (Act May 1, 1884, 23 Stat., 17; act Mar. 3, 1905, 33 Stat., 1257; and act Feb. 27, 1906, 34 Stat., 49; see sec. 3679, R. S.)

**Use of contingent and miscellaneous appropriations** for clerical compensation is restricted by section 3682, Revised Statutes, and act of August 5, 1882, section 4 (22 Stat., 255).

**During the sessions of Congress** an additional clerk can not be employed in the office of the Judge Advocate General of the Navy, as allowed by section 171, Revised Statutes, as that section is repealed by later laws prohibiting employment of clerical services in excess of annual appropriations therefor. Additional clerk may be detailed to office of Judge Advocate General, if necessary, from some other office or bureau of the Navy Department in accordance with section 166, Revised Statutes. (Comp. Dec., Oct. 28, 1915, file 26254-1906.)

**Statutes authorizing assistant chiefs and chief clerks** in the bureaus of the Navy Department are to be read in connection with section 178, Revised Statutes, as explaining who are authorized to act as chief of bureau during the latter's absence. Section 178 applies only to "assistants" to chiefs of bureaus who are specifically provided for by statute. (19 Op. Atty. Gen., 503.)

**Recording clocks not to be used** in recording time of clerks or other employees in any of the executive departments at Washington. (Act Feb. 24, 1899, 30 Stat., 864.)

No part of the appropriations for the naval service shall be available for salary of any person making, with a stop watch or other time-measuring device, a time study of any job of any employee of the United States Government or of the movements of any such employee; nor for use as premium or bonus or cash reward to any employee in addition to his regular wages, except for suggestions of improvements or economy in the operation of any Government plant. (See act Mar. 4, 1917, 39 Stat., 1195.)

**Sec. 417. [Duties of the Secretary of the Navy.]** The Secretary of the Navy shall execute such orders as he shall receive from the President relative to the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as all other matters connected with the naval establishment. [See title Public contracts. Also secs. 3660-3667, 3669.]—(30 Apr., 1798, c. 35, s. 1, v. 1, p. 353.)

- Annual reports required to be made to Congress by Secretary of the Navy—see section 429, Revised Statutes.
- Appointment of employees in the Navy Department to be made by the Secretary of the Navy—see section 169, Revised Statutes.
- Appropriations for Navy Department controlled and expended by direction of the Secretary of the Navy. (Sec. 3676, R. S.)
- Arlington Memorial Amphitheater, Secretary of the Navy to serve on commission to make annual recommendations as to memorials, entombments, etc., in. (Act Mar. 4, 1921, 41 Stat., 1440.)
- Business of Navy Department to be distributed by Secretary of the Navy between the bureaus and offices therein. (Secs. 161 and 419, R. S.)
- Coast Guard to be under the orders of the Secretary of the Navy in time of war or when the President may direct. (Act Jan. 28, 1915, 38 Stat., 800.)
- Congressional Record, daily examination of, to be required by the Secretary of the Navy in his department. (Act Jan. 12, 1895, sec. 90, 28 Stat., 623.)
- Contracts and purchases of supplies to be under the direction of the Secretary of the Navy. (Sec. 3714, R. S., as amended by act Feb. 27, 1877, sec. 1, 19 Stat., 249; see also sec. 3747, R. S.; secs. 3718-3730, R. S.)
- Courts-martial and courts of inquiry may be convened by the Secretary of the Navy. (Sec. 1624, R. S., art. 38, as amended by act Feb. 16, 1909, sec. 10, 35 Stat., 621; and sec. 1624, R. S., art. 55.)
- Courts-martial proceedings may be set aside, or their sentences remitted or mitigated by the Secretary of the Navy. (Sec. 1624, R. S., as amended by act Feb. 16, 1909, sec. 9, 35 Stat. 621.)
- Custody of property appertaining to the Navy Department to be in the Secretary of the Navy. (Sec. 418, R. S.)
- Desertion charge entered against enlisted men during Civil War may be removed by Secretary of the Navy. (Act Aug. 14, 1888, 25 Stat., 412, as amended by act May 24, 1900, 31 Stat., 183.)
- Discharge certificates in true names to be issued by Secretary of the Navy, in certain cases to persons who served in Navy under assumed names. (Act Aug. 22, 1912, 37 Stat., 324.)
- Duplicate discharge certificates may be issued by Secretary of Navy to officers and men in certain cases in lieu of lost discharges. (Act Feb. 7, 1890, 26 Stat., 6.)
- Duties of bureaus in the Navy Department to be under the direction of the Secretary of the Navy. (Sec. 420, R. S.)
- Duties of Chief of Naval Operations to be under the direction of the Secretary of the Navy. (Act Mar. 3, 1915, 38 Stat., 929.)
- Duties of Judge Advocate General to be under the direction of the Secretary of the Navy. (Act June 8, 1880, 21 Stat., 164, as amended by act June 5, 1896, 29 Stat., 251.)
- Estimates to be submitted annually to Congress by Secretary of the Navy through the Secretary of the Treasury. (Secs. 3660, 3669, R. S.; see references under sec. 430, R. S.)
- Insane persons belonging to the Navy or Marine Corps to be placed in hospitals for the insane upon order of the Secretary of the Navy. (Secs. 1551 and 4843, R. S.; act Feb. 9, 1900, 31 Stat., 7.)
- Marine Corps, subject to the orders of the Secretary of the Navy except when detached by President for duty with the Army. (Sec. 1621, R. S.)
- Midshipmen may be appointed to Naval Academy by Secretary of the Navy without congressional nomination. (Acts June 29, 1906, 34 Stat., 578; June 30, 1914, 38 Stat., 410; Feb. 15, 1916, 39 Stat., 9; Aug. 29, 1916, 39 Stat., 576; Mar. 4, 1917, 39 Stat., 1182; Dec. 20, 1917, 40 Stat., 430.)
- Midshipmen may be dismissed by Secretary of Navy upon written approval of the President. (Act Apr. 9, 1906, sec. 1, 34 Stat., 104.)
- Midshipmen on graduation may be assigned by Secretary of the Navy to fill vacancies in Marine Corps or Staff Corps of the Navy. (Act July 9, 1913, 38 Stat., 103.)
- Navy-yard employees, number and compensation of clerical, drafting, inspection, and messenger force to be fixed by Secretary of the Navy. (Act Mar. 3, 1909, 35 Stat., 754.)
- Ocean mail vessels to be constructed according to plans approved by Secretary of the Navy, with reference to their conversion into auxiliary naval cruisers; Postmaster General not to employ any vessel in ocean mail service which is not approved by the Secretary of the Navy. (Act Mar. 3, 1891, sec. 4, 26 Stat., 831.)
- Officers may be furloughed by the Secretary of the Navy (sec. 1442, R. S.); may be assigned to duty on ocean mail vessels with furlough pay (act Mar. 3, 1891, sec. 7, 26 Stat. 832); may be employed on active duty after retirement (secs. 1462-1465, R. S.; acts Aug. 22, 1912, 37 Stat., 329, and July 1, 1918, 40 Stat., 717); settlement of claims for traveling expenses under the control of the Secretary of the Navy (act Mar. 3, 1909, 35 Stat., 774.)
- Official Register of the United States: Information for publication in, must be furnished biennially by the Secretary of the Navy



to the Director of the Census. (Act Jan. 12, 1895, sec. 73, 28 Stat., 618, as amended by act June 7, 1906, 34 Stat., 219, and act Oct. 22, 1913, 38 Stat., 224.)

Opinion of the Attorney General may be obtained by the Secretary of the Navy upon questions of law pending in the Navy Department (secs. 356, 357, R. S.); decision of the Comptroller of the Treasury may be obtained by the Secretary of the Navy upon any question involving a payment to be made by or under the Secretary (act July 31, 1894, sec. 8, 28 Stat., 208); and a report by the Court of Claims of its findings of fact and conclusions of law may be obtained by the Secretary of the Navy for his guidance upon any claim or matter pending in the Navy Department which involves controverted questions of fact or law. (Judicial Code, act Mar. 3, 1911, secs 148-150, 36 Stat., 1137, 1138; *Berger v. U. S.*, 36 Ct. Cls., 243, 247.)

Regulations for the Navy Department and Naval Establishment are to be issued by the Secretary of the Navy. (Secs. 161 and 1547, R. S.; see also secs. 1548, 1549, 1620, 1621, and 1624, art. 34, R. S.; acts Feb. 9, 1889, 25 Stat., 658; May 22, 1896, 29 Stat., 133; May 13, 1908, 35 Stat., 128, amended Aug. 22, 1912, 37 Stat., 329; May 13, 1908, 35 Stat., 153; Feb. 16, 1909, secs. 5, 14, 35 Stat., 621, 622; Mar. 3, 1909, 35 Stat., 768; June 24, 1910, 36 Stat., 619; Aug. 22, 1912, 37 Stat., 341; Mar. 4, 1913, 37 Stat., 909; Feb. 16, 1914, 38 Stat., 283; Mar. 3, 1915, 38 Stat., 930, 939, 941, 942, 943; etc.).

Requisitions on Treasury for moneys appropriated for the Navy, to be made by the Secretary of the Navy. (Sec. 3673, R. S.)

Requisitions on Treasury for advances to disbursing officers to be made by the Secretary of the Navy. (Act June 19, 1878, 20 Stat., 167.)

Smithsonian institution, Secretary of the Navy is member of. (Sec. 5579, R. S., as amended. See also note to sec. 415, R. S.)

State, War, and Navy Department Building to be under the care and supervision of a commission composed of Secretaries of State, War, and Navy. (Act Mar. 3, 1883, 22 Stat., 553.)

Superintendence of Navy hospitals (sec. 4807, R. S.) and of Naval Home (sec. 4811, R. S.) to be under the Secretary of the Navy.

Trustee of Navy Pension Fund, Secretary of the Navy to be. (Sec. 4750, R. S.)

Vessels to be named by Secretary of the Navy (secs. 1531-1533, R. S.; act May 4, 1898, 30 Stat., 390; act May 13, 1908, 35 Stat., 159); may be loaned by Secretary to nautical schools (act Mar. 4, 1911, 36 Stat., 1353). Naval equipment may be loaned to military schools. (Act Mar. 3, 1901, 31 Stat., 1440, as amended by act June 29, 1906, 34 Stat., 620, and act June 24, 1910, 36 Stat., 613.)

Y. M. C. A. buildings in navy yards and stations may be furnished heat and light without charge, in the discretion of the Secretary of the Navy. (Act Mar. 4, 1911, 36 Stat., 1274.)

"The Secretary of the Navy represents the President, and exercises his power on the subjects confided to his department." (*U. S. v. Jones*, 18 How., 92.)

As a general rule, no appeal lies to the President from the head of a department, whose acts are presumed to be the acts of the President himself. (9 Op. Atty. Gen., 462.) However, in the naval service appeals may be taken to the President from the orders or decisions of the Secretary of the Navy. (Art. 5323, Naval Instructions, 1913.)

"The President acts and speaks through the heads of the departments, and the acts of the head of an executive department must be presumed to be by the direction of the President." (*Weller v. U. S.*, 41 Ct. Cls., 324, holding that the Secretary of the Navy acts for the President in appointing and dismissing midshipmen. But see act Apr. 9, 1906, sec. 1, 34 Stat. 104, providing for dismissal of midshipmen by the Secretary of the Navy "upon written approval of the President.")

The Secretary of the Navy's action in advancing money to contractors is the action of the President within the terms of the statute relating thereto. "In reference to this subject it may be said, with even more propriety than in *Wilcox v. Jackson* [13 Pet., 498, 513] that whatever the President is to do, he is to do through and by the Secretary. So far as the authority of the President was necessary, I must consider him as speaking and acting through the Secretary to whom the subject was committed by Congress. I must presume, in the absence of all evidence, that the advances made were with his approbation and under his direction within the meaning of the act of Congress." (*U. S. v. Cutter*, 25 Fed. Cas. No. 14911.)

An order issued by the Secretary of the Navy is presumed to be issued with the approval of the President and meets the requirements of section 1547, Revised Statutes, although it does not bear the express approval of the President; and this applies even though the order may be in conflict with a prior regulation which was expressly approved by the President. (*Adams v. U. S.*, 42 Ct. Cls., 211.)

The Secretary of the Navy may sign commissions issued to officers; but "it is proper" that the commission should declare the act to be an act of the President, performed by the head of the department as his representative. (22 Op. Atty. Gen., 82. See also *O'Shea v. U. S.*, 28 Ct. Cls., 392; 25 Op. Atty. Gen., 292.)

The transfer of a part of the naval station in Porto Rico to the Government of Porto Rico in accordance with law may be made by the Secretary of the Navy, since in contemplation of law the acts of the heads of the executive departments are the acts of the President; but it would be preferable to have the formal transfer effected by Presidential proclamation. (29 Op. Atty. Gen., 205.)

By the Constitution, the President is made Commander in Chief of the Army and Navy of the United States. The Departments of War and of the Navy are the channels, through which his orders proceed to them, respectively, and the Secretaries of those departments are the organs by which he makes his will known to

them. The orders issued by those officers are, in contemplation of law, not their orders, but the orders of the President of the United States. (1 Op. Atty. Gen., 380; 6 Op. Atty. Gen., 357, 365.)

Where an appropriation was made "to be expended at the discretion of the President," it evinces the utmost confidence of Congress in the President to make proper distribution of the fund. The order of the Secretary of the Navy, in the administration of the appropriation, must be regarded as the order of the President, and was an exercise of the discretion vested in the President. (*Hayden v. U. S.*, 38 Ct. Cls., 39.)

A letter was addressed by the Secretary of the Navy to an officer of the Marine Corps, stating "you are hereby dismissed from the service from this date." At this time the power of summarily dismissing officers was possessed by the President. It was contended that "since the order in question simply purported to be the act of the Secretary, and did not purport to be the act of the President, or to have been issued in pursuance of any previous direction by him given, the presumption can not be indulged that the dismissal of Lieutenant McElrath was by order of the President." The court stated in its opinion: "These propositions open up a very broad field of inquiry as to what exceptions there are to the general rule that the direction of the President is to be presumed in all instructions and orders issuing from the proper department concerning executive business, notwithstanding they may contain no express statement of any direction from him, as to the matters to which such instructions or orders refer. There are undoubtedly official acts which the Constitution and laws require to be performed by the President personally, and the performance of which may not be delegated to heads of departments; or to other officers in the executive branch of the Government. It is equally true that as to the vast multiplicity of matters involved in the administration of the executive business of the Government, it is physically impossible for the President to give them his personal supervision. Of necessity he must, as to such matters, discharge his duty through the instrumentality or by the agency of others. Whether a particular act belongs to one or the other of these classes may sometimes be very difficult to determine, and we shall not attempt now to lay down any general rule upon the subject. Nor shall we extend this opinion by any consideration of the question whether the particular order signed by Secretary Welles should not be presumed to have been issued by direction of the President. The determination of that question is not essential to the disposition of this case, since if that order should, for the reasons urged by the claimant's counsel, be deemed a nullity, the nomination and confirmation subsequently of Lieutenant Haycock, followed by his commission as a first lieutenant in the Marine Corps in place of Lieutenant McElrath, as certainly operated under the law as it then was to remove the latter from the service as if he had been dismissed by direct order of the President under his own signature." (*McElrath v. U. S.*, 102 U. S., 426.)

For other decisions, see notes to Constitution, Article II, section 1, clause 1, and Article II, section 2, clause 1; and section 158, Revised Statutes. (See also *Bishop v. U. S.*, 38 Ct. Cls., 473; *McCollum v. U. S.*, 17 Ct. Cls., 101, and cases there cited; *Northern Pac. R. Co. v. Mitchell*, 208 Fed. Rep., 469; *De Arnaud v. Ainsworth*, 24 App. D. C. 167, 5 L. R. A. (N. S.) 163; *Hegler v. Faulkner*, 153 U. S., 109, 117.)

**Deliberate delays in performing duties.**—An executive department has no right, at the request of a committee of Congress, to omit or delay the discharge of duties imposed upon it by law. When a right is created by law and a duty devolved upon an executive department under the same law, the enjoyment or enforcement of such right can not be suspended because of the possibility that the law may be changed. To deprive any person of a right which the law creates, at the request of anybody, would be a novel idea under a system of government which is supposed to be a government of laws and not of men. Such a result could not be attained by any action even of the whole House of Representatives, or of both branches of Congress, unless by a change in the law itself. (13 Op. Atty. Gen., 113.)

**Duties generally require judgment and discretion.**—In general the official duties of the Secretary of the Navy, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the Government in the administration of the various and important concerns of his office is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress under which he is from time to time required to act; if he doubts, he has a right to call on the Attorney General to assist him with his counsel; and it would be difficult to imagine why a legal adviser was provided by law for the heads of departments as well as for the President unless their duties were regarded as executive, in which judgment and discretion were to be exercised. (*Decatur v. Paulding*, 14 Pet., 497.)

Where the Secretary of the Navy is authorized by law to construct vessels in the most improved way, he is necessarily clothed with large discretion, both as to the materials and methods to be used. (*Brooks v. U. S.*, 39 Ct. Cls., 494.)

The Secretary of the Navy has authority to settle the amounts due under a contract for the building of a ship of war, and demands for extra work agreed upon, and expenses incurred because of the department's action of which the Government has received the benefit. (*Myerle v. U. S.*, 31 Ct. Cls., 105.)

When the law constitutes the Secretary of the Navy, together with the heads of certain other departments, a board of commissioners of a fund for the benefit of the Navy, and gives some general directions in what way the fund is to be employed, but the mode and manner of transacting their business is not in any way prescribed, it rests in the discretion of the board whether or not its proceedings shall be in writing. It is fit and proper that important



transactions should be reduced to writing, but the law imposes no such indispensable duty. (*U. S. v. Fillebrown*, 7 Pet., 28, concerning "commissioners of navy hospitals," which existed under laws not now in force.)

The Secretary of the Navy is authorized, in his discretion, to appoint a firm in London to act as his agent in paying drafts drawn by naval officers, and he may, when necessary, exact and receive all such securities as he can obtain to protect his department against loss by reason of the apprehended insolvency of such firm. (*Weetjen v. St. Paul & P. R. Co.*, 4 Hun. (N. Y.), 529. But see sec. 1550, R. S., providing that "no person shall be employed or continued abroad to receive and pay money for the use of the naval service on foreign stations, whether under contract or otherwise, who has not been, or shall not be, appointed by and with the advice and consent of the Senate.")

The head of a department of the Federal Government is authorized, in the administration of the duties of his office, to employ agents and to determine when an exigency arises demanding their employment. Section 3614, Revised Statutes, recognizes this right. (*U. S. v. Potter*, 27 Fed. Cas. No. 16076; compare *Weeks v. U. S.*, 21 Ct. Cls., 124.)

**Jurisdiction of courts over business of department.**—The court can not entertain an appeal from the decision of the Secretary of the Navy nor revise his judgment in any case where the law authorized him to exercise his discretion or judgment; nor can it by mandamus control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties. The interference of the courts with the performance of the ordinary duties of the executive departments of the Government would be productive of nothing but mischief, and this power was never intended to be given to them. (*Decatur v. Paulding*, 14 Pet., 497; see also *U. S. ex rel. Dunlap v. Black*, 128 U. S., 40; *U. S. ex rel. Redfield v. Windom*, 137 U. S., 636; *Boynton v. Blaine*, 139 U. S., 306; *U. S. v. Schurz*, 102 U. S., 378; *Keim v. U. S.*, 177 U. S., 290; *Ness v. Fisher*, 223 U. S., 683; *Ray v. Garrison*, 42 App. D. C. 34; *Martin v. Mott*, 12 Wheat., 31, 32.)

Where the administration of a statute rests within the discretion of the Secretary of the Navy, the exercise of his discretion is not subject to review by the courts or by the accounting officers. (*Dyer v. U. S.*, 37 Ct. Cls., 337.)

The Secretary of the Navy can not be compelled by mandamus to accept the highest bid for a naval vessel offered for sale. He has discretionary power under the act of March 3, 1883 (22 Stat. 599), to reject any bid, and unless he decides to accept it, there has been no sale. "It is reasonably practicable for Congress to provide on broad lines only for the control and disposition of vessels belonging to the United States, and wide discretion in respect of the many details thereof has necessarily been committed to the discretion of the executive department." (*Goldberg v. Meyer*, 37 App. D. C., 282; affirmed *Goldberg v. Daniels*, 231 U. S., 218.)

The Secretary of the Navy can not be compelled, by writ of mandamus, to record the

name of a person upon the register of retired officers of the Navy as a paymaster's clerk where the court is of the opinion that the petitioner was not a paymaster's clerk within the meaning of the law. "He was no more an officer of the Navy than any one of the many employees of the Navy Department at Washington. We rule, therefore, that he never possessed any right to retirement." (*U. S. ex rel Foreman v. Meyer*, 38 App. D. C., 472; 227 U. S., 452.)

Where an officer of the Navy has been retired by order of the President with the rank of captain, the Secretary of the Navy can not be compelled, by writ of mandamus, to place his name upon the retired list with the rank of rear admiral. (*U. S. ex rel Moser v. Meyer*, 38 App. D. C., 13.)

The courts will not by mandamus compel the Secretary of War to change the position of an officer's name in the Army Register, even though it be conceded that an error exists therein. When an officer claims that, by reason of the erroneous position in which his name appears in the Army Register, he is deprived of a rank or position that might be of benefit to him in a future claim to promotion to the rank of captain, nevertheless he is not deprived of any right that he can appeal to a court of justice to enforce. His rank as shown by the official Army Register is conclusive of no such right of promotion. "Promotion in a certain sense is a new appointment, and to the position of captain can only be effected by the nomination of the President with the advice and consent of the Senate. The mere entry, therefore, in the official Army Register of the name and rank of the appellant would not operate to entitle him to, or to control, such promotion. That must rest primarily upon the judgment and discretion of the President." (*U. S. ex rel. Edwards v. Root*, 24 App. D. C., 419, 431; file 27231-8, Feb. 7, 1911.)

While the writ of mandamus may now be regarded as having become a writ of right, there is yet a sound judicial discretion reposing in the courts, even though the petitioner for it may be technically entitled to it, to refuse to grant it when its issuance would not promote the substantial ends of justice, or when it would be without beneficial results to the relator or petitioner. (*Dancy v. Clark*, 24 App. D. C., 487; see file 27231-8, Feb. 7, 1911.)

A mere abstract right unattended by any substantial benefit to the relator will not be enforced by mandamus; the writ will issue to enforce only a right the denial of which affects the party's pecuniary interest, and the writ must be denied where the value of the thing in demand is insignificant and no substantial interest is involved. (See file 27231-8, Feb. 7, 1911.)

Where the petition for a writ of mandamus is merely an attempt to obtain a decision of the court with a view to using such decision in furtherance of claims undoubtedly to be presented by petitioner later, it should not be granted. (See file 27231-8, Feb. 7, 1911.) "The grant of the writ in this instance in the circumstances in which we find the case can have but one effect; that is, to encourage \* \* \* in future petty litigation for the fees and emoluments of the office. The writ of mandamus should not

be used for such purpose." (*State v. Finley*, 74 Mo. App. 213, 216; see file 27231-8, Feb. 7, 1911.)

"The principle that there can be no interference of the courts with the performance of the ordinary duties of the executive departments is too well established for the court to group the authorities." (*Medrick v. U. S.*, 44 Ct. Cls., 469, 481.)

The courts will hesitate before requiring the executive heads of the departments of the Government to abandon their construction of departmental regulations, and their administrative action thereunder. (*Hitchcock v. U. S.*, 22 App. D. C., 275.)

The national courts can not rightfully interfere with executive action in any case where an executive officer is authorized to exercise judgment or discretion in the performance of an official act. (*Taylor v. Kercheval*, 82 Fed. Rep., 497.)

The courts can not properly interfere with executive action, either by mandamus or injunction, in a matter in which the executive officer is authorized to exercise his judgment or discretion. (*Dudley v. James*, 83 Fed. Rep., 345.)

The courts have no power by mandamus to compel an executive officer to perform an act which is discretionary with him. (*U. S. v. Leamen*, 17 How., 225; *Gaines v. Thompson*, 7 Wall., 347; *Cox v. U. S.*, 9 Wall., 298; *U. S. v. Black*, 128 U. S., 40; *U. S. v. Hitchcock*, 205 U. S., 80, affirming 26 App. D. C., 290.)

The courts of the United States have no authority to enjoin the officers of the Government against performing any act not merely ministerial, but involving the exercise of discretion. (*McElrath v. McIntosh*, 16 Fed. Cas. No. 8781; *Gaines v. Thompson*, 7 Wall., 347; *Maese v. Hermann*, 17 App. D. C., 52, affirming 183 U. S., 572; *Cummins Co. v. Burleson*, 40 App. D. C., 500; *Louisiana v. McAdoo*, 234 U. S., 627; see also, to same effect, *Enterprise Sav. Assn. v. Zumstein*, 67 Fed. Rep., 1000; *Walker v. Smith*, 21 How., 579; *Litchfield v. Register*, 15 Fed. Cas. No. 3388, affirming *Litchfield v. Richards*, 9 Wall., 575; *Koehler v. Barin*, 25 Fed. Rep., 161; *Sioux City, etc., R. Co. v. U. S.*, 34 Fed. Rep., 835; *Lane v. Anderson*, 67 Fed. Rep., 563; *Chapman v. Keindel*, 46 Fed. Rep., 99.)

Where the head of a department in construing a statute has placed a construction thereon which is a possible one, and has acted accordingly, his action will not be restrained by injunction. (*O'Brien v. Lane*, 40 App. D. C., 493.)

Where an act of Congress, providing for an increase and reorganization of the Army, imposed upon the President and Secretary of War many and complicated duties in carrying out its purpose, it would require a very plain and unmistakable departure from its provisions to justify the judiciary in interposing by mandamus to control and reverse the action of the War Department in its work of reorganization. (*U. S. v. Root*, 22 App. D. C., 419.)

Mandamus may not lawfully issue to command or control an executive officer in the discharge of those of his duties which involve the exercise of his judgment or discretion, either in the construction of the law or in determining the existence or effect of the facts, though there

may be no other method of review or correction provided by law. (*Kimberlin v. Commission*, 105 Fed. Rep., 653.)

The Secretary of State is the confidential political agent of the President for the execution of his will in matters committed to his discretion by the Constitution; and to coerce the action of the Secretary is to attempt the coercion of the President. (*U. S. v. Hay*, 20 App. D. C., 576.)

Whatever may be thought of the propriety of a particular direction of the President to the Secretary in respect to the business of his department, the latter simply complies with the law in obeying that direction, and mandamus will not lie to compel him to a contrary course. (*U. S. v. Bayard*, 4 Mackey, D. C., 310.)

It being the duty of the Secretary of State, in the conduct of every matter which constitutes a part of the business of his department, to act "in such manner as the President shall direct," and the acts of the Secretary in matters which the President is authorized to direct being presumed to have been directed by the President the Secretary can not be compelled by mandamus to pay over to a claimant moneys received from Spain in satisfaction of a judgment in his favor, as in refusing payment the Secretary is presumed to be acting under the direction of the President and therefore according to law. (*U. S. v. Bayard*, 4 Mackey, D. C., 310; but see *U. S. v. Bayard*, 5 Mackey, D. C., 428.)

The decision of the head of a department in restoring an attorney to good standing who had previously been disbarred can not be reviewed by the courts where the order of restoration is not completely satisfactory to the attorney. As the order of restoration was made in the exercise of the Secretary's unquestioned jurisdiction, the court has no power to review his judgment. (*U. S. v. Ballinger*, 35 App. D. C., 520.)

Under the Constitution the Supreme Court of the United States has no power to issue a writ of mandamus to the head of an executive department in the city of Washington; the issue of such writ being the exercise of an original jurisdiction not conferred by the Constitution. (*Marbury v. Madison*, 1 Cranch, 137.)

The Supreme Court of the United States has neither an original nor an appellate jurisdiction to issue a mandamus to persons holding offices under the authority of the United States. (*McClung v. Silliman*, 2 Wheat., 369.)

Mandamus will not lie to the head of a department to direct a subordinate official to perform a mere ministerial duty, such as countersigning a check. If the duty be a mere ministerial one, no order of the head of the department could be justification for refusal on the part of the subordinate to perform it. (*Hitchcock v. U. S.*, 22 App. D. C., 275.)

The United States can not be bound by a decision relating to its property rendered in mandamus proceedings against the Secretary of the Navy. The United States is not a party to such mandamus proceedings, and can not be "interfered with behind its back." (*Goldberg v. Daniels*, 231 U. S., 218.)

As to jurisdiction of the courts with reference to the appointment, removal, and assignment to duty of public officers, see cases noted under section 416, Revised Statutes.



As to freedom of Federal officers from interference by State courts, see note to Constitution Article I, section 8, clause 13.

For other decisions on subject of mandamus, see note to section 236, Revised Statutes.

**When courts will interfere with business of department.**—While the head of a governmental department is not subject to mandamus in any matter involving the exercise of discretion, this writ may issue against him in relation to matters wherein he performs a mere ministerial duty. (*Marbury v. Madison*, 1 Cranch, 137; *Kendall v. U. S.*, 12 Pet., 524; *Board of Liquidation of Louisiana v. McCombs*, 92 U. S., 531.)

In a case where it is sought by mandamus to compel a public officer to perform a certain act, the question is whether the act is of a ministerial or of a judicial character, as those terms have been defined and limited by the courts; for there is no ministerial act to which the writ would be applicable that does not in some measure and to some extent involve the exercise of judgment and discretion; and there are acts apparently judicial which are not such in contemplation of law. (*Payne v. U. S.*, 20 App. D. C., 581.)

Mandamus may issue to command an executive officer to act and to decide, though his act and decision involve the exercise of judgment and discretion; but in such case it may not direct him in what particular way or in whose favor he shall decide. (*Kimberlin v. Commission*, 105 Fed. Rep., 653.)

Courts will not compel executive officers to perform their official duties, even though such duties require an interpretation of the law, unless they refuse to act at all, or the act which it is sought to compel them to perform is purely ministerial. (*U. S. v. Windom*, 137 U. S., 636.)

While the exercise of discretion by executive officers acting within the scope of their authority will not be questioned by mandamus, when such officers exceed their authority and act without warrant of law, mandamus will lie. (*Griffin v. U. S.*, 30 App. D. C., 177, 188, 190; 31 App. D. C., 231, 232, 233, 234.)

The court is powerless to direct the action of an executive officer by mandamus unless a positive legal right is being invaded by him in violation of a duty clearly imposed upon him by law; and such duty must be so plain and positive that he has no discretion left. (*Moore v. U. S.*, 32 App. D. C., 243.)

While the action of an officer clothed with a discretion is not reviewable if exercised upon matters left to his discretion, yet his judgment as to the extent of his discretion under the law, and the matters on which it may be exercised, are reviewable on mandamus; and where a discretion is abused and made to work injustice, it may be controlled by mandamus. (*U. S. v. Custis*, 35 App. D. C., 247; see also *U. S. v. Cortelyou*, 26 App. D. C., 298.)

The necessary ground of an application for the writ of mandamus against an executive officer of the United States is that it shall appear that he has been charged by law with the performance of a specific official duty to which the petitioner is entitled, and that he refuses to perform that duty. (*U. S. v. Bayard*, 4 Mackey, D. C., 310.)

While the lawful exercise of discretion by public agents and officers can not be controlled by mandamus, the writ will lie to compel the person or body in whom the discretion is lodged to proceed to exercise its discretion, and in case the manner of such exercise has been prescribed by law, to compel the person or body not to proceed in any other way. (*Huidekoper v. Hadley*, 177 Fed. Rep., 1.)

Mandamus is the proper remedy, and the only remedy to compel the auditor of the Panama Canal to pay the United States judge for the Canal Zone the salary provided by law for the latter, the auditor's refusal being based upon an alleged indebtedness of the judge to the United States. (*Smith v. Jackson*, 241 Fed. Rep., 747; affirmed *Smith v. Jackson* (246 U. S., 388).)

Mandamus will lie to compel the Secretary of State to pay over money to which, under an act of Congress, the petitioner has a clear legal right; and the Secretary can not justify under an order from the President. (*U. S. v. Bayard*, 5 Mackey, D. C., 428.)

Mandamus will lie to compel the members of the Board of Labor Employment at the United States navy yard in the city of Washington, to register an applicant for examination for employment as mechanic or laborer, where they rest their refusal solely on the ground that the applicant is not a citizen of the United States, although a resident of Porto Rico, and owing allegiance to the United States. Rule 5 of the Civil Service Commission, promulgated by the President April 15, 1903, which modifies previous regulations of the Navy Department, provides that "no person shall be admitted to examination unless he be a citizen of or owe allegiance to the United States"; and that an applicant who claims citizenship by virtue of residence in Porto Rico and who shows birth or naturalization in Porto Rico, will not be required to show further evidence of citizenship. (*U. S. v. Bowyer*, 25 App. D. C., 121.)

The members of the United States Board of Labor Employment at the United States navy yard in the city of Washington are ministerial officers, and their duty to register an applicant for employment does not cease to be ministerial because they rest their refusal of the registration on the determination of a pure question of law, involving the ascertainment of no fact whatever. (*U. S. v. Bowyer*, 25 App. D. C., 121.)

The courts of the District of Columbia have power by mandamus proceedings to compel the head of an executive department in the city of Washington to do a ministerial act. (*Kendall v. U. S.*, 12 Pet., 524; affirmed *Decatur v. Paulding*, 14 Pet., 497.)

A cabinet officer may be enjoined from doing an act which was not authorized by the statutes under which he assumed to act. (*American School of Magnetic Healing v. McAnnulty*, 187 U. S., 94; see also *Caldwell v. Robinson*, 59 Fed. Rep., 653; *Frayser v. Russell*, 9 Fed. Cas. No. 5067; *Kirwin v. Murphy*, 83 Fed. Rep., 275, 170 U. S., 205; *Sang Lung v. Jackson*, 85 Fed. Rep., 502; *Wong Wai v. Williamson*, 103 Fed. Rep., 1; *Lane v. Watts*, 234 U. S., 525, affirming 41 App. D. C., 139.)

Where a Cabinet officer reopens and rejudicates a case decided by his predecessor, there being no contention that the former decision was obtained by fraud, and the law providing that such decision should be "final and conclusive," a court of equity has jurisdiction to require such officer to recognize and enforce the prior decision. (*Mickadiet v. Lane*, 43 App. D. C., 414.)

**Subpœnas for heads of departments.**—See note to Constitution, Article II, section 1, clause 1, and section 871, Revised Statutes; see also note to section 418, Revised Statutes, concerning power of courts to compel production of public records and documents.

**Decisions of heads of departments not binding on courts.**—If a suit should come before the Supreme Court which involved the construction of any of the laws imposing duties on the heads of the executive departments, the court certainly would not be bound to adopt the construction given by the head of the department; and if they supposed his decision to be wrong, they would of course so pronounce their judgment. But the judgment of the court upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress. (*Decatur v. Paulding*, 14 Pet., 497.)

Whatever the conclusiveness of executive acts so far as executive departments are concerned, as a rule of administration, it has long been settled that the action of executive officers in matters of account and payment can not be regarded as a conclusive determination when brought in question in a court of justice. (*Wisconsin Cent. R. Co. v. U. S.*, 164 U. S., 205. For other cases, see note to sec. 236, R. S.)

Where the head of a department is authorized by law to ascertain "the legal heirs" of a decedent, and it is provided that his decision shall be "final and conclusive," this does not mean that he could arbitrarily ignore the legal heirs and decide in favor of a collateral heir or a stranger in blood; and when he does this, his decision is arbitrary and capricious and not binding on the courts. (*Mickadiet v. Lane*, 43 App. D. C., 414.)

**Decisions of heads of departments are binding on their successors.**—"The law is well settled that public officers can not open and reexamine cases decided by their predecessors except for fraud, mistake in matters of fact arising from errors in calculations, or newly discovered material evidence." (*Maine v. U. S.*, 36 Ct. Cls., 531, 553, quoting *Waddell v. U. S.*, 25 Ct. Cls., 325, 328, and cases there cited.)

"It has long been held in the executive departments that when a claim or controversy between the United States and individuals therein pending has once been fully considered, and final action and determination had thereon by any executive officer having jurisdiction of the same, it can not be reopened, set aside, and a different result ordered by any successor of such officer, except for fraud, manifest error on the face of the proceedings, such as a mathematical miscalculation or newly discovered evidence, presented within a reasonable time and under such circumstances as would be a sufficient cause for granting a new trial in a court of law. This ruling and practice of the

departments has been approved elsewhere and has been sustained by the courts." (*Rollins and Presbrey v. U. S.*, 23 Ct. Cls., 123, citing, 9 Op. Atty. Gen., 34; 12 Op. Atty. Gen., 172, 358; 14 Op. Atty. Gen., 387, 456; 14 Op. Atty. Gen., 275; *U. S. v. Bank of Metropolis*, 15 Pet., 401; *Lavelette's case*, 1 Ct. Cls., 147; *Jackson's case*, 19 Ct. Cls., 504; *State of Illinois case*, 20 Ct. Cls., 342; *McKee's case*, 12 Ct. Cls., 560; *Day's case*, 21 Ct. Cls., 264; and opinion of the Judiciary Committee of the Senate, reported by Senator and Judge David Davis, quoted in *Jackson's case*, above referred to.)

"The doctrine of *res judicata* [a thing adjudicated—meaning that a specific case which has once been finally adjudicated can not be reopened] as being applicable to the jurisdiction of the head of a department is fully recognized by this court in several adjudications." (*Day v. U. S.*, 21 Ct. Cls., 264.)

"It is desirable upon all accounts that there should be an end of controversies. \* \* \* Unless such is the case, as each successive incumbent of one of the great administrative offices assumes his position he may be compelled to review all the decisions of his predecessors which have been against applicants and claimants." (15 Op. Atty. Gen., 315.)

It is "a rule of action prescribed to itself by each administration, to consider the acts of its predecessors conclusive, as far as the Executive is concerned. It is but a decent degree of respect for each administration to entertain of its predecessor, to suppose it as well qualified as itself to execute the laws according to the intention of their makers; and not to set an example of review and reversal, which, in its turn, may be brought to bear upon itself, and thus keep the acts of the Executive perpetually unsettled and afloat. In conversing with President Adams on this subject, I understood him to concur in the general rule of considering all acts of the preceding administration as final; and, although partial injuries may now and then remain unredressed by the operation of this, in common with all other general rules, yet it is better to bear that partial evil, or leave it to legislative redress, than to introduce the more extensive, incalculable evils which must result from considering all the past acts of all the past Executives as open to reconsideration and readjudication, at the pleasure of the individuals who were interested in them. And if a decision made in regard to these gentlemen, eight years ago, during the presidency of Mr. Monroe, is open to review and reversal, I do not see upon what principle of discrimination we can refuse to review and reverse a decision made during the presidency of Mr. Washington, upon the application of any other individual supposing himself aggrieved by it." (2 Op. Atty. Gen., 9.)

If the present administration has authority to review the acts of its predecessors, "the Executive which is to follow us must have the like authority to review and unsettle our decisions, and to set up again those of our predecessors; and upon this principle, no question can be considered as finally settled. The establishment of such a principle, besides the uncertainty and confusion just noticed, would throw upon the Executive a load of duties which it



could not possibly sustain. Each administration has already as much as it can do, in the current business which belongs to it; but if to this is to be superadded the burden of reviewing all the acts of preceding administrations by which individuals may suppose themselves to have been aggrieved, it is manifest that the burden will become immediately insupportable." (2 Op. Atty. Gen., 9.)

"The principle has been so frequently declared that the final decision of a matter before the head of a department is binding upon his successors in the same department, under certain well-defined exceptions, that it is now entitled to be regarded as a settled rule of administrative law. (See on this subject, *United States v. Bank of Metropolis*, 15 Pet., 401; *Opinion of Mr. Wirt*, 2 Opins., 9; of *Mr. Taney*, 2 Opins., 464; of *Mr. Nelson*, 4 Opins., 341; of *Mr. Toucey*, 5 Opins., 29; of *Mr. Johnson*, 5 Opins., 123; of *Mr. Black*, 9 Opins., 101, 301-2, 387; of *Mr. Stanberry*, 12 Opins., 358; of *Mr. Hoar*, dated Apr. 26, 1869, in relation to the case of *Admiral Goldsborough*, ante, p. 33; and another, dated May 5, 1870, in relation to the claim of *George Chorpennig*, ante, p., 226; all of which authorities are cited and approved in a recent opinion addressed to you by the Attorney General, dated Mar. 7, 1871, in the case of *R. C. Sargent* and others against the *Western Pacific Railroad Company*.) None of the exceptions referred to are shown to exist in the case submitted; and thus, as it seems to me, the rule just stated being properly applicable here, under its operation you clearly have no authority to disturb the decision of your predecessor or reopen the case finally determined by him." (13 Op. Atty. Gen., 457.)

The head of a department is without jurisdiction to reopen and readjudicate a case finally decided by his predecessor; there being no allegation that the previous decision was obtained by fraud, and it being, under the law, "final and conclusive." In such a case, it was held that a court of equity has jurisdiction to order the Secretary to recognize and enforce the former decision, upon petition of parties injuriously affected by its reversal. (*Mickadiet v. Lane*, 43 App. D. C., 414.)

The principles enunciated in the authorities above quoted have been consistently followed by the Navy Department in the past with reference to decisions of previous administrations. (File 5252-32, re legality of appointment to the Naval Academy of *Midshipman Douglas*, and 28 Op. Atty. Gen., 180, in same case; file 26256-111:2, naval service of *Captain Owen S. Willey*, U. S. R. C. S.; file 11130-6, application of *Captain Julius S. Turrill*, U. S. M. C., for change in date of commission; file 27231-42, Civil-War service of *Captain Robert E. Impey*, Commander *Charles A. Adams*, Commander *Dennis W. Mullan*, and Chief Boatswain *John B. F. Langston*, U. S. N., retired, and file 27231-42:2 and 3, in same cases; see also file 20971-19:1, Apr. 14, 1913; file 26252-71:2, Aug. 29, 1913; file 26836-15, Nov. 17, 1913.)

For other cases, see note to section 236, Revised Statutes.

**Decision not binding on successors except as to specific case adjudicated.**—The

head of an executive department of the Government has the right to reverse a departmental practice, based on the decisions of a predecessor, even if a long-continued one, and such a former decision can be said to have no elements of estoppel or res judicata save in respect of subject matter finally settled and closed under it. (*Payne v. Houghton*, 22 App. D. C., 234; *Smith v. Payne*, 22 App. D. C., 463.)

But "it is almost as important that the law should be settled permanently as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous. Vacillation is a serious evil." (File 5252-68, May 15, 1915, quoting *Gilman v. Philadelphia*, 3 Wall., 724.)

According to the doctrine of stare decisis, where a statute has been construed by the Navy Department in a previous administration and such construction is not clearly erroneous, the matter should be regarded as settled so far as the law is concerned, and the previous construction should not be disturbed. (File 5252-68, May 15, 1915.)

The Navy Department having decided in a specific case that the law does not prohibit the appointment of an alien to the Naval Academy, although he can not be commissioned as an officer without in the meantime becoming a citizen, and this decision not being "clearly erroneous," it should be adhered to as the correct interpretation of the law, but the regulations may be amended so as to prohibit the appointment of aliens to the Naval Academy, this not being contrary to statute. (File 5252-68, May 15, 1915.)

No change in a usage can have a retroactive effect, but must be limited to the future. (*U. S. v. Macdaniel*, 7 Pet., 1, 15; see also *Campbell v. U. S.*, 107 U. S., 407.) Where payments have been made under a long-continued practice of the administrative department, sanctioned by the accounting officers of the Treasury, payments so made by disbursing officers prior to the promulgation of a Comptroller's decision reversing the former construction of the law, if otherwise correct, will be passed to their official credit. (20 Comp. Dec., 182; see also Comp. Dig., 295, 296. In this connection, consult *Muhler v. New York & Harlem R. Co.*, 197 U. S., 544; *Gelpcke v. Dubuque*, 1 Wall., 175; *Ohio Life & Trust Co. v. Debolt*, 16 How., 432; compare *Weber v. Rogan*, 188 U. S., 10, and cases there cited.)

**Jurisdiction of Secretary of the Navy and accounting officers of the Treasury.**—See cases collected on this subject in note to section 236, Revised Statutes.

**Secretary of the Navy will not decide hypothetical questions.**—The official business of the Navy Department is such that it is compelled to decline answering hypothetical questions, assuming facts which may never actually be presented to the person requesting decision. As was stated by the Attorney General in an opinion to the Secretary of the Treasury, "you will readily perceive the inconvenience of giving, upon a hypothetical case, an opinion which, upon the consideration of an actual case, might require modification on account of circumstances not imagined, and, therefore, not considered in the prepara-

tion of the opinion." (File 26287-1776, Oct. 28, 1913, citing 13 Op. Atty. Gen., 531. See in this connection, note to sec. 356, R. S.)

**Legal liability of Secretary for official acts.**—The head of a department incurs no personal liability in approving by his signature vouchers or other instruments in writing involving the expenditure of public moneys if he acts in reliance upon properly chosen subordinates whose ability and good faith he has no reason to question, even if it turns out that the voucher or other instrument should not have been executed. The head of a department must, of course, exercise due care in every official act connected with his department. But as his personal investigation of every detail is in the nature of things impossible, he has a right to act in reliance upon properly chosen subordinates whose ability and good faith he has no reason to question. (20 Op. Atty. Gen., 573.)

The same general considerations of public policy which demand, for judges of courts of superior jurisdiction, immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of executive departments when engaged in the discharge of the duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts. As in the case of a judicial officer, a distinction exists between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority and action having more or less connection with general matters committed by law to his control or supervision. Whatever difficulty may arise in applying these principles to particular cases in which the rights of the citizen may have been materially impaired by the inconsiderate or wrongful action of the head of a department, it is clear that he can not be held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress and in respect of matters within his authority by reason of any personal motive that might be alleged to have prompted his action, for personal motives can not be imputed to duly authorized official conduct. In exercising the functions of his office the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the Government if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct can not be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals. Where the head of a

department does not exceed his authority nor pass the line of his duty the motive that impelled him to act is wholly immaterial. Even though he acted maliciously, that could not change the law. (*Spalding v. Vilas*, 161 U. S., 483; see also *Hodgson v. Dexter*, 1 Cranch, 345; *Lamar v. Browne*, 92 U. S., 187.)

A report made by the chief of a bureau or office in a department to the head of the department as to the merits of a claim for a medal of honor which has been referred to him for investigation, which report contains nothing that does not relate to or reflect upon the alleged questionable character of the claimant and the want of just foundation for his claim, is absolutely privileged, notwithstanding the motive which may have actuated the maker, or the mistakes of fact which it may contain. If the report complained of as a libel had been made by the head of the department to the President for his action, it could hardly be contended for a moment that an action for libel could be maintained against the Secretary. The latter is the regularly constituted organ of the President for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as those of the Executive. And as it is impossible for a single individual to perform in person all the various duties assigned to the particular department of which he is head, he must of necessity, under proper orders and regulations, perform the larger portion of such duties through the agencies of the heads of bureaus and divisions of his department. But the work when done is in contemplation of law the work of the department, and is entitled to all the privilege and protection that would attach to it if done by the Secretary in person. It is, therefore, not the particular position of the party making the report or communication that entitles it to absolute privilege, so much as the occasion of making it and the reasons of public policy for the immunity. (*De Arnaud v. Ainsworth*, 24 App. D. C., 167; 5 L. R. A. (N. S.), 163.)

The question of motive is not material. A party is not liable for the motives with which he discharges an official duty; nor is he liable for any mistake of fact he may commit in the course of the exercise of that duty. Public policy affords absolute protection and immunity for what may be said or written by an officer in his official report or communication to a superior, when such report or communication is made in the course and discharge of official duty. Otherwise the perfect freedom which ought to exist in the discharge of public duty might be seriously restrained, and often to the detriment of the public service. Of course, when a party steps aside from duty and introduces into his report or communication defamatory matter wholly irrelevant and foreign to the subject of inquiry, a different question is presented. (*De Arnaud v. Ainsworth*, 24 App. D. C., 167; 5 L. R. A. (N. S.), 163.)

Section 1547 of the Revised Statutes, by express terms, provides that orders, regulations, and instructions issued by the Secretary of the Navy are to be recognized as the regulations of the Navy. One of these regulations directs that "all officers through whom communica-



tions from inferiors are to be forwarded to the department, one of the bureaus, or any authority higher than themselves, must forward the same, if couched in respectful language, as soon after being received as practicable, and they will invariably state their opinion in writing, by indorsement or otherwise, in relation to every subject presented for decision." [Similar provision was contained in Art. I-5305, Naval Instructions, 1913.] M. was a professor at the United States Naval Academy at Annapolis, and placed his resignation in the hands of W., then superintendent of the academy, to be forwarded to the Secretary of the Navy for his decision. The resignation was forwarded by W. with his indorsement thereon of reasons why it should be accepted. In an action for libel, based upon this indorsement, brought by M. against W., it was held, (1) that the indorsement in question did not fall within the class of communications which are *absolutely* privileged; (2) that it was, however, privileged to the extent that the occasion of making it rebutted the presumption of malice, and threw upon the plaintiff the onus of proving that it was not made from duty, but from actual malice and without reasonable and probable cause. (*Maurice v. Worden*, 54 Md., 233.)

The mere sending to the head of a department, by a subordinate officer in the course of official duty, of a communication reflecting upon the character and conduct of a subordinate is not such a publication as is essential to maintain an action for a libel. (*Gardner v. Anderson*, 9 Fed. Cas. No. 5220.)

Handing to another a copy of a Senate document containing a report of an official of the War Department adverse to a claim for a medal of honor for distinguished service in the Army is not a libelous publication of the matter therein contained, since the report is a public document which every one may circulate, receive, and inspect. (*De Arnaud v. Ainsworth*, 24 App. D. C., 167; 5 L. R. A. (N. S.), 163.)

For decisions concerning the production in court of papers on file in the departments, for use in libel suits against public officers, see note to section 418, Revised Statutes.

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of Government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to the supremacy and to observe the liabilities which it imposes upon the exercise of the authority which it gives." (*U. S. v. Lee*, 106 U. S., 196.)

Executive Federal officers are personally liable at law in the ordinary forms of action for illegal official ministerial acts or omissions to the injury of an individual. (*U. S. v. Kendall*, 26 Fed. Cas. No. 15517; affirmed *Kendall v. U. S.*, 12 Pet., 526.)

An officer is bound to use that care and diligence in the discharge of his duties that a conscientious and prudent man, acting under a just sense of his obligations, would exercise under the circumstances of a particular case;

and if he fails and neglects to do so he is culpable. (*U. S. v. Baldridge*, 11 Fed. Rep., 552.)

Where a public act or order rests in executive discretion, neither the President nor his authorized agent is personally civilly responsible for the consequences. (*Durand v. Hollins*, 8 Fed. Cas. No. 4186.)

For other decisions concerning legal liability of public officers, see notes to Constitution, Article II, section 1, clause 1, and Article I, section 8, clause 13.

The signature of the head of a department does not require the use of pen and ink, held and guided by the hand of the person himself. The impress of his name with a stamp or copperplate by himself or in his presence is legally sufficient. (1 Op. Atty. Gen., 670.)

The head of a department can not delegate authority to other officers to sign his name in attestation of commissions, Treasury warrants, passports, and the like without authority of Congress. If the time occupied in signing his name becomes a serious impediment to the prompt performance of his merely intellectual duties, relief should be obtained from Congress. (7 Op. Atty. Gen., 594.)

The abbreviation employed by the head of a department is in legal contemplation his signature, if used for that purpose; and if in any case it should become material to establish it by evidence, the same testimony would avail as would suffice to verify his name written out at length. (4 Op. Atty. Gen. 187.)

The signature of a public official, in the form of a facsimile stamp affixed by a subordinate under the direction of such officer and initialed by the subordinate authorized to affix the same, is a valid signature and conveys the authority of the officer in all cases where he is authorized to act. (31 Op. Atty. Gen., 349, file 22724-39:3.)

**Secretary of the Navy may exercise powers vested by law in subordinates.**—The office of Commandant of the Marine Corps is under the direct supervision and control of the Secretary of the Navy, and its duties may be performed by him or by the Acting Secretary while the office of commandant is vacant. (28 Op. Atty. Gen., 486, citing *Swain v. U. S.*, 165 U. S., 553, 28 Ct. Cls., 221, in which the courts held that "a military officer can not be invested with greater authority by Congress than the Commander in Chief.")

Similarly, held that the Secretary or Acting Secretary of the Navy, as the case may be, may sign all mail which requires the signature of the Chief of the Bureau of Steam Engineering during a vacancy in that office. (File 22724-7e, May 14, 1909; compare *Williams Eng. and Cont. Co. v. U. S.*, 55 Ct. Cls., 349.)

**Power of Secretary to reprimand subordinates.**—"No doubt the Secretary of the Navy may, within his discretion, when he believes it for the good of the service, send communications to subordinate officers which may be in the nature of a reprimand. This right is necessarily vested in him as the chief officer of a department; but such communications can not be regarded in the nature of a punishment as defined in the Regulations." (28 Op. Atty. Gen., 625.)

"The assumption that the Secretary of the Navy can not pronounce a rebuke, public or private, upon an officer for a breach of discipline, or a failure in the performance of duty, without obtaining the sanction of a court, is an unheard of proposition. The department impartially awards praise or blame to the officer who deserves one or the other, as occasion may arise; and the practice is as old as the department itself. Cases have occurred where the department, without trial, has pronounced emphatic reprimand upon officers in general orders. The publicity that is given either to its commendation or its reproof is a matter within its own discretion, in the exercise of which it consults only the public interests." (File 26251-2993, Mar. 10, 1910, quoting letter of Jan. 14, 1891, to Commander George C. Reiter, U. S. Navy; see also, G. C. M. Order No. 9, Jan. 31, 1893, citing precedents, and see file 26283-522, Feb. 12, 1913.)

The Secretary of the Navy has authority to detail enlisted men of the Marine Corps to guard and protect property of the Government placed on exhibition at an exposition. (20 Op. Atty. Gen., 576); to order a naval detachment to Raleigh, N. C., to participate in ceremonies attending the unveiling of monument to late Ensign Bagley (file 3679-2); and to detail the Marine Band to appropriate duty anywhere (file 4288-6, Apr. 22, 1907), including its participation in a charity fete (file 4288-4, Apr. 18, 1907).

The act of June 3, 1916, section 35 (39 Stat., 188), does not prohibit the detail or permitting of enlisted men, including members of the Marine Band, to engage in their profession in civil life without remuneration, even though this may possibly interfere with the employment of local civilians. (File 4924-435, June 20, 1916).

By act of August 29, 1916 (39 Stat., 612), members of the Marine Band are prohibited as individuals from furnishing music in competition with civilian musicians, and from accepting remuneration for furnishing music except under special circumstances when authorized by the President.

As to detail of enlisted men to duty in an executive department, see statutes noted under section 416, Revised Statutes, "Restrictions on employment of clerical services."

**Sec. 418. [Department property, books, and records.]** The Secretary of the Navy shall have the custody and charge of all the books, records, and other property now remaining in and appertaining to the Department of the Navy, or hereafter acquired by it.—(30 Apr., 1798, c. 35, s. 3, v. 1, p. 554.)

Accounts, property: "Clothing and small stores" fund created by act of June 30, 1890 (26 Stat., 197).

Accounts: "Naval supply account" was created and the "naval supply fund" abolished by acts of June 25, 1910 (36 Stat., 792), and March 4, 1911 (36 Stat., 1279).

Accounts: Property returns to be audited and responsibility for losses determined by Paymaster General of the Navy and officer in charge of the Quartermaster's Department of the Marine Corps. (Act Mar. 29, 1894, 28 Stat., 47.)

**Miscellaneous.**—The head of a department should see that contracts which belong to his office are properly and faithfully executed, whether he made the contracts or conferred authority on others to do so; and if he becomes satisfied that contracts which he made are being fraudulently executed, or that contracts made by others were made in disregard of the rights of the Government, or with intent to defraud, it is his duty to interpose, arrest execution thereof, and adopt measures to protect the Government against the dishonesty of his subordinates. (*U. S. v. Adams*, 7 Wall., 463.)

Navy regulations are binding on the subordinates of the Secretary of the Navy, but do not bind the Secretary himself. (See *U. S. v. Burns*, 12 Wall., 246; *Smith v. U. S.*, 24 Ct. Cls., 215; and 9 Comp. Dec., 280; noted under sec. 161, R. S., "IX. Waiver of Regulations.")

The presumption is that officers of the Government perform their duty, and the presumption is strengthened in a particular case by the fact that heavy statutory penalties will be incurred by neglect. (*Crussell v. U. S.*, 7 Ct. Cls., 276, publishing decision of Supreme Court.)

The failure of an officer of the United States to discharge a plain duty imposed on him by law does not charge the Government itself with the loss caused by the default. (*In re Schmalz*, 4 Ct. Cls., 142.)

All the officers of the Government, from the highest to the lowest, are but agents with delegated powers; and if they act beyond the scope of those delegated powers, their acts do not bind the principal. (*U. S. v. Maxwell, etc.*, Co., 21 Fed. Rep., 19; see also *Steele v. U. S.*, 113 U. S., 128, holding Government not bound by illegal action of Navy Department, noted under sec. 236, R. S., VIII, (C), 3.)

All instructions from the executive which are not supported by law are illegal, and no inferior officer is bound to obey them. (*Gilchrist v. Collector*, 10 Fed. Cas. No. 5420; see cases on this subject collected in note to Constitution, Art. I, sec. 8, clause 13.)

The fact that one is an officer of the Navy of the United States, and is acting under orders, gives him no justification for the retention of premises held by him under that authority against the claim of the true owner. (*San Francisco Sav. Union v. Irwin*, 28 Fed. Rep., 708.

Army supplies: Transfer of, as needed, to naval or marine officers commanding detachments on shore, was required by sections 1135 and 1143, Revised Statutes.

Bids may be rejected under certain circumstances. (Secs. 3722 and 3724, R. S.)

Coal produced by certain mines in Alaska required to be sold to United States for use of Navy at price fixed by President. (Act May 28, 1908, sec. 2, 35 Stat., 424.)

Coal on Government lands in Alaska may be mined under the direction of the President,



- when necessary for the Navy. (Act Oct. 20, 1914, 38 Stat., 741.)
- Congressional Record: One bound copy to be furnished to the library of the Navy Department and to the Naval Observatory. (Act Jan. 12, 1895, sec. 73, 28 Stat., 617.)
- Contracts for supplies are to be made by or under direction of Secretary of the Navy. (Sec. 3714, R. S., as amended by act Feb. 27, 1877, 19 Stat., 249.)
- Contracts for provisions are to be awarded to lowest responsible bidder on each item. (Act Mar. 4, 1913, 37 Stat., 904.)
- Contracts or purchases are not to be made unless authorized by law or under appropriation adequate to their fulfillment, except in the War and Navy Departments for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed necessities of current year. (Sec. 3732, R. S., as amended by act June 12, 1906, 34 Stat., 255)
- Contractors required to furnish bond or certified check. (Sec. 3719, R. S., as amended, act May 25, 1896, 29 Stat., 136, and Dec. 11, 1906, 34 Stat., 841.)
- Contractors liable to forfeiture, as liquidated damages, for failure to perform. (Sec. 3720, R. S., as amended, June 22, 1910, 36 Stat., 591.)
- Contractors may be paid reservations on deliveries. (Sec. 3730, R. S.)
- Contractors may be paid partial payments during progress of work. (Acts Aug. 22, 1911, 37 Stat., 32; Oct. 6, 1917, sec. 5, 40 Stat., 383.)
- Contractor's name required to be marked on supplies. (Sec. 3731, R. S.)
- Copies of books, records, papers, or documents, under seal of department, admissible in evidence in Federal courts. (Sec. 882, R. S.)
- Domestic steel material to be used in construction of naval vessels. (Act Aug. 3, 1886, sec. 2, 24 Stat., 215, as amended by act May 4, 1898, 30 Stat., 390.)
- Domestic hemp to be purchased for Navy, subject to price and quality. (Sec. 3725, R. S.)
- Domestic articles to be preferred in purchases for Navy. (Sec. 3728, R. S.)
- Exchange of typewriters, adding machines, and other labor-saving devices, authorized in part payment for new machines. (Act Mar. 4, 1915, sec. 5, 38 Stat., 1161.)
- Flags captured by Navy to be collected by Secretary of Navy and delivered to the President. (Secs. 428, 1554, 1555, R. S.)
- Foreign materials for construction or repair and equipment of naval vessels may be imported without duty. (Act Oct. 3, 1913, sec. IV, J, subsecs. 5, 6, 38 Stat., 196.)
- Foreign war material may be purchased in emergencies and imported free of duty. (Act Mar. 4, 1913, 37 Stat., 896. See also act June 30, 1914, 38 Stat., 399.)
- Foreign supplies not to be purchased in excess of prevailing market prices. (Sec. 3723, R. S.)
- Gifts of flags used for draping coffins may be made by Secretary of the Navy to relatives of deceased, or to schools, patriotic orders, or societies. (Act June 30, 1914, 38 Stat. 406.)
- Gifts to vessels of silver, colors, books, and articles of equipment or furniture, to be accepted and cared for by Secretary of the Navy. (Act May 20, 1908, 35 Stat., 171.)
- Government publications (one copy) are to be furnished by the Superintendent of Documents to the libraries of the Executive Departments, and of the United States Military and Naval Academies, which libraries are constituted designated depositories of such publications. (Act Jan. 12, 1895, sec. 98, 28 Stat., 624.)
- Inventory of property pertaining to Navy is required to be kept by the Secretary of the Navy. (Sec. 197, R. S.; amended by act Feb. 27, 1877, sec. 1, 19 Stat., 241.)
- Inventory to be kept of all supplies pertaining to Naval Establishment, and annual report thereof made to Congress, by Bureau of Supplies and Accounts. (Act Mar. 2, 1889, 25 Stat., 817.)
- Life-saving dress authorized as part of naval equipment. (Act Mar. 3, 1883, 22 Stat., 475.)
- Loan of naval vessels to nautical schools, authorized by act of March 4, 1911 (36 Stat., 1353).
- Loan or permanent transfer of naval vessels to U. S. Shipping Board, authorized by act of September 7, 1916, section 6 (39 Stat., 730).
- Loan of naval equipment to military schools, authorized by act of March 3, 1901 (31 Stat., 1440), as amended by act of June 29, 1906 (34 Stat., 620), and June 24, 1910 (36 Stat., 613).
- Loan or gift of condemned ordnance, guns, and cannon balls by the Secretary of the Navy to soldiers' monument associations, posts of Grand Army of the Republic, and municipal corporations, authorized by act of May 22, 1896 (29 Stat., 133).
- Loan of scientific instruments by Secretary of the Navy to the Weather Bureau was authorized by act of October 19, 1888, section 3 (25 Stat., 600), as amended by act of October 1, 1890 (26 Stat., 653).
- Loan of articles to Red Cross was authorized by joint resolution of May 8, 1914 (38 Stat., 771), as amended by joint resolution of May 18, 1916 (39 Stat., 164).
- Official Register of the United States—20 copies of each edition to be furnished to the Navy Department under Public Printing and Binding Act, January 12, 1895, section 73 (28 Stat., 618).
- Punishment for injuring or destroying naval supplies and property is provided by Criminal Code, act of March 4, 1909, section 286 (35 Stat., 1144); and section 1624, Revised Statutes, article 4.
- Punishment for injuring naval vessel or equipment is provided by section 1624, Revised Statutes, article 4.
- Punishment for failure to prevent destruction of public property is provided by section 1624, Revised Statutes, article 8.
- Punishment for wasting ammunition, provisions, or other public property, or permit-

- ting such waste, is provided by section 1624, Revised Statutes, article 8.
- Punishment for unlawfully purchasing naval property from person not having lawful right to sell same is provided by section 1624, Revised Statutes, article 14; and Criminal Code, act of March 4, 1909, section 35 (35 Stat., 1095).
- Punishment for stealing, embezzling, or unlawfully selling ordnance, arms, equipment, ammunition, clothing, subsistence stores, or other naval property is provided by section 1624 Revised Statutes, article 14; and Criminal Code, act of March 4, 1909, sections 36 and 47 (35 Stat., 1096, 1097).
- Punishment for unlawfully concealing, removing, mutilating, obliterating, falsifying, or destroying any public record, book, paper, etc., is provided by Criminal Code, sections 128 and 129 (35 Stat., 1111, 1112).
- Punishment for forging or altering public records for purpose of defrauding United States is provided by section 28, Criminal Code, act of March 4, 1909 (35 Stat., 1094); and section 1624, Revised Statutes, article 14. (See also act Mar. 4, 1911, 36 Stat., 1355.)
- Purchase of supplies is deemed to be for the Navy, and not for any bureau thereof, and they shall be classified and issued accordingly. (Act Mar. 2, 1891, 26 Stat., 807; act June 30, 1890, 26 Stat., 205.)
- Purchase of structural steel, ship plates, armor, armament, or machinery from unlawful combinations or monopolies, or at price in excess of a reasonable profit, is prohibited by a clause in the annual naval appropriation act under "Increase of the Navy." (See act Mar. 4, 1917, 39 Stat., 1195.)
- Purchase of naval supplies, when time will permit, is to be made by contract after advertisement and from lowest bidder. (Sec. 3718, R. S., as amended by act June 30, 1890, 26 Stat., 189; act July 19, 1892, 27 Stat., 243; and act Mar. 3, 1893, 27 Stat., 715.)
- Purchase of material for steam boilers is authorized without advertisement. (Res., June 14, 1878, 20 Stat., 253.)
- Purchase of gun steel or armor for the Navy, without public competition, is prohibited by act of March 3, 1893 (27 Stat., 732).
- Purchase of shells or projectiles, except for experimental purposes, is not to be made without bids. (Act Mar. 4, 1913, 37 Stat., 896; act June 30, 1914, 38 Stat., 398.)
- Purchase of ordnance, gunpowder, medicines, hunting, butter and cheese, contraband of war, and supplies abroad for vessels on foreign stations may be made without advertisement. (Sec. 3721, R. S.)
- Purchase of tobacco for the Navy is to be made after advertisement in the same manner as other supplies. (Act June 10, 1896, 29 Stat., 370.)
- Purchase of supplies in open market for all branches of the naval service without formal contract or bond is authorized where amount does not exceed \$500. (Act Mar. 2, 1907, 34 Stat., 1193.)
- Purchase of material, supplies, and equipment, so far as possible, shall be made from other services of the Government, possessing material, supplies, and equipment no longer required because of cessation of war activities. (Act Mar. 1, 1919, sec. 8, Pub. No. 314; see also act Feb. 25, 1919, Pub. No. 275, and Executive Order of Dec. 3, 1918.)
- Purchase of preserved meats, pickles, butter, desiccated vegetables, and flour is to be made in such manner as Secretary of the Navy may deem best. (Secs. 3726 and 3727, R. S.)
- Purchase of bunting may be made in open market. (Sec. 3729, R. S.)
- Purchases not to be made of vessels, armament, articles, or materials which the navy yards, gun factories, or other industrial plants of the Navy are equipped to supply, except in cases of emergency, etc. (See annual naval appropriation acts, e. g., act of Mar. 3, 1915, 38 Stat., 952.)
- Record is to be kept of proceedings of naval examining boards. (Sec. 1501, R. S.)
- Record of officer in his existing grade shall be considered by naval examining board and the President in determining his fitness for promotion. (Sec. 1502, R. S., as amended by act June 18, 1878, sec. 1, 20 Stat., 165.)
- Records of all courts-martial, courts of inquiry, and boards for the examination of officers for retirement and promotion are to be received and recorded by the Judge Advocate General under the direction of the Secretary of the Navy. (Act June 8, 1880, 21 Stat., 164; amended by act June 5, 1896, 29 Stat., 251.)
- Records are to be kept of all proposals for naval supplies. (Sec. 3720, R. S., as amended by act June 22, 1910, 36 Stat., 591.)
- Records are to be kept in Navy Department of commissions of all officers under the direction and control of the Secretary of the Navy. (Act Mar. 28, 1896, 29 Stat., 75.)
- Records of character and treatment of diseases are to be transmitted to Navy Department by surgeon of the fleet. (Sec. 1374, R. S.)
- Records of naval contracts are to be kept in Returns Office, Interior Department. (Secs. 512-515, 3744-3747, R. S.)
- Records of Revolutionary War pertaining to the Navy, in the possession of any official of the United States, are required to be transferred to the Navy Department. (Act Mar. 2, 1913, 37 Stat., 723; act June 29, 1906, 34 Stat., 579.)
- Records pertaining to the Navy, from beginning of the Navy Department to the Civil War, in the possession of any of the executive departments, are required to be transferred to the Secretary of the Navy. (Act Apr. 27, 1904, 33 Stat., 403.)
- Records and books of bureaus in the Navy Department are to be retained in custody of the bureaus. (Sec. 420, R. S.)
- Records of courts of inquiry are admissible in evidence before courts-martial. (Sec. 1624, R. S., art. 60.)
- Records of naval retiring boards are to be laid before the President by Secretary of the Navy. (Sec. 1452, R. S.)
- Records of Revolutionary War are to be classified by Secretary of the Navy with view to pub-



- lication. (Act Mar. 2, 1913, 37 Stat., 723; act June 29, 1906, 34 Stat., 579.)
- Records of Civil War are to be published by the Secretary of the Navy. (Act July 31, 1894, 28 Stat., 190; see also legislative, executive, and judicial appropriation acts for subsequent years.)
- Regulations for the purchase, preservation, and disposition of naval supplies are to be made by the President. (Sec. 1549, R. S.)
- Regulations for the custody, use, and preservation of the records, papers, and property appertaining to any executive department, are to be made by the head of such department. (Sec. 161, R. S.)
- Regulations and general orders shall be furnished each commissioned and warrant officer of the Navy. (Sec. 1548, R. S.)
- Repairs to naval vessels are restricted by sections 1538 and 1539, Revised Statutes, and laws noted thereunder.
- Sale of naval stores to persons in the Navy and Marine Corps and civilian employees at certain naval stations is authorized by act of March 3, 1909 (35 Stat., 768); act of June 24, 1910 (36 Stat., 619); and act of March 4, 1913 (37 Stat., 909).
- Sale of Navy and Marine Corps subsistence supplies to officers and enlisted men of the Army is authorized by annual appropriation acts. (See act Mar. 4, 1915, 38 Stat., 1072. See also sec. 1135, R. S., and note thereto.)
- Sale of vessels unfit to be repaired is authorized by sections 1540 and 1541, Revised Statutes, and subsequent laws noted thereunder.
- Sale of unserviceable materials and condemned naval supplies and stores is authorized by section 1541, Revised Statutes, and subsequent laws noted thereunder. [The chief of the Bureau of Ordnance was authorized to sell certain small arms on hand and use proceeds for purchase of new arms and ammunition by act of June 20, 1878 (20 Stat., 242). See also act of March 3, 1875 (18 Stat., 388).]
- Sale of useless papers in the Navy Department, on naval vessels, and at navy yards, is authorized by acts of February 16, 1889 (25 Stat., 672); March 2, 1895 (28 Stat., 933); February 16, 1909, section 14 (35 Stat., 622); August 22, 1912 (37 Stat., 329); and March 3, 1915 (38 Stat., 929).
- Sale of individual pieces of United States armament, when sentimental reasons exist for such sale, is authorized by act of March 2, 1905 (33 Stat., 841).
- Sale or gift of lubricating oil and gasoline to vessels of Volunteer Patrol Squadron. (See act of Aug. 29, 1916, 39 Stat., 600.)
- Sales of vessels and materials are to be reported to Congress (secs. 429, 1541, R. S.; sec. 3672, R. S., as amended by act Feb. 27, 1877, sec. 1, 19 Stat., 249; act Aug. 5, 1882, sec. 2, 22 Stat., 296).
- Sales of old material, etc.: Proceeds in certain cases are to be covered into the Treasury as "Miscellaneous receipts." (Sec. 3618, R. S.)
- Scientific investigators and students shall be afforded the facilities for study and research in the Government departments under such restrictions as heads of departments may prescribe. (Act Mar. 3, 1901, 31 Stat., 1039.)
- Statutes at Large—100 pamphlet copies are required to be furnished to the Navy Department by Secretary of State at close of each session of Congress. (Public Printing and Binding Act, Jan. 12, 1895, sec. 73, 28 Stat., 614.)
- Statutes at Large—75 bound copies are required to be furnished by Secretary of State to Navy Department at close of each Congress. (Public Printing and Binding Act, Jan. 12, 1895, sec. 73, 28 Stat., 615.)
- Supreme Court reports are to be furnished to the Secretary of the Navy, the Assistant Secretary of the Navy, the Judge Advocate General of the Navy, and the Naval Academy, for official use. (Judicial Code, act Mar. 3, 1911, sec. 227, 36 Stat., 1154.)
- Timberlands are reserved for naval purposes, and removal or destruction of timber thereon is made punishable by sections 2458–2463, Revised Statutes.
- Transfer of aeroplanes and equipment to Post Office Department was authorized by Act of February 28, 1919 (40 Stat., 1194).
- Transfer of supplies from one bureau of the War or Navy Departments to another bureau of such departments. See act of March 4, 1915 (38 Stat. 1084), and 21 Comp. Dec., 819. See also section 1135, Revised Statutes, and note thereto.
- Transfer of supplies between Bureaus of the Navy Department was authorized by act of March 2, 1889 (25 Stat., 818).
- Transfer of naval vessels to the Department of Commerce was authorized by Act of June 5, 1920 (41 Stat., 1058); and to the Shipping Board by Act of September 7, 1916, sec. 6 (39 Stat., 730; compare Act June 5, 1920, 41 Stat., 990; see also Act May 12, 1917, 40 Stat., 75).
- Transportation of naval supplies by Army transport service, is authorized by act of March 2, 1907 (34 Stat., 1170).
- Transportation of naval supplies shall be in vessels of United States, unless freight charges are unreasonable and excessive. (Act Apr. 28, 1904, 33 Stat., 518.)
- Vehicles, passenger-carrying, are not to be purchased, operated, or repaired from any appropriation without specific authority of Congress. (Act July 16, 1914, sec. 5, 38 Stat., 508).
- Vessels, foreign built and registered as vessels of United States, may be taken and used as cruisers or transports. (Act May 10, 1892, sec. 4, 27 Stat., 28.)
- Vessels used in ocean mail service may be taken and used as transports or cruisers. (Act Mar. 3, 1891, sec. 9, 26 Stat., 832.)

**Transfer of property.**—Where articles of equipment, purchased for use of a particular bureau of a department have served the purpose for which purchased, they may be transferred for use of another bureau of said department without any adjustment of appropriations. (21 Comp. Dec., 788.)

Under the provisions of the act of March 4, 1915 (38 Stat. 1084), when one bureau of the War

or Navy Departments procures supplies or performs any service for another bureau of such departments the head of the department for which the supplies are to be procured or the service performed may cause its funds to be transferred on the books of the Treasury Department to the procuring department for direct expenditure by it. The funds so transferred are to be expended and accounted for under the rules and regulations of the department to which they are advanced (21 Comp. Dec., 819; see also 17 Op. Atty. Gen., 480).

Authority of Congress is necessary for transfer of naval vessel to the Revenue-Cutter Service. (File 3160-54, May 4, 1907.)

There is no authority for the Navy Department to transfer to another department absolutely, or temporarily (under certain circumstances), property purchased from its appropriations. Accordingly, declined to loan model of the U. S. S. *Bancroft* to the Revenue-Cutter Service, to which the vessel itself had been transferred pursuant to act of June 30, 1906 (34 Stat., 702). (File 3160-36, Nov. 15, 1906. See also 17 Op. Atty. Gen., 480; 20 Op. Atty. Gen., 93, 96; 23 Comp. Dec., 175. Compare file 809-3, Sept. 28, 1906, holding that the loan of a gun to the State of Virginia might be made under the general powers of the Secretary of the Navy, there being no express statutory authority covering the case.)

The Secretary of the Navy can not exchange a vessel belonging to the Navy, which has been condemned as unfit for naval purposes, for another vessel, notwithstanding the exchange might be of advantage to the public service. The disposition of such vessel is controlled by the law providing for the sale of vessels and materials which can not be advantageously used. (14 Op. Atty. Gen., 369.)

For other cases, see notes to sections 161 and 355, Revised Statutes; and see various laws authorizing loan or transfer of Government property—for example, joint resolutions of February 3, 1913 (37 Stat., 1024), and February 9, 1917 (39 Stat., 902), authorizing Secretary of Navy to loan flags to inaugural committee, subject to certain restrictions—and see laws noted above and section 427, Revised Statutes.

**Records of department.**—The Navy Department is unable to comply with the request of attorneys that original correspondence be furnished them from the files of the department, notwithstanding their offer to give any reasonable security for its custody and return. The law requires that the records shall be kept safely in the department, and the Secretary of the Navy is made personally the custodian. (Letter of Hon. R. W. Thompson, Secretary of the Navy, May 12, 1879, published in *Maurice v. Worden*, 54 Md., 237; see also file 12475-64, Aug. 9, 1915.)

It has been the invariable practice of the Navy Department to decline to furnish in the case of legal controversies, at the request of the parties litigant, copies of papers or other information to be used in the course of the proceedings. (G. O. No. 121, Navy Dept., Sept. 17, 1914; see also file 1959-99, and 12475-53:1, Jan. 30, 1915.)

The Navy Department does not grant permission to attorneys to make preliminary and informal examination of the records, but will promptly furnish copies of papers or records upon call of a civil court before which proceedings are pending. (G. O. No. 121, Navy Dept., Sept. 17, 1914; see also file 5467-8, Mar. 27, 1907.)

"No information shall be furnished from the records of the Navy Department to attorneys or agents concerning the naval service of officers or enlisted men of the Navy until such attorneys or agents shall file a power of attorney in the department, showing that they have authority from the person whose record is desired, or his legal representatives, to request such information, and shall also file a statement of the purpose for which such information is desired. If such statement be deemed satisfactory to the department, the information will be furnished, provided the attorney or agent submits to the department the same proof of the identity of the person or persons he represents, as is required when the application for such information is made by the person or persons themselves." (Art. 26, Naval Instructions, 1913.)

It would be establishing a dangerous precedent for the Secretary of the Navy to furnish information from the official records for the use of an attorney in preparing a case against the United States in the Court of Claims, even though such attorney file a power of attorney from the legal representative of the person whose record is desired. The furnishing of such information "might be construed in violation of section 5498 Revised Statutes." The information sought might be furnished very properly upon the call of the Court of Claims. (Attorney-General to Secretary of the Navy, Jan. 18, 1915, file 12475-53:1; see also sec. 164, Judicial Code, act Mar. 3, 1911, 36 Stat., 1141, and sec. 188, R. S.) [Section 5498, Revised Statutes, above-mentioned, was repealed by section 341, Criminal Code, act of March 4, 1909 (35 Stat., 1153), and similar provisions were embodied in section 109 of said Criminal Code (35 Stat., 1107).]

There is a class of communications which the courts will not require to be produced in evidence where those having the custody of them object to their publicity on the ground of public policy. Such are official communications to the heads of Government, and between its different departments. "And where the law is restrained by public policy from enforcing the production of papers, the like necessity restrains it from doing what would be the same in effect, namely, receiving secondary evidence of their contents." (*Maurice v. Worden*, 54 Md., 254; citing 1 Green. Ev., sec. 251.)

However, where the Secretary of the Navy furnished copies of correspondence from the files of the department, for use by attorneys in the prosecution of a libel suit against the superintendent of the Naval Academy, it was held that such copies under the department's seal might be used in evidence, as the Secretary of the Navy, by furnishing such copies, showed that he did not object to their publicity. (*Maurice v. Worden*, 54 Md., 254.)



Communications in writing passing between officers of the Government, in the course of official duty, relating to the business of their offices, are privileged from disclosure on the ground of public policy, and their production will not be compelled by courts of law or equity. Neither will secondary evidence of their contents be admissible, whether in the form of copies or of oral statements of witnesses who have read and recollected the same. An official letter from the head of an office to the head of the department, recommending a person for appointment as clerk in the former's office in place of one whose removal is recommended for inefficiency and bad conduct, is a privileged communication within the rule, and can not be admitted in evidence to sustain an action for libel brought against the head of the office by the person whose removal is recommended. (*Gardner v. Anderson*, 9 Fed. Cas. No. 5220. In this case, the head of the department declined to appear before a commission to take his testimony, or to produce any paper or copy, and sent the commissioner a letter to that effect. The appointment clerk who attended and was examined, by direction of the Secretary declined to produce any paper or to speak of the contents of any. The Secretary later declined to attend the trial in obedience to a subpoena, and directed the United States attorney to state his reasons to the court. The court refused to proceed against the Secre-

tary for contempt, as moved by plaintiff. The court advised plaintiff to apply to the Secretary for a copy of the letter. The Secretary replied that, at the date of alleged letter, the defendant was appraiser of merchandise, and any communications from him to the department were official in their nature, confidential, and protected from disclosure; and he, the Secretary, was not at liberty to furnish a copy of the same to enable the plaintiff to maintain an action against a late appraiser whose defense the Government had assumed. The plaintiff then called a clerk in the appraiser's office, who had charge of the official letter copying book. The court, however, excluded such secondary evidence, its decision being as stated above.)

Removal of papers from existing records of officers is not approved. (File 4435-5, May 13, 1908.)

The official records of the Navy Department should remain inviolate, and should not be changed a hundred years after the events they purport to record. Where it is alleged that the record of an officer is in error, the evidence in support of such claim may be filed with his record, thus showing just what is claimed and just what authority there is for each claim. (File 24413-5, July 12, 1913. See also note to Constitution, Art. I, sec. 7, clause 2.)

For other cases, see notes to sections 161, 188, and 871, Revised Statutes.

**Sec. 419. [Establishment of Bureaus and Distribution of Business.]** The business of the Department of the Navy shall be distributed in such manner as the Secretary of the Navy shall judge to be expedient and proper among the following Bureaus:

First. A Bureau of Yards and Docks.

Second. A Bureau of Equipment and Recruiting.

Third. A Bureau of Navigation.

Fourth. A Bureau of Ordnance.

Fifth. A Bureau of Construction and Repair.

Sixth. A Bureau of Steam Engineering.

Seventh. A Bureau of Provisions and Clothing.

Eighth. A Bureau of Medicine and Surgery.—(31 Aug., 1842, c. 286, s. 2, v. 5, p. 579; 5 July, 1862, c. 134, s. 1, v. 12, pp. 510, 511.)

Advisory committee for aeronautics was established, and its duties prescribed, by act of March 3, 1915 (38 Stat., 930).

Aircraft Board was established by act of October 1, 1917 (40 Stat., 296).

Assistant Secretary of the Navy is authorized by act of July 11, 1890 (26 Stat., 254), and is to "perform such duties as may be prescribed by the Secretary of the Navy or required by law." (Act Mar. 3, 1891, 26 Stat., 934.)

Boards, commissions, councils, etc., are not authorized to perform any work at the expense of appropriations made by Congress, unless the creation thereof has been authorized by law; no personal services from any executive department shall be employed by such boards, etc., nor expenses of members paid. (Act Mar. 4, 1909, sec. 9, 35 Stat., 1027.)

Boards: The General Board was created by Navy Department General Order No. 544 of March 13, 1900. Its composition and duties were prescribed by Navy Regulations, 1913, Arts. R-104, 166, 167. It received statutory recognition in the act of August 29, 1916 (39 Stat., 563 and 39 Stat., 581). As to precedence of members of General Board, see note to section 421, Revised Statutes, under "IV. Rank, Titles, and Precedence."

Bureau of Construction and Repair is to designate members of board to report cost, etc., of repairs to vessels (sec. 1538, R. S.), and to conduct work of investigating and determining the most suitable and desirable shapes and forms to be adopted for naval vessels, by means of model tank at navy yard, Washington, D. C. (Act June 10,

1896, 29 Stat., 372.) The Chief Constructor to be member of Aircraft Board. (Act Oct. 1, 1917, 40 Stat., 297.)

Bureau of Equipment and Recruiting was designated as Bureau of Equipment in annual appropriation acts commencing with the fiscal year 1892; provision was made for distribution of the duties, funds, and employees of the Bureau of Equipment among the other bureaus and offices of the Navy Department by naval appropriation acts for the fiscal years 1911-1914; and the Bureau of Equipment was abolished by act of June 30, 1914 (38 Stat., 408).

Bureau of Medicine and Surgery is to recommend Medical Corps officers for appointment to the regular Medical Corps (act Aug. 22, 1912, 37 Stat., 344), and to detail expert as member of advisory board of hygiene laboratory (act July 1, 1902, sec. 5, 32 Stat., 713). Surgeon-General of the Navy is to be member of board to hear appeals from decision of Commissioner of Internal Revenue as to deleterious ingredients of imitation butter (act Aug. 2, 1886, sec. 14, 24 Stat., 212) and of filled cheese (act June 6, 1896, sec. 15, 29 Stat., 256).

Bureau of Provisions and Clothing was designated as Bureau of Supplies and Accounts by act of July 19, 1892 (27 Stat., 243, 245); it was required to keep property accounts of all supplies pertaining to the naval establishment and to make annual report thereof to Congress, by act of March 2, 1889 (25 Stat., 817); to audit property returns from officers of the Navy and determine responsibility for losses, by act of March 29, 1894 (28 Stat., 47); to make annual report of receipts and expenditures to the Secretary of the Navy, by act of May 13, 1908 (35 Stat., 153); to cause payment of death gratuity to be made in cases of officers and enlisted men of the Navy and Marine Corps by act of June 4, 1920 (41 Stat., 824); to receive quarterly returns of property from storekeeper at the Naval Academy, by act of May 13, 1908 (35 Stat., 153); to receive report of inspection and recommendation from general inspector of the Pay Corps, on accounts of storekeeper at the Naval Academy, by act of May 13, 1908 (35 Stat., 153); to pay witness fees in naval courts by act of February 16, 1909 (sec. 12, 35 Stat., 622); to audit accounts of ships' stores profits, by act of June 24, 1910 (36 Stat., 619); and to keep money accounts so as to show direct and indirect charges incident to cost of work, and make annual report thereof to Congress, by act of March 4, 1911 (36 Stat., 1267).

Bureau of Steam Engineering was designated as Bureau of Engineering by act of June 4, 1920 (41 Stat., 828).

Bureau of Yards and Docks to have supervision of power plants at navy yards. (Act Apr. 27, 1904, 33 Stat., 337).

Bureaus in contracting for naval supplies shall be at liberty to reject bids of persons who have previously defaulted (sec. 3722, R. S.), and shall not contract for supplies in foreign country except after advertisement in New York (sec. 3723, R. S. See laws

relating to contracts noted under sec. 418, R. S.).

Chief of Naval Operations, authorized by act of March 3, 1915 (38 Stat., 929), as amended by act of August 29, 1916 (39 Stat., 558), is charged, under the direction of the Secretary of the Navy, with the operations of the fleet and with the preparation and readiness of plans for its use in war; and is to succeed to duties of the Secretary of the Navy during the temporary absence of the Secretary and the Assistant Secretary.

Hydrographic Office was established by law as a part of the Bureau of Navigation, and its duties prescribed by Congress. (See secs. 431-433, R. S.)

Judge Advocate General's Office was established by act of June 8, 1880 (21 Stat., 164), amended by act June 5, 1896 (29 Stat., 251), the duties of the Judge Advocate General as prescribed by Congress being, under the direction of the Secretary of the Navy, to "receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for the examination of officers for retirement and promotion in the naval service," and to "perform such other duties as have heretofore been performed by the solicitor and naval Judge Advocate General."

Nautical Almanac Office is provided for by section 436, Revised Statutes. (See note to that section as to consolidation of Nautical Almanac Office with the Naval Observatory.)

Naval Communications Office was established by appropriations contained in act of May 29, 1920 (41 Stat., 664).

Naval Intelligence Office was established by act February 24, 1899 (30 Stat., 874). See also General Order No. 292, March 23, 1882.

Naval Observatory is included in Title X, "The Department of the Navy," by section 434, Revised Statutes, and is included in the annual appropriations for the Navy Department in the legislative, executive, and judicial appropriation act.

Naval Records and Library Office was established by the legislative, executive, and judicial appropriation act of March 4, 1915 (38 Stat., 1025), which consolidated appropriations made in previous years for "Library of the Navy Department" and "Office of Naval Records of the Rebellion."

Solicitor's Office was created by the legislative, executive, and judicial appropriation act of May 22, 1908 (35 Stat., 218), which transferred certain clerical positions from the office of the Judge Advocate General to the "office of the solicitor." The duties of the solicitor were not fixed by statute, except that he should "perform the duties of the Judge Advocate General of the Navy in case of the death, resignation, absence, or sickness of that officer"; which provision, however, was omitted from appropriation acts for the following years, and is not now in force. (See file 24690-77½, Feb. 12, 21, 1908; file 25462-6, Apr. 22, 1909; file 3980-1450, Nov. 6, 1918; and file 22724-51.)



The Navy pay office at Washington is not one of the "bureaus and offices" of the Navy Department within the meaning of a contract to deliver ice to the Navy Department and its various bureaus and offices. (File 6482, July 26, 1904.)

The Marine Corps is not one of the bureaus of the Navy Department. It is a part of the Naval Establishment, but it is not a part of the Navy Department as established at the seat of government; it is under the supervision of an executive department, but that relation to the department is not the same as being a part of it. (11 Comp. Dec., 558; see also 28 Op. Atty. Gen., 487, and note to sec. 159, R. S.)

"The office of the Judge Advocate General of the Navy, while simply designated as an office, is, nevertheless, one of the coordinate branches of the Navy Department, with responsibilities of no less importance than those of the chiefs of bureaus." (S. Repts., vol. 2, 54th Cong., 1st sess., 1895-96, No. 472.)

"The office of Judge Advocate General is one of great responsibility and requires a high order of talent to successfully perform the duties thereof." (H. Repts., vol. 1, 54th Cong., 1st sess., 1895-96, No. 285.)

"Owing to the peculiar nature of the duties pertaining to the office of Judge Advocate General in the Navy Department, it seems to be absolutely necessary that the officer appointed to said office should be familiar with the law, forms and practice of courts-martial, the rules, regulations, and established customs of the Navy; that he should have practical experience in the naval service and an acquaintance with the application of the law and regulations to the rank, grades, ratings, and of the various classes of officers and enlisted men in the service, and that he should possess proper legal attainments to enable him to discharge satisfactorily the duties of that office." (H. Repts., vol. 2, 46th Cong., 2d sess., 1879-80, No. 459.)

The duties required to be performed by the Judge Advocate General "are among the most important branches of the public business which have been confided to the Navy Department." (H. Repts., vol. 2, 46th Cong., 2d sess., 1879-80, No. 459.)

The office of the naval solicitor, as it existed under the Department of Justice [sec. 349, R. S.], was unsuited to the requirements of the naval service. After that office was abolished [act June 19, 1878, 20 Stat., 205] and prior to the establishment of the office of Judge Advocate General [act June 8, 1880, 21 Stat., 164], the necessity of having an officer of the service, possessing the necessary qualifications, to systematize the details of administration of law and justice in the Navy and perform the duties of Judge Advocate General was partially met by the detail of a suitable officer by the Secretary of the Navy to act in that capacity. But in view of the changes to which such office was subjected by their temporary assignments it was found important that Congress should fix the status of such officer by a provision for the Navy analogous to that which had long been established in the Army, except that the rank and pay of the Judge Advocate General of the Army are of a higher relative grade (brigadier general) than that given by law to the officer

appointed to discharge similar duties as Judge Advocate General of the Navy (captain in the Navy or colonel in the Marine Corps). (H. Repts., vol. 2, 46th Cong., 2d sess., 1879-80, No. 459.)

The business which it was proposed to assign to the office of Judge Advocate General by the act of June 8, 1880, "consists of the records of all courts-martial, courts of inquiry, boards for the examination of officers for retirement and promotion, the preparation of charges and specifications for courts-martial, the organization of courts and boards, the various claims filed for investigation, numerous questions of law, regulation, and other matters. The records of proceedings of the various courts and examining boards, many of them being voluminous, require careful reading and examination preliminary to action thereon by the Secretary. The claims filed for investigation and the questions of law and regulation arising in the department necessitate a thorough examination and consideration of the statutes, regulations, and established customs of the service relating thereto; and the business generally of the office being so extensive, it is impossible for the Secretary, in the midst of other varied and important duties required of him, to give to this branch of the public business the attention and consideration that its importance demands. \* \* \* All other executive departments of the Government are provided by law with an officer to perform the duties therein similar to those required of the officer who may be appointed to the office of Judge Advocate General of the Navy." (H. Repts., vol. 2, 46th Cong., 2d sess., 1879-80, No. 459.)

The word "revise" as used in section 1199, Revised Statutes, prescribing the duties of the Judge Advocate General of the Army with respect to court-martial proceedings, implies no authority to reverse; it indicates the discharge of a clerical duty, analogous to that of receiving and recording the proceedings. (Ex parte Mason, 256 Fed. Rep., 384.)

The creation of a new bureau in a department can only be authorized by act of Congress, designating its chief, defining his duties, and providing for the appointment or transfer of the necessary clerical force and messenger. (10 Op. Atty. Gen., 11, holding that the President was not authorized, without statutory enactment, to create a militia bureau in the War Department.)

**Contracts for bureaus.**—"The Bureau of Supplies and Accounts is the purchasing agent of the Navy Department for all supplies, and should be so recognized." (File 28233-1216, June 1, 1914.)

The law expressly authorizes the Secretary of the Navy to distribute the business of the department between the bureaus concerned in such manner as he deems fit. The Naval Instructions, 1913 (art. I-4651), provides that "all purchases and payments therefor shall be made under the direction of the Bureau of Supplies and Accounts, and orders directing such purchases and payments shall be given only by that bureau. When open purchase requisitions have been approved by chiefs of bureau, they shall be transmitted to the Bureau of Supplies and Accounts for action." It is also provided by the Navy Regulations, 1913 (art. R-4641),

that "the word 'purchase,' when used in the Navy Regulations or Naval Instructions, shall be construed as relating \* \* \* to the contract or agreement for the sale and delivery of any article or for the performance of any service \* \* \*." Thus interpreted, as it must be, the above article of the Naval Instructions expressly provides that the "contract or agreement \* \* \* for the performance of any service" shall be made under the direction of the Bureau of Supplies and Accounts, and that "orders directing" such contract or agreement shall be given "only by that bureau." (File 3973-126, Mar. 31, 1916.)

The terms of naval contracts are settled by the administrative bureau; a requisition embodying the transaction is then sent to the Bureau of Supplies and Accounts, which prepares a formal contract in writing, in accordance with section 3744, Revised Statutes. The contract is made by the United States through the administrative bureau, and the formal contract will be reformed where, through clerical error in the requisition, it did not embody the agreed terms. (*Ackerlind v. U. S.*, 240 U. S., 531, reversing *Lind v. U. S.*, 49 Ct. Cls., 635, and 12 Comp. Dec., 447.)

**Duties of the various bureaus.**—In the Navy, while the different bureaus and the manner of appointments of chiefs of bureaus are established by law, the descriptions and distribution of the duties performed in each bureau are left to the discretion and authority of the Secretary of the Navy, with the approval of the President. The powers vested in the Secretary of the Navy are of more than usual extent. Thus, for instance, in the organization of the Army the statutes define the duties of the chiefs of bureaus (or departments, as they are styled), such as the Quartermaster, the Commissary, the Ordnance officers, etc. (*Op. Atty. Gen.*, Oct. 27, 1909, file 3980-530.)

It is unquestionable that Congress has intended that the administration of affairs in the Navy should be through the bureaus created by the statutes now embodied in section 419, Revised Statutes. In isolated instances some of the duties of officers in one of the bureaus have been made the subject of statutory definition; but the business of the department "shall be distributed among these bureaus." This language is mandatory. The manner of the distribution is left to the discretion of the Secretary. The instrumentalities through which he performs the business are fixed by the statute. Having the power to make the regulations, he can repeal, modify, or alter them. Having the power to distribute the business, he can change the distribution and make new distribution. Subject to restrictions in the appropriation acts, he can take duties from one bureau and assign them to another bureau. (*Op. Atty. Gen.*, Oct. 27, 1909, file 3980-530.)

Congress makes appropriations for the naval service in recognition of the distribution of duties under section 419. In the appropriation acts the moneys appropriated for expenses are placed under the headings of the different bureaus in conformity with the requirements of sections 430 and 3676, Revised Statutes. While, therefore, it is within the authority of the Secretary of the Navy to make any changes

in the distribution of business that may seem to him expedient and proper, such authority must be exercised so as not to conflict with any act of Congress. (*Op. Atty. Gen.*, Oct. 27, 1909, file 3980-530.)

The grant of power by Congress to distribute the business of the department, although general and extensive, must be considered in connection with other statutes in relation to the same subject matter. Thus, by the act of June 22, 1906, section 4 (34 Stat., 448), it is required that the annual estimates shall be prepared and submitted "according to the order and arrangement of the appropriation acts for the year preceding," and that "any changes in such order and arrangement and transfers of salaries from one office or bureau to another office or bureau, or the consolidation of offices or bureaus desired by the head of any executive department, may be submitted by note in the estimates." This provision does not interfere with the authority to redistribute the matters of administration or to transfer duties from one bureau to another, nor does it alter the manner of appropriations for the different bureaus. Indeed, it clearly recognizes the authority to change the duties of the several bureaus. But it also declares the manner in which changes in the appropriations shall be made. This applies to specific appropriations made for disbursements in the different bureaus. (*Op. Atty. Gen.*, Oct. 27, 1909, file 3980-530. In this connection see act of Mar. 4, 1915, 38 Stat., 1084, with respect to transfer of funds between bureaus and departments.)

**Grouping of bureaus in "divisions."**—The work of the Navy Department may be grouped under general divisions, each of which may include different bureaus; and in each division the Secretary of the Navy may detail an officer of the Navy as an "aid" to advise the Secretary on all matters pertaining to the duties of the division and to transmit orders of the Secretary to the various chiefs of bureaus and to other subordinates of the department, signing such orders "by direction of the Secretary of the Navy." However, such aids can not, individually or collectively, exercise any supervisory authority over the chiefs of bureaus. That is the exclusive province of the Secretary and can not be delegated by him. The authority of the aids to transmit orders "by direction of the Secretary" can not be considered as conferring authority to issue orders. This formula can not be used to warrant any independent action by the aids. The aids are merely the eyes and hands of the Secretary, and the grouping of the bureaus under divisions are merely convenient methods of enabling the Secretary to exercise his legal authority over them. (*Op. Atty. Gen.*, Oct. 27, 1909, file 3980-530.)

If the plan involved the creation of new offices and the appointment of new officers to perform the business of the department, it would be beyond the power of the Secretary, with the approval of the President, to make such regulations. That work has been provided for by the establishment of the bureaus and the appointment by the President, under his constitutional power, of the officers to administer their duties. To assign those duties to other of-



ficers in other bureaus or boards would be to create new offices and new officers, which would be not authorized and in conflict with existing law. (Op. Atty. Gen., Oct. 27, 1909, file 3980-530.)

That officers detailed as aids under this plan can not by virtue of such detail perform the duties of the Secretary during the latter's absence, see note to section 179, Revised Statutes.

[The "aids" referred to above, namely "Aid for Operations," "Aid for Personnel," "Aid for Material," and "Aid for Inspections," were established by Changes in Navy Regulations No. 6, of November 18, 1909, and were abol-

ished by Changes in Navy Regulations No. 5, of July 15, 1915.]

The Secretary of the Navy may perform any duties vested by law in the chief of a bureau during a temporary vacancy in such bureau chiefship. (File 22724-7e, May 14, 1909, and see 28 Op. Atty. Gen., 487.) But where a contract provides that the chief of a bureau may under certain conditions annul the same, the Secretary of the Navy, during the temporary absence of the bureau chief, has no authority to annul said contract. (Williams Eng. and Cont. Co., v. U. S., 55 Ct. Cls., 349.)

**Sec. 420. [Orders considered as emanating from Secretary.]** The several Bureaus shall retain the charge and custody of the books of records and accounts pertaining to their respective duties; and all of the duties of the Bureaus shall be performed under the authority of the Secretary of the Navy, and their orders shall be considered as emanating from him, and shall have full force and effect as such.—(31 Aug., 1842, c. 286, s. 8, v. 5, p. 580; 5 July, 1862, c. 134. s. 4, v. 12, p. 511.)

See note to section 418 Revised Statutes, as to department's books, records, and property.

The orders of the Chief of Naval Operations shall be considered as emanating from the Secretary and shall have full force and effect as such. (Act Aug. 29, 1916, 39 Stat., 558.)

The duties of the JudgeAdvocate General shall be performed under the direction of the Secretary of the Navy. (Act June 8, 1880, 21 Stat., 164.)

**Legal liability of chiefs of bureaus for official acts.**—See note to section 417, Revised Statutes, "Legal liability of Secretary for official acts."

**Orders issued by bureaus.**—This statute does not mean to say that these bureaus, and the Secretary of the Navy in relation to them, are independent of the President. Of course the chief of the bureau does not profess to speak in the name of the President, but in that of the Secretary; yet his acts have legal effect as the acts of the President, represented, *pro hac vice*, by the Secretary of the Navy. (7 Op. Atty. Gen., 453, 474; see also McGowan v. Moody, 22 App. D. C., 148, noted under sec. 158, R. S.)

It is well settled that the President may act through the heads of the different departments, and if the head of one of the executive departments acts it will be presumed, in the absence of evidence to the contrary, that he acted by direction of the President. But no such power has been delegated to other subordinate officers of the Government, whether civil or military, and the acts of such officers, without express authorization from the President or from Congress, are ineffectual for any purpose. Although the court will presume that the head of a department acts by direction of the President in the absence of evidence to the contrary, this presumption does not extend down the line to all civil and military officers of the Government, of whatever grade. (Northern Pac. Ry. Co. v. Mitchell, 208 Fed. Rep., 469.)

In all the cases considered—and we are aware of no authority to the contrary—it will be noted that the power of the President was exercised through the head of the department and not by

a subordinate. (Truitt v. U. S., 38 Ct. Cls., 404.)

The Chief of the Bureau of Navigation is not empowered to detach one member of a naval court-martial and substitute another without authority from the Secretary of the Navy who convened the court. Where this was done, the court was illegally constituted, and its judgment ought not to be enforced. (22 Op. Atty. Gen., 137.)

Under this section, appointments issued by the Chief of the Bureau of Navigation to officers in the naval auxiliary service have the same legal effect as if they had been signed by the Secretary of the Navy. (14 Comp. Dec., 334. But civilian employees of the bureaus and offices of the Navy Department must be appointed by the Secretary of the Navy or with his written approval, by express requirement of Art. 52, Naval Instructions, 1913, quoted under sec. 416, R. S.)

This statute gives full authority to the heads of the various bureaus, and to the acting heads thereof, when properly designated, to issue under the authority of the Secretary of the Navy all orders pertaining to the business of their respective bureaus with the same force and effect as though the orders were issued by the Secretary himself. Nor is it necessary that such orders should afterwards be approved by the Secretary, but only that they should be issued under his authority. It is understood that the Acting Secretary has lately directed that all orders signed by the Chief of the Bureau of Navigation shall have the same force and effect as though signed by the Secretary. It may be doubted whether such an order was necessary, in view of the law and regulations defining the duties of that bureau; but supposing such specific authority necessary, this action on the part of the Acting Secretary would supply such authority. (9 Comp. Dec., 351.)

An order \* \* \* issued by the Bureau of Navigation under authority of the Secretary of the Navy, directing an officer to perform a journey, is sufficient authority for him to perform the travel and to entitle him to mileage

therefor, without the approval of the Secretary." (9 Comp. Dec., 351.)

The general rule that orders of the Bureau of Navigation have full force and effect as orders of the Secretary of the Navy has no application where the law specifically directs otherwise, and such special cases must be given effect as exceptions to the general rule. Thus where the law vests in the Secretary the exercise of personal judgment or discretion, or requires him personally to perform a certain duty he can not delegate to another the authority to exercise such judgment or discretion or designate another to perform the special duty which the law devolves upon him. (9 Comp. Dec., 351, citing 18 Op. Atty. Gen., 424, 432, and *Reeside v. U. S.*, 2 Ct. Cls., 1.)

A statute, providing that where repeated travel between two or more points is performed by officers, "in such vicinity as in the discretion of the Secretary of the Navy is appropriate," he may direct that actual and necessary expenses only be allowed (act July 1, 1902, 32 Stat., 663), requires that the Secretary personally exercise his discretion in determining whether an allowance of expenses instead of

mileage is appropriate, being limited in this respect to repeated journeys made between two or more places in such vicinity as he may decide upon. The decision of these questions can not be delegated to the head of a bureau of the Navy Department, nor to any one, but is imposed upon the Secretary himself. (9 Comp. Dec., 351.)

See cases noted under section 415, Revised Statutes, "Assistant Secretary of the Navy."

**Appeals from chiefs of bureaus.**—It is competent for Congress to give finality to the determination of subordinate administrative officers, provided due process of law, that is, a notice and a hearing, is provided (*Orchard v. Alexander*, 157 U. S., 372). Where Congress does not do this, the head of a department may change the erroneous decision of a subordinate (*U. S. v. Cobb*, 11 Fed. Rep., 76); and appeals may be taken to the head of the department because of his supervisory powers over the whole business of the department (*Knight v. U. S. Land Assn.*, 142 U. S., 161). In such cases the appeal should be to the head of the department and not to the President. (10 Op. Atty. Gen., 526.)

**Sec. 421. [Chiefs of Bureaus.]** The chiefs of the several Bureaus in the Department of the Navy shall be appointed by the President, by and with the advice and consent of the Senate, from the classes of officers mentioned in the next five sections respectively, or from officers having the relative rank of captain in the staff corps of the Navy, on the active list, and shall hold their offices for the term of four years.—(5 July, 1862, c. 134, ss. 1, 2, v. 12, p. 510; 3 Mar., 1871, c. 117, s. 10, v. 16, p. 537.)

Amendment to this section was made by act of March 3, 1899, section 7 (30 Stat., 1006), by changing the words "the relative rank of" to read "the rank of."

Assistants to chiefs of bureaus are specifically provided for by the following laws: Bureau of Medicine and Surgery, section 1375 Revised Statutes. Bureau of Navigation, act of March 3, 1893 (27 Stat., 717). Bureau of Supplies and Accounts, acts of July 26, 1894 (28 Stat., 132); March 3, 1899 (30 Stat., 1038); and February 25, 1903 (32 Stat., 890). Bureau of Ordnance, act of May 4, 1898 (30 Stat., 373). Bureau of Steam Engineering, act of March 3, 1905 (33 Stat., 1111). Bureau of Yards and Docks, Bureau of Construction and Repair, Office of the Judge Advocate General, and Office of Chief of Naval Operations, act of August 29, 1916 (39 Stat. 558).

Judge Advocate General is to be appointed "from the officers of the Navy or the Marine Corps." (Act June 8, 1880, 21 Stat., 164.)

Pay of chiefs of bureaus was fixed by section 1565, Revised Statutes, as highest pay of grade to which they belong, not below that of commodore; the act of March 3, 1899, section 7 (30 Stat., 1005), provided that they should receive the same pay and allowances as a brigadier-general in the Army; the act of May 13, 1908 (35 Stat., 128), provided that their pay and allowances "shall be the

highest pay of the grade to which they belong, and not below that of rear admiral of the lower nine;" the act of June 24, 1910 (36 Stat., 607), provided that their pay and allowances should be the highest shore-duty pay and allowances of the rear admiral of the lower nine; and the act of August 22, 1912 (37 Stat., 328), repealed the provision of the act of June 24, 1910, without making any further provision on the subject. [Act of May 13, 1908, was revived by the law last quoted. Comp. Dec., June 22, 1916, file 26254-2045.] By act of July 1, 1918 (40 Stat., 717), chiefs of bureaus in the Navy Department are to receive the same pay and allowances as chiefs of bureaus in the War Department.

Pay of Chief of Naval Operations shall be \$10,000 per annum (act Aug. 29, 1916, 39 Stat., 558); and he shall have such allowances as are or may be prescribed by or in pursuance of law for the grade of General in the Army. (Act July 1, 1918, 40 Stat., 716.)

Pay of Judge Advocate General was the highest pay of a captain in the Navy or the pay and allowances of a colonel in the Marine Corps under the act of June 8, 1880 (21 Stat., 164), as amended by act of June 5, 1896 (29 Stat., 251); by act of July 1, 1918 (40 Stat., 717), he is to receive the same pay and allowances as the Judge Advocate General of the Army.



Rank of chiefs of bureaus was fixed as commodore by sections 1471 and 1472, Revised Statutes; the act of March 3, 1899, section 7 (30 Stat., 1005), provided that they should have rank of rear admiral, if below that grade; the act of July 1, 1918 (40 Stat., 717), gave them rank corresponding to that of chiefs of bureaus in the War Department.

Rank of Judge Advocate General was that of captain in the Navy or colonel in the Marine Corps, under the act of June 8, 1880 (21 Stat., 164), as amended by act of June 5, 1896 (29 Stat., 251); by act of July 1, 1918 (40 Stat., 717), he is given rank corresponding to that of the Judge Advocate General of the Army.

Rank of Chief of Naval Operations is that of Admiral. (Act Aug. 29, 1916, 39 Stat., 558.)

Retirement of Chiefs of the Bureaus of Medicine and Surgery, Supplies and Accounts, Steam Engineering [now Engineering] and Construction and Repair, with rank of commodore [now rear admiral], if retired for age or length of service, was authorized by section 1473, Revised Statutes.

Retirement of any officer who shall serve as chief of a bureau "and shall subsequently be retired," with "the rank, pay, and allowances authorized by law for the retirement of such bureau chief," was authorized by act of May 13, 1908 (35 Stat., 128).

Retirement.—Chiefs of bureaus eligible for retirement after 30 years' service were entitled to the permanent rank, title, and emoluments of a chief of bureau, while on the active list, the same as they would have received if retired for age or length of service. (Act June 24, 1910, 36 Stat., 607.) This provision was repealed by act of August 22, 1912 (37 Stat., 328), which contained a proviso that no officer who had received the benefits of the act of 1910 should be deprived thereof on account of such repeal.

Retirement of Chief of Naval Operations shall be with the lineal rank and retired pay to which he would be entitled if not so serving. (Act Aug. 29, 1916, 39 Stat., 558.)

Service.—Any officer with the rank of rear admiral who has heretofore served a full term and is now serving as chief of any bureau of the Navy Department shall be credited with service for all purposes as provided by section 1486 of the Revised Statutes, and nothing herein contained shall operate to increase the rank or pay of any such officer as now authorized by law. (Act July 11, 1919, 41 Stat., 140.)

Staff officers who have served a full term as chief of bureau were thereafter exempted from sea duty, except in time of war, by section 1436, Revised Statutes.

Titles of Chiefs of Bureaus of Medicine and Surgery, Supplies and Accounts, Steam Engineering [now Engineering], and Construction and Repair, shall be Surgeon-General, Paymaster General, Engineer in Chief, and Chief Constructor, respectively. (Sec. 1471, R. S.)

# I. APPOINTMENT OF CHIEFS OF BUREAUS.

## II. TERM OF OFFICE.

## III. STATUS OF CHIEFS OF BUREAUS.

## IV. RANK, TITLES, AND PRECEDENCE.

## V. PAY OF CHIEFS OF BUREAUS AND ASSISTANTS.

## VI. RETIREMENT OF CHIEFS OF BUREAUS.

## VII. ASSISTANTS TO CHIEFS OF BUREAUS.

### I. APPOINTMENT OF CHIEFS OF BUREAUS.

**Who may be appointed chiefs of bureaus.**—The act of July 5, 1862, reorganizing the Navy Department (12 Stat., 510), established eight bureaus therein, and in the second section made the following provisions with respect to the appointment of chiefs: "The President of the United States, by and with the advice and consent of the Senate, shall appoint from the list of officers of the Navy, not below the grade of commander, a chief for each of the Bureaus of Yards and Docks, Navigation, Equipment and Recruiting, and of Ordnance, and shall in like manner appoint a chief of the Bureau of Construction and Repair, who shall be a skillful naval constructor; and shall also appoint a chief of the Bureau of Steam Engineering, who shall be a skillful engineer, and be selected from the list of chief engineers of the Navy; and shall also appoint a chief of the Bureau of Medicine and Surgery, who shall be selected from the list of surgeons of the Navy; and a chief of the Bureau of Provisions and Clothing, who shall be selected from the list of paymasters of the Navy of not less than ten years standing."

The subsequent act of March 3, 1871, which prescribes the number, rank, and pay of the officers of the various staff corps of the Navy, contained near the close of the tenth section the following proviso (sec. 10, chap. 117, 16 Stat., 537): "And provided further, That chiefs of bureaus may be appointed from the officers having the relative rank of captain in the staff corps of the Navy on the active list."

The commissioners who drafted the Revised Statutes treated the act of 1871, not as superseding but as supplementing the act of 1862, and enlarging the power of the President with respect to the appointment of chiefs, so they brought the two together in section 421, with this explanation (Commissioner's Draft Rev. Stats., p. 235):

"The Commissioners have treated the act of 1871, cited in the margin, not as repealing or superseding the restrictions in the act of 1862 on the appointment of chiefs of bureaus, but as giving an alternative or optional power of appointment; so that the President may make a given appointment either from the class indicated by the act of 1862 or from that indicated by the act of 1871, as he judges best."

Congress adopted the revision as recommended, thus giving its apparent approval to the interpretation placed on the acts of 1862 and 1871 by the commissioners. (22 Op. Atty. Gen., 47; see also note to section 422, R. S.)

**Retired officer may be appointed.**—Section 421, Revised Statutes, as punctuated, would apparently limit appointments to officers

on the active list, the clause, "on the active list," being separated from the other clauses by commas, and therefore qualifying them all. Without the commas, the words "on the active list" apply to appointments from the staff corps only. The original statutes which are consolidated in section 421 restricted appointments to the active list, only where made from the staff corps. The change in the law, if made, rests, therefore, upon the mere insertion of a comma in the revision. Where doubt exists as to the meaning of a section of the Revised Statutes, it is admissible in construction to seek light in the history of the legislation. Also, a construction that the revision amends the law is not favored. Nor is a construction favored which is restrictive of the right of selection in making appointments. Accordingly, *held*, while not free from doubt, that a retired line officer is eligible for appointment as Chief of the Bureau of Navigation. (File 21-5, Dec. 11, 1907, Opinion of Solicitor. See also 22 Op. Atty. Gen., 47, noted above.)

The statute authorizing the employment of retired officers on active duty would not empower the Secretary of the Navy to order a retired officer to perform the duty of Chief of the Bureau of Navigation. Doubtless, however, such statute should be liberally construed, and, in so far as it has any bearing on the matter, its obvious purpose was to enlarge the eligibility of retired officers for active duty. The intention of Congress in passing it was to make retired officers generally available for whatever active duty they were able to perform. (File 21-5, Dec. 11, 1907, opinion of Solicitor.)

The selection of the Judge Advocate General is not limited to the active list of the Navy or Marine Corps, but may be made from the retired list as well, since officers on the retired list come within the description of "officers" within the meaning of the act authorizing the appointment to be made. (8 Comp. Dec., 895.)

**Retired officer not eligible.**—Retired officers are not eligible for appointment as chiefs of bureaus, since section 421 in terms requires that bureau chiefs shall be appointed from officers on the active list. This requirement is not modified by the subsequent statute with respect to the assignment of retired officers to active duty, since by such assignment officers are not in fact placed on the active list, but are merely detailed for the performance of active duty. (See file 21, Nov. 25, 1902, Op. J. A. G.)

The construction placed upon the law by the department, in its practice, is against the eligibility of retired officers for appointment as chiefs of bureaus. Officers so serving have, during their terms of office, been retired without vacating their positions; but it is understood that no officers on the retired list, during the past 15 years at least, have been selected to act as chiefs of bureaus. (File 21-5, Dec. 11, 1907, Opinion of Solicitor.)

It would seem that under the laws authorizing the assignment of retired naval officers to active duty, the Secretary of the Navy is not authorized to assign a retired officer to duty as chief of a bureau in the Navy Department in case of a vacancy, when the officer is below the required grade as fixed by sections 421-426, Revised Statutes. (28 Op. Atty. Gen., 489.)

As to effect of retirement upon status of officer serving as chief of bureau, see below under "VI. Retirement of Chiefs of Bureaus."

**Temporary vacancies.**—A naval officer assigned to duty as an assistant to the chief of a bureau in the Navy Department is not authorized by section 178, Revised Statutes, in case of the death, resignation, absence, or sickness of the incumbent, to perform the duties of such chief until a successor is appointed or the absence or sickness shall cease, unless the appointment of such assistant is specifically provided for by statute. In determining who is to act in the place of a chief of bureau during his absence, section 178, Revised Statutes, is to be read in connection with the laws which make provision for the appointment of officers in the bureaus of the Navy Department. Where the highest officer recognized by statute after the chief of the bureau is the chief clerk in such bureau, the latter succeeds to the duties of the chief during a temporary absence unless otherwise directed by the President in accordance with section 179, Revised Statutes. (19 Op. Atty. Gen., 503.)

Officers who hold commissions in the naval service issued by the President, by and with the advice and consent of the Senate, but do not hold any office in the Navy Department or in a bureau by such appointment of the President after confirmation by the Senate, can not be legally designated by the President to act as chiefs of bureaus, under section 179, Revised Statutes, in the absence of the incumbents. Accordingly, an officer of the Navy detailed as assistant to the chief of a bureau in the Navy Department, but whose appointment as such assistant is not specifically provided for by statute, is not eligible for designation by the President, under section 179, Revised Statutes, to act as chief of bureau in the latter's absence. There is no more authority to authorize such an officer to perform the duties of the vacant office than there is to authorize any officer of the Navy not connected directly with the business of the department. (28 Op. Atty. Gen., 95.)

During a vacancy in the office of chief of a bureau in the Navy Department, the Secretary or Acting Secretary of the Navy may sign mail requiring the signature of the chief of bureau. (File 22724-7e, May 14, 1909; see also 28 Op. Atty. Gen., 487, noted under sec. 179, R. S.; compare *Williams Eng. and Cont. Co. v. U. S.*, 55 Ct. Cls., 349.)

A vacancy caused by the retirement of the chief of a bureau in the Navy Department can not be temporarily filled by the President under sections 178-181, Revised Statutes. (27 Op. Atty. Gen., 337.)

For other cases, see notes to sections 177-182, Revised Statutes.

## II. TERM OF OFFICE.

**Commencement of term.**—The four-year term of office of a chief of bureau commences on the date of his confirmation by the Senate. (10 Comp. Dec., 56.)

"Where a new commission is accepted, it supersedes the old one; and the four years prescribed by law as the official term of the appointee must commence to run from its date."



(2 Op. Atty. Gen., 333. This related to the appointment of a Navy agent, which was for the term of four years under laws then in force, the same as chiefs of bureau.)

The law, of course, controls special language in the nomination and confirmation. Section 421, Revised Statutes, makes the term of a chief of bureau four years from the appointment with the consent of the Senate. The term during which he served under a temporary appointment was, by law, a different term from that which commenced when he was appointed with the consent of the Senate. Accordingly, where an officer was commissioned as chief constructor in April, 1878, after confirmation by the Senate, "from April 28, 1877," having previously served under a recess appointment, *held* that notwithstanding the special wording of the nomination and the confirmation by the Senate, the term of office of the appointee as prescribed by section 421, Revised Statutes, must be deemed to begin from the date of his appointment, namely, in April, 1878, and not from "April 28, 1877," the date specified in the nomination. (16 Op. Atty. Gen., 656.)

"The fiction familiar to lawyers under the phrase *nunc pro tunc* [now for then] has no application in cases of appointments to office. Such executive action cannot, in the nature of things, operate by relation. Especially must that be so where, as here, the office during one portion of the very time to which the regular appointment and commission are made to relate had been occupied by the appointee under another competent appointment and commission, and during a second portion had been occupied by others in due course of law." (16 Op. Atty. Gen., 656.)

Nominations to take effect from past dates are familiar in the naval service, but these are made under statutes relating to promotions, to fill vacancies occurring in due course, which are not applicable to the appointment of an officer as chief of bureau. (File 21-5, Dec. 11, 1907.)

Where a chief of bureau retired while serving under an *ad interim* commission, *held* that, if such retirement rendered him ineligible for regular appointment by and with the advice and consent of the Senate [as to which point see cases noted above], the difficulty could not be overcome by wording the nomination to take effect from a prior date when he was on the active list and when his *ad interim* commission as chief of bureau took effect. (File 21-5, Dec. 11, 1907.)

**Expiration of term.**—"The chief of a bureau in the Navy Department can not lawfully hold over after the expiration of the term for which he was appointed. The general rule is that where Congress has not authorized the officer to hold over, his incumbency must be deemed to cease at the end of his term, though no appointment of a successor may then be made." (17 Op. Atty. Gen., 648; see also *Romero v. U. S.*, 24 Ct. Cls., 331.)

There is nothing in section 421 nor in any other of which I am aware which confers authority upon the incumbent of the office of chief of bureau to continue therein after the expiration of his term; and I am of opinion that in the absence of a statutory provision conferring it, such authority does not exist. Con-

gress has in terms provided that certain officers whose appointments are for a definite term shall hold until their successors are appointed and qualified (see, for example, secs. 1841, 1843, 1875, and 1876, R. S., concerning certain appointments in Territories); from which it is plainly to be inferred that officers not thus authorized can not lawfully hold over: "*Expressio unius est exclusio alterius*"—the expression of one thing is the exclusion of another. (17 Op. Atty. Gen., 648, citing *U. S. v. Eckford's Executors*, 1 How., 250, and 14 Op. Atty. Gen., 262, 263.)

Chiefs of bureaus in the Navy Department do not hold over after expiration of the term of office for which they were appointed. In the draft of a proposed new revision of the statutes, the revisers added to section 421 the provision, "or until their successors are appointed and qualified," explaining that this addition was made in view of the opinion of the Attorney General above cited; but of course these words are not yet incorporated into the statute. Accordingly, where the term of the chief of a bureau in the Navy Department expires while the Senate is not in session, a recess commission should appropriately be issued, filling the vacancy thus created. (File 21-3, Nov. 13, 1907, Opinion of Solicitor. As to inherent power of President to fill temporary vacancies, see notes to secs. 177 and 181, R. S.)

**Removal by President.**—The President has the power, without the concurrence of the Senate, to remove an officer (United States attorney) who was appointed for a fixed term, prior to the expiration of such term. (*Parsons v. U. S.*, 167 U. S., 324; for other cases, see note to Constitution, Art. II, sec. 2, clause 2.)

As to trial by court-martial, see below, "III. Status of Chiefs of Bureaus."

### III. STATUS OF CHIEFS OF BUREAUS.

**Not civil offices.**—It is very clear that the office of Secretary of the Navy is a civil office. Congress has not attempted to confine the appointing power to any class or profession in choosing the incumbent for that position. But this can not be said of the several bureaus of the Navy Department, the chiefs of which must be appointed from certain classes of officers of the Navy. When, therefore, it is said that these offices are civil, it must be shown satisfactorily why it was that Congress denied the appointing power the same range of selection in filling them as in filling the office of Secretary of the Navy and civil offices generally. It is quite clear to me that if Congress had intended to make the several bureaus of the Navy Department civil offices, it would have provided for the appointment of civilians to fill them, and not frustrated its purpose to secure the benefits of a civil administration by declaring that these offices should be filled by naval officers exclusively. (18 Op. Atty. Gen., 176.)

Rank, title, pay, and retirement are the indicia of military, not civil, officers. No statute directly or indirectly classes these bureau chiefs as civilians, and it does not appear that they have ever been so regarded in the department. Giving them a dual character, civil and military, might not only lead to

confusion and inconvenience in the department, but deprive the chiefs themselves of some advantages secured to them by the opposite practice. (*Smith v. U. S.*, 26 Ct. Cls., 143.)

**Trial by court-martial.**—"Under every system of military law, for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business." (*Smith v. Whitney*, 116 U. S., 168, 183.)

The Chief of the Bureau of Medicine and Surgery in the Navy department is amenable to the jurisdiction of a naval court-martial upon charges and specifications preferred against him for acts done as such chief. (18 Op. Atty. Gen., 176; see also *Wales v. Whitney*, 114 U. S., 564.)

The chief of a bureau (Paymaster General), may be removed from that office by sentence of court-martial. (*Smith v. U. S.*, 26 Ct. Cls., 143; see also *Smith v. Whitney*, 116 U. S., 181.)

"As to the case of staff bureau officers whose service has not been creditable and who have been guilty of misconduct or malfeasance in office, the law and practice provide for that case. Such an officer would be relieved of his duties, or, depending upon the seriousness of the offense, would be court-martialed. And section 1446, Revised Statutes, provides that no officer of the Navy shall be placed on the retired list because of misconduct, but he shall be brought to trial by court-martial for such misconduct." (25 Op. Atty. Gen., 294, 298.)

The office of chief of bureau is a military one, to the extent that its incumbent is amenable to trial by court-martial. (5 Comp. Dec., 822.)

The Judge Advocate General of the Army may be tried by court-martial and suspended from rank and duty pursuant to the sentence of such court. (*Swain v. U. S.*, 28 Ct. Cls., 173; 165 U. S., 553; see also note to sec. 179, R. S.)

**Dual status of bureau chiefs.**—The law requires the President to appoint chiefs of bureaus in the Navy Department from the list of officers in the Navy. Compliance with this law certainly could not have the effect to withdraw the appointed officer from that list, or to deprive him of the rank or pay to which he was or might become entitled by law. Such a result would involve injustice too gross to be imputed to Congress. The act limited the selection to naval officers, not below a certain grade, for the purpose of securing at the head of the bureaus named, the skill and experience of prolonged service. But nothing could be more unjust, indeed, more absurd, than to deprive the Navy of officers who possessed these qualities, by transferring them to positions which, under the law, they could hold but four years, when, if not reappointed, they would be retired from the public service altogether. The law has no such operation. It simply means that the officers appointed shall, for the term specified, be assigned to these positions, and it implies no withdrawal from the list of officers, and no loss of rank or pay. If the officer so assigned receive less pay by virtue of his rank in the Navy than the salary provided by the

law for the chief of bureau, he is entitled to draw the latter salary in lieu of his pay. But if his naval pay exceed the salary of the office, he is not bound to accept the latter and relinquish the former. If he be a rear admiral, he is entitled to the pay allotted by the law to the class of service he renders. (10 Op. Atty. Gen., 377; 27 Op. Atty. Gen., 337; Op. Atty. Gen., Mar. 15, 1911, file 22724-16:3.)

The appointment by the President, by and with the advice and consent of the Senate, of a naval officer to be Chief of the Bureau of Navigation is an investiture of him with an additional office. While Chief of the Bureau of Navigation he remains a captain in the Navy. By virtue of the former office, his orders have the force and effect of an order emanating from the Secretary of the Navy, and while he continues to hold said office he has the higher rank attached thereto by law. (17 Op. Atty. Gen., 154; see also, as to Chief of Bureau of Steam Engineering, 27 Op. Atty. Gen., 340.)

A naval officer by accepting the office of Chief of the Bureau of Steam Engineering did not vacate the office and grade he already held of captain. His appointment as chief of bureau invested him with an additional office and an additional rank. His status "while holding said office" was that of an officer of the line of the Navy of the grade of captain, with the additional rank of rear admiral and the additional office of Chief of the Bureau of Steam Engineering. (15 Comp. Dec., 860, citing 17 Op. Atty. Gen., 154, and 10 Op. Atty. Gen., 378.)

An officer appointed to be chief of one of the Navy bureaus is in effect detailed to perform shore duty, retaining during the period of his incumbency his regular rank and grade on the Navy Register, and also filling the post of chief of bureau with the rank and emoluments incidental thereto. (27 Op. Atty. Gen., 337, 341, citing 10 Op. Atty. Gen., 378, 379.)

A chief of bureau in the Navy Department is, therefore, an incumbent of two offices. First, he is an officer of the Navy holding in this case the rank of captain; second, he had been detailed by the President, by and with the advice and consent of the Senate, to hold the office of chief of bureau, with the rank of rear admiral for a period of four years. (27 Op. Atty. Gen., 337, 341.)

For other cases see below, "IV. Rank, Titles, and Precedence," and particularly Opinion of Attorney General, March 15, 1911 (file 22724-16:3) noted under "Rank of chiefs of bureaus."

**Office of chief of bureau not a "grade" in the Navy.**—While the office of chief of bureau is a military one, to the extent that its incumbent is amenable to trial by court-martial, the office itself does not constitute a grade in the Navy. The next higher "grade" referred to in section 11 of the Navy personnel act (Mar. 3, 1899, 30 Stat., 1007) is one of the different gradations in the line of the Navy or in the several staff corps, and does not include the office of chief of bureau. (5 Comp. Dec., 822.)

The grade to which an officer belongs, under section 1457, Revised Statutes, while holding the office of Chief of the Bureau of Navigation is that of captain, which in this case was his regular grade in the line, and not that of the rank incidental to his temporary occupation of



another and distinct office. For it is by virtue of his office of captain, and not of chief of bureau, that he is entitled to examination for promotion and that he is entitled or subject to retirement. It may be further remarked that, within the language of section 1457, he "continues to be borne on the Navy Register" as captain, and that the moment he ceases to be chief of bureau he loses his temporary rank incident to that office. (17 Op. Atty. Gen., 154.)

That Congress regards the grade to which the bureau chief belongs as something different from the position of chief of bureau is further evidenced by the provisions of the naval appropriation act of May 13, 1908 (35 Stat., 128), that "the pay and allowances of chiefs of bureaus in the Navy Department shall be the highest pay of the *grade to which they belong*, and not below that of rear admiral of the lower nine." (27 Op. Atty. Gen., 376, 383; 15 Comp. Dec., 860.)

As I have heretofore pointed out, the office of chief of bureau in the Navy Department is not designated in the acts of Congress as a *grade*. On the contrary, in section 421 of the Revised Statutes it is called an "office," and in section 1471 a "position"; by section 1471 the Chief of the Bureau of Construction and Repair has the "title" of Chief Constructor. Under the act of March 3, 1899, the incumbent, if an officer below the rank of rear admiral, has that "rank" while holding the office. The office of Chief Constructor was not formerly a grade in the Navy, and was not made such because the rank, title, and emoluments of the incumbent, theretofore temporary, were made permanent by the act of June 24, 1910 [now repealed]. (28 Op. Atty. Gen., 526, citing 27 Op. Atty. Gen., 376, 379. See also file 5038-19, Feb. 29, 1912.)

Neither, in my opinion, was the honorary "rank" of rear admiral, which he held as an incident to his occupation of the office of chief of bureau, a "grade" within the meaning of the act of June 7, 1900. (31 Stat., 703, reenacted, with modifications, by act Aug. 22, 1912, 37 Stat., 329.) The grade from which he was retired, within the meaning of said act, was therefore that of captain. (15 Comp. Dec., 860.)

**Office held to be a grade.**—Section 1457, Revised Statutes, which occurs in a chapter of law relating to retired officers of the Navy in general, although perhaps especially contemplating the line, provides that officers retired from active service shall be placed on the retired list of officers of the *grade* to which they belonged, respectively, at the time of their retirement, and continue to be borne on the Navy Register. Grade here appears to mean rank in the line, or by relation to the line—using rank and grade interchangeably, as those words sometimes are used, and not as indicating an officer's number in a particular grade. Section 1471 speaks of the headship of a bureau as a "position"; section 1472 as an office; section 1473 again as a position; and the Navy Regulations, incorporating the statutes and adding to them administrative details, use both terms. I think, however, that *grade* may include such staff officers, and may mean in an untechnical sense and by a certain equity, the highest post to the rank and title of which an officer has attained upon his retirement, and that section 1457 fairly includes the office or position of Pay-

master General. (25 Op. Atty. Gen., 294; disapproved, 27 Op. Atty. Gen., 376.)

By the use of the word "grade" Congress intended to indicate any marked distinction fixed by law among officers which would be expressed in their commission, title, or pay, not excluding chiefs of bureaus having a certain rank. (31 Op. Atty. Gen., 505, 515.)

For other cases, see below, "VI. Retirement of Chiefs of Bureaus."

#### IV. RANK, TITLES, AND PRECEDENCE.

**Rank of chiefs of bureaus.**—The Navy personnel act of March 3, 1899, section 7 (30 Stat., 1005), provides that "when the office of chief of bureau is filled by an officer below the rank of rear-admiral, said officer shall, while holding said office, have the rank of rear-admiral." Similar provisions were previously contained in sections 1471 and 1472, Revised Statutes, except that the rank of bureau chiefs was there fixed as the "relative rank" of commodore instead of the actual rank of rear admiral.

By act of July 1, 1918 (40 Stat., 717), chiefs of bureaus in the Navy Department, including the Judge Advocate General, shall while so serving have corresponding rank as prescribed by law for chiefs of bureaus of the War Department and the Judge Advocate General of the Army.

Of course, it is not to be doubted that the advanced rank and pay attached to service as a bureau chief ceases when the term of service is over and other active service resumed. The former relative rank *pro tempore*, the present actual rank, are only while holding said position; and no doubt a corollary to be drawn from this is that the title falls also if and when an officer returns from active service in the bureau to active service in his corps. (25 Op. Atty. Gen., 294; other portions of this opinion were disapproved in 27 Op. Atty. Gen., 376.)

The moment an officer ceases to be chief of bureau he loses his temporary rank incident to that office. (17 Op. Atty. Gen., 154.)

In the opinion of the department, where the law creates an office with a fixed term and confers upon the holder of that office a certain rank during his occupancy thereof, the rank thus conferred ends for all purposes and in all respects with the term of the office, except as otherwise provided by law. When the terms of office held by the chiefs of bureaus to which the rank of rear admiral was by statute annexed have ended, with them have ended the accompanying rank. Without a new appointment the officers holding these positions would return to their respective ranks in the line or staff of the Navy, and their ranks there would be affected in no way by the fact that they had, as an incident of service in the bureaus, temporarily enjoyed a higher rank. All the force and effect of their commissions as chief of bureau have been expended when the term of office ends, and unless reappointed they would hold only effective and living commissions as officers of their regular grade in the Navy. (File 4649-02, July 17, 1902.)

"In the course of my investigation it has appeared that upon the appointment of Rear-Admiral Taylor on the 29th day of April, 1902,

as chief of the Bureau of Navigation, a commission was issued to him as such 'with the rank of rear-admiral from the 29th day of April 1902.' This commission was erroneously expressed, as the provision of the 'Personnel Act' which gives the rank of rear-admiral to the chiefs of bureaus while holding such office is applicable only in case the 'office is filled by an officer below the rank of rear-admiral.' As at the time Rear-Admiral Taylor was not an officer within the description of the act, it had no effect upon his rank and his commission as chief of the Bureau of Navigation should not have attempted to confer upon him a rank which he already possessed independently of the statute." (File 4649-02, July 17, 1902; see also 31 Op. Atty. Gen., 557.)

The Navy personnel act changed the rank of chiefs of bureaus from the "relative rank of commodore" to the "rank of rear-admiral." New commissions were issued to those holding the offices of chiefs of bureaus at the time of the passage of this act, for the unexpired portions of the terms for which they had been appointed, "with the rank of rear-admiral." It may well be doubted whether these commissions were not entirely superfluous. They were not of such character as to amount to new appointments or reappointments. The chiefs of bureaus were already appointed to their positions for a period of four years, and the new rank which they enjoyed came not by virtue of any new appointment or commission but was annexed to their office by statute law. (File 4649-02, July 17, 1902; see also file 22724-33, Aug. 22, 1916; 22 Op. Atty. Gen., 480. As to whether officers should be given new commissions when merely advanced in rank, without change in office or grade, see note to Constitution, Art. II, sec. 3.)

An officer of the Navy or Marine Corps serving as Judge Advocate General has actual rank as a captain in the Navy or a colonel in the Marine Corps. His rank while he holds this office is not an assimilated rank, but an actual rank. His rank is a fact, not a courtesy. (*Remey v. U. S.*, 33 Ct. Cls., 218; 8 Comp. Dec., 895.)

The act of June 24, 1910 (36 Stat., 607) [repealed by act Aug. 22, 1912 (37 Stat., 328)], provided that "all officers of the Navy who are now serving or shall hereafter serve as chief of bureau in the Navy Department, and are eligible for retirement after thirty years service, shall have, while on the active list, the rank, title and emoluments of a chief of bureau, in the same manner as is already provided by statute law for such officers upon retirement by reason of age or length of service, and such officers after thirty years service shall be entitled to and shall receive new commissions in accordance with the rank and title hereby conferred." Under this law a naval officer who was a bureau chief in the Navy Department, and who attained 30 years' service, thereby becoming eligible for retirement, was entitled to retain the rank, pay, and emoluments of such bureau chief on the active list if he then resigned or was removed from his position of bureau chief and returned to general service. This is the only interpretation which can give force and effect to all the language used. For if the intention had been to confer this "rank, title, and emoluments"

only during the continuance of such officer as chief of bureau, this provision as to continuance would have been quite unnecessary; for the rank, title, and emoluments would, of course, continue unless otherwise provided by law so long as the officer continued in such office, and the other provisions would have meant precisely the same without this clause as with it. The only possible effect of that clause is to continue, as it plainly does, such rank, title, and emoluments during the time that the officer remains on the active list of the Navy, whether as bureau chief or otherwise. (28 Op. Atty. Gen., 429; quoted in 28 Op. Atty. Gen., 529; and Op. Atty. Gen., Mar. 15, 1911, file 22724-16:3.) [The officers who received permanent commissions under this act prior to its repeal and who were not affected by such repeal were Rear Admiral R. F. Nicholson, chief of the Bureau of Navigation, Chief Constructor Washington L. Capps, Paymaster General Eustace B. Rogers (file 22724-18), and Paymaster General Thomas J. Cowie.]

Where the officer was serving as chief of bureau on June 24, 1910, and then had 30 years' service, he is entitled to a permanent commission from the date of the act. (Op. Atty. Gen., Mar. 15, 1911, file 22724-16:3.)

A rear admiral of the senior nine, serving as chief of the Bureau of Ordnance, should not be given another commission under the act of June 24, 1910, as he already had the permanent rank of rear admiral, and that act did not, therefore, confer any rank upon him. Also, the law should not be construed so as to require the doing of a futile or useless thing. (Op. Atty. Gen., Mar. 15, 1911, file 22724-16:3.)

The chief of the Bureau of Supplies and Accounts, upon completion of 30 years' service, is entitled under the act of June 24, 1910, to a permanent commission with the rank of rear admiral, and not commodore. (Op. Atty. Gen., Mar. 15, 1911, file 22724-16:3.)

Where an officer was serving as chief of bureau on June 24, 1910, and then had 30 years' service, he is entitled to a permanent commission from the date of the act, although before such commission was issued he was retired. Under these circumstances a commission under the act of June 24, 1910, may be issued *nunc pro tunc*, and confirmation by the Senate is not required. (File 22724-18, Dec. 4, 6, 1911, and Jan. 3, 1912.)

The purpose of the act of 1910 quite clearly was to extend to chiefs of bureaus becoming eligible for retirement the same privileges as under the prior law they could claim upon actual retirement. This affords an adequate motive for and explanation of the new legislation; and it serves to show at once that the act of 1910 had a logical and important purpose. (28 Op. Atty. Gen., 531.)

The sole purpose of the act of June 24, 1910, was to make permanent the rank, title, and emoluments of an officer serving as chief of bureau, who had become eligible for retirement by reason of age or length of service, but who preferred to remain on the active list. Accordingly, the passage of said act and the issuing of a permanent commission thereunder to the Chief Constructor, did not operate to create a new grade in the Construction Corps. No vacancy



was created thereby in the grade of naval constructor nor in the total number of naval constructors and assistant naval constructors provided by law. Since the office of chief of bureau was not a grade prior to the time the incumbent became eligible to retirement after 30 years' service, it would seem necessarily to follow that the mere issuance of another commission "in accordance with the rank and title" theretofore conferred, and the making permanent of such theretofore temporary rank, title, and emoluments, would not have the effect of making it a grade. To hold otherwise would operate to increase to that extent the Naval Establishment, although there is no indication of such an intention on the part of Congress in the language of the statute. (28 Op. Atty. Gen., 526; followed in case of line officer serving as Chief of the Bureau of Navigation, Op. Atty. Gen., Mar. 15, 1911, file 22724-16:3.)

A line officer serving as Chief of the Bureau of Navigation continues in his regular grade, that of captain, notwithstanding the issuance to him of a permanent commission with the rank of rear admiral in accordance with the act of June 24, 1910. Accordingly, when he is reached in regular course for promotion to the grade of rear admiral, he must qualify physically and professionally prior to such promotion. (Op. Atty. Gen., Mar. 15, 1911, file 22724-16:3.)

The only way to give effect to the law of June 24, 1910, as construed by the Attorney General, is to hold that its result was to make permanent the dual status formerly occupied temporarily by the officer serving as Chief Constructor at the head of the Bureau of Construction and Repair. Accordingly, *held* that such officer continued to hold his regular place in the grade of naval constructor, although at the same time enjoying the rank, title, and emoluments of Chief Constructor under a permanent commission. (File 5038-19, Feb. 29, 1912.)

**Titles of chiefs of bureaus.**—Unless the numerous laws which have established the offices of the service or subsequently affected them, positively affix or altogether prohibit the titles which it is claimed or suggested should be used by chiefs of bureaus, the matter is subject to the administrative settlement of the Secretary of the Navy, and does not involve legal questions upon which the Attorney General may render an opinion. That is to say, the only proper inquiry for the Attorney General is whether, and how far, a rule has been laid down by the statutes which restrains the disposition of the subject by Executive order or department regulation and usage. (25 Op. Atty. Gen., 122.)

Section 1471, Revised Statutes, as amended, provides that the Chiefs of the Bureau of Medicine and Surgery, Supplies and Accounts, Steam Engineering [now Engineering], and Construction and Repair, "shall have, respectively, the title of Surgeon-General, Paymaster-General, Engineer-in-Chief, and Chief Constructor." The titles thus fixed by statute were not affected by the Navy personnel act of March 3, 1899 (30 Stat., 1005), providing that "when the office of chief of bureau is filled by an officer below the rank of rear-admiral, said officer shall, while hold-

ing said office, have the rank of rear-admiral," for the same act provided that it should not be construed "as changing the titles of officers in the staff corps of the Navy." The bureaus named in section 1471 are the staff bureaus of the Navy, under the existing organization, excepting that the Engineer Corps (steam engineering) has now been transferred to the line by the personnel act of 1899. Accordingly, *held* that the titles of the existing staff bureaus are positively fixed by section 1471, Revised Statutes, and are unchanged by the later legislation of March 3, 1899. (25 Op. Atty. Gen., 122. See note to sec. 422, R. S., as to "line" and "staff" bureaus as now existing.)

"Nor is it necessary to discuss and consider the distinctions between 'rank,' 'grade,' and 'title,' which are different aspects or attributes of office. It is sufficient to say that the terms bespeak relations and functions of the thing, and are not to be confounded; and that a statute which confers upon an officer the rank and pay of another grade does not, also, necessarily confer the title." (25 Op. Atty. Gen., 122, 123.)

Respecting bureaus which, though aiding in central administration, are not technically of the staff, and respecting line officers serving as chiefs of those bureaus, and respecting the special case of the Judge Advocate General, in all these cases the law lays down no explicit rule relative to titles, and hence in those situations and aspects the subject may and should be disposed of by Executive order, or Navy regulations and usage, paying due regard to such logical inferences or necessary effect respecting staff titles in general as the Secretary of the Navy may deem to be derivable from the statutes. (25 Op. Atty. Gen., 122; affirmed 25 Op. Atty. Gen., 294.)

"The post of Paymaster-General is an office known immemorially in the military service, with as definite, if not as technical, status as regards rank, grade, and title as any office of the line. 'Paymaster-General of the forces,' is a historical phrase, applied either to land or sea forces, not restricted to a particular force in the field or at sea, and not to be narrowed to the conception of a mere detail in administration, so as to strip the name of a certain independent rank and dignity as a definite office." (25 Op. Atty. Gen., 294, 295.)

"It seems certain that military usage universally recognizes that the highest legal rank which an officer attains marks the title accorded to him in practice for all purposes of courtesy and etiquette." (25 Op. Atty. Gen., 294, 295.)

The head of a department for his own purposes as such has authority to designate bureaus and offices therein and to cause his subordinates to designate them in official communications by names other than those theretofore borne by such offices. There is no statute or rule of law which forbids the employment of certain names in such cases, where the head of the department considers that new relations acquired by such branches of business under a reorganization of his department so requires. Congress has not seen fit to so hamper a coordinate branch of the Government. Its own use of names is not such a prohibition. There is no legal objection to the employment of two names or many names for the same object nor will it be "inconsistent

with law" for the head of the department under section 161, Revised Statutes, to make use of other names than those used by Congress. Names are ordinarily free for the person speaking or writing to choose. (24 Op. Atty. Gen., 697).

"The chiefs of the Bureaus of Medicine and Surgery, Supplies and Accounts, Engineering, Construction and Repair, and Yards and Docks, while holding these offices, shall have, respectively, the title of Surgeon General of the Navy, Paymaster General of the Navy, Engineer in Chief of the Navy, Chief Constructor of the Navy, and Chief of Civil Engineers of the Navy. Each such chief of bureau, however, shall be addressed and designated by the title of his rank, in written communications the title of his office to be stated next after his name." (Art. 152, Navy Regs., 1920; see also Art. R.-1006 (2) Navy Regs. 1913, as amended by C. N. R. 12, Sept. 12, 1918.)

See section 1471, Revised Statutes, and note thereto.

**Precedence of chiefs of bureaus.**—Chiefs of bureaus should sign papers, where joint signatures are necessary, in order of their seniority in the service, and not in order of the seniority of bureaus. "While the question is, perhaps, not of grave importance, the department considers that, since it has been raised, it must be held that the rule universally governing in military organizations, that papers should be signed in order of rank, must prevail." (File 6417, Feb. 18, 1907, re precedence of Chiefs of Bureaus of Construction and Repair, and Steam Engineering.)

The precedence of a chief of bureau is determined by the date of the existing commission which confers upon him the rank of rear admiral and is not at all affected by the date he first attained the rank of rear admiral under previous appointments as chief of bureau. The effect of reappointment is not to continue the former term, but to create a new one. (File 4649-02, July 17, 1902.)

Where a naval officer with the rank of rear admiral is commissioned as chief of bureau, his precedence is determined by the date of his commission as rear admiral and not by the date of his subsequent commission as chief of bureau. The latter commission did not confer upon him the rank of rear admiral which he already held, as under the statute it is only "when the office of chief of bureau is filled by an officer below the rank of rear admiral," that his commission as chief of bureau confers upon him the rank of rear admiral "while holding said office." (File 4649-02, July 17, 1902.)

Where the Chief of the Bureau of Navigation was commissioned as such on April 29, 1902, but had previously been commissioned as rear admiral in the line in the ordinary course of promotion on February 11, 1901, by virtue of the latter commission he takes precedence of the Chief of the Bureau of Equipment [now abolished], whose commission as such is dated December 18, 1901, notwithstanding that the latter had previously served as chief of bureau with the rank of rear admiral under commissions dated August 19, 1899, and December 1, 1899, the first being an ad interim commission. If the two officers concerned were requested to pro-

duce the commissions by which they claim and hold the rank of rear admiral, one would produce his commission dated February 11, 1901, as rear admiral in the line, and the other would produce his existing commission as chief of bureau dated December 18, 1901. Without the commission of December 18, 1901, the latter officer would hold only an effective and living commission as captain in the line, all the force and effect of his former commissions as chief of bureau having been expended. (File 4649-02, July 17, 1902.)

Section 1467 of the Revised Statutes provides that "line officers shall take rank in each grade according to the dates of their commissions." Whether this section of the statute applies to a case where one line officer holds a commission as rear admiral by virtue of promotion in the ordinary course, and another line officer has the rank of rear admiral by virtue of his position as chief of bureau, may not be entirely clear. Nevertheless it states the rule of priority which must, by military usage and apart from statute law, be applied to officers having rank in the same grade in the Navy. (File 4649-02, July 17, 1902.)

The personnel act of March 3, 1899, changed the rank of chiefs of bureaus from commodore to rear admiral. Accordingly, commissions were issued to those holding the offices of chiefs of bureaus at the time of the passage of the personnel act for the unexpired portions of the terms for which they had been appointed, "with the rank of rear-admiral." These commissions "were not of such character as to amount to new appointments or reappointments," as the chiefs of bureaus were already appointed to their positions for a period of four years, and the new rank which they enjoyed came not by virtue of any new appointment or commission, but was annexed to their office by statute law. It may well be doubted whether the new commissions were not entirely superfluous. *Held*, that these commissions for the unexpired portions of the terms of office to which chiefs of bureaus had been respectively previously appointed did not affect their relative rank and precedence. (File 4649-02, July 17, 1902.)

Assuming, without deciding, that General Order 544, constituting the General Board, designating the Chief of the Bureau of Navigation as the second member thereof, and providing that "in the absence of the Admiral of the Navy the chief of the Bureau of Navigation will preside at meetings of the Board and exercise the functions of President of the Board," does not affect the order of precedence established by law, nevertheless held that the Chief of the Bureau of Navigation takes precedence, by virtue of his commission as a rear admiral in the line, ahead of the chief of another bureau whose rank in the line is captain and whose commission as chief of bureau is later in date than the commission of the Chief of the Bureau of Navigation as rear admiral in the line. (File 4649-02, July 17, 1902, affirming decision of the Admiral of the Navy as to seating of members of the General Board.)

In the absence of the Secretary of the Navy, the Assistant Secretary of the Navy, and the Chief of Naval Operations, the duties of the Secretary of the Navy, by direction of the Presi-



dent, are to be performed by the following designated chiefs of bureaus, in the order named: The Chief of the Bureau of Navigation; in his absence, the Chief of the Bureau of Ordnance; and in the absence of those two, the Chief of the Bureau of Engineering. (File 1159-765, Bu. Nav.; Navy Reg., 1920, art. 392, as amended; see also file 22724-40, Apr. 24, 1919, and see note to sec. 415, R. S., under "Secretary of Navy.")

A Paymaster General in the Navy having the permanent rank, title, and emoluments of a chief of bureau by virtue of the act of June 24, 1910 (36 Stat., 607—now repealed), although his term of office as bureau chief has expired, does not, while serving as member of a general court-martial, take precedence of line officers whose commissions as rear admiral are of a later date than his, but whose length of service in the Navy exceeds his total length of actual and constructive service. Precedence in such case is determined by length of service, under sections 1485, 1486, Revised Statutes, and not by date of commission. (File 28025-3855, Oct. 30, 1915, overruled by file 22724-40, Apr. 24, 1919, construing act of Aug. 29, 1916 (39 Stat., 578), under which it is held that all officers, line and staff, take precedence by date of commission. Compare 32 Op. Atty. Gen., 476, file 11130-63:8, noted under sec. 1485, R. S.)

#### V. PAY OF CHIEFS OF BUREAUS AND ASSISTANTS.

By act of July 1, 1918 (40 Stat., 717), chiefs of bureaus in the Navy Department, including the Judge Advocate General, shall receive the same pay and allowances as chiefs of bureaus and the Judge Advocate General in the War Department. Prior to this enactment the pay of these officers was governed by the statutes and decisions noted below:

**Entitled only to shore-duty pay.**—The 10 per cent additional pay provided by the act of May 13, 1908, for officers of the Navy while serving on sea duty and on shore duty beyond the continental limits of the United States is not a part of the "pay of the grade" and should not be included in computing the "highest pay of the grade to which they belong" of chiefs of bureaus in the Navy Department and the assistants thereto under said act. (14 Comp. Dec., 929, 88 S. and A. Memo., 756; affirmed Comp. Dec., Aug. 7, 1908, 90 S. and A. Memo., 817.)

It is a primary rule in the construction of statutes that the intention of the legislature shall be followed when the intention is shown. Reports of committee show that the purpose of the Navy Pay Act of May 13, 1908, was to place chiefs of bureaus in the Navy Department on the same basis as officers holding like positions in the Army. If the chief of a bureau in the Navy Department of the grade of rear admiral of the lower nine be allowed \$6,600 per annum—the pay of his grade increased by 10 per cent for service at sea—he would not be paid on the same basis as officers holding like positions in the Army, but \$600 per annum more. (90 S. and A. Memo., 817.)

A rear admiral of the second nine when chief of bureau is entitled to the pay of a rear admiral of the second nine and not to the pay provided

for a rear admiral of the first nine. The Navy Pay Act of May 13, 1908, divides rear admirals into two grades, at least as to pay. In this provision for pay the pay of rear admiral of the first nine is as distinct from that of a rear admiral of the second nine as is the pay for captain or any other grade. (98 S. and A. Memo., 1034; see also *Terry v. U. S.*, 39 Ct. Cls., 353; *Gibson v. U. S.*, 194 U. S., 182.)

The pay of chiefs of bureaus in the Navy Department is the grade or shore-duty pay of a rear admiral of the lower nine, \$6,000 per annum, without the increase for service on sea duty, and is not affected by the fact that the commandant of the navy yard at Mare Island and the Superintendent of the Naval Academy, although serving on shore, are allowed sea-duty pay by joint resolution of March 3, 1863 (12 Stat., 825), and act of September 28, 1850 (9 Stat., 515). (18 Comp. Dec., 15.)

Assistant chiefs of bureaus in the Navy Department are not entitled to the 10 per cent additional of their salaries allowed for sea duty, or shore duty beyond seas, as a part of the "highest pay of their grade." (90 S. and A. Memo., 826.)

Under the provision in the act of June 8, 1880 (21 Stat., 164), as amended by the act of June 5, 1896 (29 Stat., 251), providing that the Judge Advocate General should receive the "highest pay of a captain in the Navy," an officer of the Navy serving as Judge Advocate General is entitled to the sea pay of a captain, but he is not entitled to the additional pay provided by law for officers of the Navy serving in insular possessions. "The evident purpose of said act of June 15, 1896, was to give claimant the sea pay of a captain instead of shore-duty pay. It contains no phrase looking to the future. It provides the highest pay of a captain, but not the pay which a captain in the Navy might thereafter have; no words of anticipation are in this act \* \* \*. By the acts of June 8, 1880, and June 5, 1896, the pay of the Judge Advocate General was fixed at \$4,500 a year as distinctly as if they had specifically named said amount." (11 Comp. Dec., 11; compare *Schuetze v. U. S.*, 24 Ct. Cls., 299; but see *Plummer v. U. S.*, 224 U. S., 137, holding that the act of May 4, 1898 (30 Stat., 380), providing that acting assistant surgeons in the Navy shall have the "compensation of assistant surgeons," did not, as held by the Comptroller of the Treasury, limit the pay of acting assistant surgeons to the amount of pay received by assistant surgeons on May 4, 1898, but entitled them to increases in pay thereafter allowed by law to assistant surgeons. The pay of the Judge Advocate General under the act of May 13, 1908, was not the subject of decision, but in practice he was allowed \$5,000 per annum, being the highest shore-duty pay of a captain. See in this connection House Reports, volume 1, No. 285, and Senate Reports, volume 2, No. 472, Fifty-fourth Congress, first session, 1895-96, which explain that the purpose of the act of June 5, 1896, was to allow the Judge Advocate General, when an officer of the Navy, the "sea pay" of a captain, which had been denied under the previous laws by the Court of Claims in *Lemly v. U. S.* (28 Ct. Cls., 468); see also H. Rpts., vol. 1, 52d Cong., 2d sess., 1892-93, No. 2191; and S. Rpts., vol. 1, 52d Cong., 2d sess., 1892-93, No. 1188.)

Prior to the naval personnel act of March 3, 1899 (30 Stat., 1004), the pay of chiefs of bureaus of the Navy Department was provided for by section 1565 of the Revised Statutes, as follows: "The pay of chiefs of bureaus in the Navy Department shall be the highest pay of the grade to which they belong, but not below that of commodore." The said personnel act provided for their pay as follows: "That when the office of chief of bureau is filled by an officer below the rank of rear-admiral, said officer shall, while holding said office, have the rank of rear-admiral and receive the same pay and allowances as are now allowed a brigadier-general in the Army." The law now covering the pay of chiefs of bureaus is the following provision of the act of May 13, 1908: "That the pay and allowances of chiefs of bureaus in the Navy Department shall be the highest pay of the grade to which they belong, and not below that of rear-admiral of the lower nine." By section 1375 of the Revised Statutes the officer detailed as assistant to the Bureau of Medicine and Surgery is entitled to the "highest shore pay of his grade." The other assistants to chiefs of bureaus are each entitled to the "highest pay of his grade" by the following acts in the different cases: March 3, 1893 (27 Stat., 717); May 4, 1898 (30 Stat., 373); March 3, 1899 (30 Stat., 1038), and March 3, 1905 (33 Stat., 1111). Section 1556 of the Revised Statutes, the pay statute for naval officers in effect before the Navy personnel act, provided three distinct rates of pay for each grade—one for sea duty, another for shore or other duty, and another for an officer on leave or waiting orders, and each of these rates was graduated by length of service. The act of May 13, 1908, fixes *one annual pay only for each grade*, with an increase of *such* pay, and equally permanent, for each five years' service. When the longevity pay is earned by service it becomes a part of the permanent pay of the grade. But the 10 per cent additional allowed by the act of May 13, 1908, for sea duty and for shore duty abroad is pay for particular duty and to be given only "while so serving." It is true that old Navy sea pay was only earned while on sea duty, but it was an established pay of the grade, just as the other two rates were. There is no longevity pay attached to the grade of rear-admiral of the nine lower numbers, so that there appears to be only one rate of pay provided for that grade notwithstanding the use of the words "highest pay." It is difficult to give the word "highest" a meaning in this case, and its use in the above provision seems to create an ambiguity as to the meaning of the law. Rear admirals of the nine lower numbers receive the same advance in pay by the act of May 13, 1908, as brigadier-generals of the Army receive under the Army act of May 11, 1908, viz., \$500 per annum; so that the present pay of each is \$6,000 per annum, and I am of opinion that chiefs of bureaus in the Navy Department are entitled to the same unless they are of higher grade. (14 Comp. Dec., 929.)

Formerly there were three separate and distinct rates of pay of each grade, sea pay, leave or waiting-orders pay, and shore-duty pay. Under the act of May 13, 1908, in lieu of the three there is only the one rate of pay for each grade, with increases for certain purposes. the

pay of the grade of rear-admiral of the lower nine being \$6,000 per annum, with a 10 per cent increase thereon for serving on sea duty or on shore duty beyond the continental limits of the United States. No express mention is made in the act of any increase for shore duty in the United States, and therefore the grade pay alone remains the pay for that duty, or "shore-duty pay," within the commonly accepted meaning of the term. While no meaning can be attached to the word "highest," yet the intent of Congress should not be defeated for the purpose of conferring upon it a meaning. (18 Comp. Dec., 15.)

The term "highest pay of his grade," in the cases of assistant chiefs of bureaus, is given effect by including full longevity pay, as it is a part of the pay of the grade; but the additional pay provided by the act of May 13, 1908, for a particular duty, such as sea duty and shore duty abroad, is not a part of the yearly pay of the grade. Under the act of May 13, 1908, as interpreted by the Comptroller, assistant chiefs of bureaus receive an increase of pay of at least \$500 per annum over their former pay, which is the increase generally provided by that act. (90 S. and A. Memo., 826. NOTE.—Pay Director C. J. Peoples, while serving as assistant to the Bureau of Supplies and Accounts, was paid the highest pay of the grade of pay director, viz., that of rear admiral of the upper half.)

[NOTE.—The act of May 13, 1908 (35 Stat., 129), and act of March 3, 1909 (35 Stat., 754), each provided that "the estimates for the support of the Navy shall hereafter show, under the head of Pay of the Navy, the sums allowed for pay of officers belonging to the line, to the several departments of the staff, and to the retired list; the estimates to show under each head the amount allowed for pay proper, for increases due to longevity and foreign service, and for *pay at sea rates to officers employed on shore \* \* \**"]

**Pay not reduced by appointment as chief of bureau.**—A rear admiral of the senior nine, serving as chief of the Bureau of Ordnance, is entitled to the pay of a rear admiral of the senior nine, and is not restricted to "the highest shore-duty pay and allowances of the rear admiral of the lower nine," notwithstanding the provision to that effect in the act of June 24, 1910 [since repealed]. (31 Op. Atty. Gen., 557, file 22724-16:3, approving 10 Op. Atty. Gen., 377.)

#### VI. RETIREMENT OF CHIEFS OF BUREAUS.

**Rank on retirement same as while serving.**—Section 1254, Revised Statutes, relating to the Army, and made applicable to the Marine Corps by section 1622, Revised Statutes, provides that "officers hereafter retired from active service shall be retired upon the actual rank held by them at the date of retirement." Held that, under these statutes, a captain in the Marine Corps, holding the office of Judge Advocate General of the Navy, with the rank of colonel while so serving, is entitled to be retired with the latter rank. While he held this office he held actual rank as a colonel of the Marine Corps, and not assimilated rank; his rank was a fact, not a courtesy. (*Remey v. U. S.*, 33 Ct. Cls., 218.)



Section 1457, Revised Statutes, provides that "officers retired from active service shall be placed on the retired list of officers of the *grades* to which they belonged, respectively, at the time of their retirement, and continue to be borne on the Navy register. They shall be entitled to wear the uniform of their respective grades \* \* \*." The effect of this statute upon the retirement of naval officers while serving as chiefs of bureaus has never been judicially decided. The decisions of the executive officers on the subject have been conflicting, the cases being noted below:

The decision of the Court of Claims in Remy's case (above noted) was extended to the case of Capt. Samuel C. Lemly, U. S. Navy, who was retired under section 1457, Revised Statutes, from the office of Judge Advocate General, with the rank of captain, which he held while so serving on the active list, although his rank in the line was lieutenant commander. (See file 21-2, Mar. 12, 1906.)

The act authorizing the appointment of a Judge Advocate General confers actual and not assimilated rank upon the officer so appointed, and an officer of the Navy retired while holding the rank conferred by such appointment is retired on said rank. (8 Comp. Dec., 895.)

The Attorney General (25 Op. Atty. Gen., 294) held that the word "grade" in section 1457 "appears to mean *rank* in the line or by relation to the line—using rank and grade interchangeably, as those words sometimes are used, and not as indicating an officer's number in a particular grade. Section 1471 speaks of the headship of a bureau as a 'position,' section 1472 as an office, section 1473 again as a position, and the Navy Regulations, incorporating the statutes and adding to them administrative details, use both terms \* \* \*. I think, however, that *grade* may include such staff offices and may mean in an untechnical sense and by a certain equity the highest post to the rank and title of which an officer has attained upon his retirement, and that section 1457 fairly includes the office or position of Paymaster-General." (See note to section 1362, Revised Statutes, for other citations in which "grade" and "rank" have been used synonymously.)

In the opinion noted in the preceding paragraph, the Attorney General further stated: "As I understand the matter, the situation is precisely the same in the line. An officer serving as chief of a bureau, who is a rear-admiral in fact, or is in the next lower grade, viz, captain, if he were retired during his incumbency of the bureau headship would be retired with the rank, pay and title of rear-admiral."

The above opinion of the Attorney General was followed in an opinion of the Judge Advocate General (file 21-2, Mar. 12, 1906), holding that "a captain in the Navy reaching the retiring age while serving as chief of bureau with the rank of rear-admiral, is retired with the latter rank." It was stated by the Judge Advocate General that the Attorney General's opinion was followed in the case of Paymaster General Kenny, who was "retired as a rear-admiral while a pay director in a staff corps of the Navy having no rank corresponding to

that of rear-admiral; also in the case of the present Paymaster-General [Harris], retired as rear-admiral, his rank in his corps being that of pay director." The Judge Advocate General also supported his opinion by the decision of the Court of Claims in the Remy case, above noted, and the fact that a marine officer serving as Judge Advocate General was retired with the rank of colonel, and a naval officer in the same position was retired with the rank of captain, although their lineal ranks were captain in the Marine Corps and lieutenant commander in the Navy, respectively. The Judge Advocate General further supported his opinion by the act of August 5, 1882 (22 Stat., 286), providing that "hereafter there shall be no promotion or increase of pay in the retired list of the Navy *but the rank and pay of officers on the retired list shall be the same that they are when such officers shall be retired.*"

The Navy Regulations of 1905 and 1909 provided that "officers retired while serving as chiefs of bureau or as Judge Advocate General shall retain the rank and titles held by them, respectively, while so serving." (Art. 24, Regs. 1909; art. 23, Regs. 1905; file 22724-7d, May 17, 1909. There is no similar provision in the Navy Regulations of 1913.)

The Attorney General's opinion, above noted, (25 Op. Atty. Gen., 294) reversed a former opinion of his department (17 Op. Atty. Gen., 154), which was as follows: "Where W., while holding a commission as captain in the Navy, was appointed to the office of chief of the Bureau of Navigation, with the relative rank of commodore: Held that, in case of his retirement by reason of a disability incident to the service, or on his own application, during his incumbency of that office, and whilst he is borne on the Navy Register as a captain, he should be placed on the retired list with the rank of captain." Nevertheless, in this opinion the Attorney General stated: "The interchangeability of the words rank and grade throughout the statutes leads me to the conclusion that whatever may have been their original differences in meaning, they are now to a great extent used synonymously," but his conclusion was that the word "rank" in section 1588, Revised Statutes, providing that retired officers shall receive 75 per cent of the pay of the "grade or rank which they held, respectively, at the time of their retirement," meant "grade," which was the reverse of the conclusion reached later (25 Op. Atty. Gen., 294); that the word "grade" in section 1457, Revised Statutes, meant "rank."

The decisions of the Court of Claims and of the Comptroller of the Treasury, the opinion of the Attorney General (25 Op. Atty. Gen., 294), and the Navy Regulations (art. 24, Regs., 1909), all support the view that the chief of a bureau in the Navy Department, retired for physical disability, is entitled to the rank and retired pay of a rear admiral of the lower nine. (File 22724-7d, May 17, 1909, memo. J. A. G.)

By act of May 13, 1908, Congress provided that "any officer of the Navy who is now serving or shall hereafter serve as chief of a bureau in the Navy Department, and shall subsequently be retired, shall be retired with the rank, pay, and allowances authorized by law for the retirement of such bureau chief." At the time this legis-

lation was enacted the law as construed by the Attorney General (25 Op. Atty. Gen., 294), by the Navy Department (file 21-2, Mar. 12, 1906), and by Navy regulations approved by the President (art. 23, Regs., 1905), authorized the retirement of bureau chiefs with the rank held by them while so serving, and the contrary opinion (17 Op. Atty. Gen., 154) had been reversed. [In this connection see "Introduction," ante, VI, D, "Aids to Interpretation of Ambiguous Statutes."]

Referring to this act of May 13, 1908, the Attorney General stated: "It is obvious under the language last quoted that an officer actually retired from active service while still acting as chief of bureau became entitled \* \* \* to pay during retirement of not less than three-fourths of the pay of a 'rear-admiral of the lower nine.'" (28 Op. Atty. Gen., 531.)

It is the opinion of the Navy Department that the existing laws entitle a line officer of the Navy, on retirement, while serving as Judge Advocate General or chief of bureau, to the rank held by him while so serving, the same as a Marine officer retired while serving as Judge Advocate General and a staff officer retired while serving as chief of a bureau or Judge Advocate General in the Navy Department, and any officer of the Army retired while serving as Judge Advocate General or chief of a bureau in the War Department retains on retirement the rank held by him while so serving. (File 22724-41, May 14, 1919.)

The former opinions and decisions were reviewed by the Attorney General, July 3, 1919, and the conclusion reached that "a line officer of the Navy, retired while serving as chief of bureau or Judge Advocate General, should be placed on the retired list with the rank attached by law to the said position of chief of bureau or Judge Advocate General." (31 Op. Atty. Gen., 505.)

**Rank on retirement not same as while serving.**—In 27 Op. Atty. Gen., 376, the Attorney General disapproved the opinion expressed in 25 Op. Atty. Gen., 294 (above quoted), and reverted to that expressed in 17 Op. Atty. Gen., 154 (above quoted), that the word "grade," in section 1457, Revised Statutes, does not mean "rank," but requires that a captain in the Navy, serving as chief of bureau with the rank of rear admiral, be retired with the rank of his grade in the line, namely, with the rank of captain, except as specified in section 1473, Revised Statutes, quoted below. [In this opinion the Attorney General did not consider the effect of the act of May 13, 1908, as constituting legislative approval of the existing construction of the law under which chiefs of bureaus were held entitled to retirement with the rank attached to the office of chief of bureau.]

In 27 Op. Atty. Gen., 376, the Attorney General stated that the Court of Claims' decision in Remy's case (33 Ct. Cls., 218), that a marine officer serving as Judge Advocate General is entitled to retirement with the rank of colonel, which he held by virtue of his office as Judge Advocate General, does not apply to the retirement of an officer of the Navy serving as chief of bureau, for the reason, among others, that section 1254, which applies to the retirement of marine officers, uses the word "rank,"

while section 1457, which applies to the retirement of officers of the Navy, uses the word "grade"; and that while a chief of bureau has the rank of rear admiral he does not by virtue of his office belong to the "grade" of rear admiral.

In 23 Op. Atty. Gen., 529, the Attorney General quoted approvingly from his opinion of May 26, 1909 (27 Op. Atty. Gen., 376, 379), that a chief of bureau whose actual grade is below that of rear admiral is not entitled to retirement with the rank of rear admiral except in the cases specified by section 1473, Revised Statutes (quoted below).

The Chief of Naval Operations, by express enactment, if retired while so serving, shall have the lineal rank and retired pay to which he would be entitled if not so serving. (Act Aug. 29, 1916, 39 Stat., 558).

**Rank on retirement of chiefs of "staff" bureaus.**—Section 1482, Revised Statutes, provides that "staff officers, who have been or shall be retired for causes incident to the service before arriving at 62 years of age, shall have the same rank on the retired list as pertained to their position on the active list." [The effect of this section upon the retirement of a staff officer serving as chief of bureau has not been decided. See, however, file 22724-41, May 14, 1919, and 31 Op. Atty. Gen., 505, noted above.]

Section 1473, Revised Statutes, as amended, provides that "officers who have been or who shall be retired from the position of Chiefs of the Bureau of Medicine and Surgery, of Supplies and Accounts, of Steam Engineering [now Engineering] or of Construction and Repair, by reason of age or length of service, shall have the rank of commodore [now rear admiral]."

**Rank of commodore in certain cases.**—In 5 Comp. Dec., 823, it was held by the Comptroller of the Treasury that under section 1473, Revised Statutes, the officers therein mentioned would retire, under the conditions specified, with the rank of commodore, and not rear admiral; notwithstanding the fact that the grade of commodore on the active list was abolished by the Navy personnel act of March 3, 1899, and that chiefs of bureau now have the rank of rear admiral instead of commodore, as was the case when section 1473 was enacted. (See also, to same effect, file 22724-16:1, Feb. 13, 1911, overruled by Attorney General, Mar. 15, 1911, file 22724-16:3; and see note to sec. 1362 R. S.) [The pay of commodore and rear admiral of the lower nine is the same, and as the Comptroller of the Treasury has jurisdiction only of questions involving payments, and the case before him involved the pay of an officer retired under section 1473, Revised Statutes, the question of rank to which such officer was entitled was not under the jurisdiction of the Comptroller to decide. The Comptroller of the Treasury, in a subsequent letter to the Secretary of the Navy, relating to a similar matter, stated: "The decision of \* \* \* referred only to the pay of such retired officers and not to the rank upon which they should be retired, as that was a question outside of my jurisdiction and in any event did not affect the rate of pay in the particular case considered. \* \* \* In this decision the assistant comptroller had in mind the question of



pay, which was the only question before him and the only one over which he had jurisdiction to render a binding decision. \* \* \* The question of the rank upon which such an officer should be retired has therefore no bearing upon the rate of pay which he is to receive when so retired. The question of rank is one peculiarly within the province of your department to determine and a proper one for submission to the Attorney General for his opinion in case of doubt." (File 4784-99, Dec. 8, 1899.)]

**Rank of commodore now rear admiral.**—In the following opinions the Attorney General has indicated the view that the rank of officers retired under section 1473, Revised Statutes, is now rear admiral instead of commodore: 25 Op. Atty. Gen., 296; 27 Op. Atty. Gen., 337, 344; 27 Op. Atty. Gen., 376; 31 Op. Atty. Gen., 505, 518, 519. (See also file 21-2, Mar. 12, 1906.)

In 27 Op. Atty. Gen., 337, 344, the Attorney General stated that under section 1473 "officers who have been or who shall be retired from the position of chiefs of the bureau of \* \* \* Steam Engineering \* \* \* by reason of age or length of service, shall have the relative rank of commodore," (*now the actual rank of rear-admiral* \* \* \*).

In 27 Op. Atty. Gen., 376, the Attorney General stated that Congress has provided that officers retired from the position of Chief of the Bureau of Steam Engineering by reason of age or length of service shall have the *rank of rear admiral*.

Had the Chief of the Bureau of Steam Engineering been retired on his own application, after 30 years' service, he would have been entitled, under section 1473, Revised Statutes, to the rank of rear admiral on the retired list. (File 22724-71, July 13 and Dec. 9, 1909, letters from Secretary of the Navy to House and Senate Committees on Naval Affairs.)

The Navy Regulations of 1905 and 1909 provided that a chief of bureau retired while so serving was entitled to the rank of rear admiral. (Art. 24, Regs., 1909, and art. 23, Regs., 1905. No similar provision in Regulations of 1913.)

According to the department's practice, the Paymaster General of the Navy, if retired under section 1473, Revised Statutes, is retired with the rank of rear admiral. (See file 22724-18, Nov. 28, 1911; Bu. Nav. file 2425-61, 2108.)

The Surgeon General of the Navy, Presley M. Rixey, was retired February 4, 1910, on his own application after 30 years' service, with the rank of rear admiral. (See Navy Register, Jan. 1, 1915, p. 168.)

The act of June 24, 1910 (36 Stat., 607) [repealed by the act of August 22, 1912 (37 Stat., 328)], provided that chiefs of bureau becoming eligible for retirement after 30 years' service "shall have, while on the active list, the rank, title and emoluments of a chief of bureau, in the same manner as is already provided by statute law for such officers upon retirement by reason of age or length of service, and such officers after thirty years' service shall be entitled to and shall receive new commissions in accordance with the rank and title hereby conferred." The purpose of the act of 1910 "quite clearly was to extend to chiefs of bureau becoming eligible for retirement the same privileges as under the prior law they could claim upon

actual retirement." (28 Op. Atty. Gen., 531.) Under this act of 1910, the officers affected thereby became entitled to permanent commissions with the *rank of rear admiral* (28 Op. Atty. Gen., 429); and such officers were commissioned accordingly with the rank of rear admiral, including Rear Admiral R. F. Nicholson, Chief of the Bureau of Navigation.

**Section 1473, Revised Statutes, does not restrict retirement with same rank as while serving to cases specified.**—Section 1473, Revised Statutes, in providing that chiefs of certain bureaus shall be retired with the rank of commodore, was not intended to discriminate against the chiefs of the other bureaus, but the inference is that Congress intended thereby to confer upon chiefs of the so-called staff bureaus a rank on retirement which it thought already appertained to the chiefs of the so-called line bureaus. (31 Op. Atty. Gen., 505, 519, holding that line officers serving as chiefs of bureaus are entitled to retire with the rank of rear admiral.)

Section 1473 expressly provides that the chiefs of four bureaus shall, on retirement for age or length of service, retain the rank which they held while so serving. "Expressio unius exclusio alterius"—the expression of one thing excludes another. Accordingly, *held* that a captain in the Navy, serving as Chief of the Bureau of Navigation, which is not one of the bureaus mentioned in section 1473, should be retired with the rank of captain. (17 Op. Atty. Gen., 154; overruled by 31 Op. Atty. Gen., 505.)

Section 1473 would have been entirely unnecessary if in the view of Congress or of the revisers of the statutes the effect of section 1457, in the event of the retirement of a chief of bureau, was to place him on the retired list of officers of the grade temporarily held by him during his incumbency of the office of chief of bureau. It was because of the expression of such intention only in the two cases mentioned, viz, first, on retirement by reason of age, and second, on retirement by length of service, "thus inferentially excluding all other cases," that Attorney General McVey reached the conclusion expressed by him in the Whiting case that chiefs of bureaus not coming within the provisions of section 1473 are entitled to retirement only with the rank of their regular grade in the Navy—an opinion in which I am constrained to concur. (27 Op. Atty. Gen., 376, affirming 17 Op. Atty. Gen., 155, and disapproving 25 Op. Atty. Gen., 294; but see 31 Op. Atty. Gen., 505, noted above.)

When, therefore, a line officer of the Navy, holding the position of Engineer in Chief, is retired from active service by reason of physical disability and not because of age or length of service, he is to be placed on the retired list of officers of the grade to which he belonged at the time of retirement—in this case the grade of captain—and not on the retired list of Engineers in Chief, for such office is not a grade. (27 Op. Atty. Gen., 376.) [Following this opinion, a special act of Congress was enacted May 6, 1910 (36 Stat., 352), providing for the appointment of John K. Barton as Engineer in Chief on the retired list, with the rank of rear admiral, from December 22, 1908, the date of his original retirement, under the Attorney General's

opinion, with the rank of captain. Thereafter this opinion was reversed by the Attorney General. (see 31 Op. Atty. Gen., 505, noted above.)]

**Rank on retirement of former bureau chief who has returned to general service.**—Prior to the act of May 13, 1908, the authorities clearly supported the following proposition: A chief of bureau appointed from the grade of captain, whose time of bureau ship expires, then reverts to the grade from which he was appointed, and, if afterwards retired, retires in the lower grade to which he so reverts. (File 21-2, Mar. 12, 1906.)

However, by the act of May 13, 1908 (35 Stat., 128) it was provided that "any officer of the Navy who is now serving or shall hereafter serve as chief of a bureau in the Navy Department, and shall subsequently be retired, shall be retired with the rank, pay, and allowances authorized by law for the retirement of such bureau chief."

In an informal opinion of the Attorney General it was held that the above legislation of May 13, 1908, refers only "to the case of retirement during service as chief of bureau," and does not extend to the retirement of one who has left the office of chief of bureau and returned to general duty in the service at large. (28 Op. Atty. Gen., 531.) This informal opinion was not rendered in any specific case, and had not the force and effect of an official opinion. (See cases noted under sec. 356, R. S., "V. Weight of Opinions.") However the informal opinion of the Attorney General was followed by the Court of Claims in the case of Stokes v. United States. (54 Ct. Cls., 70.)

The above provision of the act of May 13, 1908, was copied from the following clause in the Army act of February 2, 1901, section 26 (31 Stat. 755): "And any officer now holding office in any corps or department who shall hereafter serve as chief of a staff corps or department and shall subsequently be retired, shall be retired with the rank, pay, and allowances authorized by law for the retirement of such corps or department chief." (See file 22724-7m, Nov. 22, 1909). By act of June 4, 1920 (41 Stat., 762), relating to the Army, it was provided that "any officer who shall have served four years as chief of a branch, and who may subsequently be retired, shall be retired with the rank, pay and allowances authorized by law for the grade held by him as such chief."

No actual case has been judicially decided in the Army involving the interpretation of this legislation. For memoranda relating to the informal opinion of the Attorney General above cited, and presenting certain considerations which were not before the Attorney General at that time, see file 27231-66:3, Office of the Judge Advocate General of the Navy, and file 88-400, Office of the Judge Advocate General of the Army.

**Orders to chief of bureau to appear before retiring board.**—While immaterial, it seems to be an irregularity to order a chief of bureau before a retiring board by his title as chief of bureau—e. g., as "engineer in chief"—instead of the title of his office in the line, viz, "captain," for it is by virtue of his office of captain and not of chief of bureau that he is

entitled or subject to retirement. (27 Op. Atty. Gen., 337, 343. Compare cases noted above.)

**Titles of chiefs of bureau after retirement.**—I have no doubt whatever, in view of the authorities which I have cited and the various considerations affecting the subject which I have indicated, that when retirement occurs during service as head of one of the staff bureaus, the titles for the chiefs of which are provided for in section 1471, the retired officer is entitled under the law to be borne upon the Navy Register as a retired officer under that title permanently. (25 Op. Atty. Gen., 294; affirming 25 Op. Atty. Gen., 122; compare 27 Op. Atty. Gen., 376.)

**Effect of retirement upon status of chief of bureau.**—Chiefs of bureaus are eligible, after retirement, to serve out unexpired terms, particularly in view of the statute authorizing the employment of retired officers on active duty. (File 21, Nov. 2, 1902.)

An officer of the Navy on the active list is eligible for appointment as chief of bureau although he will be retired about a year later; and when the date of his retirement arrives he may be ordered to continue in the performance of his duties as chief of bureau during the unexpired portion of his term. (File 21-1, Mar. 7, 1906.)

At least one Engineer in Chief and two Paymasters General, retired while chiefs of bureaus, have been ordered to active duty upon retirement and have continued serving as chiefs of bureau until the expiration of their respective terms. The same is true of a former Judge Advocate General. Such action is therefore in accordance with precedents. (File 21-1, Mar. 7, 1906.)

The retirement of an officer of the Navy while holding the office of Judge Advocate General of the Navy did not vacate that office, and the incumbent continued to be entitled to the pay attached thereto, if continued on active duty as Judge Advocate General under the order of the Secretary of the Navy after his retirement. (8 Comp. Dec., 895.)

The Paymaster General of the Navy having been retired under section 1444, Revised Statutes [age], was ordered by the Secretary of the Navy to continue his duties as Paymaster General and Chief of the Bureau of Supplies and Accounts until further orders. *Held*, that he is entitled to the pay of that office until the expiration of his term of appointment, unless sooner relieved from active duty as chief of said bureau. (10 Comp. Dec., 56.)

It was quite properly held by the Comptroller in 8 Comp. Dec., 895, that a captain in the Navy, serving as Judge Advocate General, who after his retirement as captain was by the Secretary of the Navy directed to continue his duties as Judge Advocate General pursuant to the statute authorizing the employment of retired officers on active duty, was entitled to hold the rank and enjoy the pay adhering in such office so long as he continued to fill the office and perform the duties of Judge Advocate General, even though he had been retired as an officer of the line. (27 Op. Atty. Gen., 376.)

The retirement of an officer while Chief of the Bureau of Steam Engineering "vacated the



office of Engineer in Chief of the Navy, and left his legal status that of an officer on the retired list of the Navy, holding the rank of captain." (27 Op. Atty. Gen., 337, 344.)

An officer retired for physical disability while serving as chief of the Bureau of Steam Engineering became incapable of performing his active shore duties as Engineer in Chief unless the Secretary of the Navy, under the statute authorizing employment of retired officers on active duty, ordered him to continue his duties as chief of bureau, which was not done. (27 Op. Atty. Gen., 376, 382.)

**Pay after retirement of officers serving as chiefs of bureaus.**—See cases noted above under "Rank of chiefs of bureaus on retirement," "Rank on retirement of former bureau chief who has returned to general service," and "Effect of retirement upon status of chief of bureau."

A line officer of the grade of captain, retired while holding the office of Chief of the Bureau of Navigation, is entitled to the retired pay of an officer of the rank of captain. (17 Op. Atty. Gen., 154.)

Chiefs of bureaus coming within the terms of section 1473 are entitled to the retired pay of commodore if retired while holding such positions, but chiefs of bureaus who do not fall within said section are entitled on retirement only to the retired pay of their commissioned grade. (5 Comp. Dec., 823.)

An officer of the Marine Corps retired while serving as Judge Advocate General of the Navy is entitled to the retired pay of colonel. (*Remey v. U. S.*, 33 Ct. Cls., 218.)

An officer of the Navy serving as Judge Advocate General is retired with the rank of captain and is entitled to be paid accordingly. If continued on active duty as Judge Advocate General under the order of the Secretary of the Navy after retirement, he is entitled to receive the active-duty pay of a captain. (8 Comp. Dec., 895. *Capt. Lemly*, in whose case this decision was rendered, performed other active duty under orders of the Secretary of the Navy, after expiration of his service as Judge Advocate General, and received the active-duty pay of a captain for such service; and when not on any active duty he received the retired pay of a captain; see file 22724-7d, May 17, 1909.)

Where a line officer of the grade of captain was retired from the office of chief of bureau and was continued on active duty but not as chief of bureau, he was entitled by statute to the active-duty pay of the grade from which he was retired, which, in his case, was that of captain. (15 Comp. Dec., 860.)

## VII. ASSISTANTS TO CHIEFS OF BUREAUS.

**Status and powers of assistant.**—Without making a question that the assignment of commissioned officers of the Navy to act as assistants to chiefs of bureaus may be within the general power of the Secretary of the Navy,

officers so detailed are not legally "the assistant or deputy of such chief," unless their appointment is specifically authorized by statute. (19 Op. Atty. Gen., 503; affirmed 28 Op. Atty. Gen., 95. See also note to sec. 178, R. S.)

The office of Surgeon General (Army) is one of the distinct or separate bureaus of the administrative service of the War Department. It has been found in regard to many of these bureaus, and even to the heads of departments, that it is impossible for a single individual to perform in person all the duties imposed on him by his office. It was to relieve the overburdened principal of some part of those duties that the office of assistant was created. If no virtue attached to the acts of the assistant until approved by the Surgeon General, any inferior clerk would have answered the purpose as well. It is not intended to deny that the Assistant Surgeon General was subordinate to the chief of his bureau, could be ordered to do or not to do particular things, and when an order made by him was disapproved it might be revoked by that officer. But until so revoked or disapproved it was valid, and parties required to act under it had a right to rely on it. (*Parish v. U. S.*, 100 U. S., 504; *McCullum v. U. S.*, 17 Ct. Cls., 101.)

In some of the executive departments the statutes provide for assistants to the heads thereof, and also assistants and deputies to the heads of some of the bureaus. The duties of these assistants are generally not specifically defined by law, but are left to the direction and regulation of superior officers. Such assistants are supposed to have the confidence of those immediately above them, and to be officially engaged in carrying out the will of their principals in the details of the work of the department or bureau in which they are employed. When their acts, decisions, or directions are reduced to writing, signed by them in their official capacity, filed, or recorded among the archives of the department, and do not appear to have been revoked, annulled, or modified by the head of the department or bureau, they must be held in the absence of fraud, mistake, or irregularity to have been done within the scope of the authority of the assistant and to be as binding on the Government as though expressly ordered by the superior. Especially is that so when copies of such written documents are sent out by the head of the department in which they are found, without objection on his part to their having been made in the due and regular course of business under his control. (*McCullum v. U. S.*, 17 Ct. Cls., 101.)

The assistant to an officer designated to perform the latter's duties under section 179, Revised Statutes, is qualified to act as member of a board which the law provides shall include in its membership the officer whose duties he is temporarily performing. (20 Op. Atty. Gen. 483.)

For other cases, see notes to sections 177, 182, Revised Statutes.

**Sec. 422. [Bureaus of Yards and Docks, Equipment, Navigation, and Ordnance.]** The chiefs of the Bureau of Yards and Docks, of the Bureau of Equipment and Recruiting, of the Bureau of Navigation, and of the Bureau

of Ordnance, shall be appointed from the list of officers of the Navy, not below the grade of commander.—(5 July, 1862, c. 134, s. 1, v. 12, p. 510.)

**Bureau of Equipment and Recruiting:** Was designated as Bureau of Equipment in annual appropriation acts commencing with the fiscal year 1892; provision was made for distribution of the duties, funds, and employees of the Bureau of Equipment among the other bureaus and offices of the Navy Department by naval appropriation acts for the fiscal years 1912, 1913, and 1914; and the Bureau of Equipment was abolished by act of June 30, 1914 (38 Stat., 408).

**Bureau of Navigation:** Detail of an officer of the Navy as assistant to the chief of the Bureau of Navigation was authorized by act of March 3, 1893 (27 Stat., 717).

**Bureau of Ordnance:** Detail of a line officer of the Navy temporarily as assistant to the chief of the Bureau of Ordnance was authorized by act of May 4, 1898 (30 Stat., 373).

**Bureau of Yards and Docks:** Chief shall be selected from Corps of Civil Engineers and have had not less than seven years' active service. (Act June 29, 1906, 34 Stat., 564.) Detail of an officer of the Corps of Civil Engineers as assistant to the Chief of the Bureau of Yards and Docks was authorized by act of August 29, 1916 (39 Stat., 558).

**Line bureaus.**—These four bureaus are essentially line bureaus, while those mentioned in sections 423–426, inclusive, are staff bureaus (22 Op. Atty. Gen., 47); excepting that the engineer corps (steam engineering) has now been transferred to the line by the personnel act of 1899 (25 Op. Atty. Gen., 122). [By amendments to sections 422 and 424, the chief of the Bureau of Yards and Docks is now appointed from staff officers (civil engineer corps), and the chief of the Bureau of Steam Engineering is now appointed from line officers.]

The Bureau of Steam Engineering [now Engineering] has now become a line bureau through the amalgamation of the Engineer Corps with the line by act of March 3, 1899 30 Stat., 1004. (File 22724–16:1, Feb. 13, 1911.)

The Bureau of Yards and Docks forms a part of the Navy Department, and the Navy Department is an executive department; accordingly the embossing of envelopes for the use of the Bureau of Yards and Docks is printing for an executive department and must be done at

the Government Printing Office. The procurement of such embossing by a private establishment being contrary to law there is no authority for the payment of a voucher therefor. (13 Comp. Dec., 366.)

Only line officers eligible for appointment under this section.—This section restricts the President in his choice of chiefs of the four bureaus mentioned to officers of the line not below the grade of commander; and the act of March 3, 1871, incorporated in section 421, enlarges the President's power, giving him the alternative of making the appointment "from officers having the relative rank of captain in the staff corps of the Navy on the active list." Accordingly the appointment may be made either from line officers not below the grade of commander, under this section, or from staff officers of the rank of captain on the active list, under section 421. It may be said that the law as thus construed discriminates against the officers of the staff corps in the matter of appointment of chiefs of the four bureaus mentioned in this section by requiring them to hold a higher rank than officers of the line in order to be eligible; but the answer is that since line officers are not eligible at all to the chiefship of staff bureaus it is not unfair to require some extra evidence of fitness in a staff officer who is to be made head of a line bureau. (22 Op. Atty. Gen., 47. Chief of Bureau of Yards and Docks is now appointed from staff officers. See law noted above.)

An officer of the corps of civil engineers, not below the rank of captain, is eligible for appointment as Chief of the Bureau of Yards and Docks under section 421; but a civil engineer with the rank of commander is not an officer of the "grade" of commander, and therefore is not eligible for appointment as Chief of the Bureau of Yards and Docks under section 422. (22 Op. Atty. Gen., 47. But see subsequent amendment to this section noted above; see also note to sec. 421, "Appointment of Chiefs of Bureaus," and note to sec. 423, below.)

For other cases, see note to section 421, concerning appointment, status, rank, title, precedence, pay, retirement, etc., of chiefs of bureaus.

**Sec. 423. [Bureau of Construction and Repair.]** The chief of the Bureau of Construction and Repair shall be appointed from the list of officers of the Navy, not below the grade of commander, and shall be a skillful naval constructor.—(5 July, 1862, c. 134, s. 1, v. 12, p. 510.)

By act of March 3, 1893 (27 Stat., 716), it was provided that "any naval constructor having the rank of captain, commander, or lieutenant commander shall be eligible as Chief of the Bureau of Construction and Repair."

By section 1471, Revised Statutes, it was provided that the Chief of the Bureau of Construction and Repair shall have the relative rank of commodore [now the rank of rear admiral], while holding said position, and

the title of Chief Constructor. (See note to sec. 421, concerning the rank and titles of chiefs of bureaus.)

By section 1473, Revised Statutes, it was provided that officers retired from the position of Chief of the Bureau of Construction and Repair, by reason of age or length of service, shall have the relative rank of commodore [now the rank of rear admiral—see note to section 421, Revised Statutes, concerning retirement of chiefs of bureaus.]



Officer of the Corps of Naval Constructors may be detailed as assistant to the Chief of Bureau of Construction and Repair. (Act Aug. 29, 1916, 39 Stat., 558.)

The expression, "the list of officers of the Navy, not below the grade of commander," in sections 422 and 423, strictly construed, applies only to officers of the line. Naval constructors belong to the staff; nevertheless, they have been treated as eligible, under section 423, for appointment as Chief of the Bureau of Construction and Repair. Thus, under the practical interpretation of section 423, naval constructors are treated as officers of the Navy, and their rank as the "grade" required by the section; but it is to be observed that, in no other way could compliance be had with the explicit requirement that the officer appointed Chief of the Bureau of Construction and

Repair shall be "a skillful naval constructor." Faults in expression were disregarded in order to carry out the manifest intention of the law-maker. (22 Op. Atty. Gen., 47; see also note to sec. 422, R. S., and note to sec. 421, R. S., "Appointment of Chiefs of Bureaus.")

The office of Chief of the Bureau of Construction and Repair is not a "grade" in the Navy, and was not made so because the rank, title, and emoluments of the incumbent, theretofore temporary, were made permanent by the act of June 24, 1910 [now repealed]. (28 Op. Atty. Gen., 526. But see cases noted under sec. 421, R. S., "111 status of Chief of Bureaus.")

For other cases, see note to section 421 Revised Statutes, concerning appointment, status, rank, title, precedence, pay, retirement, etc., of chiefs of bureaus.

**Sec. 424. [Bureau of Steam Engineering.]** The Chief of the Bureau of Steam Engineering shall be appointed from the line of officers of the Navy not below the grade of lieutenant-commander, and shall be a skillful engineer.

This section was amended to read as above by act of June 7, 1900 (31 Stat., 702).

As originally enacted, this section read as follows: "SEC. 424. The chief of the Bureau of Steam Engineering shall be appointed from the chief engineers of the Navy, and shall be a skillful engineer."—(5 July, 1862, c. 134, s. 1, v. 12, p. 510.)

The Engineer Corps of the Navy was transferred to the line by act of March 3, 1899 (30 Stat., 1004), and the grade of chief engineers on the active list thereupon ceased to exist.

By act of June 4, 1920, (41 Stat., 828), the Bureau of Steam Engineering was designated as the "Bureau of Engineering."

By section 1471, Revised Statutes, it was provided that the Chief of the Bureau of Steam Engineering [now Engineering] shall have the relative rank of commodore [now the rank of rear admiral], while holding said position, and the title of engineer in chief. (See note to sec. 421, concerning the rank and titles of chiefs of bureaus.)

By section 1473, Revised Statutes, it was provided that officers retired from the position of Chief of the Bureau of Steam Engineering, [now Engineering] by reason of age or

length of service, shall have the relative rank of commodore [now the rank of rear admiral—see note to section 421, concerning retirement of chiefs of bureaus].

By act of March 3, 1905 (33 Stat., 1111), the detail of a line officer of the Navy was authorized as assistant to the Chief of the Bureau of Steam Engineering [now Engineering].

The retirement of the Chief of the Bureau of Engineering creates a vacancy in that office, unless the Secretary of the Navy order the incumbent, in accordance with law, to continue to perform the duties of said office after his retirement, which was not done in this case. The vacancy so created can not legally be filled by the assignment of the Chief of the Bureau of Construction and Repair to perform the duties of Chief of the Bureau of Engineering. (27 Op. Atty. Gen., 337, 344; 27 Op. Atty. Gen., 376, 382.)

The Bureau of Engineering has now become a line bureau. (See note to sec. 422, R. S.)

For other cases, see note to section 421, concerning appointment, status, rank, title, precedence, pay, retirement, etc., of chiefs of bureaus.

**Sec. 425. [Bureau of Supplies and Accounts.]** The chief of the Bureau of Provisions and Clothing shall be appointed from the list of paymasters of the Navy of not less than ten years' standing.—(5 July, 1862, c. 134, s. 1, v. 12, p. 510.)

"Bureau of Provisions and Clothing" was changed to "Bureau of Supplies and Accounts" by act of July 19, 1892 (27 Stat., 243, 245).

Chief of the Bureau of Supplies and Accounts to have the relative rank of commodore [now the rank of rear admiral] while holding said position, and the title of paymaster general. (Sec. 1471, R. S. See note to

sec. 421, concerning the rank and titles of chiefs of bureaus.)

Retirement of Chief of the Bureau of Supplies and Accounts, by reason of age or length of service, with the relative rank of commodore [now the rank of rear admiral] was authorized by section 1473, Revised Statutes. (See note to sec. 421, concerning retirement of chiefs of bureaus.)

Detail of a pay officer of the Navy as assistant to the Chief of the Bureau of Supplies and Accounts, was authorized by act of July 26, 1894 (28 Stat., 132), and the pay of the officer so detailed was fixed by act of March 3, 1899 (30 Stat., 1038).

Civilian assistant to Chief of the Bureau of Supplies and Accounts, to perform also the duties of chief clerk, was provided for by act of February 25, 1903 (32 Stat., 890), and by appropriation acts for subsequent years.

Duties of Bureau of Supplies and Accounts: See note to section 419, Revised Statutes. Appointment, status, rank, title, precedence, pay, retirement, etc., of chiefs of bureaus: See note to section 421, Revised Statutes.

The word "paymasters" in this section is construed in practice as meaning officers of the Supply Corps, and is not restricted to officers in the grade of paymaster. (See note to sec. 1376, R. S., as to organization of the Supply Corps.)

**Sec. 426. [Bureau of Medicine and Surgery.]** The chief of the Bureau of Medicine and Surgery shall be appointed from the list of the surgeons of the Navy.—(5 July, 1862, c. 134, s. 1, v. 12, p. 510.)

Chief of the Bureau of Medicine and Surgery to have the relative rank of commodore [now the rank of rear admiral] while holding said position, and the title of Surgeon General. (Sec. 1471, R. S. See note to sec. 421, concerning the rank and titles of chiefs of bureaus.)

Retirement of Chief of the Bureau of Medicine and Surgery, by reason of age or length of service, with the relative rank of commo-

dore [now the rank of rear admiral], was authorized by section 1473, Revised Statutes. (See note to sec. 421 concerning retirement of chiefs of bureaus.)

Detail of a medical officer as assistant to the Bureau of Medicine and Surgery, was authorized by section 1375, Revised Statutes.

Appointment, status, rank, title, precedence; pay, retirement, etc., of chiefs of bureaus: See note to section 421, Revised Statutes.

**Sec. 427. [Use of engraved plates of Wilkes's Expedition.]** The Joint Committee on the Library shall grant to the Department of the Navy the use of such of the engraved plates of the United States Exploring Expedition under Captain Wilkes, in charge of the committee, as may be desired for the purpose of printing a supply of charts for the use of the Department.—(26 July, 1866, Res. No. 80, v. 14, p. 366.)

**Historical note.**—By act of May 14, 1836 (sec. 2, 5 Stat., 29), Congress authorized the President to send a surveying and exploring expedition to the Pacific Ocean and the South Seas, and made an appropriation of \$150,000 for that purpose. On April 20, 1838, Lieut. Charles Wilkes was appointed to the command of the expedition, which sailed in the month of August, 1838. (See *Wilkes v. Dinsman*, 7 How., 91; see also, "The Wilkes Exploring Expedition," U. S. Naval Institute Proceedings, vol. 40, no. 5, p. 1323.)

The Wilkes Exploring Expedition "was a public enterprise \* \* \* specially authorized by Congress \* \* \* for purposes of commerce and science, very valuable to the country, and not entirely without interest to most of the civilized world." (*Wilkes v. Dinsman*, 7 How., 122; see also *Dinsman v. Wilkes*, 12 How., 389.)

By act of August 26, 1842 (5 Stat., 534), Congress provided for publishing, under the supervision and direction of the Joint Committee on the Library, "an account of the discoveries made by the exploring expedition, under the command of Lieut. Wilkes, of the United States Navy," and by act of March 3, 1843 (5 Stat., 645), made an appropriation of \$20,000 "for preparing and publishing charts, and otherwise carrying into effect" the act of August 26, 1842.

By act of March 3, 1851 (9 Stat., 599), the plates and engravings, which were made at the expense of the United States, were to be delivered to the Smithsonian Institution, to enable that institution to publish a new edition of Wilkes' Narrative.

July 7, 1866 (Congress Letter Book, Navy Dept., vol. 14, p. 332), the Secretary of the Navy advised the chairman of the Joint Committee on the Library, United States Senate, that the charts published under the authority of the act of March 3, 1843, had been exhausted, and that the Navy Department desired to be put in possession of the plates to enable it to have additional charts printed therefrom for the use of the Navy and the Commercial Marine, and suggesting, in case the committee should not feel authorized to transfer the plates to the Navy Department, a joint resolution be submitted to Congress authorizing such transfer to be made. As a result, the joint resolution was adopted, which was afterwards embodied in section 427, Revised Statutes.

From the records of the Hydrographic Office it appears that there were originally 106 copper plates covering the above mentioned exploring expedition, which were apparently turned over to the Navy Department in compliance with the joint resolution now embodied in section 427, Revised Statutes. These copper plates were not returned to the Joint Committee on the Library, but were used in the Hydrographic Office for several years. Thirty-eight of them are still in use by that office for printing charts and 27 others are stored as record plates, but have not been used for some time. Of the remaining 41, some were turned over to the Superintendent of the Coast and Geodetic Survey in 1881 as covering areas coming within the jurisdiction of that office, and the balance were scoured off and the copper plates used for other purposes.



So far as known, the Joint Committee on the Library has never requested the return of any of these plates, and they are regarded by the Hydrographic Office as the property of that office and of the Coast and Geodetic Survey. (File 9386-14:18, Jan. 19, 1916.)

In the Commissioners' Draft of the Revised Statutes (vol. 1, p. 214), it was stated with reference to the joint resolution now embodied in the revision as section 427: "Very probably this provision may have become obsolete. It stands however, in the Statutes at Large unrepealed." [However, inasmuch as it appears from the above that certain of these plates are still in use by the Hydrographic Office, it would seem that section 427, Revised Statutes, can not be regarded as obsolete unless it should be construed as having provided for an absolute transfer of said plates to the Navy Department. In this

connection see United States Compiled Statutes 1917, in which section 427, Revised Statutes, is treated by the publishers as obsolete.]

September 4, 1908 (file 15567-6), the president of the Carnegie Institute of Washington was informed by the Navy Department that "certain unpublished magnetic data obtained on the Wilkes expedition," comprising several hundred miscellaneous books and sheets, forming part of the archives of the Hydrographic Office, were not arranged for access to the public, and could not be spared for publication, as suggested, by the said institute; but that "later, the results obtained from them will be made generally available, if their scientific value is clear; it is in times placed in question by certain gaps in the continuity of observation. To fill these, much search for further material, has so far, proven unavailing."

**Sec. 428. [Collection of enemies' flags.]** The Secretary of the Navy shall from time to time cause to be collected and transmitted to him at the seat of Government all flags, standards, and colors taken by the Navy from the enemies of the United States.—(18 Apr., 1814, c. 78, s. 1, v. 3, p. 133.)

A similar provision to this is contained in section 1554, Revised Statutes.  
Preservation and public display of captured

flags, under the direction of the President, is provided for by section 1555, Revised Statutes.

**Sec. 429. [Reports to be made by Secretary of the Navy.]** The Secretary of the Navy shall make annual reports to Congress upon the following subjects: [See §§ 195, 196.]

First. A statement of the appropriations of the preceding fiscal year for the Department of the Navy, showing the amount appropriated under each specific head of appropriation, the amount expended under each head, and the balance which, on the thirtieth day of June preceding such report, remained unexpended. Such report shall be accompanied by estimates of the probable demands which may remain on each appropriation.

Second. A statement of all offers for contracts for supplies and services made during the preceding year, by classes, indicating such as have been accepted.

Third. A statement showing the amounts expended during the preceding fiscal year for wages of mechanics and laborers employed in building, repairing, or equipping vessels of the Navy, or in receiving and securing stores and materials for those purposes, and for the purchase of material and stores for the same purpose; and showing the cost or estimated value of the stores on hand, under this appropriation, in the navy-yards, at the commencement of the next preceding fiscal year; and the cost or estimated value of articles received and expended during the year; and the cost or estimated value of the articles belonging to this appropriation which may be on hand in the navy-yards at the close of the next preceding fiscal year.

Fourth. A statement of all acts done by him in making sale of any vessel or materials of the Navy; specifying all vessels and materials sold, the parties buying the same, and the amount realized therefrom, together with such other facts as may be necessary to a full understanding of his acts.—(1 May, 1820, c. 52, s. 2, v. 3, p. 567; 3 Mar., 1843, c. 83, v. 5, p. 617; 27 July, 1866, c. 287, s. 3, v. 14, p. 305.)

Amendment to this section was made by the act of June 22, 1910 (36 Stat., 591), which repealed the second clause of the section as quoted above with reference to contracts, and at the same time repealed a similar provision of section 3720, Revised Statutes.

#### OTHER REPORTS REQUIRED TO BE MADE.

**Accounts:** Bureau of Supplies and Accounts shall keep money accounts of the Naval Establishment so as to show direct and indirect charges in the cost of work and shall report same annually for the information of Congress (act Mar. 4, 1911, 36 Stat., 1267); shall also report annually to Secretary of the Navy all receipts and expenditures (act May 13, 1908, 35 Stat., 153).

**Advisory Committee for Aeronautics** is required to submit annual report to Congress through the President, including itemized statement of expenditures. (Act Mar. 3, 1915, 38 Stat., 930.)

**Buildings rented:** Heads of departments are required to report to Congress in annual estimates buildings rented for their departments, and the purpose and cost thereof. (Act Mar. 3, 1883, 22 Stat., 552.) The Secretary of the Treasury is required to report annually to Congress, in Book of Estimates, buildings rented by the Government in the District of Columbia, and the purpose and cost thereof. (Act July 16, 1892 (27 Stat., 199); amended by act May 1, 1913, sec. 3, 38 Stat., 3.)

**Claims:** Secretary of the Navy is required to report annually to Congress for payment, through the Secretary of the Treasury, amounts found to be due claimants for damages by collisions for which vessels of the Navy are considered responsible, where amount of claim does not exceed \$500. (Act June 24, 1910, 36 Stat., 607.) Also shall report annually to Congress amount of claims adjusted by him for damage to privately owned property not occasioned by vessels of the Navy. (Act July 11, 1919, 41 Stat., 132.)

**Condition of business:** Heads of departments are required to make annual report to Congress, in the Book of Estimates, as to the condition of business in the department, and whether in arrears. (Act Mar. 2, 1895, sec. 7, 28 Stat., 808.) Monthly reports are to be made to head of department as to condition of business in the bureaus and offices of the department at Washington (act Mar. 15, 1898, sec. 7, 30 Stat., 317); and quarterly reports are to be made to the President by the heads of departments as to the condition of the public business and whether any branch thereof is in arrears (act Mar. 15, 1898, sec. 7, 30 Stat., 317).

**Contingent funds:** Heads of departments are required to make annual report to Congress of detailed expenditures from contingent funds of the department and of the bureaus and offices thereof. (Sec. 193, R. S.; act Mar. 3, 1877, 19 Stat., 306.)

**Disbursing officers** are required to make annual reports to heads of departments of disbursements by them, and heads of departments

are required to communicate result of such reports to Congress. (Sec. 193, R. S.)

**Employees:** Annual report by Secretary of the Navy to Congress is required, of amount expended for civilians employed on clerical duty, or in any other capacity than ordinary mechanics and workingmen, from "Pay of the Navy," and other naval appropriations (act Jan. 30, 1885, sec. 3, 23 Stat., 295); a similar report is required to be made by the Secretary of the Navy in the annual Book of Estimates of the number and compensation of persons employed from "Increase of the Navy," and other general appropriations (act Apr. 17, 1900, 31 Stat., 117); report is also to be made in the annual estimates of persons employed for technical services from appropriations, "Engineering," "Construction and repair," "Ordnance and ordnance stores," and from appropriations and allotments under the Bureau of Yards and Docks (see annual legislative, executive, and judicial appropriation acts—e. g., act Mar. 3, 1917, 39 Stat., 1100, 1101).

**Employees at navy yards:** Secretary of the Navy shall each year, in the annual estimates, report to Congress the number of persons employed from lump sum appropriations for clerical, drafting, inspection, and messenger service at navy yards and stations and offices under the Navy Department, their duties, and the amount paid to each. (Act Mar. 3, 1909, 35 Stat., 755.)

**Employees detailed:** Heads of departments are required to report to Congress, in the annual Book of Estimates, employees detailed to other offices, in accordance with section 166, Revised Statutes, as amended. (Act Mar. 2, 1895, sec. 7, 28 Stat., 808.)

**Employees inefficient:** Heads of departments are required to report, in the annual Book of Estimates, number of employees in each bureau and office below a fair standard of efficiency, and the salary of each. (Act July 11, 1890, sec. 2, 26 Stat., 268.)

**Estimates:** Extracts from annual reports of heads of departments and bureaus relating to estimates for appropriations and the necessity therefor, are to be included in the Book of Estimates by the Secretary of the Treasury. (Act Mar. 3, 1875, sec. 3, 18 Stat., 370.) Report to accompany estimates showing amount of outstanding appropriation, if any, which will probably be required for each particular item of expenditure. (Sec. 3665, R. S.) [Compare laws cited under section 430, Revised Statutes, as to restriction upon "notes" following estimates.]

**Exchanges of typewriters and labor-saving devices** in part payment for new machines shall be reported annually to Congress, with details relating thereto. (Act Mar. 4, 1915, sec. 5, 38 Stat., 1161.)

**Pay of naval personnel:** Secretary of the Navy is required to report annually to Congress amount of pay and allowances for all officers and enlisted men. (See annual naval appropriation acts, e. g., act Mar. 3, 1915, 38 Stat., 928.)



Public printing: Quarterly report of work done in departmental branches of Government Printing Office is to be made to the head of each department by the person designated to approve requisitions for the department, and such reports are to be transmitted to the Public Printer for his annual report to Congress. (Act Jan. 12, 1895, sec. 31, 28 Stat., 605.) Public Printer to report annually to Congress the cost of operating each departmental branch of the Government Printing Office (act Jan. 12, 1895, sec. 31, 28 Stat., 605); a detailed statement of each account with the departments for printing and binding (act Jan. 12, 1895, sec. 22, 28 Stat., 604); and number of copies of each department report and document printed upon requisition by the department, and titles and numbers of books bound for officers (act Jan. 12, 1895, sec. 19, 28 Stat., 603.)

Publications received and distributed: Detailed report thereof is to be made annually to Congress by the head of department. (Act Jan. 12, 1895, sec. 92, 28 Stat., 623.)

Register of officers of the Navy: By Senate resolution of December 13, 1815 (Annals of Congress, 14 Cong., 1st sess., 1815-1816, pp. 21, 22), it was "*Resolved*, That the Secretary of War and the Secretary of the Navy be requested to furnish annually, on the first of January, each member of the Senate with a copy of the Register of the Officers of the Army and Navy of the United States." [From 1840 to 1861, inclusive, the annual Navy Register bore on its title page "Printed by order of the Secretary of the Navy, in compliance with a resolution of the Senate of the United States of December 13, 1815." A House resolution of January 23, 1812 (Annals of Congress, 12 Cong., 1st sess., pt. 1, p. 929), and another of March 3, 1813, required registers to be submitted for those years only. Provision is made by act of January 12, 1895, section 73 (28 Stat., 616), for the printing of 1,500 copies of the Navy Register for the use of the Senate and House. See file 27231-S, Feb. 7, 1911, and note to section 1457, R. S.]

Repairs or changes proposed upon vessels amounting to more than \$300,000 in any case: Annual report thereof is to be made to Congress by Secretary of the Navy. (Act Mar. 2, 1907, 34 Stat., 1195, as amended by act Aug. 29, 1916, 39 Stat., 605.) Annual report also to be made to Congress by the Secretary of the Navy, in detail, of amount expended for repairs to vessels, where such amounts exceed \$200,000, for any one ship in any one fiscal year. (Act Mar. 3, 1909, 35 Stat., 769.)

Sales of unserviceable vessels and materials are to be reported annually to Congress by Secretary of the Navy. (Sec. 1541, R. S.; act Aug. 5, 1882, sec. 2, 22 Stat., 296.) A detailed statement of the proceeds of all sales of old material, condemned stores, supplies, or other public property of any kind, shall be submitted to Congress at the beginning of each regular session, as a separate communication and not in the

Book of Estimates. (Sec. 3672, R. S., amended by act Feb. 27, 1877, 19 Stat., 249, and act June 25, 1910, sec. 6, 36 Stat., 773.) Heads of departments must furnish Secretary of the Treasury, within 30 days after close of each fiscal year, statement of money arising from proceeds of public property or other source, which was not paid into the General Treasury, and detailed expenditures, if any, from such fund, which statement shall be transmitted by the Secretary of the Treasury to Congress at beginning of each regular session. (Act June 30, 1906, sec. 5, 34 Stat., 763.)

Secretary of Treasury is to report to Congress annually application of money appropriated for the Navy Department (sec. 260, R. S.); also, to report annually to Congress detailed receipts and expenditures in the naval service, balances on hand, and amounts lost or unaccounted for (act June 19, 1878, 20 Stat., 167); and to report annually to Congress officers who have been delinquent in rendering their accounts and officers indebted to the United States (act May 28, 1896, sec. 4, 29 Stat., 179, amending act July 31, 1894, 28 Stat., 209).

Supplies: Bureau of Supplies and Accounts is required to report annually to Congress the money value of supplies on hand, supplies purchased and expended during year, and balances remaining (act Mar. 2, 1889, 25 Stat., 817); also, to report annually to the Secretary of the Navy all receipts and expenditures (act May 13, 1908, 35 Stat., 153).

Travel: Annual report is required to be made to Congress in detail by heads of departments of travel performed on official business, from Washington to points outside of District of Columbia, by officers or employees of such departments other than special agents, inspectors, or employees who are required to constantly travel. (Act May 22, 1908, sec. 4, 35 Stat., 244.)

Useless papers: Report to Congress by head of department is required whenever useless papers accumulated in files of department should be disposed of. (Act Feb. 16, 1889, 25 Stat., 672; act Mar. 2, 1895, 28 Stat., 933.) Commanders in chief of fleets are to make report to the Secretary of the Navy of useless papers accumulated in files of vessels of the Navy (act Aug. 22, 1912, 37 Stat., 329); and Secretary of the Navy is required to make detailed report to Congress of useless papers destroyed at navy yards (act Mar. 3, 1915, 38 Stat., 929).

#### DISTRIBUTION, PRINTING, ETC., OF REPORTS.

Distribution: No report, document, or publication of any kind distributed from an executive department shall contain any notice that the same is sent with "the compliments" of an officer of the Government, or with any special notice that it is so sent, except that notice that it has been sent, with a request for an acknowledgment of its receipt, may be given. (Act Jan. 12, 1895, sec. 73, 28 Stat. 620; see also acts

Mar. 3, 1893, 27 Stat., 612; and Aug. 5, 1892, 27 Stat., 388.)

Distribution of publications for any executive department, except maps, weather reports, weather cards, orders, instructions, directions, notices, or circulars of information, shall be made by the Public Printer, including addressing, wrapping, mailing, etc., in accordance with mailing lists or franked slips furnished by the department. (Act Aug. 23, 1912, sec. 8, 37 Stat., 414.) All reports or documents to be distributed for Senators, Representatives, and Delegates shall be folded and distributed from the folding rooms of the Senate and House of Representatives. (Act Jan. 12, 1895, sec. 71, 28 Stat., 612.)

Ownership of publications: Government publications furnished officers for official use shall be delivered to their successors on the expiration of their official term. (Act Jan. 12, 1895, sec. 74, 28 Stat., 620.)

Printing authorized: Heads of executive departments shall direct whether reports made to them by bureau chiefs and chiefs of divisions shall be printed or not. (Act Jan. 12, 1895, sec. 89, 28 Stat., 622.) No book or document not having to do with the ordinary business transactions of the executive departments shall be printed on the requisition of any executive department unless expressly authorized by Congress. (Act Mar. 3, 1905, 33 Stat., 1249.) No document or matter shall be printed except that which is authorized by law, and necessary to the public business; and executive officers before transmitting their annual reports shall carefully examine same and all accompanying documents and exclude therefrom all matter, including engravings, maps, drawings, and illustrations, except such as they shall certify in their letters transmitting such reports are necessary and relate entirely to the transaction of the public business. (Act Jan. 12, 1895, sec. 94, 28 Stat., 623.) Illustrations, maps, etc., are to be excluded from annual reports except as necessary (act Aug. 30, 1890, 26 Stat., 411); appropriation for printing and binding shall not be used for any illustration, engraving, or photograph in any document or report ordered printed by Congress unless the order to print expressly authorizes the same, nor in any document or report of any executive department until the head of the department shall certify in a letter transmitting such report that the illustration is necessary and relates entirely to the transaction of public business (act Mar. 3, 1905, 33 Stat., 1213).

Printing, cost of: Printing and binding of documents and reports emanating from the executive departments shall be charged in part to allotment of appropriation for printing and binding of the department, and in part to the allotment for printing and binding for Congress. (Act Mar. 30, 1906, 34 Stat., 825.) Any executive departments submitting reports or documents in response to inquiries from Congress shall submit therewith estimate of the probable cost of print-

ing the usual number, where such reports or documents exceed 50 pages. (Act Jan. 12, 1895, sec. 2, 28 Stat., 601, as amended by Act Mar. 1, 1907, 34 Stat., 1012.)

Printing, number of copies: No report, publication, or document shall be printed in excess of 1,000 of each in any one fiscal year, without authorization therefor by Congress, except that of the annual report of the head of the department, without appendices, there may be printed not to exceed 5,000 copies bound in pamphlet form; and of the reports of chiefs of bureaus without appendices there may be printed not to exceed 2,500 copies bound in pamphlet form; etc. (Act Jan. 12, 1895, sec. 89, 28 Stat., 622.)

Printing, by Government Printing Office: All printing, binding, and blank books for the executive department of the Government shall be done at the Government Printing Office, unless otherwise provided by law. (Act Jan. 12, 1895, sec. 87, 28 Stat., 622.)

Printing ordered by Congress: Publications ordered printed by Congress, other than reports of committees, shall be known as Senate and House documents, and numbered consecutively. (Res. Jan. 15, 1908, sec. 1, 35 Stat., 565.) "Usual number" of reports and documents, prescribed by statute, shall be printed when ordered by Congress and distributed as specifically provided for to libraries and other designated depositories, etc. (Act Jan. 12, 1895, sec. 54, amended by act June 25, 1910, 36 Stat., 868.) Of the annual reports of the departments to Congress, there shall be printed, in addition to the "usual number," 1,000 copies for the Senate, and 2,000 for the House. (Act Jan. 12, 1895, sec. 73, 28 Stat., 612, 615.) The departmental edition, if any, of publications originating in or prepared by an executive department, shall be printed concurrently with the "usual number." (Res. Jan. 15, 1908, sec. 1, 35 Stat., 565.) Public documents and reports may be printed for Congress or executive departments in two or more editions, not to exceed the total number of copies authorized. (Res. Mar. 30, 1906, 34 Stat., 826.) Title of publications printed by order of Congress for distribution by the Superintendent of Documents to State and Territorial libraries and other designated depositories shall be the title suggested by the subject of the volume. (Res. Jan. 15, 1908, sec. 2, 35 Stat., 566.)

Printing requisition: No printing shall be done for the executive departments without a special requisition, signed by the chief of the department, and filed with the Public Printer. (Act Jan. 12, 1895, secs. 89 and 93, 28 Stat., 622 and 623.)

Sale authorized: Copies of reports are to be furnished by Public Printer to all applicants, upon payment in advance of printing, not to exceed 250 to any one applicant. (Act Jan. 12, 1895, sec. 42, 28 Stat., 607.) Public documents may be reprinted for sale by order of the Superintendent of Documents, approved by the department



from which they originated. (Res. Mar. 28, 1904, 33 Stat. 584.)

**Time of making annual reports:** Where not otherwise specified, annual reports to Congress are to be made at commencement of each regular session. (Sec. 195, R. S.) Neglect or refusal of any officer to make any report within the time prescribed by law is punishable by fine of not more than \$1,000. (Criminal Code, act Mar. 4, 1909, sec. 101, 35 Stat., 1107.)

**Time of furnishing copy to printer:** By section 196, Revised Statutes, it was provided that copy of annual reports must be furnished Public Printer by heads of departments on or before the third Monday of November and copies of documents usually accompanying annual reports, on or before the 1st day of November. This section has been amended by clauses in the annual appropriation acts providing that copies of documents accompanying annual reports must be furnished to Public Printer on or before the 15th day of October; copies of annual reports on or before November 15; and complete revised proofs of accompanying documents and annual reports on the 10th and 20th days of November, respectively. (See sundry civil acts, Aug. 1, 1914, 38 Stat., 680, and July 1, 1916, sec. 3, 39 Stat., 336; see also, 30 Op. Atty. Gen., 293.) Documents and reports are not to be printed until illustrations or maps designed therefor shall be ready for publication; nor unless entire copy and illustrations for the work are furnished Public Printer within one year. (Act Jan. 12, 1895, sec. 80, 28 Stat., 621.)

**Sec. 430. [Estimates for expenses.]** All estimates for specific, general, and contingent expenses of the Department, and of the several Bureaus, shall be furnished to the Secretary of the Navy by the chiefs of the respective Bureaus. [See § 3666.]—(5 July, 1862, c. 134, s. 5, v. 12, p. 511.)

**Appropriations for the service of the year,** which have been made by former acts, are to be stated by the Secretary of the Treasury in annual estimates of appropriations required for the public service. (Sec. 3670, R. S.)

**Arrangement and order of estimates** are to be same as appropriation acts for the preceding year. Any changes therein, and transfers of salaries from one office or bureau to another office or bureau, or consolidation of offices or bureaus desired by head of department, may be indicated by note in estimates. (Act June 22, 1906, sec. 4, 34 Stat., 448.)

**Arrangement of estimates** is to be changed, under direction of the Secretary of the Treasury, before submission to Congress, when not in the form prescribed by act June 22, 1906. (Act Mar. 4, 1909, sec. 4, 35 Stat., 907.)

**Book of Estimates** is to contain all estimates of appropriations required for the fiscal year for which prepared and submitted. (Act June 22, 1906, sec. 4, 34 Stat., 448.)

#### MISCELLANEOUS REPORTS.

**Accidents to employees:** In certain cases report of accidents is to be made by heads of departments to Employees' Compensation Commission. (Act Sept. 7, 1916, sec. 24, 39 Stat., 747.)

**Appointments without advice and consent of Senate:** Report to be made to Secretary of the Treasury by the President whenever he designates, authorizes, or employs any person to perform the duties of any office without the advice and consent of the Senate. (Sec. 1774, R. S.)

**Board of Visitors to Naval Observatory** is to report to Secretary of the Navy annually, or oftener, condition of observatory buildings and apparatus, efficiency of its scientific work, and expenditures in administration. (Act Mar. 3, 1901, 31 Stat., 1122.)

**Chaplains** shall report annually to the Secretary of the Navy the official services performed by them. (Sec. 1398, R. S.)

**Chief clerks in departments** are required to make monthly reports to their superiors of any existing defect in the arrangement or dispatch of business. (Sec. 174, R. S.)

**Official Register:** Secretary of the Navy is to furnish the Director of the Census full and complete list of all officers, agents, clerks, and employees under the Navy Department, including naval officers and midshipmen, for publication in Official Register of the United States, such information to be furnished on the 1st of July in each year in which a new Congress is to assemble. (Act Jan. 12, 1895, sec. 73, 28 Stat., 618, as amended by act June 7, 1906, 34 Stat., 219, superseding sec. 198, R. S.)

**Book of Estimates** is to be prepared under the direction of the Secretary of the Treasury, through whom all annual estimates for the public service shall be submitted to Congress. (Sec. 3669, R. S.)

**Compensation of officers** is to be estimated for in accordance with express provisions of law, and not in accordance with executive distribution. (Sec. 3662, R. S.)

**Conjectural estimates** are to be distinguished from such as are framed upon actual information and applications from disbursing officers. (Sec. 3660, R. S.)

**Date and section of law, and volume and page of Statutes at Large or section of the Revised Statutes** by which proposed expenditures are authorized, are to be cited by heads of departments in submitting estimates to Congress. (Sec. 3660, R. S.)

**Form of estimates, and time of submission to Congress,** shall be as required by law, and no estimates shall be submitted in any other form or at any other time. (Act Aug. 23, 1912, sec. 9, 37 Stat., 415.)

General or lump-sum estimates are to be accompanied in certain cases by a statement in Book of Estimates showing, in parallel columns, number and compensation of persons intended to be employed, and other expenditures contemplated therefrom; and number and compensation of persons employed and other expenditures out of corresponding appropriation for preceding fiscal year. (Act Aug. 24, 1912, sec. 6, 37 Stat., 487, as amended by act Aug. 1, 1914, sec. 10, 38 Stat., 680.) Such information shall be submitted according to uniform and concise methods which shall be prescribed by the Secretary of the Treasury, but with reference to estimates for pay of mechanics and laborers there shall be submitted in detail only the ratings and trades and the rates per diem paid or to be paid. (Act July 1, 1916, sec. 4, 39 Stat., 336.)

**Navy:** Estimates for pay of the Navy shall show pay of line, staff, and retired officers, amount of pay proper, longevity and foreign service increases, sea pay for officers on shore, total number of warrant and petty officers and seamen and their pay proper and longevity or service increases, and rates of pay for all petty officers and other enlisted men. (Act Mar. 3, 1909, 35 Stat., 754.)

**Navy:** Estimates for expenditures required by the Navy Department for certain purposes must be given in detail, including transportation, advertising, purchase and repair of machinery, traveling expenses, funeral expenses, recruiting, apprehending deserters, witnesses before courts-martial and courts of inquiry, etc. (Sec. 3666, R. S.)

**Navy pension fund:** Estimates of claims and demands chargeable upon and payable out of Navy pension fund are to be submitted annually to Congress by Secretary of the Navy. (Sec. 3667, R. S.)

**New items, or material variations in usual items,** are to be accompanied by explanations in estimates. (Sec. 3664, R. S.)

**Notes** shall not be submitted following any estimate other than as provided for "general or lump sum" estimates (see above) except such as suggest changes in form or order of arrangement of estimates and appropriations and reasons for such changes. (Act Aug. 24, 1912, sec. 6, 37 Stat., 487, as amended by act Aug. 1, 1914, sec. 10, 38 Stat., 680.)

**Official** is to be designated by head of each department to supervise the classification and compilation of all estimates to be submitted by such department. Said official shall have due regard for the requirements of all laws respecting preparation of estimates, including manner and time of their submission to Congress through the Secretary of the Treasury; all unnecessary words to be eliminated from all such estimates. (Act June 23, 1913, sec. 3, 38 Stat., 75.) An "estimate clerk" in the Navy Department is provided for in the annual legislative, executive, and judicial appropriation act.

**Per diem allowances in lieu of subsistence** to persons engaged in field work or travel on

official business may be prescribed by heads of departments, and estimates of appropriations from which paid shall specifically state the rates of such allowances. (Act Aug. 1, 1914, sec. 13, 38 Stat., 680.)

**President** is to recommend reduction by Congress in amounts estimated for, where in excess of estimated revenues, if practicable without undue injury to the public service; or otherwise he shall recommend such loans or new taxes as necessary to cover the deficiency. (Act Mar. 4, 1909, sec. 7, 35 Stat., 1027.)

**Printing and binding estimates** are to be submitted annually by head of department (sec. 3661, R. S.); printing and binding estimates are to be submitted to Congress in detail by the Public Printer, covering all work to be done under his direction (act Mar. 2, 1895, sec. 1, 28 Stat., 961); printing and binding estimates are to be submitted in regular annual estimates to Congress under "Printing and binding," and to include all printing and binding required by each of the executive departments, their bureaus and offices, for each fiscal year, with exception of envelopes and certain articles of stationery printed in the course of manufacture (act June 30, 1906, sec. 2, 34 Stat., 762).

**Printing and engraving for the Hydrographic Office** of the Navy Department are to be estimated for separately and in detail, and appropriated for separately. (Act Aug. 4, 1886, 24 Stat., 255.)

**Public works estimates** are to be accompanied by full plans and detailed estimates of the cost of the whole work. Subsequent estimates therefor shall state original estimated cost, amount already appropriated and expended, amount required in excess of original estimate, and reasons for the excess. (Sec. 3663, R. S., as amended by act Feb. 27, 1877, 19 Stat., 249.)

**Reports to Congress** of certain information are required to be made by heads of departments in the Book of Estimates.—See notes to section 429, Revised Statutes.

**Secretary of the Treasury:** All estimates of appropriations and of deficiencies in appropriations, shall be transmitted through the Secretary of the Treasury, and in no other manner. Secretary of the Treasury shall cause same to be classified, compiled, indexed, and printed. (Act July 7, 1884, 23 Stat., 254.)

**Secretary of the Treasury:** Estimates are to be furnished Secretary of the Treasury by heads of departments on or before 15th day of October of each year; in case of their failure to do so, he shall cause estimates to be prepared in the Treasury Department for such appropriations as in his judgment shall be requisite, which estimates shall be submitted to Congress in the Book of Estimates. (Act Mar. 3, 1901, sec. 5, 31 Stat., 1009.)

**Sources from which estimates are derived** shall be specified by heads of departments, as nearly as may be convenient, in communicating estimates to Congress. (Sec. 3660, R. S.)

**Special or additional estimates** are to be submitted only under exceptional circumstances,



and shall be accompanied by full statement of their imperative necessity and reasons for omission in the annual estimates. (Act June 22, 1906, sec. 4, 34 Stat., 448.)

Vehicles, passenger-carrying: Purchase and maintenance of, shall be estimated for in detail, specifying use for which intended, etc. (Act July 16, 1914, sec. 5, 38 Stat., 508.)

**Appropriations only for one fiscal year.**—The annual appropriation acts are enacted in conformity with the mandatory provisions of sections 430, 3676, and 3678, Revised Statutes. They always are for the service of the given year for which they are estimated and appropriated. It is undoubtedly true that in the ordinary conduct of administration, materials and supplies properly purchased remain unconsumed and unused at the

end of the fiscal year. This is recognized and has been provided for with reference to the Naval Establishment by statute (act Mar. 2, 1889, 25 Stat., 817, 818). If the statutes providing appropriations for a current fiscal year can receive the latitudinarian construction of permitting purchases of supplies avowedly for use not in that but in another and succeeding year, this would do away with the force of all the statutes making annual appropriations. It would utterly destroy the relation between the laws governing appropriations and expenditures. The intentional acquisition of naval supplies for consumption or use in succeeding years by purchase from appropriations for a current fiscal year is inconsistent with the provisions of the act of March 2, 1889. (28 Op. Atty. Gen., 634.)

**Sec. 431. [Hydrographic Office.]** There shall be a Hydrographic Office attached to the Bureau of Navigation in the Navy Department, for the improvement of the means for navigating safely the vessels of the Navy and of the mercantile marine, by providing, under the authority of the Secretary of the Navy, accurate and cheap nautical charts, sailing directions, navigators, and manuals of instructions for the use of all vessels of the United States, and for the benefit and use of navigators generally.—(21 June, 1866, c. 129, s. 1, v. 14, p. 69.)

Amendment was made to this section by act of May 4, 1898 (30 Stat., 374), which provided that the Hydrographic Office should be attached to and made a part of the Bureau of Equipment. By naval appropriation acts for the fiscal years 1912, 1913, and 1914, provisions were made for the distribution of the duties, funds, and employees of the Bureau of Equipment among the other bureaus and offices of the Navy Department, and by act of June 30, 1914 (38 Stat., 408), the Bureau of Equipment was abolished. Pursuant to these statutes the Hydrographic Office was again attached to the Bureau of Navigation by Navy Regulations, and has since been appropriated for under that bureau. (See, for example, act Mar. 4, 1915, 38 Stat., 1026.)

Appropriations for the preparation or publication of foreign hydrographic surveys shall only be applicable to their object upon approval of the Secretary of the Navy after a report from three competent naval officers to the effect that the original data for proposed charts are such as to justify their publication. (Sec. 3686, R. S., reenacted as sec. 78, act Jan. 12, 1895, 28 Stat., 621.)

International Code of Signals, sale of to the public at cost was authorized by act of March 3, 1901 (31 Stat., 1187, sundry civil act, printing and binding).

Naval officers, not exceeding four, may be detailed as necessary to the Hydrographic Office by the Secretary of the Navy. (Act Mar. 4, 1917, 39 Stat., 1172.) The Secretary of the Navy is authorized to detail such naval officers as may be necessary to the Hydrographic Office during the con-

tinuance of the present war. (Act Apr. 25, 1917, 40 Stat., 38.) "The Secretary of the Navy is authorized to detail such naval officers as may be necessary to the Hydrographic Office." (Act July 1, 1918, 40 Stat., 708.)

Personal services or other expenditures are not to be authorized under the Hydrographic Office at Washington, D. C., except as appropriated for under the Navy Department in the annual legislative, executive, and judicial appropriation act, or under appropriations for the public printing and binding. (See act Mar. 3, 1917, 39 Stat., 1099.)

Printing of charts, maps, notices to mariners, tide tables, light lists, sailing directions, bulletins, and other special publications of the Hydrographic Office, may be authorized by the Secretary of the Navy in such editions as the interests of the Government and of the public may require. (Act Jan. 12, 1895, sec. 89, 28 Stat., 622.)

Printing and engraving for the Hydrographic Office are to be estimated for separately and in detail, and appropriated for separately. (Act Aug. 4, 1886, 24 Stat., 255.)

Weather Bureau shall continue furnishing meteorological information to the Hydrographic Office for use in preparation of Pilot Charts; and said charts shall have conspicuously printed thereon: "Prepared from data furnished by the Hydrographic Office of the Navy Department and by the Weather Bureau of the Department of Agriculture, and published at the Hydrographic Office under the authority of the Secretary of the Navy." (Act June 17, 1910, 36 Stat., 508.)

**General duties of Hydrographic Office.**—

The work of the Hydrographic Office comprises the making, revision, correction, and issue of charts and sailing directions for all parts of the world, including monthly Pilot Charts of the North Atlantic and Pacific Oceans; compilation, printing, and issue of weekly and other periodical notices to mariners; revision and issue of navigation tables; supervision of ocean and lake surveys, and the direction and supervision of branch hydrographic offices and sales agencies, distributed among the principal sea and lake ports of the country. (File 24501-26:1, Jan. 25, 1912.)

The work of the Hydrographic Office ever since its inception has been directed to improving the means for navigating safely the vessels of the Navy and the Mercantile Marine by producing accurate and cheap nautical charts, books, manuals, and such secondary publications as would be of service to navigators and the maritime world as the organic law (secs. 431-433, R. S.) requires. (File 24501-22, Dec. 29, 1910.)

It is the opinion of the Navy Department that the work of the Hydrographic Office merits the heartiest confidence and support; also that there should be no reduction in the branch hydrographic offices, as they are important feeders of nautical information required by the main office. (File 24501-22, Dec. 29, 1910.)

**Pilot Charts.**—The Pilot Chart grew into being as the result of the labors and research of Lieut. Maury. The Navy of the United States was the pioneer in publishing work of this kind. Neither its usefulness nor its accuracy has ever been questioned. It is known throughout the world as being published by the Hydrographic Office. (Ann. Rept. of Hydrographic Office, 1910.)

Between 1844 and 1861 there were compiled and issued under the Navy Department, "Maury's Wind and Current Charts," upon which the present Pilot Charts are founded. (File 24501-19, Aug. 2, 1910.)

The Pilot Charts have been published since 1883 by the Hydrographic Office of the Navy Department under the provisions of sections 431 and 432, Revised Statutes. (File 24501-19, Aug. 3, 1910.)

These charts contain information concerning the North Atlantic, South Atlantic, North Pacific, South Pacific, and Indian Oceans. They are invaluable for the purposes of the Navy and almost indispensable to navigators of merchant vessels. They include the prevailing winds, as shown by averages collected for the past 10 years, the best sailing routes for vessels in view of these prevailing winds, meteorological conditions that may be expected in the various portions of the ocean, and a number of other matters of great interest to the mariner. (File 24501-19, Aug. 3, 1910.)

The Pilot Chart shows graphically navigational features (magnetic variation, currents, sail and steam ship tracks, etc.), and meteorological data. (File 24501-24, Mar. 8, 1911.)

The Pilot Charts constitute an essential link between the Hydrographic Office and the shipmasters of all nations, whereby important hydrographic and navigational reports are con-

stantly and promptly acquired for use on the other navigational charts and nautical books which the Hydrographer is charged with preparing and keeping corrected up to date. The Pilot Charts were designed and developed to insure the Hydrographic Office obtaining the various data shown upon the printed sheet entitled "Utilization of Marine Data." (File 24501-24, Mar. 8, 1911.)

**Data furnished by Weather Bureau.**—

The meteorological data for the Pilot Chart have been supplied to the Hydrographic Office by the Weather Bureau since 1905. Prior to that time the meteorological data shown on Pilot Charts were obtained by the Hydrographic Office, but in accordance with the decision of the Interdepartmental Board in 1904 the work of collecting such data was transferred to the Weather Bureau. The data other than meteorological incorporated in the Pilot Chart are furnished by observers in all parts of the world in return for the finished charts and requires nautical experience for its proper arrangement on the chart. (File 24501-19, Aug. 3, 1910.)

**Duplication of work.**—In 1909 the Weather Bureau began to publish the Ocean Meteorological charts, containing information practically the same as is furnished by the Pilot Charts of the Navy Department. By the act of June 17, 1910 [above cited], the Hydrographic Office has charge of the publication of Pilot Charts, making the proper acknowledgment to the Weather Bureau for the meteorological data secured. Although not definitely stated, this provision would seem to imply the necessary abandonment of the duplication of the work in the publication of the Ocean Meteorological Charts by the Weather Bureau. This, however, was not the case, the Chief of the Weather Bureau continuing, after the act mentioned, to publish the meteorological chart and in fact to extend its operation by collecting certain data also collected by the Hydrographic Office, this undoubtedly contrary to the intent of Congress and certainly contrary to the spirit of the above provision of law. (File 24501-19, Aug. 3, 1910.)

There is no question that this work should be performed by one department alone. It is so essential to the future welfare of the Navy, and necessarily requires such technical supervision as can only be given by a trained mariner, that the Secretary of the Navy feels sure that the work should be done by the Navy Department, and that this is the view of practically all the marine associations throughout the United States. When it was rumored that Congress might possibly abolish the Pilot Charts of the Navy Department, that department received countless letters of protest and offers of assistance to retain the publication of the Pilot Charts in the Hydrographic Office. (File 24501-19, Aug. 3, 1910.)

**Jurisdiction, Hydrographic Office and Weather Bureau.**—By agreement between the Navy Department and the Department of Agriculture, relative to the work of the Hydrographic Office and the Weather Bureau, it was decided:

"(a) That the Weather Bureau discontinue the Ocean and Lake Meteorological Charts;



"(b) That the Hydrographic Office continue the publication of the Pilot Charts;

"(c) That the Weather Bureau continue the control of ocean meteorology, so far as concerns the collection of meteorological observations and their compilation and the use of such observations in research work;

"(d) That the Hydrographic Office continue the distribution of the Pilot Charts at its main office and branch offices; and that it furnish all marine observers taking observations for the Weather Bureau, and all regular Weather Bureau coast stations, necessary copies of the issues of the several Pilot Charts.

"(e) That the Weather Bureau furnish all meteorological data necessary to the preparation of the Pilot Charts, and in such forms as may be mutually agreed upon between the two offices, in accordance with existing law;

"(f) That the Hydrographic Office give the Weather Bureau due credit on the Pilot Chart for the data thus published, as required by law." (File 24501-31, Aug. 14, 1913.)

**Miscellaneous.**—The fact that sections 431-433, Revised Statutes, require certain publications to be prepared at the Hydrographic Office in the interest of the Navy "and the Mercantile Marine," gives private citizens, having to do with shipping, interest in the proper conduct of that office. So far as the Navy Department can learn, the Hydrographic Office merits and has received from the whole maritime community only praise for its work, which so vitally concerns the welfare of our fleet at sea and the safe carriage of our goods in mercantile bottoms. (File 24501-22, Dec. 29, 1910.)

As to the naval service, the charts, books, and other publications of the Hydrographic Office are required by the Navy because our fleet could not safely and expeditiously navigate the high seas and foreign coasts without them. (File 24501-22, Dec. 29, 1910.)

The fleet is dependent upon the Hydrographic Office for its charts and sailing directions. (File 24501-23, Jan. 31, 1911.)

The supply of charts, sailing directions, and current nautical information is indispensable to the seagoing ships, and becomes more and more important with the great increase in the size, value, and speed of vessels in the last few years. Besides the Navy, the work of our Hydrographic Office is invaluable to the merchant marine, domestic and foreign, and its charts and publications have hitherto enjoyed a world-wide reputation for being second to none in accuracy, scope, reliability, and promptness of issue—the last item being of equal value with accuracy. (File 24501-26:1, Jan. 25, 1912.)

The Navy Department is endeavoring to reduce the number of foreign charts used in our ships, and the Hydrographic Office will ultimately produce all charts needed if the requisite money can be secured. This is necessary because in time of war the foreign supply would cease. (File 24501-23, Jan. 31, 1911.)

At all times, from its inception, the Hydrographic Office has been in charge of and operated by naval officers. This is clearly necessary, as the work of the office requires naval as well as scientific and nautical knowledge; and

furthermore, the hydrographer and his assistants should not only have such knowledge, but be capable of administering the activities of the office. In addition, the Navy benefits by the experience its officers get in the Hydrographic Office, as their intimate association with the preparation and issue of charts, sailing directions, and navigational works fits them the better to perform their navigational duties at sea. (File 24501-16, Apr. 19, 1910.)

Naval officers have the practical training essential to the supervision of the work of the Hydrographic Office, and it goes without saying that they have a greater interest in, and a larger feeling of responsibility for, the accuracy of the work than would civilians, whom it is impossible to secure with the proper ability to supervise the technical work involved. (File 24501-23, Jan. 31, 1911.)

The preparation of the charts, books, and other publications of the Hydrographic Office could not be intrusted to a nonnavigational bureau, but should be continued in the hands of capable and trained naval officers, familiar with the requirements of the navigator and the practical use of these publications. Such has been the custom with us, and such is the unvarying practice under foreign Governments, for it is well recognized that any other course might jeopardize an important element of national defense. (File 24501-22, Dec. 29, 1910.)

Legislation restricting the number of naval officers who may be detailed to the Hydrographic Office, although contained in an annual appropriation act, is in effect perpetual and is the law until repealed, such provision not being expressly or otherwise limited in its operation to any particular period of time. (File 24501-26, July 11, 1911. But see act of July 1, 1918, 40 Stat., 708, which removes limitation upon number of naval officers detailed to Hydrographic Office.)

See note to section 434, Revised Statutes, as to proposed consolidation of Hydrographic Office and Naval Observatory.

**An officer of the Navy is not entitled to the salary of a draftsman** in the Hydrographic Office in addition to his own, though he hold both offices. The office of draftsman in the Hydrographic Office is incompatible with that of cadet engineer [now abolished]. The Secretary of the Navy may detail an engineer for service in the Hydrographic Office, but the detail will not entitle the officer to additional pay. Where two incompatible offices are held by the same person, to which are attached different salaries, he is entitled to the larger. (*Winchell v. U. S.*, 28 Ct. Cls., 30. In this case the officer was erroneously discharged from the Navy, and thereafter appointed to a civil position in the Hydrographic Office. When later restored to the Navy, he sought to recover the pay of both offices. See also 5 Comp. Dec., 885.)

**The purchase of supplies for the Hydrographic Office is governed by the laws relating to the purchase of supplies and contracts for supplies** "for any of the departments of the Government." (21 Op. Atty. Gen., 59.)

**Sec. 432. [Maps, charts, etc.]** The Secretary of the Navy is authorized to cause to be prepared, at the Hydrographic Office attached to the Bureau of Navigation in the Navy Department, maps, charts, and nautical books relating to and required in navigation, and to publish and furnish them to navigators at the cost of printing and paper, and to purchase the plates and copyrights of such existing maps, charts, navigators, sailing directions and instructions, as he may consider necessary, and when he may deem it expedient to do so, and under such regulations and instructions as he may prescribe.—(21 June, 1866, c. 129, s. 2, v. 14, p. 69.)

See note to section 431, Revised Statutes.

This section was reenacted by act of January 12, 1895, section 77 (28 Stat., 621), as follows: "The Secretary of the Navy is authorized to cause to be prepared at the Hydrographic Office attached to the Bureau of Navigation, in the Navy Department, maps, charts, and nautical books relating to and required in navigation, and to pub-

lish and furnish them to navigators at the cost of printing and paper, and to purchase the plates and copyrights of such existing maps, charts, navigators' sailing directions and instructions as he may consider necessary and when he may deem it expedient to do so, and under such regulations and instructions as he may prescribe."

**Sec. 433. [Money received from sale of maps, charts, etc.]** All moneys which may be received from the sale of maps, charts, and nautical books shall be returned by the Secretary of the Navy into the Treasury of the United States, to be used in the further preparation and publication of maps, charts, navigators, sailing directions, and instructions for the use of seamen, to be sold at the rates as set forth in the preceding section.—(21 June, 1866, c. 129, s. 3, v. 14, p. 69.)

See note to section 431, Revised Statutes.

This section was reenacted by act of January 12, 1895, section 77 (28 Stat., 621), as follows: "All moneys which may be received from the sale of maps, charts, and nautical books shall be paid by the Secretary of the Navy into the Treasury of the United States, to be used in the further preparation and publication of maps, charts, navigators' sailing

directions, and instructions for the use of seamen, to be sold at the cost of printing and paper."

It was amended by act of May 29, 1920 (41 Stat., 665), which provided that receipts from sales of publications "shall be covered into the Treasury of the United States as miscellaneous receipts."

**Sec. 434. [Naval Observatory.]** The officer of the Navy employed as superintendent of the Naval Observatory at Washington shall be entitled to receive the shore-duty pay of his grade, and no other.—(3 Mar., 1865, c. 114, v. 13, p. 533.)

American Ephemeris and Nautical Almanac: Publication of, by the Naval Observatory, is authorized by Article I-604 (3 a), Naval Instructions, 1913. Assignment of a professor of mathematics to duty at the Naval Observatory in charge of the Nautical Almanac is provided for by Article R-3111, Navy Regulations, 1913. (See sec. 436, R. S.)

Appointment or detail to office of astronomical director, director of the Nautical Almanac, astronomer, or assistant astronomer may be made upon recommendation of the Board of Visitors to the Naval Observatory. (Act Mar. 3, 1901, 31 Stat., 1122.)

Board of Visitors to the Naval Observatory is to be appointed by the President, by and with the advice and consent of the Senate, for a

period of three years without compensation other than actual expenses; four members to be astronomers of high professional standing and two members eminent citizens of the United States. (Act Mar. 3, 1901, 31 Stat., 1122.)

Library of Naval Observatory may have books for its exclusive use bound in half Turkey or material no more expensive. (Act Jan. 12, 1895, sec. 86, 28 Stat., 622.)

Observatory Circle: No street, avenue, or public thoroughfare shall extend within the area of a circle described with a radius of 1,000 feet from the center of the building known as the clock room of the observatory. (Res., Aug. 1, 1894, 28 Stat., 588.)

Printing authorized of 1,800 additional copies of the Observations of the Naval Observa-



tory, of which 800 shall be for distribution by the Naval Observatory, and the remainder for the Senate and House; and of the astronomical appendixes to said observations, 1,200 separate copies, and of the meteorological and magnetic observations, 1,000 copies, shall be printed for distribution by the Naval Observatory. (Act Jan. 12, 1895, sec. 73, 28 Stat., 613.)

Professors of mathematics shall perform such duties at the Naval Observatory as may be assigned them by order of the Secretary of the Navy. (Sec. 1401, R. S.)

Public Printer shall furnish one bound copy of the Congressional Record gratuitously to the Naval Observatory. (Act Jan. 12, 1895, sec. 73, 28 Stat., 617.)

Regulations prescribing scope of astronomical and other researches of the Observatory and duties of its staff shall be prepared and submitted to the Secretary of the Navy by the Board of Visitors. (Act Mar. 3, 1901, 31 Stat., 1122.)

Report to the Secretary of the Navy shall be made at least once each year by the Board of Visitors respecting condition of buildings, instruments, apparatus, efficiency, and expenditures of the observatory (Act Mar. 3, 1901, 31 Stat., 1122.)

Scientific investigators and students of certain educational institutions shall be afforded the facilities of the Naval Observatory for research and illustration, under such restrictions as the officers in charge may prescribe. (Res., Apr. 12, 1892, 27 Stat., 395.) They shall similarly be afforded facilities for study and research in the Government departments under such restrictions as heads of departments may prescribe. (Act Mar. 3, 1901, 31 Stat., 1039.)

Superintendent of the Naval Observatory shall be a line officer of the Navy not below the rank of captain. (Act Mar. 3, 1901, 31 Stat., 1122.)

A superintendent of the Naval Observatory, "who shall be either a captain, commander, or lieutenant in the Navy," at a salary of \$3,000 per annum, was authorized by act of March 3, 1847 (9 Stat., 169), as amended by act of Aug. 3, 1848 (9 Stat., 266).

This provision as to the rank of the superintendent was repealed by act of March 3, 1865 (13 Stat., 533), which act further provided that "no officer of the Navy employed as super-

intendent shall receive other than the shore duty pay of his grade."

The superintendent should be carefully selected with reference to special fitness, and there can be no doubt that there can always be found officers in the Navy competent to administer this institution, which had its beginnings through the ability and zeal of naval officers, as also its rise to high eminence. Distinction in astronomy does not by any means go to show that its possessor will be a good administrator. The most eminent astronomer that France has produced was an utter failure in the administration of the National Observatory at Paris, and was succeeded by an admiral of the Navy, under whose direction it was excellently administered. (File 5331, Sept. 7, 1894.)

The regular work of the Naval Observatory is essential to the Navy; it can be systematically and successfully accomplished only under Government control; and no portion of it should be discontinued or transferred to other than the control of the Navy Department. The observations made in addition to those necessary for the regular work are of more interest to astronomers, do not interfere with the regular work, and should be continued. (File 15924, Apr. 3, 1903.)

Both the Naval Observatory and the Hydrographic Office are employed in supplying the fleet with navigation equipment, both are concerned in the instruction of navigators; the Hydrographic Office controls the marine surveying parties, yet the Observatory provides and attends to the repairing of instruments for them, instructs surveying officers in the use of astronomical instruments, and cooperates with them in the determination of longitudes. In numerous ways the two institutions have unity of interests and should harmonize and strengthen each other under one management. (File 26509-97, Feb. 4, 1913, recommending legislation "for consolidating the activities of the Naval Observatory and Hydrographic Office." See sec. 431, R. S., for law relating to Hydrographic Office.)

The Naval Observatory is a naval station, and the Superintendent of the Naval Observatory is the commandant of a naval station within the meaning of the act of January 25, 1895 (28 Stat., 639), "authorizing certain officers of the Navy and Marine Corps to administer oaths," as amended by the act of March 3, 1909 (31 Stat., 1086). (File 19037-45, May 26, 1914.)

### Sec. 435. [Meridians. Repealed.]

This section provided as follows:

"SEC. 435. The meridian of the Observatory at Washington shall be adopted and used as the American meridian for all astronomical purposes, and the meridian of Greenwich shall be

adopted for all nautical purposes."—28 Sept., 1850, c. 80, s. 1, v. 9, p. 515.

It was repealed by act of August 22, 1912 (37 Stat., 342).

**Sec. 436. [Nautical Almanac.]** The Secretary of the Navy may place the supervision of the Nautical Almanac in charge of any officer or professor of mathematics in the Navy who is competent for that service. Such officer or professor, when so employed, shall be entitled to receive the shore-duty pay of his grade, and no other.—(3 Mar., 1857, c. 111, s. 3, v. 11, p. 246.)

Assignment of a professor of mathematics to duty at the Naval Observatory in charge of the Nautical Almanac, is provided for by Article R-3111, Navy Regulations, 1913.

Director of the Nautical Almanac may be recommended for appointment by the Board of Visitors to the Naval Observatory. (Act Mar. 3, 1901, 31 Stat., 1122.)

Employees of Nautical Almanac Office whose services can be spared from duty of preparing for publication the annual volumes of the American Ephemeris and Nautical Almanac, may be employed by said office in duty of improving the tables of the planets, moon, and stars, to be used in preparing for publication the annual volumes of the office. (Act Aug. 22, 1912, 37 Stat., 342.)

Exchange of data with foreign almanac offices may be arranged for by the Secretary of the Navy, any such arrangement to be terminable on one year's notice; the work of the Nautical Almanac Office to be so conducted that in case of emergency the entire portion of the work intended for the use of navigators may be computed by it, without foreign cooperation. (Act Aug. 22, 1912, 37 Stat., 342.)

Printing is authorized of 1,500 copies of Ephemeris and Nautical Almanac, in addition to the "usual number"—500 copies to be for use of Senate and House, and 1,000 copies for distribution or sale by the Navy Department (act Jan. 12, 1895, sec. 73, 28 Stat., 613). "Usual number" of American Ephemeris and Nautical Almanac is not to be printed; in lieu thereof, 1,100 copies of same shall be printed and bound, uniform with the editions printed for the Navy Department—500 copies for Senate and House and 600 for Superintendent of Documents for distribution to State and Territorial libraries and designated depositories (res., May 13, 1902, 32 Stat., 740); 2,500 copies of American Ephemeris and Nautical Almanac are to be published—1,500 copies for the Senate and House and 1,000 for distribution or sale by the Navy Department (act July 1, 1902, 32 Stat., 678). Secretary of the Navy is authorized to have additional copies of the Ephemeris and of the Nautical Almanacs extracted therefrom, printed for the public service and for sale to navigators and others. All moneys received from sale of the Ephemeris and of the Nautical Almanacs shall be deposited in the Treasury and placed to the credit of the general fund for public printing (act Jan. 12, 1895, sec. 73, 28 Stat., 613).

Professor of Mathematics, corps shall cease to exist: See note to section 1399, Revised Statutes.

The first statute relating to the Nautical Almanac was the act of March 3, 1849 (9 Stat., 375), providing that "a competent officer of the Navy, not below the grade of lieutenant, be charged with the duty of preparing the Nautical Almanac for publication."

By act of August 5, 1854 (10 Stat., 583), it was provided that "any naval officer who may be charged with the preparation, superintendence, or publication of the Nautical Almanac, shall

receive no compensation for such duty beyond what he would receive while on duty at sea." Further provisions on the subject were contained in the act of March 3, 1857, upon which the above section of the Revised Statutes is based.

**Nautical Almanac Office a department of the Naval Observatory.**—The Regulations of the United States Naval Observatory, approved by the Secretary of the Navy January 25, 1904, provide in part as follows: "The Naval Observatory, under the control of the Secretary of the Navy, is subject to the direct supervision of the Bureau of Equipment [now Bureau of Navigation], Navy Department, and shall be governed in accordance with the U. S. Navy Regulations relating to the general administration of shore stations where applicable" (par. 1); "the observatory work shall be divided into two branches, astronomical and nautical. The first shall include \* \* \* the department of the Nautical Almanac" (par. 3); "there shall be \* \* \* a director of the Nautical Almanac \* \* \*" (par. 5); "the Superintendent of the Naval Observatory \* \* \* shall exercise entire control over every department of the observatory \* \* \*" (par. 7); "he [the superintendent of the observatory] shall have charge of and be responsible for the direction, scope, character, quantity, and preparation for publication of all work which is performed at the Naval Observatory \* \* \*" (par. 9); "the director of the Nautical Almanac shall be held directly responsible to the superintendent for the preparation and publication of the Nautical Almanac and Ephemerides for use of naval vessels, merchant vessels, and for astronomical purposes, as provided for by law and the regulations and orders of the Navy Department" (par. 17). These regulations and others in line therewith, which make the Nautical Almanac Office a department of the observatory, and place the supervision thereof in charge of the superintendent of that institution, the department regards as within its power to prescribe under the authority conferred upon the Secretary of the Navy by secs. 419 and 436 of the Revised Statutes, relating, respectively, to the distribution of the business of the Navy Department and the superintendence of the Nautical Almanac. The fact that the Nautical Almanac Office is appropriated for separately in the annual legislative, executive, and judicial appropriation act does not, it is believed, constitute it a separate shore station, and its treatment as such would appear to be incompatible with its status as fixed by the regulations above mentioned. It may be added that the department's recent order, giving the present superintendent of the observatory, as such, "charge of the supervision of the Nautical Almanac," establishes his authority in matters pertaining to that work independently of the regulations cited. (File 9449-04, Jan. 19, 1905.)

The fact that the Nautical Almanac was intended to become an integral part of the Naval Observatory is established by the regulations issued by the Secretary of the Navy, September 20, 1894, and by those approved January 25, 1904. There is no question that in the early days of the existence of the Nautical Almanac it was recognized as quite distinct and separate



from the Naval Observatory, but the removal of that office to the Observatory buildings and the issuance of regulations making it a branch of the Naval Observatory soon after such removal, changed it to a department of the Naval Observatory. (File 17626, and 9449-04, March 18, 1904, letter of Superintendent of the Naval Observatory.)

The fact that the appropriations for the Naval Observatory and the Nautical Almanac Office have continued since the amalgamation of the two departments in 1894, to be provided for separately has caused some question in dealing with other departments of the Government, in view of which the recommendation of the Superintendent of the Naval Observatory as to change in the appropriations to conform to the existing regulations was approved by the Secretary of the Navy. (File 18168-25, and 9449-04, Dec. 2, 1904; and 17279-3, May 11, 1905.)

The Navy Department has established the Nautical Almanac as a department of the Naval Observatory, and appointed the Superintendent of the Naval Observatory as supervisor of the Nautical Almanac in accordance with section 436, Revised Statutes. There seems, therefore, no warrant for styling the head of the department of the Nautical Almanac as the "Director of the Nautical Almanac." (File 17279-3, May 11, 1905, letter of Superintendent of the Naval Observatory.)

The Director of the Nautical Almanac invited attention to the fact that the Navy Register of January, 1904, did not, as did those for the preceding 17 years, make mention of the Nautical Almanac Office as a separate shore station, and to the fact that his "present duty" was given in that Register as "Naval Observatory" instead of, as formerly, "Director Nautical Almanac," and requested that in subsequent issues of the Navy Register the Nautical Almanac Office be restored to its former status:

*Held*, That the Navy Register, in the particulars mentioned, is not regarded as in error, and the department is therefore constrained to deny the request that in subsequent issues the changes suggested be made. (File 9449-04, and 17626, Jan. 19, 1905.)

**Supervision of Nautical Almanac can not be limited to line officers.**—A regulation providing that "a line officer not below the rank of captain shall be assigned by the Secretary of the Navy as superintendent of the Naval Observatory," and that "in his charge shall also be placed the supervision of the Nautical Almanac," in so far as the latter portion thereof is concerned, would be illegal, as it would place upon the supervision of the Nautical Almanac a restriction not prescribed by law, to wit, that it should be under "a line officer not below the rank of captain," whereas the law (sec. 436, R. S.) leaves the supervision of the publication open to "any officer or professor of mathematics in the Navy who is competent for that service." (File 1112-04, Feb. 12, 1904; 17279-2, Feb. 13, 1904; see also note to sec. 161, R. S.)

**A nautical almanac is well known to be a book.** It is a "nautical book" of the sort mentioned in section 432 of the Revised Statutes. The machinery by which the Secretary is authorized from year to year to have this book made is to be found in section 3661 of the Revised Statutes in connection with annual reports by and appropriations for that officer. By this provision the Secretary is to submit to Congress an estimate "for printing and binding to be executed under the direction of the Congressional Printer." Accordingly, *held*, that the printing and binding at the Government Printing Office of the book called "The American Ephemeris and Nautical Almanac" for the Navy Department, are within the appropriation made for printing and binding for that department, and accordingly are authorized by law. (16 Op. Atty. Gen., 127.)





# TITLE XI.

## THE DEPARTMENT OF THE INTERIOR.

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Sec.  
437. Establishment of Department of the Interior.  
441. Duties of Secretary.  
442. Duties concerning territories.  
470. Commissioner of Pensions.

Sec.  
471. Duties of Commissioner.  
512. Returns Office.  
513. Clerk to file returns.  
514. Indexes.  
515. Copies of returns.

**Sec. 437. [Establishment of Department of the Interior.]** There shall be at the seat of Government an Executive Department to be known as the Department of the Interior, and a Secretary of the Interior, who shall be the head thereof.—(3 Mar., 1849, c. 108, s. 1, v. 9, p. 395.)

Origin and growth of executive departments—see note to section 158 Revised Statutes.

**Sec. 441. [Duties of Secretary.]** The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: \* \* \*

Second. The public lands, including mines.

Third. The Indians.

Fourth. Pensions and bounty-lands.

Fifth. Patents for inventions. \* \* \*

Seventh. Education.

Eighth. Government Hospital for the Insane.

Ninth. Columbia Asylum for the Deaf and Dumb.—(3 Mar., 1849, c. 108, ss. 3, 5, 6, 7, 8, 9, v. 9, p. 395; 8 July, 1870, c. 230, s. 1, v. 16, p. 198; 5 Feb., 1859, c. 22, s. 1, v. 11, p. 379; 20 July, 1868, c. 176, s. 1, v. 15, pp. 92, 106; *Maguire v. Tyler*, 1 Bl., 195.)

**Government Hospital for the Insane.**—The designation of this institution was changed to "Saint Elizabeths Hospital" by act of July

1, 1916 (39 Stat., 309). See sections 4838-4843, Revised Statutes, and notes thereto.

**Sec. 442. [Duties concerning Territories.]** The Secretary of the Interior shall hereafter exercise all the powers and perform all the duties in relation to the Territories of the United States that were, prior to March first, eighteen hundred and seventy-three, by law or by custom exercised and performed by the Secretary of State.—(1 Mar., 1873, c. 217, v. 17, p. 484.)

**Guam and Samoa.**—On and after June 1, 1907, all official communications from and to executive officers of the Territories and territorial possessions, including Samoa and Guam, shall be transmitted through the Secretary of the Interior in such manner and under such regulations as he may prescribe. (Exec. O., May 11, 1907.)

It will be entirely satisfactory to the Interior Department to receive copies of the official

reports relative to Guam and Samoa instead of the originals direct. (File 21393-26, June 4, 1907.)

The governors of Guam and of Tutuila, Samoa, are directed to forward all reports, etc., relating to territorial matters, as distinguished from matters of purely naval administration, to the Navy Department in duplicate in order that one copy may be forwarded to the Secretary of the Interior. (File 21393-26, June 6, 1907.)

**Sec. 470. [Commissioner of Pensions.]** There shall be in the Department of the Interior a Commissioner of Pensions, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to receive a salary of four thousand dollars a year.—(2 Mar., 1833, c. 54, s. 1, v. 4, pp. 619, 622; 3 Mar., 1835, c. 46, ss. 1, 2, 3, v. 4, p. 779; 3 Mar., 1837, c. 43, v. 5, p. 187; 4 Mar., 1840, c. 4, ss. 1, 2, 3, v. 5, p. 369; 4 Mar., 1840, c. 4, s. 4, v. 5, p. 370; 20 Jan., 1843, c. 4, v. 5, p. 597; 14 Jan., 1846, c. 4, s. 1, v. 9, p. 3; 19 Jan., 1849, c. 20, s. 1, v. 9, p. 341; 3 Mar., 1873, c. 226, s. 3, v. 17, p. 508.)

This section has been amended with reference to the salary of the Commissioner.

**Sec. 471. [Duties of Commissioner.]** The Commissioner of Pensions shall perform, under the direction of the Secretary of the Interior, such duties in the execution of the various pension and bounty-land laws as may be prescribed by the President.—(2 Mar., 1833, c. 54, s. 1, v. 4, pp. 619, 622; 3 Mar., 1835, c. 46, s. 2, v. 4, p. 779; 3 Mar., 1837, c. 43, s. 2, v. 5, p. 187; 4 Mar., 1840, c. 4, s. 2, v. 5, p. 369; 4 Mar., 1840, c. 4, s. 4, v. 5, p. 370; 20 Jan., 1843, c. 4, s. 2, v. 5, p. 597; 19 Jan., 1877, c. 27, v. 19, p. 224.)

Service pensions to disabled enlisted men are to be granted under the direction of the Secretary of the Navy. (Secs. 4756-4757, R. S.)

**Jurisdiction, Commissioner of Pensions.**—Requests for information concerning pensions should be addressed to the Commissioner of Pensions, under whose jurisdiction lies the authority of granting pensions to claimants and deciding questions of law and fact relative thereto. (File 26250-709:1, Jan. 5, 1916; see also file 26510-1247.)

The law (act of May 11, 1912, 37 Stat., 112) requires proof of the length of service of pension claimants to be made "according to such rules and regulations as the Secretary of the Interior may provide." This language is similar to that contained in the act of August 5, 1892, under which it was held by the Interior Department (16 P. D., 492, 493) that evidence as to whether a person rendered the required service "must be considered and passed upon by the Commissioner of Pensions, subject only to the supervisory jurisdiction of the Secretary of the Interior;" that where the evidence concerning claimant's length of service is indefinite and contradictory, "the record is not conclusive either as to the length or character of the employment;" and that "the fact of such service, or employment, may be proved by any competent witness, whether officer, enlisted man, or civilian." (File 26510-1214, Sept. 2, 1915.)

The exclusive jurisdiction of the Commissioner of Pensions to determine all such questions, under the direction of the Secretary of the Interior, was again expressed by the Assistant Secretary of the Interior (18 P. D., 480) as follows: "It is the duty of the Commissioner of Pensions to judge and determine all applications for pensions and to construe and interpret all questions which may arise as to the construction of the several acts of Congress relating to pensions; and said officer is the exclusive judge of the law and the facts in all cases within the scope of his authority, subject only to the

direction of the Secretary of the Interior. Thus, acting under the direction of the Secretary of the Interior, the Commissioner of Pensions constitutes a special tribunal for the adjudication of pension claims, and his judgments, awards, and decrees in such claims are final; they are in the nature of judicial decrees which necessarily conclude the rights of all persons within the scope of his authority." See also 19 P. D., 269, 272, and cases there cited. (File 26510-1214, Sept. 2, 1915.)

In 19 P. D., 188, the decision of the War Department that the death of a soldier occurred in line of duty was rejected by the Commissioner of Pensions. On appeal, the action of the Commissioner of Pensions was reversed by the Assistant Secretary of the Interior, who, nevertheless, stated: "This department does not—can not, under the law—accept the conclusion that this soldier was in line of duty when he was killed merely because the War Department so holds. It does, however, upon the facts in the case, conclude that \* \* \* he is held for pensionable purposes to have been in line of duty when he met his death." (File 26510-1214, Sept. 2, 1915.)

In answer to inquiries, the Navy Department should furnish the Commissioner of Pensions with all facts of record bearing upon the service of claimants, leaving the determination of doubtful questions and the drawing of inferences from such facts to the jurisdiction of the Pension Bureau, which is claimed by the Interior Department in the decisions above cited to be exclusive. The law, as interpreted by the Interior Department, having made it the duty of the Commissioner of Pensions and his superiors to decide all questions of *law and fact* which may be involved in pension claims, the Navy Department should not be called upon to render an "opinion" upon such questions for the information or guidance of another department of the Government which claims that its jurisdiction thereof is exclusive. (File 26510-1214, Sept. 2, 1915.)



Where the records are incomplete, the establishment therefrom of a definite date when an enlisted man should be regarded as having been discharged from the Navy during the Civil War "would at best be merely a matter of conjecture." Whether or not such man was discharged, and if so, on what date, is a question of fact which may be established by competent evidence in any case in which it becomes necessary to decide such question. However, where a claim is filed and pending in the Bureau of Pensions, this does not present a case pending before the Navy Department which requires a decision of this question, but is a case requiring determination thereof by the Bureau of Pensions. Accordingly, *held* that the Navy Department can not with propriety render a decision as to the date when said man should be regarded as having been discharged from the Navy for pension purposes, first, because the records of the Navy Department do not disclose this fact; second, because the evidence submitted on this point is contradictory; third, because the determination of this question, upon the facts shown by the records of the Navy and Treasury Departments and evidence submitted by the claimant, is a question which, under the law as interpreted by the Interior

Department, is within the exclusive jurisdiction of the Commissioner of Pensions, subject only to the direction of his official superiors. (File 26510-1214, Sept. 2, 1915. In this connection, see War Department Circular of Nov. 2, 1901, publishing decision of the Secretary of War (Mr. Root) concerning the powers of the Secretary of War and the authority which had been attempted to be exercised by subordinate officers of other departments of reviewing and overruling the decisions of the Secretary of War upon military questions and matters arising in the administration of the War Department.)

The Secretary of the Navy and not the Secretary of the Interior has exclusive jurisdiction to determine whether applicants are entitled to pensions under sections 4756 and 4757, Revised Statutes; the Commissioner of Pensions in making payments under said sections acts only in a ministerial capacity; it is immaterial whether he concurs or differs in such judgments as may be arrived at by the Secretary of the Navy. (31 Op. Atty. Gen., 127, affirmed Op. Atty. Gen., Nov. 7, 1917, file 26510-1022:11; see also 31 Op. Atty. Gen., 268, and C. M. O. 37, 1918, p. 20.)

**Sec. 512. [Returns Office.]** The Secretary of the Interior shall from time to time provide a proper apartment, to be called the Returns Office, in which he shall cause to be filed the returns of contracts made by the Secretary of War, the Secretary of the Navy, and the Secretary of the Interior, and shall appoint a clerk of the first class to attend to the same. [See §§ 3744-3747.]—(2 June, 1862, c. 93, s. 4, v. 2, p. 412.)

Contracts made by or under the Secretary of the Navy shall be reduced to writing, signed by the contracting parties, and copy thereof filed, by the officer making and signing the contract, in the Returns Office within 30 days, together with all bids, offers, proposals and advertisements relating thereto, and affidavit of the officer making the return. (Secs. 3744-3745, R. S.) Time may be extended to 90 days in discretion of Secretary of the Navy. (Act of June 15, 1917, 40 Stat., 198.)

Copies of returns of contracts, certified and authenticated under the seal of the Interior Department, shall be evidence in prosecutions against officers for falsely swearing to returns. (Sec. 888, R. S.)

Failure of any officer to make return as required is punishable by fine and imprisonment. (Sec. 3746, R. S.)

Secretary of the Navy shall furnish printed instructions and blank forms of contracts and affidavits to officers authorized to make contracts. (Sec. 3747, R. S.)

The Secretary of the Interior has no jurisdiction over the contracts entered into by the Secretary of War or the Secretary of the Navy because of the fact that returns are to be made to an office in his department. (29 Op. Atty. Gen., 293.)

It is the duty of the Secretary of the Interior to call apparent violations of section 3746, Revised Statutes, to the attention of the

Department of Justice in order that, if the law has been violated, appropriate criminal proceedings may be instituted for its enforcement. (29 Op. Atty. Gen., 293.)

**The duty rests upon each head of department** to reduce to writing and make a proper return to the Returns Office of all contracts made by him referred to in section 3744, Revised Statutes. (29 Op. Atty. Gen., 293.)

**Sufficiency of return.**—The return made by the Assistant Secretary of the Navy, stating that there were excepted therefrom "certain plans that are confidential and can not be divulged at this time without detriment to the public interests," is a sufficient compliance with the law. (29 Op. Atty. Gen., 293.)

**Confidential plans.**—Section 3744, Revised Statutes, should not be construed as requiring the disclosure of plans that are confidential and can not be divulged without detriment to the public interests, notwithstanding such plans form part of the contract by express stipulation contained therein. It is manifest that if the Secretary of War and the Secretary of the Navy were required in making returns of contracts made by them for the construction of things authorized for the national defense, such as vessels of war, fortifications, armor and armament, to accompany such contracts with copies of plans and specifications, secrets pertaining to the national defense would be exposed to the public view. (29 Op. Atty. Gen., 293.)

Sec. 513. [Clerk to file returns.] The clerk of the Returns Office shall file all returns made to the Office, so that the same may be of easy access, keeping all returns made by the same officer in the same place, and numbering them in the order in which they are made.—(2 June, 1862, c. 93, s. 4, v. 12, p. 412.)

Sec. 514. [Indexes.] The clerk of the Returns Office shall provide and keep an index-book, with the names of the contracting parties, and the number of each contract opposite to the names; and shall submit the index-book and returns to any person desiring to inspect it.—(2 June, 1862, c. 93, s. 4, v. 12, p. 412.)

Sec. 515. [Copies of returns.] The clerk of the Returns Office shall furnish copies of such returns to any person paying therefor at the rate of five cents for every one hundred words, to which copies certificates shall be appended in every case by the clerk making the same, attesting their correctness, and that each copy so certified is a full and complete copy of the return.—(2 June, 1862, c. 93, s. 4, v. 12, p. 412.)



## TITLE XIII.

### THE JUDICIARY.

#### CHAPTER THIRTEEN.

#### HABEAS CORPUS.

Sec.

751. Courts authorized to issue writ.  
752. Judges authorized to grant writ.  
753. Writ in case of prisoner in jail.  
754. Application for writ.  
755. Allowance and direction of writ.  
756. Time of return.

Sec.

757. Form of return.  
758. Body of party to be produced.  
759. Day for hearing.  
760. Denial of facts in return; amendments.  
761. Summary hearing; disposition of party.

**Sec. 751.** [Courts authorized to issue writ.] The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus.— (24 Sept., 1789, c. 20, s. 14, v. 1, p. 81; 10 Apr., 1869, c. 22, s. 2, v. 16, p. 44; 2 Mar., 1833, c. 57, s. 7, v. 4, p. 634; 5 Feb., 1867, c. 28, s. 1, v. 14, p. 385; 29 Aug., 1842, c. 257, s. 1, v. 5, p. 539; *U. S. v. Hamilton*, 3 Dall., 17; *Ex parte Burford*, 3 Cr., 448; *Ex parte Bollman*, 4 Cr., 75; *Ex parte Wilson*, 6 Cr., 52; *Ex parte Kearney*, 7 Wh., 38; *Ex parte Watkins*, 3 Pet., 193; *Ex parte Watkins*, 7 Pet., 568; *Ex parte Milburn*, 9 Pet., 704; *Holmes v. Jennison*, 14 Pet., 540; *Ex parte Barry*, 2 How., 65; *Ex parte Dorr*, 3 How., 103; *Barry v. Mercein*, 5 How., 103; *In re Metzger*, 5 How., 176; *In re Kaine*, 14 How., 103; *Ex parte Wells*, 18 How., 307; *Ex parte Milligan*, 4 Wall., 2; *Ex parte McCardle*, 6 Wall., 318; *Ex parte McCardle*, 7 Wall., 506; *Ex parte Yerger*, 8 Wall., 85; *Ex parte Lange*, 18 Wall., 163; *In re Heinrich*, 5 Blatch., 414; *Ex parte Keeler*, Hems., 306; *U. S. v. Williamson*, 3 Am. Law Rep., 729; *Bennet v. Bennet*, 1 Dedy, 299; *Ex parte Evarts*, 7 Am. Law Rep., 79; *Norris v. Newton*, 5 McLean, 22; *U. S. v. Rector*, 5 McLean, 174; *Veremaitre's Case*, 13 Law Rep., 608; *Ex parte Sifford*, 5 Am. Law Rep., 659; *Ex parte McCan*, 14 Am. Law Rep., 158; *U. S. v. French*, 1 Gallis., 1; *Ex parte Cheeney*, 5 Law Rep., 19; *Ex parte Des Roches*, 1 McAllis., 68; *Ex parte Pleasants*, 4 Cr. C. C., 314; *Ex parte Turner*, 6 Int. Rev. Rec., 147; *Ex parte Jenkins*, 2 Wall., jr., 521; *Ex parte Robinson*, 6 McLean, 355; *Ex parte Smith*, 3 McLean, 121; *Mead's Case*, 1 Brock., 324; *U. S. v. Anderson*, Cooke, 143; *Fisk v. Union Pacific Railway*, 10 Blatch., 518; *In re Joseph Stupp*, 11 Blatch., 124; *In re MacDonnell*, 11 Blatch., 79, 170; *In re Thomas*, 12 Blatch., 370; *In re Giacamo*, 12 Blatch., 391; *In re Joseph Stupp*, 12 Blatch., 501; *In re W. B. Bird*, 2 Saw., 33; *In re Bogart*, 2 Saw., 396.)

Circuit courts were abolished and their powers and duties transferred to the district courts by the Judicial Code, act of March 3, 1911, sections 289-291 (36 Stat., 1167).

Due process of law denied accused, habeas corpus proceedings as remedy—see note to Constitution, fifth amendment, under "VI. Remedy when Due Process Denied."

Power of Federal courts to order release of person held by State authorities—see note to section 753, Revised Statutes, and to Constitution, Article I, section 8, clause 13, under “III. Jurisdiction of Civil Authorities.”

Power to review proceedings of courts-martial by habeas corpus—see note to section 753 Revised Statutes, and to Constitution, Article I, section 8, clause 14, under “III. Finality of court-martial proceedings.”

State courts without jurisdiction to order release of persons held by authority of United States—see note to Constitution, Article I, section 8, clause 13, under “III. Jurisdiction of Civil Authorities.”

Suspension of privilege of writ of habeas corpus—see Constitution, Article I, section 9, clause 2, and note thereto.

The writ of habeas corpus ad subjiciendum, which is the ordinary writ of habeas

corpus, is the written order of a judge or court of competent jurisdiction, addressed to a person who is alleged to be restraining another of his liberty without authority of law, requiring the speedy production in court of the party restrained, together with a return or statement setting forth the true cause of such restraint. (See note to Constitution, Art. I, sec. 9, clause 2.)

The writ of habeas corpus ad testificandum is the judicial process issued to the officer in charge of a prison, commanding the production in court of a prisoner in his custody for the purpose of having such prisoner testify as a witness in a case there pending. (See note to sec. 753, R. S.)

Under section 876, Revised Statutes, a writ of subpoena in a criminal case will run into any district; and it is held that the writ of habeas corpus ad testificandum will run where a subpoena runs, it being but a substitute for a subpoena. (12 Comp. Dec., 538.)

**Sec. 752. [Judges authorized to grant writ.]** The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.—(24 Sept., 1789, c. 20, s. 14, v. 1, p. 81; 10 Apr., 1869, c. 22, s. 2, v. 16, p. 44; 2 Mar., 1833, c. 57, s. 7, v. 4, p. 634; 5 Feb., 1867, c. 28, s. 1, v. 14, p. 385; 29 Aug., 1842, c. 257, s. 1, v. 5, p. 539.)

“Within their respective jurisdictions.”—Where the party is alleged to be unlawfully restrained of his liberty in a distant possession of the United States (island of Guam), by or under authority of a naval officer serving as governor thereof, a writ of habeas corpus can not be directed to the Secretary of the Navy commanding him to produce such party in the Supreme Court of the District of Columbia, in order that the court may inquire into the grounds of the detention. The prisoner not being in the actual custody of the Secretary of the Navy, jurisdiction to issue the writ can not be conferred upon the court by the allegation that the Secretary of the Navy has the final control over his imprisonment. Even though the court were authorized to inquire into the grounds of detention, where the party is confined out of its jurisdiction, the writ could not be issued to the Secretary of the Navy, because the officers of the Navy are not his agents, but are the agents of the President, who is Commander in Chief; therefore the power to release the prisoner or to produce him in obedience to the writ would be in the President and not in the Secretary. (*McGowan v. Moody*, 22 App. D. C., 148.)

It is possible that the court might issue a writ of habeas corpus addressed to a person within its jurisdiction, commanding him to produce in court a person confined by his order and under his control outside of the court's jurisdiction, should it be made to appear that the party had been confined within the jurisdiction of the court and had been removed therefrom to evade its process. (*McGowan v. Moody*, 22 App. D. C., 148, reviewing authorities.)

The provisions of the Revised Statutes “contemplate a proceeding against some person who has the immediate custody of the party de-

tained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary.” (*Wales v. Whitney*, 114 U. S., 574.)

“Restraint of liberty.”—“In the case of a man in the military or naval service, where he is, whether as an officer or a private, always more or less subject in his movements, by the very necessity of military rule and subordination, to the orders of his superior officer it should be made clear that some unusual restraint upon his liberty of personal movement exists to justify the issue of the writ; otherwise, every order of the superior officer directing the movements of his subordinate, which necessarily to some extent curtails his freedom of will, may be held to be a restraint of his liberty, and the party so ordered may seek relief from obedience by means of a writ of habeas corpus.” (*Wales v. Whitney*, 114 U. S., 564.)

“Something more than moral restraint is necessary to make a case of habeas corpus. There must be actual confinement, or the present means of enforcing it.” (*Wales v. Whitney*, 114 U. S., 564.)

An officer of the Navy, against whom charges had been preferred for trial by court-martial, was given the following order by the Secretary of the Navy: “You are placed under arrest and you will confine yourself to the limits of the city of Washington.” The facts showed that he was not under “physical restraint;” and that the above-mentioned order did not operate to restrain his movements any more than would have been the case had it directed him to remain in Washington to serve as a member of the court-martial. Held, that there was no such “restraint of liberty” in this case as to justify the use of habeas corpus; and that the



feared of being forcibly arrested and returned should he leave the city of Washington, if sufficient to keep the officer within the limits of the city, "is a moral restraint, which concerns his own convenience, and in regard to which he exercises his own will." (*Wales v. Whitney*, 114 U. S., 564.)

"In case of a person who is going at large, with no one controlling or watching him, or detaining him, his body cannot be produced by the person to whom the writ is directed, unless by consent of the alleged prisoner, or by his capture and forcible traduction into the presence of the court." (*Wales v. Whitney*, 114 U. S., 564.)

**Sec. 753. [Writ in case of prisoner in jail.]** The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify.—(24 Sept., 1789, c. 20, s. 14, v. 1, p. 81; 2 Mar., 1833, c. 57, s. 7, v. 4, p. 634; 5 Feb., 1867, c. 28, s. 1, v. 14, p. 385; 29 Aug., 1842, c. 257, s. 1, v. 5, p. 539; *Ex parte Dorr*, 3 How., 103; *Ex parte Barnes*, 1 Sprague, 133; *Ex parte Bridges*, 2 Woods, 428.)

- I. PERSONS IN CUSTODY BY SENTENCE OF COURT-MARTIAL.
- II. PERSONS IN CUSTODY FOR ACT DONE IN PURSUANCE OF A LAW OF THE UNITED STATES.
- III. PERSONS IN CUSTODY IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.
- IV. BRINGING PRISONER INTO COURT TO TESTIFY.

#### I. PERSONS IN CUSTODY BY SENTENCE OF COURT-MARTIAL.

**Jurisdiction of courts-martial subject to review.**—"It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence. And, on the other hand, it is equally clear that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial; and that no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction. That being established, the habeas corpus must be denied and the petitioner remanded. But wanting, it must be sustained and the petitioner discharged." (*In re Grimley*, 137 U. S., 147.)

An enlisted man of the Marine Corps is not amenable to trial by naval court-martial under section 1624 of the Revised Statutes (Articles for the Government of the Navy) where the offense charged was committed by him while detached for service with the Army, in accordance with section 1621, Revised Statutes, at which time he was subject to the Articles of

War (sec. 1342, R. S.) and not subject to the laws or regulations for the government of the Navy. Accordingly, in habeas corpus proceedings the prisoner is entitled to discharge from custody under the sentence of the naval court-martial. (*U. S. v. Waller*, 225 Fed. Rep., 673; *C. M. O. 31*, 1915, p. 6. But see subsequent amendment to sec. 1342, R. S., art. 2 (c), made by act Aug. 29, 1916, 39 Stat., 651.)

**Errors of procedure cannot be reviewed.**—Where the military authorities proceed regularly within their jurisdiction, they cannot be interfered with "no matter what errors may be committed in the exercise of their lawful jurisdiction." (*In re McVey*, 23 Fed. Rep., 878.)

"Where a court-martial had jurisdiction to try petitioner for an offense against the naval regulations, and to impose sentence authorized thereby, a civil court in habeas corpus proceedings could only review the question of jurisdiction and could not pass on alleged errors of law committed by the court-martial or on the severity of the sentence imposed." (*Ex parte Dickey*, 204 Fed. Rep., 322.)

A statute providing that the judge advocate shall not be present during a closed session of the court, relates to procedure merely, and not to jurisdiction; and, while the rights of the accused are violated by allowing the judge advocate to be present for a short time during a closed session, the nonobservance of the statute is a matter for the revising military authorities, not for the civil courts in habeas corpus proceedings. (*Ex parte Tucker*, 212 Fed. Rep., 569. The statute referred to was the act of July 27, 1892, sec. 2, 27 Stat., 277, relating to Army courts-martial, and was erroneously cited by the court as applicable to naval courts-martial; there was no similar statute with

reference to the Navy, but the Navy Regulations contained a provision to the same effect.)

Where a court-martial has jurisdiction over the person and subject matter, its proceedings can not be collaterally impeached for any mere error or irregularity, if there were such committed, within the sphere of its authority. (Ex parte Reed, 100 U. S., 23.)

"We must not be understood by anything we have said as intending in the slightest degree to impair the salutary rule that the sentences of courts-martial, when affirmed by the military tribunal of last resort, cannot be revised by the civil courts save only when void because of an absolute want of power, and not merely voidable because of the defective exercise of power possessed." (Carter v. McClaughry, 183 U. S., 401.)

"Undoubtedly errors are committed by courts-martial which a civil tribunal would regard as sufficient grounds for a reversal of their judgments if it were sitting as an appellate court. But there is always this radical difference between an appellate court sitting for the correction of errors and a civil court into which the record of a court-martial is collateral—in the former there is not a failure of justice; the appellate court may reverse a judgment or prescribe another or award a new trial; in the latter the court must either give full effect to the sentence or pronounce it wholly void." (Swain v. U. S., 28 Ct. Cls., 217; affirmed 165 U. S., 563.)

"Courts-martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced." (Carter v. Roberts, 177 U. S., 496; Ex parte Mason, 105 U. S., 697; Johnson v. Sayre, 158 U. S., 109.)

"With the sentences of courts-martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil court." (Dynes v. Hoover, 20 How., 55, 82.)

**Sufficiency of charges and specifications can not be reviewed.**—"Where a charge against a person tried by a military court is within the court's jurisdiction, and is authorized by the Army or Navy Regulations, the manner of setting out the offense is a matter of pleading, rather than jurisdiction, the sufficiency of which is for the exclusive determination of the court-martial." (Ex parte Dickey, 204 Fed. Rep., 322.)

In the case of Carter v. McClaughry (183 U. S., 355, 400), it was contended in habeas

corpus proceedings that the offense of embezzlement by an officer of the Army was erroneously charged as a violation of article 62 of the Articles of War (sec. 1342, R. S.), which provides for the punishment of offenses "to the prejudice of good order and military discipline." In overruling this contention it was stated by the Supreme Court:

"We should suppose that embezzlement would be detrimental to the service within the intent and meaning of the article, but it is enough that it was peculiarly for the court-martial to determine whether the crime charged was 'to the prejudice of good order and military discipline.' (Swain v. United States, 165 U. S., 553; Smith v. Whitney, 116 U. S., 178; United States v. Fletcher, 148 U. S., 84.) In Swain v. United States, which involved a sentence under the sixty-second Article of War, Mr. Justice Shiras, delivering the opinion, said: 'But, as the authorities heretofore cited show, this is the very matter that falls within the province of courts-martial, and in respect of which their conclusions cannot be controlled or reviewed by the civil courts. As was said in Smith v. Whitney, 116 U. S., 178, "of questions not depending upon the construction of the statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law . . . Under every system of military law for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business."'"

**Sentence final when confirmed by the proper military authority.**—In cases which do not extend to the loss of life, or to the dismissal of a commissioned or warrant officer, the Secretary of the Navy is "the final reviewing authority provided by law to act upon records of courts-martial." (Ex parte Dickey, 204 Fed. Rep., 322, 326.) Where the court-martial is ordered by the Secretary of the Navy, its sentence can not be carried into effect until confirmed by him (Dynes v. Hoover, 20 How., 81); where ordered by an officer of the Navy vested with such authority, its sentence may be carried into execution on confirmation by such officer (sec. 1624, R. S., art. 53). Where the sentence extends to loss of life, or to the dismissal of a commissioned or warrant officer, it can not be carried into execution until confirmed by the President. (Sec. 1624, R. S., art. 53.) In any of these cases, where the sentence has been so confirmed by the proper reviewing officer, "it becomes final, and must be executed, unless the President pardons the offender. It is in the nature of an appeal to the officer ordering the court, who is made by law the arbiter of the legality and propriety of the court's sentence. When confirmed, it is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdic-



tion over the subject matter or charge, or one in which, having jurisdiction over the subject matter, it has failed to observe the rules prescribed by the statute for its exercise." (*Dynes v. Hoover*, 20 How., 81.)

"When affirmed by the military tribunal of last resort," the sentences of courts-martial can not be revised by the civil courts, "save only when void because of an absolute want of power." (*Carter v. McLaughry*, 183 U. S., 380.)

The judgments of a court-martial when approved as required, rest on the same basis and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals. (*Ex parte Reed*, 100 U. S., 23.)

Where the sentence of a court-martial has been approved by the Secretary of the Navy, in a case not extending to loss of life or dismissal of a commissioned or warrant officer, it can not be revised by the civil courts on the ground that alleged errors of law were committed by the court-martial, or that the prisoner was harshly dealt with and a sentence of undue severity was imposed. (*Ex parte Dickey*, 204 Fed. Rep., 322.)

**Excessive sentence not void.**—"Under a writ of habeas corpus, the inquiry is not addressed to errors, but to the question whether the proceedings and judgment are nullities; and unless it appears that the judgment or sentence under which the prisoner is confined is void, he is not entitled to his discharge." Where a court "has jurisdiction of the person and the offense, the imposition of a sentence in excess of what the law permits, does not render the legal or authorized portion of the sentence void, but only leaves such part of it as may be in excess, open to question and attack." (*U. S. v. Pridgeon*, 153 U. S., 48; see also file 26287-1543; and *G. C. M. Rec.* No. 23271.)

The prisoner "cannot be discharged on habeas corpus until he has performed so much of the judgment, or served out so much of the sentence as it was within the power of the court to impose." (*In re Swan*, 150 U. S., 637, 653; *U. S. v. Pridgeon*, 153 U. S., 48.)

**Discharge not required by subsequent change in party's status.**—An officer convicted by court-martial and sentenced to dismissal and imprisonment, which sentence is duly approved by the President, can not be released from custody on habeas corpus on the ground that upon execution of the sentence of dismissal he ceased to be amenable to military jurisdiction and could not be held to serve his period of imprisonment. "Where the jurisdiction of the military court has attached in respect of an officer of the Army, this includes not only the power to hear and determine the case, but the power to execute and enforce the sentence." (*Carter v. McLaughry*, 183 U. S., 365.)

Where jurisdiction has attached, it can not be divested by mere subsequent change of status. (*Carter v. McLaughry*, 183 U. S., 383, citing *Barrett v. Hopkins*, 7 Fed. Rep., 312; *Coleman v. Tennessee*, 97 U. S., 509; see also file 26251-5447, Dec. 8, 1911.)

## II. PERSONS IN CUSTODY FOR ACT DONE IN PURSUANCE OF A LAW OF THE UNITED STATES.

**Military guard charged with manslaughter.**—There is no question that an act done by a soldier in the performance of his duty in the military service of the United States, is done in pursuance of a law of the United States, and so not within the jurisdiction of a State court to try. Accordingly, where a soldier on guard duty shot at an escaping prisoner, as required by the manual of guard duty, and killed a young woman pedestrian, there being no claim that the killing was intentional or that the guard acted maliciously or wantonly or otherwise than in good faith, held that the guard in shooting was acting in the supposed performance of his duty as a soldier, and was not subject to arrest and trial by the State authorities for manslaughter, even though it might have been more prudent for him to have exercised still greater care; and accordingly, the judge of a district court of the United States has authority under sections 752, 753, and 761 Revised Statutes, to inquire into the facts of the case and direct his release from the custody of the State authorities. (*U. S. v. Lipsett*, 156 Fed. Rep., 65; see also *In re Fair*, 100 Fed. Rep., 149.)

For other cases, see note to Constitution, Article I, section 8, clause 13, under "III. Jurisdiction of Civil Authorities."

## III. PERSONS IN CUSTODY IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

**Imprisonment without due process of law.**—"It is open to the courts of the United States, upon an application for a writ of habeas corpus, to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not." (*Frank v. Mangum*, 237 U. S., 309.)

**One committed for refusing to incriminate himself,** in the exercise of his right under the Constitution, should be released on habeas corpus. (*Foot v. Buchanan*, 113 Fed. Rep., 156.)

For other cases see note to Constitution, fifth amendment.

## IV. BRINGING PRISONER INTO COURT TO TESTIFY.

**Naval prisoners as witnesses or parties in civil courts.**—"If the Federal or State authorities desire the attendance of a naval prisoner as a witness in a criminal case pending in a civil court, upon the submission of such a request to the Secretary of the Navy authority will be given in a proper case for the production of the man in court without resort being had to a writ of habeas corpus ad testificandum." (*G. O. No. 121*, Navy Dept., Sept. 17, 1914, par. 16, citing file 26251-8684:2, June 10, 1914; 26276-93, May 29, 1914; 26276-40, June 10, 1912; 26276-33, June 5, 1911; 26276-17, Nov. 10, 1909; etc.)

However, the Navy Department "will not authorize the attendance of a naval prisoner in a Federal or State court, either as a party or as a witness in private litigation pending before such court, as in such cases the court may grant a postponement or a continuance of the trial;

but the department will allow the deposition of such naval prisoner to be taken in the case." (G. O. No. 121, Navy Dept., Sept. 17, 1914, par. 16, citing file 26251-4913:1, Oct. 12, 1911; 26276-36, Dec. 9, 1911.)

**Sec. 754. [Application for writ.]** Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application.—(5 Feb., 1867, c. 28, s. 1, v. 14, p. 385.)

**Averments of conclusions of law, inadequate.**—"If the detention is claimed to be unlawful by reason of the invalidity of the process or proceedings under which the party is held in custody, copies of such process or proceedings must be annexed to or the essential parts thereof set out in the petition, and mere averments of conclusions of law are necessarily inadequate." (*Creamer v. Washington*, 168 U. S., 128. See also *Whitten v. Tomlinson*, 160 U. S., 231; *Kohl v. Lehlback*, 160 U. S., 293; *Cuddy*, Petitioner, 131, U. S., 280; *Andersen v. Treat*, 172 U. S., 24.)

Where a petition for habeas corpus alleges that the petitioner is the father of the person whose release is sought, and that such person, being between the ages of 18 and 21 years, entered into the United States Navy without

the parent's consent, and is himself desirous of being released therefrom; and that, under the statutes of the United States in such case made and provided, the enlistment of such person was illegal and invalid: *Held*, That no issue as to the intoxication of the recruit at the time of enlistment is presented, especially in view of the fact that the Revised Statutes, section 1624, article 19, requires the dishonorable dismissal of an officer who knowingly enlists an intoxicated person. *Held, also*, That no issue as to intoxication at the time of enlistment being presented by the pleadings, the fact that the recruit was permitted, apparently without objection, to testify to such intoxication, does not constrain the court on appeal to review the latter question. (*Thomas v. Winne*, 122 Fed. Rep., 395.)

**Sec. 755. [Allowance and direction of writ.]** The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained.—(5 Feb., 1867, c. 28, s. 1, v. 14, p. 385; *Ex parte Watkins*, 3 Pet., 193; *Ex parte Milligan*, 4 Wall., 2, (110).)

Suspension of privilege of writ—see note to Constitution, Article I, section 9, clause 2.

**The writ need not be awarded** where it is obvious that, before a return to the writ can be made, or any other action can be taken, the restraint of which the petitioner complains would have terminated. (*Ex parte Baez*, 177 U. S., 378.)

**Persons confined by naval officers** are not in the custody of the Secretary of the Navy so as to warrant the issuance of a writ of habeas corpus directed to him. (*McGowan v. Moody*, 22 App. D. C., 148; see note to sec. 752, R. S.)

**"If the party is not in the custody of the officer to whom the writ is directed, he will so state in his return."** (G. O. No. 121, Navy Dept., Sept. 17, 1914, par. 7; see also file 26262-1665:41, Inc. 1, p. 26.)

**Service of writ.**—A writ of habeas corpus was issued by a Federal judge, directed to the commanding officer of the *Arkansas*, which vessel was under orders to sail from the navy yard, Norfolk, Va., on the morning that the writ was returnable. The writ was not served, but the United States marshal communicated with

the commandant of the navy yard, who informed the commanding officer of the *Arkansas* by radiogram that the writ had been issued; whereupon the commanding officer delivered the party named therein to the commandant of the navy yard, and sailed in accordance with previous orders. *Held*, That the radiogram from the commandant was in no sense legal service on the commanding officer of the *Arkansas* of the writ of habeas corpus; however, the latter's action in delivering the party to the commandant, under the circumstances, was approved. (File 26522-26, Nov. 30, 1914.)

A writ of habeas corpus was issued by a United States judge, addressed to the Secretary of the Navy, the commandant of the navy yard, Brooklyn, N. Y., "and any other person having custody of" the enlisted man named in said writ. The writ was delivered at the naval prison, navy yard, New York, about 3.45 p. m. The prisoner had been transferred under guard from said prison at about 3 p. m. the same day. The original of the writ was then served upon the prisoner's guard, while waiting on the Bay State Line pier for instructions just prior to leaving



with his prisoner for the naval prison, Portsmouth, N. H. The circumstances were reported to the commandant, navy yard, New York' who directed that the guard carry out his orders to deliver the prisoner at Portsmouth, which was done. The matter being brought to the attention of the Secretary of the Navy, orders were immediately issued for the return of the prisoner to New York and his production in court in answer to the writ of habeas corpus, the com-

mandant's attention being invited to the erroneous procedure adopted by him in directing the guard to proceed with his prisoner to Portsmouth after a writ of habeas corpus had been served upon said guard; the fact that a writ of habeas corpus issued by a Federal court must always be obeyed; and the unnecessary annoyance and expense caused by the erroneous procedure in this case. (File 26522-25.)

**Sec. 756. [Time of return.]** Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond a distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days.—(5 Feb., 1867, c. 28, s. 1, v. 14, p. 385.)

**Full time permitted.**—"The officer upon whom such a writ of habeas corpus is served can not be required to obey same in any shorter period after the service of the writ than that specified in the above section of the Revised Statutes, even though the writ should in terms require that the person named therein be produced 'forthwith,' or 'immediately,' or at a specified time." (G. O. No. 121, Navy Dept., Sept. 17, 1914, par. 5, citing *Ex parte Baez*, 177 U. S., 389, and *United States v. Bollman*, 24 Fed. Cas., 1190.)

**Commanding officers of vessels or shore stations** of the Navy or Marine Corps are forbidden to deliver any person in their custody or under their control to the civil authorities, in obedience to writs of habeas corpus, without first communicating with the Secretary of the Navy and awaiting his instructions in the premises. "The Secretary of the Navy will promptly issue the necessary orders in the case or make request upon the Attorney-General, in accordance with Title VIII of the Revised Statutes of the United States, to furnish such legal assistance to the commanding officer concerned as the interests of the United States involved in such case may demand." Should instructions for any reason not be received by the commanding officer from the Secretary of the Navy by the last day of the period allowed by law for making return, he will comply with sections 757 and 758 of the Revised Statutes, and request the court to delay the hearing of the cause for the full period of five days allowed by section 759, Revised Statutes, so that further opportunity may be afforded for the receipt of instructions in the premises from the Secretary of the Navy. (G. O. No. 121, Navy Dept., Sept. 17, 1914.)

**A fine of \$1,000 for contempt of court** was imposed upon General Jackson, at the close

of the War of 1812, for refusing obedience to a writ of habeas corpus, which fine he paid. (See *Dow v. Johnson*, 100 U. S., 158, 194, noted under Constitution, Art. I, sec. 8, clause 11, "Effect of martial law.")

**An officer of the Army refused** during the Civil War to receive service of a writ of habeas corpus issued by the Chief Justice of the United States on the ground that the privilege of the writ had been suspended by him, under authority from the President. The chief justice held that he was without power to proceed further in the premises, and that it became the duty of the President under the Constitution, Article II, section 3, to come to the aid of the judicial authority when resisted by a force too strong to be overcome, assisting it to execute the process and enforce its judgments. (*Ex parte Merryman*, 17 Fed. Cas. No. 9487; see note to Constitution, Art. I, sec. 9, clause 2, and Art. II, sec. 3.)

**When service of the writ is prevented by force**, the court does not perceive that anything more can be done. "The court deeply regrets that officers of the United States should obstruct process out of a court of the United States, especially this process;" nevertheless, "those officers are at present beyond the control of the law, and the court has not the command of the physical force needful to effect a service of this writ at the present time. Let the writ be placed on file, to be served when and where service may become practicable." (*In re Winder*, 30 Fed. Cas. No. 17867.)

**An order from the War Department** to a United States marshal not to obey a writ of habeas corpus is no protection to such officer, who is answerable for contempt of court for refusing obedience to the writ. (*Ex parte Field*, 9 Fed. Cas. No. 4761.)

**Sec. 757. [Form of return.]** The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party.—(5 Feb., 1867, c. 28, s. 1, v. 14, p. 385.)

**"If the party is not in the custody** of the officer to whom the writ is directed, he will so state in his return." (G. O. No. 121, Navy

Dept., Sept. 17, 1914, par. 7; see also file 26262-1625:41, Inc. 1, p. 26.)

The following is a form of return which has been used in such a case (see citation last above noted):

"Return of Respondent.

"U. S. S. ———,

"Hampton Roads, Va., Nov. 13, 1912.

"In re W. W. D. ———, Chief Commissary Steward, U. S. Navy.

"To the Honorable The Judge of the U. S. District Court, Eastern District of Virginia:

"The respondent, Captain J. A. H. ———, U. S. Navy, having been served a writ for the production of W. W. D. ———, respectfully makes return and states that the said W. W. D. ——— is not now under his command.

"J. A. H. ———,

"Captain, U. S. Navy,

"Commanding U. S. S. ———."

For form of return filed in the case of an officer of the Navy who applied for a writ of habeas corpus while under arrest awaiting trial by court-martial, but not in actual custody, merely being confined "to the limits of the city," in which such trial was to be had, see *Wales v. Whitney*, 114 U. S., 567.

The following form of return has been prescribed by the Secretary of the Navy for the guidance of officers on whom writs of habeas corpus are served by Federal courts or judges (see *Naval Courts and Boards*, 1917):

"In the District Court of the United States for the (Eastern) District of (Virginia).

"In the Matter of } Return of re-  
A. ——— F. B. ———. } spondent.

"Upon application for writ of Habeas Corpus.

"To the Honorable G. ——— H. R. ———, Judge of said Court (or To the said Court):

"1. Comes now M. ——— H. C. ———, captain, U. S. Navy (or U. S. Marine Corps), commanding officer of the ———, and by way of return to the writ of habeas corpus issued herein, states, in conformity with the provisions of section 757 of the Revised Statutes of the United States, as follows, to wit:

"2. That the said A. ——— F. B. ——— enlisted in the United States Navy (or in the United States Marine Corps) as ——— on the ——— day of ———, 19—, at (Boston, Massachusetts), for a term of four years from that date.

"3. That the said A. ——— F. B. ———, at the time of his enlistment as aforesaid, stated on oath that he was born on the ——— day of ———, 1—, thus making him more than eighteen years of age, as will appear from a copy of the enlistment record of said A. ——— F. B. ———, hereto attached as a part of this return; that since the enlistment of said A. ——— F. B. ——— he has received pay and allowances from time to time thereunder; that on the ——— day of ———, 19—, the said A. ——— F. B. ——— was detained and recommended for trial by

general court-martial for fraudulent enlistment in the United States Navy, in violation of the act of Congress approved March 3, 1893, United States Statutes at Large, volume twenty-seven, page seven hundred and sixteen; and that said action was before the issuing of the writ herein.

"4. That the said A. ——— F. B. ——— deserted from said United States Navy (or United States Marine Corps), at (Boston, Massachusetts), on the ——— day of ———, 19—, and remained absent in desertion until he was apprehended at (Norfolk, Virginia), on the ——— day of ———, 19—, and was thereupon committed to the custody of the respondent, as commanding officer of the ———; and that the said A. ——— F. B. ——— was detained and recommended for trial by general court-martial for said offense of desertion in violation of section 1624 of the Revised Statutes of the United States.

"5. That the said A. ——— F. B. ——— has been duly arraigned and tried for the said offenses before a general court-martial convened by order of the Secretary of the Navy (and is now held, awaiting the action of the convening authority upon the proceedings and findings of said court) (or was convicted thereof by said court and was sentenced to ———, which sentence was approved) (or was mitigated to ———, and approved) on the ——— day of ———, 19—, by the Secretary of the Navy, as required by article 53, section 1624, of the Revised Statutes of the United States. (A copy of the order promulgating said sentence and the action of the Secretary of the Navy thereon is hereto attached.)

"6. This respondent here produces in court the body of the said A. ——— F. B. ———, as commanded by the writ of habeas corpus issued in this matter as aforesaid, but he prays that your honor (or this honorable court) will refuse to discharge the said A. ——— F. B. ———, and will return and remand him to the custody of this respondent.

"Respectfully submitted.

"M. ——— H. C. ———,

"Captain, U. S. Navy,

"Commanding ———.

"———, 19—.

"Var. 1.—If the offense is not fraudulent enlistment by a minor under 18 years of age, omit paragraph 3 above.

"Var. 2.—If the offense is fraudulent enlistment by a minor under 18 years of age without desertion, omit paragraph 4 above.

"Var. 3.—If the offense is neither fraudulent enlistment by a minor under 18 years of age, nor desertion, omit paragraphs 3 and 4 above and substitute an appropriate description of the offense for which the accused is detained, and state whether or not he has been recommended for trial by general court-martial for said offense.

"Var. 4.—If the accused has not been tried by general court-martial, omit paragraph 5 above."



**Sec. 758. [Body of party to be produced.]** The person making the return shall at the same time bring the body of the party before the judge who granted the writ.—(5 Feb., 1867, c. 28, s. 1, v. 14, p. 385.)

See note to section 756, Revised Statutes.

**“In case of a person who is going at large,** with no one controlling or watching him, or detaining him, his body cannot be produced by the person to whom the writ is directed, unless by consent of the alleged prisoner, or by his capture and forcible traduction into

the presence of the court.” In such a case there is nothing to support a habeas corpus. (*Wales v. Whitney*, 114 U. S., 564; see note to sec. 752, R. S.)

**“If the party is not in the custody of the officer to whom the writ is directed,** he will so state in his return.” (See note to sec. 757, R. S.)

**Sec. 759. [Day for hearing.]** When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time.—(5 Feb., 1867, c. 28, s. 1 v. 14, p. 385.)

See note to section 756, Revised Statutes.

**Sec. 760. [Denial of facts in the return; amendments.]** The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained.—(5 Feb., 1867, c. 28, s. 1, v. 14, p. 385.)

**Sec. 761. [Summary hearing; disposition of party.]** The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.—(5 Feb., 1867, c. 28, s. 1, v. 14, p. 385.)

**Summary hearing.**—“The injunction to hear the case summarily, and thereupon ‘dispose of the party as law and justice require’ does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it.” (*Ex parte Royall*, 117 U. S., 251.)

**Issues of fact.**—This section confers express power upon a Federal judge in habeas corpus proceedings to pass upon questions of fact; accordingly, where a soldier was arrested by the civil authorities of a State upon a charge of manslaughter growing out of the killing by him of a young woman while shooting at an escaping prisoner, *Held*, that the Federal judge was empowered in habeas corpus proceedings to inquire into the facts and decide that the soldier was free from blame and therefore not subject to prosecution in the State courts for manslaughter. (*United States v. Lipsett*, 156 Fed. Rep., 65; see also, note to Constitution, Art. I, sec. 8, clause 13, under “III. Jurisdiction of Civil Authorities.”)

[However, when the party is held pursuant to the laws and regulations governing the Navy, the only “facts” which the civil courts may inquire into on habeas corpus are whether the naval authorities have jurisdiction. (See note to sec. 753, R. S.) Where he is held pursuant to the finding of a court-martial the sufficiency of the evidence is no part of such facts. (See *In re Stupp*, 23 Fed. Cas. No. 13563.)]

**Disposition of party upon subsequent change of status.**—A writ of habeas corpus was issued to determine the legality of the confinement of a Chinaman held by the immigration authorities upon order of deportation signed by the “Acting Secretary” of Labor, it being contended that such officer was not in fact the Acting Secretary at the time the order was signed, and that his order was therefore illegal and void. While the case was pending the Secretary of Labor personally reviewed the deportation proceedings and affirmed the previous order signed by the “Acting Secretary.” Thereupon the court discharged the writ and remanded the petitioner to the custody of the immigration authorities, holding that in view of the action personally taken by the Secretary there remained “nothing at issue,” and that “courts are not organized to do idle things, but to determine issues presented,” and it was unnecessary to examine into the right of the “Acting Secretary.” (*Ex parte Ching Hing*, 224 Fed. Rep., 261.)

**Disposition of party claiming discharge from Navy on ground of fraudulent enlistment.**—It is the policy of the Navy Department, upon return of the writ in fraudulent enlistment cases to request the court to make the order of discharge, if granted, to take effect only after trial and punishment by naval court-martial for the statutory offense involved. For cases where this request has been granted and

full statement of this policy, see file 2757-8 of August 27, 1906. (In this connection see provision in the naval appropriation act of March 3, 1915 (38 Stat., 931), that any minor who fraudulently procures his enlistment in the Navy by making false oath as to age "shall, upon request of either parent, or, in case of their death, by the legal guardian, be released from service in the Navy, upon payment of full cost of first outfit, unless, in any given case, the Secretary, in his discretion, shall relieve said recruit of such payment.")

A minor who enlists while under the statutory age without the required consent of his parents or guardian is "not only de facto, but de jure, a soldier—amenable to military jurisdiction," and can not secure his discharge upon habeas corpus proceedings instituted by himself. The statutory requirement of consent in such cases "is for the benefit of the parent or guardian. It means simply that the Government will not disturb the control of the parent or guardian over his or her child without consent. It gives the right to such parent or guardian to invoke the aid of the court and secure the restoration of a minor to his or her control; but it gives no privilege to the minor." (In re Morrissey, 137 U. S., 157; *Solomon v. Davenport*, 87 Fed. Rep., 318.)

Since the decision of the Supreme Court in Morrissey's case (above noted) it is the settled law that the enlistment of a minor in the Army or Navy without the written consent of his parents or guardian and against the prohibition of the statutes of the United States is not void, but voidable only; that it is good as to the minor but voidable at the instance of the parent or guardian. But notwithstanding such enlistment is voidable, the civil courts on habeas corpus will not interfere to discharge one who is thus enlisted, "if at time of presentation of petition for the writ he has been arrested and is being held on any charge cognizable by a military court." It does not follow from the fact that such an enlistment is voidable that the enlisted minor may obtain immunity from prosecution for an offense committed by him against the law of the United States. (In re Scott, 144 Fed. Rep., 79; file 2757-4. In this case the minor was arrested on a charge of fraudulent enlistment preferred against him by his commanding officer to the Commandant of the Marine Corps. While said charges were pending and undetermined the minor's father applied for a writ of habeas corpus; the court denied the petition without prejudice to the petitioner to renew same at the termination of the military proceedings and at the expiration of the sentence, if any be imposed thereunder; see also *Dillingham v. Booker*, 163 Fed. Rep., 696; 16 Ann. Cas., 127, file 5956-6; *United States v. Pendleton*, 167 Fed. Rep., 690.)

Where the Secretary of the Navy preferred charges against a minor after hearing had been had upon a writ of habeas corpus granted upon petition of minor's father to inquire into the legality of his enlistment, and while the court had the matter under advisement before rendering a decision, *Held*, that although the enlistment was voidable at the instance of minor's father, who had not consented thereto, nevertheless he could not be discharged from the

custody of the naval authorities on writ of habeas corpus until he had answered and satisfied the charges pending against him. (U. S. v. Reaves, 126 Fed. Rep., 127; file 15204. In this case the minor, after fraudulently enlisting and receiving pay from the Government, deserted; was arrested by the civil authorities and held as a deserter; his father sued out a writ of habeas corpus; the chief of police made return on Jan. 5, 1903, the hearing of which was set for Jan. 15, 1903, and the matter held under advisement until Feb. 16, 1903. In the meantime, Feb. 12, 1903, the Secretary of the Navy preferred charges against the minor for desertion and fraudulent enlistment, which were served upon the prisoner. His discharge was ordered by the circuit court (121 Fed. Rep., 848), but on appeal the decision was reversed.)

A minor under 18 years of age enlisted in the Navy without the consent of his parents; deserted; was arrested by the civil authorities on a charge of desertion; while confined for safe-keeping his father applied for his discharge on habeas corpus. *Held*, that the minor was subject to arrest and punishment for desertion and other infractions of the rules and regulations of the Navy, and can not be discharged on writ of habeas corpus pending proceedings against him therefor. (Ex parte Rock, 171 Fed. Rep., 240; see also *In re Lessard*, 134 Fed. Rep., 305.)

A minor under the age of 18 years enlisted in the Navy without the consent of his parents, who petitioned for a writ of habeas corpus. In the meantime, prior to the suing out of the writ, said minor was "detained and recommended" for trial by court-martial for fraudulent enlistment. Upon the hearing it did not appear that charges had been preferred against him. *Held*, that the petitioners are entitled to the discharge of the minor on habeas corpus, and the right can not be denied because of contemplated or possible court-martial proceedings against the minor for fraudulent enlistment, especially where between the time demand for his discharge was made by his parents of the naval authorities and the procuring of the writ, several months elapsed, during which no proceedings were taken against him. (Ex parte Bakley, 148 Fed. Rep., 56; affirmed *Dillingham v. Bakley*, 152 Fed. Rep., 1022; file 5506-5; compare *Dillingham v. Booker*, 163 Fed. Rep., 696, 16 Ann. Cas., 127, file 5956-6, which arose in the same jurisdiction, and in which the minor was remanded to the custody of his commanding officer; in the latter case it was shown beyond question that the minor was being held for trial by court-martial for desertion.)

An enlisted man arrested by a civil officer as a deserter from the Navy will not be discharged on habeas corpus upon the allegation that he was intoxicated at the time of enlistment. "It seems to me illogical to say that a man can commit a crime and when arrested obtain a discharge on the ground that the original enlistment was not regular or proper." (In re Hamilton and Carroll, Superior Court, Fulton County (Ga.), Atlanta Circuit, file 7969 and 7988-04; see also *In re McVey*, 23 Fed. Rep., 878.)



An enlisted soldier can not avoid a charge of desertion by showing at the time when he voluntarily enlisted he had passed the age at which the law allows recruits to be enlisted for the Army. (In re Grimley, 137 U. S., 147.)

Minors between the ages of 18 and 21 years may be enlisted in the Navy without the consent of their parents or guardians, being included in the term "other persons" in section 1418, Revised Statutes, as amended. (Thomas v. Winne, 122 Fed. Rep., 395; see also In re Doyle, 18 Fed. Rep., 369; In re Norton, 93 Fed. Rep., 606.) The age at which an infant shall be competent to do any acts or perform any duties, civil or military, depends wholly upon the legislature. (In re Morrissey, 137 U. S., 157.)

**Disposition of party claiming discharge from Marine Corps on ground of fraudulent enlistment.**—The Marine Corps is not an independent organization, but is part of the Navy rather than of the Army; and sections 1418-1419, Revised Statutes, which, taken together, authorize the enlistment of minors over 18 years of age to serve in the Navy without the consent of their parents or guardians, apply to enlistments in the Marine Corps as well; so that a minor who has enlisted in the Marine Corps when over 18 years of age will not be discharged from the custody of the officers of the Marine Corps in habeas corpus proceedings brought by the father, who did not consent to the enlistment. (Elliott v. Harris, 24 App. D. C., 11, following In re Doyle, 18 Fed. Rep., 369, and overruling In re Shugrue, 3 Mackey (D. C.), 325, as being "in manifest conflict with the principle upon which the subsequent case of United States v. Dunn (120 U. S., 249) was decided by the Supreme Court of the United States." See also file 26251-6297:7, May 18, 1914, and 26251-6297:8, June 4, 1914. But see McCalla v. Facer (144 Fed. Rep., 61), in which the court approved and followed In re Shugrue, apparently overlooking the fact that said case had been overruled.)

Section 1117, Revised Statutes, providing that no person under 21 years of age shall be enlisted or mustered into the military service of the United States, refers exclusively to enlistments in the Army and does not include enlistments in the Navy or Marine Corps. (Elliott v. Harris 24 App. D. C., 11.)

As to status of Marine Corps, see note to section 1621, Revised Statutes.

**Appeal from decision of court or judge granting writ.**—It is required by regulations of the Navy Department (published in Naval Courts and Boards, 1917), that whenever an adverse decision is rendered in habeas corpus proceedings against any officer of the Navy or Marine Corps, such officer or counsel shall note an appeal pending instructions from the Navy Department, and shall immediately make report to the Judge Advocate General, forwarding to him direct a copy of the opinion of the court as soon as it can be obtained.

Insane persons in the Army and Navy lawfully committed by the Secretary of War or Secretary of the Navy to the Government Hospital for the Insane should continue to be held by the superintendent of that hospital until the court orders otherwise or until they are cured.

The United States attorney for the District of Columbia has been instructed to advise the Department of Justice of any proceedings through which such patients secure their release from the hospital, so that consideration can be given to the question of securing a review of the case by the court of appeals. In this way an authoritative ruling can be had which will set at rest any question as to the right of the superintendent to hold persons after their discharge from the Army or the Navy. (File 26251-4927-10, July 8, 1911, quoting letter from Department of Justice to the Interior Department, dated Mar. 23, 1912.)

**Arrest of petitioner after discharge.**—An enlisted man of the Marine Corps, discharged on habeas corpus proceedings, was afterwards arrested upon the charge of perjury in connection with his sworn statements at time of enlistment and held for trial in the civil courts of the United States at the instance of the Navy Department. (File 5939-1, Oct. 12, 1906.) Later the prosecution was discontinued, because of the peculiar circumstances of hardship which it involved, the Secretary of the Navy concurring in the recommendation of the United States attorney to this effect. (File 5939-7, Feb. 18, 1907.) In this connection see U. S. v. Chung Shee (71 Fed. Rep., 277), holding that the discharge of the party upon habeas corpus is res judicata as to the issues of law and fact involved, and that he is not subject to rearrest for the same cause. Compare In re White (45 Fed. Rep., 237) and Ex parte Kaine (14 Fed. Cas., No. 7597), the latter holding that a decision upon one writ refusing the discharge of a prisoner is no bar to the issuing of any number of other successive writs by any court or magistrate having jurisdiction, and accordingly that the decision of a circuit court of the United States dismissing the writ and remanding the prisoner was no bar to an inquiry by a justice of the Supreme Court of the United States upon a habeas corpus issued by him into the legality of the detention of the prisoner. (Upon question whether decision adverse to petitioner prevents a new petition being filed for the same cause, where an appeal was not taken see King v. McLean Asylum, 64 Fed. Rep., 331.)

The Navy Department has authority under the law to recommit an officer to the Government Hospital for the Insane after his discharge therefrom has been ordered by the Supreme Court of the District of Columbia in accordance with the finding of a jury that he is of sound mind. However, to avoid placing itself in the position of disregarding the court's action sufficient time should elapse and new evidence be obtained, so that a second habeas corpus proceeding could be successfully met. (File 8528-327, Apr. 18, 1911.)

Where the Supreme Court of the District of Columbia decided that an officer of the Navy was entitled to his discharge from the Government Hospital for the Insane but the chief justice agreed to withhold the signing of an order until the Navy Department could be communicated with and be heard on the subject, the Navy Department ordered the officer in question to a naval hospital for treatment, and decided to take no further action in the case. (File 8528-327:2, Jan. 31, 1911.)

## CHAPTER SIXTEEN.

### WITNESSES' FEES.

Sec.

848. Witnesses' fees.

849. No officer of court to have witness fees.

850. Witnesses in Government service allowed actual expenses.

Sec.

851. Witnesses transported on Government or private vessel.

**Sec. 848. [Witnesses' fees.]** For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning. When a witness is subpœnaed in more than one cause between the same parties, at the same court, only one travel fee and one per diem compensation shall be allowed for attendance. Both shall be taxed in the case first disposed of, after which the per diem attendance fee alone shall be taxed in the other cases in the order in which they are disposed of.

When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of one dollar a day. [See §§ 879, 881.](—(26 Feb., 1853, c. 80, s. 3, v. 10, p. 167; 1 May, 1876, c. 88, v. 19, p. 41; Dennis v. Eddy, 12 Blatch., 195.)

Witnesses before naval courts are to be allowed fees and mileage at the rates provided for witnesses in the United States district courts for the State, Territory, or district in which such naval court is held. (Act Feb. 16, 1909, sec. 12, 35 Stat., 622.)

Witness fees allowed for giving depositions for use in Federal courts—see section 870, Revised Statutes.

Witness fees allowed for giving depositions for use in State courts—see section 874, Revised Statutes.

Witness fees allowed for giving depositions for use before departments in pending claims—see section 185, Revised Statutes.

Witnesses in Government employ—see section 850, Revised Statutes.

Witnesses in United States courts in Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, Colorado, Utah, New Mexico, and Arizona are allowed \$3 a day during attendance and necessary travel time; and 15 cents a mile for travel by stage or private conveyance; and 5 cents a mile for other travel. (Act May 27, 1908, sec. 1, 35 Stat., 377.)

Witnesses in courts in District of Columbia are allowed \$1.25 a day and 5 cents a mile coming and returning when summoned from without the District. (Sec. 1114, Code, D. C., act Mar. 3, 1901, 31 Stat., 1367.)

**Courts-martial.**—Section 1202, Revised Statutes, which authorizes judge advocates of Army courts-martial "to issue like process to compel witnesses to appear and testify which courts of criminal jurisdiction within the State, Territory, or District where such military courts shall be ordered to sit, may lawfully

issue," operates to make applicable to such courts-martial the provisions of section 848, Revised Statutes, fixing the amount of fees and mileage of such witnesses before courts of the United States. As there is but one statute upon the subject of witnesses attending in court or before an officer, I feel compelled to hold that the words "in court" are broad enough to include a court-martial, and that the analogy existing between what is exacted of a witness, both in the matter of attendance upon and the giving of testimony, whether in a civil or criminal court on the one hand or in a court-martial on the other, is so great, coupled with the fact that there is but one statute, as above stated, regulating the compensation of witnesses in attendance upon any court or any officer pursuant to law, that I see no way of escape from the conclusion that a witness in attendance upon a court-martial shall be paid the same, and no more than is paid to a witness in attendance upon a civil or criminal court. Since there is a statute regulating the amount of per diem and traveling expenses of a witness in attendance "in court," it seems clear to my mind that that shall be made applicable to cover the compensation of a witness "in a court-martial" rather than leave it to the discretion of even so high an authority as that of the honorable Secretary of War. (1 Comp. Dec., 79. In this case the War Department took the position that the appropriation for compensation of witnesses attending courts-martial is to be expended under the rules and regulations prescribed by the Secretary of War, and the rate of compensation is a matter to be left entirely to the discretion of the Secretary of War. The Comptroller took



the view that there being a statute in force regulating the compensation of witnesses in attendance upon courts and before judges and others authorized to compel their attendance, it was applicable also to a witness compelled by process of law to attend before a court-martial; and accordingly concluded that civilian witnesses duly subpoenaed to attend before a court-martial are entitled only to such compensation as is paid to witnesses in attendance upon United States courts.)

A military commission is not a court-martial. (Dig. Comp. Dec., 89.)

For other cases, see below, "Expert witnesses"; and see note to section 850, Revised Statutes.

**Departmental regulations** govern the use of departmental appropriations, but do not apply to appropriations for expenses of witnesses, which are by law audited by and disbursed upon order of the court. (18 Comp. Dec., 992, citing *U. S. v. Sanborn*, 135 U. S., 271, 284; see also "Courts-martial," above.)

**Fees allowed for Sunday.**—I have not found any case specifically holding that under section 848, Revised Statutes, which provides for compensation to witnesses for attendance in Federal courts, a witness is entitled to a per diem for Sunday when obliged to remain over from one week to another in the hearing of a case. There are cases, however, to that effect in State courts, under State laws similar to section 848. It has also been held that a witness in attendance upon the court, although not actually testifying, is entitled to his per diem compensation for the days which he thus necessarily attends. It would seem, therefore, not improper, when in the discretion of the court or commissioner such action is necessary, to allow a witness his per diem for Sunday under the circumstances stated. (1 Comp. Dec., 252.)

**Witness in two cases.**—A witness who attended under subpoenas on behalf of the United States before the same commissioner on the same day in two cases against different defendants, and was sworn and testified in each case and was allowed a separate per diem therefor in each case for the same day by the commissioner, is entitled to the separate per diem as allowed. (14 Comp. Dec., 378.)

A witness who attends before a United States commissioner in Kentucky in different cases on the same day is entitled under section 848, Revised Statutes, to 5 cents a mile for each mile he actually travels in going from his place of residence to the place of hearing, and 5 cents a mile for returning, but is not entitled to double or constructive mileage. (15 Comp. Dec., 796.)

**Voluntary attendance of witness.**—Where a person voluntarily present at proceedings before a United States commissioner is called upon to testify, he is entitled for his services as such witness to the usual per diem, but not to mileage. (11 Comp. Dec., 792.)

**Amount of fees can not be exceeded.**—Section 848 is mandatory and limits the amount that may be paid to any witness under ordinary circumstances, however much said witness may lose in obeying a summons of a court. Accordingly, held that a Chinese inspector in charge is not entitled to reimbursement for an

amount paid by him to a railroad employee residing within the jurisdiction of the court's process for loss sustained by such employee by reason of his serving as a witness for the Government in Chinese-exclusion cases, for which service such employee received from the Government fees and mileage as provided by section 848. (12 Comp. Dec., 660; see also 6 Op. Atty. Gen., 356.)

**Additional allowance to witness outside of jurisdiction.**—If the Secretary of the Treasury, in the exercise of his discretion, deems it a necessary expense in the enforcement of the Chinese-exclusion acts, the sum of \$68 may be paid from the appropriation for enforcing said acts, to secure the attendance in a Chinese smuggling case of an important witness living in Mexico, who refuses to attend without such payment. (4 Comp. Dec., 106.)

The appropriation for expenses of collecting the revenue from customs is applicable to the compensation and expenses of witnesses under agreements to come within the jurisdiction of the courts, and the expenses incurred by an assistant district attorney in collecting evidence when the testimony of the witnesses and the evidence collected are necessary in proceedings for the forfeiture of goods seized by customs officers. (4 Comp. Dec., 519.)

The Secretary of the Treasury is authorized to enter into an agreement to compensate a witness whose testimony is necessary in the prosecution of a smuggler, for coming within the jurisdiction of the courts, and to reimburse him for the necessary expenses incurred in performing the service. The appropriation for prevention and detection of frauds upon the customs service is applicable to the expenses of procuring evidence to be used in the prosecution of a smuggler. (4 Comp. Dec., 495.)

If the Secretary of Commerce and Labor in the exercise of his discretion deems it a necessary expense in the enforcement of the alien immigration act, the sum of \$3.50 per day may be paid by him from the appropriation for the expenses of regulating immigration to secure the attendance of a witness living in Mexico who refuses to attend unless paid that amount in addition to the witness fee provided for by section 848 of the Revised Statutes. (12 Comp. Dec., 438, citing 4 Comp. Dec., 106.)

A United States commissioner has no authority to issue process to be served outside of his district. Accordingly, a witness attending a hearing before a commissioner in a district other than that of the residence of such witness is entitled to mileage only from a point within the commissioner's district nearest the residence of the witness to the place of the hearing and return therefrom to said point; if the subpoena is issued in such case by a United States court, whose process runs into any other district, the witness would be entitled to mileage for going from his residence to the place of hearing and returning therefrom. (14 Comp. Dec., 752.)

A United States commissioner is not authorized to issue a subpoena for a witness outside of his district, and a witness attending before a commissioner upon a subpoena issued by him is entitled to mileage for travel within his district only. (9 Comp. Dec., 121.)

A subpoena issued under section 4 of the act of January 31, 1903 (32 Stat., 790, relative to depositions for use before registers and receivers of the land office) does not run outside of the county in which the witness resides; and when a witness in obedience to such subpoena testifies in another county, said witness is entitled only to mileage from his residence to the border of the county nearest to the place where the deposition is taken. (17 Comp. Dec., 983.)

**Expense of witness in preparing to testify.**—When it becomes necessary for a witness to proceed from Chicago to New York and return, for the purpose of refreshing his memory before testifying in an antitrust case in Chicago, compensation and expense of travel by such witness may be paid from the appropriation "Enforcement of the Anti-Trust laws, etc., 1912." This preliminary preparation could not have been required of him under his obligation as a witness in the case, and he did not, by reason of this employment, become entitled to the fees and mileage allowed by law to witnesses. He is entitled, however, subject to the Attorney General's approval, to such compensation as may have been agreed upon, whether fixed by reference to fees of witnesses or otherwise. The appropriation for fees of witnesses is clearly not applicable, as it applies only to mileage and attendance in court or before any officer pursuant to law. The expense was incident to the preparation of the case rather than to its trial. (18 Comp. Dec., 541.)

**Expert witnesses.**—A witness is one who may be compelled to testify concerning a transaction which he has fortuitously beheld; an expert is one who testifies as to his own self-acquired knowledge, which he can not be compelled to impart by the expedient of calling him as a witness. (In re Maj. William Smith, 24 Ct. Cls., 209; C. M. O. 19-1915, p. 4.)

The Government can not acquire the services, skill, or knowledge of an expert without his consent and without just compensation. (In re Maj. William Smith, 24 Ct. Cls., 209.)

The employment of experts before a court-martial is within the legal and proper discretion of the Secretary of War, and his order to employ and pay them is official authority to an officer who, in the ordinary discharge of his duty, makes such payments, and protects him from the summary remedy of having his pay stopped. (In re Maj. William Smith, 24 Ct. Cls., 209. As to employment of expert witnesses by accused before naval courts-martial, see note to Constitution, sixth amendment.)

Where a civilian physician was subpoenaed to attend before a naval court of inquiry as an ordinary witness to testify to facts within his knowledge, he is entitled merely to ordinary witness fees, notwithstanding that in the course of his examination his testimony may have developed into the nature of expert testimony. In both civil and military courts, compensation for expert testimony is a matter for determination between the witness and the party calling him for such testimony. In the Navy, if the testimony of an expert, as such, is desired, the question is one which must be submitted in each specific instance to the Navy Department

for its determination as to whether the circumstances warrant the expenditure. In this case, the judge advocate having summoned the claimant as an ordinary witness, and having no authority to summon him for any other purpose, the claim for compensation as an expert witness can not be approved. (File 26276-105, Mar. 16, 1915.)

The compensation of expert witnesses, the expenses of collecting evidence, and the purchase and preparation of exhibits in connection with suits against collectors of customs may, under the long-established practice, be paid from the appropriation made for the expenses of collecting the revenue from customs. (1 Comp. Dec., 249.)

An expert witness summoned to appear before the Board of United States General Appraisers may be allowed, in addition to the ordinary witness fees, such sum as the Secretary of the Treasury may direct, payable from the appropriation for collecting the revenue from customs. (2 Comp. Dec., 449.)

Where the employment of expert witnesses is necessary to properly enforce the pure food and drugs act, the Secretary of Agriculture is authorized to employ and pay such expert witnesses from the appropriations made to carry into effect the provisions of said act. (15 Comp. Dec., 757.)

**Interpreter not witness.**—The expenses of a person who did not attend as a witness in the case, but who was present as an "interpreter," are not chargeable to the appropriation "Fees of witnesses, United States courts," but to the appropriation "Miscellaneous expenses, United States courts," upon the authorization and approval of the Attorney General. (16 Comp. Dec., 92.)

**Increased allowances in certain States.**—The act of August 3, 1892 (27 Stat., 347, superseded by act of May 27, 1908, sec. 1, 35 Stat., 377, noted above), does not apply to witnesses attending before United States commissioners, as such proceedings are not in any court of the United States. (2 Comp. Dec., 66.)

Larger fees and mileage are allowed to witnesses in some districts than in others, because local conditions make the hardships and expense of travel greater. The reason does not apply where the deposition of a witness is taken elsewhere for use in one of the districts where the larger allowance is paid witnesses for testifying therein. The act of January 31, 1903 (32 Stat., 790), relating to compulsory attendance of witnesses before registers and receivers of the land office, provides that when the witness resides outside of the county in which the hearing is held, any party to the proceedings may take his testimony by deposition in the county of his residence, and provides further that such witness "shall receive the same fees and mileage, and be subject to the same penalties in all respects, as in cases of the violation of subpoena to appear before the register or receiver and subject to the same limitations." The act provides that the fees and mileage of witnesses before a register or receiver "shall be the same as that provided by law in the district courts of the United States in the district in which such land offices are situated." *Held*, that a witness whose deposition is taken under



the act of January 31, 1903, for use in a hearing before a register or receiver of the General Land Office is entitled to the fees allowed to witnesses in the United States district court *in the district in which the deposition is taken*. (20 Comp. Dec., 308, overruling 16 Comp. Dec., 153, which held that witnesses residing in New York City, while testifying in the county of their residence by deposition before a commissioner under appointment issued by the authorized officers of the land office in Wyoming, are entitled to \$3 a day, payable in advance if necessary to secure their testimony, this being the amount allowed by the act of May 27, 1908, for witnesses in Wyoming, and the law providing that witnesses in proceedings before registers and receivers shall be entitled to the same fees as provided by law in the district court of the United States in the district in which such land offices are located.)

Such witness, testifying by deposition in Alaska, is entitled to the witness fees allowed in the United States district court in the judicial division of the district of Alaska in which the deposition is taken. (20 Comp. Dec., 308.)

**Witness against the United States.**—As a general rule, when the United States is a party to a suit it is not liable to pay costs incurred by the adverse party, even though such adverse party prevail in the suit, unless there is an affirmative statute clearly making the United States liable therefor. (16 Comp. Dec., 693.)

The act of August 1, 1888 (25 Stat., 357), relating to condemnation proceedings to acquire sites for public buildings, does not imply that the United States should stand upon the same footing in a State as would a quasi public corporation, or other artificial entity with reference to the payment of costs. (16 Comp. Dec., 693.)

**Sec. 849. [No officer of court to have witness fees.]** No officer of the United States courts, in any State or Territory, or in the District of Columbia, shall be entitled to witness fees for attending before any court or commissioner where he is officiating.—(16 Aug., 1856, c. 124, s. 8, v. 11, p. 50. 21 July, 1852, c. 66, s. 1, v. 10, p. 16, (22).)

**Sec. 850. [Witnesses in Government service allowed actual expenses.]** When any clerk or other officer of the United States is sent away from his place of business as a witness for the Government, his necessary expenses, stated in items and sworn to, in going, returning, and attendance on the court, shall be audited and paid; but no mileage, or other compensation in addition to his salary, shall in any case be allowed.—(26 Feb., 1853, c. 80, s. 3, v. 10, pp. 167, 168.)

Witness fees in general—see note to section 848, Revised Statutes.

**Expenses of subsistence limited to \$5 per day.** (Act Apr. 6, 1914, 38 Stat., 318; 22 Comp. Dec., 484.)

- I. WHAT PERSONS INCLUDED.
- II. WITNESS FOR THE GOVERNMENT.
- III. NATURE OF PROCEEDINGS.
- IV. CHARACTER OF EXPENSES ALLOWED.
- V. APPROPRIATION FROM WHICH PAID.

When the defendant in condemnation proceedings has incurred expenses in procuring the attendance of witnesses upon the day set for trial, and the case was on said day continued upon motion of the district attorney and was subsequently dismissed at the request of the Government, and there is no Federal or State statute clearly authorizing the taxing of defendant's costs against the Government or their payment by the Government, such expenses are not legally payable from Government funds. (16 Comp. Dec., 693.)

When land has been condemned and the court in rendering judgment includes in said judgment or award certain costs, such judgment including the costs, would be a legal charge against the appropriation to acquire the site when the payment of the judgment was made a condition precedent to vesting title in the Government. (16 Comp. Dec., 693.)

Nothing said in the above decision is intended to relieve the judicial appropriations from the payment of fees to witnesses subpoenaed by and for the United States, and who attend court as witnesses for the Government in condemnation proceedings, when such witnesses are paid by the marshal upon order of the court. (16 Comp. Dec., 693.)

For other cases, see "Courts-martial," under section 850, Revised Statutes, "II. Witnesses for the Government."

**Appropriation from which paid.**—A witness summoned to appear before the board of United States General Appraisers is entitled to the allowances for witnesses prescribed in section 848, Revised Statutes, payable from the appropriation for collecting the revenue from customs. (2 Comp. Dec., 449.)

For other cases, see decisions noted above under this section; and see note to section 850, Revised Statutes, under "V. Appropriation from which Paid."

#### I. WHAT PERSONS INCLUDED.

**The words "clerk or other officer"** must be construed in the broad sense of "official," and includes an employee. (9 Comp. Dec., 276; 17 Comp. Dec., 586; 22 Comp. Dec., 126.)

The word "officer" in this section has been construed in the broad sense of "official" and includes an employee. (18 Comp. Dec., 896, citing 5 Comp. Dec., 797; 9 Comp. Dec., 276; 17 Comp. Dec., 584.)

A department clerk when subpoenaed to testify on behalf of the United States has no right to witness fees, but his expenses are allowable. (21 Op. Atty. Gen., 263.)

See below, "Persons in Army and Navy."

**Waiver of salary.**—An officer or employee for whom a salary is provided by law can not, by relinquishing his salary, become entitled to fees or mileage as a witness for the Government. (9 Comp. Dec., 276.)

**Persons in Army and Navy.**—An officer of the Navy who travels to testify as a witness for the Government is entitled, under this section, to his actual and necessary expenses only, notwithstanding that such officer may have been ordered by his superior officer to travel for that purpose. (19 Comp. Dec., 752, citing 4 Comp. Dec., 147; but see below, "Courts-martial," under "III. Nature of Proceedings.")

These general statutes regulate the fees for attendance as witnesses before civil courts, and the compensation to Army and Navy officers for attendance as witnesses before such courts must conform to them, whether the attendance is in obedience to a subpoena or to an order from the head of their department. (10 Comp. Dec., 55, citing 4 Comp. Dec., 146, and Dig. Sec. Comp., vol. 2, sec. 1211.)

This section is found under the title of "The Judiciary" in the Revised Statutes, and undoubtedly applies to clerks and officers of the United States who are witnesses before the Federal civil courts. (Comp. Dec. Apr. 14, 1914, file 26254-1476:1.)

"The word 'officer' in this section is to receive a liberal construction. It does not import an officer as distinguished from a soldier, but any person who is an employee or is in the service of the United States, in however humble a capacity." (16 Op. Atty. Gen., 113, holding that Army officers and enlisted men who appear as witnesses for the Government before any court of the United States are entitled to receive their necessary expenses in going, returning, and attendance on the court, and are not entitled to any mileage or witness fees; see also 15 Op. Atty. Gen., 486; 16 Op. Atty. Gen., 147; 17 Comp. Dec., 584.)

**Retired officers.**—A retired Army officer who is called to testify before a civil court as a witness for the United States is entitled to lawful fees as a witness and not to actual expenses as provided by section 850 of the Revised Statutes. (19 Comp. Dec., 966, following 10 Comp. Dec., 51, holding that retired officers are not within the purview of section 850 because not subject to orders to testify as witnesses. In this connection, see act of August 22, 1912, 37 Stat., 329, providing that retired officers of the Navy and Marine Corps may, with their consent, be ordered to any active duty at sea or on shore. And see below, "Courts-martial," under "III. Nature of Proceedings.")

**A Naval Militia member subpoenaed as a witness before a naval court-martial when his organization is not in the service of the United States is in the status of a civilian witness, not in Government employ, and he is entitled to fees and mileage accordingly.** (File 26251-10968:9, Dec. 1, 1915; 26276-119, Dec. 22, 1915. See below, "Courts-martial," under "III. Nature of Proceedings.")

**United States Senators.**—The provision in section 850, Revised Statutes, does not apply to Senators of the United States. To fall within its terms the clerk or officer must have a place of business and be sent away therefrom, indicating very clearly that class of officials who occupy subordinate positions and are subject to the control and direction of their superior officers. It is hardly necessary to add that United States Senators are not of this class. Such witnesses are accordingly entitled to the compensation fixed by section 848, Revised Statutes. (7 Comp. Dec., 764. As to compulsory attendance of Senators and Representatives as witnesses in judicial proceedings, see note to Constitution, Art. I, sec. 6, clause 1.)

**Federal prisoners.**—A person in custody awaiting trial for an alleged offense who attended before a United States commissioner as a witness is entitled to the fee provided by law for such attendance. He is not, however, entitled to mileage for at least two reasons: First, the Government necessarily bears the expenses of his transportation, if there are such, from the jail to the place where he testifies; second, the jail can not be said to be his place of residence. (6 Comp. Dec., 588.)

However, where a person in custody has been convicted of crime, has forfeited his residence, and his time and services belong to the Government, which is charged with his care and support while imprisoned in a penitentiary or jail, per diem for attendance and mileage are not allowable. (6 Comp. Dec., 588.)

If a convicted person were called upon to testify in a civil suit, the Government would be entitled to charge for and collect, as against the person subpoenaing him as a witness, a per diem on account thereof, as his services belong to the Government. (6 Comp. Dec., 588.)

**Temporary employee.**—A temporary mail weigher is an employee of the United States, and if said mail weigher is subpoenaed to testify in a United States district court on behalf of the Government, he is entitled to be paid his actual and necessary expenses in addition to his regular compensation as mail weigher, while going to, returning from, and attendance on the court. (18 Comp. Dec., 896.)

A person who has been paid \$3 for a day's service as bailiff under a United States marshal, is not entitled to the statutory fee of \$1.50 for his attendance as a witness for the Government before a United States commissioner on the same day. After adjournment of the court, he was summoned and attended as a witness before the commissioner. However, the per diem allowed him as bailiff covered his time and services as bailiff for an entire day, and the adjournment of the court did not release him from liability to serve for the remainder of the day for which he was paid. (22 Comp. Dec., 126.)

**Private clerk of Government official.**—"The theory of the statute manifestly is that where the Government is entitled to an officer's time, the diversion of it from his official routine to attend in court as a witness in its behalf shall not entitle him to dual compensation. The court does not overlook the fact that a marshal's clerk is appointed by him and that his compensation is conditional and dependent upon



the fees and emoluments of the marshal's office \* \* \*; but nevertheless the service is rendered for the government, the expense is additional to the marshal's compensation, and the money with which the clerk is paid is the money of the Government and would otherwise go into the Treasury. The marshal, therefore, is not the employer but the appointing power, and his chief clerk is as much an employee of the Government as is the private secretary of the President." (*Duval v. U. S.*, 23 Ct. Cls., 102; 17 Comp. Dec., 584.)

A person employed by a postmaster, who receives a fixed salary without any allowance for clerk hire, and who himself pays such person as his deputy, is not a "clerk or officer of the United States" within the meaning of this section. (*In re Waller*, 49 Fed. Rep., 271.)

**District of Columbia employee.**—Officers and employees of the District of Columbia are not officers or employees of the United States within the meaning of this section; they are accordingly entitled to the fees allowed by law to other witnesses, unless it is a part of their official duty under their appointments to attend and testify in proceedings of the character involved. (18 Comp. Dec., 382, citing 17 Comp. Dec., 153.)

## II. WITNESS FOR THE GOVERNMENT.

**No testimony given.**—An officer of the Navy was ordered to "proceed to Norfolk, Va., and on December 27, 1912, confer with the district attorney. Upon the completion of this conference report to the commandant of the navy yard for temporary duty as witness before a court of inquiry at the station under his command." The Auditor for the Navy Department held that the travel involved was primarily performed in order that claimant might testify on behalf of the Government in the United States Court for the Eastern District of Virginia. This ruling was reversed by the Comptroller of the Treasury, who decided that there was nothing in the orders in question to direct the officer to appear as a witness in the United States District Court for the Eastern District of Virginia, and the officer stated that he did not so appear. Accordingly, held that the officer was entitled to mileage for the travel in question, and that section 850, Revised Statutes, was not applicable thereto. (Comp. Dec. Apr. 14, 1914, file 26254-1476:1; see below, "Courts-martial," under "III. Nature of Proceedings.")

An officer of the Navy ordered to perform travel in order that he might be present to testify, if needed, in a suit to which the Government was not a party, but in which it had sufficient interest to make it necessary, or at least advisable, in the opinion of the Secretary of the Navy, for the officer to be present, could not be considered as a witness for the Government within the meaning of section 850, Revised Statutes. In performing the travel in question appellant should be regarded as traveling on public business under orders of the Secretary of the Navy, and entitled to mileage accordingly. (Comp. Dec., July 28, 1915, 173 S. and A. Memo., 3729.)

**Identifying party under charges.**—A clerk in the Navy Department who performed

travel to New York City, at the request of the police department of the District of Columbia, for the purpose of identifying and securing the arrest of a party wanted for trial in the District of Columbia upon charges of larceny and bigamy, was not in the status of a witness for the Government during her absence from duty for the purpose stated. (File 4488-61, June 24, 1911.)

**Witness for private party.**—When subpoenaed by a private party a department clerk may demand and accept witness fees. (21 Op. Atty. Gen., 263.)

A naval officer giving expert testimony in a suit between private parties may receive compensation therefor at the usual rates, in accordance with his agreement with the party for whom he appeared. (File 1981-1900; see also file 6053, Oct. 30, 1906; and file 26276-125, Nov. 22, 1915.)

An employee of the Navy Department who attends court as a witness otherwise than as a witness for the Government is not entitled to draw salary during the period absent from work, unless such absence is charged to his annual leave. (File 6036-2, Apr. 5, 1907.)

**Witness against the Government.**—Where a naval constructor appeared as a witness in behalf of the defendant, the complainant being the United States, he was informed that there appeared from the facts stated to be no reason why he should not accept "ordinary mileage and attendance fees." (File 4565-4, Oct. 23, 1906.)

**Courts-martial.**—This section clearly recognizes the fact that persons in the employ of the Government may be called upon to testify before the courts in matters not necessarily connected with the service for which they are paid, and that their salaries shall continue while so absent from their regular duties. Since no distinction is made in military courts between payment of witnesses, whether for or against the Government, it must be held that they are equally entitled to their salaries while in attendance before a military court, if they were acting under proper orders, although they appeared as witnesses for the accused. Their attendance was required at this court-martial by proper subpoena issued by the judge advocate of the court. It was requested by the Secretary of War in a letter addressed to the Secretary of State. The Secretary of State ordered them, through the proper channels, to attend the trial and at the same time directed that they be retained in the employ of the Government and receive their compensation during their attendance. Accordingly, held that they were entitled to their salaries until the time they were discharged from attendance upon the court-martial, and that the same should be paid from the appropriations for their regular duties with the Nicaragua Canal Commission. (5 Comp. Dec., 797.)

## III. NATURE OF PROCEEDINGS.

**Courts-martial.**—Civilian employees of the United States subpoenaed on behalf of the Government as witnesses before naval courts are not entitled to mileage or per diem as witnesses, but to their regular salaries and actual and necessary expenses only, their rights being con-

trolled by section 850 of the Revised Statutes. (14 Comp. Dec., 143; see also, 1 Comp. Dec., 79, noted under sec. 848, R. S.)

A per diem employee of a navy yard is entitled to his actual and necessary expenses while attending under orders as a witness before a court of inquiry and while going to and returning from the court. (8 Comp. Dec., 211.)

This section does not apply to military officers when witnesses before military courts; it appears under the title of "The Judiciary," in the Revised Statutes, and undoubtedly applies to clerks and officers of the United States when witnesses before the Federal civil courts; accordingly, held that an officer of the Navy is entitled to mileage for travel performed under orders for the purpose of appearing as a witness before a naval court of inquiry. (Comp. Dec. Apr. 14, 1914, file 26254-1476:1; see above, "No testimony given," under "II. Witness for the Government.")

A contract surgeon in the Army who is directed by special orders to attend as a witness before a general court-martial by which he had been duly summoned is not entitled to reimbursement of expenses as a civilian employee of the Government, but is limited to the mileage allowance payable to commissioned officers traveling under orders. (9 Comp. Dec., 461.)

Section 850, Revised Statutes, has never, so far as I am aware, been applied in fixing the compensation of officers of the Army and Navy on the active list for attendance as witnesses before general courts-martial, when in attendance in obedience to orders; and I know of no reason why it should apply in the case of a retired officer if it does not apply to an officer on the active list. The retired officer has no place of business to be sent away from, within the meaning of that section, and he is not an officer subject to be ordered to such duty, and is not, therefore, within the purview of the said section. (10 Comp. Dec., 55, citing 7 Comp. Dec., 764.)

A retired officer of the Army is not entitled to commutation of quarters while in attendance as a witness before a general court-martial, but he is entitled to the per diem compensation and mileage provided for civilian witnesses not in the employ of the Government. (10 Comp. Dec., 51.)

A summons to a retired officer of the Navy to attend as a witness before a general court-martial does not place him on active duty, and he is not, therefore, entitled to the difference between active duty and retired pay in consequence thereof. (5 Comp. Dec., 244. At the time this decision was rendered retired officers of the Navy could not be ordered to active duty except in time of war; accordingly, it had been held by the accounting officers (Dig. Sec. Comp. Dec., vol. 2, sec. 1211) that in time of peace officers on the retired list of the Navy while attending upon courts-martial as witnesses were not entitled to active-duty pay. This case arose in time of war, but it was held that the effect of an ordinary summons to attend as a witness before a court-martial in time of war, even though approved by the Secretary of the Navy, did not place the officer in any different position than he would have occupied had the summons been issued and the travel performed in time of peace. An order which

places a retired naval officer upon duty in time of war should clearly express such intention, and no such intention can properly be imputed in the case of an ordinary summons to attend as a witness, approved by the Secretary of the Navy after it is issued. The existing law, act of Aug. 22, 1912, 37 Stat., 329, provides that retired officers of the Navy and Marine Corps may, with their consent, be ordered to any active duty at sea or on shore.)

A member of the Naval Militia subpoenaed as a witness before a naval court-martial is not thereby called into the service of the United States under the provisions of the Constitution (Art. I, sec. 8, clause 15) and the Naval Militia Act of Feb. 16, 1914, sec. 3 (38 Stat., 284). He is not, therefore, by virtue of such subpoena entitled to the pay and allowances provided for the Naval Militia when called into the service of the United States. (File 26276-119:3, Jan. 26, 1916.)

See cases noted above, under "I. What Persons Included."

In courts-martial the United States pays not only its own witnesses but the witnesses of the accused; accordingly, while section 850 refers directly to witnesses for the Government, the fact that all witnesses before military courts are paid by the Government bring the latter within the spirit of this section. (5 Comp. Dec., 802. See note to Constitution, sixth amendment, as to compulsory process for obtaining witnesses in behalf of the accused before naval courts-martial.)

**District of Columbia courts.**—Salaried employees of the Government are not entitled, under the provisions of section 850 of the Revised Statutes, to witness fees for attendance as witnesses on behalf of the United States before a United States grand jury in the District of Columbia. Accordingly, held that a clerk in the Treasury Department at Washington, D. C., is not legally entitled to witness fees, either per diem or mileage, for her attendance before the United States grand jury, Supreme Court of the District of Columbia, as a witness on behalf of the United States. (17 Comp. Dec., 282.)

Salaried officers or employees of the United States who attend before the Supreme Court of the District of Columbia as witnesses for the Government are not entitled to the compensation provided by law for witnesses who are not such officers or employees. (18 Comp. Dec., 382, citing 17 Comp. Dec., 282; see above, "Identifying party under charges," under "II. Witness for the Government.")

**State courts.**—The actual expenses of officers of the Army in attending, by authority of the Secretary of War, upon a State court as witnesses for the United States in a case in which the United States is a party, may be paid from the appropriation for contingent expenses of the War Department. (12 Comp. Dec., 649; see above, "No testimony given," under "II. Witness for the Government.")

**Extradition proceedings before commissioner.**—An employee of the Government is not entitled to mileage and fees, but only to actual and necessary expenses, for attendance as a witness before a United States commissioner in extradition proceedings instituted in the name of the United States. (11 Comp. Dec., 665.)



**Justice of the peace.**—This section applies to payment of witnesses in attendance upon a preliminary hearing before a justice of the peace. (16 Comp. Dec., 92.)

**Civil Service Commission.**—A civil-service employee of the War Department on duty in the ordnance office at Frankford Arsenal, Philadelphia, Pa., who appears as a witness before the Civil Service Commission in obedience to a duly authorized summons of the commission under Civil Service Rule XIV approved by the President, should, while going to, attending on, and returning from the commission be treated as in a duty status, and as in the performance of duty under his employment, and should be paid accordingly from the appropriation for the ordnance service. (18 Comp. Dec., 135.)

#### IV. CHARACTER OF EXPENSES ALLOWED.

**Employment of a substitute.**—The necessary expenses of travel, board, and lodging of salaried employees of the Government attending a United States court or before a United States commissioner as witnesses on behalf of the Government, are usually payable, under section 850 of the Revised Statutes, from the appropriation for "Fees of witnesses, United States courts"; but there is no provision for the payment of the hire of a substitute whom it may be necessary to engage by reason of the salaried employee's absence. (16 Comp. Dec., 630.)

Section 850, Revised Statutes, does not authorize the payment to a consul of an amount paid by him as compensation to his vice consul while in charge of the consulate during the absence of the consul as such witness. (9 Comp. Dec., 521.)

This section provides for the ordinary and usual expenses of the witness, and does not include the loss of salary because of such absence. The items of expense of such a witness are his necessary traveling expenses in going and returning, and his necessary expenses while in attendance upon the court. (9 Comp. Dec., 521.)

**Leave of absence.**—A per diem employee of a navy yard is entitled to his compensation as such per diem employee, and actual expenses while attending under orders a court of inquiry as a witness, and while going to and returning from the court; and the time he is so absent from his employment is not to be deducted from the time for which he may be granted leave of absence. (8 Comp. Dec., 211.)

Employees of the Navy Department attending as witnesses for the Government, as to leave to which they may be entitled by law, are in the same status as if they had been actually at work at their regular place of work and had not been absent as such witnesses. (17 Comp. Dec., 584.)

Employees of the Navy Department who attend court as witnesses otherwise than as witnesses for the Government are not entitled to draw salary during the period absent from work unless charged to annual leave. (File 6036-2, Apr. 5, 1907. But see 5 Comp. Dec., 797, noted below, as to witnesses for accused in court-martial cases.)

An employee of the Navy Department absent from duty at the request of the police

department of the District of Columbia, for the purpose of identifying and securing the arrest of a person in New York wanted for trial in the District for larceny and bigamy, is not within the purview of the decision of the Comptroller which treats employees of the Government as in a duty status when in attendance as witnesses for the Government in Federal courts. The absence from duty in such case should, therefore, be charged to the employee's leave. (File 4488-61, June 23, 1911.)

An employee of the War Department should be treated as in a duty status while going to, attending on, and returning from an inquiry by the Civil Service Commission in obedience to a subpoena issued by the commission. (18 Comp. Dec., 135.)

Civilian employees of the State Department appearing before an Army court-martial, in obedience to a subpoena issued by the judge advocate of the court and proper orders issued by the Secretary of State upon request of the Secretary of War, should be treated as in a duty status, notwithstanding that they were subpoenaed as witnesses against the Government and for the accused. (5 Comp. Dec., 797.)

While attending as a witness for the Government in a United States district court, an employee was performing a service for and on behalf of the Government other than the service required under his appointment, and such compulsory absence would not have the effect of relieving him of his pay status for the reason that during that time he is to be regarded as in the performance of duty under his employment and therefore should be paid his regular compensation in addition to his actual and necessary expenses. (18 Comp. Dec., 896.)

**Witness outside jurisdiction.**—Where an office deputy marshal attends as a witness before a United States commissioner in a district other than his own, the allowance of his expenses of subsistence is a matter within the discretion of the commissioner, unlimited by the statutory maximum fixed for deputy marshals. (19 Comp. Dec., 91.)

A deputy collector of internal revenue is entitled to all necessary and lawful expenses incurred in attending a hearing before a United States commissioner pursuant to the subpoena of said commissioner, although the hearing is held in a district other than that of the deputy collector's residence. (20 Comp. Dec., 195.)

It has been held that a witness from another district attending before a commissioner upon a subpoena issued by the commissioner, is not entitled to the mileage provided by section 848, Revised Statutes, for travel outside of the commissioner's district. (9 Comp. Dec., 121.) This ruling does not apply to officers or employees of the Government whose official duty it is to testify in behalf of the Government and who are bound to attend for that purpose whether in the district in which they reside or elsewhere. Such officer or employee is entitled to his necessary expenses in going, returning, and attending, when sent away from his place of business as a witness for the Government. (20 Comp. Dec., 195.)

See, in this connection, note to section 848, Revised Statutes, relative to expense of bringing witnesses within jurisdiction of the court.

## V. APPROPRIATION FROM WHICH PAID.

**Judiciary appropriation.**—The necessary expenses of travel, board, and lodging of salaried employees of the Government attending a United States court or before a United States commissioner as witnesses on behalf of the Government are usually payable, under section 850, Revised Statutes, from the appropriation for "Fees of witnesses, United States courts." (16 Comp. Dec., 630.)

In 12 Comp. Dec., 391, it was held that the expenses of officers of the United States incurred in going, returning, and in attendance on courts when sent away from the usual place of the performance of their duties as witnesses for the Government are payable from the appropriate fund of the department from which they are sent, and not from the judicial appropriation for fees of witnesses. However, this decision is published with a footnote, stating that since it was rendered it had been discovered that the decision therein relied upon had been overruled by the Supreme Court of the United States. Hence, the necessary expenses of a clerk sent away as a witness for the Government should be audited by the court, taxed as witness fees, and paid in full from the proper judicial appropriation.

The auditing contemplated by section 850 must be done, primarily, in the court in which the case is pending and where it can best be determined what expenses have been necessarily incurred by the witness. It was not intended by section 850 to deny to the Government the right, when successful in a suit, to have even the necessary expenses of witnesses of the class described in that section included in the judgment for costs, nor did the United States intend to remit to its defeated adversary not only witness fees for per diem and mileage, but the necessary expenses of witnesses who happened to be in its employment and whom it sent away from their place of business to testify in its behalf. As a person of that class receives while absent his stipulated salary and is paid in that way for his time, it is not deemed just that he should also receive mileage and per diem; but, instead thereof, he is allowed his necessary expenses, which, being audited by or under the direction of the court upon which he attends as a witness, he is entitled to have paid to him, and the Government, being under an obligation to pay them, is entitled to have the amount so audited included in its bill of costs and in any judgments rendered in its favor. In other words, when the Government is successful in a suit, the "necessary expenses" of its witnesses of the class described in section 850 take the place in its bill of costs of the per diem and mileage which, but for that section, would have been taxed and allowed in its favor. (*U. S. v. Sanborn*, 135 U. S., 271.)

Necessary expenses of soldiers as witnesses for the Government allowed under this section may be paid by marshals upon proper proof thereof. (16 Op. Atty. Gen., 147.) [Enlisted men detained by a United States marshal as witnesses, and by him paid \$1.70 per day, are not entitled to rations during the period they were absent from their ship. (File 1098-94.)]

Where a trustee in bankruptcy is called to testify as an expert witness in a criminal prosecution, growing out of transactions in connection with the bankrupt estate, the act of August 24, 1912 (37 Stat., 462), prohibits the payment to him of any compensation whatever for services as such expert from the appropriation "Miscellaneous expenses, United States courts, 1913." (19 Comp. Dec., 395.)

**Other appropriations available.**—"Attention is invited to the fact that while section 850, Revised Statutes, allows a clerk or officer his actual expenses when sent away from his place of business, it does not provide that such expenses shall be paid from the judiciary appropriations. On the contrary, the inference is that such expenses will be paid from whatever appropriation is applicable." (5 Comp. Dec., 2.)

**Naval appropriation.**—The claim of an enlisted man of the Army for reimbursement of expenses incurred in complying with a subpoena issued by a naval court-martial is a proper charge against the naval appropriation, "Pay, miscellaneous." (File 26276-14.)

"Expenses of courts-martial, prisoners and prisons, and courts of inquiry, boards of inspection, examining boards, with clerks' and witnesses' fees, and traveling expenses and costs," are appropriated for each year in the naval appropriation act under the heading, "Pay, miscellaneous." (See, for example, naval appropriation act Mar. 3, 1915, 38 Stat., 929.)

**Appropriation for department where witness is employed.**—If an officer of the Government attends upon the United States courts, or before United States commissioners, in his official capacity, in connection with the examination or trial of persons charged with violations of certain laws relating to the work of his department, and it is his duty under the laws or regulations governing his appointment, to aid in the prevention, detection, suppression, punishment, or prosecution of such violators or offenses, then his proper actual traveling expenses, incurred by reason of his attendance upon such examination or trial, are properly chargeable to the appropriation out of which his ordinary traveling expenses are usually paid, notwithstanding the fact that he may be called and testify in the case as a witness; but when a salaried government employee is subpoenaed as a witness and he so attends otherwise than as above stated, he is entitled to reimbursement of his actual expenses by the marshal from the appropriation "Fees of witnesses, United States courts." (15 Comp. Dec., 298.)

As early as January 4, 1879, the Attorney General issued a circular, section 2 of which is as follows: "2. That section 850 is regarded by this department as not extending to officers or employees of the government for whose necessary expenses while traveling to and from court, and also during their attendance thereon, provision is otherwise made by Congress. Within this category, it is believed, come the special agents of the Post-Office Department, the special agents of the Pension Office, the special agents of the Treasury Department, Internal Revenue agents, and Secret Service operatives under the control of the Treasury Department, [see below, "Special laws govern-



ing use of appropriations"] especially when called as witness for the Government in those cases wherein they are employed by direction of their respective bureaus or departments. These agents and operatives (in addition to certain salaries or per diem paid them as compensation for their services) are understood to receive allowances for traveling and other incidental expenses, incurred while in the discharge of their duties, out of appropriations specially providing for these objects. Section 850 does not comprehend expenses for which Congress has thus specially provided. District attorneys and marshals are instructed, in dealing with the claims of witnesses under section 850, to act in conformity hereto. They are directed, before allowing or paying under that section any officer or employee of the United States who has been subpoenaed as a witness for the Government his necessary expenses for travel and attendance on court, to require from the claimant a declaration, to be inserted in and made a part of the affidavit to his account, that he has not received, and is not entitled by the regulations of the bureau or department in whose service he is or was employed, to claim or receive, and will not claim, from such bureau or department, any allowance whatever for those expenses." (5 Comp. Dec., 2.)

The Comptroller of the Treasury concurs in the opinion of the Attorney General that section 850, Revised Statutes, "does not comprehend expenses for which Congress has thus specially provided." (5 Comp. Dec., 2, affirming 4 Comp. Dec., 649.)

The actual expenses of a salaried officer of the Government who testifies as a witness for the Government may be paid in either of two ways, according to the nature of his employment and the character of the testimony given. (18 Comp. Dec., 992, citing 16 Comp. Dec., 411.)

In order to relieve the appropriation, "Fees of witnesses, United States courts," from the payment of the expenses of officers, employees or agents of the Government while in attendance as witnesses, two things must concur: First, it must be the actual duty of such officers, employees or agents who are called as witnesses before a commissioner, grand jury or court, to investigate the facts upon which the proceedings are based, and to appear in their official capacity to testify as to the facts so acquired; and, second, there must be an appropriation controlled by that particular department of the Government, under which such officers, employees or agents are serving, applicable to the payment of such expenses. (16 Comp. Dec., 411.)

Where Government employees are required to attend the sessions of a court in the discharge of their official duties, testimony given by them is incidental to such official attendance, whether subpoenaed as witnesses or not, and their expenses incurred thereby are not payable from the appropriation for "Fees of witnesses," but are a charge against the proper appropriation for their department. (14 Comp. Dec., 80.)

Where it is the duty of an officer, either under law or rule or regulation, to aid in the detection, prosecution, and punishment of a certain class of offenders, he is not entitled to his expenses from the appropriation for witnesses, his attend-

ance being incidental to the performance of his duties and the expenses thereof being chargeable to the appropriation of his department. (14 Comp. Dec., 113; 14 Comp. Dec., 80.)

Where inspectors who are employed under appropriations to carry into effect the pure food and drugs act attend as witnesses for the prosecution of offenses under said act, based on facts certified to the district attorney by the Secretary of Agriculture, they should be considered as attending in their official capacity unless they are called to give evidence of facts not found by them in the discharge of their duties as inspectors, and while in attendance in their official capacity their actual and necessary traveling expenses should be paid from appropriations under the Department of Agriculture. (15 Comp. Dec., 757.)

The actual, necessary expenses of customs officers, while attending as witnesses before a United States commissioner, grand jury, or district court, to testify on behalf of the Government as a result of knowledge gained by them in the discharge of their official duties, are payable from the appropriation for "Collecting the revenue from customs." It is the duty of the customs officer in the cases now under consideration to attend before the commissioner or upon the court, and when so attending he is not present as an ordinary witness (in obedience to a subpoena and for no other reason), but is present in his capacity as a customs officer to aid in the detection, prevention, and suppression of violations of the customs laws and in the discharge of duties for which he is appointed. His presence in the character of a witness in a case wherein he made the seizure and arrest must be regarded as incidental to the real purpose for which he is present, and expenses incurred in attending such hearing or trial should be considered as incurred in his official capacity as a customs officer and in the interests of the customs service; accordingly, such expenses, actually and necessarily incurred under the proper departmental regulations, are payable from the appropriation out of which his other expenses incurred in the line of his duty are paid. (15 Comp. Dec., 154.)

The attendance of a naturalization examiner before a United States commissioner in a hearing of a case upon a warrant sworn out by him for a violation of the naturalization laws, and his subsequent attendance before a grand jury relative to the same case for the purpose of having the defendant indicted for such violation, are a part of his official duties and whether he was subpoenaed or not testimony given by him at such hearing or before the grand jury, as a result of knowledge gained by him in the discharge of his official duties, was only incidental thereto and his expenses incurred thereby, within the limits of his appointment, are payable from the appropriation for "Pay of assistant attorneys in naturalization cases," and not from the judicial appropriation for fees of witnesses. (14 Comp. Dec., 516.)

The law makes it a part of the duty of a special examiner to aid in the prosecution of persons violating the pension laws. He therefore appears as a witness in such cases as an official duty. Accordingly, held that the ap-

appropriation for examiners in the Bureau of Pensions is exclusively applicable to the expenses of such examiners for attendance upon court as witnesses, there being no provision in that appropriation that no part thereof shall be used in defraying such expenses, such as appears in some appropriations for other departments. (5 Comp. Dec., 2.)

In the matter of the appropriations chargeable with the traveling expenses incurred by salaried employees of the Government by reason of their attendance upon a trial or examination before a United States court or a United States commissioner, the Comptroller of the Treasury can not undertake to determine the exact status of such employees and the nature of the trial or examination in each and every one of the cases which arise. (15 Comp. Dec., 298.)

The payment of expenses of a witness in the Government service should be governed by the rule laid down in 15 Comp. Dec., 298 (above noted). Whether said witness attended in his official capacity as an officer, or as an ordinary witness, is unknown to the comptroller, and it is the duty of the marshal to develop the facts and apply the rule to such facts when definitely ascertained. (16 Comp. Dec., 92.)

Expenditures incurred by a departmental clerk in obeying a subpoena issued by a district court of the United States are properly chargeable to the appropriation "Fees of witnesses, United States courts," when it is shown that said clerk was summoned for no other purpose than that of an ordinary witness. The subpoena in this case was addressed to the Chief of the Division of Naturalization, Department of Commerce and Labor, Washington, D. C., and was issued for the purpose of securing the production before the grand jury of a certain "duplicate declaration of intention" on file in the department; a clerk of class 4 in the department at Washington was directed to attend in answer to this subpoena, which he did and in so doing incurred the expenses in question. It does not appear that said clerk officially

investigated or found out and developed the facts upon which the case before the grand jury was predicated, or that it was his official duty under the law or regulations to aid in the prosecution of the case. In fact, there is nothing to show that this departmental clerk attended otherwise than in the character of an ordinary witness under section 850 Revised Statutes. (16 Comp. Dec., 672.)

**Special laws governing use of appropriations.**—The principle announced in previous decisions (4 Comp. Dec., 649; 5 Comp. Dec., 2; 14 Comp. Dec., 80; 14 Comp. Dec., 516; 15 Comp. Dec., 154; 15 Comp. Dec., 298, all above noted) is correct and should be adhered to in determining the particular appropriation chargeable with the expenses of employees in attendance upon the United States courts whose duties under their appointments or under the law involve aiding in the detection, prevention, prosecution or suppression of violations of certain laws, except in cases where Congress has seen fit to exempt any class of employees from the operation of such rule by special legislation. (15 Comp. Dec., 594.)

By act of May 22, 1908 (35 Stat., 207) an exemption was made with reference to officers of the Internal Revenue Service, and similar provisions have been enacted with reference to Secret Service employees. Accordingly, *held* that, "in view of the provisions of the act of May 22, 1908, the actual and necessary expenses of a deputy collector of internal revenue, under section 850 of the Revised Statutes, incurred by reason of his attendance as a witness on behalf of the United States before the grand jury in obedience to a subpoena issued by the United States district court are payable from the appropriation "Fees of witnesses, United States courts." (15 Comp. Dec., 594; *followed*, 16 Comp. Dec., 838, and 20 Comp. Dec., 195, with reference to expenses of attendance as witnesses before United States commissioners in obedience to subpoenas.)

**Sec. 851. [Witnesses transported on Government or private vessel.]** There shall be paid to each seaman or other person who is sent to the United States from any foreign port, station, sea, or ocean, by any United States minister, chargé d'affaires, consul, captain, or commander, to give testimony in any criminal case depending in any court of the United States, such compensation, exclusive of subsistence and transportation, as such court may adjudge to be proper, not exceeding one dollar for each day necessarily employed in such voyage, and in arriving at the place of examination or trial. In fixing such compensation, the court shall take into consideration the condition of said seaman or witness, and whether his voyage has been broken up, to his injury, by his being sent to the United States.

When such seaman or person is transported in an armed vessel of the United States no charge for subsistence or transportation shall be allowed. When he is transported in any other vessel, the compensation for his transportation and subsistence, not exceeding in any case fifty cents a day, may be fixed by the court, and shall be paid to the captain of said vessel accordingly.—(26 Feb., 1853, c. 80, s. 3, v. 10, p. 168.)



## CHAPTER SEVENTEEN.

### EVIDENCE.

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| <p>Sec.<br/>             859. Evidence in criminal proceedings.<br/>             868. Depositions for use in Federal courts.<br/>             869. Compelling production of records before commissioner appointed to take depositions.<br/>             870. Fees of witness before commissioner to be paid in advance.<br/>             871. Depositions for use in State courts.<br/>             872. Depositions when no commission issued.<br/>             873. Manner of taking and transmitting depositions.<br/>             874. Witness fees allowed for giving depositions.<br/>             877. Witnesses; form of subpoena.</p> | <p>Sec.<br/>             879. Imprisonment or recognizance of witnesses.<br/>             881. Confinement of witnesses at any time to insure appearance.<br/>             882. Copies of department records and papers.<br/>             883. Copies of records in office of Solicitor of Treasury.<br/>             886. Transcripts from records of Treasury.<br/>             887. Evidence in embezzlement cases.<br/>             888. Copies of records in Returns Office.<br/>             895. Extracts from Journals of Congress.<br/>             896. Copies of records in consular offices.<br/>             905. Authentication of State laws and records.<br/>             906. Proof of State records other than judicial.</p> |
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**Sec. 859. [Evidence in criminal proceedings.]** No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege. [See § 103.]—(24 Jan., 1862, c. 11, v. 12, p. 333. 24 Jan., 1857, c. 19, s. 2, v. 11, p. 156.)

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| <p>Accused shall, at his own request but not otherwise, be a competent witness in proceedings before courts-martial, courts of inquiry, and civil courts of the United States. His failure to make such request shall not create any presumption against him. (Act Mar. 16, 1878, 20 Stat., 30.)</p> <p>Admissibility of evidence in Federal criminal cases is to be determined by the law of the State where the court is held, as it existed when the courts of the United States were established by the judiciary act of 1789. (<i>U. S. v. Reid</i>, 12 How., 361; <i>Fitter v. U. S.</i>, 258 Fed. Rep., 576.)</p> <p>Court of inquiry records admissible in evidence before naval courts-martial in cases not capital nor extending to dismissal of commissioned or warrant officer, provided oral testimony can not be obtained. (Sec. 1624, R. S., art. 60.)</p> <p>Courts-martial—see section 1624, Revised Statutes, articles 29, 40–42 and 60.</p> <p>Depositions may be used in evidence before naval courts in cases not capital nor extending to imprisonment for more than one year. (Act Feb. 16, 1909, sec. 16, 35 Stat., 622.)</p> | <p>Handwriting may be proved by comparison with any admitted or proved handwriting of the party which may be offered in evidence. (Act Feb. 26, 1913, 37 Stat., 683.)</p> <p>Husband or wife of accused shall be competent witness in prosecutions for bigamy, polygamy, or unlawful cohabitation, but shall not be compelled to testify, nor shall such witness be permitted to testify as to any confidential communication. (Act Mar. 3, 1887, sec. 1, 24 Stat., 635. In other cases wife is not competent to testify for or against husband in United States courts, except where he is charged with personal injury to her. See C. M. O. 31, June 12, 1914; C. M. O. 22, 1916, p. 8; compare <i>Fitter v. U. S.</i>, 258 Fed. Rep., 576.)</p> <p>Incriminating or degrading testimony—See note to Constitution, fifth amendment.</p> <p>Possession of goods imported contrary to law sufficient evidence to sustain conviction unless satisfactorily explained. (Sec. 3082, R. S.)</p> <p>Possession of opium imported contrary to law sufficient evidence to sustain conviction unless satisfactorily explained. (Act Feb. 9, 1909, sec. 2, 35 Stat., 614.)</p> |
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**Sec. 868. [Deposition for use in Federal courts.]** When a commission is issued by any court of the United States for taking the testimony of a witness named therein at any place within any district or Territory, the clerk of any court of the United States for such district or Territory shall, on the application of either party to the suit, or of his agent, issue a subpoena for such witness,

commanding him to appear and testify before the commissioner named in the commission, at a time and place stated in the subpoena; and if any witness, after being duly served with such subpoena, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such subpoena, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpoena to testify issued by such court.—(24 Jan., 1827, c. 4, s. 1, v. 4, p. 197; *York Co. v. Central R. R.*, 3 Wall., 113.)

Depositions for use before naval courts are authorized by act of February 16, 1909, section 16 (35 Stat., 622).

Depositions for use before departments in connection with pending claims are authorized by section 184, Revised Statutes.

Depositions for use in the Court of Claims are authorized by the Judicial Code, act of March 3, 1911, sections 163, 168–171 (36 Stat., 1140, 1141).

Depositions in civil cases, without the previous issuance of a commission by the court in which pending, are authorized by sections 863, 864, and 865, Revised Statutes.

Depositions, taken in mode prescribed by State laws, for use in Federal courts, are authorized by act of March 9, 1892 (27 Stat., 7).

Depositions for use in Federal courts, upon the previous issuance of a commission, are authorized by sections 866–868, Revised Statutes.

Depositions for use in State courts are authorized by sections 871–874, Revised Statutes.

Notaries public of the States, Territories, and District of Columbia were authorized to take depositions, by act of August 15, 1876 (19 Stat., 206).

**Heads of departments.**—See note to section 871, Revised Statutes, as to duty of heads of departments to testify or furnish depositions.

**Assistant to head of department required to appear and testify before commissioner appointed to take his deposition.**—In habeas corpus proceedings instituted by a Chinaman in the United States Court for the Western District of Washington it was contended by petitioner that proceedings for his deportation were invalid for the reason that his appeal to the Secretary of Labor was heard and disposed of by a subordinate officer of the Department of Labor, who signed his action thereon as Acting Secretary, whereas such officer had been authorized to perform the duties of the Secretary, under section 179, Revised Statutes, only when the Secretary and Assistant Secretary were both absent from the department, and at the time in question both the Secretary and Assistant Secretary were present at their offices. A commission was issued by the court to take the deposition of the Assistant Secretary of Labor before a commissioner in the District of Columbia. A subpoena was duly issued by the Supreme Court of the District of Columbia, requiring the Assistant Secretary to appear and testify before the said commissioner. The

Assistant Secretary appeared, but declined to answer the interrogatories or cross-interrogatories propounded, on the ground that each question “relates to the internal administration of the department and I regard it as calling for an answer that might be prejudicial to the public interest. For this reason I decline to answer until instructed otherwise by the Secretary of Labor.” The first and material question was: “Were you on duty at the Department of Labor on each of the following dates: September 24, 1914, September 25, 1914, and September 26, 1914?” A rule was issued to the Assistant Secretary by the Supreme Court of the District of Columbia, requiring him to show cause why he should not answer the questions propounded. In his return the Assistant Secretary stated, in part, that he had been instructed by the Secretary of Labor “that the disclosures sought to be obtained by the interrogatories propounded would be prejudicial to the public interest,” and that “he was advised by the Solicitor of the Department of Justice for the Department of Labor, as a matter of law, that he was privileged to decline to answer the said questions pursuant to such instructions and for the reasons stated in said declination.” It was thereupon ordered by the court that the Assistant Secretary appear before the commissioner and make full and true response to the question above quoted. In the opinion of the court it was stated in part:

“It will therefore be seen that the question propounded to the witness Post, which he declined to answer, goes to the jurisdiction of the officer who assumed to act as Secretary of Labor in signing the mandate, or order of exclusion, under which Ching Hing is detained.

“As stated by Judge Dooling of the United States District Court for the Northern District of California in the case of *In re Tsuei Shee et al.*, on October 23, 1914: ‘The appellants were by law entitled to appeal to the Secretary of Labor, and entitled to have their appeal heard and determined by him except as above stated, and the determination of their appeal by another not authorized is neither a fair hearing, nor due process of law.’

“Briefly stated, the question asked respondent was whether or not he was on duty in the department on three named days. Upon his answer to an extent, depends the liberty of Ching Hing. He declined to answer because the answer ‘might be prejudicial to the public interest.’ In exactly what manner it might be ‘prejudicial to the public interest’ for any official to testify as to whether he was, at a given time, performing the duties charged



upon him by law and for which he was being paid at public expense, when the fact becomes important in a judicial investigation affecting the liberty of an individual—even a Chinaman—is not apparent on this record. In the instant case, upon the record before the court, it is impossible to find any prejudice to the public interest in requiring an answer to the question propounded.

“This case is differentiated from *Boske v. Comingle* (177 U. S., 459), where the information sought of the collector of internal revenue was prohibited by a regulation of the Secretary of the Treasury made under authority of law and for the purpose of making more efficient the Internal Revenue Service, and also from such cases as *Gody v. Pentland* (85 Pa., 22), in which public officials are protected in their refusal to produce records on grounds of public policy. Here the question of the public policy involved in the answer sought is as capable of being decided by the court as by the executive official, because apparently all the information surrounding the alleged privilege of respondent is before the court. And upon this information, the court is of the opinion that it is the duty of respondent to answer the question put to him. An analogous situation might be supposed if the judgment of a court against a citizen was questioned because of the lack of jurisdiction in the court to render the judgment, and the court should

refuse to permit an investigation as to the fact of such jurisdiction. If the Department of Labor has acted without authority, and an individual has been denied his liberty as a result of such action, it is most extraordinary for the department to assert that public policy requires a concealment of the truth in regard to such lack of authority. Indeed, if the department *had* authority to act, and that authority were questioned in a proper judicial proceeding, by a court having jurisdiction of the matter, it would seem reasonable that the respect due by one coordinate branch of the Government to another would discountenance a concealment of the facts upon which the department acted.” (In the matter of *Ching Hing*, Supreme Court of the District of Columbia, decided June 10, 1915, file 26276-127; for other cases, see note to secs. 161, 417, and 418, R. S., and Constitution, Art. II, sec. 1, clause 1. See also *Ex parte Ching Hing*, 224 Fed. Rep., 261, in which the commission to take testimony in the case above quoted was recalled by the United States Court for the Western District of Washington, for the reason that after such commission was issued the Secretary of Labor personally reviewed and affirmed the decision of the “Acting Secretary” in the same proceedings; affirmed *Ching Hing v. White*, 234 Fed. Rep., 616.)

**Sec. 869. [Compelling production of records before commissioner appointed to take deposition.]** When either party in such suit applies to any judge of a United States court in such district or Territory for a subpoena commanding the witness, therein to be named, to appear and testify before said commissioner, at the time and place to be stated in the subpoena, and to bring with him and produce to such commissioner any paper or writing or written instrument or book or other document, supposed to be in the possession or power of such witness, and to be described in the subpoena, such judge, on being satisfied by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book, or other document is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of said court to issue such subpoena accordingly. And if the witness, after being served with such subpoena, fails to produce to the commissioner, at the time and place stated in the subpoena, any such paper, writing, written instrument, book, or other document, being in his possession or power, and described in the subpoena, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpoena, or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court. When any such paper, writing, written instrument, book, or other document is produced to such commissioner, he shall, at the cost of the party requiring the same, cause to be made a correct copy thereof, or of so much thereof as shall be required by either of the parties.—(24 Jan., 1827, c. 4, s. 2, v. 4, p. 199; 1 Burr’s Trial, 183.)

See notes to sections 161, 418, and 871, Revised Statutes, concerning records of executive departments.

**Sec. 870. [Fees of witness before commissioner to be paid in advance.]** No witness shall be required, under the provisions of either of the two preceding sections, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition; nor shall any witness be deemed guilty of contempt for disobeying any subpoena directed to him by virtue of either of the said sections, unless his fee for going to, returning from, and one day's attendance at, the place of examination, are paid or tendered to him at the time of the service of the subpoena.—(24 Jan., 1827, c. 4, ss. 1, 2, v. 4, pp. 197, 199.)

**Sec. 871. [Depositions for use in State courts.]** When a commission to take the testimony of any witness found within the District of Columbia, to be used in a suit depending in any State or territorial or foreign court, is issued from such court, or a notice to the same effect is given according to its rules of practice, and such commission or notice is produced to a justice of the supreme court of said District, and due proof is made to him that the testimony of such witness is material to the party desiring the same, the said justice shall issue a summons to the witness, requiring him to appear before the commissioners named in the commission or notice, to testify in such suit, at a time and at a place within said District therein specified.—(3 Mar., 1869, c. 128, s. 1, v. 15, p. 324.)

See note to section 868, Revised Statutes, for references to other laws authorizing depositions in various cases.

**Heads of departments.**—In the absence of specific authority on the subject the Attorney General is inclined to hold that the head of a department is not legally bound to appear and testify in obedience to a subpoena of a court. However, where it is proposed to take the testimony by commission, and the head of the department is not thus required to appear in court but before a commissioner, suggested that an arrangement might readily be made which would better comport with the dignity of his office as head of an executive department of the Government, whereby such testimony as he should deem proper and advisable to give could be taken at the department of which he is the head. (25 Op. Atty. Gen., 326; see also *Gardner v. Anderson*, 9 Fed. Cas. No. 5220, noted under sec. 418, R. S., in which head of department refused to respond to subpoena and court refused to proceed against him for contempt. Compare *In the matter of Ching Hing*, noted under sec. 868, R. S.)

**Chiefs of bureaus in the Navy Department** have been authorized by the Secretary of the Navy to answer interrogatories propounded before a commissioner duly appointed by a State court to take their testimony, without any summons being issued by a justice of the Supreme Court of the District of Columbia as provided for by the above section of the Revised Statutes. (See for example, file 12475-52, Oct. 31, 1914.)

**Copies of records** will not be furnished parties litigant for use in the course of proceedings in a Federal or State court; but the Navy Department will promptly furnish such copies upon call of the court before which the litigation is pending. (G. O. No. 121, Navy Dept., Sept. 17, 1914, par. 18; see also file 12475-65, Jan. 12, 1916.)

Officers of the Navy or Marine Corps are prohibited from producing official records or copies thereof in a State court in answer to subpoena duces tecum or otherwise, without first obtaining authority therefor from the Secretary of the Navy. (G. O. No. 121, Navy Dept., Sept. 17, 1914, par. 18, citing *Boske v. Comingore*, 177 U. S., 460.)

The Navy Department will permit the duly authorized commissioner appointed by a State court to obtain copies of records, at the expense of the party desiring them, the same as such copies would have been furnished upon call of the court before which litigation is pending in which they are to be used. (File 12475-52:1, Aug. 15, 1914.)

In accordance with Navy Regulations (Art. R-2958, 1913) and the practice of the Navy Department, a medical officer is not authorized, without approval by the department in each specific case, to (a) sign the form used in secret fraternal orders to secure sick dues; (b) sign a death certificate for presentation to a secret society or lodge having death benefits; or (c) fill out insurance blanks in the case of the death of a naval patient. This relates to medical records of officers and enlisted men in the naval service who have been patients of the medical officer of whom the certificates are requested. Where certificates of death are required by State laws in connection with the transportation of remains, such certificates would be "official certificates" and would not come under the prohibition of the regulations. (File 12475-52:10, Aug. 5, 1915; see also 12475-52:3, Dec. 5, 1914; 12475-71, Mar. 16, 1916; 26806-15, Apr. 8, 1909; 5195-61:1, Mar. 21, 1912.)

It has been the practice of the Navy Department to consider a man's medical record as private and confidential, and that it should be given to no one but the man himself, or if dead to his next of kin, and furthermore that such



action is to be taken only upon application to the department direct. (File 12475-52:8, Dec. 12, 1914; C. M. O. 6, 1915, p. 14.) Attorneys or agents may obtain information concerning the service of officers or enlisted men, by filing with the department a power of attorney from

the party or his next of kin, and giving a satisfactory statement as to the purpose for which the desired information is to be used. (Art. I-26, Naval Instructions, 1913.)

For other cases, see note to sections 161 and 418, Revised Statutes.

**Sec. 872. [Depositions when no commission issued.]** When it satisfactorily appears by affidavit to any justice of the supreme court of the District of Columbia, or to any commissioner for taking depositions appointed by said court—

First. That any person within said District is a material witness for either party in a suit pending in any State or territorial or foreign court;

Second. That no commission nor notice to take the testimony of such witness has been issued or given; and

Third. That, according to the practice of the court in which the suit is pending, the deposition of a witness taken without the presence and consent of both parties will be received on the trial or hearing thereof, such officer shall issue his summons, requiring the witness to appear before him at a place within the District, at some reasonable time, to be stated therein, to testify in such suit.—(3 Mar., 1869, c. 128, s. 2, v. 15, p. 325.)

**Sec. 873. [Manner of taking and transmitting depositions.]** Testimony obtained under the two preceding sections shall be taken down in writing by the officer before whom the witness appears, and shall be certified and transmitted by him to the court in which the suit is pending, in such manner as the practice of that court may require. If any person refuses or neglects to appear at the time and place mentioned in the summons, or, on his appearance, refuses to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit.—(3 Mar., 1869, c. 128, s. 3, v. 15, p. 325.)

**Sec. 874. [Witness fees allowed for giving depositions.]** Every witness appearing and testifying under the said provisions relating to the District of Columbia shall be entitled to receive for each day's attendance, from the party at whose instance he is summoned, the fees now provided by law for each day he shall give attendance.—(3 Mar., 1869, c. 128, s. 4, v. 15, p. 325.)

See sections 848-851, Revised Statutes, for amount of fees allowed witnesses.

See section 185, Revised Statutes, as to fees allowed witnesses giving depositions for use before departments in pending claims.

**Sec. 877. [Witnesses; form of subpoena.]** Witnesses who are required to attend any term of a circuit or district court on the part of the United States, shall be subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney.—(6 Feb., 1853, c. 80, s. 3, v. 10, p. 169.)

Circuit courts were abolished by the Judicial Code, act of March 3, 1911, sections 289-291 (36 Stat., 1167).

Naval courts have power to issue like process to compel witnesses to appear and testify

which United States courts of criminal jurisdiction may lawfully issue. (Act Feb. 16, 1909, sec. 11, 35 Stat., 621.)

**Sec. 879. [Imprisonment or recognizance of witnesses.]** Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offense against the United States may, at the hearing of any

such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case. And where the crime or offense is charged to have been committed on the high seas, or elsewhere within the admiralty and maritime jurisdiction of the United States, he may, in his discretion, require a like recognizance, with such sureties as he may deem necessary, of any witness produced in behalf of the accused, whose testimony in his opinion is important, and is in danger of being otherwise lost. [See §§ 848, 1014.]—(24 Sept., 1789, c. 20, s. 33, v. 1, p. 91; 23 Aug., 1842, c. 188, s. 2, v. 5, p. 517; 8 Aug., 1846, c. 98, s. 7, v. 9, p. 73.)

See note to section 877, Revised Statutes, as to power of naval courts to compel attendance of witnesses.

**Sec. 881. [Confinement of witnesses at any time to insure appearance.]** Any judge of the United States, on the application of a district attorney, and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial of any criminal proceeding in which the United States are parties or are interested, may compel such person to give recognizance, with or without sureties, at his discretion, to appear to testify therein; and, for that purpose, may issue a warrant against such person, under his hand, with or without seal, directed to the marshal or other officer authorized to execute process in behalf of the United States, to arrest and bring before him such person. If the person so arrested neglects or refuses to give recognizance in the manner required, the judge may issue a warrant of commitment against him, and the officer shall convey him to the prison mentioned therein. And the said person shall remain in confinement until he is removed to the court for the purpose of giving his testimony, or until he gives the recognizance required by said judge.—(8 Aug., 1846, c. 98, s. 7, v. 9, p. 73.)

See note to section 877, Revised Statutes, as to power of naval courts to compel attendance of witnesses.

In prosecutions for unlawful cohabitation, when it appears that there is reasonable ground to believe that a witness will refuse

to obey a subpoena, an attachment for such witness may be issued without previous subpoena, and the witness held until he executes a recognizance for his appearance. (Act Mar. 3, 1887, sec. 2, 24 Stat., 635.)

**Sec. 882. [Copies of Department records and papers.]** Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof.—(15 Sept., 1789, c. 14, s. 5, v. 1, p. 69. 22 Feb., 1849, c. 61, s. 3, v. 9, p. 347. 31 May, 1854, c. 60, s. 2, v. 10, p. 297.)

Certified copies of records in naturalization cases are evidence in any case in which originals might be admissible. (Act June 29, 1906, sec. 28, 34 Stat., 606.)

Courts-martial—As to admissibility of evidence and competency of witnesses before naval courts-martial, see section 1624, Revised Statutes, articles 40–42, and 60.

Practice of Navy Department as to furnishing copies of records for use in court proceedings—See note to section 871, Revised Statutes.

**Scope of section.**—Only papers or documents which were made by an officer or agent of the Government in the course of his official duty are embraced by this section, which can not be held to include every document or paper on file. (Block's case, 7 Ct. Cls., 406.)

The words "documents" and "papers" used in acts of Congress do not mean every document or paper on file in a department, but such as were made public documents by officers of the Government in the discharge of their duties. (The Ship *Parkman*, 35 Ct. Cls., 407.)



The statutes providing for the authentication of copies of books, papers, and documents in the executive departments employ substantially the same language that is used by common-law writers on the same subject and they must be understood and interpreted by the same reasons that govern at common law. (Block's case, 7 Ct. Cls., 406.)

Transcripts from the records of the executive departments, when authenticated by the seal of the department, are evidence both at common law and by statute; but the words "documents" and "papers" used in the act of Congress can not be held to mean every document or paper on file, but such only as were made by an officer or agent of the Government in the course of his official duty. Official documents duly certified need no further proof; but other documents, though on file, do not by the mere fact of certification become so authenticated as to entitle them to be read in evidence. (Block's case, 7 Ct. Cls., 406.)

A receipt for property captured, procured from a military governor by a claimant and by him filed in an executive department, is not a public document; and an authenticated copy thereof can not be read in evidence. The original must be produced and proved according to the rules of evidence. (Block's case, 7 Ct. Cls., 406.)

This statute applies at least to any paper which is by law required to be kept on file in any executive department; it is not limited to papers written by an officer in his official capacity. (Cohn v. U. S., 258 Fed. Rep., 355, 362.)

See notes to section 1624, Revised Statutes, articles 34 and 42.

**Form of authentication.**—It is a sufficient compliance with this section for the head of the office where the record is kept to certify that it is a true copy of the original, and for

the head of the department to certify under seal to the official character of the head of the office. (Ballew v. U. S., 160 U. S., 187.)

**State courts** may admit in evidence certified copies of papers and documents on file in the Navy Department, pursuant to State statutes similar to the above provision of section 882. (See, for example, Maurice v. Worden, 54 Md., 233.)

**When documentary evidence is offered before a naval court-martial** it must be in a public session of the court, and if admitted the document in full or an authenticated copy thereof must be appended to the record or set out in full in the recorded testimony of the witness who reads from the document (Naval Courts and Boards, 1917, arts. 187, 203), except that it is not necessary for a court-martial to append either the originals or certified copies of efficiency reports to the record of proceedings when introduced in evidence, a simple notation in the record that they were admitted in evidence being sufficient, as the originals form a part of the officer's official record on file in the Navy Department, where they may readily be examined at any time in connection with the court-martial proceedings. (C. M. O. 19, May 25, 1915, citing file 26251-7777, July 2, 1913.)

When it is desired to put any part of the official record of an officer in evidence, the original, where available, should be offered, and the action of a judge advocate in making admissions as to its contents would not in general meet with the approval of the Navy Department. (C. M. O. 19, May 25, 1915; Naval Courts and Boards, 1917, art. 191.)

**Court-martial orders**, general and special orders, circulars, regulations, and similar publications of the Navy Department should be judicially noticed by courts-martial without being offered in evidence. (See Naval Courts and Boards, 1917.)

**Sec. 883. [Copies of records in office of Solicitor of Treasury.]** Copies of any documents, records, books, or papers in the office of the Solicitor of the Treasury, certified by him under the seal of his office, or, when his office is vacant, by the officer acting as Solicitor for the time, shall be evidence equally with the originals.—(22 Feb., 1849, c. 61, s. 2, v. 9, p. 347.)

**Sec. 886. [Transcripts from records of Treasury.]** When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department, certified by the Register and authenticated under the seal of the Department, or, when the suit involves the accounts of the War or Navy Departments, certified by the Auditors respectively charged with the examination of those accounts, and authenticated under the seal of the Treasury Department, shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or other papers relating to, or connected with, the settlement of any account between the United States and an individual, when certified by the Register, or by such Auditor, as the case may be, to be true copies of the originals on file, and authenticated under the seal of the Department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original

papers if produced and authenticated in court: *Provided*, That where suit is brought upon a bond or other sealed instrument, and the defendant pleads "non est factum," or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration, and, if it appears to be necessary for the attainment of justice, may require the production of the original bond, contract, or other paper specified in such affidavit.—(3 Mar., 1797, c. 20, s. 1, v. 1, p. 512; 3 Mar., 1817, c. 45, s. 11, v. 3, p. 367; *Walton v. U. S.*, 9 Wh., 651; *U. S. v. Buford*, 3 Pet., 12; *Smith v. U. S.*, 5 Pet., 292; *Cox v. U. S.*, 6 Pet., 172; *U. S. v. Jones*, 8 Pet., 375; *Gratiot v. U. S.*, 15 Pet., 336; *U. S. v. Irving*, 1 How., 250; *Hoyt v. U. S.*, 10 How., 109; *Bruce v. U. S.*, 17 How., 437; *U. S. v. Edwards*, 1 McLean, 467; *U. S. v. Hilliard et al.*, 3 McLean, 324; *U. S. v. Lent*, 1 Paine, 417; *U. S. v. Martin*, 2 Paine, 68; *U. S. v. Van Zandt*, 2 Cr. C. C., 328; *U. S. v. Griffith*, 2 Cr. C. C., 336; *U. S. v. Lee*, 2 Cr. C. C., 462; *U. S. v. Harrill*, 1 McAll., 243; *U. S. v. Mattison*, Gilp., 44; *U. S. v. Corwin*, 1 Bond, 149; *U. S. v. Gaussen*, 19 Wall., 198.)

This section was amended by act of July 31, 1894, section 17 (28 Stat., 210), as amended by act of March 2, 1895, section 10 (28 Stat., 809), so as to require that "the transcripts from the books and proceeding of the Department of the Treasury and the copies of the

bonds, contracts, and other papers provided for" in section 886, Revised Statutes, "shall hereafter be certified by the Secretary or an Assistant Secretary of the Treasury under the seal of the Department."

**Sec. 887. [Evidence in embezzlement cases.]** Upon the trial of any indictment against any person for embezzling public moneys, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury Department, as provided by the preceding section.—(6 Aug., 1846, c. 90, s. 16, v. 9, p. 63; 2 Mar., 1797, c. 20, s. 1, v. 1, p. 512. *U. S. v. Gaussen*, 19 Wall., 198.)

A similar provision is contained in the Criminal Code, act March 4, 1909, section 93 (35 Stat., 1105).

A provision that transcript from account books of Auditor for Post Office Department shall be prima facie evidence of balance against person on trial for embezzlement of postal funds, is contained in the Criminal Code, act of March 4, 1909, section 225 (35 Stat., 1133.)

Accepting or transmitting to Treasury Department for allowance, receipt from creditor of the United States without having paid full amount specified therein, is evidence

of conversion. (Criminal Code, act Mar. 4, 1909, sec. 95, 35 Stat., 1106.)

Failure to produce or pay over postal funds when required is prima facie evidence of embezzlement. (Criminal Code, act Mar. 4, 1909, sec. 225, 35 Stat., 1133.)

On general subject of embezzlement see sections 89-96, Criminal Code, act March 4, 1909 (35 Stat., 1105, 1106), and section 1624, Revised Statutes, article 14.

Refusal of officer to surrender or transfer public funds when required is prima facie evidence of embezzlement. (Criminal Code, act Mar. 4, 1909, sec. 94, 35 Stat., 1106.)

**Sec. 888. [Copies of records in Returns Office.]** A copy of any return of a contract returned and filed in the returns-office of the Department of the Interior, as provided by law, when certified by the clerk of the said office to be full and complete, and when authenticated by the seal of the Department, shall be evidence in any prosecution against any officer for falsely and corruptly swearing to the affidavit required by law to be made by such officer in making his return of any contract, as required by law, to said returns-office. [See § 3744.]—(2 June, 1862, c. 93, s. 4, v. 12, p. 412.)

See sections 512-515, Revised Statutes, relating to Returns Office.

**Sec. 895. [Extracts from Journals of Congress.]** Extracts from the Journals of the Senate, or of the House of Representatives, and of the Executive Journal of the Senate when the injunction of secrecy is removed, certified by the Secre-



tary of the Senate or by the Clerk of the House of Representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have if produced and authenticated in court.—(8 Aug., 1846, c. 107, s. 1, v. 9, p. 80.)

See section 859, Revised Statutes, concerning testimony given by witnesses before Congress.

**Sec. 896. [Copies of records in consular offices.]** Copies of all official documents and papers in the office of any consul, vice-consul, or commercial agent of the United States, and of all official entries in the books or records of any such office, certified under the hand and seal of such officer, shall be admitted in evidence in the courts of the United States. [See § 1707.]—(8 Jan., 1869, c. 7, v. 15, p. 266.)

Copies of protests or declarations before consular officers are admissible in evidence under section 1707, Revised Statutes.

**Sec. 905. [Authentication of State laws and records.]** The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.—(26 May., 1790, c. 11, v. 1, p. 122; 27 Mar., 1804, c. 56, s. 2, v. 2, p. 299; *Ferguson v. Harwood*, 7 Cr., 408; *Mills v. Duryee*, 7 Cr., 481; *U. S. v. Amedy*, 11 Wh., 392; *Buckner v. Finley*, 2 Pet., 592; *Owings v. Hull*, 9 Pet., 627; *Urtetiqui v. D'Arbel*, 9 Pet., 700; *McElmoyle v. Cohen*, 13 Pet., 312; *Stacey v. Thrasher*, 6 How., 44; *Bank of Alabama v. Dalton*, 9 How., 522; *D'Arcy v. Ketchum*, 11 How., 165; *Railroad v. Howard*, 13 How., 307; *Booth v. Clark*, 17 How., 322; *Mason v. Lawrason*, 1 Cr. C. C., 190; *Buford v. Hickman*, Hemp., 232; *Craig v. Brown*, Pet. C. C., 354; *Stewart v. Gray*, Hemp., 94; *Gardner v. Lindo*, 1 Cr. C. C., 78; *Trigg v. Conway*, Hemp., 538; *Turner v. Waddington*, 3 Wash. C. C., 126; *Catlin v. Underhill*, 4 McLean, 199; *Morgan v. Curtenius*, 4 McLean, 366; *Hale v. Brotherton*, 3 Cr. C. C., 594; *Mewster v. Spalding*, 6 McLean, 24; *Parrot v. Habersham*, 1 Cr. C. C., 14; *Talcott v. Delaware Ins. Co.*, 2 Wash. C. C., 449; *James v. Stookey*, 1 Wash. C. C., 330; *Bennett v. Bennett*, District Court, Oregon, 1867.)

Revised Statutes of the United States (first edition): Printed volume legal evidence of the laws therein contained (act June 20, 1874, sec. 2, 18 Stat., 113).

Revised Statutes of the United States (second edition): Printed volume legal evidence of the laws therein contained, but shall not preclude reference to nor control in case of discrepancy the effect of any original act as passed by Congress since December 1, 1873. (Act Mar. 2, 1877, sec. 4, 19 Stat., 269, as amended by act Mar. 9, 1878, 20 Stat., 27.)

Statutes at Large: Printed volumes legal evidence of laws and treaties therein contained. (Act June 20, 1874, sec. 8, 18 Stat., 114; act Jan. 12, 1894, sec. 73, 28 Stat., 612.)

**Judicial notice of State laws.**—The National and State courts, not being foreign to one another, as the State courts are, but subordinate courts of a complete system of Government, with limited and separate jurisdiction; and the former having judicial knowledge of the laws of the several States, and therefore of the mode of authenticating the judicial records

thereof, a statute prescribing the mode of proving the judicial records of a State when used in another State does not apply to a case where such record is sought to be used in a national court. (*Bennett v. Bennett*, 3 Fed. Cas. No. 1318; see also, as to judicial notice by courts of the United States of the public statutes of the several States, *Merchants Exch. Bank v. McGraw*, 59 Fed. Rep., 972; *Owings v. Hull*, 9 Pet., 625; *Bank v. Franklyn*, 120 U. S., 747; *Lamar v. Micou*, 114 U. S., 857; *Gormley v. Bunyan*, 138 U. S., 453.)

All Federal courts, when exercising original jurisdiction, take judicial notice of the constitutions and public statutes, not only of the

State where they are sitting, but of every other State and of every Territory. All courts in the United States take judicial notice of the United States Constitution and amendments thereto, and of the public statutes enacted by Congress. Judicial knowledge of a statute includes the date when it went into effect, when it was suspended or repealed, and facts recited or recognized in the statute. (See 16 Cyc., 889, 890, 892, and cases there cited.)

Naval courts-martial must take judicial notice of the law of a State which is pertinent to a case on trial, without such law having been offered in evidence. (C. M. O. 27, 1913, p. 8.)

**Sec. 906. [Proof of State records other than judicial.]** All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State, or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken.—(27 Mar., 1804, c. 56, ss. 1, 2, v. 2, pp. 298, 299; 21 Feb., 1871, c. 62, v. 16, p. 419.)



## CHAPTER EIGHTEEN.

### PROCEDURE.

**Sec. 1023.** [Perjury before naval court-martial.] In prosecutions for perjury committed on examination before a naval general court-martial, or for the subornation thereof, it shall be sufficient to set forth the offense charged on the defendant, without setting forth the authority by which the court was held, or the particular matters brought before, or intended to be brought before said court.—(17 July, 1862, c. 204, s. 1, art. 13, v. 12, p. 604.)

Perjury committed by persons in the naval service is punishable under section 1624, Revised Statutes, article 14, clause 4, and articles 22 and 42.

Perjury is defined and made punishable by fine and imprisonment, by the Criminal Code, act March 4, 1909, section 125 (35 Stat., 1111).

## CHAPTER TWENTY-ONE.

### THE COURT OF CLAIMS—JURISDICTION, POWERS, AND PROCEDURE.

[THE PROVISIONS OF EXISTING LAW CONCERNING THE COURT OF CLAIMS ARE CONTAINED IN THE JUDICIAL CODE, ACT OF MARCH 3, 1911, SECTIONS 136-187 (36 STAT., 1135-1143). THE FOLLOWING SECTIONS OF THE REVISED STATUTES, WHICH ARE REPEALED BY SECTION 297 OF THE JUDICIAL CODE (36 STAT., 1168), ARE NOTED BELOW FOR CONVENIENCE IN LOCATING THE CORRESPONDING SECTIONS OF THE JUDICIAL CODE TO WHICH THEY HAVE BEEN TRANSFERRED.]

**Sec. 1059.** [Jurisdiction: Claims against United States; set-offs; disbursing officers' responsibility for losses.] See section 145, Judicial Code (36 Stat., 1136).

**Sec. 1061.** [Judgments for set-off or counterclaim.] See section 146, Judicial Code (36 Stat., 1137.)

**Sec. 1062.** [Decree relieving disbursing officers of responsibility for losses.] See section 147, Judicial Code (36 Stat., 1137).

**Sec. 1063.** [Questions referred to Court of Claims by heads of departments.] See section 148, Judicial Code (36 Stat., 1137).

**Sec. 1064.** [Procedure in cases transmitted by departments.] See section 149, Judicial Code (36 Stat., 1138).

**Sec. 1065.** [Judgments in cases transmitted by departments; how paid.] See section 150, Judicial Code (36 Stat., 1138).

**Sec. 1075.** [Commissioners to take testimony.] See section 163, Judicial Code (36 Stat., 1140).

**Sec. 1076.** [Power to call upon departments for information.] See section 164, Judicial Code (36 Stat., 1140).

**Sec. 1088.** [New trial on motion of United States.] See section 175, Judicial Code (36 Stat., 1141).



## TITLE XIV.

### THE ARMY.

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Sec.

- 1135. Supplies and transportation for naval and marine detachments.
- 1143. Rations, to be furnished naval detachments.
- 1176. Trusses, to whom furnished.
- 1177. Trusses, applications for.
- 1178. Trusses, purchase of.
- 1225. Detail of Army and Navy officers to educational institutions.

Sec.

- 1229. Dismissal of officers in military or naval service.
- 1342, Art. 2. Persons subject to military law.
- 1342, Art. 4. Who may serve on courts-martial.
- 1342, Art. 120. Command, when different corps happen to join.

#### **Sec. 1135. [Supplies and transportation for naval and marine detachments.]**

The officers of the Quartermaster's Department shall, upon the requisition of the naval or marine officer commanding any detachment of seamen or marines under orders to act on shore, in co-operation with land troops, and during the time such detachment is so acting or proceeding to act, furnish the officers and seamen with camp-equipment, together with transportation for said officers, seamen, and marines, their baggage, provisions, and cannon, and shall furnish the naval officer commanding any such detachment, and his necessary aids, with horses, accouterments, and forage.—(15 Dec., 1814, c. 13, ss. 1, 2, v. 3, p. 151.)

Ordnance or ordnance stores may be transferred or sold to other executive departments, payment to be made by the proper disbursing officer of the department concerned, the price to include cost price of the stores and the costs of inspection and transportation. (Act Aug. 24, 1912, 37 Stat., 589.)

Quartermaster-General of Army may sell articles of serviceable quartermaster property to officers of the Navy and Marine Corps for use in the public service, the same as such articles are sold to officers of the Army. (Act Mar. 4, 1915, 38 Stat., 1079.)

Subsistence supplies of the Army may be sold to officers and enlisted men of the Navy and Marine Corps at same prices charged officers and enlisted men of the Army. (Act Mar. 4, 1915, 38 Stat., 1072.)

Subsistence supplies furnished by the War Department to another executive department are to be paid for in cash by the proper disbursing officer of the bureau, office, or department concerned, or by the employee to whom the sale is made; the price charged to include the contract or invoice price and 10 per cent additional to cover wastage in transit, and the cost of transportation. (Act Mar. 3, 1911, 36 Stat., 1047.)

Transportation by or under the instructions of the Quartermaster General of the Army, of property for the civil or naval departments of the Government in Washington or else-

where, under the regulations governing the transportation of Army supplies, was authorized by act of July 5, 1884 (23 Stat., 111), which provided that the amount paid for such transportation should be refunded or paid by the bureau to which such property or stores pertained.

When in the opinion of the Secretary of War accommodations are available, transportation may be provided for the officers, enlisted men, employees, and supplies of the Navy, the Marine Corps, and other officers of the Government while traveling on official business, and without expense to the United States for the families of those persons herein authorized to be transported. (Act Mar. 2, 1907, 34 Stat., 1170.)

When in the opinion of the Secretary of War accommodations are available, transportation on vessels of the Army transport service may be furnished to officers, employees, and enlisted men of the Coast Guard and their families, without expense to the United States, and also secretaries and supplies of the Army and Navy department of the Young Men's Christian Association. (Act Mar. 3, 1911, 36 Stat., 1051.)

When the War Department procures stores or material, or performs any service, for the Navy Department, the funds of the Navy Department may be placed subject to the requisition of the War Department for direct expenditure by it. (Act Mar. 4, 1915, 38 Stat., 1084.)

**Sec. 1143. [Rations to be furnished naval detachments.]** The officers of the Subsistence Department shall, upon the requisition of the naval or marine offi-

cer commanding any detachment of seamen or marines under orders to act on shore, in co-operation with the land troops, and during the time such detachment is so acting or proceeding to act, furnish rations to the officers, seamen, and marines of the same.—(15 Dec., 1814, c. 13, s. 1, v. 3, p. 151.)

Provision for supplying enlisted men of the Marine Corps with the Army or Navy ration, or commutation therefor, under varying

conditions, was made by section 1615, Revised Statutes, and act of March 4, 1913 (37 Stat., 909).

#### Sec. 1176. [Trusses, to whom furnished. Superseded.]

**This section provided as follows:**

"SEC. 1176. Every soldier of the Union Army who was ruptured while in the line of duty during the war for the suppression of the rebellion, is entitled to receive a single or double truss, of such style as may be designated by the Surgeon General, as best suited for his disability."—(28 May, 1872, c. 228, s. 1, v. 17, p. 164.)

It was superseded by the following provision of the act of March 3, 1879 (20 Stat., 353):

"That section one of the act entitled 'An act to provide for furnishing trusses to disabled soldiers,' approved May twenty-eighth, eighteen hundred and seventy-two [incorporated in section 1176, Revised Statutes], be, and the same is hereby, amended so that said section shall read as follows:

"That every soldier of the Union Army, or petty-officer, seaman, or marine in the naval service, who was ruptured while in the line of duty during the late war for the suppression of the rebellion, or who shall be so ruptured thereafter in any war, shall be entitled to receive a single or double truss of such style as may be designated by the Surgeon General of the United States Army as best suited for such disability;

"And whenever the said truss or trusses so furnished shall become useless from wear, destruction, or loss, such soldier, petty-officer, seaman, or marine shall be supplied with another truss on making a like application as provided for in section two of the original act of which this is an amendment:

"*Provided*, That such application shall not be made more than once in two years and six months; \* \* \*

The words "section two of the original act," as used in the above enactment of March 3, 1879, refer to section 2 of the act of May 28, 1872, which is incorporated in section 1177, Revised Statutes, set forth below.

**Artificial limbs** or commutation therefor are allowed officers, soldiers, seamen, and marines who shall have lost a limb in the line of duty in the military or naval service, by act of August 15, 1876 (19 Stat., 203). See also section 4787, Revised Statutes, as amended by acts of February 27, 1877, section 1 (19 Stat., 252) and March 3, 1891 (26 Stat., 1103); and see sections 4788–4791, Revised Statutes, as amended by acts of February 27, 1877 (19 Stat., 252) and March 3, 1891 (26 Stat., 979).

**Sec. 1177. [Trusses, application for.]** Application for such truss shall be made by the ruptured soldier, to an examining surgeon for pensions, whose duty it shall be to examine the applicant, and when found to have a rupture or hernia, to prepare and forward to the Surgeon-General an application for such truss without charge to the soldier. [See § 4787.]—(28 May, 1872, c. 228, s. 2, v. 17, p. 164.)

This section was amended by act of March 3, 1879 (20 Stat., 353), which provided, "That sections two and three of the said act of May twenty-eighth, eighteen hundred and seventy-two, shall be construed so as to apply to petty officers, seamen, and marines of the naval serv-

ice, as well as to soldiers of the Army." Section 2 of the act mentioned was incorporated in section 1177, Revised Statutes, and section 3 of said act was embodied in section 1178, Revised Statutes.

**Sec. 1178. [Trusses, purchase of.]** The Surgeon-General is authorized and directed to purchase the trusses required for such soldiers, at wholesale prices, and the cost of the same shall be paid upon the requisition of the Surgeon-General out of any moneys in the Treasury not otherwise appropriated.—(26 May, 1872, c. 228, s. 3, v. 17, p. 164.)

This section was amended by act of March 3, 1879, quoted above, under section 1177, Revised Statutes.

It was repealed in part by the following provision of the act of May 27, 1908 (35 Stat., 367): "So much of section eleven hundred and seventy-eight of the Revised Statutes of the United States as makes a permanent indefinite

appropriation to purchase trusses for soldiers, is repealed, to take effect after June thirtieth, nineteen hundred and nine, and estimates of sufficient sums for the purchase of such trusses shall be submitted to Congress for the fiscal year nineteen hundred and ten, and annually thereafter, in the regular Book of Estimates."



**Sec. 1225.** [Detail of Army and Navy officers to educational institutions.] The President may, upon the application of any established military institute, seminary or academy, college or university, within the United States having capacity to educate at the same time not less than one hundred and fifty male students, detail an officer of the Army or Navy to act as superintendent, or professor thereof; but the number of officers so detailed shall not exceed fifty from the Army, and ten from the Navy, being a maximum of sixty, at any time, and they shall be apportioned throughout the United States, first, to those State institutions applying for such detail that are required to provide instruction in military tactics under the provisions of the act of Congress of July second, eighteen hundred and sixty-two, donating lands for the establishment of colleges where the leading object shall be the practical instruction of the industrial classes in agriculture and the mechanic arts, including military tactics; and after that, said details to be distributed, as nearly as may be practicable, according to population. The Secretary of War is authorized to issue, at his discretion and under proper regulations to be prescribed by him, out of ordnance and ordnance stores belonging to the Government, and which can be spared for that purpose, such number of the same as may appear to be required for military instruction and practice by the students of any college or university under the provisions of this section, and the Secretary shall require a bond in each case, in double the value of the property, for the care and safe keeping thereof, and for the return of the same when required.

**This section was expressly amended and reenacted** to read as above by act of September 26, 1888 (25 Stat., 491), section 2 of which act provided "That the said section twelve hundred and twenty-five of the Revised Statutes of the United States, as amended by the said act of Congress approved July fifth, eighteen hundred and eighty-four, and all acts and parts of acts inconsistent or in conflict with the provisions of this act, be, and the same are hereby, repealed, saving always, however, all acts and things done under the said amended section as heretofore existing."

**As originally enacted,** this section provided as follows:

"Sec. 1225. The President may, upon the application of any established college or university within the United States, having capacity to educate, at the same time, not less than one hundred and fifty male students, detail an officer of the Army to act as president, superintendent, or professor thereof; but the number of officers so detailed shall not exceed twenty at any time, and they shall be apportioned throughout the United States, as nearly as may be practicable, according to population. Officers so detailed shall be governed by general rules prescribed, from time to time, by the President. The Secretary of War is authorized to issue at his discretion and under proper regulations to be prescribed by him, out of any small arms or pieces of field artillery belonging to the Government and which can be spared for that purpose, such number of the same as may appear to be required for military instruction and practice, by the students of any college or university under the provisions of this section; and the Secretary shall require a bond in each case, in double the value of the property,

for the care and safe-keeping thereof, and for the return of the same when required." 28 July, 1866, c. 229, s. 26, v. 14, p. 336. 4 May, 1870, res. 40, v. 16, p. 373.

**By act of July 5, 1876** (19 Stat., 74), the maximum number of officers to be detailed to educational institutions was increased from twenty, as authorized by the original section 1225, to thirty, and by act of July 5, 1884 (23 Stat., 108), was further increased to forty, until section 1225 was amended and reenacted as set forth above by act of September 26, 1888 (25 Stat., 491).

#### OTHER LAWS AUTHORIZING DETAILS TO EDUCATIONAL INSTITUTIONS.

*Sec. 1260, R. S.*: "Any retired officer may, on his own application, be detailed to serve as professor in any college. [But while so serving, such officer shall be allowed no additional compensation.]"—(15 July, 1870, c. 294, s. 23, v. 16, p. 320. 27 Feb., 1877, c. 69, v. 19, p. 243.)

*Act February 26, 1879* (20 Stat., 322): "That for the purpose of promoting a knowledge of steam engineering and iron shipbuilding among the young men of the United States, the President may, upon the application of an established scientific school or college within the United States, detail an officer from the Engineer Corps of the Navy as professor in such school or college: *Provided*, That the number of officers so detailed shall not at any time exceed twenty-five, and such details shall be governed by rules to be prescribed from time to time by the President: *And provided further*, That such details may be withheld or withdrawn whenever, in the judgment of the President, the interests of the public service shall so require."

[The "Engineer Corps of the Navy" was abolished and the personnel thereof transferred to the line of the Navy by act of March 3, 1899 (30 Stat., 1004). See note to section 1390, Revised Statute.]

*Act May 4, 1880 (21 Stat., 113):* "Upon the application of any college, university, or institution of learning incorporated under the laws of any State within the United States, having capacity at the same time to educate not less than one hundred and fifty male students, the President may detail an officer of the Army on the retired list to act as president, superintendent, or professor thereof; and such officer may receive from the institution to which he may be detailed the difference between his retired and full pay, and shall not receive any additional pay or allowance from the United States."

*Act September 26, 1888 (25 Stat., 491):* "Provided, That nothing in this act shall be so construed as to prevent the detail of officers of the Engineer Corps of the Navy as professors in scientific schools or colleges as now provided by act of Congress approved February twenty-sixth, eighteen hundred and seventy-nine, entitled 'An act to promote a knowledge of steam engineering and iron shipbuilding among the students of scientific schools or colleges in the United States.'" [The act of September 26, 1888, from which this provision is taken, reenacted section 1225, Revised Statutes, as set forth above. As to the "Engineer Corps of the Navy" see note above to act of February 26, 1879.]

*Act January 13, 1891 (26 Stat., 716):* "That section twelve hundred and twenty-five of the Revised Statutes, concerning details of officers of the Army and Navy to educational institutions, be, and the same is hereby, amended so as permit the President to detail, under the provisions of said act, not to exceed seventy-five officers of the Army of the United States; and the maximum number of officers of the Army and Navy to be detailed at any one time under the provision of the act passed September twenty-sixth, eighteen hundred and eighty-eight, amending said section twelve hundred and twenty-five of the Revised Statutes, is hereby increased to eighty-five: *Provided*, That no officer shall be detailed to or maintained at any of the educational institutions mentioned in said act where instruction and drill in military tactics is not given: *Provided further*, That nothing in this act shall be so construed as to prevent the detail of officers of the Engineer Corps of the Navy as professors in scientific schools or colleges as now provided by act of Congress approved February twenty-sixth, eighteen hundred and seventy-nine, entitled 'An act to promote a knowledge of steam engineering and iron shipbuilding among the students of scientific schools or colleges in the United States.'" [As to the "Engineer Corps of the Navy," see note above to act of February 26, 1879.]

*Act November 3, 1893 (28 Stat., 7):* "That section twelve hundred and twenty-five of the Revised Statutes, concerning details of officers of the Army and Navy to educational institutions, be, and the same is hereby, amended so as to permit the President to detail under the provisions of said act not to exceed one hundred

officers of the Army of the United States; and no officer shall be thus detailed who has not had five years' service in the Army, and no detail to such duty shall extend for more than four years; and officers on the retired list of the Army may upon their own application be detailed to such duty, and when so detailed shall receive the full pay of their rank; and the maximum number of officers of the Army and Navy to be detailed at any one time under the provisions of the act approved January thirteenth, eighteen hundred and ninety-one, amending section twelve hundred and twenty-five of the Revised Statutes as amended by an act approved September twenty-sixth, eighteen hundred and eighty-eight, is hereby increased to one hundred and ten."

*Act August 6, 1894 (28 Stat., 235):* "Nothing in the act entitled 'An act to increase the number of officers of the Army to be detailed to colleges,' approved November third, eighteen hundred and ninety-three, shall be so construed as to prevent, limit, or restrict the detail of retired officers of the Army at institutions of learning under the provisions of section twelve hundred and sixty, Revised Statutes, and the act making appropriations for the support of the Army, and so forth, approved May fourth, eighteen hundred and eighty, nor to forbid the issue of ordnance and ordnance stores, as provided in the act approved September twenty-sixth, eighteen hundred and eighty-eight, amending section twelve hundred and twenty-five, Revised Statutes, to the institutions at which retired officers may be so detailed; and said act of November third, eighteen hundred and ninety-three, and said act of May fourth, eighteen hundred and eighty, shall not be construed to allow the full pay of their rank to retired officers detailed under said section twelve hundred and sixty, Revised Statutes, and said act of May fourth, eighteen hundred and eighty."

*Act March 2, 1895 (28 Stat., 826):* "Any retired officer of the Navy or Marine Corps may, on his own application, be detailed to service as a teacher or professor in any school or college, but while so serving such officer shall be allowed no additional compensation."

*Act February 26, 1901 (31 Stat., 810):* "Whereas the national defense must depend upon the volunteer service of the people of the several States; and

"Whereas those schools which shall adopt a system of military instruction are entitled to the assistance of the Government in order to secure to the United States such a knowledge of military affairs among the youth of the country as will render them efficient as volunteers if called upon for the national defense: Therefore,

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section twelve hundred and twenty-five of the Revised Statutes, concerning the detail of officers of the Army and Navy to educational institutions be, and the same is hereby, amended so as to permit the President to detail under the provisions of that act, and in addition to the detail of the officers of the Army and Navy now authorized to be detailed under the existing provisions of said act, such retired officers of the Army and Navy of the United States as in his judgment may be



required for that purpose, to act as instructors in military drill and tactics in schools in the United States, where such instruction shall have been authorized by the educational authorities thereof, and where the services of such instructors shall have been applied for by said authorities.

"Sec. 2. That no detail shall be made under this act to any school unless it shall pay the cost of commutation of quarters of the retired officers detailed thereto and the extra-duty pay to which the latter may be entitled by law to receive for the performance of special duty: *Provided*, That no detail shall be made under the provisions of this act unless the officers to be detailed are willing to accept such position without compensation from the Government other than their retired pay."

*Act April 21, 1904 (33 Stat., 225):* "That section twelve hundred and twenty-five of the Revised Statutes, concerning the detail of officers of the Army and Navy to educational institutions, be, and the same is hereby, amended so as to permit the President to detail under the provisions of that act, and in addition to the detail of the officers of the Army and Navy now authorized to be detailed under the existing provisions of said act, such retired officers and noncommissioned officers of the Army and Navy of the United States as in his judgment may be required for that purpose to act as instructors in military drill and tactics in schools in the United States and Territories where such instructions shall have been authorized by the educational authorities thereof, and where the services of such instructors shall have been applied for by said authorities.

"Sec. 2. That no detail shall be made under this act to any school unless it shall pay the cost of commutation of quarters of the retired officers or noncommissioned officers detailed thereto and the extra-duty pay to which they may be entitled by law to receive for the performance of special duty: *Provided*, That no detail shall be made under the provisions of this act unless the officers and noncommissioned officers to be detailed are willing to accept such position: *Provided further*, That they shall receive no compensation from the Government other than their retired pay."

*Act March 3, 1909 (35 Stat., 738):* "That the act approved November third, eighteen hundred and ninety-three, authorizing the detail of officers of the Army and Navy to educational institutions, be amended so as to provide that retired officers, when so detailed, shall receive the full pay and allowances of their rank, except that the limitations on the pay of officers of the Army above the grade of major as provided in the acts of March second, nineteen hundred and five, and June twelfth, nineteen hundred and six, shall remain in force."

*Act March 4, 1911, section 3 (33 Stat., 1353):* "That the President of the United States is hereby authorized, when in his opinion the same can be done without detriment to the public service, to detail proper officers of the Navy as superintendents of or instructors in such schools: *Provided*, That if any such school shall be discontinued, or the good of the naval service shall require, such vessel shall be imme-

diately restored to the Secretary of the Navy and the officers so detailed recalled: *And provided further*, That no person shall be sentenced to or received at such schools as a punishment or commutation of punishment for crime." [The schools referred to in this section are certain nautical schools, or schools or colleges having a nautical branch.]

*Act June 3, 1916, section 45 (39 Stat., 192):* "The President is hereby authorized to detail such numbers of officers of the Army, either active or retired, not above the grade of colonel, as may be necessary, for duty as professors and assistant professors of military science and tactics at institutions where one or more units of the Reserve Officers' Training Corps are maintained; but the total number of active officers so detailed at educational institutions shall not exceed three hundred, and no active officer shall be so detailed who has not had five years' commissioned service in the Army. In time of peace retired officers shall not be detailed under the provisions of this section without their consent. Retired officers below the grade of lieutenant colonel so detailed shall receive the full pay and allowances of their grade, and retired officers above the grade of major so detailed shall receive the same pay and allowances as a retired major would receive under a like detail. No detail of officers on the active list of the Regular Army under the provisions of this section shall extend for more than four years."

*Act June 3, 1916, section 46 (39 Stat., 192):* "The President is hereby authorized to detail for duty at institutions where one or more units of the Reserve Officers' Training Corps are maintained such number of enlisted men, either active or retired or of the Regular Army Reserve, as he may deem necessary, but the number of active noncommissioned officers so detailed shall not exceed five hundred, and all active noncommissioned officers so detailed shall be additional in their respective grades to those otherwise authorized for the Army. Retired enlisted men or members of the Regular Army Reserve shall not be detailed under the provisions of this section without their consent. While so detailed they shall receive active pay and allowances."

*Act June 3, 1916, section 56 (39 Stat., 197):* "Such arms, tentage, and equipment as the Secretary of War shall deem necessary for proper military training shall be supplied by the Government to schools and colleges, other than those provided for in section forty-seven of this act, having a course of military training prescribed by the Secretary of War and having not less than one hundred physically fit male students above the age of fourteen years, under such rules and regulations as he may prescribe; and the Secretary of War is hereby authorized to detail such commissioned and noncommissioned officers of the Army to said schools and colleges, other than those provided for in sections forty-five and forty-six of this act, detailing not less than one such officer or noncommissioned officer to each five hundred students under military instruction." [Section 47 of this act provides for "institutions at which one or more units of the Reserve Officers' Training Corps are maintained."]

*Act September 17, 1919 (41 Stat., 286):* "That no officer on the active list [Army] shall be detailed for \* \* \* duty at schools and colleges, not including schools of the service, where officers on the retired list can be secured who are competent for such duty." (Similar provision contained in act June 4, 1920, 41 Stat., 777.)

**Generous policy in respect to educational institutions.**—The policy of the United States has always been a generous one in respect to educational institutions. Statutes have been enacted appropriating a particular section in each township of the public lands for use of schools. By the acts of July 30, 1890 (26 Stat., 417), and March 4, 1907 (34 Stat., 1281), money is annually appropriated to each State and Territory for the more complete endowment and maintenance of colleges for the benefit of agriculture and the mechanical arts now established or which may be hereafter established in accordance with the act of July 2, 1862 (12 Stat., 503). Accordingly, the provisions of section 1225, Revised Statutes, should be given a broad interpretation. (17 Comp. Dec., 691, Mar. 22, 1911.)

**"Within the United States," includes college in Porto Rico.**—The words, "upon the application of an established college or university within the United States," as used in section 1225 of the Revised Statutes, were not intended to restrict the benefits of said statute to colleges or universities "within the United States," in the sense of the States united, but were used in a broader sense and embrace the organized contiguous Territories; and the act of April 12, 1900 (31 Stat., 79), authorizes the extension of the benefits of section 1225 as amended to Porto Rico. (17 Comp. Dec., 691, Mar. 22, 1911.)

**"An officer of the Army or Navy" includes a retired officer.**—When the law speaks of "officers of the Army," without any qualifying words, it includes officers on the retired list as well as those on the active list. Section 1225, as amended by the act of September 26, 1888, authorizes the President to detail officers of the Army (without qualifying words) for duty at educational institutions; retired officers are included in this authorization. (6 Comp. Dec., 120, Aug. 15, 1899.)

Until the passage of the act of November 3, 1893, there was no authority of law for the detail of retired officers to such duty with the full pay of their rank, details of this kind being limited to officers on the active list. "I can not believe that a duty to which for many years only officers on the active list were permitted to be assigned is not active duty or ceases to be such when retired officers are permitted on their own application to undertake it." (11 Comp. Dec., 693, May 18, 1905. As to pay of retired officers detailed to colleges, see cases noted below.)

It will be noted that section 1225, Revised Statutes, as amended by the act of September 26, 1888 (25 Stat., 491), refers to the detail of officers "of the Army," but it was never held to apply to retired officers until amended by the act of November 3, 1893 (28 Stat., 7), so as to provide that "officers on the retired list of the Army

may upon their own application be detailed to such duty, and when so detailed shall receive the full pay of their rank." This appears to have been the first law authorizing the payment of full pay to retired officers on duty at educational institutions, and it would not apply to or affect details under section 1260, Revised Statutes, or the act of May 4, 1880. (23 Comp. Dec., 500.)

The act of November 3, 1893, was amended by the act of March 3, 1909. The next legislation on this subject was the act of June 3, 1916. From an examination of the various laws relative to the detail of officers to educational institutions, it appears to have been the uniform practice of Congress whenever it intended to provide for the detail of retired officers to designate them specifically and also to stipulate as to the pay they should receive. Section 56 of the act of 1916 makes no specific reference to retired officers or to pay, and Congress did not intend by said section to grant any new authority for the detail of retired officers to educational institutions. Accordingly, *held*, that the term "commissioned and noncommissioned officers of the Army," as used in section 56, act of June 3, 1916 (39 Stat., 197), does not include retired officers, although in its broad sense the Army of the United States does include officers and enlisted men on the retired list. (23 Comp. Dec., 500.)

For other cases, see note to section 1457, Revised Statutes.

**Limitation upon number of officers detailed applies both to active and retired list.**—The act of November 3, 1893, authorizes the detail of 100 officers from the active list of the Army, but does not require it. Said act leaves it within the discretion of the President to make the detail of officers of the Army for colleges wholly from the active list of the Army, or wholly from retired officers, who, "upon their own application," may be detailed for those services, or from both lists, in such proportion as he sees fit and as the applications for such detail from the retired officers will allow. No other limit than 100 is set to the number of such officers that can be detailed and these may be taken by the President from either the active or retired list of the Army, or both. (20 Op. Atty. Gen., 687, Dec. 8, 1893.)

**Restrictions as to length of service in Army and period of detail apply both to active and retired lists.**—The "five years' service in the Army," as well as the limit of detail to four years, applies to officers detailed from the retired as well as from the active list. (20 Op. Atty. Gen., 687, Dec. 8, 1893.)

**Number of active and retired officers detailed must be apportioned.**—By section 1225, Revised Statutes, and the acts of September 26, 1888, November 3, 1893, and March 3, 1909, the President may, upon the application of any established military institute, seminary or academy, college or university, within the United States, having a certain capacity, detail an officer of the Army on the active or retired list to act as superintendent, or professor thereof, but such officers so detailed shall be apportioned throughout the United States, first, to those State institutions applying for such detail that are required to provide instruction in military tac-



tics under the provisions of the act of Congress of July 2, 1862 (12 Stat., 503), donating lands for the establishment of colleges, etc., and after that said details to be distributed as nearly as may be practicable according to population, etc. (17 Comp. Dec., 691, Mar. 22, 1911.)

**Officer bound to obey order to act as professor.**—Where an officer of the Army is detailed by peremptory order to act as professor in a college, under the act of July 28, 1866 (14 Stat., 336, sec 26), [embodied in section 1225, Revised Statutes], the order so detailing him is one which he is bound to obey. (*Long v. U. S.*, 8 Ct. Cls., 398, Dec. Term, 1872.)

Service as an instructor in an institution of learning, under a detail pursuant to section 1225, Revised Statutes, as amended, is active service to which a retired naval officer may be ordered in time of war; but to which he could not be assigned, without his consent, in time of peace. The act of March 2, 1895, applies to cases where retired officers desire to engage as instructors on their own account in purely private institutions where military tactics are not taught, and to which Government officers could not therefore be assigned for duty as such; and said act has no reference to the case where an officer might lawfully be ordered to perform such service without his consent. A similar provision to the act of March 2, 1895, is found in section 1260, Revised Statutes, with regard to retired officers of the Army, and Congress has made a distinction between employment under that section and under section 1225. See act of August 6, 1894. (5 Comp. Dec., 326, Dec. 19, 1898. When this decision was rendered, retired officers of the Navy and Marine Corps could not be employed on active duty except in time of war. See note to sec. 1462, R. S.)

The act of August 6, 1894, leaves it in the power of the President to detail retired officers of the Army, under the act of May 4, 1880, upon application by the institutions; that is, to make compulsory details. (6 Comp. Dec., 120, Aug. 15, 1899.)

**Retired officer may be allowed additional compensation by college.**—Section 1260, Revised Statutes, refers to additional compensation from the United States, not from the colleges. That this does not refer to any additional compensation from the college, but from the United States, is evident from the language employed, which does not prohibit the receiving, but the allowing of additional compensation. (20 Op. Atty. Gen., 687, Dec. 8, 1893.)

**Pay of retired officers.**—A retired officer of the Navy who, in time of war, is detailed to act as superintendent or professor at any educational institution, as provided by section 1225, Revised Statutes, and the act of September 26, 1888 (25 Stat., 491), is engaged in active service and entitled to active-duty pay, under section 1592, Revised Statutes, during the continuance of the war. (5 Comp. Dec., 326, Dec. 19, 1898.)

Officers of the Army on the retired list who, upon their own application, are detailed to educational institutions in accordance with the provisions of the act of November 3, 1893 [as part of the limited number of officers authorized to be detailed by said act], are entitled

to the full pay of their rank. (6 Comp. Dec., 120, Aug. 15, 1899.)

When, under the act of November 3, 1893, a retired Army officer is detailed as a professor of military science and tactics at a university located in the Island of Porto Rico, such officer is entitled while so detailed to the full pay of his rank. (17 Comp. Dec., 691, Mar. 22, 1911.)

Officers of the retired list detailed for college duties prior to November 3, 1893, and still on duty under such detail, are entitled to full pay only from the passage of the act of that date, under and by virtue of which alone is their right to full pay derived. (20 Op. Atty. Gen., 687, Dec. 8, 1893.)

Under section 1225, as amended by act of September 26, 1888, which says nothing about pay, retired officers, if so detailed, would be placed on duty and would thereby ordinarily become entitled to the full pay of their grades (citing *Long v. U. S.*, 8 Ct. Cls., 403, holding that "a retired officer when called into service and assigned to duty is entitled to receive the full pay and the emoluments of his rank"). This view would, however, be subject to modification in case some statute should require it. The act of May 4, 1880, provides that a retired officer "may receive from the institution to which he may be detailed the difference between his retired and full pay, and shall not receive any additional pay or allowance from the United States." As the law stood after the act of May 4, 1880, retired officers detailed to educational institutions could not receive full pay of their grade from the United States, and it would not be material whether the detail was compulsory or made upon application of the officers. (See also sec. 1260, R. S.) The act of November 3, 1893, amended section 1225 and entitled retired officers to receive the full pay of their rank, provided the detail is not compulsory, but is made upon the application of said retired officers. The act of August 6, 1894, does not attempt to repeal or modify the act of 1893 in so far as said act of 1893 authorizes full pay for retired officers when they are detailed "upon their own application" in making up the maximum of 100 officers, both active and retired, authorized by the act. The act of 1894 still leaves it in the power of the President to detail retired officers under the act of 1880, upon application by the institutions (or compulsory details), and under section 1260, Revised Statutes, upon application of said retired officers, but when so detailed under the act of 1880 or section 1260 the officers will not be entitled to any pay or allowance from the United States beyond their pay as retired officers. It is difficult to understand why officers detailed upon their own application under the act of 1893 should be given full pay, and denied it when detailed upon their own application under section 1260; or why denied it when compulsorily detailed under the act of 1880 and other acts; but such must be the construction of the law as it is. (6 Comp. Dec., 120, Aug. 15, 1899.)

It will be observed that retired officers detailed to educational institutions under the acts of May 4, 1880 (21 Stat., 113), and May 21, 1904 (33 Stat., 225), receive only their retired pay and such additional compensation or allow-

ances as may be paid by the institution to which detailed. (23 Comp. Dec. 500.)

**Pay of retired Army officers governed by general laws relating to active duty.**—

A retired officer of the Army with the rank of colonel who was detailed under the act of November 3, 1893, for duty at an educational institution, was while so detailed "assigned to active duty" within the meaning of the act of March 2, 1905 (33 Stat., 831), and therefore, under the provisions of said act, he was only entitled while so detailed to the full pay and allowances of a major on the active list. (11 Comp. Dec., 698, May 18, 1905.)

The act of March 2, 1905 (33 Stat., 831), refers to the pay of retired officers of the Army when "assigned" to active duty; the term "assigned" includes "detailed," as a detail is only one method of assignment; the act of March 2, 1905, therefore applies to retired officers detailed to duty at educational institutions, as such duty is to be regarded as "active duty," and officers so assigned to active duty are entitled only to the rates of pay authorized by that act. (11 Comp. Dec., 698, May 18, 1905.)

An officer of the Army on the retired list detailed to duty at an educational institution under the act of November 3, 1893, who was advanced from the rank of major to the rank of lieutenant colonel, under the act of April 23, 1904 (33 Stat., 264), on account of civil-war service, should be regarded for pay purposes as a lieutenant colonel, and under the act of March 2, 1905 (33 Stat., 831), he is, while on such duty, entitled to receive the full pay and allowance of a major on the active list. (16 Comp. Dec., 716, May 13, 1910.)

**Pay of retired Navy officers not governed by general laws relating to active duty.**—A retired officer of the Navy detailed to service under the act of March 2, 1895, during the period February 7, 1903, to September 30, 1903, is not entitled to active-duty pay and commutation of quarters. (Comp. Dec., July 18, 1905, 53 S. and A. Memo., 572.)

The act of June 7, 1900 (31 Stat., 703), which authorized the detail of any retired naval officer to active duty (during a period of twelve years from its date), with "the pay and allowances of an officer of the active list of the grade from which he was retired," did not apply so as to entitle the officer to active-duty pay during his detail to active duty under the act of March 2, 1895. (Comp. Dec., July 18, 1905, 53 S. and A. Memo., 572.)

The act of March 2, 1895, is a special statute, while the later one of June 7, 1900, was general, and under established rules a subsequent act treating a subject in general terms and not expressly contradicting the provisions of a prior special statute is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all. As the act of March 2, 1895, under which this officer was detailed, provides that while so detailed he shall be allowed no additional pay, he is not entitled to active-duty pay and commutation of quarters. (Comp. Dec., July 18, 1905, 53 S. and A. Memo., 572.)

As to interpretation of act of March 2, 1895, see 5 Comp. Dec., 326, noted above, under "Officer bound to obey order to act as professor."

**Commutation of quarters.**—Under the provision of the act of November 3, 1893, that retired officers of the Army detailed at educational institutions "shall receive the full pay of their rank," but which does not include allowances, such officers so detailed are not entitled to commutation of quarters. (6 Comp. Dec., 506, Nov. 23, 1899; Spencer v. U. S., 41 Ct. Cls., 430.)

The act of May 4, 1880, prohibits both pay and allowances, while the act of November 3, 1893, merely removes the restriction as to pay, but says nothing about allowances. This omission is significant and controlling in the construction of the act of 1893. The general rule in military matters is that where the word pay is used alone, it does not include allowances. (6 Comp. Dec., 506, Nov. 23, 1899.)

Where an officer of the Army is detailed by peremptory order to act as professor in a college under the act of July 28, 1866 (14 Stat., 336, sec. 26) [embodied in section 1225, Revised Statutes], he is entitled to fuel and quarters or commutation therefor, and his right to commutation is not affected by the fact that his detail was procured by the president of the college with his cooperation. In such a case, if there be no quarters at the place, it will be a station without troops within the meaning of the Army Regulations, and he need not make requisition for quarters. (Long v. U. S., 8 Ct. Cls., 398, Dec. Term, 1872.)

An officer relieved from duty at a station where he had quarters in kind, and ordered to report in person for duty at a college during vacation, is not entitled to commutation of quarters prior to the date on which he reports in person at the college. A report by letter does not have the effect of placing him on duty at the college in such a sense as to entitle him to commutation of quarters at that station. (4 Comp. Dec., 254; Nov. 26, 1897.)

**Medical attendance.**—A retired officer of the Army who is detailed as a professor at an educational institution is not entitled to reimbursement for expenditures for medicines or for medical attendance. (7 Comp. Dec., 89, Aug. 14, 1900.)

It seems clear that medicines and medical attendance can not be considered as part of the pay of an officer, and they must therefore be regarded as in the nature of an allowance, which is not authorized to be given to a retired officer detailed under the act of November 3, 1893. (7 Comp. Dec., 89, Aug. 14, 1900.)

A retired colonel or lieutenant colonel of the Army, detailed under the act of November 3, 1893, to duty at an educational institution, being entitled under the provisions of the act of March 2 1905 (33 Stat., 831), to the full pay and allowances of a major on the active list, is entitled to such medical attendance and medicines at the expense of the United States as are authorized for a major on the active list; but under the provisions of said act of March 2, 1905, a retired officer above the rank of colonel is not entitled while so detailed to said allowances. (11 Comp. Dec., 758, June 14, 1905.)



**Mounted pay.**—Cavalry and Field Artillery officers on the active list of the Army below the grade of major, who are detailed at educational institutions, are required to be mounted during such detail within the meaning of the act of May 11, 1908 (35 Stat., 108), and if they provide suitable mount or mounts at their own expense they are entitled to the addition to their pay on that account and to the allowances for mounts as authorized by law. (16 Comp. Dec., 638, Mar. 31, 1910.)

**Detail of retired Marine officer.**—The act of March 2, 1895 (above quoted) does not appear to have been affected by any subsequent legislation in so far as officers of the Marine Corps are concerned. The Navy Department is therefore of opinion that a retired Marine officer is eligible under that act to detail to service as a teacher or professor in any school or college. (File 9736-22, Aug. 12, 1911.)

There appears to have been no change in the act of March 2, 1895, so far as retired officers of the Marine Corps are concerned. As specific authority thus exists for the detail of the retired Marine officer concerned, it is unnecessary to pass upon the question whether said officer may properly be considered an officer of the Navy within the intent of the act of April 21, 1904 (above quoted). The act of March 2, 1895, as construed by the Attorney General, does not

prohibit additional compensation from the college, but from the United States. (File 11112-649, Sept. 8, 1916.)

**Detail of petty officer in the Navy.**—There is no statutory authority for detailing a petty officer on the active list to an educational institution as instructor therein. However, the act of April 21, 1904 (above quoted), includes retired petty officers in the Navy by the phrase "retired officers and noncommissioned officers of the Army and Navy." It follows that a retired petty officer of the Navy may be detailed as instructor in an educational institution, and while so detailed such institution is, under the terms of the act cited, required to pay him commutation of quarters. Further, the prohibition in said act against payment of compensation from the Government, other than retired pay, to the "noncommissioned" officers so detailed, does not prohibit the acceptance by such noncommissioned or petty officers of additional compensation from the institution to which detailed. It should be noted that section 1225, Revised Statutes, as amended, limits the details in question to colleges or universities having capacity to educate at the same time "not less than 150 male students," and prevents details thereunder of retired noncommissioned or petty officers unless they "are willing to accept such position." (File 7657-361, May 6, 1916.)

**Sec. 1229. [Dismissal of officers in military or naval service.]** The President is authorized to drop from the rolls of the Army for desertion any officer who is absent from duty three months without leave; and no officer so dropped shall be eligible for re-appointment. And no officer in the military, or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.—(Art. of war, 99; art. of war, 106; 15 July, 1870, c. 294, s. 17, v. 16, p. 319; 13 July, 1866, c. 176, s. 5, v. 14, p. 92.)

By act of April 2, 1918 (40 Stat., 501), the President was authorized "to drop from the rolls of the Navy or Marine Corps any officer thereof who is absent from duty without leave for a period of three months or more, or who, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a State or Federal penitentiary: *Provided*, That no officer so dropped shall be eligible for reappointment."

Dismissals from the naval service are further provided for by section 1624, Revised Statutes, article 36.

Dismissals from the Army are further provided for by section 1342, Revised Statutes, article 118, as amended by act of August 29, 1916 (39 Stat., 669).

Dropping an officer from the rolls of the Army is authorized, where he has been absent in confinement in a prison or penitentiary for more than three months after final conviction by a civil court of competent jurisdiction. (See act Jan. 19, 1911, 36 Stat., 894; and art. 118, sec. 1342, R. S., as amended by act Aug. 29, 1916 (39 Stat., 669).)

**Historical note.**—As recommended to Congress by the Commission to Revise the Laws (1872), this section read as follows: "The President is authorized to drop from the rolls of the Army for desertion any officer who is absent from duty three months without leave; and no officer so dropped shall [be eligible for re-appointment] *ever be restored to the military service, except by a re-appointment confirmed by the Senate*. But such dismissal shall be subject to the provisions of the next section." The "next section" contained provisions similar to those of article 37 of the Articles for the Government of the Navy. (Sec. 1624, R. S.) In the notes to the proposed section (Comms. Draft, R. S., pp. 610, 611), it was stated:

"The act of 3 March, 1865, ch. 79, §12, vol. 13, p. 489, provides: 'That in case any officer of the military or naval service who may be hereafter dismissed by authority of the President shall make an application in writing for a trial, setting forth under oath that he has been wrongfully and unjustly dismissed, the President shall, as soon as the necessities of the public service may permit, convene a court-martial to try such officer on the charges on which he was dismissed. And if such court-

martial shall not award dismissal or death as the punishment of such officer, the order of dismissal shall be void. And if the court-martial aforesaid shall not be convened for the trial of such officer within six months from the presentation of his application for trial, the sentence of dismissal shall be void.'

"Section 17 of act 15 July, 1870, ch. 294, vol. 16, p. 319, provides for dropping an officer 'from the rolls,' but as it declares him thereafter ineligible 'for re-appointment,' it appears that this process of dropping is absolute dismissal. Taken by itself the later provision seems to imply that the action of the President is conclusive; but it is assumed by this commission that it can not be construed separately from the existing general provision as to all dismissals by the President. The last clause of the section in the text is not inserted as a new suggestion, therefore, but as the necessary construction of the provision.

"It is to be observed that the act of 20 July, 1868, ch. 185, vol. 15, p. 125, provides that officers *cashed* by sentence of court-martial shall not be restored to the military service except by re-appointment confirmed by the Senate, while the act of 15 July, 1870, cuts off such re-appointment. The earlier act treats the appointing and confirming power as a trustworthy authority to review all the circumstances

of a dismissal by court-martial, as well as to consider the subsequent history of the convicted person. Cases might very well occur in which a prolonged absence without leave could be explained, but after a certain time the party would be without remedy. It seems probable that no distinction in this respect between the cases of dismissal by court-martial and cases of dismissal by the President was intended. The words in *italics* are inserted for the purpose of placing them on the same footing."

However, the recommendations of the commissioners were not accepted by Congress, which enacted this provision in the Revised Statutes as section 1229, in the language given above. (As to the effect of pardon with reference to the reappointment of dismissed officers to the Navy, see note to section 1441, Revised Statutes; as to distinction between various methods by which the service of officers may be terminated without their consent, see note to section 1454, Revised Statutes, under "Meaning of 'wholly retired,'" and note to section 1456, Revised Statutes, under "Character of discharge issued under act of 1882.")

See note to Constitution, Art. II, section 2, clause 2, under "VIII. Power of Removal," and section 1624, Revised Statutes, article 36.

### Sec. 1342. [Articles of War. Repealed.]

This section of the Revised Statutes, which contained the Articles of War, and statutes amendatory thereof, were repealed by act approved June 4, 1920 (41 Stat., 812), which same act contained new articles of war (*id.*, pp. 787-812). However, article 2 of the original section 1342, which prescribed the oath of allegiance to be taken by enlisted men, is continued in force for enlisted men of the Navy by act of March 3, 1899, sec. 25, noted under section 1418, Revised Statutes.

The Navy is governed by the articles embodied in section 1624 of the Revised Statutes, known as the "Articles for the Government of the Navy."

The Marine Corps is governed by "the laws and regulations established for the government of the Navy," except when detached for service with the Army by order of the President; and when so detached it is subject to the rules and articles of war prescribed for the government of the Army. (See sec. 1621, R. S.; and art. 2 (c), quoted below.)

"Officers and enlisted men of the Medical Department of the Navy, serving with a body of marines detached for service with the Army in accordance with the provisions of section sixteen hundred and twenty-one of the Revised Statutes, shall, while so serving, be subject to the rules and articles of war prescribed for the government of the Army in the same manner as the officers and men of the Marine Corps while so serving." (Act Aug. 29, 1916, 39 Stat., 573.)

Article 2 of the Articles of War (June 4, 1920) reads as follows:

"ART. 2. PERSONS SUBJECT TO MILITARY LAW.—The following persons are subject to these articles and shall be understood as in-

cluded in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles: *Provided*, That nothing contained in this Act, except as specifically provided in Article two, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction unless otherwise specifically provided by law.

"\* \* \* (c) Officers and soldiers of the Marine Corps when detached for service with the Armies of the United States by order of the President: *Provided*, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases \* \* \*."

As to persons in the Navy and Marine Corps subject to the Articles of War, see notes above, under this section, and see notes to section 1621, Revised Statutes.

The only case in which it is "otherwise *specifically* provided by law" that any person under the United States naval jurisdiction shall be subject to the Articles of War is that set forth in the act of August 29, 1916 (39 Stat., 573, quoted above under this section), relating to members of the Medical Department of the Navy serving with a body of marines detached for service with the Army. By section 6 of this act of August 29, 1916, "All laws and parts of laws in so far as they are inconsistent with this act are hereby repealed." Accordingly *held*, that a fireman second class in the Navy was not subject to the jurisdiction of an Army court-martial for absence without



leave from U. S. Army Base Hospital No. 6, A. E. F., and that the sentence of an Army summary court-martial purporting to require forfeiture of pay in his case was null and void and should be disregarded and ignored by the naval authorities. (File 26287-5459, Feb. 28, 1919.)

Men enlisted in the Army may on their own application be transferred to the Navy or Marine Corps, but such transfer shall not release them "from any penalty incurred for a breach of military law." (Sec. 1421, R. S.)

**Article 4 of the Articles of War** (June 4, 1920) reads as follows:

**"ART. 4. WHO MAY SERVE ON COURTS-MARTIAL.**—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial. \* \* \*

It was originally provided by section 1342, as article 78 of said section, that "officers of the Marine Corps, detached for service with the Army by order of the President, may be associated with officers of the Regular Army on courts-martial for the trial of offenders belonging to the Regular Army, or to forces of the Marine Corps so detached; and in such cases the orders of the senior officer of either corps, who may be present and duly authorized, shall be obeyed."

As to status of Marine Corps when detached for service with the Army, see note to section 1621, Revised Statutes; see also note to article 120, below.

**Articles 119 and 120 of the Articles of War** (June 4, 1920) read as follows:

**"ART. 119. RANK AND PRECEDENCE AMONG REGULARS, MILITIA, AND VOLUNTEERS.**—That in time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade.

**"ART. 120. COMMAND WHEN DIFFERENT CORPS OR COMMANDS HAPPEN TO JOIN.**—When different corps or commands of the military forces of the United States happen to join or do duty together, the officer highest in rank of the line of the Regular Army, Marine Corps, forces drafted or called into the service of the United States, or Volunteers, there on duty, shall, subject to the provisions of the last preceding article, command the whole and give orders for what is needful in the service, unless otherwise directed by the President."

It was originally provided by section 1342, as article 122 of said section, that, "if, upon marches, guards, or in quarters, different corps of the Army happen to join or do duty together, the officer highest in rank of the line of the Army, Marine Corps, or militia, by commission, there on duty or in quarters, shall command the whole, and give orders for what is needful to the service, unless otherwise specially directed by the President, according to the nature of the case."

By amendment of March 8, 1910, (36 Stat., 234), article 122 of the original section 1342, was changed to read as follows: "If, upon marches, guards, or in quarters, different corps of the Army happen to join or do duty together, the officer highest in rank of the line of the Army, Marine Corps, or militia, by commission, there on duty or in quarters, shall command the whole, and give orders for what is needful to the service, unless otherwise specially directed by the President, according to the nature of the case."

Scope of article.—"The one hundred and twenty-second [now 120th] article of war above quoted applies only when 'different corps of the Army' happen to join or do duty together. It has no pertinency when a portion of the naval force of the United States and a part of the Army happen to join or do duty together, or when any portion of the Marine Corps happens to serve in conjunction with the Army, unless such portion of the Marine Corps can be deemed at the time a part of the Army or at least organically attached to it." (28 Op. Atty. Gen., 15.)

Marine Corps detached for service with Army.—When the Marine Corps is detached for service with the Army, by order of the President, in accordance with section 1621, Revised Statutes, "then of course it becomes a 'corps of the Army' within the scope of the one hundred and twenty-second [now 120th] article of war. When any part of the Marine Corps is present with the Army and engaged in a common enterprise with it, without an order of the President detaching it for service with the Army, the case is one of cooperation, but not of incorporation; and then no officer of the Marine Corps can exercise command over the Army any more than a naval officer can when some part of the Navy is cooperating with the Army; and conversely it is true that no officer of the Army can exercise command over the Marine Corps when the Army and Marine Corps are merely cooperating, without the Marine Corps having been attached to the Army by order of the President, any more than an Army officer can exercise command over the Navy under like circumstances. Indeed, this case of some part of the Marine Corps and some part of the Army being together engaged in a common enterprise is but a special instance of the many cases in which the Army and Navy cooperate to a common end. It becomes different only when some portion of the Marine Corps has been attached to the Army by the President's order." (28 Op. Atty. Gen., 15.)

"The one hundred and twenty-second [now 120th] article of war does not operate to give to officers of the Marine Corps any authority to exercise command in the Army unless they have been detached for service with the Army by order of the President and are still serving with the Army under that order." (28 Op. Atty. Gen., 15.)

Command of joint forces of Army and Navy.—"At the present time there is no law which purports to provide who shall command joint forces of the Army and Navy doing duty together, this matter having heretofore been left by Congress where it properly belongs—to the President, who, as Commander in Chief of

the Army and Navy, is the only authority vested by the Constitution with the power to determine what officers shall take command of such forces either by virtue of rank or by special designation. As an example of this authority of the President, the following article (1050) of the Navy Regulations, all of which are issued with the written approval of the President, may be cited:

"An officer of the Navy can not assume command of Army forces on shore, nor can an officer of the Army assume command over any ship of the Navy, or over its officers or men afloat, except in either case by special authority for a particular service; but when officers of the Navy are on duty on shore with the Army, they shall be entitled to the precedence of the rank in the Army to which their own corresponds, except

command as aforesaid, and this precedence will regulate their right to quarters."

"Similarly the regulations governing the relationship of Army and naval officers while engaged in convoy operations or in the transportation of Army forces aboard naval vessels which have recently been amplified, indicate again the authority of the President in the matter of determining questions of command. Therefore, it appears clear to this department that the President may issue immediately whatever regulations he may deem wise on the subject of command of joint forces of the Army, Navy, and Marine Corps, and no enactment of Congress can increase the power which he already possesses over this subject matter." (Secretary of the Navy to the Secretary of War, Mar. 4, 1918, file 3980-1402:3.)



## TITLE XV.

### THE NAVY.

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## CHAPTER ONE.

### ORGANIZATION.

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### Sec. 1362. [Grades of line officers. Superseded.]

#### This section provided as follows:

"SEC. 1362. The active list of the line officers of the Navy of the United States shall be divided into eleven grades, as follows, namely:

- "First. Admiral.
- "Second. Vice Admiral.
- "Third. Rear admirals.
- "Fourth. Commodores.
- "Fifth. Captains.
- "Sixth. Commanders.
- "Seventh. Lieutenant commanders
- "Eighth. Lieutenants.
- "Ninth. Masters.
- "Tenth. Ensigns.
- "Eleventh. Midshipmen.

"Provided, That vacancies occurring in the grades of Admiral and Vice Admiral shall not be filled by promotion, or in any other manner; and that when the offices of said grades shall become vacant, the grade itself shall cease to exist."—(16 July, 1862, c. 183, s. 1, v. 12, p. 583. 21 Dec., 1864, c. 6, s. 1, v. 13, p. 420. 25 July, 1866, c. 231, s. 1, v. 14, p. 222. 2 Mar., 1867, c. 174, s. 1, v. 14, p. 516. 24 Jan., 1873, c. 62, v. 17, p. 418).

It was superseded by the Navy personnel act, March 3, 1899, section 7 (30 Stat., 1005), which provided that "the active list of the line of the Navy" shall be composed of

- Rear admirals;
- Captains;
- Commanders;
- Lieutenant commanders;
- Lieutenants;
- Lieutenants (junior grade); and
- Ensigns.

Rear admirals were divided into two grades for pay purposes by section 7 of the personnel act above cited, rear admirals of the "nine lower numbers" being given the pay and allowances of brigadier generals in the Army, while rear admirals of the upper nine numbers were not specifically provided for, but, under the general provisions contained in section 13 of the same act they received the same pay and allowances as officers of corresponding rank in the Army, namely, major general, that being the rank corresponding with the rank of rear admiral according to section 1466, Revised Statutes. This division of rear admirals into two grades for pay purposes was continued in effect by the act of May 13, 1908 (35 Stat. 127), which provided different rates of pay for "rear admiral, first nine," and "rear admiral, second nine." (See *Terry v. U. S.*, 39 Ct. Cls., 353.)

By act of August 29, 1916 (39 Stat., 576, 577), provision was made for increasing the number of officers allowed in the various grades and ranks of the Navy, and it was further enacted that "hereafter pay and allowances of officers in the upper half of the grade or rank of rear admiral, including the staff corps and including staff officers heretofore permanently commissioned with the rank of rear admiral, shall be that now allowed by law for the first nine rear admirals, and the pay and allowances of officers in the lower half of the grade or rank of rear admiral, including the staff corps, shall be that now allowed by law for the second nine rear admirals."

The grade of commodore was omitted from the active list by the Navy personnel act, section 7, above cited. That act, however, while thus abolishing the grade of commodore on the active list, did not thereby affect the rank of officers then on the retired list having the rank of commodore, and it contained several provisions for the future retirement of officers with that rank under certain prescribed conditions, viz, by section 7 of said act (30 Stat., 1005) it was provided "that nothing contained in this section shall be construed to prevent the retirement of officers who now have the rank or relative rank of commodore with the rank and pay of that grade;" by section 8 (30 Stat., 1006), it was provided that officers retired on their own application for the purpose of creating a prescribed minimum of annual vacancies should be placed on the retired list with the rank and pay of the "next higher grade, as now existing, including the grade of commodore;" by section 9 (30 Stat., 1006), it was provided that officers retired by selection for the purpose of creating a prescribed minimum of annual vacancies should be placed on the retired list with the rank and pay of the "next higher grade, including the grade of commodore, which is retained on the retired list for this purpose." None of these provisions for retirement with the rank of commodore is now in force. By section 11 of the personnel act (30 Stat., 1006), it was provided that officers having Civil-War service should, when retired, be retired with the rank "of the next higher grade;" under that section, officers with the rank of captain on the active list were retired with the rank of rear admiral and not commodore. Under section 1481, Revised Statutes, certain staff officers are retired with the rank of commodore, this being the only case in which any officers are now placed on the retired list with that rank. (In this connection, see notes to secs. 421 and 1473, R. S., concerning the retirement of chiefs of bureaus in the Navy Department.) The naval appropriation act of May 13, 1908 (35 Stat., 127), which established new rates of pay for the Navy, provided that "hereafter all commissioned officers of the *active list* of the Navy shall receive the same pay and allowances according to rank and length of service, and the annual pay of each grade shall be as follows: \* \* \* rear admiral, second nine, or *commodore*, six thousand dollars." However, there were no commodores on the active list at the time of this enactment and none have since been appointed.

The grade of Admiral ceased to exist, in accordance with section 1362, Revised Statutes, February 13, 1891, in consequence of the death of Admiral David D. Porter. The grade of Vice Admiral had previously ceased to exist, Vice Admiral Stephen C. Rowan having retired February 26, 1889, and died March 31, 1890. However, by act March 2, 1899 (30 Stat., 905), the President was authorized to appoint an "Admiral of the Navy," with the condition that "whenever such office shall be vacated by death or otherwise the office shall cease to exist." The following day, March 3, 1899, the Navy personnel act became law, providing,

as above set forth, what officers should compose "the active list of the line of the Navy," and making no mention of "Admiral of the Navy." In anticipation of a possible decision that this omission of the grade of "Admiral of the Navy" from the personnel act impliedly repealed the prior enactment of March 2, 1899, authorizing the appointment of such officer, the said act of March 2, 1899, authorizing the appointment of an "Admiral of the Navy," was reenacted in the same words as a clause in the naval appropriation act of March 3, 1899 (30 Stat. 1045). The grade of "Admiral of the Navy" accordingly continued as part of the active list of the Navy until such office was "vacated" by the death of Admiral George Dewey on January 16, 1917, when such grade in accordance with law ceased to exist.

The naval appropriation act of March 3, 1915 (38 Stat., 941, 942), provided that the commanders in chief of the Atlantic, Pacific, and Asiatic Fleets shall have the rank of admiral, and the officers second in command of said fleets shall have the rank of vice admiral, from the date each such officer shall assume duty as commander in chief or second in command, respectively, until his relinquishment of such duty; and that "the grades of admiral and vice admiral in the Navy are hereby reestablished and authorized for the purposes of this section." It was further provided that when an officer is detached from duty as such commander in chief or second in command, "he shall return to his regular rank in the list of rear admirals" from which appointed. This act has been construed as not investing the officers concerned with the offices of admiral and vice admiral, but merely as conferring upon them temporarily the rank and pay of those offices, while they continued at the same time to be officers of the grade of rear admiral. (21 Comp. Dec., 840.) See note below, "Title," "grade," "rank," and "office" defined and distinguished."

By act of May 22, 1917, section 18 (40 Stat., 89) the provision in the act of March 3, 1915, quoted in the preceding paragraph, was expressly repealed, and in lieu thereof it was provided that the President be authorized to designate six officers of the Navy for the command of fleets or subdivisions thereof, and that, after such designation, from the date of assuming such command until relinquishing thereof, not more than three of such officers shall each have the rank and pay of an admiral and the others shall each have the rank and pay of a vice admiral; and that "the grades of admiral and vice admiral are hereby authorized and continued for the purpose of this Act;" provided, that in time of war the selections under the provisions of said act shall be made from the grades of rear admiral or captain on the active list of the Navy, and that in time of peace such selections shall be made from among the rear admirals on the active list of the Navy; provided further, that nothing contained herein shall create any vacancy in any grade in the Navy or increase the total number of officers authorized by law; provided further, that when any officer with the rank of admiral or vice admiral is detached from the command of a fleet or subdivision thereof he shall return to his regular rank in the list of officers of the Navy and shall

thereafter receive only the pay and allowances of such rank; and provided further that nothing in said act shall be held or construed as amending or repealing sections 1434, 1463, and 1464 of the Revised Statutes.

By act of August 29, 1916 (39 Stat., 558), it was provided that the Chief of Naval Operations, while so serving, shall have the rank and title of admiral, to take rank next after The Admiral of the Navy, and if retired while so serving he shall be retired with the lineal rank and retired pay to which he would be entitled had he not been serving as Chief of Naval Operations.

**The grades of master and midshipman** as part of the active list of the line, under section 1362, Revised Statutes, were abolished, and the grades of lieutenant (junior grade) and junior ensign, created by act of March 3, 1883 (22 Stat., 472), which had the effect of changing the title "master" to "lieutenant (junior grade)" and the title "midshipman" to "ensign" (see *Schuetze v. U. S.*, 24 Ct. Cls., 299; *Weller v. U. S.*, 41 Ct. Cls., 324, 337), and the grade of junior ensign thus created was abolished by act of June 26, 1884, section 2 (23 Stat., 60). The title of "midshipman" was applied to students at the Naval Academy by act of July 1, 1902 (32 Stat., 686). "Midshipmen are, by law, officers in a qualified sense. They are classed as being of the line." (Art. R-1002, par. 3, Navy Regulations, 1913. See *Weller v. U. S.*, 41 Ct. Cls., 324; *Schuetze v. U. S.*, 24 Ct. Cls., 299.)

**Who are line officers; status of warrant and commissioned warrant officers.**—In 1862 Congress passed an act purporting to establish the grade of line officers in the Navy. Prior to that time there is little or nothing in the statutes about the line of the Navy. In that statute, without explaining which of the various meanings of the word "line" Congress had in mind, it left no doubt as to the officers it intended to embrace among the line officers of the Navy, for it mentioned them all. This specification was practically repeated in the acts of July, 1866, in the Revised Statutes of 1873, in an act of August 5, 1882, and in the naval personnel act of March 3, 1899. (22 Op. Atty. Gen., 620.)

It is obvious that all officers specified by Congress as line officers were thereby distinguished from all officers not specified, whether those officers were staff officers, properly so called, or officers belonging to special corps, such as the Pay Corps, the Medical Corps, and the like, warrant officers, or petty officers. (22 Op. Atty. Gen., 620.)

"From the earliest times the officers of the Navy have been divided into commission officers, warrant officers, and petty officers, the difference being rather a difference in the mode of the appointment or designation than one growing out of the function to be performed. The commission officers were those holding commissions from the President like the commissions of other officers of the United States; warrant officers had no such commissions but only warrants given by the President or Navy Department; and petty officers were rated or designated by the commanders of their respective vessels from among the enlisted men on board." (22 Op. Atty. Gen., 620.)



It seems to be clear that, within the meaning of the Revised Statutes and subsequent laws, line officers of the Navy are the officers specified as such by Congress, and that no others are such officers of the line. It follows that no warrant officers are, within the meaning of those laws, officers of the line. (22 Op. Atty. Gen., 620.)

However, Congress in speaking of "the line" evidently does not mean "the line of command," and there is nothing in its classification to indicate an intent to make unlawful the exercise of command by boatswains and gunners. "It would seem that boatswains and gunners have been in the line of command as a matter of fact for a century. Both of them are officers whose functions and business are ancient and are involved in the customs of the British and American navies. As a navy is an organic growth, its antecedents and customs should not be ignored \* \* \*. From all that has been said I think we may conclude that treating those officers as in the line of command was not without lawful authority before 1862 \* \* \*. These things being so, I think those officers are not improperly classed in the Regulations as officers of the line, and that they can properly be given the star upon their uniforms." (22 Op. Atty. Gen., 620.)

"The machinist has existed in the Navy for some time, of course, and yet for no great period. He has been a rated or petty officer (Art. 794, Regulations of 1893). The personnel act of this year [1899] creating the office of warrant machinist [now "machinist"] shows plainly that Congress did not intend to place the machinists in its own list of line officers, for it repeated that list in section 7, and omitted them. They had previously been connected with the Engineer Corps or its business, a staff or special corps, no part of which had been exercising military command. The personnel bill has not been regarded as ipso facto transferring all the officers of that corps to the line of command. (See General Orders 524.) As these machinists do not appear to have previously exercised military command, I think that, before they are to be held entitled to command, and others, including senior officers, held to be under obligations to obey them, something positive to that effect should be produced from the personnel acts or from the general nature of their duties or elsewhere. The presumption is the other way, and I find nothing to overcome it." (22 Op. Atty. Gen., 620.)

Since the above opinion was rendered by the Attorney General, it has been held by the Navy Department (file 17789-15, Dec. 13, 21, 1909) that machinists should be classified as line officers, the same as boatswains and gunners, and accordingly it was provided by Navy Regulations that chief boatswains, chief gunners, and chief machinists (who are commissioned officers, designated by the Navy Regulations as "commissioned warrant officers," Art. R-1013, par. 2, Navy Regs., 1913), and boatswains, gunners, and machinists (who are warrant officers), are line officers of the Navy (Art. R-1013, par. 3, Navy Regs., 1913); but that "so far as succession to command or succession to duties aboard ship outside the engineer department are concerned chief machinists and machinists are restricted to the

performance of engineering duty only." (Art. R-1013, par. 3, Navy Regs., 1913.)

As to the appointment of warrant officers and commissioned warrant officers, see note to section 1405, Revised Statutes.

"Title," "grade," "rank," and "office" defined and distinguished.—Title is the name by which an office or the holder of an office is designated and distinguished in the statute and by which the officer has a right to be known and addressed; grade expresses one of the divisions or degrees in the particular department or branch of the service according to which offices therein are classified or graded; and rank, which originally signified that which determines the right to command and is still an inseparable incident to such right, expresses the position of officers of different grades or of the same grade in point of authority, precedence, or the like, of one over another. (16 Op. Atty. Gen., 414.)

The word "rank" is sometimes used, however, as synonymous with "grade"; thus, when it is said that a particular officer shall have the rank of captain, commander, and so forth, there being no qualifying word, it is used in the sense of grade, and this whether the rank is permanently or temporarily given. (16 Op. Atty. Gen., 414; see also *Wood v. U. S.*, 15 Ct. Cls., 151, 160.)

In some cases the same word or appellation may express, alike, title, grade, and rank with clearness. Thus, in section 1362, which provides that "the active list of the line officers of the Navy of the United States shall be divided into eleven grades, as follows, namely," etc., each of the words "Admiral," and "Vice Admiral," expresses the title of the officer holding either of those respective positions, his grade, and his rank; in other words, the name by which he is entitled to be addressed, the division or degree in the line of the Navy to which he belongs, and the rank which he holds in it. If, however, there were more than one officer of the same title and grade, it would not necessarily express rank. Thus, "rear admiral," which is a grade composed of more officers than one, each having a right to the same title, does not express the rank which they hold inter sese, although it expresses the rank so far as those above and below that grade are concerned. (16 Op. Atty. Gen., 414.)

"Grade is a step or degree in either office or rank, and has reference to the divisions of the one or the other or both, according to the connection in which the word is employed." (*Wood v. U. S.*, 15 Ct. Cls., 151, 160; affirmed 107 U. S., 414; see also *Moser v. U. S.*, 42 Ct. Cls., 86; *Thornley v. U. S.*, 18 Ct. Cls., 111.)

The distinction between rank and office is more clearly apparent with reference to staff officers than to officers of the line, because in the latter case the words used to designate the rank and the office are usually the same, while in the former case they are always different. (*Wood v. U. S.*, 15 Ct. Cls., 151, 159.)

While "grade" has the same meaning as "office," "rank" is merely a classification to fix the position of officers with respect to other officers in the same or in other grades, as to command, precedence, privilege, or pay. "Rank" may be conferred by mere notifica-

tion, and without either examination, confirmation, or commission (citing *Gen. Wood's Case*, 15 Ct. Cls., 151, 159; *Wood v. U. S.*, 107 U. S., 414; 20 Op. Atty. Gen., 358, 362, 363; 19 Op. Atty. Gen., 169; 27 Op. Atty. Gen., 376). So also, while "grade" is only partially, "rank" is wholly, within the control of Congress (citing *Wood v. U. S.*, 107 U. S., 414, 417; *Sen. Rept. No. 2163*, 38th Cong., 2d sess.). But whenever Congress creates a new grade or rank, without making any provision for filling it, the selection, in the case of a vacancy in grade, is made by the President, by and with the advice and consent of the Senate (citing 29 Op. Atty. Gen., 117); while in the case of a vacancy in rank it is made by the President as Commander in Chief of the Navy, without any action on the part of the Senate (citing *Gen. Ainsworth's Case*, 22 Op. Atty. Gen., 480). (Op. Atty. Gen., Dec. 27, 1916, file 28687-4:8.)

Rank is often used to express something different from office. It then becomes a designation or title of honor, dignity, or distinction conferred upon an officer in order to fix his relative position with reference to other officers in matters of privilege, precedence, and sometimes of command, or by which to determine his pay and emoluments. (*Wood v. U. S.*, 15 Ct. Cls., 151, 159.)

In some cases, officers of the line have a rank assigned to them different from that of the title of their office. Congress has frequently exercised the power of changing the mere rank of officers, without invoking the constitutional power of the Executive to appoint the incumbents to new offices. Accordingly, *held* that when a line officer is retired upon a higher rank pursuant to act of Congress, as a reward for services rendered in battle, his office remains the

same as it was on the active list, but he acquires a higher rank without in any sense being appointed to a new office. (*Wood v. U. S.*, 15 Ct. Cls., 151, 159, 161, 162; affirmed 107 U. S., 414.)

The titles or names of offices to which line officers are appointed are employed also as the designation of rank, and when no other rank is conferred upon them the titles of their respective offices also express their rank; but it does not follow that rank and office are therefore always identical, and in point of fact they are not so. (*Wood v. U. S.*, 15 Ct. Cls., 151, 158, 159.)

The office remaining the same, the officer may have a different rank conferred on him, as a title of distinction, to fix his relative position with reference to others. (*Wood v. U. S.*, 107 U. S., 414.)

The word "grade" in Revised Statutes, section 1588, which fixes the pay of retired officers of the Navy at 75 per cent of the pay of the grade or rank held by them at the time of retirement, refers to the divisions of officers into five-year periods of service. (*Rutherford v. U. S.*, 18 Ct. Cls., 339.)

Where the law provided that certain officers should have "the highest rates of pay attached to their respective grades," it was held that the officers in question were thereby entitled to the highest pay of their rank, the court saying: "A grade is a step in a series, a rank; \* \* \* a grade is a rank, and in our opinion Congress intended to give plaintiff the highest pay of his rank." (*Schuetze v. U. S.*, 24 Ct. Cls., 299.)

For other cases, see notes to sections 421, 422, 423, and 1457, Revised Statutes.

**Relative rank between Army and Navy officers.**—See section 1466, Revised Statutes.

### Sec. 1363. [Number of line officers.

**This section provided as follows:**

"SEC. 1363. There shall be allowed on the active list of the line officers of the Navy one Admiral, one Vice-Admiral, ten rear-admirals, twenty-five commodores, fifty captains, ninety commanders, eighty lieutenant-commanders, two hundred and eighty lieutenants, one hundred masters, and one hundred ensigns; and no promotion to the grade of lieutenant-commander shall be made until the number of such grade is reduced below eighty."—(25 July, 1866, c. 231, s. 1, v. 14, p. 222. 15 July, 1870, c. 295, ss. 9, 10, v. 16, p. 333.)

It was amended by act of August 5, 1882 (22 Stat., 286), which reduced the number of officers in the various grades of the line to the following: Rear admirals, 6; commodores, 10; captains, 45; commanders, 85; lieutenant commanders, 74; lieutenants, 250; masters, 75; and ensigns, 75.

It was superseded by the Navy personnel act of March 3, 1899, section 1 of which act (30 Stat., 1004) transferred the officers of the Engineer Corps of the Navy to the line, and section 7 of which act (30 Stat., 1005) provided that "the active list of the line of the Navy, as constituted by section one of this act, shall be composed of" the following: 18 rear admirals, 70 captains, 112 commanders, 170 lieutenant commanders, 300 lieutenants, and not more than a

### Superseded.]

total of 350 lieutenants (junior grade) and ensigns.

The number of line officers was increased by act of March 3, 1903 (32 Stat., 1197), which authorized 30 additional lieutenant commanders, in all 200; 50 additional lieutenants, in all 350; and such total numbers of lieutenants (junior grade) and ensigns as may qualify for said grades under existing law.

The number of line officers was again increased by act of August 29, 1916 (39 Stat., 576, 577), which provided that "hereafter the total number of commissioned officers of the active list of the line of the Navy, exclusive of commissioned warrant officers, shall be four per centum of the total authorized enlisted strength of the active list, exclusive of the Hospital Corps, prisoners undergoing sentence of discharge, enlisted men detailed for duty with the Naval Militia, and the Flying Corps: *Provided*, That the total number of commissioned line officers on the active list at any one time, exclusive of commissioned warrant officers, shall be distributed in the proportion of one of the grade of rear admiral to four in the grade of captain, to seven in the grade of commander, to fourteen in the grade of lieutenant commander, to thirty-two and one-half in the grade of lieutenant, to forty-one and one-half in the grades of lieutenant (junior grade) and ensign, inclusive:



*Provided further*, That lieutenants (junior grade) shall have had not less than three years' service in that grade before being eligible for promotion to the grade of lieutenant. \* \* \* When there is an odd number of officers in the grade or rank of rear admiral in the line or in each corps, the lower division thereof shall include the excess in number, except where there is but one. Whenever a final fraction occurs in computing the authorized number of any corps, grade or rank in the naval service, the nearest whole number shall be regarded as the authorized number: *Provided*, That at least one officer shall be allowed in each grade or rank. For the purpose of determining the authorized number of officers in any grade or rank of the line or of the staff corps, there shall be excluded from consideration those officers carried by law as additional numbers, including staff officers heretofore permanently commissioned with the rank of rear admiral, and nothing contained herein shall be held to reduce below that heretofore authorized by law the number of officers in any grade or rank in the staff corps." (As to the total authorized number of enlisted men, see note to sec. 1417, R. S.)

The act of May 22, 1917 (40 Stat., 84), as amended by act of July 1, 1918 (40 Stat., 715), which authorized a temporary increase in the number of enlisted men, provided (sec. 4) for the temporary appointment and promotion of additional commissioned officers, based upon such temporary increase in the enlisted strength, such additional temporary officers to be distributed between the various grades and ranks, not above lieutenant commander, in accordance with the provisions of the act of August 29, 1916 (above cited). The same act and section further provided for temporary appointments and promotions to fill, during the period of the war, the deficiency existing prior to May 22, 1917, in the total number of commissioned officers authorized by the act of August 29, 1916, and "that lieutenants (junior grade) and ensigns may be considered eligible for temporary promotions to the grades of lieutenant and lieutenant (junior grade) without regard to length of service in grade."

The act of July 11, 1919 (41 Stat., 137, 138), which temporarily increased the enlisted strength for specified periods, provided that during such periods the "average number" of commissioned officers of the line, including temporary officers and reserves on active duty, shall not exceed 4 per centum of the total temporary authorized enlisted strength of the Regular and Temporary Navy, and members of the Naval Reserve Force in enlisted ratings on active duty; with a proviso that nothing in said act "shall be construed as affecting the permanent commissioned strength of the Navy as authorized by existing law."

The act of June 4, 1920 (41 Stat., 834) provided "That the number of commissioned officers of the line, permanent, temporary, and reserve on active duty shall not exceed 4 per centum of the total authorized enlisted strength of the Regular Navy," with the proviso that nothing therein contained should be construed as reducing the permanent commissioned strength of the Regular Navy as authorized by existing law.

**Ensigns are commissioned as such** from among the graduates of the Naval Academy (see acts Mar. 7, 1912, 37 Stat., 73, and July 9, 1913, 38 Stat., 103), and the appointment of 12 ensigns each year from among the boatswains, gunners, machinists, chief boatswains, chief gunners, and chief machinists in the Navy was authorized by acts of March 3, 1903 (32 Stat., 1197), and March 3, 1909 (35 Stat., 771); see also acts of March 3, 1899, section 12 (30 Stat., 1007); March 3, 1901 (31 Stat., 1129); and April 27, 1904 (33 Stat., 346).

**Lieutenants (junior grade)** are appointed by promotion from ensigns who have had three years' service as such (act Mar. 3, 1899, sec. 7, 30 Stat., 1005). By act of June 4, 1920, section 5 (41 Stat., 836) it was provided that until June 30, 1923, promotions to lieutenant (junior grade) and lieutenant may be made without regard to length of service.

**Additional officers are authorized** by various enactments, including the following: Advancement of officers for "eminent and conspicuous conduct in battle or extraordinary heroism" is authorized by sections 1506-1507, Revised Statutes, notwithstanding that the higher grades to which such officers may be so advanced already have the full number of officers specified by law. By acts of March 3, 1901 (31 Stat., 1108) and June 16, 1906 (34 Stat., 296), officers so advanced are to be carried as additional to the numbers of each grade in which they serve. By sections 1508-1510, Revised Statutes, any line officer receiving the thanks of Congress for "highly distinguished conduct in conflict with the enemy, or for extraordinary heroism in the line of his profession," may be advanced one grade, and such vote of thanks shall be held "to affect such officer only." Retired officers detailed for the command of squadrons or single ships in time of war may be restored to the active list if they receive a vote of thanks of Congress for their services and gallantry in action against the enemy (sec. 1465, R. S.). See also file 26521-400, June 19, 1920, noted below under "Effect of exceeding number of officers allowed in any grade."

The act of March 3, 1901 (31 Stat., 1108), provides that no promotion shall be made to fill a vacancy occasioned by the promotion, retirement, death, resignation, or dismissal of any officer who is an additional number in his grade under the provisions of the said act; and section 1510, Revised Statutes, provides that no promotion shall be made to fill a vacancy occasioned by the final retirement, death, resignation, or dismissal of an officer who has received a vote of thanks.

Officers on the active list of the line who, under the provisions of section 5 of the Navy personnel act of March 3, 1899 (30 Stat., 1005), perform engineering duty on shore only, were made "additional to the numbers in the grades" in which they were serving or to which they might be promoted, by act of March 4, 1911 (36 Stat., 1267). [Note: Such former engineer officers are now made available by law for any shore duty compatible with their rank and grade. See note to section 1390, Revised Statutes.]

The act of March 3, 1915 (38 Stat., 939), authorized the President to restore to the active list

officers who were compulsorily retired to create vacancies in accordance with section 9 of the Navy personnel act approved March 3, 1899 (30 Stat., 1006), and provided that officers so transferred to the active list shall be carried as additional numbers in the grades to which transferred or thereafter promoted. Provision for restoration to the active list of certain designated retired officers, as additional numbers in grade, was made by act of August 29, 1916 (39 Stat., 602).

The act of August 29, 1916 (39 Stat., 580), provided for the appointment and detail of line officers of the Navy for engineering duty only, and the same act (39 Stat., 578, 579) provided that such officers, and officers of the former Engineer Corps "who are restricted by law to the performance of shore duty only," shall, when promoted by selection to the grades of commander, captain, and rear admiral, "be carried as additional numbers in grade."

The act of August 29, 1916 (39 Stat., 582, 586), created a naval flying corps, to be composed in part of 150 officers, detailed from the line of the Navy and from the Marine Corps, or appointed to the line of the Navy or Marine Corps, for aeronautic duties only, and provided that said number of officers shall be in addition to the total number of officers provided by law "for the other branches of the naval service."

**Warrant officers and commissioned warrant officers.**—As to number of, authorized by law, see note to section 1405, Revised Statutes.

**Naval Reserve.**—The Secretary of the Navy is authorized to establish a list of persons who have been found eligible by examination for commissions in any reserve or volunteer naval force hereafter organized, other than the Naval Militia, and, when exigency demands, the President is authorized to issue commissions in the Regular Navy to persons so qualified. The President is also authorized to commission or warrant former officers who have been honorably discharged from the Navy. (Act Feb. 16, 1914, sec. 21, 38 Stat., 289.)

The act of August 29, 1916 (39 Stat., 587), amended by acts of March 4, 1917 (39 Stat., 1174), April 25, 1917 (40 Stat., 37), April 25, 1917 (40 Stat., 38), May 22, 1917 (40 Stat., 84), July 1, 1918 (40 Stat., 708-712), and June 4, 1920 (41 Stat., 834), created a "Naval Reserve Force" and provided for enrollment therein, for "general service" only, of former officers and citizens of the United States or of the insular possessions and aliens, not enemies, who have declared their intention to become citizens, who "may be ordered into active service in the Navy by the President in time of war or when, in his opinion, a national emergency exists"; said Naval Reserve Force to have the various grades and ranks, not above the rank of lieutenant commander, corresponding to those in the Navy.

**National Naval Volunteers.**—By act of August 29, 1916 (39 Stat., 595), the "National Naval Volunteers" was created, to be composed of members of the Naval Militia, "to provide a force for use in any emergency, including that of actual or imminent war, requiring the use of naval forces in addition to those of the Regular Navy." By act of July 1, 1918 (40 Stat., 708), all laws relating to the Naval Militia and Na-

tional Naval Volunteers were repealed and the President was authorized to transfer as a class all members of the National Naval Volunteers to the Naval Reserve Force or Marine Corps Reserve.

**The Coast Guard.**—By act of January 28, 1915 (38 Stat., 800), amended by act of August 29, 1916 (39 Stat., 600), the Coast Guard was established, to "constitute a part of the military forces of the United States," and "to operate as a part of the Navy, subject to the orders of the Secretary of the Navy, in time of war or when the President shall so direct."

**The Lighthouse Service.**—By act of August 29, 1916 (39 Stat., 602), it was provided that "the President is hereby authorized, whenever in his judgment a sufficient national emergency exists, to transfer to the service and jurisdiction of the Navy Department, or of the War Department, such vessels, equipment, stations, and personnel of the Lighthouse Service as he may deem to be the best interest of the country."

**Coast and Geodetic Survey.**—By act of May 22, 1917, section 16 (40 Stat., 87), it was provided "that the President is hereby authorized, whenever in his judgment a sufficient national emergency exists, to transfer to the service and jurisdiction of the War Department, or of the Navy Department, such vessels, equipment, stations, and personnel of the Coast and Geodetic Survey as he may deem to be the best interest of the country."

**Public Health Service.**—In times of threatened or actual war the President is authorized in his discretion to utilize the Public Health Service in such manner as in his judgment shall promote the public interest without impairing the efficiency of the service for the purposes for which created. (Act July 1, 1902, sec. 4, 32 Stat., 713.)

When detailed in time of war for duty with the Navy, officers of the Public Health Service shall be subject to the laws prescribed for the government of the Navy (act July 9, 1917, 40 Stat., 242); and are empowered to serve on naval courts-martial (act Oct. 6, 1917, 40 Stat., 393).

**Acting officers.**—As to authority for appointment of, see note to section 1410, Revised Statutes.

**During the Spanish War,** by act of May 4, 1898 (30 Stat., 369), the President was authorized, for a period of twelve months, in case of an exigency, to appoint officers of the line and staff not above the rank of commander, and warrant officers, and officers of the Marine Corps not above the rank of captain, as might be requisite; such officers to serve only during the continuance of the exigency under which their services were required in the then existing war. (In this connection, see 22 Op. Atty. Gen., 82; and *U. S. v. Hite*, 204 U. S., 343.)

**Number of officers not to be increased without explicit legislation.**—Legislation relating to the Navy should not be construed as impliedly increasing the number of officers authorized by law, where no such result was intended by Congress. Thus a law providing that increased rank and pay should be conferred upon certain officers on the active list who had served as chiefs of bureaus in the Navy Department should not be construed as creating a vacancy in the list of officers of their former



rank, with a resultant increase in the total number of officers. Such provision was intended to affect only the officers for whose benefit it was enacted, and not to increase the number of officers in the Navy. When Congress has seen fit to make increases in the number of officers in the Navy, either generally or in particular corps or grades, it has generally used specific and apt language to accomplish that object. (28 Op. Atty. Gen., 526; see also note to sec. 421, R. S.)

In accordance with the above opinion of the Attorney General, *held*, that an act of Congress providing that pharmacists in the Navy having six years' service as such should be commissioned as chief pharmacists, which grade had not theretofore existed, was intended merely to confer increased rank and emoluments upon officers who had served a specified period as pharmacists, and not to increase the total number of such officers; accordingly, the law having previously limited the total number of pharmacists to 25, this limitation must be held to embrace the new grade of chief pharmacist, and said grades of pharmacist and chief pharmacist combined, should be limited to a maximum of 25. (File 27213-3, May 6, 1913; see also 5460-81, May 12, 1916, and see note to sec. 1405, R. S.)

**Effect of exceeding number of officers allowed in any grade.**—The law fixes the maximum number of officers in various grades in the Navy; and where the number in each of the grades is full, no new appointment, either original or by promotion, can be made in those grades, without either increasing the number allowed by law, or removing some other officer. Therefore, the nomination and confirmation of an officer for appointment to a grade already full (commander), vice M, "promoted," at a time when M had been nominated for promotion but not confirmed and was therefore still in the grade of commander, must either, first, increase the number of commanders beyond that allowed by law; or second, operate to remove M from the Navy; or third, operate to confirm M as a captain; or, fourth, be ineffectual or void. (23 Op. Atty. Gen., 30, holding that in this case effect of nomination and confirmation of successor to M, was to confirm M's nomination as captain. Compare 13 Op. Atty. Gen., 44, noted under sec. 1457, R. S., "Correction of erroneous retirement.")

The President has not power, by and with the advice and consent of the Senate, to increase the number of commanders in the Navy beyond the number expressly fixed and limited by Congress. While the Constitution gives the President the power, with the advice and consent of the Senate, to appoint officers, it does not confer power to create such offices as these, nor to increase their number. He may appoint such officers as are created by the Constitution or by law, but there can be no doubt of the power of Congress to fix and limit the number of such officers as these, and such action is binding upon

both the Executive and the Senate, and can be changed by Congress alone. (23 Op. Atty. Gen., 30.)

The act of August 29, 1916 (39 Stat., 576), while it does not in numbers fix the complement of the various commissioned grades and ranks of the Navy, does specify a definite method of determining the maximum number of such officers by mathematical calculation. The result of such calculation is the fixed number of officers allowed by law in each grade and rank for the period covered thereby and the number thus arrived at for any period can not be exceeded during said period any more than if the law had specified same in actual figures. The power of Congress to reduce the number of officers is undoubted. Accordingly, should subsequent computations result in decreasing the number of officers as previously fixed, it is not unlikely that the excess number of officers would be legislated out of office, in the absence of further legislation. (File 28687-19, Jan. 24, 1917, citing 23 Comp. Dec., 33. But see file 26521-400, June 19, 1920, holding that officers found to be in excess of the authorized number in any grade, as the result of new computations, should be carried as additional numbers in grade until such time as the number is reduced by death, resignation, promotion, retirement, etc., no provision having been made by Congress for the reduction of such officers to lower grades, and the President not being required or directed by law to revoke their commissions.)

As to removal of officer by nomination and confirmation of successor, see note to Constitution, Art. II, sec. 2, clause 2, under "VIII. Power of Removal."

**Vacancies necessary prior to promotion.**—"Officers subject to examination before promotion to a grade limited in number by law shall not be entitled to examination in such a sense as to give increase of pay until designated by the Secretary of the Navy to fill vacancies in the higher grade." (Sec. 1495, R. S.)

Where an officer in a grade limited in number by law, which grade counting him is full, becomes due for promotion to fill a vacancy in a higher grade, but his promotion is delayed, a successor to such officer can not lawfully be appointed until the latter's promotion is consummated. (File 26521-67, June 4, 1913; 26521-67:1, Dec. 4, 1913; see also 11 Comp. Dec., 764; and file 28762-277, Dec. 10, 1917.)

The act of June 22, 1874 (18 Stat., 191) [noted under section 1561, Revised Statutes], providing that officers on promotion in certain cases shall be entitled to the pay of the grade to which promoted from date of rank therein, does not apply so as to entitle officers to pay in the higher grade from date of rank when it appears that there were no vacancies in the higher grade on that date. (23 Op. Atty. Gen., 30, 40.)

See note to section 1364, Revised Statutes, under "Vacancies necessary prior to promotion."

### Sec. 1364. [When number of line officers may be exceeded. Obsolete.]

This section provided as follows:

"SEC. 1364. The provisions of the foregoing section shall not have the effect to vacate the commission of any lieutenant-commander,

lieutenant, master, or ensign appointed according to law, in excess of the respective number therein fixed; nor to preclude the advancement of any officer to a higher grade, for distinguished

conduct in battle, or for extraordinary heroism, under the provisions of sections fifteen hundred and six and fifteen hundred and eight.”—(16 July, 1862, c. 183, s. 9, v. 12, p. 584. 25 July, 1866, c. 231, ss. 1, 2, v. 14, p. 222.)

It was rendered obsolete by the Navy personnel act of March 3, 1899, section 7 (30 Stat., 1005), which superseded “the foregoing section” referred to herein, namely, section 1363, Revised Statutes, by making new and complete provisions as to the number of officers who should compose the active list of the line of the Navy.

**Provisions relating to the advancement of officers to higher grades for distinguished conduct in battle or for extraordinary heroism,** notwithstanding that such grades already had the full number of officers specified by law, were contained in sections 1507 and 1509, Revised Statutes, and the acts of March 3, 1901 (31 Stat., 1103) and June 16, 1906 (34 Stat., 296), noted above, under section 1363, Revised Statutes. Also, the act of March 3, 1903 (32 Stat., 1197, 1198), noted above under section 1363, Revised Statutes, after increasing the number of officers in certain grades of the active list of the line, and fixing a new total for such grades, provided that “nothing contained in this act shall affect the officers of the Navy who may have been or may hereafter be advanced in rank under existing provisions of law by which

they become extra numbers in their respective grades, or operate to vacate the commission of any officers now in the service.” See also note to section 1363, Revised Statutes, under “Effect of exceeding number of officers allowed in any grade.”

**Vacancies necessary prior to promotion.**—Section 1364 provides that the provisions of the foregoing section shall not have the effect to vacate the commission of certain grades of officers appointed according to law, in excess of the respective number therein fixed—thus, by a familiar rule of construction, implying that the commissions of other officers in excess of the number fixed, might be thereby vacated. (23 Op. Atty. Gen., 30.)

Sections 1364, 1506, and 1507 authorize the advancement of officers of the Navy to higher grades for eminent and conspicuous conduct in battle or extraordinary heroism, even though in excess of the number in such grade as fixed by statute. These sections do not apply in the cases of officers promoted in turn to fill vacancies, and such promotions could not be sustained if they increased the number of officers of these grades beyond the number fixed by law. (23 Op. Atty. Gen., 30, 39.)

See note to section 1363 Revised Statutes, under “Vacancies necessary prior to promotion.”

**Sec. 1365. [Selection of rear admirals during war.]** During war rear-admirals shall be selected from those officers on the active list, not below the grade of commanders, who shall have eminently distinguished themselves by courage, skill, and genius in their profession; but no officer shall be so promoted, under this provision, unless, upon recommendation of the President by name, he has received the thanks of Congress for distinguished service.—(16 July, 1862, c. 183, s. 7, v. 12, p. 584.)

Examinations prior to promotion on the active list are required by sections 1493–1497, Revised Statutes. See also section 1366, Revised Statutes, below.

In time of war the President may, by and with the advice and consent of the Senate, detail any officer on the retired list, not below the grade of commander, for the command of a squadron, with the rank and title of “flag officer”; and retired officers so detailed may be restored to the active list if they receive a vote of thanks of Congress. (Secs. 1463–1465, R. S.)

Temporary promotions to all grades in the Navy, “during the period of the present war,” were authorized by act of May 22, 1917, section 4 (40 Stat., 85), as amended by act of July 1, 1918 (40 Stat., 715, 716.)

President may select any officer not below the grade of commander on the active list of the Navy and assign him to the com-

mand of a squadron, with the rank and title of “flag officer.” (Sec. 1434, R. S.)

Thanks of Congress, effect of: See sections 1465, 1508–1510, Revised Statutes. Persons who have by name received the thanks of Congress are entitled to the privilege of admission to the floor of the House of Representatives. (See Rules of the House of Representatives.)

The act of August 29, 1916 (39 Stat., 578), provides that “hereafter all promotions to the grades of commander, captain, and rear admiral of the line of the Navy, including the promotion of those captains, commanders, and lieutenant commanders who are, or may be, carried on the Navy list as additional to the numbers of such grades, shall be by selection only from the next lower respective grade upon the recommendation of a board of naval officers as herein provided.”

### Sec. 1366. [Promotion to rear admiral during peace. Superseded.]

This section provided as follows:

“SEC. 1366. During peace, vacancies in the grade of rear-admiral shall be filled by regular promotion from the list of commodores, sub-

ject to examination according to law.”—(16 July, 1862, c. 183, s. 7, v. 12, p. 584.)

It was superseded by the act of March 3, 1899, section 7 (30 Stat., 1005), which abolished



the grade of commodore on the active list of the Navy. (See note to sec. 1362, R. S.) Thereafter, promotions to the grade of rear admiral were made by seniority from the grade of captain. (See sec. 1458, R. S.)

New provisions for promotion to the grade of rear admiral were contained in the act of August 29, 1916 (39 Stat., 578), noted under section 1365, above.

See also sections 1434, 1463, 1464, and 1497, Revised Statutes.

**Sec. 1367. [Secretaries to Admiral and Vice Admiral.]** The Admiral and Vice Admiral shall each be allowed a secretary, who shall be entitled to the rank and allowances of a lieutenant in the Navy.—(21 Dec. 1864, c. 6, s. 2, v. 13, p. 420. 16 May, 1866, c. 84, v. 14, p. 48. 25 July, 1866, c. 231, s. 6, v. 14, p. 223. 2 Mar., 1867, c. 174, s. 1, v. 14, p. 516.)

Appointments from civil life of secretaries or clerks to the Admiral or Vice Admiral when on sea service were prohibited by act of May 4, 1878 (20 Stat., 50), which further provided that an officer not above the grade of lieutenant shall be detailed to perform the duties of secretary to the Admiral or Vice Admiral when on sea service.

Pay of secretaries to the Admiral and Vice Admiral was fixed at \$2,500 per annum by section 1556, Revised Statutes.

Secretaries and clerks are not petty officers of the Navy. (See sec. 1410, R. S.)

See note to section 1362, Revised Statutes, as to the grades of Admiral and Vice Admiral in the Navy.

**Appointment of secretary.**—The appointment of secretary allowed the Admiral of the Navy by section 1367, Revised Statutes, does not belong to the President with the advice and consent of the Senate, but devolves upon the Admiral as one personal to himself, and the contemporaneous construction of the statute and uniform practice thereunder by the executive branch of the Government have accorded with this view. (19 Op. Atty. Gen., 589. As to appointment of officers in general, see note to Constitution, Art. II, sec. 2, clause 2.)

It can not be supposed, in the absence of express provision, that Congress wished to deprive the Admiral and Vice Admiral of the important privilege of selecting their confidential assistants, especially when such a privilege had always been accorded to officers inferior to them in rank. (19 Op. Atty. Gen., 589.)

The office of secretary to the Admiral is not an independent office to be filled without regard to the Admiral's nomination and for a life term like that of a lieutenant in the line. By section 1362, Revised Statutes, it is provided that when the office of Admiral becomes vacant, the grade shall cease to exist. Thus, if the foregoing opinion were not correct, we should have a secretary to the Admiral without an Admiral. It would then be a puzzling question to define the scope of his official duties. Congress could not have intended such an anomalous state of affairs. (19 Op. Atty. Gen., 589.)

Section 1410, Revised Statutes, provides that "all officers not holding commissions or warrants, or who are not entitled to them, except such as are temporarily appointed to the duties of a commissioned or warrant officer, and except secretaries and clerks, shall be deemed petty officers," etc. The necessary implication of this section is that secretaries are officers not holding commissions or warrants, and are not entitled to them. (19 Op. Atty. Gen., 589.)

When Congress gave the Admiral and Vice Admiral secretaries, it had been the established practice in the Navy Department for 40 years to allow commanders of fleets, squadrons, and divisions to appoint secretaries to serve them while in command; and such secretaries were staff officers with the relative rank of lieutenant. Without any legislation, therefore, the Admiral and Vice Admiral, while in command on the sea, would have been allowed secretaries on their own appointment. The statutory provision embodied in section 1367 simply extended the privilege of a secretary to these high officers of the Navy for their shore service also. (19 Op. Atty. Gen., 589.)

**Pay of secretary.**—The position of secretary to the Admiral was necessarily in abeyance until the grade of Admiral was revived. However, when the grade was revived, the provisions of law relating to the secretary to the Admiral became again operative. Not being a commissioned officer, his pay was not affected by the Navy personnel act of March 3, 1899. Accordingly, he is entitled to a salary of \$2,500 per annum under section 1556, Revised Statutes, and to the allowances of a lieutenant in the Navy, under section 1367. (6 Comp. Dec., 828.)

**By special enactment of Congress** the appointment was authorized, as an assistant paymaster in the Navy, of Leonard G. Hoffman, secretary to the late Admiral of the Navy, as an additional number in grade, the services of said Hoffman as secretary to be credited to him, for purposes of pay, as service in the Navy. (Act Mar. 4, 1917, 39 Stat., 1184.)

### **Sec. 1368. [Medical Corps; organization of. Superseded.]**

**This section provided as follows:**

"Sec. 1368. The active list of the Medical Corps of the Navy shall consist of fifteen medical directors, fifteen medical inspectors, fifty sur-

geons, and one hundred assistant surgeons."—(3 Mar., 1871, c. 117, s. 5, v. 16, p. 535.)

**It was superseded** by a clause in the naval appropriation act of August 5, 1882 (22 Stat., 285),

which provided that "the active list of the Medical Corps of the Navy shall hereafter consist of fifteen medical directors, fifteen medical inspectors, fifty surgeons, and ninety assistant and passed assistant surgeons."

**The number of officers was increased** by act of June 7, 1900 (31 Stat., 697), which provided that "the active list of surgeons shall hereafter consist of fifty-five, and that of passed assistant and assistant surgeons of one hundred and ten."

**A further increase** was made by the act of March 3, 1903 (32 Stat., 1197), which provided that "the grades of the active list of the Navy hereinafter designated shall be so increased that there shall be \* \* \* thirty additional surgeons with the rank of lieutenant commander, in all eighty-five; one hundred and twenty additional passed assistant and assistant surgeons, with the rank, respectively, of lieutenant, and lieutenant (junior grade), in all two hundred and thirty; \* \* \* and not more than twenty-five assistant surgeons \* \* \* in addition to those necessary to fill vacancies in said grades, shall be appointed in any one calendar year."

**A further increase** was made by the act of June 12, 1916, section 4 (39 Stat., 224), entitled "An act to authorize and empower officers and enlisted men of the Navy and Marine Corps to serve under the Government of the Republic of Haiti, and for other purposes," which provided for the following increase in the Navy: 1 surgeon, 2 passed assistant surgeons, 5 hospital stewards, and 10 hospital apprentices, first class.

**The number of officers was again increased** by act of August 29, 1916 (39 Stat., 576), which provided that "the total authorized number of commissioned officers of the Medical Corps shall be sixty-five one-hundredths of one per centum of the total authorized number of the officers and enlisted men of the Navy and Marine Corps, including midshipmen, Hospital Corps, prisoners undergoing sentence of discharge, enlisted men detailed for duty with the Naval Militia, and the Flying Corps."

The same act (39 Stat., 577) provided that "the total number of commissioned officers of the active list of the following mentioned staff corps at any one time, exclusive of commissioned warrant officers, shall be distributed in the various grades of the respective corps as follows: Medical Corps: One-half medical directors with the rank of rear admiral to four medical directors with the rank of captain, to eight medical inspectors with rank of commander, to eighty-seven and one-half in the grades below medical inspector \* \* \*. When there is an odd number of officers in the grade or rank of rear admiral in the line or in each corps, the lower division thereof shall include the excess in number, except where there is but one. Whenever a final fraction occurs in computing the authorized number of any corps, grade or rank in the naval service, the nearest whole number shall be regarded as the authorized number: *Provided*, That at least one officer shall be allowed in each grade or rank. For the purpose of determining the authorized number of officers in any grade or rank of the line or of the staff corps, there shall be excluded from consideration those officers

carried by law as additional numbers, including staff officers heretofore permanently commissioned with the rank of rear admiral, and nothing contained herein shall be held to reduce below that heretofore authorized by law the number of officers in any grade or rank in the staff corps."

In the same act (39 Stat., 581) it was provided that "hereafter the authorized number of surgeons in the United States Navy be, and it is hereby, increased by one; and that hereafter the Secretary of the Navy be, and he is hereby, authorized to detail one or more officers of the Medical Corps of the United States Navy for duty with the Military Relief Division of the American National Red Cross."

**Distribution of medical officers between lower grades.**—In the distribution of medical officers between the grades below medical inspector under the act of August 29, 1916, the following numbers fixed by prior laws should be regarded as established by law and not to be reduced in consequence of anything contained in the act of August 29, 1916: 87 in the grade of surgeon and 232 in the grades of passed assistant and assistant surgeon. There is no fixed distribution between the grades of passed assistant and assistant surgeon, except for the specific authorization of two passed assistant surgeons contained in the act of June 12, 1916, section 4, above cited. Subject to these restrictions, the increase in the grades of the Medical Corps below medical inspector resulting from the act of August 29, 1916, may be distributed among the three lower grades in such proportions as may, in the discretion of the Secretary of the Navy, best serve the interests of the Navy. (File 27223-37, Mar. 20, 1918. See also note to sec. 1376, R. S.)

**The temporary appointment of additional officers** during the period of the existing war was authorized by the act of May 22, 1917, section 4 (40 Stat., 85), as amended by act of July 1, 1918 (40 Stat., 715), which also authorized temporary appointments and promotions to fill, during the period of the war, the deficiency existing prior to May 22, 1917, in the total number of commissioned officers authorized by the act of August 29, 1916.

**Acting assistant surgeons**, not to exceed twenty-five may be appointed by the President for temporary service (act May 4, 1898, 30 Stat., 380); and such acting assistant surgeons as the exigencies of the service may require, may be appointed by the Secretary of the Navy for temporary service in case of war. (Sec. 1411, R. S., as amended by act Feb. 15, 1879, sec. 2, 20 Stat., 295; see also note to sec. 1410, R. S.)

**A Dental Corps**, to be a part of the Medical Department of the Navy, was authorized by the act of August 22, 1912 (37 Stat., 344), which was superseded by new provisions on the same subject contained in the act of August 29, 1916 (39 Stat., 573), which was in turn superseded by act of July 1, 1918 (40 Stat., 708).

**A dental surgeon in the Navy for duty at the Naval Academy** was authorized by act of March 4, 1913 (37 Stat., 891), as amended by act of July 1, 1918 (40 Stat., 709), as a special provision for the civilian dentist then employed at the Naval Academy.



**A Medical Reserve Corps**, to be a constituent part of the Medical Department of the Navy, was established by the act of August 22, 1912 (37 Stat., 344), "under the same provisions, in all respects (except as may be necessary to adapt the said provisions to the Navy), as those providing a Medical Reserve Corps for the Army." This law was repealed and provision for transfer of Medical Reserve Corps officers to the Naval Reserve Force was made by act of July 1, 1918 (40 Stat., 708).

**A Navy Dental Reserve Corps** was authorized by the act of March 4, 1913 (37 Stat., 903), to be organized and operated under the provisions of law providing for the Navy Medical Reserve Corps. This act was superseded by new provisions on the same subject contained in the act of August 29, 1916 (39 Stat., 574), and the latter act was repealed and provision made for transfer of Dental Reserve Corps officers to the Naval Reserve Force, by act of July 1, 1918 (40 Stat., 708).

**A Hospital Corps**, to be permanently attached to the Medical Department of the Navy, was established by act of June 17, 1898 (30 Stat., 474), as amended by acts of August 22, 1912 (37 Stat., 345), and August 29, 1916 (39 Stat., 572).

**A Nurse Corps (female)** was established by the act of May 13, 1908 (35 Stat., 146).

**Public Health Service.**—By act of July 1, 1902, section 4 (32 Stat., 713) it was provided that "the President is authorized, in his discretion, to utilize the Public Health and Marine-Hospital Service in times of threatened or actual war to such extent and in such manner as shall in his judgment promote the public interest without, however, in any wise impairing the efficiency of the service for the purposes for which the same was created and is maintained."

By act of February 3, 1905 (33 Stat., 650) it was provided that "said Service shall remain under the jurisdiction of the Treasury Department until otherwise hereafter specifically provided by law."

By resolution of July 9, 1917 (40 Stat., 242), it was provided that "when officers of the United States Public Health Service are serving on Coast Guard vessels in time of war, or are detailed in time of war for duty with the Army or Navy in accordance with law, they \* \* \* shall be subject to the laws prescribed for the government of the service to which they are respectively detailed."

By act of October 6, 1917 (40 Stat., 393) commissioned officers of the Public Health Service were authorized to serve on naval courts-martial "when actively serving under the Navy Department in time of war or during the existence of an emergency, pursuant to law, as a part of the naval forces of the United States."

The designation of the Public Health and Marine-Hospital Service was changed to Public Health Service by act of August 14, 1912 (37 Stat., 309).

**A Naval Reserve**, composed of persons who have been found qualified by examination for commissions in any reserve or volunteer naval force hereafter organized, other than the Naval Militia, is authorized by the act of February 16, 1914 section 21 (38 Stat., 289); and the

same act provides that when exigency demands the President is authorized to issue commissions in the Regular Navy to persons so qualified; and also authorizes the President to commission or warrant former officers who have been honorably discharged from the Navy.

As to other auxiliary naval forces, see note to section 1363, Revised Statutes.

**Number of officers not to be increased without explicit legislation.** (See note to sec. 1363, R. S.)

**Passed assistant surgeons.**—Section 1368, Revised Statutes, did not include the grade of passed assistant surgeon as a part of the Medical Corps. However, by section 1556, Revised Statutes, provision was made for the pay of passed assistant surgeons at a higher rate than that allowed assistant surgeons by the same section; it was also provided by said section that "assistant surgeons of three years' service, who have been found qualified for promotion by a medical board of examiners," shall be allowed "the pay of passed assistant surgeons." Where an assistant surgeon had successfully passed his examination for promotion, the practice was for the Secretary of the Navy to notify him by letter that the report of the board of examiners had been approved by the department, and from that date he would be regarded as a "passed assistant surgeon." In a case where this procedure was followed, it was held by the Supreme Court that "the place of passed assistant surgeon is an office, and the notification by the Secretary of the Navy was a valid appointment to it," notwithstanding that the law (see sec. 1369, R. S.) provided that all appointments in the Medical Corps of the Navy should be made by the President, by and with the advice and consent of the Senate. (*Moore v. U. S.*, 95 U. S., 760, see also *Collins v. U. S.* 14 Ct. Cls., 568.)

In the organization of the Medical Corps of the Navy a passed assistant surgeon and an assistant surgeon were, under the Revised Statutes (secs. 1368, 1375, 1474, 1480, and 1556), officers of one and the same grade, but belonging to different classes in such grade. A passed assistant surgeon was simply an assistant surgeon who had been officially notified that he had passed successfully the examination necessary to be undergone before he could be appointed a full surgeon when a vacancy might occur. If it had been the purpose of Congress in adopting the Revised Statutes to make passed assistant surgeon a distinct grade, instead of a mere classification under a grade, the same particularity of enactment would have been used in their case as in the case of passed assistant paymasters (secs. 1376, 1377, 1380, and 1383) and passed assistant engineers (secs. 1390, 1392). But no such legislation is to be found. (19 Op. Atty. Gen., 169.)

In *United States v. Moore* (95 U. S., 760), it was held that a nomination by the President and confirmation by the Senate were not necessary to make a passed assistant surgeon out of an assistant surgeon, a position that could not have been taken if there had been such a grade as passed assistant surgeon. (19 Op. Atty. Gen., 169.)

The reference in section 1480, Revised Statutes, to the "grades" established in the six pre-

ceding sections, which included mention of passed assistant surgeons, was an error on the part of the revisers, and could not be construed as an intention to make a change in the organization of the Medical Corps of the Navy by establishing passed assistant surgeon as a separate grade. (19 Op. Atty. Gen., 169.)

It seems very clear that under the law, as it stood when the act of August 5, 1882 (22 Stat., 285), was passed, there was no such "grade" in the Navy as that of passed assistant surgeon. That act was intended merely to cut down the number of assistant and passed assistant surgeons, "and to deduce anything more, especially anything so radical as a change in the organization of the Medical Corps, by establishing a new grade, would be \* \* \* to take an unwarrantable liberty with the language of the statute. (19 Op. Atty. Gen., 169.)

A court is not always confined to the written words of a statute; in order to avoid giving higher pay to an inferior officer, the words "assistant surgeon," as used in a statute may be construed to include passed assistant surgeons, and the latter, as well as assistant surgeons, thus held to rank with captains in the Army (U. S. v. Farenholt, 206 U. S., 226.)

[Passed assistant surgeons now clearly constitute a separate "grade" in the Navy, by virtue of the act of February 13, 1897 (29 Stat., 526), which provided that "passed assistant surgeons now borne upon the Navy Register shall be commissioned as such by the President, such commissions to bear the dates upon which said passed assistant surgeons, respectively, received their appointments as such; and hereafter assistant surgeons shall be regularly promoted and commissioned as passed assistant surgeons, and passed assistant surgeons as surgeons, subject to such examinations as may be prescribed by the Secretary of the Navy."]

**Medical attendance allowed persons in Navy.**—See section 1586, Revised Statutes.

**Compulsory medical treatment of persons in Navy.**—An enlisted man refused to permit an injection, for the purpose of immunization, of anti-diphtheritic serum during the prevalence of an epidemic of diphtheria on board his ship; for his refusal he was reported by his commanding officer to the Navy Department; his trial by general court-martial was ordered, resulting in his conviction, which was approved by the Secretary of the Navy on February 11, 1910. (G. C. M. Rec. No. 21477; see file 26253-98, May 17, 1910.)

An enlisted man refused to submit to an injection of typhoid prophylactic, as required by general order issued by the Secretary of the Navy and the order of his commanding officer; he was tried by general court-martial and convicted of "refusing to obey the lawful order of his superior officer." *Held*, that he was legally convicted, and the fact that the proposed treatment violated the tenets of his religious faith, could not legally justify his refusal to obey the orders of his official superiors. (File 26251-6149:4, June 24, 1912.)

An enlisted man refused to allow the medical officer properly to treat him; the treatment contemplated was not dangerous nor very painful; the result of his refusal was carefully explained to him and he persisted in his refusal.

He was accordingly tried therefor by summary court-martial. (File 1117-2, Oct. 11, 1906; see file 26253-98, May 17, 1910.)

While the Navy Department will not undertake to lay down, as a general rule, that a man must, particularly in cases involving risk of life or loss of limb, submit to a surgical operation, on the other hand it can not accept the opinion that it is optional with the man concerned whether or not he shall submit to such an operation in the course of medical treatment. In ordinary cases when, in the opinion of the medical officer, after consultation, if advisable, with other surgeons available, it is deemed necessary, in order to restore a man to his capacity for the performance of his duties, that a minor surgical operation be made upon him, he can be required to undergo the same, under penalty of punishment, as by sentence of court-martial, in case of his refusal to submit thereto. (File 1165-02, Feb. 12, 1902.)

The Navy Department is of the opinion that an enlisted man should not be required to undergo a surgical operation for hernia in opposition to his wishes, and that disciplinary action should not be taken against him on account of his refusal to permit such operation. (File 1117, Mar. 17, 1905; file 1117-1, Mar. 10, 1906.)

The Navy Department has heretofore held that a man need not submit to an operation for hernia against his wishes, while the War Department has held otherwise. The principle seems to be the same in both departments as to an operation involving risk of life even though there be diversity in the application of the rule. *Held*, that one in the naval service may not, against his will, be ordered to submit to an operation which is dangerous to life or limb, whereas he may be ordered to submit to an operation which would correct a condition which destroys his usefulness, when such operation may fairly be said, by a responsible medical officer, to be of such a character as not to endanger the life or limb of the patient, under the conditions existing at the time of operation or under the conditions which were believed then to exist and which an experienced medical officer would, in the exercise of due care, be justified in believing to exist. (File 7036-382, Nov. 9, 1917; C. M. O. 72, 1917, p. 18.)

"It will be noted, from the foregoing, that so far as the Department's policy in such matters is concerned, a distinction is made between a minor operation and one of greater magnitude or danger, such as an operation for hernia. In the former case a man, and doubtless an officer, may be required to submit to such an operation under penalty of punishment upon his refusal. But in the case of an operation for hernia, that is, one of greater danger, he 'should not be required to undergo a surgical operation' therefor in opposition to his wishes." (File 26253-98, May 17, 1910.)

The finding of a retiring board, that the incapacity of an officer of the Marine Corps is due to the fact that he will not submit to an operation recommended by responsible medical officers of the Navy, and is therefore not the result of an incident of the service, should be disapproved. It appears to be clear upon



principle, and in accordance with precedent, that he should not be required to submit to the operation which was advised in his case, and which was of a serious nature. (File 26253-98, May 17, 1910.)

If a disability results from an incident of the service, and is of such a serious character that a person in the service may properly decline to be operated upon, such person is entitled to a finding of "in line of duty." But where one may properly be ordered to submit to operation, and is punishable for failure so to submit, the notation of record, "not in line of duty, due to his own misconduct," correctly reflects the facts. A condition having its inception in an incident of the service ceases to be due to that cause and becomes instead traceable to the recalcitrance of the patient. (File 7036-382, Nov. 9, 1917.)

**Medical attendance to persons not in the Navy.**—Medical officers are required by the Navy Regulations, in addition to their official duties, to attend the families of officers and enlisted men residing within a prescribed distance from navy yards, naval stations, recruiting offices, and the Navy Department; and to render professional assistance to mechanics or laborers injured while at work in navy yards. (R-4006, Navy Regs. 1913.)

There is no provision of law which prohibits professional attendance by medical officers upon families of officers of the naval service, and if such attendance does not interfere with the necessary service to officers and men of the Navy and Marine Corps, it is not contrary to law. (File 28019-17, Jan. 26, 1912.)

United States medical officers, where practicable, shall furnish reasonable medical, surgical, and hospital services to Federal employees injured while in the performance of duty. (Act Sept. 7, 1916, 39 Stat., 742.)

The Bureau of War Risk Insurance shall, by arrangement with the Secretary of the Navy, make use of the services of surgeons in the Navy. (Act Oct. 6, 1917, sec. 14, 40 Stat., 399.)

Persons injured while in the naval service in the line of duty shall be furnished by the United States such reasonable governmental medical, surgical, and hospital services as the director of the Bureau of War Risk Insurance may determine to be useful and reasonably necessary. (Act Oct. 6, 1917, sec. 302 (4), 40 Stat., 406.)

Persons applying for or in receipt of compensation under the War Risk Insurance Act, Art. III, shall, as frequently and at such times and places as may be reasonably required, submit to examination by medical officers of the United States. (Act Oct. 6, 1917, sec. 303, 40 Stat., 406.)

[Medical officers of the Army are required by law to attend the families of officers and soldiers free of charge whenever practicable. (Act July 5, 1884, 23 Stat., 112.)]

Commanders in chief, senior officers present, and division commanders may require the medical officers of their commands to render professional aid to persons not in the naval service, when such aid can be rendered without detriment to the interests of the Government, and is necessary and demanded by the laws of humanity or the principles of international courtesy. (R-1607, Navy Regs. 1913.)

A medical officer in the Navy is entitled to compensation from appropriations under control of the Department of Justice for professional services rendered by him to United States prisoners in a United States jail. In this case it appeared that it had been the custom of the Department of Justice for many years to employ medical officers of the Navy to render necessary medical services to prisoners confined in the jail in question, for which services the medical officers were paid by the local United States marshal from the appropriation "support of prisoners." In passing upon the marshal's accounts, certain fees thus paid were disallowed by the Auditor for the State and Other Departments, on the ground that, as the medical officer was an assistant surgeon in the Navy, his compensation was fixed by law, and therefore under section 1765, Revised Statutes, he was not entitled to receive any further salary or fees from the Government. The marshal called upon the medical officer to refund the amounts disallowed, which the latter refused to do, whereupon the marshal made a report to the Secretary of the Navy, who declined to take any action in the matter. Thereafter, the action of the auditor was reversed by the Comptroller of the Treasury, who stated that the medical officer in question was not required by virtue of his office to attend the prisoners in question, and followed the principle applied in 18 Comp. Dec., 156, in which it was held that, "where a clerk to a United States attorney typewrites official reports for an examiner of the Bureau of Investigation, Department of Justice, and the making of such reports is not authorized or directed by a superior officer, such typewriting is not a part of the official duties of said clerk, and compensation therefor is not prohibited by sections 1764 and 1765 of the Revised Statutes." (Comp. Dec., May 15, 1912, 45 MS. Comp. Dec., 300; see file 6320-15, Bu. Nav. As to appropriation chargeable with expenses of officer detailed for duty under another department, see note to sec. 1437, R. S.)

The private practice of medicine and surgery by a medical officer of the Navy in competition with a private physician is not disapproved by the Navy Department under the circumstances of the case presented. (File 17088-8, Jan. 4 and 19, 1910. In this case the facts as accepted by the department were that for many years there had never been a civilian doctor resident in the vicinity of the naval hospital, which compelled the naval medical officer to assume private practice, for a large portion of which he received no remuneration; that the private physician who protested to the department was not permanently located in the immediate vicinity of the hospital, but had a sanitarium and business interests at a distance, which necessitated his absence from town for periods of a month at a time; that should the naval medical officer be prohibited from practicing outside of Navy limits, the inhabitants of the town and surrounding country, a number of whom were destitute, would be left without the services of a physician; that the professional and personal probity of the medical officer in question was satisfactorily established; that the resources of the naval hospital were not being used by him for personal profit or in any manner

inconsistent with proper practice; that said medical officer had observed professional ethics in his association with patients and with other medical practitioners, and would unquestionably continue to do so. See also, as to same case, file 118514 Bu. M. and S., and file 6320-9, Bu. Nav.)

A member of the Hospital Corps of the Navy treated a private patient who called at the naval dispensary and whose case required immediate attention. He accepted compensation for such treatment. A warrant for his arrest for practicing medicine without a license was issued at the instance of a private medical practitioner located in the vicinity of the naval station. Upon report of the occurrence to the Navy Department the case was immediately referred to the Attorney General, who detailed counsel for the defense, with the result that the case was dismissed by the civil magistrate. (File 6692-233.)

**Right to practice medicine and surgery.**—"It is well settled that under the police power inherent in the State, the legislature may enact regulations for the examination and registration of physicians, and the practice of medicine and surgery, and such statutes violate neither the Federal nor the State constitutions. Similar statutes have been sustained for the regulation of the practice of dentistry." (30 Cyc., 1547.)

"The qualifications prescribed by the several States to entitle one to enter upon the practice of medicine and surgery may be generally classified as follows: (1) The candidate must have a diploma from a medical college in good standing and, in addition, must pass a satisfactory examination before a board of examiners. (2) The candidate must pass a satisfactory examination, as in the first class, but is not required to have a diploma. (3) The candidate may either present an acceptable diploma, or, if he has no diploma, he may be examined as to his qualifications. (4) The applicant must hold a diploma issued by a reputable medical college, which must be satisfactorily shown to belong to him." (30 Cyc., 1548.)

"The statutes in many States except from their operation certain classes of persons, and services rendered in particular cases. Thus it is commonly provided that the statute shall not apply to any commissioned medical officer of the United States Army, Navy, or Marine service; \* \* \* physicians called into consultation from another State, or to treat a particular case, and who do not otherwise practice in the State; \* \* \* or to services rendered gratuitously, or in case of emergency, or to the administration of domestic medicines. These exemptions have been attacked as unconstitutional on the ground of discrimination, but have been upheld by the courts." (30 Cyc., 1560.)

The act of March 3, 1896 (29 Stat., 198), "to regulate the practice of medicine and surgery, to license physicians and surgeons, and to punish persons violating the provisions thereof in the District of Columbia," provided (sec. 12) "that this act shall not apply to commissioned surgeons of the United States Army, Navy, or Marine Hospital Service, nor to regularly licensed physicians and surgeons in actual

consultation from other States or Territories, nor to regularly licensed physicians and surgeons actually called from other States or Territories to attend specified cases in the District of Columbia, nor to the treatment of any case of actual emergency, \* \* \* nor to the use of ordinary domestic remedies without fee, gift, or consideration of any kind."

"An emergency means a case in which ordinary medical practitioners are not available, as where the exigency is of so pressing a character that some kind of action must be taken before such parties can be found or procured." (30 Cyc., 1560, citing *People v. Lee Wah*, 71 Cal., 80, 11 Pac., 851.)

The treatment of civilian patients by a medical officer of the Navy within the limits of the Naval Reservation at Indianhead, Md., can not be prosecuted by the State authorities as a violation of State laws prohibiting the practice of medicine and surgery without a license. (File 6692-233; see also note to sec. 355, R. S., under "VI. Jurisdiction, Naval Reservations.")

**Right of medical officers to perform autopsies on deceased members of the naval personnel.**—The following principles are established by judicial decisions concerning the power of coroners and attending physicians to perform autopsies without consent of relatives of the deceased:

"1. In general, coroners are authorized to hold inquests and perform autopsies only in cases of death accompanied by suspicious circumstances such as to indicate that death resulted from violence or other unlawful means. This matter, however, is regulated by statutes in the different jurisdictions, some of which are very much broader in their terms than others.

"2. Where the attending physician is required by law to make a report of death showing the cause thereof, or where the law requires a burial certificate to be issued before interment of the remains, a post-mortem examination is authorized, regardless of the consent of the relatives, where such an examination is necessary to determine the cause of death. This question is wholly distinct from the subject of coroner's inquests, and in cases of this character an autopsy may be performed without the existence of any suspicious circumstances. In some of the cases considered in support of this statement, the autopsy was authorized by the appropriate city authorities. In others, the autopsy was performed by the attending physician upon his own responsibility and his action sustained by the courts.

"3. In cases where an autopsy is proper, it must be performed in a decent manner, with due regard to the sensibilities of the family and the respect due to the dead. Accordingly, there should be no further disfigurement of the body than is absolutely necessary, and any parts of the body removed should be restored for burial, unless it be necessary to preserve some particular organ for further examination as to whether a crime had been committed or for evidence." (File 13673-1587, Apr. 22, 1912).

The Navy Regulations, 1909, articles 1644 (1), 1645 (3), and 1646 (2) [embodied in "Naval Courts and Boards," 1917, articles 596-608, superseding Navy Regulations, 1913, articles R 321, 322, and 323], are similar to the



various State statutes relating to the duties of coroners, and clearly authorize the making of a post-mortem examination, without the consent of the family; whenever death occurs in the Navy under the conditions stated by the Regulations, i. e., "as the result of an accident, or attended with unnatural or suspicious circumstances," in which cases a board of inquest must be convened. (File 13673-1587, Apr. 22, 1912.)

The Instructions for Medical Officers, U. S. Navy, 1909, pages 109, 110, required that a post-mortem examination be made "in every case of death" occurring in the Navy, whether necessary to determine cause of death or not. These instructions, which were incorporated in the Navy Regulations, 1909, by article 1143 of said Regulations, are too broad. A post-mortem examination should be required only in cases of death occurring under circumstances which afford a reasonable necessity for the performance of an autopsy. (File 13673-1587, Apr. 22, 1912.—The instructions mentioned were modified in accordance with the foregoing, in Manual for Medical Department, U. S. Navy, par. 2443, incorporated in the Navy Regulations, 1913, by art. R-4562; see also art. 964, Navy Regs., 1909, now art. R-2963, Navy Regs., 1913.)

As to force and effect of Navy Regulations, see note to section 161, Revised Statutes; as to responsibility of naval officers for illegal acts, see

cases noted under Constitution, Article I, section 8, clause 13; as to right of coroners to hold inquests on naval reservations, see note to section 355, Revised Statutes.

**Reports by medical officers of the Navy to State authorities** can not be required in cases of communicable diseases occurring in naval reservations, as the State laws do not operate within such places under the jurisdiction of the Federal Government. (File 14560-174, Apr. 19, 1916. See also file 4778-95, Dec. 1, 1916, 7657-458, July 27, 1917, and 7657-458; 1, Dec. 13, 1917; and see note to sec. 355, R. S.)

**Medical records confidential.**—See notes to section 161, Revised Statutes, under "II. Custody of Property and Records"; section 418, Revised Statutes, under "Records of department"; and section 871, Revised Statutes, under "Copies of records."

**Medical officers serving with the Army.**—"Officers and enlisted men of the Medical Department of the Navy, serving with a body of marines detached for service with the Army in accordance with the provisions of section sixteen hundred and twenty-one of the Revised Statutes, shall, while so serving, be subject to the rules and articles of war prescribed for the government of the Army in the same manner as the officers and men of the Marine Corps while so serving." (Act Aug. 29, 1916, 36 Stat., 573).

**Sec. 1369. [Medical Corps; appointments in, how made.]** All appointments in the Medical Corps shall be made by the President, by and with the advice and consent of the Senate.—(21 April, 1806, c. 35, s. 3, v. 2, p. 390. 16 April, 1814, c. 58, s. 5, v. 3, p. 125. 24 May, 1828, c. 121, s. 3, v. 4, p. 313.)

As to appointment of officers in general, see note to Constitution, Article II, section 2, clause 2.

Acting assistant surgeons may be appointed by the President (act May 4, 1898, 30 Stat., 380); or in time of war by the Secretary of the Navy (sec. 1411, R. S., as amended by act Feb. 15, 1879, sec. 2, 20 Stat., 295.)

Appointments in the Naval Reserve Force, to commissioned grades, shall be made by the President alone, and to warrant grades shall be made by the Secretary of the Navy. (Act Aug. 29, 1916, 39 Stat., 587.)

Appointments in the Dental Corps of the Navy are made by the President, by and with the advice and consent of the Senate. (Act July 1, 1918, 40 Stat., 708, superseding act Aug. 29, 1916, 39 Stat., 573, which superseded act Aug. 22, 1912, 37 Stat., 345.)

Appointments of temporary commissioned officers during the war with Germany were to be made by the President, by and with the advice and consent of the Senate. (Act May 22, 1917, sec. 12, 40 Stat., 87.)

Nurses (female) are appointed by the Surgeon General with the approval of the Secretary of the Navy; except the superintendent of the Nurse Corps, who is appointed by the Secretary of the Navy. (Act May 13, 1908, 35 Stat., 146.)

Passed assistant surgeons are appointed by the President, by and with the advice and

consent of the Senate. (See note to sec. 1368, R. S.)

Pharmacists in the Hospital Corps are to be appointed by the President (act Aug. 29, 1916, 39 Stat., 572, amending act June 17, 1898, sec. 1, 30 Stat., 474). Chief pharmacists in the Hospital Corps are to be appointed by the President, by and with the advice and consent of the Senate. (Act Aug. 22, 1912, 37 Stat., 345; amended by act Aug. 29, 1916, 39 Stat., 572.)

Promotion of medical officers—see note to section 1371, Revised Statutes.

Rank of officers of the Navy shall not be changed, "except in accordance with the provisions of existing law, and by and with the advice and consent of the Senate." (Sec. 1506, R. S., as amended by act June 17, 1878, 20 Stat., 143.)

Recess appointments, when Senate not in session—see note to Constitution, Article III section 2, clause 3.

The Secretary of the Navy was authorized to make "temporary appointments as warrant officers of the Navy" by act May 22, 1917, section 5 (40 Stat., 85).

**Recess appointment not accepted.**—A recess commission issued to a candidate who had qualified for appointment as assistant surgeon, which, however, was not accepted and was therefore never of any practical effect, should not be accepted after the appointment has been confirmed by the Senate, but should

be disregarded and a permanent commission issued in the usual manner. (File 8622-2, Feb. 10, 1908.)

An examination of statutes relating to appointments in the Navy, as well as appointments in the Army, indicates that Congress frequently discriminates between appointments to be made by the President alone, and appointments to be made by the President by and with the advice and consent of the Senate. For example, section 1369, Revised Statutes, provides that all appointments in the Medical Corps shall be made by the President, by and with the advice and consent of the Senate; section 1378 contains a similar provision with reference to appointments in the Pay Corps; section 1394 provides in a similar manner for the appointment of cadet engineers as second assistant engineers [now repealed]; section 1395 contains a similar provision as to chaplains in the Navy; section 1382 empowers the President alone to appoint a paymaster of the fleet; section 1393 authorizes the President to appoint an engineer of the fleet; section 1403 authorizes cadet engineers of

certain merit to be immediately appointed as assistant naval constructors [now amended]; section 1405 authorizes the President to appoint as many boatswains, gunners, sailmakers, and carpenters as may in his opinion be necessary and proper; section 1411 authorizes the Secretary of the Navy to appoint acting assistant surgeons for temporary service; section 1414 authorizes the Secretary of the Navy to appoint storekeepers on foreign stations. Where the statute provides for the appointment of an officer by the President, without requiring the consent of the Senate, such consent is unnecessary, and the President may make such appointment without submitting the same to the Senate for confirmation. In the latter case the commission may be signed by the Secretary of the Navy as the act of the President. (22 Op. Atty. Gen., 82; for other examples of cases in which the President has been authorized to appoint officers of the Navy without consent of the Senate, see note to Constitution, Art. II, sec. 2, clause 2, under "II. Constitutional Power of Appointment.")

**Sec. 1370. [Medical Corps; qualifications for assistant surgeons.]** No person shall be appointed assistant surgeon until he has been examined and approved by a board of naval surgeons, designated by the Secretary of the Navy, nor who is under twenty-one or over thirty years of age, inclusive.

This section was expressly amended to read as above by a clause in the naval appropriation act of May 4, 1898 (30 Stat., 380). As originally enacted it provided as follows: "Sec. 1370. No person shall be appointed assistant surgeon until he has been examined and approved by a board of naval surgeons, designated by the Secretary of the Navy; nor who is under twenty-one or over twenty-six years of age."—(24 May, 1828, c. 121, s. 1, v. 4, p. 313. 3 Mar., 1871, c. 117, s. 5, v. 16, p. 536.)

Amendment to this section, as reenacted by the act of May 4, 1898, was made by the act of August 29, 1916 (39 Stat., 577), which provided "that hereafter appointees to the grade of assistant surgeon shall be between the ages of twenty-one and thirty-two at the time of appointment;" and by act of March 4, 1917 (39 Stat., 1171), as to boards being convened by officers on foreign stations.

Qualifications for appointment as dental surgeon in the Dental Corps—see act of August 29, 1916 (39 Stat., 573).

Qualifications for appointment in the Naval Reserve Force are prescribed by the act of August 29, 1916 (39 Stat., 587), as amended.

Special age limits were prescribed for officers appointed to the Regular Navy, by transfer from the temporary Navy and Naval Reserve Force, by act approved June 4, 1920, section 5 (41 Stat., 835).

**Appointments to temporary service.**—The above law, as its language imports, was to guard against the appointment of incompetent surgeons in the Navy, and evidently applies to appointments to be made in the

regular or permanent service, as contradistinguished from appointments in the temporary service; for in the next succeeding clause or paragraph of the act of May 4, 1898 (amending section 1370), there is a provision authorizing the President "to appoint for temporary service twenty-five acting assistant surgeons, who shall have the relative rank and compensation of assistant surgeons" [and containing no restrictions as to the qualifications necessary for such temporary appointments]. The Congress by their legislation have recognized the distinction between officers in the permanent and temporary service in the Navy. (Taylor v. U. S. 38 Ct. Cls., 155, 161; see also file 27231-51:5, July 10, 1915; and see note to sec. 1411, R. S.)

The act of May 22, 1917 (40 Stat., 84), providing for temporary appointments and promotions in the Navy, does not require compliance with statutory provisions governing permanent promotions. The decision of the Court of Claims in Taylor v. U. S. (38 Ct. Cls., 155), [noted above], is directly in point in connection with the administration of the act of May 22, 1917. (File 28687-22, June 14, 1917; see also Op. Atty. Gen., Oct. 20, 1917, file 28550-123:4.)

Acting assistant surgeons may be appointed for temporary service after such examination as the Secretary of the Navy may prescribe. (Art. R-3305, Navy Regs., 1913; see note to sec. 1411, R. S.)

**Application of statutory requirements to appointments under subsequent laws.**—"When a general law prescribes what persons may be appointed to any class or kind of office or place, the time or manner of their appointment, the tenure of their office, their qualifications or the test of their qualifications and



fitness, any appointment of that kind thereafter authorized, must, unless otherwise provided, be made with reference to and in conformity with the requirements of such general law. I think it a mistake to suppose that, in order to bring such appointments within the purview of the general law, it would be necessary to state specifically in the act authorizing them, that they are to be made as thus prescribed, or as provided by law, or that such idea be expressed in any form. On the contrary, I think that in order to exempt such appointments from the operation of the general law, a specific exemption therefrom would be required. Indeed, as a general rule, it may be said that in every statute authorizing or requiring a certain act, there is implied, as if there written, the direction that such act shall be done with reference to and in conformity with existing laws on the subject, if there are any. All laws in *pari materia* should be construed together, and so as to give effect to all and to not conflict with each other." (25 Op. Atty. Gen., 341.)

**General requirements for appointment.**—No person shall be appointed to any office in the Navy unless he is a citizen of the United States, nor until he shall have passed a physical, a mental, and a professional examination. The physical examination shall precede the mental and professional, and if a candidate be physically unfit he shall not be examined otherwise. (Art. R-3301, Navy Regs., 1913; see note to sec. 1428, R. S., as to citizenship of officers of the Navy.)

**"Board of naval surgeons."**—The word "surgeons" in this section is construed to mean "medical officers," and not as restricting the membership of the examining board to officers in the grade of surgeon. (See Art. R-3305, Navy Regs., 1913, providing that a candidate for assistant surgeon must be examined physically, morally, mentally, and professionally by a board of "medical officers"; see also note to sec. 1493, R. S. As to the grades of officers constituting the Medical Corps, see note to sec. 1368, R. S.)

**Age of candidates for appointment.**—See notes to section 1379, Revised Statutes, as to age of candidates for appointment as assistant paymasters; section 1517, Revised Statutes, as to age of candidates for appointment as midshipman at the Naval Academy; and act March 3, 1899, section 14 (30 Stat., 1007), as to age of candidates for appointment as warrant machinists, now designated as "machinists."

Where a candidate for assistant surgeon had not passed his thirtieth birthday when confirmed by the Senate, the statutory requirement was fulfilled, and he can legally be commissioned and accept the appointment after passing said age. (File 8622-2, Feb. 10, 1908; see also note to Constitution, Art. II, sec. 2, clause 2, under "VI. What Constitutes Appointment.")

In the case noted in the preceding paragraph it was assumed that the words "over thirty years of age" excluded candidates who had passed their thirtieth birthday, but it was held that the particular candidate in question, having been under thirty years of age at the time he was nominated by the President and confirmed

by the Senate, was eligible under the law, and might legally accept his appointment after passing his thirtieth birthday, the acceptance of the office by the appointee being distinct from the appointment and not necessary to render the appointment complete. In other words, that the candidate in question was not over thirty years of age when "appointed" and might, therefore, accept such appointment after passing his thirtieth birthday. (File 27223-12:1, Jan. 27, 1915.)

An act of July 25, 1861, section 3, relating to an increase in the Marine Corps, provided "that the appointment of commissioned officers to be made under the provisions of this act shall be of persons between the ages of twenty and twenty-five years; and shall be subjected, under the direction of the Secretary of the Navy to an examination as to their qualifications for the service to which they are to be appointed." A candidate attained the age of twenty-five years on the 24th day of April; he had been examined and found qualified on the 22d of April; on the 23d he was nominated to the Senate; his nomination was confirmed on the 14th of June following: *Held*, that the President may lawfully issue a commission to the candidate as second lieutenant in the Marine Corps under the circumstances of his case as above-stated. (10 Op. Atty. Gen., 308.)

In the case noted in the preceding paragraph, the Attorney General stated: "I need not discuss the significance of the word *appointment*, for it has various meanings and the true sense can only be known by a study of the subject matter and the context in which it is used. This case does not present the question, at what time an officer is so authentically certified as to be known and respected in his official relations; nor the question, when he is so inducted into his office as to be entitled to be paid for his official services; nor yet the question, at what time the officer has a legal right to receive the final evidence of his appointment, to wit, the commission." The question applies solely to the eligibility of the candidate; that is, had the President lawful power to choose him to be a second lieutenant of Marines at the time when he did actually choose him and name him to the Senate for office, asking the Senate to consent to and ratify his act. "That is the question in this case, and I am clearly of the opinion that Stoddard was eligible and that the President had lawful power to appoint him, subject only to the consent of the Senate. In such case the Senate has no power to appoint but the power only to arrest and prevent the appointment by the President. The action by the Senate upon the President's nomination is always and necessarily relative, for all that it can do is to reject or affirm what the President has already done. I am of opinion that it is lawful and right to give Mr. Stoddard his commission." (10 Op. Atty. Gen., 308.)

An act of July 14, 1862, section 7, prescribed the age of chaplains in the Navy. Under that act it was held that the President could not appoint a person to that office above the age limit of 35 years, although before the passage of that act the President had instructed the Secretary of the Navy to prepare a nomination of the person in question to the Senate for the

office which nomination had not, however, actually been made. If the nomination had actually been made by the President prior to the act of July 14, 1862, the appointment might lawfully have been made after confirmation by the Senate, whether such action of the Senate had been taken before or after the date of said act, this being in accordance with the prior

opinion (10 Op. Atty. Gen., 308) holding valid the appointment of a lieutenant of Marines who was of lawful age when nominated, but over age when confirmed. (10 Op. Atty. Gen., 324.)

**Date of appointment.**—See note to section 1371, below, under "Length of service prior to promotion."

### Sec. 1371. [Medical Corps; promotions in. Superseded.]

This section provided as follows:

"Sec. 1371. No person shall be appointed surgeon until he has served as an assistant surgeon at least two years, on board a public vessel of the United States at sea, nor until he has been examined and approved for such appointment, by a board of naval surgeons, designated by the Secretary of the Navy."—(24 May, 1828, c. 121, v. 4, p. 313.)

It was superseded by the following provision in the act of February 13, 1897 (29 Stat. 526): "Hereafter assistant surgeons shall be regularly promoted and commissioned as passed assistant surgeons, and passed assistant surgeons as surgeons, subject to such examinations as may be prescribed by the Secretary of the Navy."

**Examinations were discontinued** for promotion of staff officers in grade by act of May 22, 1917, section 20 (40 Stat., 89), which act and section also reenacted a provision in the act of March 4, 1917 (39 Stat., 1182), requiring examinations of staff officers for advancement in rank.

**As to status of passed assistant surgeons,** see note to section 1368, Revised Statutes.

**Assistant surgeons are promoted** to passed assistant surgeons after three years' service. This practice was originally in accordance with the provision of section 1556, Revised Statutes, that "assistant surgeons of three years' service, who have been found qualified for promotion by a medical board of examiners," shall be allowed "the pay of passed assistant surgeons." The practice has continued, although not now specifically provided for by law, section 1556, Revised Statutes, with reference to the pay of assistant surgeons, being no longer in force. (File 26280-68, Apr. 12, 1916.)

**Assistant surgeons on original appointment** have the rank of lieutenant (junior grade). (Act Aug. 29, 1916, 39 Stat., 577.) They are entitled to advancement to the rank of lieutenant with the line officer with whom or next after whom they take precedence. (Act Aug. 29, 1916, 39 Stat., 576.) Lieutenants (junior grade) of the line are entitled to promotion to lieutenant after not less than three years' service in grade (act Aug. 29, 1916, 39 Stat., 576), except that during the existing war this requirement as to length of service shall not apply to temporary promotions (act May 22, 1917, sec. 5, 40 Stat., 86.) The Secretary of the Navy has discretion to provide that all assistant surgeons may be promoted to passed assistant surgeons at the same time that they are advanced to the rank of lieutenant. (File 27223-37, Apr. 6, 1918.)

**Passed assistant surgeons are promoted** to surgeons, surgeons are promoted to medical

inspectors, and medical inspectors are promoted to medical directors, all by seniority, to fill vacancies, in accordance with section 1480, Revised Statutes, and the "established rules of the service" (see sec. 1458, R. S.), subject to examination, as required by sections 1493 and 1496, Revised Statutes, and the act of February 13, 1897, above quoted. (In this connection see note to sec. 1372, R. S.) As to constitutionality of laws requiring promotion by seniority, see notes to sections 1458 and 1480, Revised Statutes.

**Advancement to the ranks of commander, captain, and rear admiral** in the Staff Corps of the Navy are to be made by selection upon recommendation of a board of officers of the corps concerned. (Act July 1, 1918, 40 Stat., 718.)

**Subject to the limitations contained in laws** prior to August 29, 1916, as to the number of officers in certain lower grades of the Medical Corps (see note to sec. 1368, R. S.), the Secretary of the Navy has discretion to provide that all passed assistant surgeons shall be promoted to surgeons at the same time that they are advanced to the rank of lieutenant commander (File 27223-37, Apr. 6, 1918.)

**Pay on promotion.**—All officers of the Navy advanced in grade or rank pursuant to law shall be allowed the pay and allowances of the higher grade or rank from the dates stated in their commissions. (Act Mar. 4, 1913, 37 Stat., 892; see sec. 1561, R. S.)

**Suspension from promotion of officers** who fail to qualify when examined is required by section 1505, Revised Statutes, as amended by act of March 11, 1912 (37 Stat., 73).

**Length of service prior to promotion.**—The three years' service of assistant surgeons prior to promotion may lawfully be regarded as commencing on the date of their appointment rather than on the date of actual entry upon the duties of the office. "In support of this view it is urged that the uniform practice of the Navy Department, extending through many years, has been to have regard to the date of appointment rather than the other date as fixing the beginning of the required three years' service, a practice which is said to rest in the custom in the Navy of advancing by seniority. As illustrating the reason of the practice it is said that when several men are examined for appointment as assistant surgeon the respective numbers assigned to them upon qualifying professionally are based upon the order of proficiency shown by the examination. If the circumstance of location nearer Washington, which would enable one applicant to execute his oath of office earlier than could one who was not so conveniently located, should be given effect, then it could follow that the



one entitled by his examination to the first number might have to fall below the others, and this for no other reason than that the one entitled to the higher position in the grade could not get his oath of office executed as soon as one more conveniently located \* \* \*. We find no statute which prohibits said practice, and administrative action is entitled to consideration. *Ross's case*, 283 U. S., 530, 538. It does not appear that any positive law has been disregarded, nor does it appear that the four or five days' difference in the dates was caused by any fault or negligence of the plaintiff or resulted from any other cause than a supposed orderly practice long continued. As stated by the Judge Advocate General in *re John A. Nelson*, April 12, 1916, "The only argument in favor of the legality of the present practice is that it is expedient and has so long continued that it may be regarded as having been known to and acquiesced in by Congress." (*Toulon v. U. S.*, 52 Ct. Cls., 333).

**Advancement in rank.**—By act of August 29, 1916 (39 Stat., 576), it was provided that

**Sec. 1372. [Medical Corps; rank of assistant surgeons in case of delayed examination. Obsolete.]**

This section provided as follows:

"SEC. 1372. When any assistant surgeon was absent from the United States, on duty, at the time when others of his date were examined, he shall, if not rejected at a subsequent examination, be entitled to the same rank with them; and if, from any cause, his relative rank can not be assigned to him, he shall retain his original position on the register."—(3 Mar., 1835, c. 27, s. 1, v. 4, p. 757.)

It was rendered obsolete by the abolishment of competitive examinations in accordance with the Attorney General's opinion noted below. Also, examinations for promotion of assistant surgeons to higher grades have now been discontinued, in accordance with the act of May 22, 1917, noted above under section 1371, and the advancement in rank of staff officers is regulated by the acts of August 29, 1916, and July 1, 1918, noted above, under section 1371.

**Promotion by seniority and not competitive examination.**—The practice of the Navy Department, requiring competitive examinations to determine the relative position of medical officers of the Navy preparatory to promotion to the grade of surgeon, which originated prior to the act of May 24, 1828 [now sections 1370 and 1371, Revised Statutes], was recognized and confirmed by a clause in the act of Congress approved March 3, 1835, which is embodied in the Revised Statutes as section 1372. (17 Op. Atty. Gen., 48.)

The system of competitive examinations to determine the relative merit of assistant surgeons preliminary to promotion, and thus to define their rank by seniority, has, under authority of section 1372, been continued to the present time [February 25, 1881], and the uniform practice of the Navy Department has been to assign to the members of each class of assistant surgeons examined and found qualified for promotion, positions in accordance with their

"Officers of the lower grades of the Medical Corps, Pay Corps, Construction Corps, and Corps of Civil Engineers shall be advanced in rank up to and including the rank of lieutenant commander with the officers of the line with whom or next after whom they take precedence under existing law: *Provided*, That all assistant surgeons shall from date of their original appointment take rank and precedence with lieutenants (junior grade)."

By act of May 22, 1917, section 17 (40 Stat., 89), it was enacted that the above clause in the act of August 29, 1916, shall not operate "to disturb the relative position of officers in the Medical Corps with reference to precedence or promotion, but all such officers otherwise qualified shall be advanced in rank with or ahead of officers in said corps who were their juniors on the date of said act."

By act of July 1, 1918 (40 Stat., 718), it was provided that advancement to the ranks of commander, captain, and rear admiral in the Staff Corps of the Navy shall be made by selection in the manner therein prescribed.

See note to section 1474, Revised Statutes.

relative standing as determined and reported by the board of examiners. (17 Op. Atty. Gen., 48.)

However, the custom of requiring competitive examination of assistant surgeons and assigning them positions in the Navy Register in order of relative merit as ascertained and reported by the board of examiners, is not correct under the present law. A clause in the act of March 3, 1871 (16 Stat., 536), contemplated that promotion in the staff corps, including the Medical Corps, should be by seniority, and not by competitive examination. This clause did not find its way into the first edition of the Revised Statutes. It was reenacted by act of February 27, 1877 (19 Stat., 249), and as so reenacted was included in the second edition of the Revised Statutes as section 1480. The effect of it is to adopt the rule of seniority in regard to promotions from one grade to another in the Staff Corps, including, among others, the Medical Corps. (17 Op. Atty. Gen., 48.)

The rule that officers shall be assigned rank in the order of merit as determined by competitive examinations was never prescribed by law, but was a usage that had grown up in the Navy Department. The propriety of that usage was, perhaps, recognized by the act of 1835, later embodied in section 1372, Revised Statutes. However, that act was at most a recognition of the previous practice in an implied way, and not by a very clear implication. The Secretary of the Navy was not required by law to assign relative rank according to the results of competitive examinations, but the matter was within his discretion. The Secretary had a right to maintain this as a rule, or to rescind it the moment after it was carried into execution. (*U. S. ex rel. Hall v. Whitney*, 5 Mackey (D. C.), 370.)

Following the Attorney General's opinion above noted, the Secretary did rescind the previous rule of assigning relative rank by com-

petitive examinations. Whether he thought that the act of 1877 required that officers should rank according to seniority alone, or whatever were the grounds of his action, it was within the scope of his authority. Accordingly, where an assistant surgeon was assigned relative rank according to the previous rule, as the result of a competitive examination, and later, following the Attorney General's opinion, was reduced from the rank which he had already been assigned and given a lower position to which his seniority entitled him, *held*, that the court could not by mandamus proceedings compel

the Secretary of the Navy to restore him to his former position in the Navy Register. (U. S. ex rel. Hall v. Whitney, 5 Mackey (D. C.), 370.)

"It is within the authority of the Secretary of the Navy to adopt a rule by which the relative rank of officers of the Navy shall be regulated, and afterwards to rescind such rule and adopt another, although the latter rule may have the effect of placing an officer in a lower relative rank than that assigned him under the provisions of the previous rule." (U. S. ex rel. Hall v. Whitney, 5 Mackey (D. C.), 370.)

**Sec. 1373. [Medical Corps; surgeon of the fleet.]** The President may designate among the surgeons in the service, and appoint to every fleet or squadron an experienced and intelligent surgeon, who shall be denominated "surgeon of the fleet," and shall be surgeon of the flag-ship.—(24 May, 1828. c. 121, s. 2, v. 4, p. 313.)

Pay of fleet surgeons was fixed at \$4,400 per annum by section 1556, Revised Statutes.

The word "surgeons" as used in this section has been construed to mean "medical officers," and not as restricting details for this

duty to officers in the grade of "surgeon." (See Art. R-1826 (2), Navy Regs., 1913.)

See note to sections 1382 and 1393, Revised Statutes, for cases relating to appointment and pay of fleet officers.

**Sec. 1374. [Medical Corps; duties of surgeon of the fleet.]** The surgeon of the fleet shall, in addition to his duties as surgeon of the flag-ship, examine and approve all requisitions for medical and hospital stores for the squadron or fleet, and inspect their quality. He shall, in difficult cases, consult with the surgeons of the several ships, and he shall make, and transmit to the Navy Department, records of the character and treatment of diseases in the squadron or fleet.—(24 May, 1828, c. 121, s. 2, v. 4, p. 313.)

**Sec. 1375. [Medical Corps; assistant to Bureau of Medicine and Surgery.]** A surgeon, assistant surgeon, or passed assistant surgeon, may be detailed as assistant to the Bureau of Medicine and Surgery, [who shall receive the highest shore pay of his grade.]—(16 July, 1862, c. 183, s. 18, v. 12, p. 587. 27 Feb., 1877, c. 69, v. 19, p. 244.)

See note to section 421, Revised Statutes, for cases relating to assistants to chiefs of bureaus in the Navy Department.

The amendment to this section, concerning the pay of officers detailed thereunder as assistants to the Bureau of Medicine and Surgery, contained language which clearly gave it a retrospective character. (15 Op. Atty. Gen., 259.)

**Pay of assistant.**—Both the Navy and Treasury Departments have in practice uni-

formly interpreted this law as entitling surgeons detailed as assistants to the Bureau of Medicine and Surgery to the shore pay given to a surgeon after 20 years' service, although they may not have served as surgeons over 5 years; and these officers have always been so paid. This shows that the word "grade" is intended to give the officer the highest pay of his "rank." (Schuetze v. U. S., 24 Ct. Cls., 299; as to difference between "grade" and "rank," see note to sec. 1362, R. S.)

**Sec. 1376. [Supply Corps; organization of. Superseded.]**

This section provided as follows:

"SEC. 1376. The active list of the Pay Corps of the Navy shall consist of thirteen pay directors, thirteen pay inspectors, fifty paymasters, thirty passed assistant paymasters, and twenty assistant paymasters."—(15 July, 1870, c. 295, s. 11, v. 16, p. 334. 3 Mar., 1871, c. 117, s. 6, v. 16, p. 536.)

It was superseded by a clause in the naval appropriation act of August 5, 1882 (22 Stat. 285), which provided that "the active list of

the Pay Corps of the Navy shall hereafter consist of thirteen pay directors, thirteen pay inspectors, forty paymasters, twenty passed assistant paymasters, and ten assistant paymasters."

The number of officers was increased by act of March 3, 1899 (30 Stat., 1038), which provided that "the active list of passed assistant and assistant paymasters of the Pay Corps shall hereafter consist of thirty and forty, respectively."



A further increase was made by act of March 3, 1903 (32 Stat., 1197), which provided that "the grades of the active list of the Navy hereinafter designated shall be so increased that there shall be \* \* \* two additional pay inspectors, in all fifteen; thirty-six additional paymasters, in all seventy-six; twenty-six additional passed assistant and assistant paymasters, in all ninety-six; \* \* \* not more than twenty assistant paymasters, \* \* \* in addition to those necessary to fill vacancies in said grades, shall be appointed in any one calendar year."

The Pay Corps was again increased by act of August 22, 1912 (37 Stat., 328), which provided that "the grades of the active list of the Pay Corps of the Navy are hereby increased by ten additional paymasters, in all eighty-six paymasters, and by twenty additional passed assistant and assistant paymasters, in all one hundred and sixteen passed assistant and assistant paymasters: *Provided*, That the total increase of the Pay Corps of the Navy shall not exceed twenty during the first fiscal year."

The number of officers was again increased by act of August 29, 1916 (39 Stat., 576), which provided that "the total authorized number of commissioned officers of the active list of the following staff corps, exclusive of commissioned warrant officers, shall be based on percentages of the total number of commissioned officers of the active list of the line of the Navy, as follows: Pay Corps, twelve per centum \* \* \*"

The same act (39 Stat., 577) provided that "the total number of commissioned officers of the active list of the following mentioned staff corps at any one time, exclusive of commissioned warrant officers, shall be distributed in the various grades of the respective corps as follows: \* \* \* Pay Corps: One-half pay directors with the rank of rear admiral to four pay directors with the rank of captain, to eight pay inspectors with the rank of commander, to eighty-seven and one-half in the grades below pay inspector. \* \* \* When there is an odd number of officers in the grade or rank of rear admiral in the line or in each corps, the lower division thereof shall include the excess in number, except where there is but one. Whenever a final fraction occurs in computing the authorized number of any corps, grade, or rank in the naval service, the nearest whole number shall be regarded as the authorized number: *Provided*, That at least one officer shall be allowed in each grade or rank. For the purpose of determining the authorized number of officers in any grade or rank of the line or of the staff corps, there shall be excluded from consideration those officers carried by law as additional numbers, including staff officers heretofore permanently commissioned with the rank of rear admiral, and nothing contained herein shall be held to reduce below that heretofore authorized by law the number of officers in any grade or rank in the staff corps."

By act of June 4, 1920 (41 Stat., 834), it was provided "that the number of commissioned officers of the line, permanent, temporary, and reserve on active duty shall not exceed 4 per centum of the total authorized enlisted strength of the Regular Navy, and the number of staff

officers on active duty of whatever kind shall be in the same proportions as authorized by existing law \* \* \* That nothing herein shall be construed as reducing the permanent commissioned \* \* \* strength of the Regular Navy as authorized by existing law."

The temporary appointment of additional officers during the period of the existing war was authorized by the act of May 22, 1917, section 4 (40 Stat., 85), as amended by act of July 1, 1918 (40 Stat., 715), which also authorized temporary appointments and promotions to fill, during the period of the war, the deficiency existing prior to May 22, 1917, in the total number of commissioned officers authorized by the act of August 29, 1916.

The designation of the "Pay Corps" was changed to "Supply Corps" by act of July 11, 1919 (41 Stat., 147).

"The number of passed assistant and assistant paymasters in the Navy to be appointed in each of the two grades under the act of March 3, 1903 (32 Stat., 1197), not being prescribed by that act, is necessarily left to Executive discretion, to be controlled by the general terms and regulations providing for the advancement of officers in the naval service. Nor is it required that the relative proportion of officers in each of those grades shall remain always the same, a change in the proportion being within the discretion of the Executive, unless controlled by general laws or regulations." (26 Op. Atty. Gen., 511; see also *Williams v. U. S.*, 47 Ct. Cls., 316; *Crapo v. U. S.*, 50 Ct. Cls., 337.)

While the total increase of 26 in the number of assistant and passed assistant paymasters, made by the act of March 3, 1903, may be placed in the grade of passed assistant paymaster, which was limited by the act of March 3, 1899, to 30, thereby increasing the total number of passed assistant paymasters to 56, this number can not be exceeded under the act of March 3, 1903. That act did not have the effect of also authorizing the transfer of the 40 assistant paymasters, prescribed by the act of March 3, 1899, to the grade of passed assistant paymaster, thereby increasing the latter grade to 76, and leaving no officers in the grade of assistant paymaster. (File 3022-7, Apr. 10, 1908.)

The above interpretations of the act of March 3, 1903, were applied to the increase made by the act of August 22, 1912, of "twenty additional passed assistant and assistant paymasters," this total increase being placed in the grade of passed assistant paymaster, thereby increasing that grade to 76, and retaining in the grade of assistant paymaster the 40 positions authorized by the act of March 3, 1899. (File 1660-139, Bu. Nav.)

The act of August 29, 1916, authorizes 87½ per cent of the commissioned officers of the Pay Corps in the grades below pay inspector without fixing the number in each grade. In other words, it authorizes an increase in the number of officers allowed in the three grades of paymaster, passed assistant paymaster, and assistant paymaster, combined, just as the acts of March 3, 1903, and August 22, 1912, provided increases in the grades of passed assistant paymaster and assistant paymaster, without providing how the increases should be distributed.

Accordingly, *held*, that the act of August 29, 1916, should receive the same construction as the previous acts, and that the distribution of the increase among the grades below pay inspector has been left to the executive discretion. Hence, 87½ per cent of the increase in the Pay Corps may be distributed among the three lower grades in such proportions as may best serve the interests of the Navy. This would result in having at least 40 officers in the grade of assistant paymaster when the three lower grades are full, the act of August 29, 1916, not having the effect of repealing the act of March 3, 1899, which fixed the number of assistant paymasters at 40. In other words, although additional officers, authorized from time to time, may be distributed between the lower grades of the Pay Corps where not otherwise provided by Congress, the number of assistant paymasters specifically authorized by previous laws can not be distributed so as, for example, to place in the grades of passed assistant paymaster and paymaster the total number of pay officers allowed below the grade of pay inspector without retaining any officers in the grade of assistant paymaster. (File 27223-37, Mar. 20, 1918.)

See note to section 1380, Revised Statutes, re promotion of assistant paymasters.

**Acting officers.**—See section 1381, Revised Statutes, and note to section 1410, Revised Statutes.

**Clerks to officers of the Supply Corps.**—By naval appropriation act of March 3, 1915 (38 Stat., 942), three grades were established of clerks to pay officers, viz, acting pay clerks, appointed by the Secretary of the Navy; pay clerks, warranted by the President; and chief pay clerks, commissioned by the President by and with the advice and consent of the Senate.

**Special disbursing agents** are authorized to be employed by section 3614, Revised Statutes. (30 Op. Atty. Gen., 132.)

**Disbursing officers abroad** are not to be employed for naval service, under contract or otherwise, unless they hold appointments confirmed by the Senate. (Sec. 1550, R. S.)

**A naval reserve**, composed of persons who have been found qualified by examination for commissions in any reserve or volunteer naval force hereafter organized, other than the Naval Militia, is authorized by act of February 16, 1914, section 21 (38 Stat., 289); which act authorizes the President, when exigency demands, to issue commissions in the Regular Navy to persons so qualified; and also authorizes him to commission or warrant former officers who have been honorably discharged from the Navy.

As to other auxiliary naval forces, see note to section 1363, Revised Statutes.

**Number of officers not to be increased without explicit legislation.**—(See note to sec. 1363, R. S.)

**The Pay Corps consists of officers** commissioned by the President, and clerks and others who are not so commissioned do not belong to the Pay Corps. This is obvious from the language of section 1378, Revised Statutes (U. S. v. Mouat, 124 U. S., 303.)

**Duties of Supply Corps.**—The number of pay officers for the Navy is fixed by law, and each must give bond for the faithful discharge of

his duties. They are prohibited from loaning money to brother officers. With these exceptions there are no statutes prescribing their duties or functions. These latter spring from regulations issued from time to time by the Secretary of the Navy pursuant to section 161, Revised Statutes. Such regulations, when not inconsistent with law, are binding upon the Comptroller of the Treasury, and pay officers are amenable to court-martial for violation thereof. (30 Op. Atty. Gen., 376, 171 S. and A. Memo., 3611.)

**Decisions of Comptroller.**—Disbursing officers may apply for and obtain decision of the Comptroller of the Treasury concerning legality of proposed payments (act July 31, 1984, sec. 8, 28 Stat., 203); and may appeal to the Comptroller of the Treasury from disallowances in their accounts by the Auditor for the Navy Department. (Same act and section.) Requests for advance decisions of the Comptroller of the Treasury must be forwarded by pay officers through the Secretary of the Navy; but appeals to the Comptroller from disallowances by the Auditor for the Navy Department may be forwarded by them direct. (Art. I-2205, Naval Instructions, 1913; 90 S. and A. Memo., 836.)

**On general subject of accounting** see note to section 236, Revised Statutes; and see Title XL, "The Public Monies," sections 3591-3659, Revised Statutes.

Disbursing officers of the Navy shall render their accounts and vouchers direct to the proper accounting officer of the Treasury. (Sec. 3622, R. S., as amended.)

**Secretary of the Treasury** is required to report annually to Congress disbursing officers delinquent in rendering accounts. (Act May 28, 1896, 29 Stat., 179.)

Failure in rendering accounts as provided by law is punishable as embezzlement by section 90, Criminal Code, act of March 4, 1909 (35 Stat., 1105); other proceedings against delinquent officer are provided for by sections 3624-3638, Revised Statutes, and acts of July 31, 1894 (28 Stat., 206), and May 28, 1896, section 4 (29 Stat., 179.)

Accounts of pay officer of lost or captured vessel; see section 284, Revised Statutes for provisions concerning.

Settlement of outstanding checks and accounts of disbursing officers. (See secs. 306-310, R. S., and art. R-4334, Navy Regs. 1913.)

Lost checks, procedure with reference to. (See secs. 3646, 3647, R. S.; act of Feb. 23, 1909, 35 Stat., 643, and art. R-4337, Navy Regs., 1913.)

**Advances of public money are prohibited** by section 3648, Revised Statutes, with certain exceptions contained in that section and in section 1563, Revised Statutes, as amended by act of March 4, 1917 (39 Stat., 1181); and unauthorized advances are punishable as embezzlement under section 87, Criminal Code, act of March 4, 1909 (35 Stat., 1109.)

Requisitions for advances to disbursing officers and agents of the Navy may be issued by the Secretary of the Navy under a "general account of advances." (Act June 19, 1878, sec. 1, 20 Stat., 167.)

**Exchange of Government funds for other funds**, with certain exceptions, is prohibited;



disbursing officer violating this prohibition shall be suspended from duty immediately, and the matter reported to the President to the end that he may be promptly removed from office or restored to duty (Sec. 3639 and 3651, R. S.); and such unauthorized exchange of government funds is punishable as embezzlement under section 89, Criminal Code, act of March 4, 1909 (35 Stat., 1105). See section 1624, Revised Statutes, article 14.

**Depositing public money** in place not authorized by law is punishable as embezzlement under section 87, Criminal Code, act of March 4, 1909 (35 Stat., 1105); a disbursing officer who deposits money in a bank not designated as a depository in accordance with sections 3620 and 3639, Revised Statutes, is liable with his sureties for any loss that may arise from the failure of such bank (20 Op. Atty. Gen., 24); and the conduct of bankers or officers of banks in knowingly receiving such money on deposit is punishable as embezzlement by section 96, Criminal Code, act of March 4, 1909 (35 Stat., 1106.)

All moneys received by any officer for the United States must be promptly paid into the Treasury, without deduction (sec. 3617, R. S.); officers violating this requirement shall be removed from office and forfeit moneys withheld (sec. 3619, R. S.); and such failure to deposit public money when required so to do is punishable as embezzlement (sec. 91, Criminal Code, act Mar. 4, 1909, 35 Stat., 1105). But see note to section 236, Revised Statutes, under "Set-off."

**Failing safely to keep public moneys** in the care of a disbursing officer is punishable as embezzlement. (Sec. 88, Criminal Code, act Mar. 4, 1909, 35 Stat., 1105.) See section 1624, Revised Statutes, article 14.

**Making false returns, keeping false accounts, or embezzling public or private money or property**, shall be punished by fine and imprisonment by any court, civil or military, having jurisdiction. (Sec. 5306, R. S.) See section 1624, Revised Statutes, article 14.

**Making false or fictitious entries in accounts or records, or making false reports of moneys or securities belonging to the United States or to any person, or aiding or abetting therein**, shall be punished by fine of not more than \$5,000, or imprisonment for not more than 10 years, or both. (Act Mar. 4, 1911, 36 Stat., 1355.)

**Trading in Federal or State funds** is punishable under section 103, Criminal Code, act of March 4, 1909 (35 Stat., 1107).

Any officer of the United States who sells for a premium any Treasury note or other public

security not his own property, without accounting for such premium, shall be forthwith dismissed from office. (Sec. 3652, R. S.)

**Responsibility of disbursing officers.**—Upon application to Court of Claims, disbursing officers may be relieved of responsibility for losses incurred without fault or neglect on their part. (Judicial Code, act Mar. 3, 1911, secs. 145, 147, 36 Stat., 1136, 1137.)

Disbursing officers of the Navy shall be relieved by the accounting officers of responsibility on account of loss or deficiency determined by the Secretary of the Navy to have occurred without fault or negligence on the part of such disbursing officers while they were in the line of their duty. (Act July 11, 1919, 41 Stat., 132; see also similar provision in the same act (41 Stat., 153) as to losses incurred during the "present emergency" due to military necessity or accidental circumstances.)

Responsibility of disbursing officers for payments made by order of commanding officers: See section 285, Revised Statutes, and cases noted thereunder; see also note to section 176, Revised Statutes.

**Embezzlement.**—On general subject, see sections 86-96, Criminal Code, act of March 4, 1909 (35 Stat., 1105, 1106), and section 1624, Revised Statutes, article 14.

**Receipts.**—Taking receipt for larger sum than paid is punishable as embezzlement under sections 86 and 95, Criminal Code, act of March 4, 1909 (35 Stat., 1105, 1106); taking receipts for payments by check, duplicate receipts for cash payments, or receipts in advance of actual payments, is prohibited by Navy Regulations, 1913, article R-4303.

**Miscellaneous.**—Disbursing officers are required to furnish heads of departments with certain data for annual reports to Congress (sec. 193, R. S.); and are required to make annual report to the Secretary of the Treasury of checks outstanding for three years or more (sec. 310, R. S.).

Disbursing officers are not allowed to pay expense connected with any commission or inquiry, except courts-martial or courts of inquiry in the military or naval service, unless special appropriation therefor is made by law (sec. 3681, R. S.); nor to pay compensation or expenses of any commission, council, board, or similar body, unless the creation of the same shall be authorized by law. (Act Mar. 4, 1909, sec. 9, 35 Stat., 1027.)

No money can be paid to any person as compensation who is in arrears to the United States. (Sec. 1766, R. S. See note to sec. 236, R. S., under "VI. SET-OFF.")

**Sec. 1377. [Supply Corps; no promotion or appointment in certain grades until reduced. Obsolete.]**

This section provided as follows:

"Sec. 1377. Until the number of passed assistant paymasters shall have been reduced below thirty, there shall be no promotion to that grade, nor any appointment to the grade of assistant paymaster."—(15 July, 1870, c. 295, s. 11, v. 16, p. 334.)

It became obsolete as soon as the number of passed assistant paymasters was reduced below 30. See also later laws, noted above under section 1376, increasing the number of passed assistant and assistant paymasters.

**Sec. 1378. [Supply Corps; appointments in, how made.]** All appointments in the Pay Corps shall be made by the President, by and with the advice and

consent of the Senate.—(30 Mar., 1812, c. 47, s. 6, v. 2, p. 699. 22 June, 1860, c. 181, s. 3, v. 12, p. 83. 17 July, 1861, c. 4, s. 1, v. 12, p. 258. 3 May, 1866, c. 72, s. 1, v. 14, p. 43.)

Amendment to this section was made by act of July 11, 1919 (41 Stat., 147), which changed the designation of the Pay Corps to "Supply Corps."

As to appointment of officers in general, see note to Constitution, Article II, section 2, clause 2.

Acting pay officers may be appointed at sea by senior officer present, in cases authorized by section 1381, Revised Statutes; see also note to section 1410, Revised Statutes.

Appointments as acting pay clerks are made by the Secretary of the Navy; appointments as pay clerks are made by the President; and appointments as chief pay clerks are made by the President, by and with the advice and consent of the Senate. (Act Mar. 3, 1915, 38 Stat., 942.)

Appointments in the Naval Reserve Force, to commissioned grades, shall be made by the President alone, and to warrant grades shall be made by the Secretary of the Navy. (Act Aug. 29, 1916, 39 Stat., 587.)

Appointments of temporary commissioned officers during the war with Germany were to be

made by the President, by and with the advice and consent of the Senate. (Act May 22, 1917, sec. 12, 40 Stat., 87.)

Promotion of officers; for provisions relating to, see section 1380, Revised Statutes.

Rank of officers of the Navy shall not be changed "except in accordance with the provisions of existing law, and by and with the advice and consent of the Senate." (Sec. 1506, R. S. as amended by act June 17, 1878, 20 Stat. 143.)

Recess appointments when Senate not in session. (See note to Constitution, Art. II, sec. 2, clause 3; see also note to sec. 1381, R. S.)

**Supply Corps limited to commissioned officers.**—"It is obvious from the language of section 1378 that the Pay Corps is limited to officers commissioned by the President, and that clerks and others who are not so commissioned do not belong to the Pay Corps." (U. S. v. Mouat, 124 U. S., 303.)

See note to section 1369, Revised Statutes, concerning appointments in the Navy.

**Sec. 1379. [Supply Corps; qualifications for assistant paymasters.]** No person shall be appointed assistant paymaster who is, at the time of such appointment, less than twenty-one or more than twenty-six years of age; nor until his physical, mental, and moral qualifications have been examined and approved by a board of paymasters appointed by the Secretary of the Navy, and according to such regulations as he may prescribe.—(17 July, 1861, c. 4, s. 2, v. 12, p. 258.)

Age for appointment as assistant paymaster from among chief pay clerks and pay clerks, was fixed by act of March 3, 1915 (38 Stat., 943), at "between the ages of twenty-one and thirty-five years at the time of appointment."

Boards may be convened by officers on foreign stations. (Act March 4, 1917, 39 Stat., 1171.)

Midshipmen on graduation may be appointed assistant paymasters in the Navy, by authority of act of July 9, 1913 (38 Stat., 103); see also note to section 1521, Revised Statutes.

The age limit fixed by this section was waived by act of July 3, 1894 (28 Stat., 99), for the benefit of certain graduates of the Naval Academy who had been discharged from the service; and by act of March 3, 1899 (30 Stat., 1038), for the benefit of persons who had served as assistant paymasters in the war with Spain. The age limit has also been waived by special act of Congress in individual cases (see, for example, act May 9, 1914, 38 Stat., 39). Special age limits were prescribed for officers appointed in the Regular Navy by transfer from the temporary Navy and Naval Reserve Force, by act of June 4, 1920, section 5 (41 Stat., 835).

**A candidate who has passed his twenty-sixth birthday** is ineligible and can not, therefore, legally be appointed to the Pay Corps under section 1379, Revised Statutes. This has been the prior interpretation of the law by the Navy Department, and such interpretation received the approval of Congress in the enactment of a special act of May 9, 1914 (38 Stat., 39), waiving the age limit in the case of a candidate who successfully passed the Pay Corps examination while under 26 years of age, but who attained that age the day after the board's finding was approved and before his nomination could be made by the President, owing to an adjournment of the Senate for the Christmas holidays. Other statutes relating to the ages of candidates for appointment to the Navy have been, similarly interpreted by the Navy Department and the Attorney General, and there have been judicial decisions in civil cases which support such interpretation. (File 27223-12:1, Jan. 27, 1915, citing authorities.)

For other decisions, see note to section 1370, Revised Statutes, as to age of candidates for appointment as assistant surgeons; see also section 1517, Revised Statutes, as to age of candidates for appointment as midshipmen at the Naval Academy; and act of March 3, 1899, section 14 (30 Stat., 1007), as to age of candidates for appointment as warrant machinists (now designated as "machinists").



As to what constitutes appointment, see note to Constitution, Article II, section 2, clause 2; and see note to section 1370, Revised Statutes, as to when an appointment as assistant surgeon is complete.

**Examination by "board of paymasters."**—The term "paymasters" in this section has been construed to mean "officers of the Supply Corps," and not as restricting the membership of the examining board to officers in the grade of "paymaster." (See Art. 1640, Navy Regs., 1920. As to grades of officers constituting the Supply Corps, see note to sec. 1376, R. S.)

[This section is peculiar in requiring the physical qualifications of candidates for the Supply Corps to be examined and approved by a board not composed of medical officers. In practice, nevertheless, candidates for this corps are physically examined by a board of medical officers, who report the result of such examination to the statutory board, and the latter thus have the benefit of the medical officers' opinion to guide

them in making their report upon the physical qualifications of the candidates. (See Art. R-3306, Navy Regs., 1913. See also in this connection act Mar. 3, 1915, 38 Stat., 942, providing that candidates for appointment as acting pay clerk, pay clerk, and chief pay clerk shall be physically, as well as mentally, morally, and professionally examined by a board, composed when practicable of officers of the Pay [now Supply] Corps.) Report of medical officers is not, however, binding upon the statutory board, which may legally find physically qualified for appointment a candidate who has been adversely reported upon by the medical officers. (See, for example, records of examining boards in cases of Assistant Paymasters Charles L. Austin, Walter Maudry, and Maury W. Boykin.)]

**Qualifications for temporary appointment.**—See note to section 1370, Revised Statutes, under "Appointments to temporary service."

**Sec. 1380. [Supply Corps; promotions in.]** Passed assistant paymasters shall be regularly promoted and commissioned from assistant paymasters, and paymasters from passed assistant paymasters; subject to such examinations as may be prescribed by the Secretary of the Navy.—(17 July, 1861, c. 4, s. 5, v. 12, p. 258. 3 May, 1866, c. 72, s. 1, v. 14, p. 43.)

Examinations were discontinued for promotion of staff officers in grade by act of May 22, 1917, section 20 (40 Stat., 89), which act and section also reenacted a provision in the act of March 4, 1917 (39 Stat., 1182), requiring examinations of staff officers for advancement in rank.

It was provided by act of August 29, 1916 (39 Stat., 576), that "officers of the lower grades of the Medical Corps, Pay [now Supply] Corps, Construction Corps, and Corps of Civil Engineers shall be advanced in rank up to and including the rank of lieutenant commander with the officers of the line with whom or next after whom they take precedence under existing law." (See note to sec. 1475, R. S.)

By act of July 1, 1918 (40 Stat., 718), it was provided that advancement to the ranks of commander, captain, and rear admiral in the Staff Corps of the Navy shall be made by selection in the manner therein prescribed.

**Assistant paymasters are promoted to** passed assistant paymasters after three years' service, provided vacancies exist in the upper grade.

The following order was issued by the Secretary of the Navy, February 21, 1908: "It is directed that hereafter assistant paymasters shall be considered as due for promotion to be passed assistant paymasters as soon as they have served three years in the grade of assistant paymaster: *Provided*, That the number of passed assistant paymasters shall not exceed fifty-six." (File 3022-5; as to increase by law in total of passed assistant paymasters, see note to sec. 1376, R. S.)

This order was modified by the President, upon recommendation of the Secretary of the

Navy, August 23, 1912 (file 1660-139, Bu. Nav.), by increasing the grade of passed assistant paymaster to 76, pursuant to act of August 22, 1912, (noted under sec. 1376, R. S.), and providing that "no assistant paymaster shall be promoted to passed assistant paymaster until he shall have served three years in the grade of assistant paymaster."

The promotions of assistant paymasters in accordance with the above order of the Secretary of the Navy are promotions "in course," within the meaning of the act of June 27, 1874 (18 Stat., 191), and are advancements in grade "pursuant to law," within the meaning of the act of March 4, 1913 (37 Stat., 892). (See *Williams v. U. S.*, 47 Ct. Cls., 316, and *Crapo v. U. S.*, 50 Ct. Cls., 337; see also sec. 1561, R. S.)

The law does not regulate the length of time which an officer must serve in the grade of assistant paymaster before being eligible, if otherwise qualified, to fill a vacancy which may exist in the grade of passed assistant paymaster. The department has, however, adopted the procedure, which is now well established, by which such advancements are regulated by length of service, but it may modify in a particular case the procedure thus established. (File 11130-30:1, May 4, 1916.)

Subject to the limitations contained in laws prior to August 29, 1916, as to the number of officers in certain lower grades of the Pay Corps (see note to sec. 1376, R. S.), the Secretary of the Navy has discretion to provide that all assistant paymasters shall be promoted to passed assistant paymasters at the same time that they are advanced to the rank of lieutenant, and that all passed assistant paymasters shall be promoted to paymaster at the same time that they are advanced to the rank of lieutenant commander. (File 27223-37, Mar. 20, 1918.)

**Pay on promotion.**—All officers of the Navy advanced in grade or rank pursuant to law shall be allowed the pay and allowances of the higher grade or rank from the dates stated in their commissions. (Act Mar. 4, 1913, 37 Stat., 892; see note to sec. 1561, R. S.)

**Suspension from promotion of officers** who fail to qualify when examined is required by section 1505, Revised Statutes, as amended by act of March 11, 1912 (37 Stat., 73), and May 22, 1917, section 20 (40 Stat., 89).

**Sec. 1381.** [Supply Corps; acting appointments on ships at sea.] When the office of paymaster or assistant paymaster becomes vacant, by death or otherwise, in ships at sea, or on foreign stations, or on the Pacific coast of the United States, the senior officer present may make an acting appointment of any fit person, who shall perform the duties thereof until another paymaster or assistant paymaster shall report for duty, and shall be entitled to receive the pay of such grade while so acting.—(17 July, 1861, c. 4, s. 4, v. 12, p. 258.)

Acting appointments in general; see note to section 1410, Revised Statutes.

Pay of officer under acting appointment; see section 1564, Revised Statutes.

Restrictions upon employment of persons to receive and pay money for use of the naval service on foreign stations, are contained in section 1550, Revised Statutes.

**Status of appointee while acting.**—"An officer duly appointed to act in any grade shall, while serving under such appointment, be entitled to the same command, precedence, and honors as if he held a commission in that grade of the same date as his appointment." (Art. R-1048, Navy Regs., 1913.)

In determining the meaning of the Revised Statutes, and of subsequent acts of Congress, "the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense." (Sec. 1, R. S.)

The words "paymaster or assistant paymaster" have been construed as including "any officer of the Pay Corps on duty"; (Art. R-3006, Navy Regs., 1913; see also 22 Comp. Dec., 171); and as including assistant paymasters of the Marine Corps, by virtue of section 1621, Revised Statutes (22 Comp. Dec., 171).

**Acting appointment not an office.**—"An acting paymaster appointed by the senior officer present is not an officer. He is not appointed as required by the Constitution, takes no oath of office, and gives no bond as paymaster." (Webster v. U. S., 28 Ct. Cls., 25; see note to Constitution, Art. II, sec. 2, clause 2.)

"From the above it will be seen that, strictly speaking, there is no such office in the Navy as acting assistant paymaster to which appellant could have been appointed. As a matter of law he was given an acting appointment to perform the duties of the assistant paymaster as pay officer on board a vessel at sea. \* \* \* There is no evidence in the papers in the case that he took any oath as acting assistant paymaster, and even though he did it would not make him an incumbent of the office of acting assistant paymaster, because there is in law no such office. The distinction is between one acting as assistant paymaster, and holding the office of acting assistant paymaster. He continued to hold office under his appointment as a paymaster's clerk." (21 Comp. Dec., 548.)

**Acting appointee continues to hold his regular office.**—"An acting appointment of a paymaster's clerk to perform the duties of pay officer on board a naval vessel at sea, under section 1381, Revised Statutes, does not change his official status as a paymaster's clerk." (21 Comp. Dec., 548.)

**Not entitled to dual compensation.**—"A naval officer acting as paymaster is appointed to discharge the duties of an office which he does not hold, and is prohibited from receiving dual compensation by the Revised Statutes, sections 1763, 1765." (Webster v. U. S., 28 Ct. Cls., 25.)

It is true that Revised Statutes, sections 1381 and 1564, provide that any person performing the duties of paymaster by appointment of the senior officer, shall be entitled to receive the pay of such grade while so acting. Those sections must be construed with reference to other provisions of the statute, and while they may operate literally if the appointee holds no office under the Government, as may be the case, if he holds an office he can not escape from the prohibitions of the Revised Statutes, sections 1763, 1765. It does not appear that Congress intended to allow an officer two salaries when temporarily discharging the duties of acting paymaster by appointment under section 1381. (Webster v. U. S., 28 Ct. Cls., 25.)

**Entitled to larger compensation of the two positions.**—"It is the liberal custom of the Treasury Department to allow a person holding more than one office the compensation of that which is the larger." (Webster v. U. S., 28 Ct. Cls., 25.)

"The offices of engineer and paymaster in the Navy are incompatible, and he who holds them is not entitled to the compensation of both, but is entitled to the larger of the two." (Webster v. U. S., 28 Ct. Cls., 25.)

**Not entitled to pay officer's longevity pay.**—"Where a paymaster's clerk of the Navy is appointed, under sections 1381 and 1564 of the Revised Statutes, to perform the duties of a paymaster, such acting paymaster is entitled to receive the base pay of the paymaster whose duties he is appointed to perform, but not his longevity pay." (18 Comp. Dec., 491; see also 21 Comp. Dec., 548; Ostrander v. U. S., 22 Ct. Cls., 218, 222; Webster v. U. S., 28 Ct. Cls., 25.)

Where the officer whose place is vacant held the grade of paymaster, with the rank of



lieutenant commander, there being two ranks in the grade of paymaster—namely, lieutenant commander and lieutenant; *held*, that a paymaster's clerk appointed to perform the paymaster's duties is entitled to pay based upon the rank of lieutenant commander. (18 Comp. Dec., 491.)

"The claimant was paid the salary of a paymaster in the first five years of service. He claims the pay of paymaster in the fourth five years, in whose place he was acting. Increase of pay for length of service in the Navy is founded on the theory that an officer acquires experience and efficiency by the long performance of the same duties. It is not to be presumed that Congress intended to pay from the beginning the increased compensation allowed for length of service to one who is appointed temporarily to discharge the duties of paymaster." (Webster v. U. S., 28 Ct. Cls., 25; 18 Comp. Dec., 491.)

**Termination of acting appointment.**—Under section 1381 the continuance of the acting appointment "does not depend upon a discharge or revocation. It terminates when another paymaster reports for duty, and the pay continues at farthest only to the time when the acting officer's accounts are made up and filed." (Ostrander v. U. S., 22 Ct. Cls., 218.)

By virtue of an appointment under this law the claimant was authorized to perform the duties of the invalid officer "until another paymaster or assistant paymaster should report for duty," and no longer. No phraseology in the appointment could confer greater rights than are herein authorized. Words which confer more, if any such are employed, are simply void. (Ostrander v. U. S., 22 Ct. Cls., 218.)

A paymaster's clerk in the Navy, authorized under section 1381, Revised Statutes, to perform the duties of assistant paymaster, was delinquent in settling his accounts in the latter capacity. During the period of delinquency he was a witness before a naval general court-martial. *Held*, That from the date his accounts should have been settled until he was discharged as a witness before the general court-martial his status was that of paymaster's clerk, to which status he reverted on the date that his accounts should have been settled. *Held, further*, That a waiver of delinquency which was granted in forwarding his accounts to the Treasury Department did not operate to place him in the duty status of settling accounts, and consequently did not entitle him during that period to the pay of the officer whose duties he was appointed to perform. (21 Comp. Dec., 548.)

**Temporary absence of officer not a vacancy.**—The office of paymaster or assistant paymaster must become vacant before the conditions exist in which a person may be appointed to act "until another paymaster or assistant paymaster shall report for duty." The temporary absence of a paymaster from his ship or station does not create a vacancy in his office as contemplated by the statute. (10 Comp. Dec., 135; compare sec. 179, R. S., and cases noted thereunder.)

Where an officer was acting in a double capacity, as pay officer of a vessel and general

storekeeper at the naval station, and while absent performing his duties as pay officer of the ship was directed to turn over to a pay clerk such of the duties of his station as could be legally executed by said clerk during his absence. *Held*, That this did not operate to detach the officer from the office of general storekeeper, and did not create a vacancy therein, so as to authorize the appointment of an acting assistant paymaster during such temporary absence. (10 Comp. Dec., 135.)

**Inherent power of President to provide for acting appointments.**—Section 1381 applies in terms to a vacancy in the office of "paymaster or assistant paymaster." However, by Navy Regulations 1920 (Art. 1228), provision is made for acting appointments by the senior officer present in case of the death, etc., of "any officer of the Supply Corps on duty." (See also Art. 1229.)

Statutory authority was not necessary for the President to make a valid regulation providing that "on foreign stations a commander may, when absolutely necessary, give acting appointments to fill vacancies which may be occasioned by death or other circumstances; but in such cases he shall take the earliest opportunity to make known the circumstances to the Secretary of the Navy, and state his reasons for making such acting appointments." This regulation was published in the Navy Regulations of 1818, commonly called the "Blue Book," under the head of "Appointments." After its promulgation it was considered "as entitled to respect and obedience. Many acting appointments, including acting pursers, have been made under it, which have received the recognition of the President, the Navy Department, and the accounting officers of the Treasury and the courts of law. \* \* \* To fill up a vacancy by an appointment of one to act ad interim and for a particular exigency in a distant service, is in its nature an executive, ministerial, and administrative power." (6 Op. Atty. Gen., 357.)

A statute which provides that an officer shall not act unless first approved by the Senate, must have a construction consistent with the exception to the power of the Senate, contained in the Constitution, whereby the President is authorized to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session, so that the statute shall not be in conflict with the Constitution. That is to say, there is an exception not expressed in the statute but necessarily implied. The Constitution itself, in relation to the power of the President to fill up vacancies which may happen during the recess of the Senate, must have a reasonable construction, adapted to the end, utility, and practical effect intended in conferring that power. In the cases of officers of the Navy, on far distant service, in the different seas and oceans, vacancies will happen which can not abide to be filled until the President may be informed and exercise his appointing power. To meet such exigencies, the President may provide by regulation for the temporary filling of such vacancies by the naval commander. (6 Op. Atty. Gen., 357; in this connection, see sec. 1378, R. S.)

In the absence of legislative authority, the commander of a squadron of the Navy on a foreign station has power to appoint a provisional or acting disbursing officer in the absence of any such officer duly appointed by the President. Although such appointment be subsequently disapproved by the Secretary of

the Navy, still the acts which the acting officer may have performed while so acting are not thereby invalidated. (6 Op. Atty. Gen., 357.)

For other cases, see notes to sections 177 and 181, Revised Statutes, and to Constitution, Article II, section 2, clause 3.

**Sec. 1382. [Supply Corps; paymaster of the fleet.]** The President may designate among the paymasters in the service, and appoint to every fleet or squadron a paymaster, who shall be denominated "paymaster of the fleet."—(24 May, 1828, c. 121, s. 2, v. 4, p. 313. 21 April, 1864, c. 63, s. 7, v. 13, p. 54.)

Pay of fleet paymasters was fixed at \$4,400 per annum by section 1556, Revised Statutes. (See note to that section.)

See section 1373, Revised Statutes, as to appointment of fleet surgeons; and section 1393, Revised Statutes, as to appointment of fleet engineers.

The word "paymasters" as used in this section has been construed to mean any officer of the Supply Corps, and not as restricting details for this duty to officers in the grade of "paymaster." (See Art. R-1826 (2), Navy Regs., 1913, as amended.)

**Must be designated by the President.**—No designation other than that made by the President entitles a naval paymaster to the place and perquisites of paymaster of the fleet. (18 Op. Atty. Gen., 156; followed 5 Comp. Dec., 466; compare Art. R-1826 (2), Navy Regs., 1913.)

The powers conferred by sections 1381 and 1382, respectively, are quite distinct. (18 Op. Atty. Gen., 156.)

**Secretary of the Navy acts for the President.**—"The action of the Secretary of the Navy in approving the designation of the fleet officers named by general squadron order may be regarded as the action of the President, and as a sufficient compliance with the law which authorizes him to make such appointment. The action of the head of a department within the scope of his authority is to be taken as the action of the President himself." (5 Comp. Dec., 888, citing *Wolsey v. Chapman*, 101 U. S., 755, 769; *Wilcox v. Jackson*, 13 Pet., 498, 513; *U. S. v. Eliason*, 16 Pet., 291; 4 Comp. Dec., 463; see also note to sec. 1393, R. S.)

For other cases, see note to section 417, Revised Statutes.

**Approval by Secretary of the Navy not retroactive.**—"The designation by the commander in chief of a naval squadron of a paymaster of the Navy as paymaster of the fleet does not entitle him to the increased pay of that position, and a subsequent approval of

such designation by the Secretary of the Navy can not have a retroactive effect." (5 Comp. Dec., 466.)

Where designation was made by a commander in chief, and subsequently (more than a year later), was approved by the President, he did not become entitled from the date of his designation to pay as paymaster of the fleet. There is not any *relation* by the subsequent approval to the *time* of the designation by the Admiral. The latter act has no significance in point of law, no more than as any other recommendation made to an appointing power. (18 Op. Atty. Gen., 156; followed 5 Comp. Dec., 466.)

**Termination of appointment.**—In the case of *Denig v. U. S.* (37 Ct. Cls., 383) it was shown that the officer (fleet engineer) had no duties to perform as fleet engineer from the date the commander in chief was detached until his designation by the new commander in chief was approved by the Secretary of the Navy, his vessel in the meantime being separated from the rest of the fleet and no duty required of claimant as fleet engineer. It was held that the officer was not entitled to pay as fleet engineer during the interim, "even if the detachment of the commander in chief was not of itself a revocation of his appointment as fleet engineer." (10 Comp. Dec., 817.)

**Pay when not performing duty.**—"The effect of this decision [*Denig v. U. S.*, noted in preceding paragraph] is that, although *Denig's* appointment as fleet engineer continued unrevoked during said fifty-four days, he was not entitled to receive the pay of fleet engineer during that period, because the flagship upon which he was serving was separated from the rest of the fleet and no duties were required of him as fleet engineer." (10 Comp. Dec., 817.)

"An officer of the Navy serving as paymaster of a fleet is not entitled while on leave of absence to the pay of a fleet paymaster, but only to the shore pay of his rank." (10 Comp. Dec., 817.)

**Sec. 1383. [Supply Corps; bonds of officers.]** Every paymaster, passed assistant paymaster, and assistant paymaster shall, before entering on the duties of his office, give bond, with two or more sufficient sureties, to be approved by the Secretary of the Navy, for the faithful performance thereof. Paymasters shall give bonds in the sum of twenty-five thousand dollars, passed assistant paymasters in the sum of fifteen thousand dollars, and assistant paymasters in the sum of ten thousand dollars.—(30 Mar., 1812, c. 47, s. 6, v. 2, p. 699; 1 Mar., 1817, c. 24, s. 1, v. 3, p. 350; 22 June, 1860, c. 181, s. 3, v. 12,



p. 83; 17 July, 1861, c. 4, s. 5, v. 12, p. 258; 14 July, 1862, c. 175, s. 1, v. 12, p. 575; 3 May, 1866, c. 72, s. 2, v. 14, p. 43.—U. S. v. Tingey, 5 Pet., 115.)

Deficiency, when discovered, shall be reported by accounting officers to head of department, who shall immediately notify all obligors thereof; but failure to give such notice shall not discharge the sureties. (Act Aug. 8, 1888, sec. 1, 25 Stat., 387.)

Disbursing clerks in executive departments: See section 176, Revised Statutes, and note thereto, as to bonds required to be furnished.

Disbursing officers against whom a warrant of distress has been issued for failure to account for public moneys, must furnish bond in a prescribed sum before an injunction shall issue upon their complaint to stay proceedings on such warrant. (Sec. 3636, R. S.)

Examination of bonds shall be made at least once in two years by officers having power to take and approve such bonds, and by officers having power to fix the amount thereof, for purpose of ascertaining sufficiency of sureties and of approving or fixing the amount. (Act Mar. 2, 1895, sec. 5, 28 Stat., 807.)

Navy mail clerks and assistant Navy mail clerks are required to give bond in such sum as the Postmaster General may deem sufficient. (Act May 27, 1908, 35 Stat., 417, as amended by act Aug. 24, 1912, secs. 3 and 11, 37 Stat., 554, 560.) All bond taken by the Post Office Department shall be made to the United States of America. (Sec. 403, R. S.)

Pay of naval officer required to give bond commences, upon original entry into the service, upon date of approval of his bond. (See sec. 1560, R. S.)

Premium on bonds furnished by surety or bonding company for any officer or employee of the United States shall not be more than 35 per centum in excess of the rate of premium charged for a like bond during the calendar year 1908. (Act Aug. 5, 1909, 36 Stat., 125.) The United States shall not pay any part of the premium or other cost of furnishing a bond required by law or otherwise of any officer or employee of the United States. (Same act.)

President is authorized, if in his opinion the interest of the United States require the same, to regulate and increase the sums for which bonds are or may be required by law of officers employed in the disbursement of the public moneys under the direction of the Navy Department. (Sec. 3639, R. S.)

Renewal of bonds necessary at least once every four years; but where not so renewed, liability of principal or sureties shall not be affected. (Act Mar. 2, 1895, sec. 5, 28 Stat., 807; see also sec. 1384, R. S.)

Special disbursing agents, other than officers of Army or Navy, are required to give bond. (Sec. 3614, R. S.)

Storekeepers on foreign stations: Civilian storekeepers appointed by Secretary of the Navy on foreign stations are required to give bond in amount fixed by Secretary of the Navy. (Sec. 1415, R. S.)

Storekeepers on foreign stations: Officers of the Navy acting in such capacity are required to give bond in amount fixed by Secretary of the Navy. (Sec. 1439, R. S.)

Suit on bonds: Sureties discharged if suit not instituted within five years after discovery of indebtedness. (Act Aug. 8, 1888, sec. 2, 25 Stat., 387.)

Suit on bonds: Judgment at return term shall be granted by court when suit is brought by United States upon a bond, unless the defendant pleads "non est factum," or makes a motion to the court, verifying such plea or motion by his oath, and the court thereupon requires the production of the original bond, in which case a continuance may be granted until the next succeeding term. (Sec. 957, R. S.)

Suit on bonds: Judgment that plaintiff recover so much as is due according to equity shall be rendered in suits to recover forfeitures annexed to bonds, where the forfeiture, breach, or nonperformance appears by default or confession of the defendant, or upon demurrer; and when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties requests it, be assessed by a jury. (Sec. 961, R. S.)

Suit on bonds: Copies of bonds duly certified and authenticated are admissible in evidence in suits against delinquent officers, unless defendant pleads "non est factum" or makes his motion to the court, verifying such plea or motion by his oath, in which case the court may, if it appears to be necessary for the attainment of justice, require the production of the original bond. (Sec. 886, R. S.)

Surety or guaranty company which complies with necessary requirements may be accepted as sole surety on a bond. (Act Aug. 13, 1894, 28 Stat., 279, as amended by act Mar. 23, 1910, 36 Stat., 241.)

#### I. WHO ARE REQUIRED TO GIVE BONDS.

#### II. NECESSITY OF FURNISHING BOND BEFORE ENTERING UPON DUTY.

#### III. DATE FROM WHICH BOND TAKES EFFECT.

#### IV. FORM OF BOND.

#### V. SUFFICIENCY OF SURETIES.

#### VI. APPROVAL OF BOND.

#### VII. CONDITION OF BOND.

#### VIII. CONFLICT OF LAWS.

#### IX. LIABILITY OF SURETIES.

#### X. MISCELLANEOUS.

#### I. WHO ARE REQUIRED TO GIVE BONDS.

See statutes noted above, under this section.

Pay directors and pay inspectors, although not specified in the above section of the Revised Statutes, are required to give bond

by Navy Regulations, 1913 (art. R-3002), which provide that "before entering upon the duties of his office every officer of the Pay Corps shall give bond for the faithful performance thereof, with sufficient surety, to be approved by the Secretary of the Navy, and under such regulations or instructions as may be issued from time to time by proper authority"; and by Naval Instructions, 1913 (art. I-3901), which provide that "officers of the Pay Corps of the Navy, \* \* \* and such other officers or officials as the Secretary of the Navy may direct, are required to furnish bonds for the faithful performance of their duties."

"While there is no express statutory authority requiring pay directors and pay inspectors to give bond, the department, in view of the fact that such officers have or may have disbursing accounts, requires that they give bond in the sum of twenty-five thousand dollars." (File 26284-94, May 8, 1909.)

**The Chief of the Bureau of Supplies and Accounts** has no disbursing account and is not held personally responsible for the disbursement of public moneys under the bureau. Therefore in the absence of an express statutory requirement it is not considered necessary that he furnish a bond. \* \* \* Should there be such a change in the business methods of the Bureau of Supplies and Accounts as would place public funds in the hands of the Paymaster General, in any capacity, it is considered in such case that the public interests would indicate that a bond be required." (File 26284-94, May 8, 1909, Memo. of Solicitor, Navy Dept.)

**"Chief pay clerks, pay clerks, and acting pay clerks** will be required to furnish bond for the faithful performance of their duties in the sum of five thousand dollars; and will be responsible under said bond for all money and stores in their custody." (Art. R-3318A, par. 7, Navy Regs., 1913, file 3980-1283, Oct. 18, 1916, 201 S. and A. Memo. 4423, Dec. 1, 1917; C. N. R. 11, Dec. 1, 1918. See 24 Comp. Dec., 650; 25 Comp. Dec., 550; and see decisions of the Supreme Court, noted below, as to the power of the head of a department to demand a bond in cases not required by statute; see also above, as to pay directors and pay inspectors.)

**Enlisted men** on duty involving the handling of Government stores and money may be required by the Secretary of the Navy to give bond. (File 3980-1283, Oct. 18, 1916, May 2, 1917, and July 31, 1917.)

**Pay Officers, Naval Reserve Force**, whether of the Fleet Naval Reserve or Naval Coast Defense Reserve, must furnish bond in conformity with section 1383, Revised Statutes, before their pay can commence. (Comp. Dec., Apr. 30, 1917, file 26254-2224:5; see also Comp. Dec., Apr. 14, 1917, file 26254-2222:1; Comp. Dec., Apr. 7, 1917, file 26254-2224:2.)

**Pay Officers, Naval Militia**, assigned to duty under the provisions of section 11 of the Naval Militia Act of February 16, 1914 (38 Stat., 286, repealed by act July 1, 1918, 40 Stat., 708), not called into the service of the United States and not required to disburse Federal funds, are not required to give bond as officers of the Navy. (Comp. Dec., July 6, 1917, file 26254-2224:7.)

The head of a department has power to demand a bond from an officer appointed to a place of trust, although there is no statutory authority to take such bond. It was held in *United States v. Tingey* (5 Pet., 115) that the United States had the right to take a bond to insure the faithful performance of duty on the part of an individual or officer where such bond was voluntarily given and was not in violation of any provision of law; but that no officer of the Government has a right, under color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond "with a condition different from that prescribed by law." The power of the Government to take bonds in cases where not required by any law or regulation, but only by direction of the head of a department, was recognized again in *United States v. Bradley* (10 Pet., 343, 359). (*Moses v. U. S.*, 166 U. S., 571, 586, 587; but see, contra, 24 Comp. Dec., 650; compare 25 Comp. Dec., 550.)

It is in the discretion of the President whether or not to require bond of an officer of the Engineer Corps employed as disbursing agent of the Government. (6 Op. Atty. Gen., 24; compare sec. 3614, R. S.)

Although the general functions and duties of certain officers do not include specifically the disbursement of public money, and those officers are not required by statute to give bond, yet the head of the department may lawfully assign to them duties within the general scope of their employment other than and in addition to those prescribed, whenever the exigencies of the public service require it. Where the particular duty thus assigned involves the receipt or disbursement of public money, it is competent for the Secretary to take a bond for the protection of the Government against loss, although such bond may not be required by statute; and the bond would be valid and binding upon both principal and sureties if voluntarily given by the officer. (17 Op. Atty. Gen., 391.)

The term "voluntary bond" does not mean that it must have been offered and pressed upon the Government when never asked for or demanded by it. It is a voluntary bond when it is not demanded by any particular statute or regulation based thereon, and when it is not exacted in violation of any law or valid regulation of a department. The Government in such cases has the right to demand a bond, in the absence of any law; but can not extort a bond from a reluctant officer with a condition therein contained different from that which a statute calls for. (*Moses v. U. S.*, 166 U. S., 571; see also *U. S. v. Maurice*, 26 Fed. Cas. No. 15747; *Jessup v. U. S.*, 106 U. S. 147; *U. S. v. Rogers*, 28 Fed. Rep., 607; *Boehm v. U. S.*, 20 Ct. Cls., 241; 6 Op. Atty. Gen., 24.)

The head of a department may "require" an officer to execute a "voluntary" bond in such penalty as the former may deem adequate to protect the public interests. (26 Op. Atty. Gen., 627.)

Although there is no statute specially providing for the execution of a bond by one holding a particular office, the order of the head of the department that a bond be executed is one which the Secretary has power to make. "The consideration or the condition of the bond



must not be in violation of law; it must not run counter to any statute; it must not be either *malum prohibitum* nor *malum in se*. Otherwise and for all purposes of security, a bond may be valid, though no statute directs its delivery." (*Moses v. U. S.*, 166 U. S., 571; but see 24 Comp. Dec., 650. Compare 25 Comp. Dec., 550.)

In *Moses v. U. S.* (166 U. S., 571), and *U. S. v. Dieckerhoff* (202 U. S., 302), the court concluded by laying down the general rule that if the bond does not run counter to a statute, and is neither *malum prohibitum* nor *malum in se*, it is binding upon all parties. And even though it run counter to a statute in one or more of its provisions, the bond is valid as to the others, providing they are properly severable from those which are invalid. (26 Op. Atty. Gen., 70, 72; citing also *U. S. v. Mora*, 97 U. S., 421, and *U. S. v. Hodson*, 10 Wall., 395.)

Having the right to take a bond in a case where it is not required by statute, the Government has the right to demand it from the officer and to say to him that if he do not give it he will not be continued in the office. Such a demand, when complied with, does not amount to the illegal exaction or extortion of the bond. The case of a bond so procured differs radically from a case in which a bond is extorted from a reluctant officer with a condition therein contained different from that which a statute calls for. (*Moses v. U. S.*, 166 U. S., 571.)

The chief of an office in the War Department has the power to designate one of the officers detailed for service under him as a "property and disbursing officer," to whom shall belong, as provided for in the order of such chief, the custody of all Government property and funds pertaining to the office; and such chief has the power, under the general direction of the Secretary of War, to provide that the property and disbursing officer shall be responsible for the due execution of his duties as such. Where in such a case the Secretary of War directed the property and disbursing officer so designated to give bond as such officer, he thereby recognized and in effect provided that there should be such an office. A bond having accordingly been given for such faithful performance, and such officer having been guilty of the forgery of vouchers and the embezzlement of public moneys officially received by him, such conduct was a plain violation of his duty as such officer, and the condition of the bond, as it plainly covered such conduct, was violated thereby. (*Moses v. U. S.*, 166 U. S., 571.)

"A distinction is drawn in this class of cases between a bond compulsorily executed, as in the case under consideration, and a bond or other obligation voluntarily given to the Government for which there is no statutory authority. In this latter case the bond has been held to be valid." (*Constable v. National Steamship Co.*, 154 U. S., 51, 78.)

"The United States, for instance, as incident to the general right of sovereignty, have the capacity, within the sphere of their constitutional powers, and through the instrumentality of the proper department, to enter into contracts and take bonds, not prohibited by law, and appropriate to the just exercise of those powers, although not expressly directed or authorized to do so by any legisla-

tive act." (*Van Brocklin v. State of Tennessee*, 117 U. S., 154.)

Where a bond given by an officer is objectionable in point of form, the direction of the head of the office to execute a new bond must be considered as that of the head of the department, and the bond given in compliance therewith can not be considered as having been extorted from the officer and his sureties contrary to statute. (*Soule v. U. S.*, 100 U. S., 8.)

"Every one is presumed to know the law. Ignorance standing alone can never be the basis of a legal right. If a bond is liable to the objection taken in this case and the parties are dissatisfied, the objection should be made when the bond is presented for execution. If executed under constraint, the constraint will destroy it. But where it is voluntarily entered into, and the principal enjoys the benefits which it is intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense. In such case there is neither injustice nor hardship in holding that the contract as made is the measure of the right of the Government and of the liability of the obligors." (*U. S. v. Hodson*, 10 Wall., 395, 409.)

Where a statute directs a bond to the Government to be given by persons exercising certain employments, and to be conditioned for the performance of several particular acts which it specifically states, and the agent of the Government takes a bond conditioned, not in the specific way that the statute directed but for the party's compliance with "all the provisions" of the act, "and such other acts as are now or may hereafter be in this behalf enacted," the bond, if it has been voluntarily given, and is not contrary to law or public policy, is valid as against a party who has enjoyed benefits under it. And this although the statute which required the bond to be conditioned in a particular way contain numerous other provisions which it makes the duty of persons exercising employments under it to comply with, but for which it does not contemplate the giving of any bond. (*U. S. v. Hodson*, 10 Wall., 395.)

## II. NECESSITY OF FURNISHING BOND BEFORE ENTERING UPON DUTY.

### Requirement held to be mandatory.—

Where public officers are required to give bond previously to entering upon the execution of their respective offices, *held* that they can not execute their offices before giving bond, because the bond is a preliminary to the execution. (5 Op. Atty. Gen., 687.)

### Requirement held not mandatory.—

Where a statute required that paymasters in the Army "shall, previously to entering on the duties of their offices, give good and sufficient bonds to the United States, fully to account for all moneys and public property which they may receive, in such sum as the Secretary of War shall direct," held that an officer's "appointment as paymaster was complete when his appointment was duly made by the President and confirmed by the Senate. The giving of the bond was a mere ministerial act for the security of the Government, and not a condition precedent to his authority to act as paymaster.

Having received the public moneys as paymaster, he must account for them as paymaster." (U. S. v. Bradley, 10 Pet., 343, 364.)

Where a statute required an officer, "before he enter upon the duties of his office," to give bond: *Held* That the emoluments of the office "were the considerations allowed him for the execution of the duties of his office; and his appointment and commission entitled him to receive this compensation, whether he gave any security or not"; *held, further*, that he was a de jure as well as a de facto officer prior to furnishing bond. (U. S. v. Linn, 15 Pet., 290, 313.)

"When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete. Congress may provide, as it has done in this case, that certain acts shall be done by the appointee before he shall enter on the possession of the office under his appointment. These acts then become conditions precedent to the complete investiture of the office; but they are to be performed by the appointee, not by the executive; all that the executive can do to invest the person with his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions, his title to enter on the possession of the office is also complete." (U. S. v. Le Baron, 19 How., 73, 78.)

In view of former decisions (U. S. v. Bradley, U. S. v. Linn, and U. S. v. Le Baron, above noted), "it can not be held that the execution by Glavey of the bond required by the act of 1882 was a condition precedent to his right to exercise the functions of the office to which he was appointed by the Secretary of the Treasury. Congress did not so direct. His appointment was complete, at least, when he took the required oath and transmitted evidence of the fact to the Secretary. After taking the oath, evidencing thereby his acceptance of the appointment, he was entitled to proceed in the execution of the duties of his office, and became liable for any failure to properly discharge them." (Glavey v. U. S., 182 U. S., 595, 604. In this case the statute did not require the bond to be executed before entering on the duties of the office.)

"When an office with a fixed salary has been created by statute, an appointment thereto is complete when duly made by the President and confirmed by the Senate, and the giving of a bond required by law is a mere ministerial act for the security of the Government, and not a condition precedent to his authority to act in performance of duties of the office." (Glavey v. U. S., 182 U. S., 595; see also U. S. v. Eaton, 169 U. S., 331.)

The provisions of section 1383, Revised Statutes, are directory only and do not preclude a paymaster who has given bond and whose bond has been approved from the receipt of the pay of that office for a period prior to the date of its approval (citing 4 Comp. Dec., 496). There is, however, a separate general statute (sec. 1560, R. S.) which does preclude assistant paymasters of the regular naval service from the receipt of pay prior to the date of the ap-

proval of their bond as assistant paymasters. (Comp. Dec., Apr. 7, 1917, file 26254-2224:2.)

**Pay commences prior to furnishing bond.**—Pay of disbursing officers may commence prior to furnishing bond—that is, upon acceptance of appointment or entering upon duty—the same as other officers, although statute requires that said officers shall give bond "before entering upon the duties of their respective offices." (16 Op. Atty. Gen., 38; see also U. S. v. Eaton, 169 U. S., 346; Glavey v. U. S., 182 U. S., 595; U. S. v. Bradley, 10 Pet., 343; U. S. v. Linn, 15 Pet., 290.)

The giving of a bond required by law by a person appointed to an office is a ministerial act, and not a condition precedent to the performance of duty or to the right to compensation. (9 Comp. Dec., 101.)

Statutes which require that an officer shall give a bond before entering upon the duties of his office are directory only, and a receiver of public moneys who after his appointment entered upon the duties of his office prior to giving a bond, is entitled to the compensation of the office from the date of his entry upon duty. (20 MSS. Comp. Dec., 473; see also 4 Comp. Dec., 496.)

[Prior to the above decisions, it was held by the Comptroller of the Treasury that where there are certain acts to be done by the appointee, as for instance the giving of a bond, those acts are conditions precedent to the complete investiture of the office, and accordingly where a statute required an officer to give bond satisfactory to his chief, he was not entitled to be paid for his services prior to the date of approval of his bond by his chief. (2 Comp. Dec., 26; see also 2 Comp. Dec., 330; 2 Comp. Dec., 448; and 3 Comp. Dec., 447.)]

**Compensation can not be paid prior to furnishing bond.**—It has been repeatedly held that officers are not entitled to salary or compensation where they have failed to give the bond required by a statute providing that such bond shall be given before the officer "enters upon the duties of his office." In the case of U. S. v. Eaton (169 U. S., 331), it was held that the requirement as to giving bond by a consular officer before entering upon the duties of his office was directory, and in that case, where the officer did actually give bond, he was entitled to compensation for a period during which he performed the duties of the office before his official bond was received and approved. The Comptroller has regarded this decision of the Supreme Court as meaning that the statutory provision is directory as to the time of performance merely; it is nowhere suggested in the Eaton case that the requirement as to the giving of the bond was merely directory. All the provisions of a statute are meant to be obeyed, or they would not be enacted. Accordingly, *held* that an officer who was appointed and took the oath of office, but died before execution of bond required to be given before entering upon duty, was not entitled to an allowance of salary for the period between the date of oath and his death, notwithstanding that the failure to give bond was due to his absence from the United States when appointed, and his death prior to his qualifying under such appointment, and not to fault or neglect on his part. (15 Comp. Dec.,



418; citing 8 Comp. Dec., 201; compare 21 Comp. Dec., 49.)

In the case of *Glavey v. U. S.* (182 U. S., 595), it was decided that an officer was entitled to the salary of his office although he had failed to execute an official bond; but in that case, although the statute required that he should "execute a proper bond," the bond itself was to be "in such form and upon such conditions as the Secretary of the Treasury may prescribe," and there was no inhibition as to his entering upon duty before giving such bond. The bond was not given for the reason that the Secretary of the Treasury failed to prescribe the form of the bond or the conditions thereof and did not require any bond of the officer. It will be readily seen that the law and facts in the *Glavey* case differ materially from those in a case where the statute requires the bond to be given by the officer before entering upon the duties of his office and can not be construed to entitle the latter officer to salary where he failed absolutely to give a bond. (15 Comp. Dec., 418.)

Where an officer was temporarily appointed to a vacancy, but did not take the oath of office nor give bond, and was subsequently given a new appointment to the same position for which he duly qualified: *Held*, That he was not entitled to the salary of the office under the first appointment until he had qualified by taking the proper oath and giving bond as required by law; and that the fact that he had qualified under the second appointment would not prohibit him from subsequently qualifying under the previous appointment, it being understood that he had accepted such previous appointment and immediately entered upon the duties of the office thereunder. (17 Comp. Dec., 95; see also Comp. Dec., Jan. 30, 1917, file 26254-2189, regarding pay of Navy mail clerks.)

An officer is not invested with the office until he gives the bond required by law; nor can he recover the salary of the office where he has neglected to give bond. (*Dainese v. U. S.*, 15 Ct. Cls., 64.)

An appointee is not invested with an office nor entitled to the salary thereof until he complies with the conditions imposed by law, such as taking the oath of office and giving bond, if one be required. (*Williams v. U. S.*, 23 Ct. Cls., 46.)

**Compensation of naval officer commences upon date of approval of bond.**—The pay of a naval officer required to give bond commences upon original entry into the service upon date of approval of his bond. (Sec. 1560, R. S.)

The Navy Regulations provide that, when an officer is required to give bond, "his pay shall begin upon the date of approval of his bond by the Secretary of the Navy, provided he has already accepted his appointment and taken the oath of office" (Art. R-4416, Navy Regs., 1913); but "an officer of the Pay Corps, when promoted, is entitled to increased pay from the date of his promotion, his bond in the lower grade being binding until his new bond in the higher grade is approved" (Art. R-4418, Navy Regs., 1913, as amended by C. N. R. 7, Sept. 15, 1916).

There is no statute requiring the pay of an assistant paymaster on his advancement to the rank of lieutenant (junior grade) to commence from the date of the approval of his bond. (Comp. Dec., Apr. 7, 1917, file 26254-2224:2.)

While section 1383, Revised Statutes, is directory only, and does not preclude a paymaster who has given bond and whose bond has been approved, from the receipt of the pay of that office for a period prior to the date of its approval, section 1560, Revised Statutes, does preclude assistant paymasters of the regular naval service, in common with all other regular naval officers, from the receipt of pay prior to the date of the approval of their bond. The same law is made applicable to assistant paymasters on their original entry into the Naval Reserve Force, and the pay of the latter is likewise prohibited from beginning prior to the date of the approval of their bond. (Comp. Dec., Apr. 7, 1917, file 26254-2224:2; see also Comp. Dec., Apr. 14, 1917, file 26254-2222:1.)

Section 1560, Revised Statutes, as applied to the Naval Reserve Force, relates to the original entry of a Naval Reserve officer into the Naval Reserve Force; the fact that the officer originally entering that force had previously served in the Navy would not differentiate him from one who had entered it without previous naval service. (Comp. Dec., Apr. 30, 1917, file 26254-2224:5.)

Should a former officer be reappointed to the regular naval service as a passed assistant paymaster or paymaster, directly from civil life, he would come within the purview of section 1560, and his pay would be, by that section, precluded from commencing from a date prior to that of the approval of his bond. (Comp. Dec., Apr. 30, 1917, file 26254-2224:5.)

The payment of compensation to an officer of the Navy upon his original entry into the service, for a period from the date he accepted his appointment until the date his bond was approved by the proper authority, is in violation of section 1560, Revised Statutes. The evident object of that section is to protect the Government by insuring the giving of the required security in handling the public funds. Before approval of his bond the officer is in a status similar to that of a *de facto* officer, as he is not fully qualified as an officer *de jure*. Where, therefore, he has been paid his salary under the circumstances stated, he is entitled to retain same, it appearing that he subsequently gave bond a few days before his discharge from the service took effect. (18 Comp. Dec., 596.)

Where a candidate for appointment as assistant paymaster in the Navy after his commission has been issued but prior to its receipt by him and prior to receipt of notice by him that he had been commissioned and prior to accepting the office or taking the oath of office or entering upon duty, executed an official bond in anticipation of his appointment: *Held*, That under section 1560, Revised Statutes, and the Navy regulations pursuant thereto, he was not entitled to pay prior to the date of his acceptance of the appointment and taking the oath of office. (19 Comp. Dec., 358.)

The appointment as a temporary assistant paymaster of an acting pay clerk, temporary,

who, as such acting pay clerk had given a bond for \$5,000, was not an original entry into the service within the meaning of section 1560, Revised Statutes, but was substantially a promotion, and he is entitled to pay as assistant paymaster prior to approval of his bond as such. (25 Comp. Dec., 550; compare 24 Comp. Dec., 650.)

**Date of bond.**—"Every bond shall bear date even with or subsequent to the date of the commission or appointment." (Art. I-3903, Naval Instructions, 1913.)

"Every bond shall bear date even with or prior to that of the affidavits of the sureties and to that of the certificates as to their sufficiency." (Art. I-3904, Naval Instructions, 1913.)

### III. DATE FROM WHICH BOND TAKES EFFECT

**From date of delivery.**—"A bond may not be a complete contract until it has been accepted by the obligee; but if it be delivered to him to be accepted if he should choose to do so, that is not a conditional delivery, which will postpone the obligor's undertaking to the time of its acceptance, but an admission that the bond is then binding upon him and will be so from that time, if it shall be accepted. When accepted, it is not only binding from that time forward, but it becomes so upon both from the time of delivery. This is the offer which the obligor makes when he hands the bond to the obligee, and in that sense the obligee received it." (*Broome v. U. S.*, 15 How., 143, 153. In this case the statute did not require the officer to give bond before entering upon duty, but within three months thereafter.)

It is not necessary that the bond be handed to the officer charged with its approval. It may be handed to an agent appointed by that officer to receive it, or it may be put into the possession of any person to deliver it, or it may be transmitted by mail. If done in any one of these ways, it is a delivery from the moment that the collector and his sureties part with it. It is from that moment in the course of transmission, with the intention that the law may act upon it through the agency of the approving officer, and his subsequent approval is an acceptance with relation to the time beginning the transmission. A written acceptance dated after a delivery is not to be taken as the time from which the completeness of the contract is to be computed; but such an acceptance has a relation to the time of delivery, making that time the beginning of its obligation upon the parties to the bond. (*Broome v. U. S.*, 15 How., 143.)

"The possession of the bond by the Treasury Department was *prima facie* evidence of delivery." (*Duncan v. U. S.*, 7 Pet., 435, 447.)

The general rule of law is that, like a deed, an official bond becomes operative from the date of its delivery. In the absence of evidence to the contrary, the delivery will be presumed to have been made on the day of its date. But where it is provided by statute that the official bond to be given by an officer shall be approved by another officer, other considerations arise. In *Broome v. United States* [above noted] it was held that an official

bond, when accepted, is binding from the time of its delivery; but in that case the statute provided that the officer should give bond "within three months after he enters upon the execution of the duties of his office"; and in *United States v. Le Baron* [noted below] the court distinguished this case from one where no time is allowed after entering upon the duties of the office for giving the bond required by law, and held that in the latter case the bond speaks only from the time of its acceptance and "can not be intended to relate back to any earlier date." But in *Glavey v. United States* (182 U. S., 595) the court, after reviewing prior decisions, including *United States v. Le Baron*, held that the giving of an official bond required by law to be given by an officer is a mere ministerial act for the security of the Government, and not a condition precedent to his authority to act in the performance of the duties of his office. "I think, therefore, the principle enunciated in *Broome v. United States*, supra, that when a bond is accepted it becomes binding from the time of delivery must be regarded as controlling. This principle is sometimes expressed in different language, it being held that a subsequent approval of an official bond must be deemed to relate back to the time the bond was delivered for approval." (14 Comp. Dec., 428; compare 17 Comp. Dec., 86, noted below, under "Intention of parties controlling.")

**From date of approval.**—"The bond of an officer of the Pay Corps takes effect from the date of its approval by the Secretary of the Navy." (Art. R-3002 (3), Navy Regs. 1913.)

In *Broome v. United States* [noted above] it was held that a bond may be deemed to be delivered when it is put in course of transmission to the officer whose duty it is to examine and approve or reject such bonds. But this decision proceeded upon the ground that the act of Congress there under consideration allowed the officer to exercise his office for three months without a bond; and that consequently the approval and delivery were not necessarily simultaneous acts, nor need the approval precede the delivery; and the distinction was adverted to between the case then presented and one in which the statute required the officers to give bond with approved security on their appointment, and allowed them no time, after entering on their offices, to comply with this requirement. In the latter case the bond must be accepted by the head of the department as sufficient in point of amount and security before it can have any effect as a contract; otherwise the officer might enter on the office merely on giving a bond which, on its presentation, the head of the department might reject as insufficient. In other words, the person appointed might act without any operative bond, which was not intended by Congress. The purpose of the surety was to become security for one legally authorized to exercise the office, not for one who enters on it unlawfully because he failed to comply with the requirement to furnish an approved bond; and this purpose can be accomplished only by holding that the appointee can not act, and the bond can not take effect, until it is approved. Our opinion is,



therefore, that this bond speaks only from the time when it reached the head of the department and was accepted by him; that until that time it was only an offer or proposal of an obligation which became complete and effectual by acceptance; and that, unlike the case of an officer's bond which is not a condition precedent to his taking office and which may be intended to have a retrospective operation, the bond in this case can not be intended to relate back to any earlier date than the time of its acceptance, because it is only after its acceptance that there can be any such holding of the office as the bond was meant to apply to. (*U. S. v. Le Baron*, 19 How., 73; compare *Glavey v. U. S.*, 182 U. S., 595, and 14 Comp. Dec., 428, noted above, under "From date of delivery.")

The officer was required by law to give bond before entering upon the duties of his office. According to the principles laid down in the case of *United States v. Le Baron*, a bond given under that provision must be considered to speak and to take effect, not from the day of its date, but from the date upon which it was approved. (14 Op. Att. Gen., 7.)

"It is settled that a bond of that character takes effect on the date of acceptance, and it is from that time it speaks." (*Moses v. U. S.*, 166 U. S., 571, citing *U. S. v. Le Baron*, 19 How., 73 and 4 Wall., 642, 647.)

For cases as to what constitutes approval, see below, "VI. Approval of Bond."

**Intention of parties controlling.**—Where the bond is tendered under such circumstances as to show that it is intended, if accepted, to be effective from its date, it relates back, when accepted, to its date. Where, however, it is executed under such circumstances as to show that it is tendered as an offer of an obligation to take effect when approved, it neither relates back nor is completely executed until approved. In such case the date of approval will be taken as the date of final delivery, and all accounts under such bond should be started by taking that as the date of delivery. (17 Comp. Dec., 86.)

It is not ordinarily a prerequisite to the legal holding of an office that a bond be approved when a person enters upon the duties of his office. A bond afterwards given may relate back to his entry upon office, or may be effective from the time it was delivered, or when it was approved, or when he entered upon office, depending upon the circumstances of its execution. (17 Comp. Dec., 86.)

The liability upon a renewal bond in some instances commences when it is delivered, in other instances when it is approved. No inflexible rule can be laid down covering all cases as to when the liability of one bond ceases and when the other commences. These are questions of law, in no way depending upon the convenience of the auditors in stating accounts under them. (17 Comp. Dec., 86.)

The presumption that delivery was made on the date of the bond would not obtain where it was clear that the delivery of the bond was a mere offer, or was intended as an escrow. In such case it could only become operative from its date by relating back to the time of its execution. (17 Comp. Dec., 86.)

**May be made retroactive.**—A bond voluntarily given by an officer of the United States for the faithful discharge of the duties of his office, under a statute requiring such officers to give bond "for the faithful discharge of the duties of their respective offices," may be worded so as to operate retroactively. Such a bond does not contain provisions or conditions differing from or in any wise inconsistent with those prescribed or required by law. (29 Op. Att. Gen., 28.)

The manifest purpose and intent of the law is that the United States shall be fully secured for the faithful discharge by public officers of their duties, and therefore it is in entire conformity with the purpose of the act to require that a bond given by such an officer shall cover his entire term. It frequently occurs, however, that the public interests require that an officer enter upon the discharge of his duties before he is able to give the requisite bonds, or, as the statute contemplates, a new bond may be necessary in order to increase or strengthen existing bonds. To hold, therefore, that in such a case the bond could not be made to cover his prior service, even if voluntarily given, would be to say that the statute requires the Government to go unprotected to that extent. Such a view is contrary to sound principles of public policy, and is not required by any consideration of justice or protection to the official who gives the bond. (29 Op. Att. Gen., 28.)

Where an officer was temporarily appointed to a vacancy, but did not take the oath of office nor give bond, and was subsequently given a new appointment to the same position, for which he duly qualified: *Held*, That the fact that he had qualified under the second appointment would not prohibit him from subsequently qualifying under the previous appointment by taking the proper oath and giving bond as required by law, it being understood that he had accepted such previous appointment and immediately entered upon the duties of the office thereunder. (17 Comp. Dec., 95.)

#### IV. FORM OF BOND.

**In general.**—In the case of some officers the form of bond is prescribed by statute (e. g., see sec. 2619, R. S., as amended by act Feb. 27, 1877, chap. 69, sec. 1, 19 Stat., 245). In the case of other officers, the form of the bond, by express terms of the statute requiring it, is to be prescribed by or to be subject to the approval of the President, head of department, or other officer named therein (e. g., see sec. 1697, R. S.). In most cases, however, where official bonds are required, the form thereof is tacitly or impliedly left by Congress to be regulated or fixed by the officers by whom the bonds are to be approved. Section 1383, Revised Statutes, belongs to this class of cases (18 Op. Att. Gen., 274).

**Must be under seal.**—"The term bond, *ex vi termini*, imports a sealed instrument, and, as a general rule, independent of any statute providing otherwise, sealing is necessary to constitute a perfect bond. \* \* \* The seal is not a mere formality of execution, but a mat-

ter of substance which gives to the paper certain legal effects which cannot be attached to an unsealed paper. \* \* \* (26 Op. Atty. Gen., 507.)

Where an act of Congress directs the security to be taken by bond, an instrument not under seal was not a bond and was not in form the instrument required by the act of Congress. (*U. S. v. Linn*, 15 Pet., 290; see also *Moses v. U. S.*, 166 U.S., 571; *U. S. v. Linn*, 1 How., 104.)

Where the bond sued on had no seal opposite the name of one of the obligors, and there was no evidence that he had adopted the seal of any of the other parties to the instrument, it was held that the instrument was not his bond, because in fact there was no evidence of any seal belonging to him ever having been affixed, and no such seal was on the instrument when it was produced on the trial. (*Moses v. U. S.*, 166 U.S., 571, 582.)

Bonds must be sealed, and for abundant caution they should be sealed with wax or wafer and paper cap, which are everywhere acknowledged to be seals; although scrolls or any other sealing would be valid which is a good sealing in the place where they are executed. (2 Op. Atty. Gen., 93.)

"Seals of wafer or wax shall be attached to the bond at the place indicated, opposite the places for the signatures of the principal and sureties." (Art. I-3905, Naval Instructions, 1913.)

"In all cases where a seal is necessary by law to any commission, process, or other instrument provided for by the laws of Congress, it shall be lawful to affix the proper seal by making an impression therewith directly on the paper to which such seal is necessary; which shall be as valid as if made on wax or other adhesive substance." (Sec. 6, R. S.)

In an action on an official bond, although the copy of the bond sued on, which was certified from the Treasury Department of the United States, exhibited a scroll instead of a seal, it may be presumed that the original bond had been executed according to law. (*Duncan v. U. S.*, 7 Pet., 435.)

A corporation may adopt for the purpose and use a seal other than its corporate seal on a bond so as to make the bond a corporate deed of the corporation. An agent of a corporation, appointed by an instrument under the corporate seal of the corporation, may on its behalf adopt a special seal so as to make it, in executing the purpose for which he was appointed, the corporate seal of the corporation. (26 Op. Atty. Gen., 507.)

For other cases, see below "Alteration of bond."

**May be valid instrument although not under seal.**—Although an unsealed instrument purporting to be an official bond is not a "bond" and does not meet the statutory requirement, nevertheless held that such instrument was good at common law. The actual difference between an instrument under seal and one not under seal is that in the one case the seal imports a consideration and in the other it must be proved. There ought to be some very strong grounds to authorize a court to declare a contract absolutely void which has been voluntarily made upon a good con-

sideration and delivered to the party for whose benefit it was intended. The mere want of seals is not such a departure from the statute as to warrant the court, upon any supposed principles of public policy, to pronounce the instrument utterly void; it being good at common law, and given in furtherance of the great object of the statute, and as security for the faithful discharge of the duties required of the office. (*U. S. v. Linn*, 15 Pet., 290.)

"The United States *v. Linn* was an action against a receiver of public moneys and his sureties. The statute in that case required that the receiver should 'give bond,' with approved security, in the sum of ten thousand dollars, for the faithful discharge of his trust.' The instrument given was without seal, and was, therefore, not the security required by the statute. The counsel for the defendants insisted that the instrument was void for the reasons, among others, that it was not the form of security required by the statute; that the prescribing of one security was an implied prohibition of all others; and that if the instrument in question could be sustained, the statute might in all cases be disregarded and a mortgage of realty or personality or any other imaginable security might be substituted for that which the statute required. The court responded: 'If this is a contract, entered into by competent parties and for a lawful purpose, not prohibited by law, and is founded upon a sufficient consideration, it is a valid contract at common law. A mortgage, or any other approved security voluntarily given, would no doubt be valid.'" (*U. S. v. Hodson*, 10 Wall., 395, 408.)

**Names of parties.**—The law recognizes but one Christian name; hence the bond with sureties, and the oath of office of a receiver of public moneys, subscribed "Benjamin F. Edwards," where the commission had issued to "Benjamin Edwards," are valid. (2 Op. Atty. Gen., 332.)

"A mistake in the baptismal name of an obligor to a bond, executed by his attorney duly authorized to execute a bond in his right name, does not vitiate the bond, the error being shown to be purely accidental." (*Dolton v. Cain*, 14 Wall., 472.) See 9 Op. Atty. Gen., 128, holding that a bond, to be accepted by the Government, ought to be executed by the parties, and not by their attorney.

Where the statute requires the giving of security to secure payment "to the Treasurer of the United States," this does not mean that the bond should be made payable to the Treasurer of the United States; it may be made payable directly to the United States and conditioned that payment shall be made to the Treasurer and not depart from any express provision of the law. But if the statute should be construed to mean that the bond shall be payable to the Treasurer, still we are of opinion that a bond in which the United States is the obligee, and which is conditioned that payment shall be made to the Treasurer, is a valid and binding obligation. The authorities show that the United States can, without the authority of any statute, make a valid contract, and that when the form of a contract is prescribed by the statute a departure from its



directions will not render the contract invalid. The bond is good at common law. (*Jessup v. U. S.*, 106 U. S., 147.)

Where the United States of America are the obligees, a misdescription of the incorporate or political name in the bond by calling them "United States of North America" furnishes no valid ground of exception, there being an averment of identity in the declaration. (*U. S. v. Bradley*, 10 Pet., 343.)

**Witnesses.**—The attestation of witnesses to a bond is merely for convenience of proof. The law does not require such witnesses, but it is expedient and safe always to require them. (17 Op. Atty. Gen., 285.)

No attestation is necessary to their validity, although witnesses may be useful and convenient to make proof of handwriting in case of necessity. (2 Op. Atty. Gen., 93.)

**Acknowledgment.**—"An acknowledgment is the act of one who executes a deed on going before some competent officer or court and declaring it to be his act and deed. The functions of an acknowledgment are twofold, to authorize the deed to be given in evidence without further proof of its execution, and to entitle it to be recorded. \* \* \* Bonds differ from deeds in that the former are not required to be recorded. For that reason, no acknowledgment as to them is, in my opinion, necessary." (26 Op. Atty. Gen., 507.)

**Certificate of sufficiency.**—There is no law requiring a United States judge or a United States attorney to certify as to the sufficiency of guarantors or bondsmen, and no fees are chargeable against the Government for such service. (19 Op. Atty. Gen., 181. See below "Expense of furnishing bond," under "X. Miscellaneous.")

Where the law then in force required the bond of a purser in the Navy to be approved by the judge or attorney for the United States of the district in which the purser resided, it was *held* that to save the necessity of proof on this subject, the residence should be expressed in the body of the instrument; *held, further*, that the certificate of the district attorney approving the sureties is, to all substantial purposes, an approval of the bond. (2 Op. Atty. Gen., 93.)

Where the law required that the sureties on a naval officer's bond shall be approved by the judge or attorney for the United States of the district in which such naval officer shall reside, it was *held* that the certificate of a district attorney was sufficient although he did not use the word "approved," which was used in the statute; but his certificate that the sureties were "good and sufficient" was, to all substantial purposes, an approval. (2 Op. Atty. Gen., -93.)

By Naval Instructions, 1913 (art. I-3910), it is provided that "the sufficiency of the sureties shall be certified to by a judge or a clerk of a United States court for the district in which the sureties reside, or by a United States attorney for such district."

[The act of March 1, 1817, chapter 24, section 1, 3 Stat., 350, which is one of the statutes cited by the revisers in their note to section 1383, provided that the sureties on bonds of naval officers "shall be approved by the judge or attor-

ney for the United States, for the district" in which such naval officers shall reside. However, this provision of the original law was not embodied in the Revised Statutes, and was therefore repealed by section 5596, Revised Statutes. In this connection see below, "Renewal of bonds," under "V. Sufficiency of Sureties."]

**Temporary appointment.**—Where a temporary appointment of an officer has been made by the President, the recital in the official bond should be in conformity with the nature of the appointment. (9 Op. Atty. Gen., 53.)

**Parties jointly and severally bound for full amount.**—The form of bond required to be given by a public officer—whether the parties thereto are to be jointly and severally or may be only jointly bound, and whether each surety is to bind himself for the full amount of the penalty or may restrict his liability to a less amount—where not made the subject of statutory regulation is left to the determination of the officers by whom the bond is to be approved. (18 Op. Atty. Gen., 274.)

The form ordinarily made use of in practice is that wherein the principal and sureties are jointly and severally bound for the full amount of the penalty. (18 Op. Atty. Gen., 274.)

This form being preferable to any other, and its use sanctioned by long practice, the adoption of a different form, though it may not be inconsistent with the terms of the statute so to do, would not be warranted unless the circumstances of the particular case were such that the public interests could not otherwise be served. (18 Op. Atty. Gen., 274.)

**Departure from statutory form.**—"The authorities show that the United States can, without the authority of any statute, make a valid contract, and that when the form of a contract is prescribed by the statute, a departure from its directions will not render the contract invalid. The bond is good at common law." (18 Op. Atty. Gen., 458, 460, quoting *Jessup v. U. S.* 106 U. S., 152; see also to same effect 26 Op. Atty. Gen., 70, 72, citing *Moses v. U. S.*, 166 U. S., 571, and *U. S. v. Dieckerhoff*, 202 U. S., 302.)

Nothing but very strong and express language should induce a court of justice to adopt the interpretation that a bond taken in a form not prescribed by the statute, because of mutual mistake or accident and wholly without design, should be utterly void; it would be a very mischievous interpretation of the act to suppose that it intended such consequence. (*U. S. v. Bradley*, 10 Pet., 343; *U. S. v. Linn*, 15 Pet., 290.)

The case of *United States v. Bradley* (10 Pet., 343, 365), holding that bonds not taken in the prescribed form are not utterly void, "has been frequently sustained by the Supreme Court, and was cited as the law in the case of *Jessup v. The United States* (106 U. S., 151), where a number of the decisions of the Supreme Court upon this question are reviewed. The decisions of the Supreme Court sustaining the validity of bonds executed under directory statutes, where mistakes and omissions have occurred therein, are as follows: *Jessup v. United States* (106 U. S., 147), *United States v. Mora* (97 U. S., 421), *United States v. Bradley* (10 Pet., 362),

*Farrar v. The United States* (5 Pet., 373)." (18 Op. Atty. Gen., 458.)

Where a statute expressly requires a public officer to give bond for the faithful disbursement of public money, and in the bond given the words which relate to disbursement are omitted, and the only words inserted are "that he shall faithfully discharge the duties of his office," *held* that, "the court feel no difficulty in maintaining, that where the conditions are cumulative, the omission of one condition can not invalidate the bond, so far as the other operates to bind the party." (*Farrar v. U. S.*, 5 Pet., 373.)

"It is a settled principle of law that where a bond contains conditions, some of which are legal and others illegal, and they are severable and separable, the latter may be disregarded and the former enforced." (*U. S. v. Hodson*, 10 Wall., 395, 408.)

In a case where the statute specified the precise form of the bond to be given by certain public officers (sec. 2619, R. S.), and certain words prescribed by the statutory form were omitted in the bond furnished, *held* that "the statute authorizing the execution of the bond is a directory one," and that "the omission of the words as stated does not impair the validity" of the bond, but that the bond is a valid one, "either under the statute or at common law." (18 Op. Atty. Gen., 458.)

When the legal effect of an official bond is questionable, it should be rejected. (9 Op. Atty. Gen., 263.)

For other cases, see below, "VII. Condition of Bond."

**Alteration of bond.**—If any material change is made in a bond subsequent to its execution, the instrument is thereby rendered void, unless it can clearly be shown that after the change the parties assented to it and still acknowledge the signing and sealing to be their act. (17 Op. Atty. Gen., 285.)

"A party who claims under an instrument which appears on its face to have been altered, is bound to explain the alteration; but not so, when the alteration is averred by the opposite party, and does not appear upon the face of the instrument." (*U. S. v. Linn*, 1 How., 104.)

An obligation to the United States, duly signed by the sureties, was presented to the proper Government official and rejected by him as lacking seals; it was taken away by the principal and returned with proper seals. *Held*, That it will be presumed, in the absence of proof to the contrary, that the sureties consented to the seals being attached. (*Moses v. U. S.*, 166 U. S., 571.)

An erasure and interlineation in a bond, increasing the amount of the penalty, does not invalidate that instrument or impair its legal effect if in fact it was made prior to its execution. (17 Op. Atty. Gen., 285.)

Whether an instrument that was produced on the trial and had no seals attached to it, had had them attached when the instrument was originally executed, many years prior thereto, has been held to be a question of fact which should be submitted to the jury. (*Moses v. U. S.*, 166 U. S., 571.)

After a bond had been signed by the obligors, the omission of seals to the signers of the instru-

ment was noted; thereupon one of the obligors took a pen and added scrolls by way of seals to each name subscribed as makers of the instrument. *Held*, That "the adding of the scroll by Linn to his own name did not vitiate the instrument as to him; he had a right to add the seal, or at least he can have no right to set up his own act in this respect to avoid his own deed. It was therefore his deed, and the plea of non est factum as to him is false." (*U. S. v. Linn*, 1 How., 104, 107.)

Where a commissary general of the Army had omitted, through mistake, to sign his official bond, but had delivered it to the proper department signed only by the sureties, such bond is probably incurably defective as a statutory bond, though perhaps it may avail as a bond at common law. Advised that it be returned to be signed by the officers, and attested specially in the form prescribed by the Attorney General. This might have the desired effect. At all events, it would not impair the obligation of the bond as to those who signed it at the proper time, whatever that obligation might be; and it would be obligatory on the principal, at least from the time of its execution by him, which is all that could be effected by an original bond now executed by him. (5 Op. Atty. Gen., 718; but see above, "III. Date from Which Bond Takes Effect.")

#### V. SUFFICIENCY OF SURETIES.

**Certificate of sufficiency.**—See above, under "IV. Form of Bond," and see below, "Renewal of bonds."

**Married woman as surety.**—"In case a married woman be offered as surety, an additional certificate shall be required to the effect that such surety holds her property in her own right, and is competent to bind herself as surety in such cases, under the laws of the State in which she resides." (Art. I-3910, Naval Instructions, 1913.)

In determining whether or not a married woman is competent to contract as surety on a bond, it is first necessary to determine whether the contract is to be considered as a contract made in the State where she signed or in the District of Columbia, as the laws of the State and of the District of Columbia may be different in regard to the capacity of married women to make contracts. Upon this point, *held* that the place of contract must be considered at Washington, D. C. Although the bond was actually signed in Missouri, it was there executed imperfectly and only with the intention that it should be delivered in Washington and there acquire its validity. This view of contracts made elsewhere and yet intended to have force and effect at Washington is maintained in the cases of *Cox v. United States* (6 Pet., 172) and *Duncan v. The United States* (7 Pet., 435). The validity of her contract is therefore to be decided by the law prevailing in the District of Columbia. (15 Op. Atty. Gen., 472, holding that, under the laws of the District of Columbia a married woman can not bind her separate property as surety on a bond. See sec. 1155, D. C. Code.)

A bond would not be rendered invalid by reason of the fact that one of the sureties was



the wife of the principal, even if she were not competent to contract. It would still be a sufficient contract as against the other surety or sureties who might be upon it. (15 Op. Atty. Gen., 472.)

"The wife of a principal shall not be accepted as a surety." (Art. I-3907, Naval Instructions, 1913.)

For other cases, see below, "VIII. Conflict of Laws."

**Surety induced to execute by misrepresentation.**—A bond perfect upon its face, apparently duly executed by all whose names appear thereto, purporting to be signed and delivered and actually delivered without a stipulation, can not be avoided by the sureties upon the ground that they signed it on a condition that it should not be delivered unless it was executed by other persons who did not execute it, where it appears that the obligee had no notice of such condition and there was nothing to put him upon inquiry as to the manner of its execution, and that he had been induced upon the faith of such bond to act to his own prejudice. (*Dair v. U. S.*, 16 Wall., 1.)

In any case, if the bond is so written that it appears that several were expected to sign it, the obligee takes it with notice that the obligors who do sign it can set up in defense the want of execution by the others, if they agreed to become bound only on condition that the other cosureties join in the execution. (*Dair v. U. S.*, 16 Wall., 1, 6; see also, *Pawling v. U. S.*, 4 Cranch, 219, and *Duncan v. U. S.*, 7 Pet., 435, 448.)

"A person who signs, as surety, a printed form of Government bond, already signed by another as principal, but the spaces in which for names, dates, amounts, etc., remain blank, and who then gives it to the person who has signed as principal, in order that he may fill the blanks with a sum agreed on between the two parties as the sum to be put there, and with the names of two sureties who shall each be worth another sum agreed on, and then have those two persons sign it, makes such person signing as principal his agent to fill up the blanks and procure the sureties, and if such person fraudulently fill up the blanks with a larger sum than that agreed on between the two persons and have the names of worthless sureties inserted, and such sureties to sign the bond, and the bond thus filled up and signed be delivered by the principal to the Government, who accepts it in the belief that it has been properly executed, the party so wronged can not on suit on the bond again set up the private understandings which he had with the principal." (*Butler v. U. S.*, 21 Wall., 272; see also *Veach v. Rice*, 131 U. S., 293, 318.)

**Surety company as surety.**—The Secretary of the Navy has power, under section 1383, Revised Statutes, to approve a pay officer's bond in which the sureties are corporations, or a corporation joined with a natural person, if he deem such sureties sufficient. (19 Op. Atty. Gen., 175; see also 19 Op. Atty. Gen., 57; 20 Op. Atty. Gen., 16.)

The act of August 13, 1894 (28 Stat., 279), authorizing guaranty companies to become sureties on official bonds, is permissive only, and where an officer elects to furnish such surety it is

for his personal convenience and not for the purpose of furnishing better security to the United States. (13 Comp. Dec., 375.)

The act of August 13, 1894 (28 Stat. 279), authorizing the acceptance of bonds and undertakings of surety and fidelity companies does not permit the imposition of conditions and regulations by Government officials relative to the percentage of capital stock to liability on a single official bond, or the minimum rates to be charged for such insurance, etc. (22 Op. Atty. Gen., 421.)

If the laws of a State under which a surety company is incorporated limit the amount of liability to a certain percentage of the capital, which can be incurred on account of any one partnership or association, and if a greater amount of liability is incurred it is to be secured by a collateral agreement of indemnity, such provision is thereby made a part of its charter, and to that extent it is restricted in its dealings with the United States. (22 Op. Atty., Gen., 421.)

The validity of the bond or the obligation of either of the sureties is not impaired by the fact that one of them (a surety company) has not the written authority of the Attorney General to do business as required by the act of Congress of August 13, 1894. (26 Op. Atty. Gen., 276.)

Bonds of surety companies, executed in States in which they are not licensed, for principals residing in those States, or for contracts to be performed therein, are valid and enforceable against such companies, no matter how flagrant their violation of the law of the State may have been as regards failure to qualify to do business in the State. (28 Op. Atty. Gen., 127.)

The execution of a bond by a surety company at its home office, or outside of the boundaries of the State wherein it is not licensed, for a principal residing in such State or for a contract to be performed there, would not be the doing of business by the surety within the State. (28 Op. Atty. Gen., 127.)

The Treasury Department should not accept the bond of a surety company in a State where the company is forbidden by the laws of the State to do business, notwithstanding the company may have complied with the provisions of section 2 of the act of August 13, 1894. (28 Op. Atty. Gen., 34.)

The act of August 13, 1894, requires the appointment of a process agent in the district where the principal resides, and also in the district where the contract is to be performed. (28 Op. Atty. Gen., 34.)

Surety companies may, under the provisions of the act of August 13, 1894, appoint process agents in Porto Rico but not in the Philippine Islands. (27 Op. Atty. Gen., 208.)

A surety company may be accepted as surety on the official bond of an officer of the Government who is to discharge his duties in the Panama Canal Zone, provided the surety company has appointed process agents in the judicial district in which the principal in the bond resided at the time it was made or guaranteed and in the judicial district in which the office is located to which it is returnable, and provided the company has also complied

with all other legal requirements. (27 Op. Atty. Gen., 208.)

The Canal Zone is not within the contemplation of the act of August 13, 1894, which provides that surety companies doing business outside of the States or Territories under which they are incorporated shall appoint agents residing within the jurisdiction of the court where such suretyship is to be undertaken upon whom process may be served. (27 Op. Atty. Gen., 136.)

A surety company of Kansas City, Mo., having the power to guarantee the fidelity of persons holding positions of public or private trust and the power to execute and guarantee bonds and undertakings in judicial proceedings, possesses appropriate corporate powers to entitle it to certificate as a sole surety under the provisions of the acts of Congress of August 13, 1894 (28 Stat., 279), and March 23, 1910 (36 Stat., 241). (28 Op. Atty. Gen., 411.)

Voluntary bonds given by an employee or officer of the United States to a superior officer, do not come within the purview of the act of August 13, 1894, which prescribes the character and qualifications of guaranty companies which may be accepted on official bonds required by law. (28 Op. Atty. Gen., 28.)

**Renewal of bonds.**—Every officer of the Supply Corps "shall give a new bond, with sufficient surety, every four years, or whenever required to do so by the Secretary of the Navy; and all such bonds shall be examined every two years for the purpose of ascertaining the sufficiency of the surety thereon." (Art. R-3002, Navy Regs., 1913; see sec. 1384, R. S., and act of Mar. 2, 1895, sec. 5, 28 Stat., 807.)

Prior to the act of March 2, 1895 (28 Stat., 807), new or additional bonds, under certain contingencies, such as the death or insolvency of the surety, etc., might be and were required of public officers, and the purpose of that act was to make general what was theretofore sporadic and subject to the discretionary power of some Government department or official. It is believed that the failure to give such renewal at any time would operate to disqualify the defaulting official from exercising the office to which he had been appointed just as the failure to give the bond required by law on the original appointment would operate. (13 Comp. Dec. 375; see below, "Failure to give new bond," under "X. Miscellaneous.")

"As there is no express statutory requirement that the Paymaster General of the Navy give a bond and as the public interests do not require that he furnish one, it is not considered necessary to call upon the present Paymaster General to renew his last bond given as a pay director at the expiration of the four-year period, June 22, 1909. Nothing in this opinion should be considered as applying to the renewal of bonds of pay directors or pay inspectors, officers of which rank while not required by statute to furnish bond are properly required by the Department so to do, for the reason that public funds may from time to time be placed in their hands." (File 26284-94, May 8, 1909, Memo. of Solicitor, Navy Dept.)

Where a bond given by an officer is objectionable in point of form, the direction of his official superior to execute a new one must be

considered as that of the head of the department, and the bond given in compliance therewith can not be considered as having been extorted from the officer and his sureties contrary to statute. (Soule v. U. S., 100 U. S., 8.)

For other cases, see below, "IX. Liability of Sureties."

**Biennial examination of official bonds.**—The law as it now stands provides for the biennial examination of the bonds of all pay officers of the Navy, without providing adequate machinery for or defraying the cost of such examination. Prior to the act of March 2, 1895, it was the practice of the Navy Department to require pay officers to renew their bonds at the end of each five years. By the terms of the present law it is made compulsory to renew them every four years at least, and to examine them every two years. The Secretary of the Navy requested the Attorney General's opinion upon "the question of having the necessary examination into the character and value of the property of the sureties on the official bonds approved by this Department made by the United States attorneys for the respective districts in which the various bondsmen reside. The opinion of the Attorney General, rendered March 30, 1895, stated: "I am not advised of any statute which either requires or authorizes a United States attorney to make an examination of the character suggested, and am of the opinion that he can not be called upon to render any such service to any officer of the Navy Department charged with the duty of approving official bonds." (21 Op. Atty. Gen., 154.) The aforesaid opinion having rendered it impossible to refer official bonds to the Department of Justice for the certification as to the solvency of the sureties thereon, the Navy Department has been constrained to adopt the only remaining available method of making the required biennial examinations of bonds, i. e., to forward to each pay officer concerned a "certificate of sufficiency of sureties" for execution, said certificate containing forms for the justification of the several sureties on such officer's bond, and also a form for the certification, by a United States attorney or a judge or clerk of a United States court, to the effect that he has personally inquired into the solvency of the sureties and is satisfied that they are sufficient for an amount double that of the bond. In case the surety is a corporation qualified to become sole surety on a bond, under the act approved August 13, 1894, the certificate differs slightly in detail from the one just described. (Ann. Rept. Judge Adv. Gen. to the Sec. of the Navy, 1895; see also 2 Comp. Dec., 444, and 3 Comp. Dec., 135, noted below, under "X. Miscellaneous \* \* \* Expense of furnishing bond.")

#### VI. APPROVAL OF BOND.

**What constitutes approval.**—There is no rule which can be applied to determine what constitutes the approval of official bonds. Every case must depend upon the laws directing such an approval. The purpose for which such a bond is required must be looked to. The character of the office and its duties must be examined. The time within which such a bond must be given and approved, and whether it is retrospective or for the future only, must



be considered before it can be determined how and when the approval must be made. (*Broome v. U. S.*, 15 How., 143.)

The statute does not require the approval to be in writing. It may be so, or may be done verbally; or it may not be done in either way. Receiving the bond, and retaining it for a considerable time without objection, will be sufficient evidence of acceptance to complete the delivery, especially when the exception is taken by the party who had done all he could to complete it. Presumptive evidence is admissible to prove the approval and acceptance of a bond, such as its being in the possession of the obligee, having been retained without objection, and the obligor continuing to act under it without having called for a more formal acceptance. (*Broome v. U. S.*, 15 How., 143.)

The law prescribes no form of acceptance; nor does it even require that the acceptance should be evidenced by writing. The date of acceptance should be indorsed on the bond for the security of the sureties bound in the old bond; yet the parties to the new bond are bound by the acceptance in fact of their bond, and this acceptance may be shown as any other fact is required to be. (4 Op. Atty. Gen., 187.)

The receipt of the instrument, its indorsement, its being filed among the archives of the department, or its record, and so forth, may be invoked as evidence of its acceptance by the officer authorized to require it. The more obvious and ordinary mode of evidencing this fact, it is true, is by the signature of the officer authorized to act; but it is by no means indispensable. The abbreviation employed by the head of a department is in legal contemplation his signature, if used for that purpose; and if in any case it should become material to establish it by evidence, the same testimony would avail as would suffice to verify his name written out at length. (4 Op. Atty. Gen., 187, citing *U. S. v. Dandridge*, 12 Wheat., 64.)

"The possession of the original bond by the proper officers of the United States, was prima facie evidence that it had been delivered and accepted." (*U. S. v. Wilkinson*, 12 How., 246, 253.)

**Power of approving officer.**—The officer charged with the approval of the bond may accept the sureties or reject them. He may call at any future time for other sureties, if circumstances shall occur, or information shall be received, which make it necessary that the United States shall have a more responsible security. Or he may call for a new bond. He may decide upon the sufficiency of the sureties before they have made themselves such, or after they have signed the bond. (*Broome v. U. S.*, 15 How., 143, 154.)

**Delegation by Secretary of power of approval.**—"The duty of approval of all bonds that have heretofore been transmitted to this office for examination and recommendation only, has, by order of the Secretary, devolved upon the Solicitor \* \* \*." (Ann. Rept. of the Solicitor to the Sec. of the Navy, 1917, p. 8.)

#### VII. CONDITION OF BOND.

**Departure from statutory form.**—See cases noted above, under "IV. Form of Bond."

**Binds officer as insurer of Government funds.**—When a receiver of public money binds himself in a penal sum to perform the duties of his office without exception, he "makes himself an insurer by express contract" of moneys coming into his hands. "There is an established difference between a duty created merely by law, and one to which is added the obligation of an express undertaking. The law does not compel to impossibilities, but it is a settled rule that if performance of an express engagement becomes impossible by reason of anything occurring after the contract was made, though unforeseen by the contracting party and not within his control, he will not be excused \* \* \*. If, as we have seen, his liability is to be measured by his bond, and that binds him to pay the money, then the cause which renders it impossible for him to pay is of no importance, for he has assumed the risk of it." (*Boyden v. U. S.*, 13 Wall., 17, 21, holding that it is no defense to an action upon the bond of a receiver of public moneys that he had been by irresistible force robbed of the moneys sued for. See also *Smythe v. U. S.*, 188 U. S., 167.)

The liability of a public officer on his bond for moneys collected for the United States and not paid over, is determined by his bond; and, if the case can be likened to that of private contracts at common law, it is that of a common carrier, to transmit them to the Treasury, in doing which he is not exonerated by ordinary diligence, but must answer for loss by larceny and even robbery. (*U. S. v. Morgan*, 11 How., 154, 158. See also *Smythe v. U. S.*, 188 U. S., 164.)

Officers of the Navy are liable upon their bonds for public stores committed to their charge, even though such stores are destroyed by inevitable accident. (4 Op. Atty. Gen., 355.)

In an action on the bond of a paymaster in the Army for not paying over or accounting for public money that came into his hands, *held*, no defense that, without any want of proper care and vigilance on the part of the paymaster, a certain part of the moneys had been stolen from him. (*U. S. v. Dashiell*, 4 Wall., 182; see also *Smythe v. U. S.*, 188 U. S., 165.)

"By his bond he had insured the safekeeping and prompt payment of the public money which came to his hands. His obligation was therefore no less stringent than that of a common carrier, and in some respects it was greater." (*Bevans v. U. S.*, 13 Wall., 56, 60; see also *Smythe v. U. S.*, 188 U. S., 168.)

*Held*, no defense to an action on the bond of a receiver of public moneys that the money, for the nonpayment of which the United States sued, had been feloniously stolen, taken and carried away from his possession by some unknown person or persons, without fault or negligence on his part. (*U. S. v. Prescott*, 3 How., 578, 587; see also *Smythe v. U. S.*, 188 U. S., 163.)

**Does not bind officer for losses due to overruling necessity or the public enemy.**—"No rule of public policy requires an officer to account for moneys which have been destroyed by an overruling necessity or taken from him by a public enemy, without any fault or neglect on his part." (*U. S. v.*

Thomas, 15 Wall., 337; see also *Smythe v. U. S.*, 188 U. S., 168.)

An action was brought on the bond of a surveyor of customs at Nashville, he being also a depository of public moneys at that city. The special defense was that the moneys in question were seized by the Confederate authorities, against the will and consent of the surveyor and by the exercise of force which he was unable to resist, being a loyal citizen and endeavoring faithfully to perform his duty. *Held*, That the act of a public enemy, in forcibly seizing or destroying property of the Government in the hands of a public officer, against his will, and without his fault, is a discharge of his obligation to keep such property safely, and of his official bond, given to secure the faithful performance of that duty and to have the property forthcoming when required. (*U. S. v. Thomas*, 15 Wall., 337; see also *Smythe v. U. S.*, 188 U. S., 168.)

"The *Thomas* case does not materially modify the decisions in previous cases. The general rule announced in these cases \* \* \* is that the obligations of a public officer, who received public moneys under a bond conditioned that he would discharge his duties according to law, and safely keep such moneys as came to his hands, by virtue of his office, are not to be determined by the principles of the law of bailment, but by the special contract evidenced by his bond conditioned as above stated; consequently, it is no defense to a suit brought by the Government upon such a bond that the moneys, which were in the custody of the officer, had been destroyed by fire occurring without his fault or negligence. This rule, so far from being modified by the *Thomas* case, is reaffirmed by it, subject, however, to the exception (which, indeed, some of the prior cases had in effect intimated), that it was a valid defense that the failure of the officer to account for public moneys was attributable to overruling necessity or to the public enemy. The case now before us [loss by fire without negligence] is not embraced by either exception. The result is that the special defense here made can not, in view of former adjudications, avail the superintendent or his sureties." (*Smythe v. U. S.*, 188 U. S., 156, 170.)

"Where a receiver of public moneys has such moneys in his hands, which would not have been in his hands at all, if he had paid them over with the promptness that the acts of Congress and the Treasury regulations made in pursuance of them, prescribing the duties of receivers, in this respect made it his duty to do, and which therefore—inasmuch as the duties of receivers under their official bonds are defined by those acts and Treasury regulations—it was also his duty under his official bond to do—evidence that the moneys were forcibly taken from him by the agents of the so-called 'Confederate States,' usurping the authority of the rightful government, and compelling obedience to itself exclusively throughout the State in which the receiver was, *held* to have been rightly refused in a suit by the Government on the official bond of such receiver, as short of meeting the necessity of the case; it having been owing to the default of the receiver in not paying over promptly and at the right times, that

the moneys were exposed to seizure at all by the rebel usurping government." (*Bevans v. U. S.*, 13 Wall., 56.)

In accordance with a Confederate statute a postmaster in North Carolina paid Government moneys in his hands over to a party claiming against the United States: *Held*, That he was responsible on his bond for the moneys so paid. "We cannot concede that a man who, as a citizen, owes allegiance to the United States, and, as an officer of the Government holds its money or property, is at liberty to turn over the latter to an insurrectionary government which only demands it by ordinances and drafts drawn on the bailee, but which exercises no force or threat of personal violence to himself or property in the enforcement of its illegal orders." In this case it was not proved that the postmaster would have suffered any inconvenience or been punished by the Confederate authorities if he had refused to pay the draft of the insurrectionary post office department on him. (*U. S. v. Keebler*, 9 Wall., 83; see also *Smythe v. U. S.*, 188 U. S., 165.)

**Officer may be relieved from liability for losses for which he is responsible under the terms of his bond.**—By the Judicial Code (act Mar. 3, 1911, secs. 145, 147, 36 Stat., 1136, 1137), it is provided that the Court of Claims shall have jurisdiction to relieve any disbursing officer of responsibility on account of loss, by capture or otherwise while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, where such loss occurred without fault or negligence on the part of the officer, but he has been held responsible therefor.

By act of July 11, 1919 (41 Stat., 132), the accounting officers are required to relieve any disbursing officer of the Navy of responsibility for loss or deficiency of Government funds, when determined by the Secretary of the Navy that the officer was not guilty of fault or negligence and was in the line of his duty. The same act (41 Stat., 153) contained similar provisions with respect to unauthorized payments made during the "present emergency," under military necessity or as the result of accidental circumstances for which the officer was not responsible.

In cases of hardship not covered by statute relief must be sought from Congress. The court is not authorized to make other exceptions than those made by the statute. (*U. S. v. Keebler*, 9 Wall., 83, 89.)

**Condition of bond is prospective; does not cover past transactions.**—The condition of the bond was prospective, and fraud in respect to past transactions, not within the condition, could not render the instrument void prospectively. (*U. S. v. Boyd*, 5 How., 29.)

The condition of a bond can not, by implication, be held retrospective, and to cover all defaults of the officer from the date of his commission, merely because it recites the date from which he had been appointed. The court is precluded by the authorities from maintaining that the sureties are liable by implication, contrary to the plain prospective obligation of the bond, "that the said Boyd shall faithfully execute and discharge the duties of his office." If intended to cover past derelictions, the bond



should have been made retrospective in its language. (*U. S. v. Boyd*, 15 Pet., 187, 208; *Farrar v. U. S.*, 5 Pet., 374, 389.)

For other cases, see above, "III. Date from which Bond takes Effect."

**Binds officer as long as he remains in office.**—"Bonds of officers of the United States, given for the faithful discharge of their duties, which are not in terms limited to a specified period expressed in dates, remain in force so long as such officers continue in office, even though another and different bond be given by way of renewal." (26 Op. Atty. Gen., 70.)

"A provision in an official bond, shortening the life of the bond from the entire period during which the office is held until such time as 'a new official bond shall be accepted by the proper authority and substituted' therefor, runs counter to the statute and would be without effect. In its other particulars, the bond would be good." (26 Op. Atty. Gen., 70. See above, "Departure from statutory form," under "IV. Form of Bond.")

Although the limitation is intended "to overcome the embarrassing effect of existing law, under which renewal bonds do not operate as a discharge of the bonds theretofore given," it is nevertheless unauthorized. Heads of departments are given wide latitude in the conduct of their departments by section 161, Revised Statutes, the only restriction contained in that section being that they shall not prescribe regulations inconsistent with law. However, such an attempt to surrender the legal rights of the Government as is contemplated by the proposed limitation upon the duration of official bonds is so vital as to be clearly within that restriction, and can not, therefore, be of any legal effect. (26 Op. Atty. Gen., 70.)

In view of section 1385, Revised Statutes, it becomes a serious question whether or not a bond given as assistant paymaster would not be binding upon the sureties as long as the officer remained in the Pay Corps of the Navy, even after his promotion to passed assistant and to full paymaster. It is to be presumed that this condition of affairs is not desired, and it would seem necessary that some provision be made in the form of bond which would obviate the legal effect of section 1385. (10 Comp. Dec., 44; but see 26 Op. Atty. Gen., 70, noted above.)

The bond of an officer of the Supply Corps in the lower grade continues binding "until his new bond in the higher grade is approved." (Art. R.-4418, Navy Regs., 1913, as amended by C. N. R. 7, Sept. 15, 1916; see sec. 1385, R. S.)

For other cases, see below, "Where new bond is given," under "IX. Liability of Sureties, and "Amount of bond," under "X. Miscellaneous."

**Binds officer for faithful disbursement of public moneys, whatever their amount.**—"Although when the bond was executed it might not have been supposed that the officer would have such large sums to disburse, that fact forms no defense to an action on the bond, which was conditioned for the honest disbursement of the public moneys, whatever might be their amount." (*Moses v. U. S.*, 166 U. S., 571, 592.)

**Binds officer for faithful performance of duties imposed by subsequent laws.**—

"The bond of a receiver of public money is given to insure the performance of all of his duties, and those duties are defined by the acts of Congress and by Treasury regulations made under the acts." (*Bevans v. U. S.*, 13 Wall., 56, 61.)

"The official bond of parties covers not merely duties imposed by existing law, but duties belonging to and naturally connected with their offices or business imposed by subsequent law, but the new duties must have some relation to or connection with such office or business, and not be disconnected from and foreign to both." (*U. S. v. Singer*, 15 Wall., 111.)

Where the condition of the bond is that the party shall *in all respects* faithfully comply with all the provisions of law in relation to the duties upon which he is engaged, this signifies an intention to stipulate that the principal in the bond should comply with duties subsequently imposed by law. Both parties, it must be assumed, knew that Congress might, at any time, enact new provisions imposing new duties or varying those already imposed; and the defendants must have understood that it never could have been intended that a new bond should be required with every modification made in relation to the existing duties. (*U. S. v. Powell*, 14 Wall., 493.)

Bonds of public officers are required to secure the faithful discharge of the duties ordinarily imposed upon the principal obligor, without reference to the time when the law was passed imposing the duties, and where the language of the bond is sufficiently comprehensive to embrace duties subsequently imposed of a character corresponding with those required at the date of the bond, the construction which gives a prospective, as well as a retrospective, operation to the condition of the bond may well be adopted as both reasonable and just to all concerned. (*U. S. v. Powell*, 14 Wall., 493.)

The Navy Department, in requiring the principal in the bond to perform duties which would have been performed by an officer of a different character if there had been such an officer at the navy yard, did not thereby require of him the performance of duties against defaults in which his sureties had not undertaken to protect the Government. (*Strong v. U. S.*, 6 Wall., 788.)

**Does not cover duties imposed by subsequent laws, in certain cases.**—"Exceptional cases may doubtless arise, as where the condition of the bond is in terms, or by a fair and reasonable construction, limited to existing duties, or where the appointment is a temporary one to expire at the end of the next session of the Senate. Different rules are applied in the case of a temporary appointment, as the commission is for a different tenure, and unless there is something in the act under which the first commission issued, showing that it contemplated a permanent and continuing responsibility under laws subsequently passed, the rule is that the liability of sureties must be strictly confined to the duties created by the acts passed antecedent to the date of the bond. (*U. S. v. Powell*, 14 Wall., 493, 502.)

A bond given by an officer under a recess appointment of the President, and who is subsequently appointed by the President with the advice and consent of the Senate, is to be restricted to the duties and obligations created by the statutes passed antecedently to the date of the bond. (*U. S. v. Kirkpatrick*, 9 Wheat., 720.)

It must be admitted that any substantial addition by law to the duties of the obligor of a bond, after the execution of the instrument, materially enlarging his liabilities, will not impose any additional responsibility upon his sureties unless the words of the bond, by a fair and reasonable construction, bring such subsequently imposed duties within its provisions. (*U. S. v. Powell*, 14 Wall., 501.)

"If, after an official bond has been signed, the nature of the office be changed by law, the bond ceases to be obligatory. In such a case the office is no longer the same, within the meaning of the bond." (*Gausson v. U. S.*, 97 U. S., 584, 592; *Converse v. U. S.*, 21 How., 463.)

Where bonds were given by pay officers of the Army for the performance of particular duties specified therein, it is manifest that such bonds have no effect in securing the performance of any other duties than those to which they expressly point; because this would be to vary the contract of the sureties without their consent. The duties contemplated in future for the paymasters, being variant from those to which their bonds are adapted, will be no longer secured by those bonds; and it consequently becomes requisite that new bonds should be given in every case in which new and different duties are to be performed. (5 Op. Atty. Gen., 733.)

Public officers ought to give new bonds with sureties when required to exercise additional duties (3 Op. Atty. Gen., 575); are required to give new bonds with sureties, conditioned for the performance of the new duties required by a subsequent law, as well as those before required (3 Op. Atty. Gen., 584); are not required to give bonds in a larger amount than before, unless it shall be deemed necessary by the proper officers of the department; but they are required to give new bonds with new conditions, embracing the new duties devolved upon them as well as those previously required (3 Op. Atty. Gen., 586); if the proper department shall deem it expedient, it may, in lieu of a new bond embracing all the duties of the officer, take a new bond in a suitable penalty embracing the new duties only, leaving the old one outstanding (3 Op. Atty. Gen., 600; see also 3 Op. Atty. Gen., 610).

The addition of duties different in their nature from those which belonged to the office when the official bond was given will not impose upon the obligor in the bond as such additional responsibilities, but such an addition of new duties does not render void the bond of the officer as a security for the performance of the duties at first assumed. It will still remain a security for what it was originally given to secure. (*Gausson v. U. S.*, 97 U. S., 584, 590.)

A collector of internal revenue, directed to act as disbursing agent, must give bond as such in addition to his bond as collector; his accounts in the two capacities are kept in separate

books at the Treasury. (*Hall v. U. S.*, 17 Ct. Cls., 39.)

The reimbursement to the United States of moneys paid by them to their own officers or agents in pursuance of a law in existence when the bond was executed, is not a duty so connected with or naturally belonging to the business of the principal as to be within the reasonable contemplation of the parties to the bond at the time of its execution. "It would be extending the liabilities of obligors on such bonds beyond principle and precedent to hold them responsible for the reimbursement of moneys paid by Government to its own officers or agents, because, subsequent to their payment, Government declares that such reimbursement shall be made." (*U. S. v. Singer*, 15 Wall., 111.)

#### VIII. CONFLICT OF LAWS.

**Local law of a particular State can not affect the contract.**—An official bond, given in pursuance of a law of the United States, is not to be governed by the laws of the State in which it was signed, but must be considered as having been executed at the seat of the Government of the United States and to be governed by the principles of the common law. (*Duncan v. U. S.*, 7 Pet., 435.)

"This is an official bond, and was given in pursuance of a law of the United States. By this law, the conditions of the bond were fixed, and also the manner in which its obligations should be enforced. It was delivered to the Treasury Department at Washington, and to the Treasury did the paymaster and his sureties become bound to pay any moneys in his hands. These powers, exercised by the Federal Government, can not be questioned. It has the power of prescribing, under its own laws, what kind of security shall be given by its agents for a faithful discharge of their public duties. And in such cases, the local law cannot affect the contract; as it is made with the Government, and in contemplation of law, at the place where its principal powers are exercised." (*Duncan v. U. S.*, 7 Pet., 435.)

**Liability of parties governed by rules of common law.**—The general rule of law is well settled that the law of the place where the contract is made, and not where the action is brought, is to govern in enforcing and expounding the contract, unless the parties have a view to its being executed elsewhere, in which case it is to be governed according to the law of the place where it is to be executed. Although the official bond of a naval officer was signed at New Orleans, it is very clear that the obligation imposed upon the parties thereby looked for its execution to the city of Washington. It is immaterial where the services of the officer were to be performed; his accountability for nonperformance was to be at the seat of government; he was bound to account, and the sureties undertook that he should account, for all public moneys received by him with such officers of the Government of the United States as are duly authorized to settle and adjust his accounts. The bond was given with reference to the laws of the United States on that subject, and such accounting is required to be with the Treasury Department at the seat



of government; the officer is bound by the terms of the bond to pay over such sums as may be found due to the United States on such settlement, and such paying over must be to the Treasury Department or in such manner as shall be directed by the Secretary. The bond is therefore, in every point of view in which it can be considered, a contract to be executed at Washington; and the liability of the parties must be governed by the rules of the common law. (*Cox v. U. S.*, 6 Pet., 172; see also *Pritchard v. Norton*, 106 U. S., 124, 139.)

**Construction of bond governed by decisions of Federal courts.**—"A bond given in pursuance of a law of the United States is governed, as to its construction, not by the local law of a particular State, but by the principles of law as determined by this court, and operative throughout the courts of the United States." (*Tullock v. Mulvane*, 184 U. S., 497, 514.)

**Competency of married woman as surety depends upon law prevailing in District of Columbia.**—See 15 Op. Atty. Gen., 472, cited above under "V. Sufficiency of Sureties."

#### IX. LIABILITY OF SURETIES.

**In general.**—"Nothing is plainer than the rule that a surety in a bond is liable to the same extent to which his principal is liable, by force of the bond." (*Gausson v. U. S.*, 97 U. S., 584, 590.)

All the provisions of the statutes regulating the institution of suits and the recovery by judgment of unpaid balances from delinquent officers, are as much a part of their bonds as if they were recited in them; and officers and their securities are, in contemplation of law, apprised of those provisions when their bonds are executed. (*U. S. v. Hawkins*, 10 Pet., 125.)

"The Government is not responsible for the laches or the wrongful acts of its officers \* \* \*. Every surety upon an official bond to the Government is presumed to enter into his contract with a full knowledge of this principle of law, and to consent to be dealt with accordingly. The Government enters into no contract with them that its officers shall perform their duties. A government may be a loser by the negligence of its officers, but it never becomes bound to others for the consequences of such negligence, unless it be by express agreement to that effect." (*Hart v. U. S.*, 95 U. S., 316.)

**Strictissimi juris.**—"The obligation of the surety is strictissimi juris, and he can not be called upon to pay more than the penalty of his bond." (*Leggett v. Humphreys*, 21 How., 66.)

It is perfectly clear as to the sureties in an official bond that a judgment cannot be rendered beyond the penalty, to be discharged on payment of what is due, which of course can only be, where it is less than the penalty. (*Farrar v. U. S.*, 5 Pet., 373.)

"The liability of a surety is not to extend, by implication, beyond the terms of his contract; this undertaking is to receive a strict interpretation, and not to extend beyond the fair scope of its terms." (*U. S. v. Boyd*, 15 Pet., 187; *Miller v. Stewart*, 9 Wheat., 702.)

"Nothing can be clearer, both upon principle and authority, than the doctrine that the lia-

bility of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. And courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness. \* \* \* The undertaking of the surety is to receive a strict interpretation, and is not to be extended beyond the fair scope of its terms." (*Miller v. Stewart*, 9 Wheat., 680, 702.)

**Money received prior to giving bond.**—"It matters not at what time the moneys had been received, if, after the appointment, they were held by the officer in trust for the United States, and so continued to be held, at and after the date of the bond." (*U. S. v. Boyd*, 15 Pet., 187, 207.)

If an officer, before the date of his official bond, receive money belonging to the United States with orders from the Comptroller to pay it into a United States depository, which he neglects to do, the sureties on his official bond, executed afterwards, are not liable therefor upon the bond, although the money remain in the officer's hands after the execution of the bond. (*U. S. v. Giles*, 9 Cranch, 212; see also *Farrar v. U. S.*, 5 Pet., 373.)

**Money falsely claimed by principal to be in his hands.**—The sureties are responsible for all the public moneys which were in the hands of their principal at the date of the bond, or that may have come into them afterwards, and not properly accounted for; but not for moneys which the officer may choose falsely to admit in his hands in his accounts with the Government. (*U. S. v. Boyd*, 5 How., 29, 50.)

The sureties can not be concluded by a fabricated account of their principal with his creditors; they may always inquire into the reality and truth of the transaction existing between them. (*U. S. v. Boyd*, 5 How., 29.)

The returns of the receiver to the Treasury Department are not conclusive evidence in an action by the Government against the sureties upon the receiver's bond. If the sums of money stated in such returns were not actually in the hands of the receiver, the sureties are allowed to show how the fact was. (*U. S. v. Boyd*, 5 How., 29.)

In *United States v. Boyd* (5 How., 29), the receipts which had been returned to the Treasury Department, upon which the indebtedness was found, and which had been given on entries of public lands without exacting the money, in fraud of the Government, were all given before the execution of the official bond, upon which the suit was brought. The sureties were not, therefore, responsible for the fraud; and it was these transactions on the part of the receiver, which had transpired anterior to the time when the sureties became answerable for the faithful execution of his duties, in respect to which it was held that they could not be estopped by his returns to the Government. No part of

them fell within the time covered by the official bond. (U. S. v. Girault, 11 How., 22.)

In this case the defense is attempted that the receiver never had received money which he admitted receiving in his returns to the Treasury Department. This is not a good defense, because the sureties in the bond were bound to protect the United States from the commission of the very fraud which they attempt to set up as a defense. (U. S. v. Girault, 11 How., 22, distinguishing U. S. v. Boyd, 5 How., 29, noted above.)

**Money received after termination of office.**—"The sureties are not responsible for moneys placed by the Government in the hands of the principal after the legal termination of his office; but they are responsible for moneys which came into his hands, while in office, and which he subsequently failed to account for and pay over." (U. S. v. Nicholl, 12 Wheat., 505; Bryan v. U. S., 1 Black, 140, 149.)

The liability of sureties upon the official bond of an officer is limited to acts done by him during his term of office. They are not responsible for defaults committed in relation to public moneys received by him after the term for which he was appointed. (15 Op. Atty. Gen., 214.)

A surety in the bond of a public officer is entitled to credit for all payments made by his principal during the time he remained in office, and is chargeable only with the moneys received by him during the same time and which he subsequently fails to account for and pay over. (Bryan v. U. S., 1 Black, 140.)

**Failure of principal to account after removal from office.**—There may have been no breach of the bond at the time of his removal from office, but the liability of the receiver to account remained, and the bond continued in force until he had fully accounted and thus had fulfilled all the conditions of his bond. (Smith v. U. S., 170 U. S., 372, 380.)

**Money received in a different capacity.**—The sureties of a bond of a quartermaster of the Army are not liable for his default in safely keeping and disbursing money advanced to him as acting chief commissary. (8 Comp. Dec., 269.)

**Money disbursed as accommodation to another officer.**—If B, without a receipt from A, upon a requisition for money, volunteers to pay demands which it is A's duty to pay, or pay the orders of A and permit the receipts for the sums paid by him to get into A's possession, by whom they are exhibited at the Treasury and allowed in the final settlement of his account, without A's having given credit to B, or to the Government, for the amount, it assumes the character of a private transaction between A and B, or becomes a debt due from A, as an individual, to B, as a private person; and the latter can not claim the amount at the Treasury, as an allowance in the settlement of his account, nor as a legal and equitable credit in a suit against him by the United States. (U. S. v. Hawkins, 10 Pet., 124.)

**Principal under suspension.**—The suspension of an officer involves the suspension of his bond; the bond required of the person designated to take the place of the former being substituted therefor while the person so

designated is performing the duties of the office. (18 Op. Atty. Gen., 318.)

**One bonded officer acting as assistant to another.**—"The bond of an officer of the Pay Corps acting as an assistant to another pay officer covers the public property actually in his custody, and for which he has receipted, but does not release the senior from a proper supervision over the acts of his subordinate." (Art. R-3002 (5) Navy Regs., 1913.)

**Acts done colore officii.**—The sureties on the official bond of a public officer are liable for acts done by the officer colore officii, although he acts without sufficient warrant. (Lamar v. McCulloch, 115 U. S., 163, 187, citing Lammon v. Fensier, 111 U. S., 17.)

**Money transferred by Government to officer's agent.**—A transfer of moneys by the Government to an agent of the officer does not affect the liability of the surety as a transfer to the officer himself. The fidelity or responsibility of the agent through whom the Government sees fit to transfer public money is not within the obligation assumed by the surety. (Bryan v. U. S., 1 Black, 140.)

**Public moneys.**—Where an officer receives moneys as public moneys, and charges himself with them in his accounts with the Government, his sureties are estopped to raise an objection to the payment of the moneys to the officer, which he could not raise and which is not raised by the parties paying or the United States. Their responsibility for the moneys so received is therefore clear. (Potter v. U. S., 107 U. S., 126, 130; King v. U. S., 99 U. S., 229.)

"Public money in the sense of the law, and as used in this bond, is money which legally comes to the receiver by virtue of his office, and as a public officer, and while carrying out the duties of his office, and he cannot be permitted to say that it was not public money when so received. Being public money, he is bound to account." (Smith v. U. S., 170 U. S., 372, 381; 12 Comp. Dec., 678, 688.)

A sum of money deposited with a pay officer of the Navy by a civil officer as security for the return of an enlisted man of the Navy delivered to the State authorities for trial is not public money. (17 Comp. Dec., 635; see also 16 Comp. Dec., 219, citing Branch v. U. S., 100 U. S., 673, 674, and Courdert v. U. S., 175 U. S., 178, 183.)

"It may be assumed, as a general doctrine of administrative law, that public officers, whether of deposit or disbursement, can make the Government and their sureties responsible only for official acts. As a plain corollary from this doctrine, it may in like manner be assumed that, if any citizen of the United States deposit his own private money for safe-keeping, or for transmission and remittance, in the hands of a public officer, such as a collector of customs, assistant treasurer of the United States, a paymaster in the Army, or a purser in the Navy, no liability in the premises can be thereby cast on the Government. It is quite immaterial in such a case what writings may have passed between the depositor and the bailee, what engagements the latter may have entered into with the former." Accordingly, *held*, that the official bond of an officer of the Navy is not liable for private funds paid him by his predecessor. (6 Op. Atty. Gen., 357, 366.)



For other decisions as to what constitutes public money, see note to section 236, Revised Statutes, under "II. Jurisdiction of Accounting Officers."

**Where new bond is given.**—Where, under the act of March 2, 1895 (28 Stat., 807), which provides that "every officer whose duty it is to take and approve official bonds shall cause all such bonds to be renewed every four years after their dates," an officer renews his bond by giving a bond during the same term of office, the new bond does not operate to release the sureties on the first bond from liability for future transactions, but the sureties on the old and new bonds are jointly and severally liable therefor. (5 Comp. Dec., 918.)

Where the law relating to the bonds of persons in the Navy required that every person then in service, etc., shall, instead of the bond required by a former act, enter into a new bond with sureties conditioned for the faithful performance of his duties, etc., the sureties on the old bond are discharged from all responsibility for moneys received by any person after he has given the new bond, the latter being, by the act, a substitute for the former. (U. S. v. Wardwell, 28 Fed. Cas. No. 16640, per Story, circuit justice.)

An act of Congress which requires new sureties to be given by certain public officers on or before a specified date does not expressly or by implication discharge the former sureties from their liability. (U. S. v. Nicholl, 12 Wheat., 505; see below, "Failure to give new bond," under "X. Miscellaneous.")

Whether the new bond is retroactive or not, a full account of the money on hand should be made in order to avoid any dispute between the sureties as to which bond is liable in the event of default. Furthermore, the new bond is merely cumulative, the former bond remaining in force throughout the term of his office. This being so, it would seem advisable to adhere to the present practice of requiring such account. (29 Op. Atty. Gen., 28.)

The rules as to the settlement of their accounts by disbursing officers on rebonding should be adhered to, when possible, and only departed from when it is shown that great hardship would result from a strict compliance with them; in other words, in cases where the law could excuse a noncompliance. (Comp. Dec., Apr. 21, 1903, 23 S. and A. Memo., 183.)

The regulation requiring that when a new bond is given the officer should close his accounts under the former bond and deposit any unexpended balance before an advance is made under the new bond, in order that the liability of the sureties on the respective bonds may be definitely fixed, contains requirements demanded by proper care for the interests of the Government. It is not doubted that the regulation may be waived, even retroactively, but the effect of waiver and the departure from the usual practice upon the liability of the sureties is a more difficult question. Of course the surety is bound by the terms of his contract, but it is a maxim of law that the liability of sureties is strictissimi juris, and that liability sometimes depends upon fine distinctions made by the courts and upon questions which in the

abstract seem without significance, but when applied in certain cases turn out to be matters of great importance. It therefore seems best in all cases in dealing with official bonds to follow closely the beaten tracks, and strictly to adhere to the law and regulations made in pursuance thereto. (Comp. Dec., Apr. 21, 1903, 23 S. and A. Memo., 183.)

"Where an action was brought by the United States upon the official bond of a receiver of public money, a plea that the United States had accepted another bond from the receiver was bad. The new bond could be no satisfaction for the damages that had accrued for the breach of the condition of the old one." (U. S. v. Girault, 11 How., 22.)

When an officer is continued in office for more than one term, but gives different sureties the liability of the sureties is to be estimated just as if a new person had been appointed to fill the second term. (U. S. v. Eckford, 1 How., 250; but see sec. 1385, R. S.)

"The retrospective obligation of the bond is as much limited by the term of the new appointment as the prospective. And in this view it would be as logical and just to hold that the sureties are liable for defalcations after the expiration of the term as for those which occurred before its commencement. There is no such condition in the instrument. It recites the new appointment and by consequence limits the obligation to the term of office fixed by law." (U. S. v. Eckford, 1 How., 250, 260.)

"Where there were two consecutive commissions and two sets of sureties, the latter set were responsible for all money which remained in the hands of the principal at the expiration of the first commission. If it was misapplied during the first term of office, it was incumbent upon the second set of sureties to show that it was so." (Bruce v. U. S., 17 How., 437.)

The second commission, issued under the appointment with the advice and consent of the Senate, operates as a revocation of the first commission issued under the appointment by the President, which was to continue until the end of the next session of the Senate and no longer; and the liability of the sureties in the bond did not extend beyond the duration of the first commission. (U. S. v. Kirkpatrick, 9 Wheat., 720.)

The bond given by a naval officer under his first commission, which was issued upon a temporary appointment made during a recess of the Senate, ceased to have effect after the acceptance of a new commission under an appointment made with the consent of the Senate. (2 Op. Atty. Gen., 333.)

A former disbursing officer in the Navy reappointed to that office should give a new bond; but not definitely decided that the original sureties of the officer are wholly discharged of responsibility after the reappointment: "This point should be saved on behalf of the United States." (1 Op. Atty. Gen., 175.)

The issuing of a new appointment and commission to any officer of the Supply Corps of the Navy shall not affect or annul any existing bond, but the same shall remain in force and apply to such new appointment and commis-

sion. (Sec. sec. 1385, R. S.; and see above, "Binds officer as long as he remains in office," under "VII. Condition of Bond.")

**Where disbursing officer is allowed to remain in office after defalcation.**—On a suit by the Government against the sureties of a public officer on his official bond, it is no defense that the Government, through the accounting officers of the Treasury, had full notice of the defalcation and embezzlement of funds of the United States, and yet neglectfully permitted the said officer to remain in office. (*Jones v. U. S.*, 18 Wall., 662. In this case it was contended that the knowledge of the Government that the officer had embezzled its funds should have caused his immediate dismissal; thus terminating the liability of his sureties and limiting it to the amount then due, and that, when the Government chooses to continue in office an officer known to have committed such an act, it takes upon itself the trust of his future honesty.)

Where a statute expressly directs a defaulting officer to be recalled at the expiration of six months from the time of his fault, his sureties are not discharged but remain liable for his defaults thereafter until he is actually recalled. (*U. S. v. Nicholl*, 12 Wheat., 505, 509, citing *U. S. v. Vanzandt*, 11 Wheat., 184.)

An omission of the proper officer to recall a delinquent paymaster under the injunction of a statute requiring such recall does not discharge his surety. The provisions of the statute are merely directory and intended for the security of the Government but form no part of the contract with the surety. The statute does not ipso facto remove the delinquent paymaster from office but only make it the duty of the proper officer to remove him. The officer whose duty it may be to recall him acts upon his own responsibility to the Government by declining to do so; but until he acts otherwise the paymaster is authorized, notwithstanding his delinquency, to receive and to disburse the funds which may be placed in his hands. The circumstance of new funds being placed in his hands after his delinquency does not discharge the surety. (*U. S. v. Vanzandt*, 11 Wheat., 184.)

An officer of the Supply Corps of the Navy, under arrest awaiting action upon charges of embezzlement, may be released temporarily and put on duty by the commanding officer of a ship, or other competent authority, should an emergency of the service or other sufficient cause make such measure necessary. (See art. R-1410, Navy Regs., 1913; file 26251-8072:4, Oct. 17, 1913; see also file 26251-8072:6, Oct. 28, 1913; 26251-8344, Dec. 24, 1913.)

**Certificate given in ignorance of fraud does not discharge sureties.**—A certificate given to a disbursing officer, before the discovery of his fraud, that his accounts had been examined, found correct, and were closed, did not operate to release him or his sureties from liability on the bond. (*Moses v. U. S.*, 166 U. S., 571.)

Such certificates were undoubtedly prima facie evidence of the facts they certified to, and in the absence of any evidence of mistake or fraud attacking the integrity of the items, or any of them appearing on the books and upon which the certificates were based, they would

be conclusive in favor of the officer in any action against him. \* \* \* They would not, however, be conclusive as against evidence of forgery of any vouchers upon which the accounts had been founded and the settlement arrived at; this is too plain for argument. (*Moses v. U. S.*, 166 U. S., 571, 594.)

**Laches of Government officers not a discharge.**—The failure of the receiver to account and pay quarterly, as prescribed by the rules of the Treasury Department, was no legal defalcation of which the securities can avail themselves. Laches are not imputable to the Government. The regulations requiring settlements to be made by its officers at short periods are designed for the protection of the Government, and merely directory to the officers and form no part of the contract. (*U. S. v. Boyd*, 15 Pet., 187, 208.)

Where the act of Congress does not in terms discharge the obligors from the direct claim of the United States on them, on the failure of the proper officer to commence a suit against the defaulter within the time it prescribes, their liability continues; they remain debtors of the United States; the responsibility of the proper officer under the statute is superadded to, not substituted for, that of the obligors. The claim of the United States upon an official bond, and upon all parties thereto, is not released by the laches of the officer to whom the assertion of the claim is entrusted by law; such laches have no effect whatsoever on the right of the United States, as well against the sureties as the principal in the bond. (*Dox v. Postmaster General*, 1 Pet., 318; see also *Postmaster General v. Early*, 12 Wheat., 136.)

"Sound policy requires, that the accounts of disbursing officers should be adjusted at the proper department, with as much dispatch as is practicable; this is alike due to the public and to the persons who are held responsible as sureties; to the individual who has received advances of money, no lapse of time nor change of circumstances can weaken the claim of Government for reimbursement; but there may be some cases of hardship where, after a great lapse of time, and the insolvency of the principal, the amount of the defalcation is sought to be recovered from the sureties. The law on this subject is founded upon consideration of public policy; while various acts of limitation apply to the concerns of individuals, none of them operate against the Government; on this point, there is no difference of opinion among the Federal or State courts." (*Smith v. U. S.*, 5 Pet., 292.)

"The fiscal operations of the Government are extensive and often complicated; it is extremely difficult, at all times, and sometimes, impracticable, to settle the accounts of public officers with as little delay as attends the private accounts of a mercantile establishment; but it is always in the power of an individual who may be held responsible for the faithful conduct of a public agent, to see that his accounts are settled, and the payment of any balance enforced. A notice to the Government, by the surety, that he is unwilling to continue his responsibility, would induce it, in most instances, to take the necessary steps for his release." (*Smith v. U. S.*, 5 Pet. 292.)



In general, laches is not imputable to the Government; and where the laws require quarterly or other periodical accounts and settlements, a mere omission to bring a suit, upon the neglect of the officer or agent to account, will not discharge his sureties. (*U. S. v. Kirkpatrick*, 9 Wheat., 720.)

**Failure to institute suit operates as discharge.**—Section 2 of the act of August 8, 1888 (25 Stat., 387), is absolute as regards the discharge of sureties if suit on the bond be not instituted "within five years after such statement of said account" by the accounting officer of the Treasury. It makes no exception in case the accounting officer does not make such statement as early as he should, or when a deficiency is discovered by him. (22 Op. Atty. Gen., 612.)

It was not intended by the act of August 8, 1888, section 1 (25 Stat., 387), that the accounting officer should delay notice until it has become certain that there is a deficiency; nor, on the other hand, should he always report a deficiency whenever, from the account of a disbursing officer, it may appear *prima facie* that there is one. This may be from insufficient vouchers or evidence, or from clerical error or omission, or in one or more of various ways not inconsistent with a proper disbursement of the moneys in his hands. Whenever, in the exercise of a sound judgment and after a reasonable time allowed for explanation and correction, it appears to the accounting officer that there is a probable deficiency, he should notify the head of the department as provided in section 1 of the act. (22 Op. Atty. Gen., 613.)

The five-year limitation fixed by section 2 of the act of August 8, 1888 (25 Stat., 387), within which suits may be brought upon the official bonds of disbursing officers, begins to run from the time the accounting officers of the Treasury make the statement of the account showing an indebtedness to the United States. (22 Op. Atty. Gen., 611.)

**Giving time to principal might discharge sureties.**—In general, laches is not imputable to the Government, but *quaere*, Whether in case there is an express agreement between the Government and the principal, giving time to the latter and suspending the right of the former to sue, the sureties are not discharged, as in a similar case between private individuals? (*U. S. v. Nicholl*, 12 Wheat., 505.)

"A mere proposition to give time, and suspend the right to sue, upon certain conditions and contingencies, which are not proved to have been complied with, or to have happened, will not discharge the sureties." (*U. S. v. Nicholl*, 12 Wheat., 505.)

The President has no authority to release the sureties on a bond given to the United States by a public officer for the faithful discharge of the duties of his office. (7 Op. Atty. Gen., 62.)

#### X. MISCELLANEOUS.

**Bond should not be surrendered to officer.**—It is a sound regulation, conformable to law, for the head of a department not to give up to officers their original bonds on the execution of new ones. (4 Op. Atty. Gen., 312.)

There is no act authorizing a withdrawal of official bonds, except for the purposes of suit. (4 Op. Atty. Gen., 312.)

Accounts in the Treasury are never closed. In neither the legal nor mercantile sense of the term is an account between the Government and one of its officers ever "finally adjusted," nor is his official bond ever canceled or surrendered. (*Smith v. U. S.*, 14 Ct. Cls., 114, 118; see *U. S. v. Smith*, 105 U. S., 620.)

**Amount of bond.**—A paymaster of the Navy who, on promotion from passed assistant paymaster, filed an additional bond with the same sureties in a penal sum equal to the difference between the amount of his bond as passed assistant paymaster and that required of him as paymaster, sufficiently complied with the provisions of the statutes fixing the amount of bond which shall be required of a paymaster. (10 Comp. Dec., 44. See sec. 1385, R. S., and see above, "Binds officer as long as he remains in office," under "VII. Condition of Bond.")

**Expense of furnishing bond.**—If the bond given by an officer is required by law, the expense is not chargeable to the United States, since it is the duty of persons receiving appointments from the Government to prepare and tender to the proper officer the oaths and bonds required by law; in other words, to qualify themselves for the office. (*U. S. v. Van Duzee*, 140 U. S., 171; see also 13 Comp. Dec., 386, and 2 Comp. Dec., 262.)

If the bond is not required by law, but is a voluntary bond, there is no authority for charging the expense of furnishing it to the United States, in the absence of an appropriation for such expenses. (12 Comp. Dec., 678.)

The expense incurred by an officer in furnishing the bond required by law of all disbursing officers of the Government is not a proper charge against the Government, even though the officer serves without compensation. (2 Comp. Dec., 262.)

An officer is not entitled to reimbursement for premium paid by him to a guaranty company as surety on his original and renewal bonds. (13 Comp. Dec., 375, affirming 12 Comp. Dec., 678.)

The incidental expenses incurred by a special examiner of the Pension Office in investigating the sufficiency of the sureties on a pension agent's bond, by direction of the Interior Department, are a proper charge against the appropriation for investigation of pension cases. (2 Comp. Dec., 444; but see act Aug. 5, 1909, 36 Stat., 125; and see above, "Certificate of sufficiency," under "IV. Form of Bond.")

When the Secretary of the Navy, in order to ascertain the sufficiency of the sureties on the bond of a pay officer, as is required of him by section 5 of the act of March 2, 1895 (28 Stat., 807), orders certain evidence to be procured by the officer himself, the latter is entitled to be reimbursed for the expenses incurred in executing the order. (3 Comp. Dec., 135; but see act Aug. 5, 1909, 36 Stat., 125.)

**Rate of premium.**—The provision of the act of August 5, 1909 (36 Stat., 125), regulating the charge which may be made by surety or bonding companies for becoming surety on the official bonds of officers or employees of the United States, contemplates that the charge shall not be more than 35 per cent above the

rate paid during 1908 on any bond belonging to the same general class, provided that charge did not constitute an isolated instance of an unusual or extortionate premium. (27 Op. Atty. Gen., 597.)

In determining what the charge was during 1908 for other bonds of like character, departments may exclude any premium which was so high as to be outside the range of the usual or customary charge, and include any charge even though it be the highest paid, if it be not so high as to fall within the inhibition above stated. (27 Op. Atty. Gen., 597.)

The rate of premium paid by the incumbent of any particular office during 1908 on an official bond may be used as the base for computing the rate which shall be paid upon the bond of the incumbent of the same office under the act of August 5, 1909, provided such rate did not constitute an isolated instance of an unusual or extortionate premium. (28 Op. Atty. Gen., 28.)

**Sec. 1384. [Supply Corps; new bonds required.]** Officers of the Pay Corps shall give new bonds with sufficient sureties, whenever required to do so by the Secretary of the Navy.—(26 Aug., 1842, c. 206, s. 4, v. 5, p. 535.)

Amendment to this section was made by act of July 11, 1919 (41 Stat., 147), which changed the designation of the Pay Corps to "Supply Corps."

See note to section 1383, Revised Statutes, under "V. Sufficiency of Sureties," "IX. Liability of Sureties," and "X. Miscellaneous;" see also act of March 2, 1895, section 5 (28 Stat., 807).

**Sec. 1385. [Supply Corps; bonds not affected by new commissions.]** The issuing of a new appointment and commission to any officer of the Pay Corps shall not affect or annul any existing bond, but the same shall remain in force, and apply to such new appointment and commission.—(3 Mar., 1871, c. 117, s. 6, v. 16, p. 536.)

Amendment to this section was made by act of July 11, 1919 (41 Stat., 147), which changed the designation of the Pay Corps to "Supply Corps."

See note to section 1383, Revised Statutes, under "VII. Condition of Bond—binds

officer as long as he remains in office;" and "IX. Liability of Sureties—where new bond is given." See also 10 Comp. Dec., 44, noted under section 1383, Revised Statutes, "X. Miscellaneous."

**Sec. 1386. [Supply Corps; when clerks allowed officers. Repealed.]**

**This section provided as follows:**

"Sec. 1386. Paymasters of the fleet, paymasters on vessels having complements of more than one hundred and seventy-five persons, on supply-steamers, store-vessels, and receiving-ships, paymasters at stations and at the Naval Academy, and paymasters detailed at stations as inspectors of provisions and clothing, shall each be allowed a clerk."—(14 July, 1862, c. 164, s. 3, v. 12, p. 565; 26 May, 1864, c. 96, v. 13, p. 92.)

It was repealed by act of March 3, 1915 (38 Stat., 942, 943), which made provision for the appointment of acting pay clerks, pay clerks, and chief pay clerks to the total number of one for each 250 enlisted men allowed by law in the Navy, and provided that said clerks "shall be assigned to duty with pay officers under such rules as the Secretary of the Navy may prescribe." For number of enlisted men allowed by law, see note to section 1417, Revised Statutes. See also act of May 22, 1917 (40 Stat., 84), as amended by act of July 1, 1918 (40 Stat., 715),

providing for temporary appointment of additional officers for service during the existing war.

It had previously been amended by clauses in the annual naval appropriation act, under the heading, "Pay of the Navy," increasing the number of positions for which such clerks were allowed, the latest amendment having been contained in the act of August 22, 1912 (37 Stat., 328), which made appropriation for "clerks to paymasters at yards and stations, general storekeepers ashore and afloat, and receiving ships and other vessels; two clerks to general inspectors of the Pay Corps; one clerk to pay officer in charge of deserters' rolls; not exceeding ten clerks to accounting officers at yards and stations."

**Pay, allowances, and retirement.**—By act of May 13, 1908 (35 Stat., 128), it was provided that "all paymasters' clerks shall, while on duty, receive the same pay and allowances as warrant officers of like length of service in the Navy;" this provision was superseded by the following



clause in the act of June 24, 1910 (36 Stat., 606): "All paymasters' clerks shall, while holding appointment in accordance with law, receive the same pay and allowances and have the same rights of retirement as warrant officers of like length of service in the Navy." The latter provision was, in turn, superseded by the act of March 3, 1915, above cited, which provided that "pay clerks and acting pay clerks shall have the same pay, allowances, and other benefits as are now or may hereafter be allowed other warrant officers and acting warrant officers, respectively;" and that "all pay clerks shall, after six years' service as such, be commissioned chief pay clerks and shall on promotion have the rank, pay, and allowances of chief boat-swain."

The status of clerks to officers of the Pay Corps prior to the act of March 3, 1915, above cited, was the subject of numerous decisions. They were held not officers of the Navy in the case of *United States v. Mouat* (124 U. S., 303); were held to be officers in a qualified sense in the case of *United States v. Hendee* (124 U. S., 309); and were held to be officers in the constitutional as well as the popular sense, by the Attorney General, in view of certain changes

which had been made in the Navy Regulations (27 Op. Atty. Gen., 157); but a contrary opinion was expressed by the Court of Claims in the case of *Ashton v. United States* (51 Ct. Cls., 65), which modified a previous decision by that court in the case of *Katzer v. United States* (49 Ct. Cls., 294).

They were at all times held amenable to trial by court-martial as officers of the Navy (see *Ex parte Reed*, 100 U. S. 13; *Johnson v. Sayre*, 158 U. S., 109; *U. S. v. Bogart*, 24 Fed. Cas. No. 14616; *In re Reed*, 20 Fed. Cas. No. 11636; *In re Bogart*, 3 Fed. Cas. No. 1596; but see, *Ex parte Van Vranken*, 47 Fed. Rep., 888, reversed 163 U. S., 694).

Their status as officers of the United States is now definitely established by the act of March 3, 1915, above cited, which vests the appointment of acting pay clerks in the Secretary of the Navy, the appointment of pay clerks in the President, the same as other warrant officers, and the appointment of chief pay clerks in the President, by and with the advice and consent of the Senate, the same as other commissioned officers of the Navy. (See note to Constitution, Art. II, sec. 2, clause 2, as to who are officers of the United States.)

#### Sec. 1387. [Supply Corps; when clerks not allowed officers. Repealed.]

This section provided as follows:

"Sec. 1387. No paymaster shall be allowed a clerk in a vessel having the complement of one hundred and seventy-five persons or less, excepting in supply-steamers and store-vessels."—(26 May, 1864, c. 96, v. 13, p. 92.)

It was repealed by act of March 3, 1915 (38 Stat., 942, 943).

See note to section 1386, Revised Statutes.

#### Sec. 1388. [Supply Corps; clerks to passed assistant and assistant paymasters. Repealed.]

This section provided as follows:

"Sec. 1388. Passed assistant paymasters and assistant paymasters attached to vessels of war shall be allowed clerks, if clerks would be allowed by law to paymasters so attached."—(3 Mar. 1863, c. 118, s. 5, v. 12, p. 818.)

It was repealed by act of March 3, 1915 (38 Stat., 942, 943).

See note to section 1386, Revised Statutes.

**Sec. 1389. [Supply Corps; loans to officers prohibited.]** It shall not be lawful for any paymaster, passed assistant paymaster, or assistant paymaster, to advance or loan, under any pretense whatever, to any officer in the naval service, any sum of money, public or private, or any credit, or any article or commodity whatever.—(26 Aug., 1842, c. 206, s. 6, v. 5, p. 536. 22 June, 1860, c. 181, s. 3, v. 12, p. 83.)

Advances of pay to naval officers in certain cases are authorized by sections 1563 and 3648, Revised Statutes, as modified by act of March 4, 1917 (39 Stat., 1181), and are prohibited in other cases by the latter section.

Loans of public money or unauthorized withdrawals thereof by any disbursing officer are punishable as embezzlement by section 87 of the Criminal Code, act of March 4, 1909 (35 Stat., 1105). See section 1624, Revised Statutes, article 14.

Mileage books and transportation tickets may be furnished officers and others by the

Secretary of the Navy in advance of travel, and may be paid for prior to actual performance of the travel involved. (Act Apr. 27, 1904, sec. 1, 33 Stat., 403.)

No money shall be paid to any person as compensation who is in arrears to the United States. (Sec. 1766, R. S. See note to sec. 236, R. S., under "VI. Set-off.")

The words, "paymaster, passed assistant paymaster, or assistant paymaster," as used in the above section, have been construed to include "any officer of the Supply Corps." (See Art. 1745, Navy Regs., 1920.)

An order of the commanding officer, pursuant to section 285, Revised Statutes, does not authorize an advance of public money by

an officer of the Supply Corps to the commanding officer or to any other person by his order. (Art. 1749 (2), Navy Regs., 1920.)

### Sec. 1390. [Engineer Corps; organization of. Superseded.]

This section provided as follows:

"Sec. 1390. The active list of the Engineer Corps of the Navy shall consist of seventy chief engineers, who shall be divided into three grades, by relative rank, as provided in Chapter Four of this Title;

"Ten chief engineers;

"Fifteen chief engineers; and

"Forty-five chief engineers, who shall have the relative rank of lieutenant commander or lieutenant.

"And each and all of the above-named officers of the Engineer Corps shall have the pay of chief engineers of the Navy, as now provided.

"One hundred first assistant engineers, who shall have the relative rank of lieutenant or master; and

"One hundred second assistant engineers, who shall have the relative rank of master or ensign; and the said assistant engineers shall have the pay of first and second assistant engineers of the Navy respectively, as now provided."—(3 Mar., 1871, c. 117, s. 7, v. 16, p. 536; 24 Feb., 1874, c. 35, v. 18, p. 17.)

It was amended by act of February 24, 1874, section 1 (18 Stat., 17), which changed the title of first assistant engineer to passed assistant engineer, and changed the title of second assistant engineer to assistant engineer.

It was superseded by act of August 5, 1882, section 1 (22 Stat., 286), which provided that the active list of the Engineer Corps should thereafter consist of 10 chief engineers with the relative rank of captain, 15 chief engineers with the relative rank of commander, 45 chief engineers with the relative rank of lieutenant commander or lieutenant, 60 passed assistant engineers, and 40 assistant engineers with the relative rank for each as previously fixed by law.

By the same act it was provided that when vacancies occurred in any of the grades of the Engineer Corps, "no promotion shall be made to fill the same until the number in said grade shall be reduced below the number which is fixed by the provisions of this act for such grade."

Further changes were made by act of March 3, 1883 (22 Stat., 472), which provided that thereafter "only one-half of the vacancies in the various grades in the Staff Corps of the Navy shall be filled by promotion until such grades shall be reduced to the numbers fixed for the several grades of the Staff Corps of the Navy" by act of August 5, 1882, above noted; by act of March 2, 1889 (25 Stat., 878), which authorized the appointment of five assistant engineers from among former graduates of the Naval Academy, and "enlarged" the Engineer Corps for the purpose of such additional appointments; and by act of December 16, 1892 (27 Stat., 405), which provided that the reduction in the numbers of the Engineer Corps provided for in act of August 5, 1882, "shall be considered as having ceased on the thirtieth day of June, eighteen hundred and ninety-one."

The Engineer Corps was abolished by the Navy personnel act of March 3, 1899 (30 Stat., 1004), section 1 of which act provided "that the officers constituting the Engineer Corps of the Navy be, and are hereby, transferred to the line of the Navy, and shall be commissioned accordingly."

As the officers who constituted the Engineer Corps were transferred to the line of the Navy, it follows that the corps was abolished. But it will be observed that, while such officers were transferred to the line, the duties of engineers are not abolished. There will continue to be engineers and chief engineers, though under another name. (*Denig v. U. S.*, 37 Ct. Cls., 383, 392. See also note to sec. 1393, R. S.)

The appointment and assignment of line officers for engineering duty only are authorized by acts of February 16, 1914, section 21 (38 Stat., 283), and August 29, 1916 (39 Stat., 580).

The detail of an officer from the Engineer Corps as professor in any established scientific school or college was authorized to be made by the President upon application of such school or college, for the purpose of promoting a knowledge of steam engineering and iron ship-building, such details not at any time to exceed 25. (Act Feb. 26, 1879, 20 Stat., 322; see also act Jan. 13, 1891, 26 Stat., 716, and note to sec. 1225, R. S.)

Former engineer officers who under the act of March 3, 1899 (30 Stat., 1004), perform engineering duty on shore only "shall be eligible for any shore duty compatible with their rank and grade to which the Secretary of the Navy may assign them." (Act June 30, 1914, 38 Stat., 394; act Mar. 3, 1915, 38 Stat., 930; see note to sec. 1404, R. S.)

The effect of the act of March 3, 1915 (38 Stat., 930), so far as concerns former engineer officers now of the line is to remove the restriction which existed in the case of certain of said officers by which they were eligible only for engineering duty on shore. Such officers are now eligible for any shore duty assignable to other line officers of their rank. (File 26806-140, June 9, 1916.)

Line officers assigned to engineering duty only shall retain "the right to succession to command on shore in accordance with their seniority." (Act Aug. 29, 1916, 39 Stat., 580.)

The detail of an officer from the Engineer Corps of the Army or Navy as superintendent of the State, War, and Navy Department building was authorized by act of March 3, 1883 (22 Stat., 553.)

The transfer of the Engineer Corps of the Navy to the line by the Navy personnel act of March 3, 1899 (30 Stat., 1004), does not preclude the appointment of a naval officer on the active list, formerly an officer of that corps, and now restricted to the performance of engineering duty, to the superintendency of the State, War, and Navy building, as provided in the act of



March 3, 1883 (22 Stat., 553). (25 Op. Atty. Gen., 508.)

The act of March 3, 1883, does not authorize the detail as superintendent of the State, War, and Navy building of a retired officer of the Navy transferred from the Engineer Corps to the line for engineering duty only by the Navy personnel act of March 3, 1899. (25 Op. Atty. Gen., 508; see also note to sec. 1462, R. S.)

The detail of officers in the Engineer Corps in the Army or Navy to perform services under the act of March 12, 1914 (38 Stat., 305), providing for the location, construction, and operation of railroads in the Territory of Alaska, was authorized by section 1 of that act.

**"Grades" and "ranks" in Engineer Corps.**—Under this section it was held that chief engineers constituted only one grade in the Navy, although divided into four different ranks; that their rank changed with their

seniority in that grade, but such change of rank did not constitute a change in office or grade; accordingly, that their changes in rank might be indicated by notification from the Secretary of the Navy, and that no examination or appointment or confirmation by the Senate was necessary; that the mere fact that different rank is assigned to officers whose office is designated by the same title does not necessarily put such officers in different grades; the office remains the same. (20 Op. Atty. Gen., 358, citing *Wood v. U. S.*, 107 U. S., 414, as to difference between rank and office; and explaining 16 Op. Atty. Gen., 417; see also *Rutherford v. U. S.*, 18 Ct. Cls., 339; and see note to Constitution, Art. II, sec. 3, under "Advancement in rank only." As to difference between "rank" and "grade," see generally, notes to secs. 1362 and 1457, R. S.)

### Sec. 1391. [Engineer Corps; appointments in, how made. Superseded.]

This section provided as follows:

"Sec. 1391. Engineers shall be appointed by the President, by and with the advice and consent of the Senate."—(31 Aug., 1842, c. 279, s. 6, v. 5, p. 577. 3 Mar., 1845, c. 77, s. 7, v. 5, p. 794. 25 July, 1866, c. 231, s. 7, v. 14, p. 223.)

It was superseded by the Navy personnel act of March 3, 1899 (30 Stat., 1004), by which the Engineer Corps was abolished. (See note to preceding section.)

### Sec. 1392. [Engineer Corps; qualifications for appointment and promotion. Superseded.]

This section provided as follows:

"Sec. 1392. No person under nineteen or over twenty-six years of age shall be appointed a second assistant engineer in the Navy; nor shall any person be appointed or promoted in the Engineer Corps until after he has been found qualified by a board of competent engineers and medical officers designated by the Secretary of the Navy, and has complied with existing regulations."—(3 Mar., 1871, c. 117, s. 8, v. 16, p. 536; 24 Feb., 1874, c. 35, v. 18, p. 17.)

It was superseded by act of August 5, 1882 (22 Stat., 285), as amended by acts of March 2, 1889 (25 Stat., 878), and July 26, 1894 (28 Stat., 124), noted more fully under sections 1394 and 1521, Revised Statutes, which made provision for the filling of all vacancies in the Engineer Corps by appointment from graduates of the Naval Academy. See also note to section 1390, Revised Statutes, concerning the abolishment of the Engineer Corps, and see *U. S. v. Redgrave*, 116 U. S., 474, in which this section was cited.

### Sec. 1393. [Engineer of the fleet.] The President may designate among the chief engineers in the service, and appoint to every fleet or squadron, an engineer, who shall be denominated "engineer of the fleet."—(21 Apr., 1864, c. 63, s. 7, v. 13, p. 54.)

Pay of fleet engineers was fixed at \$4,400 per annum, by section 1556, Revised Statutes. See note to that section.

See section 1373, Revised Statutes, as to appointment of fleet surgeons; and section 1382, Revised Statutes, as to appointment of fleet paymasters.

Section 1393 is not repealed by the Navy personnel act of March 3, 1899 (30 Stat., 1004), abolishing the Engineer Corps of the Navy. The office of "engineer of the fleet" continues, notwithstanding the provision in the later statute that "the officers constituting the Engineer Corps of the Navy are transferred to the line of the Navy and shall be commissioned accordingly." The duties of chief engineer in the Navy continue, though the officers have become merged in the line and are designated by another name. (*Denig v. U. S.*, 37 Ct. Cls., 383.)

**What officers eligible for appointment as fleet engineer.**—It was held by the Comptroller of the Treasury (7 Comp. Dec., 24) that as the Navy personnel act of March 3, 1899 (30 Stat., 1004), practically abolished the Engineer Corps of the Navy, and with it the grade of chief engineer, by transferring that corps to the line, the provision of section 1556 of the Revised Statutes for a special rate of pay for engineers of the fleet became inoperative, since there existed thereafter no grade from which the President might designate engineers of the fleet in pursuance of section 1393. The Court of Claims, however, in the case of *Denig v. U. S.*, above cited, laid down a different rule and held that, where an officer of the Navy who on March 3, 1899, belonged to the grade of chief engineer, has since that date been duly designated to perform the duties of engineer of the fleet, he is

entitled to the pay provided for that position by section 1556 of the Revised Statutes, notwithstanding the provision of the Navy personnel act transferring the Corps of Engineers to the line of the Navy. The comptroller subsequently followed the decision of the Court of Claims in the Denig case, and laid down the rule as follows (8 Comp. Dec., 842): "An officer of the Navy who, on March 3, 1899, belonged to the grade of chief engineers and who was duly designated as engineer of the fleet, is entitled to pay at the rate of \$4,400 per annum while performing such duty." Both the Denig case and the above decision were limited by the fact that the officer was a chief engineer on March 3, 1899, the date the Navy personnel act was approved. (9 Comp. Dec., 301.)

It must be conceded, as stated by the Court of Claims, that the duties of chief engineers were not abolished by the Navy personnel act; that it was therefore in the power of the President to designate some officer to perform those duties; and that whether he designated such officer to perform them as chief engineer or by some other title is immaterial in so far as the performance of the duties is concerned. The Court of Claims has decided that the change effected by the Navy personnel act was merely a change of name or of official title; accepting this decision as a judicial interpretation of the law, the distinction is immaterial between the case of a person who was a chief engineer at the time the law was changed and who continued to perform the duties of chief engineer, and the case of a person who was a passed assistant engineer at the time and who continued to perform the duties of passed assistant engineer until promoted to lieutenant commander and assigned to the duties of chief engineer. If the former is held to be a chief engineer under a different official title, the latter may also be. The Navy Regulations proceed upon the theory that the limitation of appointments of engineers of the fleet to the grade of chief engineer no longer applies, and that the statute is satisfied if such appointments are made from among lieutenant commanders, irrespective of whether the appointees were formerly chief engineers or not. Accordingly, *held* that an officer of the Navy who, on March 3, 1899, belonged to the grade of passed assistant engineer with the relative rank of lieutenant, and who was subsequently promoted to the grade of lieutenant-commander and thereafter designated an engineer of the fleet, is entitled to pay at the rate of \$4,400 per annum while performing such duty, under authority of section 1556, Revised Statutes. (9 Comp. Dec., 301.)

**Retired officer eligible for appointment as fleet engineer.**—A retired officer of the Navy is "in the service" within the meaning of section 1393, and therefore eligible for assignment to said duties. A lieutenant-commander in the Navy who was retired with the rank of commander and afterwards assigned to sea duty under the act of June 7, 1900 (31 Stat., 703), as fleet engineer, was entitled while serving under that assignment to the pay of a fleet engineer, which is \$4,400 per annum. (12 Comp. Dec., 185; compare 25 Op. Atty. Gen., 508, noted

under sec. 1390, R. S.; see also note to sec. 1462, R. S.)

**Appointment does not require advice and consent of the Senate.**—Section 1393, Revised Statutes, authorizes the President to appoint an engineer of the fleet; the consent of the Senate not having been required by Congress, such consent is unnecessary, and the President may make such appointment without submitting the same to the Senate for confirmation. (22 Op. Atty. Gen., 82.)

It is universally true that when Congress, in pursuance of its authority under the provision of the Constitution (Art. II, sec. 2, clause 2), sees fit to give the sole power of appointment to the President, it does so by language appropriate to that end, such as the unqualified phrase "may appoint." Under such language the President is vested with power of appointing alone. (23 Op. Atty. Gen., 136.)

For other cases, see note to Constitution, Art. II, sec. 2, clause 2, under, "II. Constitutional power of appointment."

**Section 1393 is rather permissive of a power that existed in the President to designate fleet engineers** when in his judgment they become necessary, though said section carries with it the right to the additional compensation provided for by section 1556. The necessity for the appointment of a fleet engineer must be left to the discretion of the President, and when he acts the presumption is that he has performed his duty according to law. (*Denig v. U. S.*, 37 Ct. Cls., 383, 393.)

**Secretary of the Navy acts for the President.**—The provision of the statute is satisfied when the Secretary of the Navy, acting, as he does in such matters, for the President, approves the designation of officers selected by a commander in chief to act as his general staff. (*Denig v. U. S.*, 37 Ct. Cls., 383, 391. See also note to sec. 1382, R. S.)

Under sections 1373, 1382, and 1393, Revised Statutes, which authorize the designation and appointment by the President of certain officers of the fleet, officers designated and appointed by an order of the commander in chief of a naval force, approved by the Secretary of the Navy, are entitled to the pay provided for those positions, respectively, from the date of such approval. (5 Comp. Dec., 888.)

**Chief of Bureau of Navigation does not act for the President.**—An officer ordered by the Chief of the Bureau of Navigation to duty as fleet engineer is not entitled to the pay provided by section 1556, Revised Statutes, for fleet engineers. To entitle an officer to the pay of fleet engineer, such designation must be made by the Secretary of the Navy acting for the President. There is no authority for the Chief of the Bureau of Navigation to act for the President in making such designation. (Comp. Dec., Feb. 14, 1912, 132 S. and A. Memo., 1994. See also *Truitt v. U. S.*, 38 Ct. Cls., 398, and *Weller v. U. S.*, 41 Ct. Cls., 324, 336, noted under sec. 158, R. S.)

**Commander in chief acts for President when authorized by Navy Regulations.**—The statute requires the appointment to be made by the President. However, the Navy Regulations of 1900 (par. 2 of art. 367), provide



that "when not designated by the department, the senior engineer, medical, pay, and marine officers of the fleet or squadron may be detailed by the commander in chief to act as fleet staff officers." The Navy Regulations are issued by the authority of the President. The above provision must therefore be construed as authority from him to the commander in chief of a naval force, under certain conditions, to designate certain officers to act as fleet officers, and the action of the commander in chief in pursuance of the regulation becomes the action of the President. Where the designation of an engineer of the fleet was made in accordance with the above regulation, he is entitled to the pay of fleet engineer from the date of his designation as such; if not, the beginning of such pay dates from the time when his designation was approved by the department. (9 Comp. Dec., 301, citing 5 Comp. Dec., 889.) [Art. 367 (2) Navy Regs., 1900, was embodied in Navy Regulations, 1913, as art. R-1826 (2), except that the latter article did not authorize the commander in chief to designate the senior engineer as a fleet staff officer, the engineer of the fleet under said Regulations not being a member of the fleet staff, but instead, under arts. R-1816, 1817, being made a member of the personal staff of the commander in chief. By changes in Navy Regulations and Instructions, No. 6, of Apr. 15,

1916, the designations "personal" staff and "fleet staff" were abolished.]

**The duties of a fleet engineer**, as defined by Naval Instructions, are duties relating to the vessels of a fleet, in connection with their stores, engines, boilers, machinery, etc., and the exercise of supervision over the other engineer officers of the fleet, rather than duties of a peculiarly confidential and personal nature to the commander in chief; and are not in themselves of a character for the performance of which the law confers additional pay as aid. (Comp. Dec., June 10, 1914, 160 S. and A. Memo., 3256; see also act May 13, 1908, 35 Stat., 128, as to pay of aids to rear admirals.)

An engineer of the fleet is a member of the fleet staff of a flag officer, and as such has special duties to perform, in consideration of which he receives increased pay. The position is somewhat analogous in this respect to that of aid, who is a member of the personal staff of the flag officer, and who receives additional pay for the additional services performed as such. (12 Comp. Dec., 185.) [Under Navy Regulations, 1913, the fleet engineer was not a member of the fleet staff, but of the personal staff of the flag officer. By changes in Navy Regulations and Instructions, No. 6, of Apr. 15, 1916, the designations "personal" staff and "fleet staff" were abolished.]

#### Sec. 1394. [Engineer Corps; appointments from cadet engineers. Superseded.]

**This section provided as follows:**

"SEC. 1394. Cadet engineers who are graduated with credit in the scientific and mechanical class of the Naval Academy may, upon the recommendation of the academic board, be appointed by the President and confirmed by the Senate as second assistant engineers."—(31 Aug., 1842, c. 279, s. 6, v. 5, p. 577; 4 July, 1864, c. 252, s. 2, v. 13, p. 393; 24 Feb., 1874, c. 35, v. 18, p. 17.)

It was amended by act of February 24, 1874, section 1 (18 Stat., 17), which changed the title of second assistant engineer to "assistant engineer."

It was superseded by act of August 5, 1882 (22 Stat., 285), which provided that thereafter no appointments of cadet-engineers should be made to the Naval Academy, but that all undergraduates at the Academy should be styled naval cadets, and final graduates of the academy should be appointed to the line and Engineer Corps of the Navy, and to the Marine Corps, as necessary to fill vacancies.

Said act was in turn superseded by act of March 2, 1889 (25 Stat., 878), which made provision for separating students at the Naval Academy into a "line and Marine Corps division," and an "Engineer Corps division," and provided that "the vacancies in the lowest grades of the commissioned officers of the Engineer Corps of the Navy" should be filled "by appointments from the final graduates of the engineer division at the end of their six years'

course," and that "if the number of vacancies in the lowest grades aforesaid, occurring in any year shall be greater than the number of final graduates of that year, the surplus vacancies shall be filled from the final graduates of following years, as they shall become available."

The latter act was amended by act of July 26, 1894 (28 Stat., 124), which provided that, in case the number of vacancies in the grade of assistant engineer should exceed the number of naval cadets in the engineer division of the class finally graduated in any one year, the Secretary of the Navy should select a number equal to such excess from the final graduates of said class in the line division, and such final graduates should be appointed to fill vacancies in the grade of assistant engineer.

The appointment of cadet engineers to the Naval Academy was authorized by section 1522, Revised Statutes. The act of August 5, 1882, above noted, prohibited further appointments of cadet-engineers and changed the title of all undergraduates at the Naval Academy to "naval cadets." This title of naval cadet was changed to "midshipman" by act of July 1, 1902 (32 Stat., 686).

The Engineer Corps was abolished by the Navy personnel act of March 3, 1899, noted above, under section 1390, Revised Statutes.

See section 1521, Revised Statutes, and U. S. v. Redgrave (116 U. S., 474), in which this section was cited.

**Sec. 1395. [Chaplains; number and appointment of.]** There shall be in the Navy, for the public armed vessels of the United States in actual service not exceeding twenty-four chaplains, who shall be appointed by the President

with the advice and consent of the Senate.—(21 Apr., 1806, c. 35, s. 3, v. 2, p. 390. 16 Apr., 1814, c. 58, s. 5, v. 3, p. 125. 4 Aug., 1842, c. 121, s. 1, v. 5, p. 500.)

Amendment to this section was made by act of June 30, 1914 (38 Stat., 403), which created the grade of acting chaplain in the Navy and provided that "hereafter the total number of chaplains and acting chaplains in the Navy shall be one to each twelve hundred and fifty of the total personnel of the Navy and Marine Corps as fixed by law, including midshipmen, apprentice seamen, and naval prisoners." The same act provided that "original appointments" should be made by the Secretary of the Navy in the grade of acting chaplain, and that acting chaplains should be commissioned as chaplains after three years' sea service, and after successfully passing the prescribed examination. "Provided, That not more than seven acting chaplains shall be commissioned chaplains in any one year." The

act of May 22, 1917 (40 Stat., 85), as amended by act of July 1, 1918 (40 Stat., 715), which temporarily increased the personnel of the Navy, provided (sec. 4) that "temporary chaplains and temporary acting chaplains in the Navy may be appointed for service during the period of the war in the proportion of the personnel of the Navy as now prescribed by existing law."

Pay of chaplains: See act of August 29, 1916 (39 Stat., 581), providing that "hereafter all commissioned officers of the active list of the Navy shall receive the same pay and allowances according to rank and length of service." (See also note to sec. 1556, R. S.)

Rank of chaplains: See act of June 30, 1914 (38 Stat., 403).

**Sec. 1396. [Chaplains; qualifications of.]** A chaplain shall not be less than twenty-one nor more than thirty-five years of age at the time of his appointment.—(14 July, 1862, c. 164, s. 7, v. 12, p. 565.)

Amendment to this section was made by act of June 30, 1914 (38 Stat., 403), which provided that chaplains should be commissioned from acting chaplains who shall have had three years' sea service, and shall have established their physical, mental, moral, and professional fitness to the satisfaction of the Secretary of the Navy by examination by a board of chaplains and medical officers of the Navy.

Temporary chaplains and temporary acting chaplains appointed for war service in accordance with act of May 22, 1917, section 5 (40 Stat., 85), as amended by act of July 1, 1918 (40 Stat., 716), shall be not more than 50 years of age. Special age limits were also prescribed for officers transferred to the Regular Navy from the temporary Navy and Naval Reserve Force, by act of June 4, 1920, section 5 (41 Stat., 835).

**Age of candidates for appointment.**—See cases noted under section 1370, Revised Statutes.

The act of June 30, 1914, does not prescribe the age limit of appointees as acting chaplains. Section 1396, Revised Statutes, prescribes that chaplains on the date of appointment as such shall be between the ages of 21 and 35 years, and not being specifically repealed, and not being in conflict with the act of 1914, still governs appointments to the grade of chaplain. If, after serving at least three years in the grade of acting chaplain, appointees as chaplains must be between the ages of 21 and 35 years, the act of 1914 impliedly requires that appointees as acting chaplains shall be of such an age at the time of appointment that when they have served at sea as acting chaplains for at least three years it will be possible for them to qualify under the terms of section 1396 for appointment as chaplains. (File 15721-7, Aug. 31, 1914.)

The Secretary of the Navy has instructed that acting chaplains at the time of appointment as such shall be between the ages of 21 and 31½ years. (File 15721-15, Feb. 11, 1918.)

**Sec. 1397. [Chaplains; form of worship.]** Every chaplain shall be permitted to conduct public worship according to the manner and forms of the church of which he may be a member.—(1 June, 1860, c. 67, s. 1, v. 12, p. 24.)

Commanders of vessels and naval stations to which chaplains are attached shall cause divine service to be performed on Sunday whenever the weather and other circumstances allow it to be done. (Sec. 1624, R. S., art. 2.)

Officers, seamen, and others in the naval service are earnestly recommended diligently to attend at every performance of the worship of Almighty God. (Sec. 1624, R. S., art. 2.) Students at Naval Academy not to pursue studies on Sunday. (Sec. 1526, R. S.)

General courts-martial are enjoined to sit from day to day "Sundays excepted." (Sec. 1624, R. S., art. 45.) Unnecessary work on Sundays by persons under naval jurisdiction is prohibited by Naval Instructions, 1913 (art. 86), and General Order No. 456, March 15, 1919.

Unbecoming behavior during divine service shall be punished as a general or summary court-martial may direct. (Sec. 1624, R. S., art. 3.)



**Sec. 1398. [Chaplains; annual report by.]** Chaplains shall report annually to the Secretary of the Navy the official services performed by them.—(1 June, 1860, c. 67, s. 1, v. 12, p. 24.)

Neglect or refusal of any officer to make any report within the time prescribed by law is punishable by fine of not more than \$1,000.

(Sec. 101, Criminal Code, act Mar. 4, 1909, 35 Stat., 1107.)

**Sec. 1399. [Professors of Mathematics, number of.]** The number of professors of mathematics in the Navy shall not exceed twelve.—(3 Aug., 1848, c. 121, s. 12, v. 9, p. 272. 31 May, 1872, c. 240, s. 1, v. 17, p. 192.

“Hereafter no further appointments shall be made to the corps of professors of mathematics, and that corps shall cease to exist upon the death, resignation, or dismissal of the officers now carried in that corps on the active and retired lists of the Navy.” (Act Aug. 29, 1916, 39 Stat., 577.)

Rank of professors of mathematics: See section 1480, Revised Statutes.

**Historical note.**—The act of August 3, 1848, section 12 (9 Stat., 272), provided, “That the number of professors of mathematics in the Navy shall not exceed twelve; that they shall be appointed and commissioned by the President of the United States, by and with the advice and consent of the Senate, and shall perform such duties as may be assigned them by order of the Secretary of the Navy, at the Naval School, the Observatory, and on board ships of war, in instructing the midshipmen of the Navy or otherwise.”

The act of May 21, 1864, section 3 (13 Stat., 85), provided, “That there shall be added three professors to the number of professors of mathematics now authorized by law, who shall be appointed and commissioned as now provided by law, and who shall be a professor of ethics and English studies, a professor of Spanish, and a professor of drawing, at the Naval Academy.”

By act of April 17, 1866, section 7 (14 Stat., 38), it was provided “that hereafter no vacancy in the grade of professor of mathematics in the Navy shall be filled.”

The act of May 31, 1872 (17 Stat., 192), provided that “there shall be three professors of mathematics who shall have the relative rank of captain; four that of commander; and five that of lieutenant commander or lieutenant.”

The act of 1848, with reference to the number of professors of mathematics, is embodied in section 1399 Revised Statutes; the act of 1864, concerning additional professors for duty at the Naval Academy, is embodied in section 1528, Revised Statutes; and the act of 1872, conferring relative rank upon twelve professors of mathematics, was carried into the Revised Statutes as section 1480.

[The interpretation of these sections of the Revised Statutes has been, in practice, that section 1399 limits the total number of professors

of mathematics to twelve; and that section 1528 relates to the assignment to duty of three of these twelve professors of mathematics.]

**The appointment of additional professors of mathematics** has been authorized in specific cases as follows:

By act of April 27, 1904 (33 Stat., 345), the appointment was authorized of a professor of mathematics of the rank of commander, “to be an extra number in the list of professors of mathematics in the Navy.”

By act of June 29, 1906 (34 Stat., 579), the appointment was authorized of “two additional professors of mathematics in the Navy, who shall be extra numbers in said list.”

By act of May 6, 1910 (36 Stat., 352), the appointment was authorized of a particular individual (Guy K. Calhoun) “as additional professor of mathematics in the Navy, as an extra number.”

By act of March 4, 1913 (37 Stat., 906), the appointment was authorized of two particular individuals (Nathaniel Matson Terry and William Woolsey Johnson) as “professors in the corps of professors of mathematics in the Navy with the rank of lieutenant as extra numbers not in the line of promotion,” and it was further provided that in these cases “limitations as to age at the time of appointment shall not apply nor shall age constitute a claim for retirement.” [“Limitations as to age” for appointment as professor of mathematics are not fixed by any law, other than that prescribing the age for retirement of officers. See note to section 1444, Revised Statutes.]

**Increases in number of professors of mathematics not favored.**—The Navy Department considers it inadvisable to make any further increase in the corps of professors of mathematics. There is no need for such increase, either at the Naval Academy or for the service at large. There are already certain additional professors of mathematics, some of whom are on duty at the Naval Academy, and the policy of the department is to reduce to a minimum the number of instructors at the academy who are not seagoing naval officers. (File 26289-11, Dec. 17, 1911. See note to sec. 1401, R. S. and see act of Aug. 29, 1916, noted above.)

**Sec. 1400. [Professors of mathematics; appointment of. Obsolete.]**

This section provided as follows:

“Sec. 1400. Professors of mathematics shall be appointed and commissioned by the President of the United States, by and with the advice and consent of the Senate.”—(3 Aug., 1848, c. 121, s. 12, v. 9, p. 272.)

It is rendered obsolete by the act of August 29, 1916 (39 Stat., 577), quoted under section 1399, Revised Statutes.

**Appointments as professors of mathematics** were prohibited unless appointees had passed a physical examination before a board

of naval surgeons and a professional examination before a board of professors of mathematics in the Navy, and received a favorable report from said boards. (Act Jan. 20, 1881, 21 Stat., 317. See 17 Op. Atty. Gen., 103, noted under sec. 1401, R. S.)

See note to section 1528, Revised Statutes, concerning civilian professors at the Naval Academy.

**Civilian professors not entitled to preference in appointment.**—Section 1528, Revised Statutes, does not entitle civilian professors of English, Spanish, and drawing at the Naval Academy to be promoted as a matter of right to the corps of professors of mathematics, for assignment to these subjects. The contention that the appointing power is thus restricted in its selection to the civilian professors serving at the academy is without support in the law or the practice of the Navy Department extending through a long period of years. Accordingly, *held* that a vacancy existing in the regular corps of professors of mathematics in the Navy may be filled by the appointment of any candidate possessing the necessary qualifications, and that no person can claim that he is entitled to be appointed thereto as a matter of law. (File 26289-11, Dec. 17, 1911.)

The provisions of section 1528, Revised Statutes, concerning the assignment of three professors of mathematics to special duty, relates to the performance of duty by such professors after appointment, and does not purport to restrict the appointing power in the matter of filling vacancies. (File 26289-11, Dec. 17, 1911.)

**Candidate must qualify physically for general duty.**—A candidate for appointment

as professor of mathematics to fill a vacancy in said corps was found by the board of medical examiners "physically qualified to perform all his duties as professor of mathematics, U. S. Navy, for duty in connection with instruction in drawing at the Naval Academy, Annapolis, Md." *Held*, that such a qualified finding is erroneous and irregular. Should the candidate be appointed he would be commissioned as an officer of the Navy and be subject to all the laws and regulations governing commissioned officers, including the benefit of the retirement laws and the provisions of section 1401, Revised Statutes, relating to the duties to which professors of mathematics may be assigned. The duty to be assigned this particular individual, should he be commissioned, is not a question which the board of medical examiners is authorized to consider in connection with his physical qualifications for appointment. The finding of the board in this case, if approved, might be construed as a restriction upon the department in exercising its discretion in the matter of assignment to duty of the candidate after his appointment and commissioning as a professor of mathematics of the Navy. Such a condition of affairs would operate as a dangerous precedent in making the assignment to duty of officers of the corps of professors of mathematics permanent, would have the practical effect of reducing the number of officers of that corps who would be available for the duty contemplated by law and by regulations, and would be in contravention of the existing laws and regulations. (File 26289-13:2, Aug. 3 and July 28, 1913.)

**Sec. 1401. [Professors of mathematics; duties of.]** Professors of mathematics shall perform such duties as may be assigned them by order of the Secretary of the Navy, at the Naval Academy, the Naval Observatory, and on board ships of war, in instructing the midshipmen of the Navy, or otherwise.—(3 Aug., 1848, c. 121, s. 12, v. 9, p. 272.)

**Nautical Almanac:** Secretary of the Navy may place the supervision of the Nautical Almanac in charge of any officer or professor of mathematics in the Navy who is competent for that service. (Sec. 436, R. S.)

**Naval Academy:** Three professors of mathematics shall be assigned to duty at the Naval Academy, one as professor of ethics and English studies, one as professor of the Spanish language, and one as professor of drawing. (Sec. 1528, R. S.)

**Assignment to duty governed by this section.**—While the law provides that "three professors of mathematics shall be assigned to duty at the Naval Academy, one as professor of ethics and English studies, one as professor of the Spanish language, and one as professor of drawing" (sec. 1528, R. S.), it is also provided by another section of the Revised Statutes (sec. 1401) that "professors of mathematics shall perform such duties as may be assigned them by order of the Secretary of the Navy, at the Naval Academy, the Naval Observatory, and on board

ships of war, in instructing the midshipmen of the Navy, or otherwise." Under the contemporaneous and long continued construction of the Navy Department, the former provision has been treated as advisory and not mandatory. (File 26289-11, Dec. 17, 1911; see also note to sec. 1400, R. S.; and see notes to Constitution, Art. I, sec. 8, clause 14, under "I. General powers of Congress and President," and Art. II, sec. 2, clause 1, under "I. Powers of Commander in Chief.")

"Professors of mathematics" a misnomer; duties not necessarily mathematical.—The heads of the departments of ethics and English studies, of Spanish and other modern languages, and of drawing, at the Naval Academy, should, although the title is a misnomer, be commissioned as "professors of mathematics" (sec. 1528, R. S.), after passing the examinations required by the act of January 20, 1881 (21 Stat., 317). The purpose of section 1528, that persons known to the law and the naval register as "professors of mathematics" should be engaged in teaching these



other branches of learning, is too obvious for construction. That the name did not indicate the sole duty of the office is further apparent from the express declaration of the act of August 3, 1848, section 12 (now secs. 1399-1401, R. S.), "that the number of professors of mathematics in the Navy shall not exceed twelve; that they shall be appointed and commissioned by the President of the United States by and with the advice and consent of the Senate, *and shall perform such duties as may be assigned them by order of the Secretary of the Navy at the naval school, the observatory, and on board ships of war, or otherwise.*" Section 1528, Revised Statutes, shows that, certainly as to three of these professors, the duties to be assigned them were not to be mathematical in their nature. (17 Op. Attv. Gen., 103.)

**Policy of the Navy Department.**—In practice the policy of the Navy Department has been to secure seagoing officers as instructors at the Naval Academy, and to reduce to a minimum the number of instructors at the

Academy who are not seagoing naval officers; and for this reason it has been considered inadvisable to make any further increase in the corps of professors of mathematics. (File 26289-11, Dec. 17, 1911.) [But see provision in naval appropriation acts, under "Naval Academy," that "no part of any sum in this act appropriated shall be expended in the pay or allowances of any commissioned officer of the Navy detailed for duty as an instructor at the United States Naval Academy to perform duties which were performed by civilian instructors on January first, nineteen hundred and thirteen." This was contained in the naval appropriation acts of March 4, 1913 (37 Stat., 906), June 30, 1914 (38 Stat., 408), March 3, 1915 (38 Stat., 947), August 29, 1916 (39 Stat., 607), and March 4, 1917 (39 Stat., 1187). It was omitted in the naval appropriation act of July 1, 1918 (40 Stat., 733).]

See act of August 29, 1916, noted under section 1399, Revised Statutes.

**Sec. 1402. [Construction Corps; number and appointment of naval constructors.]** The President, by and with the advice and consent of the Senate, may appoint naval constructors, who shall have rank and pay as officers of the Navy.—(25 July, 1866, c. 231, s. 7, v. 14, p. 223. 3 Mar., 1871, c. 117, s. 9, v. 16, p. 536.)

Appointments as naval constructors are to be made by promotion of assistant naval constructors who have had not less than eight nor more than fourteen years' service as assistant naval constructors. (Act Mar. 3, 1899, sec. 10, 30 Stat., 1006.)

Appointments as naval constructors are to be made "from the highest members" in the Construction Corps, "according to seniority." (Sec. 1480, R. S., as amended by act Feb. 27, 1877, 19 Stat., 244.)

**Number of naval constructors and assistant naval constructors on the active list** was fixed at 40 by act March 3, 1899, section 10 (30 Stat., 1006). This number was increased by act July 1, 1902 (32 Stat., 683), which authorized the appointment of 6 additional assistant naval constructors. A further increase was made by act March 3, 1903 (32 Stat., 1197), which authorized the appointment of 29 "additional naval constructors and assistant naval constructors, in all seventy-five." By act March 3, 1915 (38 Stat., 945), the transfer was authorized to the grade of assistant naval constructor of not more than 24 line officers of the Navy, making a total of 99 naval constructors and assistant naval constructors authorized by law. (See note to sec. 1403, R. S.) By act of August 29, 1916 (39 Stat., 576, 577), it was provided that "the total authorized number of commissioned officers of the active list of the following staff corps, exclusive of commissioned warrant officers, shall be based on percentages of the total number of commissioned officers of the active list of the line of the Navy as follows: \* \* \* Construction Corps, five

per centum. \* \* \* The total number of commissioned officers of the active list of the following mentioned staff corps at any one time, exclusive of commissioned warrant officers, shall be distributed in the various grades of the respective corps as follows: \* \* \* Construction Corps: One-half naval constructors with the rank of rear admiral to eight and one-half naval constructors with the rank of captain, to fourteen naval constructors with the rank of commander, to seventy-seven naval constructors and assistant naval constructors with rank below commander. \* \* \* When there is an odd number of officers in the grade or rank of rear admiral in the line, or in each corps, the lower division thereof shall include the excess in number, except where there is but one. Wherever a final fraction occurs in computing the authorized number of any corps, grade, or rank in the naval service, the nearest whole number shall be regarded as the authorized number: *Provided*, That at least one officer shall be allowed in each grade or rank. For the purpose of determining the authorized number of officers in any grade or rank of the line or of the staff corps, there shall be excluded from consideration those officers carried by law as additional numbers, including staff officers heretofore permanently commissioned with the rank of rear admiral, and nothing contained herein shall be held to reduce below that heretofore authorized by law the number of officers in any grade or rank in the staff corps." The temporary appointment of additional officers during the period of the existing war was authorized by the act of May 22, 1917, section 4

(40 Stat., 85), as amended by act of July 1, 1918 (40 Stat., 715), which also authorized temporary appointments and promotions to fill, during the period of the war, the deficiency existing prior to May 22, 1917, in the total number of commissioned officers authorized by the act of August 29, 1916. By act of June 4, 1920 (41 Stat., 834), it was provided "that the number of commissioned officers of the line, permanent, temporary, and reserve on active duty shall not exceed 4 per centum of the total authorized enlisted strength of the Regular Navy, and the number of staff officers on active duty of whatever kind shall be in the same proportions as authorized by existing law. \* \* \* That nothing herein shall be construed as reducing the permanent commissioned \* \* \* strength of the Regular Navy as authorized by existing law."

Pay of all officers of the Navy is prescribed by act of May 13, 1908, and amendments, noted under section 1556, Revised Statutes.

Rank of naval constructors is fixed by act of March 3, 1899, section 10, as amended by act of August 29, 1916 (39 Stat., 577). Advancement in rank of staff officers, up to and including the rank of lieutenant commander, is regulated by act of August 29, 1916 (39 Stat., 576). Advancement to the ranks of commander, captain, and rear admiral in the Staff Corps of the Navy are to be made by selection upon recommendation of a board of officers of the corps concerned. (Act of July 1, 1918, 40 Stat., 718.)

"Vacancies in the Construction Corps shall be filled in the manner now prescribed by law, at such annual rate as the Secretary of the Navy may prescribe." (Act Aug. 29, 1916, 39 Stat., 577.)

**Number not to be increased by implication.**—It will be observed from the statutes that in legislating with respect to naval constructors Congress has been very careful to limit their number. The number thus fixed by law should not be increased without legislation sufficiently explicit to clearly justify it. When Congress has seen fit to make increases in the numbers of officers in the Navy, either generally or in particular corps or grades, it has generally used specific and apt language to accomplish that object. Accordingly, *held* that where, in accordance with law, a naval constructor with the rank of captain, who had served as Chief of the Bureau of Construction and Repair, with the rank of rear admiral and title of Chief Constructor while so serving, was given a permanent commission with the title of Chief Constructor and the rank of rear admiral, and continued on the active list as such, although no longer Chief of the Bureau of Construction and Repair, the sole purpose of the law authorizing such action was to make permanent the rank, title, and emoluments which this officer had theretofore temporarily held as chief of bureau, and that Congress did not intend thereby to increase the number of officers in the Construction Corps of the Navy; and therefore the commissioning of this officer as a Chief Constructor in the Navy with the rank of rear admiral did not create a new grade in the Navy, nor did the same fact create a vacancy in the grade of naval constructor with the rank of captain or in the total number of naval constructors and assistant naval constructors as provided by law. (28 Op. Atty. Gen., 526. The act of June 24, 1910, 36 Stat., 607, 608, providing for the issuance of permanent commissions to officers, under the circumstances in this case, as Chief Constructor with the rank of rear admiral, was repealed by act August 22, 1912, 37 Stat., 328. See note to sec. 421, R. S.)

#### Sec. 1403. [Construction Corps; appointment of assistant naval constructors.]

Cadet engineers who are graduated with credit in the scientific and mechanical class of the Naval Academy may, upon the recommendation of the academic board, be immediately appointed as assistant naval constructors.—(4 July, 1864, c. 252, s. 2, v. 13, p. 393.)

Amendment to this section was made by act of August 5, 1882 (22 Stat., 285), which provided that thereafter no appointments of cadet-engineers should be made to the Naval Academy, but that all undergraduates at the Academy should be styled "naval cadets." This title of naval cadet was changed to "midshipman" by act of July 1, 1902 (32 Stat., 686).

Authority is given the Secretary of the Navy by section 1522, Revised Statutes, to make provision by regulations for educating at the Naval Academy as naval constructors such persons as may show a peculiar aptitude therefor, and to afford such persons all proper facilities for such a "scientific mechanical education" as will fit them for said profession.

Appointments to the grade of assistant naval constructor may be made by transfer from

officers of the line of the Navy who have had not less than three years' service in the grade of ensign and have taken, or are taking, satisfactorily, a post-graduate course in naval architecture under orders from the Secretary of the Navy; the total increase in the number of naval constructors and assistant naval constructors by reason of such transfers not to exceed 24, of which not more than 5 may be made in any one calendar year. (Act Mar. 3, 1915, 38 Stat., 945.) By act of August 29, 1916 (39 Stat., 577), it was provided that "vacancies in the Construction Corps shall be filled in the manner now prescribed by law, at such annual rate as the Secretary of the Navy may prescribe," and "that hereafter ensigns of not less than one year's service as such shall be eligible for transfer to the Construction Corps."



By act of July 9, 1913 (38 Stat., 103), it is provided that "midshipmen on graduation \* \* \* may be assigned by the Secretary of the Navy to fill vacancies in the lowest commissioned grades of the \* \* \* staff corps of the Navy."

Number of naval constructors and assistant naval constructors: See note to section 1402, Revised Statutes.

Rank of assistant naval constructors is fixed by act of March 3, 1899, section 10, as amended by act of August 29, 1916 (39 Stat., 577).

### Sec. 1404. [Construction Corps; duties of. Superseded.]

This section provided as follows:

"Sec. 1404. Naval constructors may be required to perform duty at any navy yard or other station."—(3 Mar., 1845, c. 77, s. 2, v. 5, p. 794.)

It was superseded by the following provision in the act of June 30, 1914 (38 Stat., 394), repeated in act of March 3, 1915 (38 Stat., 930): " \* \* \* officers of the Construction Corps shall be eligible for any shore duty compatible with their rank and grade to which the Secretary of the Navy may assign them."

"Line officers may be detailed for duty under staff officers in the manufacturing and repair departments of the navy yards and naval stations, and all laws or parts of laws in conflict herewith are hereby repealed." (Act June 24, 1910, 36 Stat., 614.)

**Sea duty.**—"Naval constructors and assistant naval constructors shall when practicable be detailed for service afloat in such fleets or on such repair ships as the department may designate." (Art. R-3122, Navy Regs., 1913.)

**General nature of duties.**—Naval constructors are appointed by the President and have rank and pay as officers of the Navy, and may be required to perform duty at any navy yard or other station. Their duties in general are to have general superintendence and charge of the construction and repair of all ships, and to cause thorough examination at least once a month of all ships in reserve to see that they are carefully guarded against deterioration or decay. (Stocker v. U. S., 39 Ct. Cls., 300.)

**Performance of duty under War Department.**—The statute creating the office of naval constructor is broad enough to include the requirement of service on vessels in the employment of the War Department, and gives the Government the right to demand such services when required, and at such times and places as may seem expedient; and this right is not affected by the omission to include such duty by specific mention in the Navy Regulations. (Stocker v. U. S., 39 Ct. Cls., 300.)

Where a naval constructor is detailed by the Secretary of the Navy to inspect a vessel, the fact that she is chartered by the War Department as an Army transport does not burden the officer with services not incident to his office. The duties required of him were of the general nature performed by him in the Navy. Additional compensation for such inspection service is prohibited by Revised Statutes, section 1765. (Stocker v. U. S., 39 Ct. Cls., 300.)

The Army and Navy constitute the military force of the Government, and their duties are to cooperate when necessity or emergency demands it. For this purpose they are a unit under the authority of one Commander in Chief. The Army has no officer corresponding to a naval constructor, and when it becomes necessary to use ships at sea to transport the troops of

the Army it becomes and is the duty of the Navy, with all its equipment and forces, when properly directed, to give necessary assistance and protection to such transportation. (Stocker v. U. S., 39 Ct. Cls., 300.)

See also section 1437, Revised Statutes, providing that "the President may detail, temporarily, three competent naval officers for the service of the War Department in the inspection of transport vessels, and for such other services as may be designated by the Secretary of War." (This statute was not cited by the Court of Claims in the case above noted.)

**Military duties are not compatible with grades of the Construction Corps.**—Duties of a purely military nature, such as contemplated by Article R-1003, paragraphs 1 and 4, Navy Regulations, 1913 (military command and senior officer present), are not compatible with the grades of the Construction Corps, and are not, therefore, within the scope of the clause above-quoted from the naval appropriation act of March 3, 1915. (File 26806-140, June 9, 1916.)

The law does not say that officers of the Construction Corps shall be eligible for any shore duty which they may individually be competent to perform; but for any shore duty compatible with their rank and grade. It is not the competency of the particular officer to perform certain duties, but the compatibility of those duties with the grade of naval constructor that governs. Military duties, such as are required of the commandant of a navy yard and his aid or executive, are not compatible with the grade of naval constructor, even though there may be found in that grade some officer who by special training or experience might be individually competent to perform such duties. (File 5038-20:1, Jan. 18, 1915.)

**Construction officer can not be commandant of navy yard.**—Section 1542, Revised Statutes, provides that the commandants of the several navy yards are to be officers of the line; that is, they are to be "officers not below the grade of commander," which grade exists only in the line of the Navy. In conformity with this law, line officers have from time immemorial been selected for duty as commandants of navy yards. The duties of commandant have thus become part of the duties of the line. The Navy Regulations provide that, in the absence of the commandant, "the line officer next in rank," if not restricted to special duty, shall become the acting commandant. The words in the act of June 30, 1914, "compatible with their rank and grade," which Congress wrote into the law evidently for some purpose, would be rendered meaningless if naval constructors could nevertheless be assigned to duty which, from its very nature, as well as in accordance with military usage and specific provisions of law and regulations, belongs exclusively to other grades. Any argument which

might be advanced to show that it is compatible with the grade of naval constructor to perform the duties of commandant, might be urged with equal force to show that it is compatible with said grade to perform the duties of the pay corps, medical corps, professors of mathematics, chaplains, or civil engineers. The duties performed by the different grades in the Navy are well understood, are defined by regulations, orders, and customs of the service, as well as by law in some cases. It must be presumed that Congress in enacting the act of 1914 legislated with reference to the duties of the various grades as they then existed, and if it had intended that naval constructors could be assigned to duties belonging to other grades, it would have omitted the restriction expressed by the phrase "compatible with their rank and grade." These words were put into the law as a limitation upon the Secretary's authority; they must be given effect; and they exclude assignment of naval constructors to duty in command of a navy yard. (File 5038-20:1, Jan. 18, 1915.)

**Construction officer can not be aid or executive of commandant or succeed to command.**—Section 1469, Revised Statutes, which limits details as aid or executive of commandants at naval stations to officers of the line, is not repealed or modified by the act of June 30, 1914, which authorizes the assignment of construction officers to duties "compatible with their rank and grade." (File 5038-20:1, Jan. 18, 1915.)

A naval constructor can not under the law be assigned to duty as aid or executive to the commandant of a naval station, nor succeed to command of a naval station in the absence of the commandant. (File 5038-20:1, Jan. 18, 1915.)

The duties of aid to a commandant may be compatible with the rank of a construction officer, but are not compatible with his grade. All commissioned officers of the Navy, both of the line and staff, have rank, and therefore, if rank only were considered, there would be nothing incompatible in ordering a naval constructor to perform any duty which might be assigned to any officer of corresponding rank in the line or in any staff corps. Grade and not rank is the distinguishing characteristic by which the duties of commissioned officers are known and defined. A naval constructor may have the rank of commander; so also may a medical officer in command of a naval hospital. Therefore it would not be incompatible with the rank of a naval constructor to command a naval hospital, but certainly it would be incompatible with his grade to perform such duty. Similarly with reference to officers of the line; regardless of rank, the military duties performed by such officers are as incompatible with the grade of naval constructor as are the duties of a medical officer in command of a naval hospital. A naval constructor assigned to duty as aid or executive to the commandant would, in so acting, perform duties of a purely military character, duties which have always been limited to the line, duties of so important a character that the law itself says they shall be performed not only by "a line officer," but "when not impracticable" by the line officer

"next in rank" to the commandant; duties which are wholly foreign to the grade of naval constructor, which are not embraced in a naval constructor's special training and experience, and which are as incompatible with the grade of naval constructor as are the duties of that grade incompatible with the grade of a line officer. (File 5038-20:1, Jan. 18, 1915. As to distinction between "rank" and "grade" see generally, notes to secs. 1362 and 1457, R. S.)

**Construction officer can not be assigned duties belonging to other grades, either in line or staff.**—Staff officers presumably know something about the duties performed by line officers, and line officers know something about the duties performed by staff officers; but these officers are all specially trained in the duties pertaining to their respective grades, and these are the duties which they are supposed to be fitted to perform. A line officer might individually know something about the treatment prescribed by medical officers for certain ailments, but the law does not contemplate that he should be intrusted with the responsibility of treating such ailments. Similarly the law does not contemplate that a medical officer or naval constructor should be intrusted with the responsibility of discharging the duties for which line officers have been specially trained and equipped. Congress, in deliberately and specifically limiting the duties of construction officers to such as are "compatible" with their "grade" did not intend that they should be assigned to duties belonging to other grades, either in the line or staff. (File 5038-20:1, Jan. 18, 1915.)

**Construction officers may exercise command in the line or other staff corps incident to performance of their duties.**—The act of June 30, 1914, limits the detail of officers of the construction corps in accordance with its provisions, to "shore duty" and to such shore duty as is "compatible with their rank and grade." The intention of this law was evidently to enlarge the power of the Secretary of the Navy in assigning construction officers to duty, but at the same time to prohibit their assignment to duty of a wholly different character from that which they had customarily performed. The only effect of the statute was to remove any disability which had previously stood in the way of assigning construction officers to duties pertaining to their grade. This disability was found in the law prohibiting staff officers from exercising command in the line or in other staff corps [sec. 1488, R. S., as amended by act Mar. 3, 1899, sec. 7, 30 Stat., 1006]. A clause in the naval appropriation act of June 24, 1910 (36 Stat., 614), partially removed this disability, but was restricted in its scope, limiting the detail of line officers under staff officers to the manufacturing and repair departments of navy yards and naval stations. It had the same effect as if it had specifically stated that line officers may not be detailed for duty under staff officers except in the manufacturing and repair departments of the navy yards and naval stations. The act of 1914 is broader, and construction officers may, by its authority, be detailed to any shore duty "compatible with their rank and grade," notwithstanding



that they are thereby placed in command of line officers or officers of other staff corps. (File 5038-20:1, Jan. 18, 1915.)

The only effect of said act of June 30, 1914, is to remove the obstacle which theretofore prevented the assignment of construction offi-

cers to duty properly embraced by their grade, where the performance of such duty might involve the exercise of command in the line or other staff corps. (File 5038-20:1, Jan. 18, 1915.)

**Sec. 1405. [Warrant officers; number and appointment of.]** The President may appoint for the vessels in actual service as many boatswains, gunners, sailmakers, and carpenters as may, in his opinion, be necessary and proper.—(21 Apr., 1806, c. 35, s. 3, v. 2, p. 390. 4 Aug., 1842, c. 121, s. 1, v. 5, p. 500. 3 Mar., 1847, c. 48, s. 1, v. 9, p. 172.)

Acting appointments as warrant officers. See note to section 1410, Revised Statutes.

Appointments from enlisted men provided for by sections 1407 and 1417, Revised Statutes.

Duties of warrant officers. See sections 1416 and 1438, Revised Statutes.

Pay of warrant officers. See section 1556, Revised Statutes.

Rank of warrant officers. See section 1491, Revised Statutes.

Temporary appointments as warrant officers of the Navy may be made by the Secretary of the Navy. (Act May 22, 1917, sec. 5, 40 Stat., 85, as amended by act July 1, 1918, 40 Stat., 716.)

**Sailmakers.**—So much of this section as provides for the appointment of sailmakers has become obsolete, there being no officer in that grade now in the Navy, and no such appointments having been made since May 4, 1888. (See Annual Navy Registers.) The Navy Register of 1917 (pp. 158, 159) shows one officer serving in the grade of chief sailmaker.

(See note below as to the promotion of warrant officers.)

"The sailmaker was, as in the British service, to report the condition of the sails to the boatswain. He has at the present day ceased, for obvious reasons, to have importance in the Navy." (22 Op. Atty. Gen., 620.)

**Machinists.**—The appointment of 100 warrant machinists was authorized by the Navy personnel act of March 3, 1899, section 14 (30 Stat., 1007). The appointment of 50 additional warrant machinists was authorized by act of March 3, 1901 (31 Stat., 1108); and provision for the appointment of as many warrant machinists "as the President may from time to time deem necessary to appoint, not to exceed twenty in any one year," was made by act of April 27, 1904 (33 Stat., 324), repeated in the naval appropriation act for each subsequent year until the act of August 29, 1916 (39 Stat., 575), when the limitation upon the number to be appointed in any one year was omitted.

The title of "warrant machinist" was changed to "machinist" by act of March 3, 1909 (35 Stat., 771).

**Pharmacists.**—The appointment by the Secretary of the Navy of 25 pharmacists in the Hospital Corps of the Navy, "with the rank, pay, and privileges of warrant officers, removable in the discretion of the Secretary," was authorized by act of June 17, 1898, section 1 (30 Stat., 474). By section 4 of the same act (30 Stat., 475), it was provided that "all benefits derived from existing laws, or that may here-

after be allowed by law, to other warrant officers or enlisted men in the Navy shall be allowed in the same manner to the warrant officers or enlisted men in the Hospital Corps of the Navy."

By act of August 29, 1916 (39 Stat., 572), the President was authorized to appoint "as many pharmacists as may be deemed necessary," who "shall have the same rank, pay, and allowances as are now or may hereafter be allowed other warrant officers."

**Pay clerks.**—A grade of warrant officers designated as pay clerks was established by act of March 3, 1915 (38 Stat., 942), appointments thereto being regularly made by promotion from the grade of acting pay clerk; and it was provided "that pay clerks and acting pay clerks shall have the same pay, allowances, and other benefits as are now or may hereafter be allowed other warrant officers and acting warrant officers, respectively."

The total number of pay clerks was not specifically fixed, but the act above cited provided that the total number of chief pay clerks, pay clerks, and acting pay clerks shall not exceed one for each 250 enlisted men allowed by law in the Navy.

**Clerks to assistant paymasters in the Marine Corps are not warrant officers.**—The provision of the act of March 3, 1915 (38 Stat., 942), in regard to warranting pay clerks of the Navy, is not sufficiently broad to include clerks to assistant paymasters in the Marine Corps. The fact that the grades of warrant officers, at the time of the statute's enactment, existed exclusively in the Navy proper, and that there were no warrant officers designated as such by law in the Marine Corps, strongly accentuates the view that the Marine Corps was not in contemplation of Congress when this legislation was enacted. It is clear that Congress did not intend its legislation with reference to clerks to pay officers in the Navy to apply to clerks to assistant paymasters in the Marine Corps, but on the contrary intended that the pay, allowances, and other benefits allowed the latter class of clerks should be the same as in the Army. (File 5460-81, May 12, 1916. By act July 1, 1918 (40 Stat., 735), the title of clerks for assistant paymasters in the Marine Corps was changed to "pay clerk," and it was provided that pay clerks "shall hereafter receive the same pay, allowances, and other benefits now provided by law for clerks for assistant paymasters.")

The warrant grades of marine gunner and quartermaster clerk were established

by the act of August 29, 1916 (39 Stat., 611), which provided that officers in said grades "shall have the rank and receive the pay, allowances, and privileges of retirement of warrant officers in the Navy."

**Mates are not warrant officers.**—See note to section 1408, Revised Statutes.

**Promotion of warrant officers.**—Boatswains, gunners, carpenters, and sailmakers were, after ten years from date of warrant, to be commissioned as chief boatswains, chief gunners, chief carpenters, and chief sailmakers, to rank with but after ensign, by act of March 3, 1899, section 12 (30 Stat., 1007). This provision was amended by act of April 27, 1904 (33 Stat., 346), providing for the promotion of the officers mentioned after six years from date of warrant, instead of ten years, as theretofore.

Machinists are, after six years from date of warrant, to be commissioned as chief machinists. (Act Mar. 3, 1909, 35 Stat., 771.)

Pharmacists were, after six years from date of warrant, to be commissioned as chief pharmacists, by a provision in the act of August 22, 1912 (37 Stat., 345). Under that provision it was held that the total number of pharmacists and chief pharmacists was limited to 25, that being the maximum number fixed by previous law for the grade of pharmacist, and the provision for the promotion of pharmacists not being intended to increase the total number of officers in the Navy. (File 27213-3, May 6, 1913; 27218-4, Dec. 5, 1913.) Prior to the act of August 22, 1912, the commissioning of pharmacists as chief pharmacists was not authorized, as sections one and four of the act approved June 17, 1898 (noted above under "Pharmacists"), did not have that effect. (File 27213, Apr. 24, 1909.) By act of August 29, 1916 (39 Stat., 572, 573), it was provided that "pharmacists shall, after six years from the date of warrant, be commissioned chief pharmacists after passing satisfactorily such examinations as the Secretary of the Navy may prescribe, and shall, when so commissioned, have the same rank, pay, and allowances as now or may hereafter be allowed other commissioned warrant officers"; and the restriction upon the number of pharmacists and chief pharmacists was removed.

Pay clerks are, after six years' service as such, to be commissioned as chief pay clerks. (Act Mar. 3, 1915, 38 Stat., 942.)

By act of May 22, 1917 (40 Stat., 84), as amended by act of July 1, 1918 (40 Stat., 716), temporarily increasing the number of officers and enlisted men of the Navy and Marine Corps, it was provided (sec. 5) that "the additional temporary officers authorized in the various grades and ranks of the Navy and Marine Corps in accordance with the next preceding section may be temporarily appointed to serve in the grades or ranks to which appointed or promoted \* \* \* by temporary appointment of \* \* \* warrant officers \* \* \* of the Navy, and warrant officers \* \* \* of the Marine Corps."

By act of June 4, 1920 (41 Stat., 834, 835), provision was made for the issuance of permanent commissions and warrants to officers who served temporarily in commissioned and warrant grades during the World War.

Commissioned warrant officers on the active list with creditable records shall, after six years from date of commission, receive the pay and allowances of a lieutenant (junior grade); and after twelve years from date of commission the pay and allowances of a lieutenant. (Act Aug. 29, 1916, 39 Stat., 578.)

**Ensigns and assistant paymasters appointed from warrant officers.**—The appointment annually of not more than six ensigns from among the boatswains, gunners, or machinists, having not less than six years' service as warrant officers, was authorized by act of March 3, 1901 (31 Stat., 1129). This provision was amended by act of March 3, 1903 (32 Stat., 1197), providing that 12 ensigns may be so appointed annually instead of 6. It was further amended by act of April 27, 1904 (33 Stat., 346), providing that such appointments may be made from among boatswains, gunners, and machinists having four years' service as warrant officers, instead of six years as previously required. It was again amended by act of March 3, 1909 (35 Stat., 771), which provided that chief boatswains, chief gunners, and chief machinists should be eligible for appointment as ensigns under the same restrictions as imposed by law upon the appointment of boatswains, gunners, and machinists to that grade.

The law does not require that warrant officers who qualify for ensign be commissioned as of July 30 of each year. By act of March 3, 1901 (31 Stat., 1129), it was provided that "whenever in view of the vacancies in the grade of ensign on July thirtieth of any year unfilled by graduates of the Naval Academy, the Secretary of the Navy shall so recommend, the President may appoint to that grade, as of July thirtieth, from among the boatswains, gunners, or warrant machinists, not exceeding six in any one calendar year." The same act contained restrictions concerning the qualifications of warrant officers eligible for such appointment as ensign. At the time this law was enacted the grades of lieutenant (junior grade) and ensign were limited by law. However, by act of March 3, 1903 (32 Stat., 1197), the appointment was authorized of such total numbers of lieutenants (junior grade) and ensigns as may be qualified for said grades under existing law, thereby making said grades unlimited in number. In the same act it was provided that "hereafter, in each calendar year there may, under the restrictions imposed by existing law, be appointed from the boatswains, gunners, and warrant machinists of the Navy, twelve ensigns." This act amended the prior law in so far as same authorized appointments of ensigns from warrant officers to be made only in the case of vacancies existing in the grade of ensign on July 30 of each year and required that such appointments be made as of July 30. Accordingly, since the act of 1903, it has not been required that the appointments of ensigns from warrant officers be made as of July 30, but same were authorized to be made at any time "in each calendar year," subject to the limitation upon the number to be so appointed. (File 28687-4, Sept. 16, 1916.)

The act of April 27, 1904 (33 Stat., 346), provided "that subject to the restrictions



imposed by existing law, boatswains, gunners, and warrant machinists shall be eligible for appointment to the grade of ensign after four years' service as warrant officers." Under the act of August 29, 1916 (39 Stat., 577) [which limited the number of officers in the various grades and ranks of the Navy, including the lowest grades of the line, in accordance with computations to be made by the Secretary of the Navy on January 1 and July 1 of each year, and provided that the numbers in each grade and rank resulting from such computations should not be varied between said dates], warrant officers qualifying for the grade of ensign should be commissioned in such grade on January 1 or July 1 of each year, and can not be commissioned between said dates except to fill vacancies occurring in the authorized number of officers in the grades of lieutenant (junior grade) and ensign, computed in accordance with the act of August 29, 1916. (File 28687-4, Sept. 16, 1916.)

The act of May 22, 1917, section 6 (40 Stat., 86), authorizing computations to be made "during the period of the present war," at such times other than January 1 and July 1 as the Secretary of the Navy "may deem necessary," suspends temporarily the restriction contained in the act of August 29, 1916, upon varying the number of officers between specified dates. The result is that additional appointments of commissioned officers in the lowest grades, line and staff, may be made at any time that eligibles become available. Such additional appointments may be made permanently where vacancies exist in the permanent service, and eligibles are available for permanent appointment, or may be made temporarily to fill any existing deficiency therein until eligibles are available for regular appointment in accordance with existing law. (File 28687-22, June 14, 1917. By act of July 11, 1919 (41 Stat., 139), permanent provision was made for computations by the Secretary of the Navy at least once each year and at such times as the Secretary may direct.)

Chief pay clerks and pay clerks between the ages of 21 and 35 years are eligible for appointment as assistant paymasters, but shall not have any preference for such appointment except as to this modification of the limitations fixed by section 1379, Revised Statutes, as to the ages of appointees. (Act Mar. 3, 1915, 38 Stat., 943.)

As to temporary appointment of warrant officers to commissioned rank, see act of May 22, 1917, as amended by act of July 1, 1918, noted above, under "Promotion of warrant officers."

**Warrant officers belonging to line and staff of Navy.**—See note to section 1362, Revised Statutes.

**Appointments by President and Secretary of the Navy.**—See note to Constitution, Article II, section 2, clause 2, under "II. Constitutional power of appointment."

Section 1405 authorizes the President to appoint as many boatswains, gunners, sailmakers, and carpenters as may in his opinion be necessary and proper. The consent of the Senate not having been required by Congress, such consent is unnecessary, and the President

may make such appointments without submitting the same to the Senate for confirmation. (22 Op. Atty. Gen., 82; see also 23 Op. Atty. Gen., 136.)

By act of May 22, 1917, section 5 (40 Stat., 85), as amended by act of July 1, 1918 (40 Stat., 716), temporary appointments as warrant officers were authorized to be made by the Secretary of the Navy.

**Warrant officers not commissioned officers.**—Warrant officers designated as boatswains, gunners, carpenters, and sailmakers are appointed under authority of section 1405, Revised Statutes, and in addition thereto Congress has from time to time authorized the appointment of other warrant officers in the Navy. Such officers have always been regarded as a separate and distinct class from commissioned officers, whose appointments in the Regular Navy are evidenced by commissions signed by the President and under the seal of the United States. Accordingly, *held* that a warrant officer is not a commissioned officer within the meaning of the provision in the Navy personnel act of March 3, 1899, section 13 (30 Stat., 1007), that certain commissioned officers of the Navy shall receive the same pay and allowances as are provided for officers of the Army. (6 Comp. Dec., 495.)

"Warrant" and "commission," outside of naval technicality, are synonymous words. There is no difference in form between a commission and a warrant as used in the Navy, except that one recites that the appointment is made "by and with the advice and consent of the Senate," and the other does not. (28 Op. Atty. Gen., 325; quoting *Brown v. U. S.*, 18 Ct. Cls., 537, 543.)

Within the meaning of Articles II, III, and IV of the War Risk Insurance Act, unless the context otherwise requires, "the term 'commissioned officer' includes a warrant officer." (Act Oct. 6, 1917, 40 Stat., 401.)

See note to section 1408, Revised Statutes, under "Mates are not warrant officers."

**Retirement of warrant officers.**—See note to section 1448, Revised Statutes.

The laws relating to the retirement of officers of the Navy having been uniformly held by the officers charged with their execution to be applicable to warrant as well as commissioned officers, such holding is sustained, although it must be conceded that were the question a new one the true construction of the law would be open to doubt. (*Brown v. U. S.*, 113 U. S., 568.)

A mate who served during the Civil War was not entitled to retirement with higher rank and pay as allowed by law to officers of the Navy having such service, because he was not one of the mates to whom Congress had granted the benefit of the retirement laws relating to warrant officers. (See note to sec. 1408, R. S.) If appointed a boatswain, this mate would be entitled, on account of his Civil War service, to retirement with the rank and retired pay of a chief boatswain six months after such appointment. *Held*, that he may validly waive his right to retirement as chief boatswain, in consideration of his appointment as boatswain and retirement with that rank. (File 3031-57, July 31, 1908, case of Thomas G. McDonough,

appointed a boatswain in the Navy Aug. 6, 1908, and retired as boatswain Feb. 6, 1909, upon his own application after 30 years' service. Compare *U. S. v. Andrews*, 240 U. S., 90.)

**Revocation of warrant.**—See note to section 1409, Revised Statutes.

**Ages of candidates for appointment.**—Candidates from civil life for machinist in the Navy must by law be "not above thirty years of age." (Act Mar. 3, 1899, sec. 14, 30 Stat., 1007.)

No person shall be appointed a pay clerk in the Navy "unless his accumulated previous service in the Army, Navy, and Marine Corps, together with his possible future service prior to attaining the age of sixty-two years, will amount to at least thirty years." (Act Mar. 3, 1915, 38 Stat., 942.)

In making temporary appointments authorized by the act of May 22, 1917 (40 Stat., 85, sec. 5), as amended by act of July 1, 1918 (40 Stat., 716), "the maximum age limit shall be fifty years for \* \* \* enlisted men of the Navy to warrant rank."

A candidate for appointment as boatswain or gunner in the Navy, other than such as are provided for in section 1407, Revised Statutes, must be under thirty-five years of age. (Arts. R-3313, 3314, Navy Regs., 1913.)

A candidate for appointment as machinist in the Navy, who at the time of making applica-

tion is enlisted in the Navy, other than such as are provided for in section 1407, Revised Statutes, "must not be more than thirty-five years of age." (Art. R-3315, Navy Regs., 1913.)

A candidate for carpenter in the Navy, other than such as are provided for in section 1407, Revised Statutes, must be under thirty-five years of age. (Art. R-3316, Navy Regs., 1913.)

No person shall be appointed a pharmacist unless his accumulated previous service in the Army, Navy, and Marine Corps, together with his possible future service prior to attaining the age of 64 years, will amount to at least 30 years.

Special age limits for officers appointed to the Regular Navy by transfer from the temporary Navy and Naval Reserve Force were prescribed by act of June 4, 1920, section 5 (41 Stat., 835).

For cases construing statutory ages for appointment in the Navy, see note to section 1370, Revised Statutes.

The Navy Department does not deem it desirable to make an exception in the case of a mate who makes application to take the examination for boatswain in the Navy, and who, at the date of the next examination, would be about nine and one-half years over the maximum age prescribed for candidates for that grade. (File 3031-55, June 16, 1908.)

**Sec. 1406. [Warrant officers; title.]** Boatswains, gunners, carpenters, and sailmakers shall be known and shall be entered upon the Naval Register as "warrant officers in the naval service of the United States."—(2 July, 1864, c. 219, s. 2, v. 13, p. 373.)

Amendment to this section has been made by the acts noted under section 1405, creating the additional grades of warrant officers designated as machinists, pharmacists, and pay clerks.

Sailmakers now obsolete. See note to section 1405.

**Commissioned warrant officers.**—Chief boatswains, chief gunners, chief machinists, chief carpenters, chief sailmakers, chief pharmacists, and chief pay clerks, are designated as "commissioned warrant officers." (See Art. R-1013 (2), Navy Regs., 1913.)

**Sec. 1407. [Warrant officers; seamen promoted for heroism. Medals of honor.]** Seamen distinguishing themselves in battle, or by extraordinary heroism in the line of their profession, may be promoted to forward warrant officers, upon the recommendation of their commanding officer, approved by the flag-officer and Secretary of the Navy. And upon such recommendation they shall receive a gratuity of one hundred dollars and a medal of honor, to be prepared under the direction of the Navy Department.—(17 May, 1864, c. 89, s. 3, v. 13, pp. 79, 80.)

Amendment to this section was made by act of March 3, 1901 (31 Stat., 1099), which extended the benefits of a gratuity and medal of honor under this section to "any enlisted man of the Navy or Marine Corps who shall have distinguished himself in battle or displayed extraordinary heroism in the line of his profession."

Appointment as warrant officer does not discharge man from his enlistment. (Sec. 1409, R. S.)

Appointment of warrant officers from enlisted men is further provided for by section 1417,

Revised Statutes, as amended, which provides that nothing contained therein shall be held to abrogate the provisions of section 1407, Revised Statutes.

Appointment of acting warrant officers, see note to section 1410, Revised Statutes.

By resolution May 4, 1893 (30 Stat., 741), the Secretary of the Navy was authorized to issue a rosette or knot to persons awarded medals of honor under the law embodied in this section, "to be worn in lieu of the medal, and a ribbon to be worn with the medal"; also, additional ribbons in place



- of those lost or destroyed without fault of persons to whom issued.
- Campaign badges and ribbons for officers and men of the Navy and Marine Corps who have participated in engagements and campaigns deemed worthy of such commemoration, authorized by act of May 13, 1908 (35 Stat., 132).
- Duplicate medals in lieu of lost medals issued prior to April 15, 1904, by authority of any law, for distinguished or meritorious services, may be prepared and delivered without charge to persons to whom original medals were presented, when loss was without fault of beneficiary. (Res. Apr. 15, 1904, 33 Stat., 588.)
- Foreign decoration or other thing, accepted by consent of Congress, shall not be publicly shown or exposed upon the person of the officer receiving same. (Act Jan. 31, 1881, sec. 2, 21 Stat., 604; see note to Constitution, Art. I, sec. 9, clause 8.) The acceptance and wearing of foreign medals and decorations under certain prescribed conditions was authorized by the Army act of July 9, 1918 (40 Stat., 872), which act applies to the Navy and Marine Corps. (Op. Atty. Gen., May 9, 1919, file 9644-55.)
- Life-saving medals of honor are to be awarded by Secretary of the Treasury to any persons "making signal exertions in rescuing and succoring the shipwrecked and saving persons from drowning in the waters over which the United States has jurisdiction." (Act June 20, 1874, sec. 7, 18 Stat., 127; act June 18, 1878, sec. 12, 20 Stat., 165; act May 4, 1882, sec. 9, 22 Stat., 57; act Jan. 21, 1897, 29 Stat., 494; Navy Regs., 1913, art. R-3663.)
- Life-saving medals of honor are to be awarded to any persons who, by extreme daring, endanger their own lives in saving or endeavoring to save lives from any wreck upon railroads within the United States; also, rosettes or knots to be worn in lieu of such medals, and ribbons to be worn with medals and replaced when lost or destroyed without fault of person to whom issued. (Act Feb. 23, 1905, 33 Stat., 743.)
- "Medal of honor roll" established in the Navy Department, upon which shall be entered names of persons awarded medals of honor under certain conditions, and who are certified by the Secretary of Navy to be entitled to a special pension. (Act Apr. 27, 1916, 39 Stat., 53.)
- Officers of the Navy, Marine Corps, or Coast Guard may be awarded medals of honor for distinguished conduct in battle or extraordinary heroism in the line of their profession. (Act Mar. 3, 1915, 38 Stat., 931.)
- Officers and enlisted men of the naval service may be awarded medals of honor, distinguished service medals, and Navy crosses, with rosettes or other devices to be worn in lieu thereof, under certain prescribed conditions. (Act Feb. 4, 1919, 40 Stat., 1056.)
- Pensions are to be allowed certain medal of honor men, in addition to other pensions or benefits. (Act Apr. 27, 1916, 39 Stat., 53.)
- Spanish War medals, commemorating battle of Manila Bay, were authorized for issuance to officers and men of the Asiatic Squadron under command of Commodore George Dewey, by resolution June 3, 1898 (30 Stat., 746); and medals commemorative of the naval and other engagements in the waters of the West Indies and on the shores of Cuba during said war were authorized for issuance to officers and men of the Navy and Marine Corps who participated therein, by resolution of March 3, 1901 (31 Stat., 1465), and act of February 27, 1906 (34 Stat., 35), which also authorized issuance of a bronze bar instead of a second medal to any person entitled to receive recognition in more than one instance.
- Wearing, upon occasions of ceremony, of distinctive badges adopted by certain military societies by officers and men of the Army and Navy who are members of such organizations in their own right is authorized by following statutes: Resolution September 25, 1890, 26 Stat., 681 (Mexican and Civil War societies); resolution May 11, 1894, 28 Stat., 583 (Regular Army and Navy Union of the United States); act February 2, 1901, sec. 41, 31 Stat., 758 (Spanish-American War and Philippine Insurrection societies); resolution January 12, 1903, 32 Stat., 1229 (Chinese Relief Expedition societies); resolution March 2, 1907, 34 Stat., 1423 (Army and Navy Union of the United States).
- "Forward warrant officers."—Formerly warrant officers' rooms were forward, and they were then called "forward" officers, but this name is no longer used. (Hamersly's Naval Encyclopedia, 1884, p. 834.)
- By Navy Regulations, 1913 (Art. R 3661) it is provided that seamen distinguishing themselves in battle, or by extraordinary heroism in the line of their profession, may be promoted to "warrant officers," if found fitted, etc., as provided in this section.
- Appointment of enlisted man as warrant officer not a "promotion."**—The appointment of enlisted men to be warrant or commissioned officers is not regarded as a promotion. (5 Comp. Dec., 142. But note language of sec. 1407 refers to promotion. As to difference between appointment and promotion, see note to sec. 1458, R. S.)
- The term "flag officer"** is defined by the Navy Regulations, as used therein, to mean "all officers of the line of the Navy above the rank of captain." (Art. R-1605, Navy Regs., 1913.)
- Flag officer is a generic term, signifying a naval officer of rank high enough to command a fleet or one of the subdivisions of a fleet; is the naval equivalent of the military term "general officer." The symbol of his rank is a flag, as distinguished from the broad pennant of a commodore. There are three grades of flag officers—admiral, vice admiral, and rear admiral. (Johnson's Universal Encyclopedia.)
- Previous to the abolishing of the grade of commodore, officers of that rank were included

among flag officers. (International Encyclopedia.)

Flag officers are admiral, vice admiral, rear admiral, and commodore. (Hamersly's Naval Encyclopedia.)

Falconer's Marine Dictionary mentions as flag officers, admiral, vice admiral, and rear admiral.

The King's Regulations (British Navy) do not include commodore among flag officers.

Officers not below the grade of commander may be assigned by the President to the command of squadrons with the rank and title of "flag-officers." (Secs. 1434, 1464, R. S.)

The annual Navy Register, under the heading "Flag Officers of the Navy," enters the names of line officers on the active list in the grade of "Rear Admirals." (See Navy Register, 1921, pp. 10 and 11.)

**Special examination for promotion of warrant officer appointed for heroism.**—

An enlisted man was promoted to boatswain, not by virtue of his professional qualifications for the position, but for an act of bravery in face of the enemy, as authorized by this section. In due time he was examined for promotion to chief boatswain, in accordance with the Navy personnel act of March 3, 1899, section 12 (30 Stat., 1007), as amended by act of April 27, 1904 (33 Stat., 346), providing for promotion of warrant officers after six years from date of warrant, subject to prescribed examinations. He was found not professionally qualified and suspended from promotion in accordance with section 1505, Revised Statutes. He was again examined, at the end of his period of suspension, and found not professionally qualified by reason of deficiency "in his knowledge of writing and spelling the English language to a degree that would incapacitate him from performing the duties of a chief boatswain," and also lack of "knowledge of signals and rules of the road." If this finding were approved, the candidate must "be dropped from the service" under the provisions of section 1505. However, the Navy Department "does not believe that a warrant officer of the Navy, appointed under such conditions, should be dropped from the naval service on account of a failure to pass a written professional examination." *Held*, that the finding of the examining board in this case need not be either approved or disapproved in its present form, but the record may be returned for a further examination of the candidate in the subjects of signals and rules of the road, with directions that the board omit from consideration his deficiency in "writing and spelling the English language," and amend its finding accordingly; or the record may be disapproved and the candidate ordered before another board for such examination as may be considered necessary, as the law does not prescribe the nature of the examination required, i. e., whether written or oral, the character of questions to be asked the candidate, nor the subjects covered thereby. Further, *held* that action upon the record can not be indefinitely withheld, and the officer continued in the grade of boatswain, as the law requires the entire record be presented to the President for his approval or disapproval of the finding, and

if approved, the officer must be dropped from the service. (File 26260-684, Jan. 8, 1910. The President disapproved the finding of the board and directed that the candidate be examined orally in such subjects as might be necessary to establish his professional qualifications for promotion. Upon such oral examination he was found qualified and promoted. (File 26260-684:2, June 3, 1910.)

**Marines entitled to gratuity and medal of honor under this section and not under Army statutes.**—Section 1216, Revised Statutes, as amended, which empowers the President to grant a certificate of merit to an enlisted man of the Army who has distinguished himself in the service and has been recommended therefor by the commanding officer of the regiment or the chief of the corps to which such man belongs, applies only to enlisted men of the Army and not to members of the Marine Corps who have been similarly commended. The latter are provided for by a specific provision which in its original form (sec. 1407, R. S.) conferred upon seamen a gratuity and medal of honor for distinguished and heroic service; and by the act of March 3, 1901 (31 Stat., 1099), this reward was expressly extended to any enlisted man of the Navy or Marine Corps who shall have distinguished himself in battle or displayed extraordinary heroism in the line of his profession. In view of the clear distinction created by the terms of the law between the enlisted men of the Army and of the Navy and Marine Corps, respectively, in regard to extraordinary reward for distinguished service, section 1612, Revised Statutes, assimilating the Marine Corps to the Army in respect to ordinary pay, allowances, and bounty for reenlisting, is not applicable to the special reward for gallant service so as to bring the Marine Corps within section 1216. (24 Op. Atty. Gen., 579.)

**Time of making award.**—The change in the language, "upon such promotion," found in the original law (acts July 16, 1862, and May 17, 1864), to "upon such recommendation," as found in section 1407, clearly changed, after the passage of the Revised Statutes, the conditions upon which the gratuity should be received. (3 Comp. Dec., 736.)

By section 3 of the act approved May 17, 1864 (13 Stat., 79), a seaman "distinguishing" himself in battle, etc., could receive the gratuity and medal of honor, as provided therein, only on being promoted. By section 1407 the act of 1864 was enlarged by not requiring the promotion of the seaman as a prerequisite to his receiving the gratuity of \$100 and the medal of honor. (7 Comp. Dec., 844.)

[See 24 Op. Atty. Gen., 580, holding that in the Army "a medal of honor cannot be awarded where the application or recommendation therefor is made after the officer or private has been discharged from the military service"; following 24 Op. Atty. Gen., 127, which held that "the President cannot grant a certificate of merit (to an enlisted man of the Army who has distinguished himself in service) if the recommendation therefor by the commanding officer or chief of his corps was made after the enlisted man was discharged from the military



service"; construing sections 1216 and 1285, Revised Statutes, as amended; see also, 8 Comp. Dec., 875; 9 Comp. Dec., 160.]

**Amendment of 1901 held to be retro-active.**—Neither section 1407 nor the law on which it was based included the Marine Corps; the term "seamen" has a limited application in the Navy and applies only to a certain class of enlisted men. The words of the act of 1864 and section 1407, "seamen distinguishing themselves" are prospective. Congress changed the language in the act of March 3, 1901, above quoted, to embrace any enlisted man of the Navy or Marine Corps, "who shall have distinguished himself," and provided that he should receive the benefits of gratuity and medal of honor authorized for seamen in section 1407. The act of 1901 is a beneficial statute and should be liberally construed. The words quoted, when taken in connection with the subject matter with which Congress was legislating, and the other language of the act, render the act retro-spective in its operation and give to the act the same effect as if it had been a part of section 1407 when it was enacted. The Judge Advocate General of the Navy, in an opinion construing the act of 1901, held that said act is retroactive to the date of the enactment of section 1407 of the Revised Statutes; that had Congress intended that the act of 1901 should be limited in its benefits to the future only, it is not unreasonable to suppose that it would have employed the language used in previous acts, instead of changing the language so as to be susceptible of both past and future application. (7 Comp. Dec., 844. Compare cases noted in Introduction, under "Statutory Construction," VI, C, 7; and compare, file 8627-189, May 12, 1915.)

**Jurisdiction to determine merits of case.**—By the act of 1901 it devolves upon the commanding officer, the flag officer, and the Secretary of the Navy to determine when an enlisted man of the Navy or Marine Corps shall have so distinguished himself in battle or displayed extraordinary heroism in the line of his profession as to entitle him to a medal of honor by virtue of said act, and if he is so entitled, and has received a medal of honor as provided for in said act, but has not received the gratuity of \$100, he is entitled to receive same. (7 Comp. Dec., 844.)

**Appropriation available for payment of gratuity.**—The gratuity of \$100 allowed seamen in the Navy by section 1407, Revised Statutes, is in the nature of extra compensation or extra pay, and is properly payable from the appropriation "Pay of the Navy." The act of June 19, 1878 (20 Stat., 167), which established a "General account of advances" in the Navy, and provided "that 'Pay of the Navy' shall hereafter be used only for its legitimate purpose, as provided by law," was intended to prohibit the use of the appropriation "Pay of the

Navy" for the purpose of paying in the first instance items properly chargeable to other appropriations, subject to transfer upon settlement by the accounting officers to the appropriation properly chargeable with such items, as had theretofore been the practice, and not to change the purposes for which the appropriation "Pay of the Navy" could be properly used. (3 Comp. Dec., 736.)

**Medal is personal property of man to whom awarded.**—A medal of honor is the personal property of the man to whom awarded, and the naval authorities can not prevent him from wearing same after his discharge for bad conduct or undesirability, and when he is not under naval jurisdiction. Buttons, cap ornaments, figures, letters, and chevrons, etc., are part of a marine's uniform, furnished to him under a clothing allowance, and may properly be removed and retained when he is so discharged; but medals of honor, campaign badges, and insignia received because of past meritorious services do not come under the same category. (File 26519-3:1, Dec. 19, 1914, and Jan. 13, 1915; see also 25 Op. Atty. Gen., 529, and act June 3, 1916, sec. 125, 39 Stat., 216, forbidding unauthorized wearing of uniform.)

**Withholding medal after award but prior to delivery.**—By desertion, an enlisted man forfeits his right to pay and allowances earned but not received, and the term "allowances," as defined in *United States v. Landers* (92 U. S., 77), includes medals of honor, good conduct medals, and campaign badges. Accordingly, medals of honor, awarded but not delivered, should be refused in cases of men who have subsequently deserted during the enlistment in which the award was made, even though they were not tried therefor by court-martial and dishonorably discharged. However, if the desertion occurs in a subsequent enlistment, the man does not thereby forfeit any medal or badge earned but not delivered in a previous enlistment. (File 26519-3, Dec. 1, 1914.)

"If the man is not a deserter, but his service for other reasons has not been honorable, he must, nevertheless, be given any medal of honor to which he would otherwise be entitled, his right thereto being absolute under the law." (File 26519-3, Dec. 1, 1914.)

**Whether section 1407 has been repealed as to medals.**—While the act of February 4, 1919 (40 Stat., 1056) authorizing the presentation of medals of honor, etc., to persons in the naval service does not expressly repeal the provisions of section 1407, Revised Statutes, as enlarged by the act of March 3, 1901 (31 Stat., 1099), yet as the scope of the later legislation indicates that Congress was dealing with the entire subject involved, the subsequent provision is to be regarded as a complete substitute for the earlier law. (26 Comp. Dec., 464; but see file 9644-489.)

**Sec. 1408. [Mates; rating of enlisted men as.]** Mates may be rated, under authority of the Secretary of the Navy, from seamen and ordinary seamen who have enlisted in the naval service for not less than two years.—(17 May, 1864, c. 89, s. 3, v. 13, p. 79. 3 Mar., 1865, c. 124, s. 3, v. 13, p. 539.)

Mates of steam vessels licensed under Title LII of the Revised Statutes shall be subject to draft in time of war, only for the performance of duties such as required by their license, and while performing such duties in the service of the United States shall be entitled to the highest rate of wages paid in the Merchant Marine of the United States for similar services; and if killed or wounded while performing such duties under the United States, they or their heirs, or their legal representatives shall be entitled to all the privileges accorded to soldiers and sailors serving in the Army and Navy, under the pension laws of the United States. (Act May 28, 1896, sec. 2, 29 Stat., 188, which relates also to licensed masters, pilots, and engineers.)

Pay of mates who were serving as such on August 1, 1894, was fixed by act of that date (28 Stat., 212); the pay of other mates was fixed by section 1556, Revised Statutes. The pay of all mates was increased 25 per cent by act May 13, 1908 (35 Stat., 128). (See below, "Pay and allowances of mates.")

Retirement of mates who were serving as such on August 1, 1894, was provided for by act of that date (28 Stat., 212). As to retirement of other mates, see act March 3, 1899, section 17 (30 Stat., 1008), relating to the retirement of enlisted men and appointed petty officers, and amendments to said act; see also cases noted below.

Term of enlistment in the Navy, see note to section 1418, Revised Statutes.

**Historical note.**—From the year 1799 master's mates in the U. S. Navy were warrant officers, except when acting under temporary and probationary appointments. Warrants were issued to them after at least one year's sea service under a probationary appointment. No such warrants were, however, issued after 1843, and in 1847 a regulation of the Navy Department forbade commanding officers to make such probationary appointments. (U. S. v. Fuller, 160 U. S., 593.)

On October 7, 1863, the Secretary of the Navy issued the following circular: "Seamen enlisted in the naval service may hereafter, as formerly, be advanced to the rating of master's mate, and such rating may be bestowed by the commander of a squadron, subject to the approval of the department, or by the commander of a vessel, with the previous sanction of the department. Seamen so rated will be entitled to the same pay, rank, and privileges as appointed or warranted master's mates, but will not be released by their rating from the obligations of their enlistment, and may be disrated by the order or with the sanction of the department. They will not, while rated as master's mates, be considered as subject to trial by a summary court-martial, nor be disrated by transfer, as in the case of petty officers. Seamen rated as master's mates will not be discharged with that rating, and will be considered as disrated to seamen upon the expiration of their enlistment, but upon their immediate reenlistment the rating of master's mate may be considered as renewed. The acceptance of such renewed rating will be considered

as renunciation of any claim to additional pay for reenlistment. All ratings of master's mates made by order of the commander of a squadron, and all such ratings renewed by reenlistment, will be reported to the department as early as practicable." (U. S. v. Fuller, 160 U. S., 593.)

Prior to 1843, "masters mates" were recognized by the law as warrant officers, or as "warranted master's mates," and appear to have been sometimes appointed by the President and sometimes rated (that is, promoted from lower grades) by commanding officers. But shortly after this time they seem to have fallen into disuse, and no further appointments were made, although the grade was not formally abolished and those who had been previously appointed continued to hold their offices and receive their pay. At the outbreak of the civil war, however, a great increase in all the naval forces became necessary, and the Secretary of the Navy made temporary appointments of "acting masters and master's mates," which were confirmed by act of Congress of July 24, 1861, c. 13, 12 Stat., 272. By act of March 3, 1865, c. 124, 13 Stat., 539, their names were changed to that of "mates," and the Secretary of the Navy was authorized to increase their pay and to rate them from seamen and ordinary seamen who had enlisted in the naval service for not less than two years. By the act of July 15, 1870, c. 294, 16 Stat., 321, 330, they were formally recognized as a part of the naval forces and their pay was fixed at \$900 when at sea, \$700 on shore duty, and \$500 on leave or waiting orders. These amounts were raised in 1894, 28 Stat., 212. Act of August 1, c. 176. (U. S. v. Fuller, 160 U. S., 593.)

The act of March 3, 1865 (13 Stat., 539, sec. 2), provided as follows: "That acting masters' mates shall be styled mates, and the Secretary of the Navy is hereby authorized to increase their pay to the sum of not exceeding sixty dollars per month." (9 Comp. Dec., 600.)

The appointment of mates as at present designated was first authorized by Congress in the acts of May 17, 1864, and March 3, 1865 (13 Stat., 79, 539), now embodied in the Revised Statutes, section 1408. The quota was not fixed, but from a maximum of about 842 on January 1, 1865, the number gradually diminished until July 1, 1894, when there were 27 remaining, the majority of whom had had service during the civil war. Prior to August 1, 1894, there had been no authority for the retirement of mates, but on that date a law was passed increasing the pay of mates then in the service and providing that said mates should have the benefits of retirement the same as warrant officers. (File 3031-40, Mar. 11, 1908.)

One purpose of the act of August 1, 1894 (28 Stat., 212), was, by increasing the rates of pay for active service, to make the retired pay of mates large enough to induce the retirement of these officers, which was also provided for in this act. At the time of the enactment of this legislation, it was the intention to allow the grade of mate to gradually go into abeyance, but it now appears to be the purpose of the naval authorities to revive it, which may be done under the authority conferred by section 1408 of the Revised Statutes. (4 Comp. Dec., 124. See also file 26255-14, May 4, 1909, quot-



ing debates in Congress upon act of Aug. 1, 1894, to the effect that after retirement of mates then in the service no further appointments were to be made to that grade.)

**Mates are enlisted men and should be discharged upon expiration of enlistment.**—The contract of an enlisted man is a contract to serve the Government in that capacity for a period specified. In this case, upon the expiration of the mate's term of enlistment, his contract was performed and was no longer a bar to his discharge by the Government. Strictly in this case the mates should have been given their discharges on the expiration of their enlistments. (26 Op. Atty. Gen., 319.)

"Mates in the Navy should be discharged from the service on the expiration of their enlistments." (File 3031-16, Aug. 15, 1907.)

"I do not agree with the Attorney General that strictly mates should be discharged on the expiration of their enlistments, as section 1409, supra, clearly contemplates that no further enlistment after their rating as mates is necessary for their continuance in the service as mates. Of course they *may* be discharged at any time, and the Secretary of the Navy, upon the suggestion contained in the Attorney General's opinion, has ordered the discharge of mates and has directed that they may reenlist in the rating of mate, thus establishing a new practice." (14 Comp. Dec., 457; compare Navy Department circular of Oct. 7, 1863, quoted above, under "Historical Note.")

Mates are enlisted men who are rated by the Secretary of the Navy, and such rating does not discharge them from their enlistment. They may be reenlisted and discharged the same as other enlisted men. (File 3031-57, June 25, 1908; file 7657-445, June 21, 1917.)

**Status of mates when not discharged upon expiration of enlistment.**—An enlisted man in the Navy who was appointed as mate and continued to serve as such after the expiration of his term of enlistment without receiving a discharge is still in the service and entitled to his discharge and may be permitted to reenlist with the benefits of continuous service. (26 Op. Atty. Gen., 319.)

As far as concerns any question here, the contract of an enlisted man differs in no respect from a contract by one individual to serve another during a specified period. In either case, if the man continues to perform the service until the end of the period specified, and if the other party has also performed, the contract is at an end. Under such circumstances an enlisted man could not require the Government to retain him in the service, nor would the Government ordinarily compel him to remain. This does not refer to those special circumstances, such as absence from the United States, etc., which might exceptionally affect this general statement. But in this case, as in a case of a contract between individuals, if neither party desires to terminate the service, but it continues without any express contract, it will be held to be a continuance of the service upon the same terms as before, but not for any definite period. That the mates in this case were not discharged upon expiration of their enlistments was due to the Government, which is estopped to say that those men are not in the

service as before. Being in the service and their terms of enlistment having expired, they are, of course, entitled to be discharged; and where they have rendered the continuous service required by the regulations, may be permitted to reenlist with the benefits thereof. (26 Op. Atty. Gen., 319.)

Where a mate was not discharged from the service on the expiration of his enlistment, in accordance with the Navy Department's instructions of August 15, 1907, he should be given a discharge to take effect from the date on which issued. (File 3031-19, Oct. 25, 1907.)

A mate of the Navy who was not discharged at the expiration of the term of his enlistment continues to be an enlisted man so long as he holds the position or rating of mate. (14 Comp. Dec., 457, following 26 Op. Atty. Gen., 319.)

**Mates are not "officers of the Navy."**—The act of June 30, 1876, section 1 (19 Stat., 65), provided that "officers of the Navy" should be allowed mileage while traveling on public business. Mates being rated by the Secretary of the Navy "from seamen and ordinary seamen who have enlisted in the naval service for not less than two years" (sec. 1408, R. S.), and not being otherwise appointed, can not be classed as officers within the meaning given thereto by the court in the case of *U. S. v. Mouat*, 124 U. S., 303, 307 [noted under Constitution, Art. II, sec. 2, clause 2, "I. Officers of the United States"]. In the act of 1876 Congress is presumed to have used the word in the sense in which "officers" has been defined; and there being no language in the act conveying a different sense, the court must give it the meaning the word unequivocally imports. *Held*, therefore, that claimant, a mate, was not an officer within the meaning of the law; that he was not appointed by the President or by a court of law, and that the action of the Secretary of the Navy in rating or promoting him from seaman, as provided in section 1408, was not sufficient action on the part of the Secretary as head of the Navy Department to constitute him an appointed officer, nor even an officer within the meaning of the mileage act. (*Baxter v. U. S.*, 32 Ct. Cls., 75.)

The rating of an enlisted man of the Navy as mate is not an appointment by the Secretary of the Navy. He remains in the service all the time, and this rating is in effect but an order which he must obey after being rated. The question of acceptance does not, therefore, arise, because he has no choice whether he will or will not accept the rating and perform the duties. (13 Comp. Dec., 514.)

For other cases, see note to Constitution, Article II, section 2, clause 2, under "I. Officers of the United States," and see below, "Mates are 'officers of the Navy' for certain purposes."

**Mates are not warrant officers.**—The personnel of the Navy is divided, generally, into commissioned officers, noncommissioned or warrant officers, petty officers, and seamen of various grades and denominations. That a mate is not a commissioned officer is entirely clear; it is equally clear that he is above the grade of seaman, and the real question is whether he is a noncommissioned or warrant officer, a person "temporarily appointed to the

duties of a commissioned or warrant officer" or a "petty officer." (U. S. v. Fuller, 160 U. S., 593.)

Mates are not warrant officers. The act of August 1, 1894, providing that "the law regulating the retirement of warrant officers in the Navy shall be construed to apply to the twenty-eight officers now serving as mates in the Navy" "would be quite unnecessary if, under the general provisions of law, they fell within the designation of warrant officers." (U. S. v. Fuller, 160 U. S., 593.)

The argument that a "warrant" is defined to be "an instrument conferring authority upon persons, inferior to a commission," and that mates must therefore be warrant officers, because they are appointed by the Secretary of the Navy, proves too much, since all petty officers hold some sort of designation from a superior authority; and if a warrant be an instrument inferior to a commission, this would make all petty officers warrant officers. On the other hand, as by section 1405 warrant officers are appointed by the President, it would seem to follow that if they held their appointments from an inferior authority they were not to be considered as warrant officers. After some hesitation and apparent confusion of opinion on the part of the Navy Department, this was the construction of the Revised Statutes finally settled upon by the Navy Regulations of 1893, article 28, and we think it is correct. The only difficulty in the case seems to have arisen from certain acts prior to the Revised Statutes, notably the act of 1813, which dealt with warranted "master's mates," under which mates continued to be classified by the Navy Department as warrant officers until the Revised Statutes were adopted. (U. S. v. Fuller, 160 U. S., 593. See also note to sec. 1405, R. S., under "Warrant officers not commissioned officers.")

Mates retired with the rank and pay of warrant officer, in accordance with the Attorney General's opinion, on account of Civil War service, do not obtain the grade of warrant officers, but continue to be mates and should be so designated. The Navy Department can not, therefore, confer upon them the title of a grade of warrant officers to which they do not belong. (File 3031-28, Dec. 12, 1907.)

**Mates are not "temporarily appointed to the duties of a commissioned or warrant officer."**—We think there is no authority for saying that they are temporarily appointed to the duties of a warrant officer within the exception to section 1410, Revised Statutes. While the words "acting master's mates," sometimes employed prior to the Revised Statutes, might indicate, by the use of the word "acting," a person temporarily appointed to the duties of a master's mate, officers who are recognized by law and whose pay is fixed by a permanent statute can not be said to be temporarily appointed. (U. S. v. Fuller, 160 U. S., 593.)

**Mates are "petty officers."**—Mates are petty officers, and as such are entitled to rations or commutation therefor, under sections 1579 and 1585, Revised Statutes. (U. S. v. Fuller, 160 U. S., 593, affirming 30 Ct. Cls., 108; see also *Baxter v. U. S.*, 32 Ct. Cls., 108.)

Mates had not been regarded as petty officers by the Treasury Department nor by the Navy Department prior to the adoption of the Navy Regulations of 1893. (U. S. v. Fuller, 160 U. S., 593.)

Mates are officers not holding commissions or warrants and not entitled to them within the meaning of section 1410, Revised Statutes, and are therefore petty officers, promoted by the Secretary of the Navy from seamen of inferior grades, who have enlisted for not less than two years, and they are distinguished from other petty officers only in the fact that their pay is fixed by statute instead of by the President. The exception of mates from other petty officers, in section 1569, indicates that they are petty officers. (U. S. v. Fuller, 160 U. S., 593.)

**Mates are "officers of the Navy" for certain purposes.**—Mates whose names are borne on the retired list of officers of the Navy, in accordance with the act of August 1, 1894 (28 Stat., 212), are officers of the Navy, but they are neither commissioned nor warrant officers, although with respect to the law regulating retirements, they are placed upon the same footing as warrant officers under the act of June 29, 1906 (34 Stat., 554), providing for advanced rank on retirement of officers who served during the Civil War. (26 Op. Atty. Gen., 433.)

Although commissioned officers of the Navy are appointed by the President, by and with the advice and consent of the Senate, warrant officers by the President alone, and mates by the head of a department, all are alike officers of the United States, and in accordance with the acts of 1894 and 1906, all are alike entitled to the benefits of the advancement provided for by the last-mentioned act whenever otherwise qualified. (26 Op. Atty. Gen., 433. But see above, "Mates are not 'officers of the Navy.'")

Not only is it expressly provided in section 1409 that when an enlisted man becomes a mate, his duties and rights as an enlisted man remain unaffected, but the same provision is made with respect to warrant officers; and if the fact of enlistment should be held a bar to securing the benefits of the act of 1906 in the case of mates, this might be equally true with respect to warrant officers as well. (26 Op. Atty. Gen., 433.)

Mates who were in the Navy on August 1, 1894, are officers within the meaning of section 11 of the Navy personnel act of March 3, 1899 (30 Stat., 1007), and of the act of June 29, 1906 (34 Stat., 554), both relating to advanced rank on retirement of officers who served during the Civil War. (26 Op. Atty. Gen., 615.)

"For the purposes of retirement certain mates are considered as officers." (File 3031-28, Dec. 12, 1907.)

Article I-4912 (3), Naval Instructions, 1913, provides for the witnessing of signatures, and states that "in the case of enlisted men each signature shall be witnessed by an officer." Article R-4384 (1), Navy Regulations, 1913, requires that pay receipts shall bear "an officer's signature as witness to the genuineness of that of the man," and that "no officer shall witness a receipt unless it be actually signed in his presence and he be personally acquainted



with the signer." *Held*, "as it is not specified that the witnessing officer be of any particular rank, but merely that the signature shall be witnessed by an officer, and as it was decided by the Attorney General (26 Op. Atty. Gen., 433), that a mate is an officer of the Navy, the department sees no objection to the witnessing of the pay receipts of enlisted men by a mate in the Navy." (File 4856-15, June 18, 1913.)

In the summary court-martial case of W. J. Stookey, chief commissary steward on the receiving ship at Mare Island, in 1908, Mate G. Johnson was recorder of the court. Accused applied to have the proceedings set aside on the ground that Mate Johnson was not an officer, and that article 27 of the Articles for the Government of the Navy (sec. 1624, R. S.), required an "officer" to act as recorder; that the court-martial was therefore illegal. The point was decided that Mate Johnson was an officer, and that the court was therefore legal. Accused was discharged pursuant to sentence. (File 26287-47, Aug. 22, 1908; see also file 4856-15, May 14, 1913, letter from captain of the yard, navy yard, Mare Island, Cal.)

"Mate Johnson has acted as recorder of several courts-martial recently, and performed this duty for a long time on the receiving ship, which would seem to establish the point definitely." (File 4856-15, May 14, 1913, letter from captain of the yard, navy yard, Mare Island, Cal.)

Article R-4512 (1), Navy Regulations, 1913, provides that certain "officers," including mates on duty at certain stations or any such "officers" on special duty or on detached service on shore, are entitled to commutation for quarters, etc.

**Certain mates held to be both "officers of the Navy" and "enlisted men."**—Mates who were in the Navy on August 1, 1894, are officers of the Navy for the purpose of retirement, although enlisted men, and entitled as such to discharge upon expiration of enlistment. A person can, under the provisions of sections 1409 and 1410, Revised Statutes, be at the same time an officer of the Navy and an enlisted man. (26 Op. Atty. Gen., 433.)

**"The status of mates in the Navy is in the highest degree anomalous."**—They have been considered as petty officers, appointed from the enlisted force, and regarded as enlisted men. This view has been re-enforced by an opinion of the Attorney General, dated July 22, 1907, in which it is *held* that a man who was enlisted for service in the Navy for a period of four years and was appointed as mate and continued to serve as such after the expiration of his term of enlistment without receiving any discharge, may have his appointment as mate revoked and be permitted to reenlist, with the benefit of continuous service. This condition has, however, been complicated by a later opinion, given October 15, 1907, in which the Attorney General holds that certain mates whose names are borne on the retired list of the officers of the Navy, having been placed there in accordance with the statute approved August 1, 1894 (28 Stat., 212), are entitled to advancement in accordance with the provisions of the act of June 29, 1906 (34 Stat., 554), to the lowest grade of warrant officers. Hence, for the purposes of

retirement, certain mates are considered as officers \* \* \*. Also, it may be stated that, although mates are considered as enlisted men for the purposes of discharge and reenlistment, yet they are debarred from the benefits of the additional pay allowed other enlisted men for succeeding reenlistments. They are usually appointed from chief petty officers having long and creditable records, who may receive a maximum pay of approximately \* \* \*, but upon appointment as mate their pay drops immediately to \* \* \*, notwithstanding the greater responsibilities of the position." (File 3031-32, Feb. 12, 1908.)

There are no similar grades in the Army to those of warrant officers and mates. (File 3031-40, Mar. 11, 1908.) [By act of July 9, 1918 (40 Stat., 881), the grades of master, first mate, second mate, chief engineer, and assistant engineer were established in the Army Mine Planter Service of the Coast Artillery Corps of the Regular Army, "who shall be warrant officers appointed by and holding their offices at the discretion of the Secretary of War." By act of June 4, 1920 (41 Stat., 761), the appointment was authorized of not more than 1,120 warrant officers, including band leaders.]

**Retirement of mates who were in the service August 1, 1894.**—There was doubt whether the law relating to the retirement of officers of the Navy [secs. 1443-1455, 1588, R. S.], applied to any but commissioned officers, but this doubt was, by the Navy Department, resolved in favor of warrant officers, which construction was confirmed by the Supreme Court in *Brown v. U. S.*, 113 U. S., 568. However, it was never held to apply to mates; and in order that the 28 officers then serving as mates might have the benefit of its provisions, the act of August 1, 1894 (28 Stat., 212), was passed. This act went no further than merely to extend the provisions of the retirement law to these mates, and had not the effect of promoting them on retirement to the rank and pay of retired warrant officers, but entitled them to be placed on the retired list with the rank of mate and three-fourths the sea pay of that grade. (27 Op. Atty. Gen., 334.)

Doubtless "warrant officers" were specially mentioned in the act of August 1, 1894, because they were the only noncommissioned officers to whom the statute had been construed to apply, and it was intended thereby to emphasize the purpose that section 1588, Revised Statutes, was to be just as applicable to these mates as to warrant officers, by entitling them to three-fourths of the pay of their grade, and not to confer upon them on retirement the retired pay of an advanced grade. Furthermore, this act was thus construed by the Navy Department ever since its passage, which fact would be controlling in case of doubt. (27 Op. Atty. Gen., 334.)

Prior to the act of August 1, 1894, mates had not enjoyed the privilege of retirement. The "law regulating the retirement of warrant officers," which by the terms of this act was to be construed to apply to certain mates, is contained in sections 1443-1455, Revised Statutes. (See *Brown v. U. S.*, 18 Ct. Cls., 537; 113 U. S., 568.) The retired pay of officers of the Navy at the time of the enactment of this law was fixed

by section 1588 of the Revised Statutes. Were the question a new one, it would still seem plain that the purpose of the act of 1894 was merely to extend to mates the same privilege of retirement, with three-fourths of their sea pay, that was enjoyed by warrant officers of the Navy. (File 26255-14, May 4, 1909.)

**Retirement of mates who served during the Civil War.**—The mates who were in the service on August 1, 1894, were placed by the act of that date on the same footing as warrant officers for purposes of retirement; and when such mates had creditable Civil War service, they are entitled, in the discretion of the President, by and with the advice and consent of the Senate, to the benefit of the advancement provided in the case of retired officers under the circumstances enumerated in the act of June 29, 1906 (34 Stat., 554). While the effect of such advancement will not be to place them in a different grade, they will obtain the rank and retired pay belonging to the next higher grade, being that of the lowest grade of warrant officers. (26 Op. Atty. Gen., 433.)

The retired pay of a mate in the Navy, whether retired under section 11 of the Navy personnel act of March 3, 1899 (30 Stat., 1007), or under the act of June 29, 1906 (34 Stat., 554), is the retired pay of a warrant officer with the same length of previous service, which is three-fourths of the sea pay of such officer. (26 Op. Atty. Gen., 599.)

The only mates who have the benefits of retirement with the rank and retired pay of warrant officers, are those who were in the service at the time of the passage of the act approved August 1, 1894, and who had creditable Civil War service in accordance with the terms of the act of June 29, 1906 (34 Stat., 554). (File 3031-38, Mar. 6, 1908.)

Where a mate was retired by reason of age, in accordance with the act of August 1, 1894, but was not on such retirement advanced in rank on account of Civil War service, in accordance with section 11 of the Navy personnel act of March 3, 1899 (30 Stat., 1007); and thereafter his retirement was corrected in conformity with the Attorney General's opinion (26 Op. Atty. Gen., 433) above noted: *Held*, that he should be given the advancement from the date of his retirement (September 26, 1899) and not from the date of the Navy Department's letter to him of November 26, 1907. (26 Op. Atty. Gen., 599.)

Mates who were in the service on August 1, 1894, were entitled to retirement by act of that date under the following circumstances: (a) After 40 years' service; (b) upon reaching the age of 62 years; (c) for physical disability incurred in line of duty (file 3031-40, Mar. 11, 1908). By section 17 of the Navy personnel act of March 3, 1899 (30 Stat. 1008), provision was made for the retirement of enlisted men, upon their own application, after thirty years' service. This law was applicable to mates who were not already entitled to retirement, under laws relating to officers. [See cases noted below.] On March 31, 1899, a mate (one of those in the service on Aug. 1, 1894) was, upon his own application, placed upon the retired list in accordance with section 17 of the Navy personnel act, the Navy Department deciding

that he was entitled to the benefits of retirement as an enlisted man after thirty years' service, although he could not otherwise have been retired (as an officer) until April 16, 1902, the date on which he would have attained the age of 62 years. Thereafter it was contended by this mate that he was erroneously retired by the Navy Department under the law relating to enlisted men, and was entitled to retirement under the laws relating to warrant officers, which would give him the retired pay of advanced rank on account of civil war service: *Held*, that his contention should be sustained, and his retirement corrected so as to show him retired with the rank and retired pay of the next higher grade, namely, that of a warrant officer having twelve years' service, in accordance with the act of August 1, 1894, and section 11 of the Navy personnel act of March 3, 1899, and that he should be given the benefit of such increased rank and pay from April 16, 1902, the earliest date on which he could have been retired under the laws relating to officers. By accepting the erroneous decision of the Navy Department, this mate did not waive or forfeit any legal right which he had to be retired otherwise. (26 Op. Atty. Gen., 615; 27 Op. Atty. Gen., 66.)

The mates held by the Attorney General to be entitled to the rank and pay of "the lowest grade of warrant officer," under the act of June 29, 1906 (34 Stat., 554), should be nominated to have the "rank and retired pay of a warrant officer in the Navy," and not to have the rank and retired pay of any particular grade of warrant officer, inasmuch as all warrant officers are on the same footing as relates to rank, pay, and allowances. (File 3031-21, Nov. 20, 1907.)

The nomination of a deceased mate, in whose case the President approved a recommendation that he be advanced one grade under the act of June 29, 1906 (34 Stat., 554), but who died after such approval but prior to nomination, should read in the usual form, with the addition thereto of the word "died," with the date on which death occurred. (File 3031-21, Nov. 20, 1907; see also 25 Op. Atty. Gen., 312, noted under sec. 1458, R. S., "Death of officer before promotion complete.")

**Retirement of mates as enlisted men.**—Mates rated as such since August 1, 1894, are entitled to retirement under the provisions of an act of Congress approved March 2, 1907 (34 Stat., 1217), providing for the retirement of enlisted men after thirty years' service. (File 3031-17, Sept. 13, 1907.)

A mate whose rating as such was subsequent to the passage of the act of August 1, 1894 (28 Stat., 212), is an "enlisted man" within the meaning of the act of March 2, 1907 (34 Stat., 1217), providing for the retirement of enlisted men of the Army, Navy, and Marine Corps. The rating of an enlisted man as mate did not discharge him from his enlistment, and the term "enlisted man" in the general sense in which it is used in the above act is broad enough to bring him within its provisions. (18 Comp. Dec., 575.)

Mates may be retired after thirty years' service under the acts of March 3, 1899, section 17 (30 Stat., 1008), and March 2, 1907 (34 Stat.,



1217); there is no restriction as to age. (File 3031-38, Mar. 6, 1908.)

The provisions of the Revised Statutes relating to the retirement of commissioned officers (secs. 1448-1455) have been held to apply to warrant officers; but in order that they might apply to mates who were in the service on August 1, 1894, a special act approved on that date was required. Mates who were not in the service on that date were not as such eligible to retirement until the passage of the act of March 3, 1899, section 17 of which provided for the retirement of enlisted men or appointed petty officers after thirty years' service. The manner of computing the 30 years' service was somewhat modified by an act approved June 22, 1906, the provisions of which are embodied in the act of March 2, 1907 (34 Stat., 1217). The act of 1899 provides specially for the retirement of enlisted men and appointed petty officers; the act of 1907, which has been held to apply to mates, refers to enlisted men, with no mention of officers or petty officers. Commissioned and warrant officers were obviously not entitled to thirty-year retirement by the language of the act of 1899 as modified by the act of 1907, and did not become entitled thereto until the act of May 13, 1908. (File 3031-57, June 25, 1908.)

Inasmuch as retirement for enlisted men and appointed petty officers after thirty years' service is covered in prior acts which specifically refer to such persons, and as it has already been held that mates are eligible to retirement thereunder, it must be held that the words "an officer of the Navy," in the thirty-year retirement clause of the act of May 13, 1908, did not include mates appointed since August 1, 1894. Accordingly *held* that such mates may be retired in conformity with the laws relating to enlisted men, but may not retire as officers under the thirty-year retirement clause in the act of May 13, 1908; and that such mates may not on retirement be given the rank of the next higher grade on account of Civil War service, as provided for officers by the act of June 29, 1906. (File 3031-57, June 25, 1908.)

**Waiver of retirement privileges.**—A mate appointed since August 1, 1894, but who had service as an enlisted man during the Civil War, not being entitled to retirement with the rank of the next higher grade, as authorized by law for commissioned and warrant officers having Civil War service, may be appointed a boatswain shortly before retirement on condition that, in consideration of said appointment and his retirement as boatswain, he waive his right to retirement with the rank of chief boatswain, to which, upon appointment as boatswain, he would legally become entitled on account of his Civil War service. (File 3031-57, July 31, 1908, case of Mate Thomas G. McDonough, appointed a boatswain in the Navy Aug. 6, 1908, and retired as boatswain Feb. 6, 1909, upon his own application after 30 years' service. Compare *U. S. v. Andrews*, 240 U. S., 90.)

By accepting retirement, under an erroneous decision of the Navy Department, with a lower rank and rate of pay than that to which he was legally entitled, a mate did not waive or forfeit any legal right which he had to be retired other-

wise; and his retirement should be corrected, retroactively, so as to confer upon him the higher rank and pay to which he was entitled. (26 Op. Atty. Gen., 615; 27 Op. Atty. Gen., 66, noted more fully above, under "Retirement of mates who served during the Civil War.")

**Pay and allowances of mates.**—The pay of mates is fixed by law; those in the service August 1, 1894, by the act of that date (28 Stat., 212); those appointed since, by section 1556 of the Revised Statutes. When a man is appointed a mate his pay does not depend upon his length of service, it merely depends upon the character of his duty—whether at sea, on shore, or on leave, or waiting orders; he receives no increase for longevity, as do the warrant and other officers. (File 3031-40, Mar. 11, 1908. See also 4 Comp. Dec., 124. The pay of all mates was increased 25 per cent by act of May 13, 1908, 35 Stat., 128.)

Although mates are considered as enlisted men for the purposes of discharge and reenlistment, yet they are debarred from the benefits of the additional pay allowed other enlisted men for succeeding reenlistments. They are usually appointed from chief petty officers having long and creditable records, whose pay upon appointment as mate may immediately be reduced, notwithstanding the greater responsibilities of the position. (File 3031-32, Feb. 12, 1908.)

The pay of an enlisted man as mate begins on the date of his rating as mate, or on the date such rating is made to take effect, without regard to the date of the administering to him of an oath for the performance of his duties as such; his rating is not an appointment, but an order which he must obey, and which he has no choice but to accept. (13 Comp. Dec., 514.)

Where a mate of the Navy, upon being honorably discharged while serving as such after the expiration of the term of his enlistment, reenlists in the rating of mate within four months from such discharge, he is entitled to the four months' gratuity pay provided by section 1573, Revised Statutes, as amended by act of March 3, 1899, computed on the pay he was receiving at the time he was discharged. (14 Comp. Dec., 457; file 3031-19, Oct. 25, 1907; Comp. Dec., Feb. 27, 1908, file 3031-35, 84 S. and A. Memo., 589.)

Mates in the Navy are petty officers, and their pay being specifically fixed by section 1556 of the Revised Statutes, and any additional pay or allowance thereto being prohibited by section 1558 of the Revised Statutes, they are not entitled upon reenlistment within the provisions of section 1573 of the Revised Statutes, as amended by act of March 3, 1899, in the rating of mates, to the increase of pay per month provided therein for enlisted men who reenlist within such provisions. (14 Comp. Dec., 457; see also 9 Comp. Dec., 600; Comp. Dec., Feb. 27, 1908, file 3031-35, 84 S. and A. Memo., 589.)

Mates of the Navy being specifically excepted from the provisions of section 1569 of the Revised Statutes, under authority of which the extra compensation for good-conduct medals and bars, seamen gunners' certificates, and petty officers' certificates, is provided, they are not entitled to such extra compensation. (14 Comp. Dec., 457; see also 9 Comp. Dec., 600, and file 3031-7, Jan. 12, 1907.)

Mates are not entitled to one-fourth additional pay for detention beyond expiration of enlistment, as provided by section 1422, Revised Statutes, as amended, for the reason that this is additional pay to that specifically provided by section 1556, Revised Statutes, and therefore prohibited by section 1558, Revised Statutes. Also, the detention of mates who were not discharged upon expiration of enlistment, was not such a detention in the service as contemplated by the statute. (14 Comp. Dec., 457.)

A mate honorably discharged on account of the expiration of his enlistment, while serving after the expiration of the term of his enlistment, is entitled to travel allowance on discharge provided for enlisted men by act of June 29, 1906 (34 Stat., 555). This is not pay, but a provision to assist enlisted men of the Navy to return to their homes or places where the Government took them into the service; is a beneficial statute, and following the rule in such cases, the Comptroller has been liberal in construing it and other similar provisions for enlisted men of the military service. (14 Comp. Dec., 457.)

Mates, although their pay is fixed by law, instead of by the President, are in other respects entitled to the emoluments of petty officers, among which are rations. The exception of mates from section 1569, Revised Statutes, merely indicates that Congress, having already fixed their pay, such pay need not be fixed by the President. But they are still within the exception of "petty officers, seamen, and ordinary seamen attached to receiving ships," who are inferentially allowed a ration by section 1579, and the exception of petty officers, from those who are not entitled to rations under section 1579, indicates that as such they are entitled to a ration. (*U. S. v. Fuller*, 160 U. S., 593.)

In the case of *United States v. Fuller* (160 U. S., 593), affirming the judgment of the Court of Claims (30 Ct. Cls., 108), it was held that "mates are petty officers, and as such entitled to rations or commutation therefor." The claimant, therefore, being a petty officer, clearly has a right to recover the commutation price of a Navy ration while serving as a mate on board a receiving ship. (*Baxter v. U. S.*, 32 Ct. Cls., 75; 12 Comp. Dec., 728.)

The status of a mate as to rations, or commutation thereof, while serving at sea, is not affected by his discharge and reenlistment in the rating of mate. (Comp. Dec., Feb. 27, 1908, file 3031-35, 84 S. and A. Memo., 589.)

While on shore duty a mate would be entitled, while performing such duty, to commutation of quarters, provided he did not occupy public quarters. (Comp. Dec., Feb. 27, 1908, file 3031-35, 84 S. and A. Memo., 589.)

The act of March 3, 1901 (31 Stat., 1107), provided under the head of Pay of the Navy, for "commutation of quarters for officers on shore, not occupying public quarters, including \* \* \* mates, who shall hereafter receive the same commutation for quarters as second lieutenants of the Marine Corps." (12 Comp. Dec., 728.)

For other references to the pay of mates, see note to section 1556, Revised Statutes.

**Mates eligible for appointment and pay as Navy mail clerks.**—"A mate being an enlisted man is eligible for selection and designation as Navy mail clerk under the act of May 27, 1908" (35 Stat., 417). It has been held that, as the pay of mates is fixed by section 1556, Revised Statutes, they are not entitled to any additional pay as enlisted men or as mates, by reason of section 1558, Revised Statutes. The prohibition in the latter section, however, applies only to compensation for performance of duties as mate, and the additional allowances refer to such allowances for duties required by the enlistment and rating as mate. Navy mail clerks and assistant Navy mail clerks perform new and additional duties, which are not those of enlisted men or of mates, and were not contemplated by the prohibition contained in section 1558. Accordingly, *held*, that a mate is entitled to receive the pay provided for Navy mail clerk, when duly designated as such, in addition to his pay as mate. (Comp. Dec., Oct. 21, 1908, 92 S. and A. Memo. 870.)

**Revocation of appointment.**—The appointment of a mate should not be revoked, unless requested by the holder. If so requested, it may be revoked, in which case he would be considered as holding a permanent appointment in the rating from which last advanced, and if discharged in that rating, should be reenlisted therein. (File 3031-19, Oct. 25, 1907.)

**Mates cannot legally be rated from men enlisted for less than two years.**—"To entitle an enlisted man to the pay provided by section 1556 of the Revised Statutes for mates, he must have been rated during an enlistment of not less than two years. A man rated as mate on August 24, 1897, while serving in an enlistment of one year, was not entitled to the pay of mate on that rating. He was actually discharged from his enlistment on December 13, 1897, and served thereafter under his appointment as mate, without reenlistment, until November, 1907. As he was recognized by the Navy Department as a mate and performed the duties of a mate, he may be considered as a de facto mate during that service (Aug. 24, 1897 to Nov., 1907); and having received the pay provided by law for a mate, he is, for the reasons stated in the case of *Badeau v. U. S.* (130 U. S., 439), entitled to retain it. (Comp. Dec., Jan. 30, 1908, 83 S. and A. Memo., 565, 566; see also note to sec. 236, R. S., under VIII (C), "Mistake of law.")

**Appointment as warrant officers.**—Mates appointed to the grades of warrant officers are not "promoted" to said grades, but are "appointed" thereto, in the same manner as any enlisted man of the Navy might have been appointed. The grade of boatswain is not the next higher grade above the rating of mate, any more than is any other warrant grade, or in fact any other corps of the Navy. (File 3031-12, July 10, 1907. For other cases see note to sec. 1453, R. S., under "'Promotion' and 'appointment' compared.")

The Navy Department does not deem it desirable to make an exception in the case of a mate who makes application to take the examination for boatswain in the Navy, and who, at



the date of the next examination, would be about 9½ years above the maximum age prescribed for candidates for that grade. (File 3031-55, June 16, 1908; see note to sec. 1405, R. S., under "Ages of candidates for appointment.")

A mate may be appointed a boatswain a few months before he becomes eligible for retirement, on condition that he waive his right to

retirement with the rank of chief boatswain on account of civil war service, to which he would become entitled upon his appointment as boatswain. (File 3031-57, July 31, 1908, case of Thomas G. McDonough, appointed a boatswain in the Navy Aug. 6, 1908, and retired as boatswain Feb. 6, 1909, upon his own application after 30 years' service. Compare U. S. v. Andrews, 240 U. S., 90.)

**Sec. 1409. [Mates and warrant officers; not discharged from enlistment.]**

The rating of an enlisted man as a mate, or his appointment as a warrant officer, shall not discharge him from his enlistment.—(17 May, 1864, c. 89, s. 3, v. 13, p. 79. 3 Mar., 1865, c. 124, s. 3, v. 13, p. 539.)

**Historical note.**—Section 3 of the act of March 3, 1865 (13 Stat., 539), provided "that hereafter mates may be rated, under authority of the Secretary of the Navy, from seamen and ordinary seamen who have enlisted in the naval service for not less than two years, and such rating of an enlisted man, or his appointment as an officer, shall not discharge him from his enlistment." The substance of this section was embodied in sections 1408 and 1409 of the Revised Statutes, the portion relating to the appointment of an enlisted man as an "officer" being interpreted to mean his appointment as a "warrant officer." (9 Comp. Dec., 600.)

**Sec. 1409 does not apply to appointments as commissioned officers.**—A man while serving an enlistment as chief yeoman was appointed paymaster's clerk and then given an appointment as assistant paymaster. *Held*, that the continuity of his service was broken by his acceptance of a commission; that his enlistment was as effectually terminated by his appointment as assistant paymaster as though he had served out the term for which he enlisted; and that "it certainly can not be ruled that an appointment as a commissioned officer causes no separation from an enlisted service under which the appointee was serving, and that no break in the enlisted service would be occasioned if the service as commissioned officer continued for four months." (Comp. Dec., Nov. 29, 1899, 11 MS. Comp. Dec., 628; and Feb. 15, 1900, 12 MS. Comp. Dec., 547; see also Comp. Dec., June 24, 1903, 27 S. and A. Memo., 222.)

Service as a commissioned officer is incompatible with service as an enlisted man. (Comp. Dec., June 24, 1903, 27 S. and A. Memo., 222.)

The act of May 22, 1917 (40 Stat., 84), contemplates the preservation of the enlisted status of men temporarily appointed to warrant and commissioned rank under that act; otherwise there would be nothing to which they could "revert" upon the termination of their temporary appointment as required by section 7 of said act. Accordingly, there is no legal objection to providing that enlisted men, temporarily appointed warrant or commissioned officers, shall not be discharged from their enlistments upon the acceptance of such appointments; and, if their enlistments expire while holding under temporary appointments as warrant or commissioned officers they shall not be discharged until the termination of their temporary appointments. Upon reverting to his

former status, if his enlistment has expired while holding such temporary appointment, the man will immediately be given his discharge and final settlement. The act thus applied creates the apparent anomaly of a person occupying the dual status of officer and enlisted man, but such a status is not unknown to the naval service (citing sec. 1409, R. S.). Withholding their discharges and final settlements under such circumstances does not amount to detaining them in the service; by their acceptance of such appointments under the conditions imposed by the statute they are deemed to have voluntarily waived their right to discharge upon the expiration of their terms of enlistment and to have accepted all of the conditions imposed by the statute, including the requirement as to reverting upon the termination of their temporary appointments. (File 7657-445, June 21, 1917.)

**Applies only to mates and warrant officers.**—The Navy Regulations, 1900, article 861, provided: "When enlisted men accept \* \* \* appointments as paymasters' clerks their enlistments terminate on the date of taking the oath under such \* \* \* appointments, and service thereunder for a longer period than four months debars them from all benefits of previous enlisted service in computing increased pay under subsequent enlistments." An enlisted man who accepted an appointment as paymaster's clerk while this regulation was in force thereby terminated his enlistment. Section 1409 of the Revised Statutes is not applicable to this case, as the claimant, a paymaster's clerk, is neither a mate nor warrant officer. (10 Comp. Dec., 529. Note: The title "paymaster's clerk" was changed to "pay clerk" and the status of pay clerks changed to that of warrant officers, by act Mar. 3, 1915, 38 Stat., 942, which also created a subordinate grade designated as "acting pay clerk" and the commissioned grade of chief pay clerk. The acceptance of an appointment as acting pay clerk ipso facto terminates the appointee's enlistment. File 26254-2020:4, Mar. 15, 1918; C. M. O 30, 1918, p. 24.)

**May be extended by regulations to include others than mates and warrant officers.**—The Navy Regulations, 1896, article 821, provided that "an enlisted man rated as a mate or appointed a warrant officer or clerk is not thereby discharged from his enlistment." This regulation was a repetition of section 1409

with the addition of the word "clerk." A departmental regulation has the force of law when not contrary to positive law, and there is no such law that would negative the regulation quoted. Accordingly, *held* that an enlisted man appointed a paymaster's clerk while this regulation was in force, and who continued to serve out the unexpired portion of his enlistment after his appointment as paymaster's clerk was revoked, was continuously in the service as an enlisted man and that there was no break in his enlistment by reason of his service as temporary paymaster's clerk, but that the service was fully authorized by article 821 of the Navy Regulations then in force, and therefore the appellant is entitled to the benefits of continuous service authorized by section 1573, Revised Statutes, as amended by section 16 of the Navy personnel act of March 3, 1899 (30 Stat., 1008). (Comp. Dec., June 24, 1903, 27 S. and A. Memo., 222. See note to preceding paragraph concerning change in status of paymaster's clerks.)

Clerical service is not incompatible with service as an enlisted man. Enlisted men are frequently required to perform clerical duties, and in such cases in the Army are entitled to extra pay for such duty. (Comp. Dec., June 24, 1903, 27 S. and A. Memo., 222.)

**Regulation can not extend provisions of this section to include other than mates and warrant officers.**—Statutory law can not be amended by regulation, and it is well settled that where certain grants are made, or privileges conferred by statute, such grants or privileges can not be enlarged or extended by regulation to persons or classes to whom they are not extended by the statute. It is not within the power of the executive to write the words "or paymaster's clerks" into section 1409. That would be legislation. The history of the regulations shows that the Navy Department formerly attempted to do this by framing a regulation in the terms of section 1409 except that the words "or clerk" were inserted after the words "warrant officer"; but in a later edition of the regulations this was corrected. The views expressed by the Comptroller of the Treasury in his decision of June 24, 1903 [noted above], are contrary to this conclusion, but nevertheless *held*, that the power to extend such a statutory provision by means of a Navy regulation, although it would be convenient to do so in many instances, does not exist; further, *held*, that the existing regulation, which provides that when enlisted men accept appointments as paymaster's clerks their enlistments terminate on the date of taking the oath under such appointments, can not be waived in an individual case, because, while any Navy regulation may be annulled, amended, suspended, or waived by the same power that framed it in the first instance, this rule is subject to the proviso that such action must not be in conflict with any statute. (File 8627-03, Dec. 30, 1903; see, generally, note to sec. 161, R. S.)

**Revocation of warrant officer's appointment.**—The President has no power to revoke the warrant of a boatswain in the Navy and discharge him from the service, without the sentence of a court-martial, in disregard of

sections 1229 and 1624 (art. 36) of the Revised Statutes. (28 Op. Atty. Gen., 325.)

A boatswain is an officer of the Navy within the restrictions of the above sections of the Revised Statutes (1229 and 1624, art. 36), concerning dismissal. (28 Op. Atty. Gen., 325; see also 15 Op. Atty. Gen., 635.)

The tenure of a boatswain's office is fixed by legislation. After it was thus established, it was not within the power of the President to limit it by the incorporation in the warrant of the provision that it was to continue in force during the pleasure of the President. The revocation of the warrant effects a discharge from the office, and, by a reasonable construction of sec. 1229, a dismissal from service. (28 Op. Atty. Gen., 325.)

The question is not affected by the provisions of section 1409. A warrant officer may, before the term of his enlistment has expired, by the sentence of a court-martial, or by resignation of his office, be returned to the condition of an enlisted man; but there is no statutory authority for the President to relegate to his former inferior position a regularly warranted officer, who has been promoted from his place as an enlisted man, for the purpose of discharging him. This is contrary to the spirit, if it is not to the very letter, of the law of section 1229, Revised Statutes. (28 Op. Atty. Gen., 325.)

"While it would be most desirable that authority should be given to the President to revoke the commission or warrant of an officer convicted of an offense and sentenced to imprisonment by a civil court, yet no such exception is found in the law to the sweeping provisions of section 1229." (28 Op. Atty. Gen., 325.)

**Revocation of rating as mate.**—See note to section 1408, Revised Statutes.

**Reduction of warrant officer to ordinary seaman.**—Under article 9 of the Articles for the Government of the Navy (sec. 1624, R. S.), an officer who absents himself from his command without leave may, by the sentence of a court-martial, be reduced to the rating of an ordinary seaman. Inasmuch as such a sentence deprives a warrant officer of his position as a warrant officer in the U. S. Navy, and as article 53 (sec. 1624, R. S.) provides that no sentence extending to the dismissal of a commissioned or warrant officer shall be carried into execution until confirmed by the President, it is deemed advisable as a matter of policy, although not specifically required by the statute, to submit the record of the general court-martial in such case to the President for confirmation of the sentence adjudged. (File 26251-11440, Mar. 30, 1916; C.M.O. 11-1916.) [In this case the sentence was confirmed by the President April 3, 1916; shortly thereafter, the warrant officer thus reduced to ordinary seaman was tried by general court-martial as an ordinary seaman on other charges, sentenced to be dishonorably discharged from the Navy, and upon approval of the sentence by the Secretary of the Navy it was duly carried into effect. G. C. M. Rec., No. 31934.]

**Deposit accounts of mates and warrant officers.**—Upon the appointment of an enlisted man as a mate, his deposit account should



be treated as though his enlistment had expired, i. e., he should be paid principal and interest to the date of his appointment as mate. (File 16407, July 28, 1903, and 3031-5, Nov. 27, 1906, construing act Feb. 9, 1889, sec. 1, 25 Stat., 657. Note: These rulings were made before the practice of discharging mates upon expiration of enlistment, as explained in note to sec. 1408, R. S., was commenced.)

While serving under an acting appointment as warrant officer, the status of an enlisted man clearly continues as that of an enlisted man; he must qualify for a permanent appointment by probationary service, or otherwise would be discharged from the service as an enlisted man. He should accordingly, while serving under such acting appointment, be permitted to make deposits, and to draw interest on deposits already made. Upon permanent appointment his deposit account should be treated as though his enlistment had expired, that is, he should be paid principal and interest to the date of his appointment, as was held by the Navy Department in the case of mates, before the present practice was commenced of discharging and reenlisting them. (File 26254-2020, June 6, 1916.)

The act of February 9, 1889 (25 Stat., 657), provides that deposits may be made by "any enlisted man or appointed petty officer of the Navy." Had it been intended to include warrant officers it would undoubtedly have specifically so provided, as it did with petty officers. Warrant officers are not in practice discharged after a fixed period of service, but their tenure of office is practically for life, unless sooner terminated by resignation, sentence of court-martial, or in other exceptional manner. While section 1409, Revised Statutes,

provides that the appointment of an enlisted man as a warrant officer "shall not discharge him from his enlistment," nevertheless, since the act of February 9, 1889, does not include warrant officers, it is necessary that upon appointment as such their deposits, made while enlisted men, be returned in the same manner as though discharged; otherwise the men might be deprived of deposits for life. (File 26254-2020, June 6, 1916.)

**Warrant officers not regarded as enlisted men.**—In the case of an enlisted man appointed as warrant officer, although his appointment does not discharge him from his enlistment, he is not reenlisted upon the expiration of his enlistment contract, but continues on under his sole status as warrant officer. He is not regarded as an enlisted man after he gets his warrant, even before the expiration of his enlistment. There is no reason for preserving his enlisted status after he has received his warrant, because he does not at any time, by operation of law, revert to his previous status as an enlisted man. (File 7657-445, June 21, 1917.)

**Discharge and reenlistment of acting warrant officer.**—Inasmuch as section 1409 clearly contemplates the concurrence of the status, duties, and obligations of an enlisted man and that of a warrant officer, and in view of the practice of the Bureau of Navigation in the matter, *held*, that there is no objection to the reenlistment of an acting warrant officer whose term of four years has expired; this with a view to preserving to the man his continuous service should he fail to be warranted. (File 7267-03.)

**Discharge and reenlistment of mates.**—See note to section 1408, Revised Statutes.

**Sec. 1410. [Acting officers; petty officers; secretaries and clerks.]** All officers not holding commissions or warrants, or who are not entitled to them, except such as are temporarily appointed to the duties of a commissioned or warrant officer, and except secretaries and clerks, shall be deemed petty officers, and shall be entitled to obedience, in the execution of their offices, from persons of inferior ratings.—(17 July, 1862, c. 204, s. 18, v. 12, p. 610.)

Acting appointments as pay officers. See section 1381, Revised Statutes.

Acting assistant surgeons. See section 1411, Revised Statutes.

Acting chaplains. See act of June 30, 1914 (38 Stat., 403).

Acting ensigns for engineering duty only were authorized by act of August 29, 1916 (39 Stat., 580).

Acting ensigns and acting lieutenants (junior grade) in the Navy, and acting second lieutenants and acting first lieutenants, in the Marine Corps, for aeronautic duty only, were authorized by act of August 29, 1916 (39 Stat., 583).

Acting flag officers. See sections 1434 and 1464, Revised Statutes.

Acting machinists. See act of March 3, 1899, section 15 (30 Stat., 1007).

Acting pay clerks. See act of March 3, 1915 (38 Stat., 942).

**Acting warrant officers.**—The Secretary of the Navy may legally appoint acting gunners

in the Navy, and the power to make such appointments is strongly implied by section 1410, Revised Statutes. A right to appoint gunners to an undefined extent (see sec. 1405, R. S.) does not conclude against the power to appoint acting gunners also. (15 Op. Atty. Gen., 564. Note: By act July 15, 1870, sec. 13, 16 Stat., 334, it was provided "that all acts or parts of acts authorizing the appointment of temporary acting officers in the Navy be, and the same are hereby, repealed, except as to assistant surgeons.")

An acting gunner is not, as such, even a petty officer. Accordingly, the laws (secs. 1229 and 1624, art. 36, R. S.) making provision as to dismissals of "officers" from the naval service, do not apply to the case of an acting gunner. (15 Op. Atty. Gen., 564.)

Acting appointments as boatswains, gunners, and carpenters are issued pursuant to Navy Regulations, 1913, article R-3312. Other acting appointments are specifically authorized by laws noted above.

**Acting commissioned officers.**—"An officer duly appointed to act in any grade shall, while serving under such appointment, be entitled to the same command, precedence, and honors as if he held a commission in that grade of the same date as his appointment." (Art. R-1048, Navy Regs., 1913.)

In accordance with the general custom, acting officers, both in the Army and Navy, do not hold commissions. (File 13707-38:7, Aug. 20, 1914.)

**"Officers" and "enlisted men" defined.**—The term "all officers" in section 1410, Revised Statutes, is a general designation, which includes petty officers. (*Muse v. U. S.*, 19 Ct. Cls., 441.)

Petty officers and warrant officers in the Navy are generally spoken of as officers, and the Revised Statutes, section 1410, recognizes the usage; but all petty officers are not officers within the sense of the Constitution or of penal statutes. (*Muse v. U. S.*, 19 Ct. Cls., 441; see also note to Constitution, Art. II, sec. 2, clause 2, under "I. Officers of the United States.")

Within the meaning of the Articles for the Government of the Navy (sec. 1624, R. S.), "unless there be something in the context or subject matter repugnant to or inconsistent with such construction, officers shall mean commissioned and warrant officers; superior officers shall be held to include mates and petty officers of the Navy and noncommissioned officers of the Marine Corps, in addition to the officers enumerated." (Naval Courts and Boards, 1917, p. 86.)

Within the meaning of the Articles of War relating to the Army, "unless the context shows that a different sense is intended, \* \* \* the word 'officer' shall be construed to refer to a commissioned officer." (Sec. 1342, R. S., art. 1, as amended by act Aug. 29, 1916, 39 Stat., 650.)

Within the meaning of the War Risk Insurance Act of October 6, 1917 (40 Stat., 401), "the term 'commissioned officer' includes a warrant officer, but includes only an officer in active service in the military or naval forces of the United States. \* \* \* The terms 'man' and 'enlisted man' mean a person, whether male or female, and whether enlisted, enrolled, or drafted into active service in the military or naval forces of the United States, and include noncommissioned and petty officers, and members of training camps authorized by law." (See sec. 22 of act cited.)

The Navy consists of officers, warrant officers, petty officers, and seamen. Some of the warrant and petty officers of the Navy may be officers technically, because appointed by the head of a department; and others may be officers only by courtesy, because they are appointed by the chief of a bureau or the commander of a ship; but the two terms, "officers" and "enlisted men" are manifestly used in section 1600, Revised Statutes, to include the four classes of the Navy. (*Muse v. U. S.*, 19 Ct. Cls., 441.)

"There are three sorts of officers known to the Navy, viz., commissioned, warrant, and petty (sec. 1410); and inasmuch as, by section 1624, article 30, petty officers may be 'dis-

charged from the service with bad conduct discharge,' by order of a summary court-martial, it seems that by 'officers' in article 36 is meant at most only warrant and commissioned officers." (15 Op. Atty. Gen., 635.)

Cadets at the Naval Academy, by statutory definition, are not to be included in general in legislation confined to "officers" of the Navy. (15 Op. Atty. Gen., 635; see also *Weller v. U. S.*, 41 Ct. Cls., 324; and see note to sec. 1512, R. S.)

The expression "officers or enlisted men," in a statute relating to longevity, is not to be construed distributively as requiring that a person should be an enlisted man or an officer nominated and appointed by the President, or by the head of a department, but was meant to include all men in service, either by enlistment or regular appointment. (*U. S. v. Hendee*, 124 U. S., 309.)

Section 1410, Revised Statutes, which defines who are petty officers, most clearly classes clerks as officers not holding commissions or warrants, and not entitled to them, but still officers of the Navy. Excepting clerks from those "officers" who would otherwise be petty officers, leaves them classed among the officers previously described. (*Hendee v. U. S.*, 22 Ct. Cls., 134; affirmed 124 U. S., 309. See note to sec. 1386, R. S., concerning present status of paymasters' clerks.)

Section 1410, Revised Statutes, classes paymaster's clerks in the Navy among "all officers not holding commissions or warrants, or who are not entitled to them," by excepting them, with others, from such officers as are to be deemed petty officers. (*Mouat v. U. S.*, 22 Ct. Cls., 293, 297; reversed, *U. S. v. Mouat*, 124 U. S., 303.)

The confused condition of our statute law relating to the officers, warrant officers, petty officers, and seamen of the Navy may be best illustrated by the fact that a paymaster's clerk was held to be an officer and was held not to be an officer by the same court, on the same day, and through the same judge; these decisions, of course, meant that a paymaster's clerk was and was not an officer within the intent of certain statutes, the one decision relating to mileage, the other to longevity pay. (*Brown v. U. S.*, 32 Ct. Cls., 379, 383, citing *U. S. v. Mouat*, 124 U. S., 303, and *U. S. v. Hendee*, 124 U. S., 309.)

A clerk to a pay officer, appointed by authority of section 1386, Revised Statutes, was not one of the petty officers who, under section 1410, Revised Statutes, are entitled to obedience in the execution of their offices from persons of inferior ratings. (*Johnson v. Sayre*, 158 U. S., 109.)

For other cases see note to section 1457, Revised Statutes, under "General legislation not applicable to retired officers," and "Retired officers may be included in general legislation."

**Mates are petty officers.**—See note to section 1408, Revised Statutes.

**Temporary officers.**—There is a class recognized in the Navy who are neither commissioned nor warrant officers, who perform the duties of the station in which they are temporarily placed. They are generally, though not



necessarily, styled acting, as acting boatswain, acting gunner, etc., and have an appointment with that title. Temporary appointments are also recognized by section 1410, Revised Statutes. The appointment referred to in this section is confined to "officers not holding commissions or warrants, or who are not entitled to them." The officer receives no commission or warrant. He is simply appointed to the duties of a commissioned or warrant officer. (28 Op. Atty. Gen., 325.)

Officers holding temporary appointments in the Navy are not either commissioned or warrant officers, as is recognized by section 1410, Revised Statutes. Legislation, therefore, as to the manner in which such officers are to be cashiered, etc., does not apply in the present case (where party was appointed "an acting master in the Navy on temporary service," and was dismissed from the service by the Secretary of the Navy). The assignment of a reason in the letter of dismissal was surplusage and perhaps might well have been omitted. (15 Op. Atty. Gen., 560.)

Mates are not "temporarily appointed to the duties of a commissioned or warrant officer" within the exception to section 1410, Revised Statutes. While the words "acting master's mates," sometimes employed prior to the Revised Statutes, might indicate, by the use of the word "acting," a person temporarily appointed to the duties of a master's mate, officers who are recognized by law, and whose pay is fixed by a permanent statute, can not be said to be temporarily appointed. (*U. S. v. Fuller*,

160 U. S., 593; for other decisions concerning status of mates see note to sec. 1408, R. S.)

Acting assistant dental surgeons in the regular Dental Corps of the Navy, appointed with a view to permanent as distinguished from temporary service, and having the same rights in respect to rank, pay, and retirement as other officers in the Regular Navy, are not temporary officers, but are officers of "permanent tenure" within the meaning of the act of March 4, 1913 (37 Stat., 903, since repealed). Strictly speaking, the term "permanent tenure" is a misnomer in any case where applied to officers of the Navy, as all such officers are subject to removal in various ways. The expression was used by Congress as applying to officers whose tenure of office is for life unless sooner terminated in some authorized manner generally applicable to officers of the Regular Navy. (File 13707-38:9, Sept. 2, 1914.)

#### **Secretary to the Admiral of the Navy.**—

The necessary implication of this section is that secretaries are officers not holding commissions or warrants and not entitled to them. If secretaries do not hold commissions and are not entitled to them, it follows that they are not appointed by the President, because appointments by the President are always evidenced by a commission. Accordingly the appointment of the secretary allowed the Admiral of the Navy, by section 1367, Revised Statutes, does not belong to the President, with the advice and consent of the Senate, but devolves upon the Admiral as one personal to himself. (19 Op. Atty. Gen., 589.)

**Sec. 1411. [Acting assistant surgeons.]** The Secretary of the Navy may appoint, for temporary service, such acting assistant surgeons as the exigencies of the service may require, who shall receive the compensation of assistant surgeons.—(3 Mar., 1865, c. 124, s. 6, v. 13, p. 539. 15 July, 1870, c. 295, s. 13, v. 16, p. 334.)

Amendment to this section was made by act of February 15, 1879, section 2 (20 Stat., 295), which provided "That from and after the passage of this act the Secretary of the Navy shall not appoint acting assistant surgeons for temporary service, as authorized by section fourteen hundred and eleven, Revised Statutes, except in case of war."

By act of May 4, 1898 (30 Stat., 380), it was provided that "The President is hereby authorized to appoint for temporary service twenty-five acting assistant surgeons, who shall have the relative rank and compensation of assistant surgeons." The words "the relative rank of" as used in sections of the Revised Statutes in defining the rank of officers were amended to read "the rank of" by the Navy personnel act, March 3, 1899, section 7 (30 Stat., 1006).

See sections 1381 and 1410, Revised Statutes, concerning acting appointments in general.

**Appointments by the President and Secretary of the Navy.**—See note to Constitution, Article II, section 2, clause 2, under "II. Constitutional power of appointment."

It is universally true that when Congress, in pursuance of its authority under the provision of the Constitution (Art. II, sec. 2, clause 2), sees fit to give the sole power of appointment to the President, it does so by language appropriate to that end, such as the unqualified phrase, "may appoint." Under such language the President is vested with power of appointing alone. (23 Op. Atty. Gen., 136; see also 22 Op. Atty. Gen., 82.)

For form of commission which has been issued by the President to officers appointed acting assistant surgeons in the Navy under the act of May 4, 1898, see *Nelson v. U. S.*, 41 Ct. Cls., 157. [In practice, commissions are no longer issued to acting assistant surgeons.]

**Acting assistant surgeons are "officers" on the active list of the Navy.**—The term "officer or enlisted man" in act of May 13, 1908 (35 Stat., 128, since repealed), providing for allowance of death gratuity, includes all persons in the service and applies to acting assistant surgeons. (File 26543-10, Sept. 11, 1908.)

An acting assistant surgeon in the Navy, appointed under the act of May 4, 1898, is an officer on the active list of the Navy within the meaning of the death gratuity law of May 13, 1908 (since repealed). (15 Comp. Dec., 176.)

Acting assistant surgeons are not officers of the Regular Navy.—Congress by their legislation have recognized the distinction between officers in the permanent and temporary service in the Navy. Thus by section 1370, Revised Statutes, as amended by the naval appropriation act of May 4, 1898 (30 Stat., 369, 380), in respect to assistant surgeons, it was provided that “no person shall be appointed assistant surgeon until he has been examined and approved by a board of naval surgeons designated by the Secretary of the Navy, nor who is under twenty-one or over thirty years of age, inclusive.” That provision, as its language imports, was to guard against the appointment of incompetent surgeons in the Navy, and evidently applies to appointments to be made in the regular or permanent service as contradistinguished from appointments in the temporary service, for in the next succeeding clause or paragraph in the same act is the provision authorizing the President “to appoint for temporary service twenty-five acting assistant surgeons, who shall have the relative rank and compensation of assistant surgeons” (without requiring an examination, or fixing any limitations as to age). (*Taylor v. U. S.*, 38 Ct. Cls., 155, 161.)

Acting assistant surgeons are not “medical officers of the Navy,” within the meaning of the act of July 28, 1892 (27 Stat., 321), but are officers in the temporary service of the Navy, and are not eligible for duty as members of marine examining boards. (File 15229-12; see also file 947 M, June 13, 1910.)

Acting assistant surgeons are officers merely in the temporary service, and not officers of the Regular Navy. (9 Comp. Dec., 827.)

The act of February 15, 1879 (20 Stat., 294), provides for a board to make an examination of “the eighteen acting and three acting passed assistant surgeons now in the service, should they desire to present themselves,” and authorized the President, by and with the advice and consent of the Senate, to appoint those found qualified as assistant surgeons “in the Regular Navy of the United States,” and to muster out those found not qualified, except that, “in the event of physical disqualifications which occurred in the line of duty, such officer may, upon the recommendation of a retiring board, be placed upon the retired list.” (File 27231-51:5, July 10, 1915.)

Again, the act of June 7, 1900 (31 Stat., 684, 697), provided that “assistant surgeons under the age of fifty years, appointed for temporary service during the War with Spain, having creditable records, who are now in the Navy, may be given permanent commissions.” (*Taylor v. U. S.*, 38 Ct. Cls., 155, 161.)

[Section 4693, Revised Statutes, providing the classes of persons entitled to pensions specified “any officer” of the Army, Navy, or Marine Corps, disabled “while in the service of the United States and in the line of duty,” and in addition specified “any acting assistant or contract surgeon,” disabled “while actually performing the duties of assistant surgeon or acting assistant surgeon with any military force in the field, or in transitu, or in hospital.” The fact that a pension was granted to a contract surgeon by the express terms of the statute was held

not to authorize a court to hold that it was because he was an officer in the Army. See *Byrnes v. U. S.*, 26 Ct. Cls., 302.]

**Not eligible for retirement.**—That an acting assistant surgeon can not legally be retired for physical disability is not open to doubt, as acting assistant surgeons have always been appointed and discharged from the Navy entirely in the discretion of the Executive. (File 27231-51:5, July 10, 1915; see also file 27231-106, Oct. 22, 1917.)

In no case has any acting assistant surgeon been placed on the retired list, with three exceptions which were expressly authorized by the law enacted “to abolish the Volunteer Navy of the United States,” viz, the act of February 15, 1879, section 1 (20 Stat., 294). (File 27231-51:5, July 10, 1915.)

Except in the cases specifically provided for by the act of 1879, the appointments of these temporary officers have invariably been revoked for physical disability; their retirement being not only unauthorized by existing law, but contrary to the best interests of the Navy. Thus, one purpose of the law is to authorize temporary appointments, when required, of doctors who are able to perform the duties for which appointed, regardless of whether they are qualified for the regular Medical Corps. For example, in the present case the officer was appointed an acting assistant surgeon after he had resigned from the regular Medical Corps following his failure to meet the professional requirements for that corps. Similarly, other acting assistant surgeons are appointed who are above the age limit for entering the regular Medical Corps and who could not, therefore, possibly serve the required period before reaching the retirement age. Others may be appointed for temporary service who could not qualify physically for the regular corps, the requirements for which are naturally more severe because of the privilege of retirement to which its members are entitled. If acting assistant surgeons were legally entitled to retirement, the Navy Department could not, in the interest of the Government, recommend the appointment of any applicant unless he possessed all of the requirements necessary for the regular service, and thus one object of the law would be defeated. (File 27231-51:5, July 10, 1915.)

When applicants accept appointments as acting assistant surgeons, they are chargeable with knowledge of the law as above stated, and of the fact that such appointments are revoked when for any reason the appointees are either unable to serve, or are no longer needed. (File 27231-51:5, July 10, 1915.)

Concerning the retirement of acting assistant surgeons for physical disability, “the law on the subject has been reviewed at length, and the conclusion reached, after consideration of all matters bearing on the subject, is that an acting assistant surgeon of the Navy, appointed for temporary service under the provisions of the act of May 4, 1898, is not eligible for retirement on account of physical disability.” (File 27231-51:4, June 30, 1915.)

The Secretary of the Navy declines to request an opinion of the Attorney General as to the retirement of acting assistant surgeons, as



the question has been decided by the Navy Department, and the Attorney General does not possess the power to review the decisions of other executive departments. Even when requested by the head of a department, the Attorney General has consistently declined to render opinions when it appears that the officer requesting the opinion has already decided the case and requests the Attorney General's opinion merely at the instance of claimants or interested parties who seek to have the existing decision reversed. (File 27231-51:6, July 15, 1915.)

[NOTE.—The act of May 22, 1917 (40 Stat., 84), authorizing temporary appointments in the Navy, to continue in force “not later than six months after the termination of the present war,” provided (sec. 9) that “any person originally appointed temporarily, as provided in this act, shall not be entitled to any rights of retirement, except for physical disability incurred in line of duty.” See also act June 4, 1920, section 2 (41 Stat., 834).]

**Revocation of appointment for physical disability.**—In view of the fact that acting assistant surgeons can not, under the law, be retired for physical disability, the most liberal arrangement which is possible in their case is to direct that the revocation of appointment be made to take effect three months after date; this is, in itself, in the nature of a gratuity, which is not expressly authorized by law, but which, under special circumstances, the Secretary of the Navy has decided may legally be regarded as within the range of executive discretion to grant. (File 27231-51:7, July 14, 1915; see also 27231-51:5, July 10, 1915.)

**Implied resignation of acting appointment by acceptance of appointment in Regular Navy.**—The appointment of an acting assistant surgeon (appointed under the act of May 4, 1898) to the regular service as an assistant surgeon, while still holding a position in the temporary force, operated as a discharge from his former position, and an appointment to the latter; and although the two services are for some purposes to be regarded as continuous the one with the other, yet the position of assistant surgeon held by him in the temporary force is a different and distinct position from that of assistant surgeon in the permanent force to which he was afterwards appointed. (Taylor v. U. S., 38 Ct. Cls., 155, 159, quoting decision of Comptroller of the Treasury.)

**Implied resignation of position in Regular Navy by acceptance of acting appointment.**—An assistant surgeon failed in his professional examination for promotion, was suspended from promotion in accordance with section 1505, Revised Statutes, and during the period of such suspension resigned from the Navy. Thereafter he was appointed an acting assistant surgeon in the Navy, which position he later resigned. It was then contended that he was insane at the time of his resignation as an assistant surgeon, and that said resignation was accordingly invalid and should be revoked. *Held*, that even though he was insane at the time of his resignation as an assistant surgeon the finding of the board of medical examiners established his sanity at the time he was ap-

pointed an acting assistant surgeon, and his acceptance of such appointment was tantamount to the resignation of his former office of assistant surgeon in the Navy, if he still held such office at the time of his acting appointment. However, the evidence clearly establishes this officer's sanity, inasmuch as he was found physically and mentally qualified by a board of examiners at the time of his appointment as an assistant surgeon, at the time of his examination for promotion, and again at the time of his appointment as an acting assistant surgeon. In the absence of evidence definitely establishing as a fact that he was of unsound mind when he resigned as assistant surgeon, his sanity under the circumstances stated must be conclusively presumed; his resignation of that office was accordingly valid, and he can be reinstated in the Navy only by a new exercise of the appointing power. (File 27231-51:1, Feb. 24, 1913.)

**Rank and pay of acting assistant surgeons.**—By act of May 4, 1898 (30 Stat., 369, 380), the President was authorized “to appoint for temporary service twenty-five acting assistant surgeons, who shall have the relative rank and compensation of assistant surgeons.” When this act was passed, the pay of officers in the naval service was generally regulated by section 1556, Revised Statutes. By section 13 of the Navy personnel act of March 3, 1899 (30 Stat., 1004, 1007), it was provided that commissioned officers of the line of the Navy and of the Medical and Pay Corps “shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law, for the officers of corresponding rank in the Army.” The effect of this act was to increase the pay of naval officers generally, and therefore to enhance the pay of assistant surgeons. (Plummer v. U. S., 224 U. S., 137.)

The act of June 7, 1900 (31 Stat., 697), raised the rank of assistant surgeons in the Navy by providing that “assistant surgeons shall rank with assistant surgeons in the Army.” The effect of this act was to give assistant surgeons in the Navy a higher rank—that is, to raise them from the rank of ensign, under section 1474, Revised Statutes, to that of lieutenant (junior grade), corresponding with the rank held by assistant surgeons in the Army. (Plummer v. U. S., 224 U. S., 137.)

The act of 1898 provided for a standard by which to determine the rank and pay of acting assistant surgeons, and that standard is the rank and pay in force at the time when the services of the acting assistant surgeons are rendered; accordingly *held* that under section 13 of the Navy personnel act of March 3, 1899 (30 Stat., 1007), and the acts of June 7, 1900 (31 Stat., 697), March 2, 1907 (34 Stat., 1167), and May 13, 1908 (35 Stat., 127), the pay of acting assistant surgeons was enhanced and assimilated to that of assistant surgeons, and did not remain fixed as regulated by section 1556, Revised Statutes. (Plummer v. U. S., 224 U. S., 137.)

It may not be doubted that the relation which the act of 1898 established between the rank and pay of acting assistant surgeons and assistant surgeons in reason must rest upon the

substantial identity of the services to be rendered by the incumbents of both offices. (*Plummer v. U. S.*, 224 U. S., 137.)

The pay of acting assistant surgeon in the Navy was temporarily increased by specific provision in the act of May 18, 1920, section 1 (41 Stat., 602). See note to section 1556, Revised Statutes.

The act of May 4, 1898 (30 Stat., 380), is permanent legislation in so far as it authorizes the appointment of acting assistant surgeons for temporary service. Although passed at a time when the United States was at war with Spain, it is not limited in

its application to the emergencies then existing or presently arising. If Congress had intended that the authority conferred upon the President to appoint acting assistant surgeons for temporary service should be a temporary grant of power, such limitations would have been expressly inserted. Accordingly, *held* that the power conferred upon the President by said act was not exhausted by its exercise during the emergencies then existing and which led to its passage, but still exists and may be exercised whenever necessity therefor arises. (9 Comp. Dec., 827.)

**Sec. 1412. [Volunteer officers; transfer to Regular Navy, etc.]** Officers who have been, or may be, transferred from the volunteer service to the Regular Navy shall be credited with the sea-service performed by them as volunteer officers, and shall receive all the benefits of such duty in the same manner as if they had been, during such service, in the Regular Navy.—(2 Mar., 1867, c. 174, s. 3, v. 14, p. 516.)

"An act to abolish the Volunteer Navy of the United States," approved February 15, 1879 (20 Stat., 294), made provision for transferring to the Regular Navy line officers and medical officers in the Volunteer Navy, and for mustering out volunteer officers not qualified to discharge the duties of their position.

Any line officer of volunteers may be advanced in grade if given a vote of thanks by Congress for heroism. (Sec. 1508, R. S.)

Honorably discharged volunteer officers and sailors are eligible for admission to the National Home for Disabled Volunteer Soldiers. (Act May 26, 1900, 31 Stat., 217.)

Other provisions for crediting officers of the Navy with service in the Volunteer Army or Navy are contained in the act of March 3, 1883 (22 Stat., 473).

Pay of officers in a volunteer naval service, when authorized by law, is provided for by section 1559, Revised Statutes.

Previous service to be credited to officers appointed to any corps of the Navy or to the Marine Corps, after serving in a different corps of the Navy or of the Marine Corps. (Act June 10, 1896, 29 Stat., 361.)

Previous service to be credited to certain surgeons in the Navy appointed for meritorious services during yellow fever epidemics. (Act June 10, 1896, 29 Stat., 361.)

"Sea service" defined: See section 1571, Revised Statutes. By act of August 29, 1916 (39 Stat., 579), it was provided that "on and after June thirtieth, nineteen hundred and twenty, no captain, commander, or lieutenant commander shall be promoted unless he has had not less than two years' actual sea service on seagoing ships in the grade in which serving. \* \* \* *Provided*, That the qualification of sea service shall not apply to officers restricted to the performance of engineering duty only." This requirement as to sea service was modified in its application to exceptional cases during war or national emergency by act of July 1, 1918 (40 Stat., 718). A re-

quirement of three years' sea service prior to promotion of acting chaplains is contained in act of June 30, 1914 (38 Stat., 403).

Service as midshipman at the Naval Academy or as cadet at the Military Academy not to be credited to officers of the Navy who were appointed to said academies after March 4, 1913. (Act Mar. 4, 1913, 37 Stat., 891.)

Staff officers appointed since March 4, 1913, not to be credited with constructive service for purposes of precedence. (Act Mar. 4, 1913, 37 Stat., 892.)

Staff officers and others appointed from civil life since March 4, 1913, not to be credited with constructive service for purposes of pay. (Act Mar. 4, 1913, 37 Stat., 891.)

Transfer of officers from the temporary Navy and Naval Reserve Force to the Regular Navy was authorized by act of June 4, 1920 (41 Stat., 834-836.).

Vessels in merchant marine may be taken possession of by President for naval purposes. (Act Sept. 7, 1916, 39 Stat., 731.)

Volunteer Naval Reserve established. (Act Aug. 29, 1916, 39 Stat., 592, as amended by act of July 1, 1918, 40 Stat., 710.)

Volunteer Patrol Squadrons: See act of August 29, 1916 (39 Stat., 600).

The effect of the law embodied in this section is to give the officers concerned the full benefit of sea duty performed by them while in the volunteer service. Such duty may go to complete the period of sea service required in certain grades of the Regular Navy prior to promotion, or may be properly taken into account in the matter of assignment to duty. It does not confer upon the officers referred to the right to have their commissions or their rank antedated. (14 Op. Atty. Gen., 198; see also 16 Op. Atty. Gen., 45, 17 Op. Atty. Gen., 189, and 17 Op. Atty. Gen., 399.)

By the regulations of the Navy in force when this law was adopted a certain period of sea service, formerly two years and later one year, was required of officers in the four grades from ensign to lieutenant commander, inclusive, before, as a general rule, they were nominated



for promotion to the next higher grades. (See Regulations of 1865, p. 46, par. 257; Regulations of 1870, p. 130, par. 299.) Besides, officers of the Navy generally are credited with their sea service with a view to its being taken into consideration in their future assignment to duty. The design of the provision referred to, then, was to give the transferred officers the full bene-

fit of their former sea service, in so far as it might go to complete the period of such service required in their respective grades previous to nomination for promotion, and in so far as it ought properly to be taken into account in the matter of assignment to duty. Beyond these advantages the provision would seem to confer nothing. (14 Op. Atty. Gen., 358.)

**Sec. 1413. [Civil Engineer Corps; and Storekeepers.]** The President, by and with the advice and consent of the Senate, may appoint a civil engineer and a naval store-keeper at each of the navy-yards where such officers may be necessary.—(2 Mar., 1867, c. 172, s. 1, v. 14, p. 490. 17 June, 1868, c. 61, s. 1, v. 15, p. 69.)

Amendment to this section was made by act of March 3, 1899, section 7 (30 Stat., 1006), which provided that "no appointments shall be made of civil engineers in the Navy on the active list under section fourteen hundred and thirteen of the Revised Statutes in excess of the present number, twenty-one."

Further amendment was made by act of July 1, 1902 (32 Stat., 671), which provided that "the appointment of six additional civil engineers is hereby authorized, three to be appointed during the present calendar year, and the other three in the calendar year of nineteen hundred and three."

"One additional civil engineer, in all twenty-eight, and twelve assistant civil engineers, of whom six shall have the rank of lieutenant (junior grade) and six the rank of ensign," were authorized by act of March 3, 1903 (32 Stat., 1197). By act of March 4, 1917 (39 Stat., 1184), it was provided that "officers of the Corps of Civil Engineers hereafter appointed shall, from the date of their original appointment, take rank and precedence with lieutenants (junior grade)."

One civil engineer (Leonard Martin Cox), was authorized by name to be restored to the Corps of Civil Engineers, to be "carried as an additional to the number of the grade to which he may be appointed under this act, or at any time thereafter." (Act Mar. 4, 1907, 34 Stat., 1407.) The total number of civil engineers in the Navy was thereby increased, temporarily, to 29. By act of August 29, 1916 (39 Stat., 576), it was provided that "the total number of commissioned officers of the active list of the following staff corps, exclusive of commissioned warrant officers, shall be based on percentages of the total number of commissioned officers of the active list of the line of the Navy, as follows: \* \* \* Corps of Civil Engineers, two per centum \* \* \*. The total number of commissioned officers of the active list of the following mentioned staff corps at any one time, exclusive of commissioned warrant officers, shall be distributed in the various grades of the respective corps as follows: \* \* \* Corps of Civil Engineers: One-half civil engineers with the rank of rear admiral to five and one-half civil engineers with the rank of captain, to fourteen civil

engineers with the rank of commander, to eighty civil engineers and assistant civil engineers with the rank below commander.

\* \* \* When there is an odd number of officers in the grade or rank of rear admiral in the line or in each corps, the lower division thereof shall include the excess in number, except where there is but one. Whenever a final fraction occurs in computing the authorized number of any corps, grade, or rank in the naval service, the nearest whole number shall be regarded as the authorized number: *Provided*, That at least one officer shall be allowed in each grade or rank. For the purpose of determining the authorized number of officers in any grade or rank of the line or of the staff corps, there shall be excluded from consideration those officers carried by law as additional numbers, including staff officers heretofore permanently commissioned with the rank of rear admiral, and nothing contained herein shall be held to reduce below that heretofore authorized by law the number of officers in any grade or rank in the staff corps." The temporary appointment of additional officers during the period of the existing war was authorized by the act of May 22, 1917, section 4 (40 Stat., 85), as amended by act of July 1, 1918 (40 Stat., 715), which also authorized temporary appointments and promotions to fill during the period of the war the deficiency existing prior to May 22, 1917, in the total number of commissioned officers authorized by the act of August 29, 1916. By act of June 4, 1920 (41 Stat., 834), it was provided that "the number of staff officers on active duty of whatever kind shall be in the same proportions as authorized by existing law."

"Promotions in the corps of civil engineers shall be after such examination as the Secretary of the Navy may prescribe." (Act Mar. 3, 1903, 32 Stat., 1197.) Examinations were discontinued for promotion of staff officers in grade by act of May 22, 1917, section 20 (40 Stat., 89), which act and section also reenacted a provision in the act of March 4, 1917 (39 Stat., 1182), requiring examinations of staff officers for advancement in rank. Advancement in rank of staff officers up to and including the rank of lieutenant commander is regulated by act August 29, 1916 (39 Stat., 576).

Advancement to the ranks of commander, captain, and rear admiral in the Staff Corps of the Navy are to be made by selection upon recommendation of a board of officers of the corps concerned. (Act July 1, 1918, 40 Stat., 718.)

Rank of civil engineers is fixed by section 1478, Revised Statutes, as amended by act of August 29, 1916 (39 Stat., 577).

Rank of assistant civil engineers. See acts of March 3, 1903, and March 4, 1917, noted above.

Storekeepers; civilians may be appointed for foreign stations. (Sec. 1414, R. S.)

Storekeepers; bonds required of civilians. (Sec. 1415, R. S.)

Storekeepers; officers required to act as. (Sec. 1438, R. S.)

Storekeepers; bonds required of officers acting as. (Sec. 1439, R. S.)

Storekeepers; mileage was allowed for travel by section 1566, Revised Statutes, now superseded.

Storekeepers; pay of officers acting as. (Sec. 1567, R. S.)

Storekeepers; pay of civilians. (Sec. 1568, R. S.)

Storekeeper at Naval Academy to be detailed from Pay [now Supply] Corps. (Sec. 1527, R. S.)

**Historical note.**—Prior to the act of March 2, 1867 (14 Stat., 490), civil engineers were appointed by the Secretary of the Navy; since then, under authority of that act (now embodied in sec. 1413, R. S.), they have been commissioned by the President by and with the advice and consent of the Senate; they were appropriated for as part of the civil establishment at the several navy yards and stations under the control of the Bureau of Yards and Docks until 1870, when their pay was regulated by section 3 of the act of July 15 of that year (now embodied in section 1556, Revised Statutes), fixing the annual pay of officers of the Navy on the active list, and appropriations for their pay have been made since 1870 under the head of "Pay of the Navy." (17 Op. Atty. Gen., 126.)

Prior to 1867 civil engineers in the Navy were appointed by the Secretary of the Navy, and their duties were shore duties—the superintendence and charge of buildings in navy yards. (Brown v. U. S., 32 Ct. Cls., 379.)

The authority of the President under the act of March 3, 1871 (now embodied in sec. 1478, R. S.), "to determine and fix the relative rank of civil engineers," was not exercised until February 24, 1881. (17 Op. Atty. Gen., 126.)

In 16 Op. Atty. Gen., 203, it was held that civil engineers, in the absence of action by the President conferring rank upon them as authorized by law, were civil officers, and not naval officers, and might be removed by nomination and confirmation of a successor in any case; and that no notice of dismissal need be sent the officer so removed. Also held that section 1413, Revised Statutes, "necessarily implies that such appointments are only to be made where such officers are found necessary, and inferentially that their services may be

dispensed with when unnecessary; and indicates that the appointment is to some extent a local one, and that the appointee can not be a naval officer in the full sense of the term."

In 17 Op. Atty. Gen., 126, it was held that civil engineers are not merely "civil officers connected with the Navy," but are officers in the Navy, plainly included among those contemplated by the amended section 1480, Revised Statutes, as belonging to the "staff corps of the Navy," and possessing, under a then recent order issued pursuant to section 1478, Revised Statutes, defined relative rank with other officers in the Navy; and accordingly, that they may be retired from active service and placed on the retired list under the statutory provisions (secs. 1443 et seq.) regulating the retirement of officers in the Navy. (It had previously been held, in 15 Op. Atty. Gen., 165, that civil engineers appointed under sec. 1413, R. S., are officers of the Navy within the meaning of arts. 36 and 37 of sec. 1624, R. S.; and in 15 Op. Atty. Gen., 597, that they were persons belonging to the Navy and as such subject to the jurisdiction of naval courts-martial.)

In *Brown v. U. S.* (32 Ct. Cls., 379), it was held that the acts of March 2, 1867 (sec. 1413, R. S.), and July 15, 1870 (16 Stat., 321, 330, sec. 3), and March 3, 1871 (16 Stat., 526, 536), did not change the legal status of civil engineers in the Navy, but were merely a legislative recognition of civil engineers as officials who were then and always had been in the naval and not in the civil service; that both the Navy Department and the accounting officers of the Treasury had uniformly held that civil engineers in the Navy were in the naval service; and accordingly that civil engineers in the Navy prior to the act of March 2, 1867 (sec. 1413, R. S.), were officers and were in the naval service within the intent of the act of March 3, 1883 (22 Stat., 473), relating to longevity pay.

**Civil Engineer Corps, increases for benefit of designated individuals not favored.**—"The Department is not satisfied as to the necessity for increase in the corps of civil engineers, and even if an increase should be deemed advisable, believes that it should be made in the regular way, by an authorized increase in the corps, and not by a bill designed to benefit a particular individual to be appointed as an additional number." (File 532-43, Mar. 31, 1908.)

"If the corps is to be increased it would seem that the increase should be made first and the candidate qualify afterwards, rather than to pass a special law creating a vacancy for any person, however worthy." (File 532-42, Feb. 29, 1908.)

As to unconstitutionality of such legislation, see note to Constitution, Article II section 2, clause 2, "Congress cannot designate appointee," under "III. Power of Congress."

**Superintendent of State, War, and Navy Building.**—The act of March 3, 1883 (22 Stat. 553), does not contemplate that an officer of the Corps of Civil Engineers of the Navy shall be eligible for appointment as superintendent of the State, War, and Navy Building. (25 Op. Atty. Gen., 508. See also notes to secs. 1390 and 1462, R. S.)



**Sec. 1414. [Civilian storekeepers on foreign stations.]** The Secretary of the Navy may appoint citizens who are not officers of the Navy to be storekeepers on foreign stations, when suitable officers of the Navy can not be ordered on such service, or when, in his opinion, the public interest will be thereby promoted.—(17 June, 1844, c. 107, s. 1, v. 5, p. 700. 3 Mar., 1847, c. 48, s. 3, v. 9, p. 72.)

Except as provided in this section, the Secretary of the Navy shall order a suitable commissioned or warrant officer to take charge of the naval stores at foreign stations where a storekeeper may be necessary. (Sec. 1438, R. S.)

Pay of civilian storekeepers on foreign stations is fixed by section 1568, Revised Statutes.

**Supply officer to be general storekeeper.**—At each navy yard and station there shall be an officer of the pay [supply] corps detailed as the general storekeeper. (Art. R-4622, Navy Regs., 1913.)

**Appointment must be made by the Secretary of the Navy.**—The appointment of a civilian naval storekeeper by the commander of a squadron is not authorized by law, and is therefore void, and furnishes no ground upon which the salary for that office can be claimed. (*Larkin v. U. S.*, 5 Ct. Cls., 535.)

It is clear that under the law embodied in this section a citizen could only be appointed to the office of naval storekeeper by the Secretary of the Navy when a suitable naval officer could not be ordered on such service or when in the Secretary's opinion the public service would be promoted by the appointment of a citizen. The commander of a squadron certainly had no authority to make such an appointment. Possibly he might under a necessity have ordered a commissioned or warrant officer of the Navy to discharge the duties of

the office temporarily [see section 1438, Revised Statutes], but it cannot be contended that he had any authority of law to order a citizen or to clothe him with the functions of the office. (*Larkin v. U. S.*, 5 Ct. Cls., 535.)

**Sale of stores to officers and enlisted men.**—The Secretary of the Navy is not authorized, in the absence of a provision of law therefor, to purchase for sale to officers and enlisted men of the Navy articles not included in the regular naval stores. (6 Comp. Dec., 321.)

Sections 1414 and 1438 of the Revised Statutes refer only to such naval stores and provisions as are authorized to be issued to the Navy, and do not include anything more than the components of the Navy ration as prescribed by law; and the appropriation for subsistence of the Navy is not available for the purchase of any article of subsistence except such as the law authorizes to be purchased and issued to the enlisted men of the Navy, and can not be used for the purchase of articles of subsistence which may be authorized to be purchased and sold in the commissary stores of the Army under section 144, Revised Statutes, and the act of July 5, 1884 (23 Stat., 108). (6 Comp. Dec., 321.)

See laws noted under section 418, Revised Statutes, with reference to sale of naval stores to persons in the Army, Navy, and Marine Corps, and to civilian employees.

**Sec. 1415. [Civilian storekeepers to give bond.]** Every person who is appointed store-keeper under the provisions of the preceding section shall be required to give a bond, in such amount as may be fixed by the Secretary of the Navy, for the faithful performance of his duty.—(17 June, 1844, c. 107, s. 1, v. 5, p. 700; 3 Mar., 1847, c. 48, s. 3, v. 9, p. 172.)

On general subject of bonds, see note to section 1383, Revised Statutes.

**Sec. 1416. [Civil offices at yards may be discontinued. Superseded.]**

**This section provided as follows:**

"Sec. 1416. The Secretary of the Navy is authorized, when in his opinion the public interest will permit it, to discontinue the office or employment of any measurer and inspector of timber, clerk of the yard, clerk of the commandant, clerk of the storekeeper, clerk of the naval constructor, and the keeper of the magazine employed at any navy yard, and to require the duties of the keeper of the magazine to be performed by gunners." 10 Aug., 1846, c. 176, s. 1, v. 9, pp. 98, 99.

It was superseded by a clause in the naval appropriation act of March 3, 1909 (35 Stat., 754), noted below under "Clerks to commandants of yards and stations."

**Clerks to commandants of yards and stations.**—By section 1556, Revised Statutes,

provision was made for the pay of clerks to commandants of yards and stations, and payment in accordance therewith was specifically authorized in the annual naval appropriation act under "Pay of the Navy," including the act of May 13, 1908 (35 Stat., 127). By naval appropriation act of March 3, 1909 (35 Stat., 754), the Secretary of the Navy was authorized to fix the pay of the "clerical, drafting, inspection, and messenger force at navy yards and naval stations" on a per annum or per diem basis as he may elect; it was further provided therein "that the number may be increased or decreased at his option, and shall be distributed at the various navy yards and naval stations by the Secretary of the Navy to meet the needs of the naval service." The same act repealed "so much of section fifteen hundred and fifty-six of

the Revised Statutes as relates to pay of clerks to commandants of navy yards and naval stations," and omitted the specific provision theretofore made under "Pay of the Navy" for such clerks.

The term "officer or enlisted man" as used in the death gratuity law of May 13, 1908 (35 Stat., 128), does not apply to commandant's clerks. (File 5460-31.)

Service as commandant's clerk is not military service, and the Navy Department does not approve of proposed legislation crediting such service to officers of the Navy or Marine Corps for longevity purposes. (File 26255-2742, Jan. 21, 1913.) But see contra. 25 Comp. Dec., 745.

**Sec. 1417. [Enlisted men, number of; advancement to warrant officers.]** The number of persons who may at one time be enlisted into the Navy of the United States, including seamen, ordinary seamen, landsmen, mechanics, firemen, and coal-heavers, and including seven hundred and fifty apprentices and boys, hereby authorized to be enlisted annually, shall not exceed eight thousand two hundred and fifty: *Provided*, That in the appointment of warrant-officers in the naval service of the United States, preference shall be given to men who have been honorably discharged upon the expiration of an enlistment as an apprentice or boy, to serve during minority, and re-enlisted within three months after such discharge, to serve during a term of three or more years: *Provided further*, That nothing in this act shall be held to abrogate the provisions of section fourteen hundred and seven of the Revised Statutes of the United States.

This section was expressly amended and re-enacted to read as above by act of May 12, 1879 (21 Stat., 3). As it appeared in the second edition of the Revised Statutes, it read as follows:

"SEC. 1417. [*The number of persons who may at one time be enlisted into the Navy of the United States, including seamen, ordinary seamen, landsmen, mechanics, firemen, coal heavers, apprentices, and boys, shall not exceed eight thousand five hundred.*] [The number of persons whomay at one time be enlisted into the Navy of the United States, including seamen, ordinary seamen, landsmen, mechanics, firemen, coal heavers, apprentices, and boys, shall not exceed seven thousand and five hundred.]"—(7 June, 1864, c. 111, v. 13, p. 120; 17 June, 1868, c. 61, s. 2, v. 15, p. 72; 30 June, 1876, c. 159, v. 19, p. 66; U. S. v. Thompson, 2 Spr., 103.)

**The number of enlisted men has from time to time been increased as follows:**

"The number of persons who may at one time be enlisted into the Navy of the United States, including seamen, ordinary seamen, landsmen, mechanics, firemen, and coal heavers, and including one thousand five hundred apprentices and boys, hereby authorized to be enlisted annually, shall not exceed nine thousand." (Act Mar. 3, 1893, 27 Stat., 730.)

"The Secretary of the Navy is hereby authorized to enlist as many additional seamen as in his discretion he may deem necessary, not to exceed one thousand." (Act Mar. 2, 1895, 28 Stat., 826.)

"The Secretary of the Navy is hereby authorized to enlist at any time after the passage of this act as many additional men as in his discretion he may deem necessary, not to exceed one thousand." (Act June 16, 1896, 29 Stat., 361.)

Subsequent acts fixed the number of enlisted men in the Navy as follows:

11,000 Petty officers, seamen, landsmen, and boys, including men in the engineers' force and for the Coast Survey Service and Fish Commission; and

750 Boys under training at training stations and on board training ships. (Act Mar. 3, 1897, 29 Stat., 648.)

12,750 Petty officers, seamen, landsmen, and boys, including men in the engineers' force and for the Coast Survey Service and Fish Commission;

1,000 Boys under training at training stations and on board training ships; and

Men detailed for duty with Naval Militia. (Act May 4, 1898, 30 Stat., 369. Provision was made by the same act for a temporary increase of the enlisted force during the existing War with Spain.)

17,500 Petty officers, seamen, landsmen, and apprentice boys, including men in the engineers' force and for the Coast Survey Service and Fish Commission;

2,500 Apprentices under training at training stations and on board training ships; and

Men detailed for duty with Naval Militia. (Act Mar. 3, 1899, 30 Stat., 1025.)

22,500 Petty officers, seamen, landsmen, and apprentice boys, including men in the engineers' force, and for the Fish Commission;

2,500 Apprentices under training at training stations and on board training ships; and

Men detailed for duty with Naval Militia. (Act Mar. 3, 1901, 31 Stat., 1108.)



- 25,500 Petty officers, seamen, landsmen, and apprentice boys, including men in the engineers' force, and for the Fish Commission;
- 2,500 Apprentices under training at training stations and on board training ships; and  
Men detailed for duty with Naval Militia. (Act July 1, 1902, 32 Stat., 662.)
- 28,500 Petty officers, seamen, landsmen, and apprentices, including men in the engineers' force, and men detailed for duty with Naval Militia, and for the Fish Commission; and
- 2,500 Apprentices under training at training stations and on board training ships. (Act Mar. 3, 1903, 32 Stat., 1177.)
- 31,500 Petty officers, seamen, landsmen, and apprentices, including men in the engineers' force, and men detailed for duty with Naval Militia, and for the Fish Commission; and
- 2,500 Apprentices under training at training stations and on board training ships. (Act Apr. 27, 1904, 33 Stat., 324.)
- 34,500 Petty officers, seamen, landsmen, and apprentices, including men in the engineers' force, and men detailed for duty with Naval Militia, and for the Fish Commission;
- 2,500 Apprentices under training at training stations and on board training ships; and  
Men undergoing imprisonment with sentence of dishonorable discharge from the service at expiration of such confinement. (Act Mar. 3, 1905, 33 Stat., 1092.)
- 36,000 Petty officers, seamen, landsmen, and apprentice seamen, including men in the engineers' force, and men detailed for duty with Naval Militia, and for the Fish Commission;
- 2,500 Apprentice seamen under training at training stations and on board training ships; and  
Men undergoing imprisonment with sentence of dishonorable discharge from the service at expiration of such confinement. (Act Mar. 2, 1907, 34 Stat., 1176.)
- 42,000 Petty officers, seamen, landsmen, and apprentice seamen, including men in the engineers' force, and men detailed for duty with Naval Militia, and for the Fish Commission;
- 2,500 Apprentice seamen under training at training stations and on board training ships; and  
Men undergoing imprisonment with sentence of dishonorable discharge from the service at expiration of such confinement. (Act May 13, 1908, 35 Stat., 127.)
- 44,000 Petty officers, seamen, landsmen, and apprentice seamen, including men in the engineers' force and men detailed for duty with Naval Militia, and for the Fish Commission;
- 3,500 Apprentice seamen under training at training stations and on board training ships; and  
Men undergoing imprisonment with sentence of dishonorable discharge from the service at expiration of such confinement. (Act June 24, 1910, 36 Stat., 606.)
- 48,000 Petty officers, seamen, landsmen, and apprentice seamen, including men in the engineers' force and men detailed for duty with Naval Militia, and for the Fish Commission;
- 3,500 Apprentice seamen under training at training stations and on board training ships; and  
Men undergoing imprisonment with sentence of dishonorable discharge from the service at expiration of such confinement. (Act Aug. 22, 1912, 37 Stat., 328.)
- 48,000 Petty officers, seamen, landsmen, and apprentice seamen, including men in the engineers' force and men detailed for duty with the Fish Commission;
- 3,500 Apprentice seamen under training at training stations and on board training ships;  
Men detailed for duty with the Naval Militia; and  
Men undergoing imprisonment with sentence of dishonorable discharge from the service at the expiration of such confinement. (Act March 3, 1915, 38 Stat., 938.)
- 68,700 Petty officers, seamen, landsmen, and apprentice seamen, including men in the engineers' force and men detailed for duty with the Fish Commission;
- 6,000 Apprentice seamen under training at training stations and on board training ships;  
Men detailed for duty with the Naval Militia;  
Men sentenced by court-martial to discharge;  
Men furloughed without pay, subject to recall in time of emergency;  
Men in the Hospital Corps; and
- 350 Enlisted men of the Naval Flying Corps. (Act Aug. 29, 1916, 39 Stat., 572, 575, 582.)
- 87,000 "The President is hereafter authorized whenever in his judgment a sufficient national emergency exists, to increase the authorized enlisted strength of the Navy to eighty-seven thousand men." (Act Aug. 29, 1916, 39 Stat., 575.)
- 150,000 "The authorized enlisted strength of the active list of the Navy is hereby temporarily increased from eighty-seven thousand to one hundred and fifty thousand, including four thou-

sand additional apprentice seamen." (Act May 22, 1917, sec. 1, 40 Stat., 84.)

131,485 "The authorized enlisted strength of the active list of the Navy is hereby increased from eighty-seven thousand to one hundred and thirty-one thousand four hundred and eighty-five." (Act July 1, 1918, 40 Stat., 714.)

181,485 "The authorized enlisted strength of the active list of the Navy is hereby temporarily increased from one hundred and thirty-one thousand four hundred and eighty-five to one hundred and eighty-one thousand four hundred and eighty-five; the authorized number of apprentice seamen is hereby temporarily increased from six thousand to twenty-four thousand; and the authorized number of enlisted men of the Flying Corps is hereby temporarily increased from three hundred and fifty to ten thousand. \* \* \* *Provided further*, That the number of enlisted men for instruction in trade schools shall not at any time exceed fourteen thousand, which number is hereby temporarily authorized: *Provided further*, That the President is authorized, at any time during the period of the present war, when in his judgment it becomes necessary, temporarily to increase the authorized enlisted strength of the Navy, as provided for herein, by the addition of fifty thousand men." (Act July 1, 1918, 40 Stat., 714, expressly amending and reenacting section 1 of the act approved May 22, 1917, 40 Stat., 84.)

241,000 "The total authorized enlisted strength of the active list of the Navy is hereby temporarily increased from 131,485 during the period from July 1, 1919, to September 30, 1919, to 241,000 men, and from October 1, 1919, to December 31, 1919, to 191,000 men, and from January 1, 1920, to June 30, 1920, to 170,000 men and the President is hereby authorized, whenever in his judgment a sufficient national emergency exists, to increase the authorized enlisted strength of the Navy to 191,000 men \* \* \*. The foregoing total authorized enlisted strength shall include the hospital corps, apprentice seamen, those sentenced by court-martial to discharge, enlisted men of the Flying Corps, those under instruction in trade schools and members of the Naval Reserve Force so serving. \* \* \* *Provided further*, That nothing herein shall be construed as affecting the permanent \* \* \* enlisted strength of the Regular Navy as authorized by existing law." (Act July 11, 1919, 41 Stat., 138.)

"That the Secretary of the Navy is hereby authorized to employ on active duty, with their own consent, members of the Naval Reserve Force in enlisted ratings, the number so em-

ployed not to exceed during any fiscal year the average of twenty thousand men: *Provided*, That the number of naval reservists, so employed on active duty, together with the total number of enlisted men in the Regular Navy, shall not exceed the total enlisted strength of the Navy as authorized by law." (Act June 4, 1920, 41 Stat., 834.)

**Apprentice seamen under training.**—By act of April 24, 1896, section 2 (29 Stat., 97), it was provided that "all apprentices of the Navy, whether at a training station or on board an apprentice training ship, shall be additional to the number of enlisted persons allowed by law for the Navy." The term "apprentices" was changed to "apprentice seamen" by act of June 29, 1906 (34 Stat., 553).

The expression "any enlisted man in the Navy," as used in the naval appropriation act of August 22, 1912 (37 Stat., 330), is broad enough to include a minor enlisted as apprentice seaman, although the same act in another connection specifically mentions "any enlisted man or apprentice." (20 Comp. Dec., 429; see also note to sec. 1418, R. S.)

**Men under sentence of dishonorable discharge.**—The act of March 3, 1905 (33 Stat., 1092), provided that "the number of enlisted men shall be exclusive of those undergoing imprisonment with sentence of dishonorable discharge from the service at expiration of such confinement." This provision was repeated in the subsequent naval appropriation acts, each year, until the act of August 29, 1916 (39 Stat., 575), which provided that "hereafter the number of enlisted men of the Navy shall be exclusive of those sentenced by court-martial to discharge." The latter clause is permanent legislation, and modifies that contained in the previous acts relating to the same subject. (File 28687-4, Sept. 16, 1916.)

**Men detailed for duty with Naval Militia.**—The Naval Militia act of February 16, 1914, section 2 (38 Stat., 283), authorized the Secretary of the Navy to detail enlisted men for duty with the Naval Militia as "ship keepers," and provided "that such enlisted men shall be in addition to the number now or hereafter allowed by law for the regular Naval Establishment." Section 17 of the same act (38 Stat., 288) authorized the Secretary of the Navy, upon application of the governor of any State or Territory or the commanding general, District of Columbia Militia, to detail enlisted men of the Navy to report to the officers mentioned "for duty in connection with the Naval Militia," but did not provide that men so detailed should be in addition to the number allowed by law for the Navy. The naval appropriation act of March 3, 1915 (38 Stat., 938), authorized 48,000 petty officers, etc., as in the previous year, but omitted therefrom the clause "including \* \* \* men detailed for duty with Naval Militia," which appeared in the prior acts, and instead made specific provision "for the pay of enlisted men detailed for duty with the Naval Militia," in addition to the 48,000 otherwise authorized.

Prior to the act of March 3, 1915, above noted, it was held that "the total number of enlisted men appropriated for by the current naval appropriation act includes 'men detailed for duty



with Naval Militia,' under the general authority conferred upon the Secretary of the Navy to detail officers and enlisted men and report to the governors of the various States, etc., but does not include men attached to vessels of the Navy loaned to the Naval Militia under section 2 of the Naval Militia law, who act as ship keepers, and, under the provisions of that act are 'in addition to the number now or hereafter allowed by law for the regular Naval Establishment.'" Also, that "the department is authorized to enlist the full number of men appropriated for, if necessary, *in addition* to the number detailed as ship keepers pursuant to section 2 of the Naval Militia law; and that the enlistment of such additional number of men in excess of appropriations is not prohibited by sections 3679 and 3732, Revised Statutes, as amended." (File 3973-106; Feb. 8, 1915.)

By act of July 1, 1918 (40 Stat., 708), "all laws heretofore enacted by the Congress relating to the Naval Militia" were repealed. By act of June 4, 1920 (41 Stat., 817) the Naval Militia was revived until June 30, 1922.

**Men detailed for duty with Coast and Geodetic Survey.**—See note to section 264, Revised Statutes.

**Men detailed to nautical schools in the Philippines** are additional to the authorized enlisted strength. (Act June 30, 1906, 34 Stat., 817.)

**Enlisted men of the Hospital Corps.**—The naval appropriation act of August 29, 1916 (39 Stat., 572), provides that the Hospital Corps shall consist of chief pharmacists, pharmacists, and enlisted men; that its authorized strength shall equal  $3\frac{1}{2}$  per centum of the authorized enlisted strength of the Navy and Marine Corps; and that it shall be "in addition" to such authorized enlisted strength.

**Enlisted men of the Flying Corps.**—The naval appropriation act of August 29, 1916 (39 Stat., 582), provides that "the Naval Flying Corps shall be composed of 150 officers and 350 enlisted men, and that the said number of officers, student flyers, and enlisted men shall be in addition to the total number of officers and enlisted men which is now or may hereafter be provided by law for the other branches of the naval service." (See laws noted above as to temporary increase of the Flying Corps.)

**Enlisted men furloughed without pay.**—The act of August 29, 1916 (39 Stat., 580), authorized the Secretary of the Navy to furlough enlisted men, without pay, for the unexpired portion of their enlistment, in lieu of discharge by purchase, and subject to recall in time of emergency; enlisted men so furloughed to be "in addition to the authorized number of enlisted men of the Navy."

A soldier on furlough is a soldier of the United States and is in the service, but not on duty. (Union Pac. R. Co. v. U. S., 52 Ct. Cls., 226.)

When an enlisted man is furloughed without pay for the unexpired portion of his enlistment, his deposit, if any, with interest, should be paid on the date the furlough is granted. (File 7657-402:1, Oct. 18, 1916, construing act Feb. 9, 1889, sec. 1, 25 Stat., 657, providing for payment of deposits and interest on discharge.)

An enlisted man furloughed without pay is nevertheless an enlisted man in the Navy, and as such is entitled to treatment in Navy hospi-

tals. (File 7657-411, Nov. 18, 1916, and Feb. 5, 1917.)

The Navy Department is not authorized to defray the burial expenses of an enlisted man of the Navy who died while furloughed under the act of August 29, 1916 (23 Comp. Dec., 504). Although the Navy Department recognizes as binding the decision of the comptroller in this case, no modification is made in the previous holding of this department with reference to medical treatment of men on furlough. File 7657-411:2, Mar. 15, 1917).

The "authorized enlisted strength" of the Navy as used in the naval appropriation act of August 29, 1916 (39 Stat., 575), refers to the 68,700 men who are exclusive of all such classes of enlisted men as are appropriated for in addition to the authorized enlisted strength. The 6,000 apprentice seamen are within the latter classification, as are also enlisted men of the Hospital Corps, enlisted men sentenced to discharge, enlisted men detailed to the Naval Militia, and enlisted men of the Flying Corps. The words "authorized enlisted strength" are sufficiently broad to include all enlisted men authorized by law, but it is evident that these words are used in the act of August 29, 1916, in their technical signification as intended to refer merely to the specific numbers of 68,700 men, and 87,000 men, authorized for ordinary times and for national emergency, respectively. (File 28687-4, Sept. 16, 1916.)

"The phrase 'authorized enlisted strength,' as applied to the personnel of the Navy, shall mean the total number of enlisted men of the Navy authorized by law, exclusive of the Hospital Corps, apprentice seamen, those sentenced by court-martial to discharge, those detailed for duty with Naval Militia, those furloughed without pay, enlisted men of the Flying Corps, and those under instruction in trade schools." (Act May 22, 1917, 40 Stat., 84, as amended by act July 1, 1918, 40 Stat., 714.)

The words "total authorized enlisted strength of the active list," as used in the act of August 29, 1916 (39 Stat., 576), are intended to designate all classes of enlisted men for whom appropriation is made; that is to say, they include the 68,700 enlisted men proper, and also apprentice seamen, enlisted men of the Hospital Corps, enlisted men of the Flying Corps, naval prisoners sentenced to discharge, and enlisted men detailed to the Naval Militia. (File 28687-4, Sept. 16, 1916.)

**Authorized number of men is daily average.**—The naval appropriation act of June 30, 1914 (38 Stat., 403), provided, "That hereafter the number of enlisted men of the Navy and Marine Corps provided for shall be construed to mean the daily average number of enlisted men in the naval service during the fiscal year."

**Naval reserve.**—A naval reserve of enlisted men was established by act of March 3, 1915 (38 Stat., 940), to consist of men enlisted therein, or transferred thereto from the Regular Navy, and it was provided that "members of the naval reserve may, in time of peace, be required to perform not less than one month's active service on board a vessel of the Navy, during each year of service in the naval reserve, and such active service shall not exceed two months in any one year"; and that "in time of war they may be

required to perform active service with the Navy throughout the war, not to exceed the term of enlistment in the case of those enlisted in the naval reserve." This was held to be superseded by act of August 29, 1916 (39 Stat., 587), establishing a Naval Reserve Force to consist of six classes, viz, the Fleet Naval Reserve, the Naval Reserve, the Naval Auxiliary Reserve, the Naval Coast Defense Reserve, the Volunteer Naval Reserve, and the Naval Reserve Flying Corps. (23 Comp. Dec., 190. The act last cited also established a Marine Corps Reserve and National Naval Volunteers, and was amended by acts of March 4, 1917, 39 Stat., 1174; April 25, 1917, 40 Stat., 38; May 22, 1917, 40 Stat., 84; July 1, 1918, 40 Stat., 708, 712; July 11, 1919, 41 Stat., 133-141; and June 4, 1920, 41 Stat., 817, 824, 834, 837.)

**Retired enlisted men.**—A retired list of enlisted men and appointed petty officers in the Navy was authorized by act of March 3, 1899, section 17 (30 Stat., 1008), which has been amended by subsequent enactments (see acts June 26, 1906, 34 Stat., 451; Mar. 2, 1907, 38 Stat., 1217); and by act of March 3, 1915 (34 Stat., 941), it was provided that "the Secretary of the Navy is authorized in time of war, or when, in the opinion of the President, war is threatened, to call any enlisted man on the retired list into active service for such duty as he may be able to perform." The act of August 29, 1916 (39 Stat., 591), enacted that "the Secretary of the Navy is authorized in time of war or when a national emergency exists to call any enlisted man on the retired list into active service for such duty as he may be able to perform. While so employed such enlisted men shall receive the same pay and allowances they were receiving when placed on the retired list." By act of July 1, 1918 (40 Stat., 719), it was provided that any retired enlisted man of the Navy or Marine Corps ordered into active service "shall be eligible for promotion and he shall be entitled to the pay and benefits of continuous service of such rank and for such length of time as he is or has been employed in active service, and when relieved of active service shall retain upon the retired list the rank and service held by him at the time of such relief, with the pay and allowances of such rank on the retired list."

Retired enlisted men form no part of the organization of the Army. They sever their connection with the Army when they go upon the retired list for the purpose of receiving at the hands of the Government retired pay. They are in effect pensioners. They have no military duty to perform and can not be required to perform any. It is true that in the act of April 25, 1914 (38 Stat., 350), known as the volunteer act, provision is made for the employment of retired enlisted men for the performance of certain military duties, and, while so employed, they doubtless become "troops of the United States." (*Union Pac. R. Co. v. U. S.*, 52 Ct. Cls., 226, citing *Murphy v. U. S.*, 38 Ct. Cls., 511, 521.)

**Enlisted men of the insular force** are in contemplation of law enlisted men or apprentices of the U. S. Navy, and therefore are entitled to the clothing bounty provided by law for "enlisted men and apprentices of the Navy," and, where detained in the service

after expiration of their term of enlistment, to the one-fourth additional pay provided for by section 1422, Revised Statutes. (12 Comp. Dec., 189.)

In pursuance of the authority conferred by section 1569, Revised Statutes, the President on April 5, 1901, issued an Executive order providing that "the Secretary of the Navy is authorized to enlist in the insular force, United States Navy, which is hereby established, not to exceed 500 Filipinos in the following ratings and at the rates of pay indicated \* \* \*." [Art. R-4429, Navy Regs., 1913] Although, under the foregoing Executive order the men are enlisted in what is designated as the insular force, U. S. Navy, they are nevertheless enlisted men in and of the Regular Navy of the United States. The fact that they are attached to a part or branch thereof termed the insular force can not affect the conclusion just stated; for said insular force was established under and by virtue of the statutes relating to and governing the Navy of the United States, and unless said insular force be a part of the Regular Navy there would exist no authority for the establishment of such force. (12 Comp. Dec., 189.)

**Men enlisted for vocational training.**— "In cases of dismemberment, of injuries to sight or hearing, and of other injuries commonly causing permanent disability, the injured person shall follow such course or courses of rehabilitation, reeducation, and vocational training as the United States may provide or procure to be provided. Should such course prevent the injured person from following a substantially gainful occupation while taking same, a form of enlistment may be required which shall bring the injured person into the military or naval service. Such enlistment shall entitle the person to full pay as during the last month of his active service, and his family to family allowances and allotment as hereinbefore provided, in lieu of all other compensation for the time being." (War Risk Insurance Act of Oct. 6, 1917, sec. 304, 40 Stat., 407.) [This section was repealed by act of June 27, 1918, sec. 10 (40 Stat., 620), and other provisions substituted therefor by section 2 of the same act (40 Stat., 617), allowing pay, etc., without enlistment.]

**Apprentices at navy yards not enlisted men.**—Service as an apprentice in a navy yard is not service as an enlisted man within the meaning of the act of March 3, 1883 (22 Stat., 473), entitling officers to credit for previous service in the Army or Navy. (*Davis v. U. S.*, 28 Ct. Cls., 21.)

There was no statute authorizing the employment of persons as apprentices in connection with navy yards, and whatever was done in that particular was under Navy regulations. In the year 1852 the Navy Department adopted certain regulations "for the admission of apprentices into the navy yards of the United States," under which the claimant became an apprentice. Those regulations (which were not the first on the subject) prescribed the manner in which a boy might become an apprentice in the navy yards by being examined before a board. The applicant had to be over fifteen and less than seventeen years of age,



possessed of a good character, and having the physical ability to perform the labor incident to this situation. (*Davis v. U. S.*, 28 Ct. Cls., 21.)

The regulations of 1852 [above referred to] were in force at the time the claimant became an apprentice, and were the authority on the part of the naval officer to enter into the agreement by which his relations were established and upon which he now seeks a benefit under the act of March 3, 1883 (22 Stat., 473). The act of June 30, 1789 (1 Stat., 575), and all subsequent acts to and including the act of March 3, 1837 (5 Stat., 153), had reference to the employment of boys in the regular naval service on board ships and not their employment in the navy yards as provided for in the regulations of 1852 and former regulations. (*Davis v. U. S.*, 28 Ct. Cls., 21.)

The relation between the defendants and claimant was established by the agreement providing for the apprenticeship of the claimant, which was executed by his father and him jointly with the agent of the defendants, and which simply provided for the performance of duty ordinarily incident to an indentured apprentice. He was not required to take an oath, perform any naval or military duty, but simply to well and truly serve the United States, be obedient to all persons in authority over him, and subservient to all laws and regulations that might be established for the government of navy yards. He was required to furnish his own tools, board, clothing, and medical attendance. The service which he was to perform was not subject to the restraints, inconveniences, and powers incident to military or naval service, but such restrictions as are legally and ordinarily incident to the relation of master and apprentice. No statute of the United States had provided for the enlistment of men or boys to be employed in the navy yards of the United States, and the regulations did not provide for any such enlistment, if that could be done by mere regulations. If the claimant had failed to perform his duty and had deserted from the service, it can not be said that he would have been amenable to the laws of war and liable to be shot for desertion. (*Davis v. U. S.*, 28 Ct. Cls., 21.)

Section 1417 provides for the enlistment in the Navy of "apprentices and boys;" sections 1418 and 1419 provide for the enlistment of minors. Nowhere do we find in the statutes any reference to the service of boys in the navy yards spoken of as an enlistment in the Navy. The service which boys as apprentices were called upon to perform was on board ship. (*Davis v. U. S.*, 28 Ct. Cls., 21; see also 4 Op. Atty. Gen., 89.)

In the absence of any law providing for the enlistment of boys into the Navy to be employed as apprentices in the navy yards, the fact that claimant's connection with the service was founded on the ordinary contract of apprenticeship, that he took no oath and was not subject to the performance of any military duty or subject to the restrictions of military life, that he was not amenable to the highest obligation of a soldier—continued service, and that his whole duty was the result of a contract or agreement made by him and his father founded on the regulations of the Navy, it is determined,

as a conclusion of law, that he does not come within the act of March 3, 1883, 22 Stat., 473. (*Davis v. U. S.*, 28 Ct. Cls., 21.)

**A militiaman, when brought into the service of the United States** in accordance with law, is an "enlisted man on the active list" of the Navy within the meaning of laws providing for payment of a gratuity to the beneficiary of any enlisted man on the active list of the Navy in case of the latter's death from causes not the result of his own misconduct. The active force of the Navy is increased by laws providing for the induction of the militia into the service of the United States. (See 23 Comp. Dec., 36. But see act June 4, 1920 (41 Stat., 824), which excludes from the benefits of death gratuity members of forces of the Navy other than the Regular Navy and Marine Corps.)

**Enlisted men of the Coast Guard.**—The Navy is made up of and embraces its component parts; hence in law and in fact it embraces the Coast Guard in time of war just as certainly as it does any other military force operating under the orders of the Secretary of the Navy. Accordingly the word "Navy" is broad enough to include the Coast Guard in time of war, service in the Coast Guard at such time is service in the Navy, and enlisted men of the Coast Guard in time of war are enlisted men of the Navy. However, the word "Navy" as used in a law, may have a broad or restricted meaning, depending upon the context. As used in the act of August 31, 1918, section 3 (40 Stat., 956), providing that "men registered under the provisions of this act who have served in the Navy of the United States shall, upon their own application, be permitted to reenlist in the naval or marine service of the United States with and by the approval of the Secretary of the Navy," it includes a registrant who served in the Coast Guard in time of war. (File 28798-773, Nov. 22, 1918.)

**Advancement of apprentices to warrant officers.**—When section 1417, Revised Statutes, was reenacted in 1879 to read as above, special inducements were offered to honorably discharged boys to reenlist within three months after so discharged. (See sec. 1573, R. S.) These benefits, as well as certain additional inducements, have since been made applicable to enlisted men or apprentices who reenlist within four months after being honorably discharged. (See sec. 1573, R. S., as amended.) The provision in section 1417, as reenacted, limiting preference in appointment as warrant officers to such apprentices or boys who reenlist within three months after being honorably discharged has remained unchanged.

By the Navy Regulations, 1913 (Art. R-3310), it is provided, with reference to appointments as boatswains, gunners, machinists, and carpenters, that such appointments shall be made "only after competitive professional examinations," and that "when candidates from the naval service and from civil life possess equal qualifications, preference shall be given to those from the naval service."

As to term of enlistment, see note to section 1418, Revised Statutes.

As to appointment of warrant officers, see further sections 1405-1407, Revised Statutes, and notes thereto.

**Sec. 1418. [Enlistment, age and term of.]** Boys between the ages of fourteen and eighteen years may be enlisted to serve in the Navy until they shall arrive at the age of twenty-one years; other persons may be enlisted to serve for a period not exceeding five years, unless sooner discharged by direction of the President.

This section was expressly amended and re-enacted to read as above by act of May 12, 1879 (21 Stat., 3), as amended by act of February 23, 1881, section 2 (21 Stat., 338), the amendment made by the latter act consisting in substituting the word "fourteen" for "fifteen" as used in the former act.

As originally enacted this section read as follows: "Sec. 1418. Boys between the ages of sixteen and eighteen years may be enlisted to serve in the Navy until they shall arrive at the age of twenty-one years; other persons may be enlisted to serve for a period not exceeding five years, unless sooner discharged by direction of the President." [See § 1624; art. 19.]—(2 March, 1837, c. 21, s. 1, v. 5, p. 153; *In re McNulty*, 2 Lowell, 270.)

Other amendments to this section were made by act of March 3, 1899, section 16 (30 Stat., 1008), which provided that "hereafter the term of enlistment of all enlisted men of the Navy shall be four years," and act of August 22, 1912 (37 Stat., 330), which provided that "the term of enlistment of all enlisted men of the United States Navy other than those who are enlisted during minority shall be four years," and made further provision in the same act for extension of enlistments, prior to expiration of the four-year term, for periods of one, two, three, or four years, and for the discharge of any enlisted man within three months before the expiration of his term of enlistment or extended enlistment, "without prejudice to any right, privilege, or benefit that he would have received, except pay and allowances for the unexpired period not served, or to which he would thereafter become entitled, had he served his full term of enlistment or extended enlistment." By act April 25, 1917 (40 Stat., 38), extension of minority enlistments in the Navy and Marine Corps was authorized under similar conditions as provided by law for extending other enlistments. By act of August 29, 1916 (39 Stat., 560), it was provided that enlisted men who serve one year at sea shall, in time of peace, if they so elect, be given an honorable discharge without cost; and the same act (39 Stat., 580) authorized the furlough of enlisted men, without pay, for the unexpired portion of enlistment, in lieu of discharge by purchase, subject to recall in time of emergency. So much of said act as authorized honorable discharges after one year's service at sea was repealed by act of March 4, 1917 (39 Stat., 1171). By act of August 29, 1916 (39 Stat., 586), it was provided that the Secretary of the Navy shall establish regulations governing the term of enlistment of the enlisted men of the

Flying Corps. By act of May 22, 1917, section 3 (40 Stat., 85), it was provided "that enlistments in the Navy and Marine Corps, during such time as the United States may be at war, shall be for four years, or for such shorter period or periods as the President may prescribe, or for the period of the present war." By act of July 11, 1919 (41 Stat., 134), it was provided that "until June 30, 1920, enlistments in the Navy may be for terms of two, three, or four years, and all laws now applicable to four year enlistments shall apply, under such regulations as may be prescribed by the Secretary of the Navy, to enlistments for a shorter period with proportionate benefits upon discharge and reenlistment." By act of June 4, 1920, section 7 (41 Stat., 836), the provision of the act last quoted was reenacted without limitation as to time.

Detention of men after expiration of enlistment, or their reentering to serve until their return to the United States, is authorized by section 1422, Revised Statutes.

Detention of men after expiration of enlistment to make good time lost on account of injury, sickness or disease resulting from intemperate use of drugs or alcoholic liquors or other misconduct. (Act Aug. 29, 1916, 39 Stat., 580, as amended by act July 1, 1918, 40 Stat., 717.)

Discharge of minors who swear falsely as to their age is required by the following provision in the act of March 3, 1915 (38 Stat., 931): "Provided, That hereafter no part of any appropriation for the naval service shall be expended in recruiting seamen, ordinary seamen, or apprentice seamen, unless in case of minors, a certificate of birth or a verified written statement by the parents, or either of them, or in case of their death a verified written statement by the legal guardian, be first furnished to the recruiting officer, showing applicant to be of age required by naval regulations, which shall be presented with the application for enlistment; except in cases where such certificate is unobtainable, enlistment may be made when the recruiting officer is convinced that oath of applicant as to age is credible; but when it is afterwards found, upon evidence satisfactory to the Navy Department, that recruit has sworn falsely as to age, and is under eighteen years of age at the time of enlistment, he shall, upon request of either parent, or, in case of their death, by the legal guardian, be released from service in the Navy, upon payment of full cost of first outfit, unless, in any given case, the Secretary, in his discretion, shall relieve said recruit of such payment." Provisions somewhat similar to this, but



applicable to the fiscal year only, had been contained in the annual naval appropriation act for previous years, under "Bureau of Navigation."

Enlistment of minors under 14 years of age is punishable under section 1624, Revised Statutes, article 19, as amended.

Oath of allegiance to be taken by enlisted men of the Navy is that which was prescribed for the Army by the law in force on March 3, 1899. (Act Mar. 3, 1899, sec. 25, 30 Stat., 1009.) The oath then prescribed for enlisted men of the Army was contained in section 1342, R. S., art. 2, as follows: "I, A. B., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles of war."

Punishment of fraudulent enlistment is prescribed by act of March 3, 1893 (27 Stat., 716), amending section 1624, Revised Statutes, article 22.

Reenlistment of men with special benefits within four months after their discharge is provided for by section 1573, Revised Statutes, and amendments noted thereunder. See also section 1417, Revised Statutes, as amended. By act of August 29, 1916 (39 Stat., 590), it was provided that enlisted men who enroll in the Fleet Naval Reserve within four months after their discharge from the regular service, and who reenlist in the regular service within four months after discharge from such reserve, shall have the same benefits as though they had reenlisted in the regular service within four months after discharge therefrom.

Refund of enlistment bounty where men are discharged within six months of enlistment, for causes other than disability incurred in line of duty, is provided for by act of June 29, 1906 (34 Stat., 556); and the Secretary of the Navy may require similar refund in cases where men are discharged during the first year of enlistment by request, for inaptitude, as undesirable, or for disability not incurred in line of duty. (Act Mar. 2, 1907, 34 Stat., 1176.) The furnishing of such bounty on enlistment was authorized by act of March 1, 1889 (25 Stat., 781), and amendments thereto. (See sec. 1569, R. S.) Refund of uniform gratuity by members of the Naval Reserve Force severing their connection with the service without compulsion on the part of the Government is provided for by act of August 29, 1916 (39 Stat., 589), as amended by act of July 1, 1918 (40 Stat., 711).

Term of enlistment in the Marine Corps is prescribed by section 1608 of the Revised Statutes and amendments thereto.

**Term of enlistment.**—Section 1418 of the Revised Statutes, fixing the term of enlistment during minority in the case of persons enlisted in the Navy before arriving at the age of 18 years, and for not exceeding five years in the

case of other persons, was amended by section 16 of the Navy personnel act of March 3, 1899, which provided "that hereafter the term of enlistment of all enlisted men of the Navy shall be four years." (5 Comp. Dec., 929.)

The act of March 3, 1899 (30 Stat., 1008), makes the term of enlistment for all persons four years. (*Thomas v. Winne*, 122 Fed. Rep., 395).

Section 1418, as amended by act of March 3, 1899, section 16 (30 Stat., 1008), provided that boys between 14 and 18 years of age may be enlisted in the Navy until they arrive at the age of 21, while other persons may be enlisted for a term not exceeding four years. (*Ex parte Lisk*, 145 Fed. Rep., 860.)

There is no provision of law for the enlistment for four years of anyone under 18 years of age. However, where a minor of 15 years fraudulently enlists for a term of four years he may be held to serve out that term and need not be required with consent of his father to agree to remain in the service during minority. The enlistment is a valid one unless avoided by the United States. (File 24368-7, Feb. 14, 1912.)

Prior to the enactment of March 3, 1899, section 16 (30 Stat., 1008), the enlistment of men in the Navy, under section 1418, was for a period not to exceed five years, but the enlistment period had been for three years, and under section 1426 honorable discharges were granted to men enlisting for three years, and upon reenlistment for three years within three months after discharge they became entitled to the gratuity provided by section 1573. (16 Comp. Dec., 815.)

Section 1418, Revised Statutes, required enlistments in the Navy to be for not exceeding five years, and section 1608 declared that enlistments in the Marine Corps should be for not less than five years. Thus it will be seen that the statutes fixed a maximum term of enlistment in the Navy, and a minimum term of enlistment in the Marine Corps, each at five years. At the same time, honorable discharges were granted to those who had fulfilled the three-year enlistment in the Navy (sec. 1426, R. S.). By act of March 3, 1899, section 16 (30 Stat., 1008), the term of enlistment in the Navy was changed to four years, and by act of March 3, 1901 (31 Stat., 1132), enlistment in the Marine Corps was reduced to not less than four years. (*In re Brykeczynski*, 207 Fed. Rep., 813.)

The laws relating to the granting of honorable discharges, and to extra pay on reenlisting after such discharges within a certain time, as well as the regulation granting an increase of monthly pay on reenlisting within three months after an honorable discharge, were based upon enlistment for not less than three years. The increase in monthly pay for reenlisting is now fixed by law, instead of by Navy regulation (sec. 1573, R. S., as amended by sec. 16, Navy personnel act Mar. 3, 1899). Accordingly a man, having served out his previous enlistment of three years, so as to entitle him to an honorable discharge and having enlisted for the regular term of four years within the time prescribed, comes within the operation of the new law and is entitled under his new enlistment to the four months' reenlistment pay and the

increase per month to the rate of pay he was receiving when discharged, as authorized by the amended section 1573, instead of three months' reenlistment pay and the addition of \$1 per month as under the law and regulations prior to the passage of the Navy personnel act. (5 Comp. Dec., 929.)

**Detention of men after expiration of enlistment.**—Enlistments in our service are required by law to be for a prescribed period, the last day of the term being as much fixed by the contract as the first. Consequently, unless there exists some law when the contract is entered into providing for a contingent prolongation of the term; or unless the soldier before the term is up consents to an extension thereof, with the last day of the term his engagement necessarily expires. (15 Op. Atty. Gen., 161; 12 Comp. Dec., 342; compare Op. Atty. Gen., Feb. 27, 1922, noted below.)

A man whose enlistment has expired, and in whose case there is no legal authority for retaining him in the service in point of law is entirely discharged, although no discharge certificate is issued to him. Nevertheless, if he voluntarily remain in a place subject to naval jurisdiction to await a certificate of discharge or for other purposes, he would be liable in a limited degree to the regulations necessary to the peace and subordination of the garrison, and might be imprisoned if necessary to prevent unlawful violence on his part, and to keep him until he could be placed in the hands of the proper civil authorities having jurisdiction to punish him. (U. S. v. Travers, 28 Fed. Cas. No. 16537, noted more fully under Constitution, Art. I, sec. 8, clause 14, "Persons not subject to jurisdiction of Federal courts-martial.")

It would seem that where a man has completed his period of enlistment and earned an honorable discharge, if a certificate of discharge is inadvertently not issued at the time, it may thereafter be issued as of the date he was entitled thereto, and his continuance in the service, under a purported extension of enlistment for four years, which is not valid as an extension, may be regarded as a reenlistment for four years. (File 7657-295, July 27, 1915; but see Comp. Dec., Aug. 14, 1915, 174 S. and A. Memo., 3759; and compare file 7657-65, noted under sec. 1422, R. S., "Detention of enlisted man awaiting discharge papers.")

When an enlisted man voluntarily continued to serve after expiration of his enlistment without being discharged and reenlisted, it will be held to be a continuance of his enlistment upon the same terms as before, but for no definite period. (26 Op. Atty. Gen., 319, noted more fully under sec. 1408, R. S., "Status of mates when not discharged upon expiration of enlistment.")

An enlisted man, enlisted for minority, extended his enlistment for periods aggregating two years. Such extension was not authorized in the case of persons enlisted for minority. He should therefore be considered as in the service under his original enlistment from which he has not been discharged and entitled to the same rate of pay thereunder as if no attempted extension of enlistment had been made, but he is not entitled to the additional pay allowed by section 1422, Revised Statutes.

(Comp. Dec., June 6, 1914, 160 S. and A. Memo., 3255.)

The contract of an enlisted man in the Navy calls for four years *actual* service—not for service *during* a term of four years. Nothing is said in the contract respecting continuity of the service, but, on the contrary, article 879, Navy Regulations [1905] provides that "enlisted men who are apprehended or who surrender themselves as deserters or stragglers from the Navy shall not be entitled to discharge until they have served out the period of their unauthorized absence." The Comptroller has said, with regard to this provision (12 Comp. Dec., 342): "I do not think that this requirement has the effect of extending his term of enlistment, but requires that he shall be held in the service *after the expiration* of his term of enlistment." That this was not the intention of the regulation in question, however, would seem to be clear from its further provision: "This does not apply to those enlisted for the period of their minority." (File 3031-11, July 15, 1907.)

"The Department decided, May 12, 1908 [file 2471-5], that the term of enlistment in the Navy having been fixed by law at four years, no authority existed for retaining enlisted men in the Navy after expiration of enlistment for the purpose of making up time lost by absence. Article 879, Navy Regulations, 1905, which required enlisted men of the Navy to serve out the period of their unauthorized absence before being entitled to discharge, was accordingly revoked by the Secretary of the Navy with the approval of the President." (File 26251-6297:2, July 10, 1913; compare Op. Atty. Gen., Feb. 27, 1922, noted below.)

"As enlistments in the Marine Corps are governed by the laws and regulations relating to the Navy, the Department holds that Marine Corps General Order No. 40, of October 19, 1909 [concerning the detention of marines after expiration of enlistment to make good time lost by unauthorized absence], is without sanction of and in fact contrary to the requirements of law and that the practice of requiring men to make up time lost by absence either in accordance with article 48 of the Articles of War or otherwise will immediately be discontinued." (File 26251-6297:2, July 10, 1913; compare Comp. Dec., Dec. 4, 1905, 58 S. and A. Memo., 30; and Op. Atty. Gen., Feb. 27, 1922, noted below.)

A period of desertion must be deducted from the contract period of enlistment, and the latter accordingly extended until the man has fully served the term for which he contracted. The man's contract is to "serve" for a certain period and can not be performed by desertion. (Op. Atty. Gen., Feb. 27, 1922, file 26251-26615:S.)

The Supreme Court of the United States has specifically held that the detention of enlisted men in the Marine Corps after expiration of enlistment is governed by laws relating to the Navy. [See notes to sections 1422 and 1621, Revised Statutes.] The fact that pay of the Marine Corps is assimilated by section 1612, Revised Statutes, to the Army, and that under certain circumstances enlisted men of the Army may by law be retained to make good time lost by unauthorized absence, does not mean that the



term of enlistment in the Marine Corps must be changed to conform to the conditions in the Army. (File 26251-6297:4, Aug. 19, 1913; see also file 26251-6297:6, Nov. 8, 1913; 26251-6297:7, May 18, 1914; Comp. Dec., June 3, 1914, 160 S. and A. Memo., 3250.)

Article 879, Navy Regulations, 1905, authorizing the retention of enlisted men who are apprehended or who surrender themselves as deserters or stragglers until they have served out the period of their unauthorized absence, was stricken from the Navy Regulations, with the approval of the President, on May 20, 1908. A man's enlistment expired February 9, 1908, while in desertion. Thereafter, he was convicted of desertion and sentenced to a period of confinement. Prior to expiration of his confinement he was inadvertently restored to duty on probation: *Held*, that the Secretary of the Navy, having convened the court and having approved and confirmed its proceedings, possessed the power to remit the forfeitures mentioned in its sentence, in whole or in part less than the whole, and could make such remission dependent upon any condition consistent with law (citing 13 Comp. Dec., 726); it is not necessary to decide in this case whether, in the absence of a regulation, the Secretary of the Navy may hold a man in service to make good time lost by desertion; in this case the prisoner was actually held in service *for duty*, and while so held he was entitled to the pay of the rating in which he was held. (Comp. Dec., Nov. 20, 1908, 93 S. and A. Memo., 896.)

An enlisted man serving sentence of court-martial was placed on probation. During the probationary period his enlistment expired. He continued to serve, voluntarily, without re-enlisting or expressly extending his enlistment. While in this status he committed an offense for which he was tried by court-martial and sentenced to imprisonment. *Held*, that the court-martial had jurisdiction and he is legally held to serve out the sentence, but that so much of the original sentence as remained unexecuted should be regarded as fully remitted, his conduct from the time he was placed on probation until the expiration of his enlistment having been satisfactory. (File 26251-17942:2, May 5, 1919, citing 26 Op. Atty. Gen., 319, Comp. Dec., Nov. 20, 1918, 93 S. and A. Memo., 896, etc.)

The contract of enlistment in the Navy is not merely for four years, but for four years and until discharged. "A soldier can not discharge himself," and until he has been discharged by competent authority his original contract continues binding upon him. An examination of 15 Op. Atty. Gen., 152, 161 (above noted), shows that the question was not specifically presented to the Attorney General for determination in that case, and was not thoroughly considered by him. Certainly, the Attorney General could not have meant to hold that an enlisted man would be justified in leaving his command immediately upon expiration of his enlistment, regardless of the exigencies of the service, or other sufficient cause which might, in the opinion of his superiors, justify his retention for a reasonable period. The Navy Regulations recognize that delays may occur in discharging men after the expiration of en-

listment, by providing that the commanding officer "shall make all necessary efforts to prevent delay in discharging men whose terms of service have expired" (Art. 543, Navy Regs., 1909), and the Comptroller of the Treasury has repeatedly decided that enlisted men are entitled to pay until their discharges are issued and delivered, or until such action is taken as to make the man legally chargeable with notice of his discharge, notwithstanding that pay for service after expiration of enlistment may not be expressly provided for by any statutory enactment. (See 2 Comp. Dec., 94, 95; 7 Comp. Dec., 391; and Comp. Dig., 1902, p. 146, "Discharge, time and place of taking effect.") Of course the commanding officer would not be justified in arbitrarily detaining an enlisted man without sufficient cause, and in such a case the man would be entitled to secure his release by force, if necessary, even to the point of taking the life of any one who might endeavor to prevent him, as held by Mr. Justice Story, in *U. S. v. Travers*, 2 Wh. Cr. 509, 28 Fed. Cas. No. 16537. (File 26251-5447, Dec. 8, 1911.)

The regulations for many years have contained a provision that the pay of an enlisted man under treatment in a hospital on a foreign station "continues until he is regularly discharged from the service, even after his term of enlistment has expired." (File 26251-5447, Dec. 8, 1911, citing art. 792, par. 7, Navy Regs., 1909; Comp. Dec., Aug. 18, 1903, 31 S. and A. Memo., 242. See also, art. R-3582 (7), Navy Regs., 1913.)

An enlisted man may be detained in the service after the expiration of his enlistment for the purpose of disciplinary proceedings against him for offenses committed prior to the expiration of his enlistment; in such case, not having been discharged from his contract of enlistment, and being detained for sufficient cause, the terms of his contract continue binding upon him and his status as an enlisted man of the Navy is unchanged. Should he, during the period of such detention, leave the service without permission and with the obvious intention of not returning, he might be regarded as a deserter, but his offense would more properly be charged as breaking arrest, and escape. (File 26251-5447; compare note to sec. 1422, R. S., and note to Constitution, Art. I, sec. 8, clause 14, "Persons subject to jurisdiction of Federal courts-martial." See also file 26509-259, Mar. 12, 1918, recommending legislation for trial by court-martial of prisoners for offenses committed after expiration of enlistment.)

For other cases, see note to section 1422, Revised Statutes.

Existing contracts of enlistment may be extended by Congress.—The decision rendered by the Supreme Court in *Wilkes v. Dinsman* (7 How., 88, 126) expressly held that an enlisted man is subject to any new laws which may be enacted for the better government of the Navy, even where such laws extend the period of his original contract of enlistment. The Attorney General, something more than 25 years after this decision of the Supreme Court, held that the term of enlistment could be extended only under authority of some law

which exists "when the contract is entered into." (15 Op. Atty. Gen., 152, 161.) The question presented to the Attorney General did not require any opinion as to the conditions under which the contract of enlistment might be extended beyond the original term, so the above quotation from his opinion is not to be accorded the weight due to a formal determination of a doubtful question. (File 26251-5447, Dec. 8, 1911.)

By act of June 3, 1916 (39 Stat., 187, sec. 31), it was provided that "all enlistments in the Regular Army, including those in the Regular Army Reserve, which are in force on the date of the outbreak of war, shall continue in force for one year, unless sooner terminated by order of the Secretary of War, but nothing herein shall be construed to shorten the time of enlistment prescribed."

By the Selective Draft Act of May 18, 1917, section 7 (40 Stat., 81), it was provided that "all enlistments, including those in the Regular Army Reserve, which are in force on the date of the approval of this act and which would terminate during the emergency, shall continue in force during the emergency unless sooner discharged; but nothing herein contained shall be construed to shorten the period of any existing enlistment."

[In 23 Comp. Dec., 45, it was held that an enlisted man of the Marine Corps may lawfully be paid travel allowance on discharge only at the rate authorized by laws in effect on date of discharge, notwithstanding the fact that the law in force at the time of his enlistment authorized payment of such allowance at a higher rate; and in 23 Comp. Dec., 33, it was held that enlisted men of the Army must be demoted in rank when required by laws reorganizing the Army in order to comply with the provisions of such laws reducing the number of men in the higher rank, notwithstanding that they are deserving men and that their demotion is not believed by the War Department to be within the spirit of the new law.]

**Extension of enlistments in Marine Corps.**—The act of August 22, 1912 (37 Stat., 331), authorizing enlisted men of the Navy, by their voluntary agreement, to extend their enlistments for a period of one, two, three, or four years "from the date of expiration of the then existing four-year term of enlistment," applies to the Marine Corps by virtue of section 1621, Revised Statutes, which makes the Marine Corps subject to the laws established for the government of the Navy; and the Supreme Court decision in the case of *Wilkes v. Dinsman* (7 How., 88), in which it was held that the law now embodied in section 1422, Revised Statutes, authorizing the detention of persons enlisted for the Navy after the expiration of their enlistment under certain conditions, authorized the detention of enlisted men of the Marine Corps. The conclusion in this case might also be based upon the naval appropriation act of March 3, 1901 (31 Stat., 1132), providing that "hereafter enlistments into the Marine Corps shall be for a period of not less than four years." In the absence of a law expressly providing for the extension of enlistments in the Navy and made applicable to the

Marine Corps by section 1621, Revised Statutes, it might well be argued that the extension of enlistments in the Marine Corps by voluntary agreement of the man concerned would be authorized under the foregoing enactment of 1901, which does not fix any maximum term of enlistment. (File 26507-214:8, Apr. 5, 1915; 23 Comp. Dec., 349; compare 23 Comp. Dec., 22; see also act Apr. 25, 1917, 40 Stat. 38, authorizing extension of minority enlistments in the Marine Corps.)

**Minors over 18 may be enlisted without consent of parents or guardians.**—Under the act of Congress of March 2, 1837, section 1 (5 Stat., 153) [afterwards embodied in sections 1418 and 1419, Revised Statutes], a minor of the age of 18 can enlist in the Navy without the consent of his parents or guardian. (*Rush v. Watson*, 28 Fed. Cas. No. 16650a.)

The enlistment of minors in the naval service above the age of 18 is valid, without the consent of the parents or guardian. (12 Op. Atty. Gen., 258.)

The period at which persons reach their majority and become sui juris with respect to the ordinary affairs of life can not abridge the power of the General Government to prescribe the rules and conditions under which voluntary or compulsory services are to be rendered by citizens. (21 Op. Atty. Gen., 327.)

The phrase "other persons" in the act of March 2, 1837 [section 1418, Revised Statutes], includes minors above 18, as well as men of full age. (21 Op. Atty. Gen., 327.)

The enlistment of minors in the naval service is lawful and can not be set aside at the instance of their parents, except in so far as such enlistments are forbidden by Congress. (In re *Doyle*, 18 Fed. Rep., 369, citing *U. S. v. Bainbridge*, 1 Mas., 71 [Fed. Cas. No. 14497]; In re *Roberts*, 2 Hall, L. J., 192; *Com. v. Barker*, 5 Bin., 423; *Ex parte Browne*, 5 Cranch, C. C., 554 [Fed. Cas. No. 1972].)

Neither section 1419, Revised Statutes, nor any other law requires the consent of parents and guardians for the enlistment of minors over 18 in the Navy. It is clear that Congress has authorized the enlistment in the Navy of minors over 18, and that the consent of parents and guardians is not necessary to make the enlistment valid. (21 Op. Atty. Gen., 327.)

If a statute authorizes a minor by enlistment to bind himself during his minority, he can bind himself for a further period. (21 Op. Atty. Gen., 327.)

Under sections 1418, 1419, and 1624 (art. 19), Revised Statutes, relating to enlistments in the Navy, which prohibited the enlistment of boys under the age of 16 [now 14], but permitted the enlistment of boys between the ages of 16 and 18 [now 14 and 18] with the consent of their parents or guardian until they shall arrive at the age of 21, and provided for the enlistment of "other persons" for terms not exceeding five years, the consent of the parents or guardian of a minor over the age of 18 is not essential to his valid enlistment, and he can not be discharged from such enlistment by a court on a writ of habeas corpus at suit of his parents or guardian. (In re *Norton*, 93 Fed. Rep., 606.)



Section 1418 provides that boys between the ages of 14 and 18 may be enlisted to serve in the Navy until they shall reach 21; other persons may be enlisted to serve for a period not exceeding five years, etc.; section 1419 provides that minors between 14 and 18 shall not be enlisted without the consent of their parents or guardians; section 1420 provides that no minor under the age of 14 shall be enlisted: *Held*, that a minor between the ages of 18 and 21 may be enlisted without the consent of parents or guardian, being included in the term "other persons" in section 1418. (*Thomas v. Winne*, 122 Fed. Rep., 395.)

A minor who, at the age of 19, with the consent of his father, enlisted in the Navy has not the right, on coming of age, to demand his discharge under the rule which applies to his ordinary civil contracts. (21 Op. Atty. Gen., 327, further holding that consent of parents or guardian is not necessary to enlistment of minors who are over 18. Compare *Ex parte Brown*, 4 Fed. Cas. No. 1972.)

For other cases, see note to section 761, Revised Statutes.

**Minority enlistments in Marine Corps governed by Navy laws.**—The Marine Corps is part of the United States naval service, in which minors over 18 years of age may be enlisted, under sections 1608 and 1418, Revised Statutes, without the consent of their parents or guardians. The limitations of sections 1418 and 1419 undoubtedly apply to enlistments in the Marine Corps, under section 1608; but these limitations do not aid the petitioner in this case, since the only restraint is in regard to enlistments of persons under the age of 18 years, while Corporal Doyle in the present case was between 19 and 20 at the time of his enlistment. (*In re Doyle*, 18 Fed. Rep., 369.)

The restrictions of section 1117, Revised Statutes, apply only to enlistments in the "Army" under Title XIV. (*In re Doyle*, 18 Fed. Rep., 369.)

The Marine Corps is not an independent organization, but is a part of the Navy rather than of the Army; and sections 1418, 1419, Revised Statutes, which, taken together, authorize the enlistment of minors over 18 years of age to serve in the Navy without the consent of their parents or guardians, apply to enlistment in the Marine Corps as well; so that a minor who has enlisted in the Marine Corps when over 18 years of age will not be discharged from the custody of the officers of the Marine Corps in habeas corpus proceedings brought by his father. (*Elliott v. Harris*, 24 App. D. C., 11, overruling *In re Shugrue*, 3 Mackey (D. C.) 325, as being "in manifest conflict with the principle upon which the subsequent case of *United States v. Dunn* [120 U. S., 249] was decided by the Supreme Court of the United States.")

The Marine Corps of the United States is not a part of the Navy, and enlistments therein are not governed by the statutes relating to enlistments in the Navy, but by regulations prescribed by the Secretary of the Navy, under whose government and control such corps is primarily placed; and such officer having prescribed in the published regulations of his department that "the regulations for the recruit-

ing service of the Army shall be applied to the recruiting service of the Marine Corps as far as practicable," the enlistment of minors therein is governed by the statutory provisions relating to Army enlistments and no person under the age of 21 years can lawfully enlist without the consent of his parents or guardian, as required by Revised Statutes, section 1117. (*McCalla v. Facer*, 144 Fed. Rep., 61, citing and following *In re Shugrue*, 3 Mackey (D. C.), 324, but overlooking the fact that the case cited had been overruled by the Court of Appeals of the District of Columbia in *Elliott v. Harris*, 24 App. D. C., 11.)

For other cases, see note to section 1621, Revised Statutes, covering status of Marine Corps; see also notes to sections 761 and 1422, Revised Statutes.

**Policy of Congress to encourage enlistment of minors.**—The law [March 1, 1889, 25 Stat., 781] providing clothing bounty on enlistment, did not intend that the Secretary of the Navy should have such discretionary power with respect to furnishing the bounty as would enable him to furnish it in one case and in another case decline to furnish it; but should be construed as imposing upon the Secretary of the Navy an imperative obligation and not merely discretionary power. The whole purpose of the act is to "encourage the enlistment of boys as apprentices in the U. S. Navy," and upon the Secretary of the Navy is imposed the duty of executing the provisions of the statute. (25 Op. Atty. Gen., 270.)

**Certificate required prior to enlistment of minor.**—Where an applicant is "obviously" beyond 18 years of age, a written statement of the medical officer of the recruiting party to that effect should be accepted in lieu of the certificate required by the act of June 29, 1906. (File 1689-5, Aug. 25, 1906. The act cited prohibited enlistment of any applicant "unless a certificate of birth or written evidence, other than his own statement, satisfactory to the recruiting officer, showing the applicant to be of age required by naval regulations, shall be presented with the application for enlistment." The present law is contained in the act of Mar. 3, 1915, noted above, under this section.)

**Minor is "enlisted man."**—A minor enlisted in the Navy during the period of his minority is an "enlisted man" in the Navy within the meaning of the act of August 22, 1912 (37 Stat., 330), providing for the discharge of any enlisted man within three months prior to expiration of enlistment. (20 Comp. Dec., 429.)

The statute in making provision for the enlistment of persons under age, makes it competent for any such person to bind himself by enlisting and in respect to that contract or enlistment he is to be regarded as an adult and competent to do all acts within the purview of the statute as fully as if he were a person of full age. It has been decided that an enlisted man has a right to make an agreement with the Government waiving his claim to travel allowance on discharge, when that contract is made at the time he is about to be discharged (citing *Comp. Dec.*, Oct. 8, 1901, *MS. Dec.*, vol. 19, p. 70). If the claimant is to be regarded as of full age in dealing with all matters connected

with his enlistment, and an adult can waive his right to travel allowance, it follows that he can do so. The power to enlist being conferred, all the incidental powers necessarily belonging to a person in that situation with reference to his enlistment naturally follow. (9 Comp. Dec., 5.)

"Apprentice seamen may be enlisted between the ages of 17 and 25. Those below 18 are enlisted during minority, or until they become 21 years of age. Those 18 years of age or over are enlisted for four years. There are several other rates in which those as young as 18 may be enlisted. (Navy Regs., 1913, art. R-3525.) When enlisted apprentice seamen are sent to training stations where they are given a special course of instruction, at the termination of which they are transferred to and become a part of the regular complements of cruising vessels in the Navy, and may be promoted to higher ratings. No distinction on account of duties or pay is made between the apprentice seamen who enlist during minority and those who enlist for four years, nor is any such distinction made on account of their being under or over 21 years of age." (20 Comp. Dec., 409.)

"The phrase, 'enlisted men,' has generally been used and understood to mean all those who enlist in the Navy, whether under or over 21 years of age, as distinguished from the officers who are appointed or commissioned. In other words, the entire enlisted force in the Navy are generally referred to and described as enlisted men." (20 Comp. Dec., 409.)

The enlistment in the Navy of boys between 14 and 18 years of age until they shall arrive at the age of 21 years is provided for by section 1418, Revised Statutes, as amended by the act of February 23, 1881 (21 Stat., 338). In any case when an apprentice seaman is discharged on account of expiration of his enlistment, he is 21 years of age, a man in the strict legal sense; [but see act Aug. 22, 1912, 37 Stat., 330, relative to discharge of men three months before expiration of term for which enlisted]; he therefore comes within the law of June 29, 1906 (34 Stat., 553, 555), providing that "hereafter enlisted men discharged on account of expiration of enlistment, shall receive in lieu of transportation and subsistence travel allowance of four cents per mile from the place of discharge to the place of enlistment, for travel in the United States;" and also within the meaning of the annual appropriation for travel allowance of "enlisted men" discharged on account of expiration of enlistment, although other appropriations make provision for transportation of "enlisted men and apprentice seamen," mentioning them as if they were of separate classes. Apprentice seamen may be mentioned in the other items of the transportation appropriation because they are transported before they are 21 years of age, and may also be discharged "on medical survey" before they arrive at that age. (19 Comp. Dec., 591.)

A minor who enlists in the Navy is competent to designate a beneficiary under the act of May 13, 1908 (35 Stat., 128) [since amended by act of Aug. 22, 1912, 37 Stat., 329, and acts of Oct. 6, 1917, 40 Stat., 392, and Oct. 6, 1917, sec.

312, 40 Stat., 408], and amount of death gratuity in his case should be paid to beneficiary in accordance with such designation. (File 26543-38.)

Minors enlisting with consent of parents or guardians have the same right to make agreement to reenlist or waiving transportation as other enlisted men, notwithstanding a request to the contrary made by the guardian in any case. (File 4682-04, May 31, 1904.)

A minor may be tried by general court-martial without the appointment of a guardian ad litem to defend him. This is in accordance with decisions of the civil courts under which a minor is amenable for crime and pleads without intervention and must suffer the penalty when found guilty. "A minor is tried like an adult. He may defend personally or by attorney and no guardian ad litem is to be appointed or appear for him;" although in one State, by statute, his defense is by guardian. In some decisions it has been expressly held that to defend in person or by attorney is the right of the minor, and that it is error to assign him a guardian and try the case upon a plea pleaded for him by the guardian. (File 26251-6020, July 7, 1913; G. C. M. Rec. No. 25157.)

**When enlistment complete.**—Where man signed shipping articles one day but did not take the oath of allegiance until the next, *held*, that while section 25 of the Navy personnel act of March 3, 1899 (30 Stat., 1009), requires an oath of allegiance to be taken, there appears to be no provision of law that postpones the taking effect of an enlistment until such oath is taken; said man should, accordingly, be taken up for pay and rations from the date he signed the shipping articles, which is regarded as the date of his enlistment; oath of allegiance should be executed as of the date on which it is taken. (File 1096, Mar. 30, 1905.)

Men who applied for enlistment in the Marine Corps were examined and accepted at Denver, Colo., but took the oath of allegiance at Salt Lake City, Utah; *held*, that they were enlisted at Denver within the meaning of the law allowing mileage on discharge to place of enlistment. (File 7657-94, Dec. 31, 1910, construing act Mar. 2, 1901, 31 Stat., 902.)

The Comptroller of the Treasury decided, in accordance with the rulings of the Navy Department, that an enlisted man is entitled to pay from the date he presents himself for service in the Marine Corps, signs the prescribed application, and submits to and passes a medical examination, although he does not take the oath of allegiance until a later date and in a different city. (Comp. Dec., Mar. 8, 1911, file 7657-94:2, 17 Comp. Dec. 656, 121 S. and A. Memo., 1696; see also Comp. Dec., Mar. 4, 1911, file 26254-659.)

It has been specifically decided by the Navy Department, the War Department, and the Comptroller of the Treasury that the taking of the oath of allegiance is not essential to the validity of an enlistment. (File 19037-58, Apr. 6, 1917.)

A man who signed the shipping articles, was furnished and accepted transportation from Raleigh to Norfolk, was passed by the medical officer, was furnished subsistence and clothing



outfit, and was actually assigned to duty, is legally and for all purposes an enlisted man in the Navy in all respects, notwithstanding that he has refused to take the oath of allegiance. Inasmuch as the law (act Mar. 3, 1899, sec. 25, 30 Stat., 1009), expressly states that the oath of allegiance "shall" be administered "to the officers and men of the Navy," should the man in question be ordered to take the oath and then refuse to do so, appropriate disciplinary action might be taken against him for refusing to obey the lawful order of his superior. (File 19037-58, Apr. 6, 1917.)

A man was honorably discharged, January 4, 1905; applied for reenlistment, January 5, 1905; was reported physically disqualified; remained on the vessel awaiting action of the Navy Department; his physical disability having been waived, was reenlisted as of January 5, 1905, but executed the oath of allegiance January 16, 1905, date the waiver was received on board: *Held*, that he was properly reenlisted as of January 5, 1905, and is entitled to pay and rations from that date, provided he was actually held to service from that date. (File 1096, Mar. 30, 1905.)

If the man was actually held to service while his physical condition was under consideration, he may be said to have been conditionally accepted and is entitled to pay for such service. The fact that the man in such a case was accepted for service during the period awaiting action should be made to appear by the certificate of the proper commanding officer before payment is made. (Comp. Dec., June 25, 1902, 5 S. and A. Memo., 65; see also file 1096, Mar. 30, 1905.)

It is a rule that an enlistment paper can not be dated back so as to cover a period when the person was not actually in the service; he must be actually accepted for service; in which event his enlistment paper may be dated back to cover the period of such service if it was not made out at the time the party was so accepted. (Comp. Dec., June 25, 1902, 5 S. and A. Memo., 65; see also file 1096, Mar. 30, 1905.)

Plaintiff signed an agreement "to serve for a period of three years from the date of \* \* \* being mustered into the United States service." Plaintiff then refused to go to camp, was arrested, taken to camp of rendezvous, and, by order of the commander, confined for several days. On release, brought suit for damages: *Held*, the words "enlist" and "enlistment" in the law, as in common usage, may signify either the completed fact of entering into the military service or the first step taken by the recruit toward that end. The present question is not one of breach of contract but change of status. The plaintiff was not a soldier, nor subject to any military authority or discipline as such. The statutes seem to assume the mustering of a recruit into the service as the point at which the right to exercise military restraint over him begins. The court is not, however, prepared to say that actual submission as a soldier to a commissioned officer would not of itself be sufficient; still less, that a recruit of full age who had actually served or received money from the Government could be allowed to dispute legality of the enlist-

ment. But the mere promise to serve from a future date, to be fixed only by performance of a distinct act, is not sufficient to change state of a citizen into that of a soldier. (Tyler v. Pomeroy, 8 Allen (90 Mass.) 480.)

A seaman who had been examined by a surgeon and passed through all the necessary steps at a naval rendezvous, signing shipping articles, and received orders to go on board receiving ship, but who, on reaching receiving ship was found to be intoxicated and sent away until he should become sober, and who, before returning, was enticed away by the defendant, *held*, not to be an "enlisted seaman" because he had done no duty, been paid no money, and was not entitled by the regulations to any pay until passed on the receiving ship. (United States v. Thompson, 28 Fed. Cas. No. 16491.)

Man applied for enlistment in the Marine Corps, and after signing declaration and undergoing medical examination, failed to report to complete enlistment, but enlisted in the Navy. Upon report of the facts to the Navy Department, *held*, that the man would be retained under his enlistment in the Navy, as it otherwise appeared that he was a desirable person, and that no action would be taken to recover from him the cost of his medical examination for the Marine Corps. (File 7657-58.)

Recruits detained at the place of recruiting, if said place is not a "naval station" within the meaning of the act of January 30, 1885 (23 Stat., 291), (authorizing rations or commutation thereof for enlisted men), are entitled to be subsisted from the appropriation "Provisions, Navy," provided they actually enlisted and became in fact enlisted men of the Navy at such place. If their enlistments are not completed at the place of recruiting, or if they are only held together tentatively as enrolled persons applying to enter the naval service, they may be furnished subsistence from appropriation "Transportation, recruiting, and contingent." (7 Comp. Dec., 408.) Under this decision, applicants for enlistment who have passed the physical and other examinations and are held together at substations awaiting the arrival of the recruiting officer to administer the oath and complete their enlistment, are entitled to be subsisted from the appropriation "Recruiting, Navigation." (Comp. Dec., Aug. 30, 1904, 43 S. and A. Memo., 419.)

Certain applicants signed papers agreeing to enlist in the Marine Corps, and without being accepted were transported to other cities for the purpose of being examined to determine their fitness. Upon arrival it was discovered that the applicants had concealed former service in and dishonorable discharge from the Navy. Without being enlisted, they were confined by the commanding officer, for varying periods, approximately two months in one case, with a view to causing their arrest by the civil authorities for fraudulently obtaining Government transportation, subsistence, etc. *Held*, that the men in question were civilians, and their confinement by officers of the Marine Corps was without legal authority or justification, and might expose such officers to prosecution, both civilly and

criminally, for false imprisonment. (File 7657-180, June 4, 1913, quoting *U. S. v. Travers*, 28 Fed. Cas. No. 16537, noted under Constitution, Art 1, sec. 8, clause 14, "IV. Jurisdiction of Courts-Martial." Followed file 28909-191, Jan. 21, 1919.)

"In order to become a soldier of the United States Army—i. e., in order to become a fully enlisted man—the party must first enlist by signing the prescribed application, and he must then be accepted and sworn into the service by the proper officer." (*Coe v. U. S.*, 44 Ct. Cls., 419, 427; *Union Pac. R. Co. v. U. S.*, 52 Ct. Cls. 226.)

Applicants for enlistment are in no way connected with the military organization or any movement of the same, and may never become so. Such persons have not changed their status in life from that of ordinary citizens to that of a soldier and are not amenable to military jurisdiction. They are not members of the military organization and therefore are not included within the term "troops of the United States." (*Union Pac. R. Co. v. U. S.*, 52 Ct. Cls., 226; 249 U. S., 354.)

**De facto enlistment.**—See note to section 1426, Revised Statutes, under "Honorable discharge of de facto enlisted man." See also cases noted above, under "Detention of men after expiration of enlistment."

**Errors in enlistment.**—Where a minor over 18 years of age was enlisted to serve during minority, contrary to the provisions of article 931, Navy Regulations, 1905, and declined to have the error in his enlistment corrected, he should be discharged on account of illegal enlistment. (File 5731, Sept. 14, 1906; compare file 24368-7, Feb. 14, 1912, noted under sec. 1419, R. S., "Consent required for enlistment.")

A recruit at time of enlistment gave his date of birth as January 9, 1879, making his age 18 years. In three subsequent enlistments he renewed his former statement as to his date of birth, verifying same by oath on each occasion. Thereafter, while serving as a warrant officer, he reported to the Navy Department that his correct date of birth was January 9, 1881; that he had only a short time previously discovered this; and inclosed an affidavit purporting to be signed by his mother in support of his statements. *Held*, that while a person's statement as to his age is necessarily hearsay evidence, it is universally admitted by the courts as competent. Nevertheless, such hearsay evidence is not conclusive, and the testimony of one's mother, substantiated, as in this case, by an apparently bona fide entry in the family Bible, would certainly appear to be better evidence. The credibility of the new evidence, however, is a matter which should be carefully considered, especially as it is not incumbent upon the department to decide the question and change its official records in the absence of good reasons, which should be made to appear. Accordingly,

the officer should be required to give his reasons for desiring the department's records changed, and explain why he did not, previous to his enlistments, obtain from his mother the date of his birth, or consult the family Bible. His reasons and explanations would in all probability assist in determining the credibility of his evidence, and enable the department to take such action in the premises as might appear just and desirable. (File 24368-9, Nov. 22, 1913.)

Man applied for enlistment in the Navy, but did not sign the shipping articles; no shipping articles were ever made out for him; the officer supposed to have enlisted him did not sign the service record in his case; he reported for duty, served as a machinist's mate second class, and presumably received pay and allowances as such; he now desires to be released from the service: *Held*, that the error in this case was the error of the Government and not the error, mistake or fraud of the man; that the most which can be held is that he enlisted in the Navy upon an implied contract of enlistment but for no definite period and if he now refuses to execute a formal contract and demands his release, and there are no charges pending against him, and he is not being held under sentence of court-martial, he should forthwith be discharged. (File 7657-882, May 2, 1919.)

A recruit over 18 years enlisted for minority, giving erroneous date of birth. He reenlisted, giving correct date of birth, substantiated by a birth certificate. *Held*, that the original enlistment was illegal, it being required by law and regulations that persons 18 years of age or over be enlisted for a term of four years. *Held further*, that while original enlistment was illegal, it was voidable only, and not void, and having been fully executed and terminated by an honorable discharge, the man is entitled to all the benefits thereof as if it had been a legal and valid contract. (File 7657-360, May 9, 1916.)

Where a minor signed a contract of enlistment reading, "I oblige and subject myself to serve during minority, until January 1, 1915," the legal effect of the contract was to bind him to serve until he arrived at the age of 21 years, which the evidence in this case shows would be January 1, 1916. The date on which he would attain his majority, given in the contract of enlistment and consent of parents as January 1, 1915, must be rejected as an error in computation. Since the man stated that he was informed by the recruiting officer that his enlistment would expire January 1, 1915, which statement is confirmed by the date given in the shipping articles, it would be proper to give him his discharge at once, but if he desires the benefits of a discharge by reason of expiration of enlistment, he would have to serve until January 1, 1916. (File 7657-273, Jan. 16, 1915; C. M. O. 6, 1915, p. 11.)

**Sec. 1419. [Enlistment, minors, consent of parents and guardians.]** Minors between the ages of fourteen and eighteen years shall not be enlisted for the naval service without the consent of their parents or guardians.



This section was expressly amended and re-enacted to read as above by act of May 12, 1879 (21 Stat., 3), as amended by act of February 23, 1881, section 2 (21 Stat., 338), the amendment made by the latter act consisting in substituting the word "fourteen" for "fifteen" as used in the former act.

As originally enacted this section read as follows: "Sec. 1419. Minors between the age of sixteen and eighteen years shall not be enlisted for the naval service without the consent of their parents or guardians." [See section 1624; article 19.]—(2 Mar., 1837, c. 21, s. 1, v. 5, p. 153. 3 Mar., 1865, c. 79, s. 18, v. 13, p. 490.)

The discharge of minors who swear falsely as to their age is required by act of March 3, 1915, noted under section 1418, Revised Statutes.

The punishment for fraudulent enlistment is prescribed by act of March 3, 1893 (27 Stat., 716), amending section 1624, Revised Statutes, article 22.

The punishment of officers who knowingly enlist "any minor between the ages of fourteen and eighteen years without the consent of his parents or guardian, or any minor under the age of fourteen years," is prescribed by section 1624, Revised Statutes, article 19, as amended.

"The register of wills [of the District of Columbia] shall prepare papers in connection with appointment of guardians to enable indigent boys to enlist in the United States Navy as provided by law, without making any charge therefor." (Act Mar. 3, 1891, 26 Stat., 1063.)

**Consent required for enlistment.**—The consent of the mother would not be a sufficient compliance with the terms of this section where the father is living, although it is claimed that the father is working in a remote part of the State where he can not be reached by mail, and that he would undoubtedly consent to the enlistment if consulted. (File 7657-293, June 19, 1915.)

"The consent of the father is necessary except where the mother or other person is the legal guardian of such minor." (File 7657-293, June 19, 1915.)

Where the father and mother of a minor, 17 years of age, are both dead, and no legal guardian has been appointed, *held* that neither the stepmother nor sister of said minor could legally consent to his enlistment unless first legally appointed as guardian. (File 7657-293:3, Aug. 21, 1915.)

Where the applicant's father and mother are both living, but the father has deserted his wife and is not contributing to the child's support, *held*, that the consent of the mother, who has not legally been appointed guardian of the applicant, can not be accepted as sufficient, but that upon the facts stated the consent must be signed by the father. (File 7657-293:3, Aug. 21, 1915.)

"If the recruiting service is embarrassed by the requirements as to consent in the cases of minors, the remedy must be sought in an amendment of the statutes by Congress, as such considerations can not justify administrative officers in departing from the plain lan-

guage of the law as it exists. In other words, the settled maxim that it is the province of courts to construe laws and not to make them applies to the fullest extent to the action of executive officers." (File 7657-293:1, July 29, 1915.)

Where a minor during the lifetime of his father had a guardian appointed to sign his consent papers upon enlistment, and the father demanded the boy's release on the ground that he had not consented to the enlistment, *held*, that the Navy Department can not go behind the action of the court to inquire into the legality of the guardian's appointment, and that the enlistment was accordingly valid. (File 3956, Jan. 25, 1906; see also file 7657-207, Nov. 7, 1913.)

Minor enlisted in the Navy with consent of his father after his mother had instituted proceedings against the father for divorce and care and custody of the minor child. *Held*, that enlistment was illegal, the minor being under the jurisdiction of the court pending termination of the proceedings, and his care and custody having been awarded to his mother two weeks after his enlistment. (File 9750-04, Nov. 30, 1904.)

A minor enlisted in the Navy for four years when 15 years old, alleging that he was 18 years old. To straighten out his record he afterwards submitted the consent of his father. Question was presented whether it would be legal to accept the evidence and retain the minor under his four-year enlistment (there being no provision of law for the enlistment for four years of any one under 18 years of age), or whether it was necessary to secure the agreement of the father and boy for the latter to remain in the service during minority. *Held*, that enlistment was a valid one unless avoided by the United States, and it would therefore be legal to retain the boy under his four-year term of enlistment. (File 24368-7, Feb. 14, 1912. Compare note to sec. 1418, R. S., "Errors in enlistment.")

A minor under 18 years, father and mother both dead, enlisted in Navy for minority with consent of his aunt, who made oath that she was the sole legal guardian of the recruit, although in fact she was not his legally appointed guardian. Thereafter, the minor's brother-in-law was appointed his legal guardian and objected to his "retention in the service because of under-age enlistment." *Held*, that minor should be discharged without prejudice to his right to reenlist if desired when he attains the required age; that the fact that the guardian was appointed after the minor's enlistment is not material, the enlistment having been without the consent required by section 1419; and that, the recruit not having sworn falsely as to age, it does not appear that he was guilty of fraud. (File 7657-207, Nov. 7, 1913.) This same holding applies in a case where the minor swore falsely as to his age at the time of enlistment, except perhaps as to prejudice regarding reenlistment. (File 7657-559, Feb. 16, 1918.)

A minor enlisted with the consent of a party who made oath that she was the sole legal guardian of the recruit. Thereafter, another party made application for discharge of the minor, forwarding papers showing that said applicant

was appointed as guardian for the minor some months after his enlistment. *Held*, that the minor should not be discharged upon application of a guardian appointed after his enlistment unless satisfactory evidence is produced to establish that the party who consented to his enlistment was not his legal guardian at the date of said enlistment. (File 7657-332, Dec. 29, 1915.)

To satisfy the requirements of law, the consent of the father, mother, or legal guardian of the minor must be furnished. The consent of parent or guardian may be executed before an officer of a court of record having custody of its seal, a notary public, justice of the peace, or other officer authorized to administer oaths for general purposes, or before an officer of the Navy or Marine Corps in accordance with the act of March 3, 1901 [see note to section 183, Revised Statutes]. If such officer (other than an officer of the Navy or Marine Corps) is not required by law to have and use a seal, his official character, signature, and term of office should be certified by the proper officer, State, county, or city, under his official seal, unless such certificate has already been filed in the Navy Department for general reference. (File 2757-5, June 15, 1906.)

**The consent of both parents is not necessary** to the enlistment of a minor under 18 years of age, but in such case the consent of the father is sufficient. (File 26806-142, Oct. 16, 1916.)

**False and fraudulent consent papers executed before notary.**—A notary public may be prosecuted for violation of section 31 of the Federal Criminal Code (act Mar. 4, 1909, 35 Stat., 1094) where he permitted an applicant to sign in his presence the consent papers for his enlistment in the name of his mother, and then falsely certified concerning the appearance of the mother before him. (See file 7657-299.)

For other cases, see file 8205-2, October 17, 1907; 5954, October 18, 1906; file 7657-156, July 24, 1912.

**Fraudulent enlistment of minor in violation of this section is not void, but voidable.**—It is well settled that under this section the enlistment of a minor without the consent of his parents or guardian, while valid as to the minor, is voidable at the instance of the parents or guardian, and, upon application of the parents or guardian, the civil courts will, by habeas corpus proceedings, direct the immediate discharge of the minor under such circumstances, unless disciplinary proceedings have been commenced against him by the naval authorities for fraudulent enlistment or other offense. (File 7657-207, Nov. 7, 1913.)

Section 1419, as amended by act of February 23, 1881, is for the protection of the parents or guardian; and an enlistment in violation thereof is valid as to the minor, and voidable only by the parent or guardian before the minor arrives at the age of 18 years. (U. S. ex rel. Hendricks v. Pendleton, 167 Fed. Rep., 690.)

A minor enlisted in the Navy, although without the consent of his parents and in violation of the statute, is punishable for breach of discipline and cannot be discharged on habeas corpus at suit of his parent while undergoing such pun-

ishment. (U. S. ex rel. Hendricks v. Pendleton, 167 Fed. Rep., 690.)

Where a minor under the age of 18 years enlisted in the Navy without the consent of his father, then living, on the minor's fraudulent representation that he was over 21 years of age, such enlistment was not void as to the minor, but was voidable only at the instance of his father. (U. S. v. Reaves, 126 Fed. Rep., 127, reversing *Ex parte Reaves*, 121 Fed. Rep., 848, which held that section 1419, as amended, declares a public policy, and the enlistment of a minor under the age of 18, without the consent of his father, is void from the beginning as against the father, and gives the minor no status in the naval service which can be asserted by the United States to deprive the father of the custody and control of his son after he has regained the same, or which renders the son punishable by court-martial for desertion in peacefully leaving his ship and returning to his father with the latter's approval.)

The civil courts should not interfere by habeas corpus to discharge a minor under 18 years of age who has been enlisted in the naval service without the consent of his parents or guardians, if at the time of presentation of the petition for the writ the minor is under arrest and held for trial by court-martial on a charge of desertion or fraudulent enlistment or other charge cognizable by a naval court. (*Dillingham v. Booker*, 163 Fed. Rep., 696; compare *Ex parte Bakley*, 148 Fed. Rep., 56, affirmed 152 Fed. Rep., 1022; *Ex parte Lisk*, 145 Fed. Rep., 860; and *In re Falconer*, 91 Fed. Rep., 649.)

The appellee, William Booker, did enlist as an apprentice seaman, and did serve as such until he deserted. It may be admitted that he fraudulently enlisted; still he was both de facto and de jure in the Navy until discharged therefrom by operation of law, and while he was such a seaman he was subject to the rules and regulations of the Navy and liable to be tried and punished for any infraction of the laws relating thereto. To hold otherwise would make enlistment a farce, would destroy discipline, and offer a premium for desertion. It will not do to hold that he cannot be punished by court-martial for crimes committed when he was in the naval service simply because his parents did not consent to his enlistment. The lack of such consent will necessitate his discharge from the service, but it will not absolve him from punishment for the crimes he committed when in the service. (*Dillingham v. Booker*, 163 Fed. Rep., 696.)

Section 1624, Revised Statutes, provides for the government of the United States Navy, and article 8 thereof provides that such punishment as a court-martial may adjudge may be inflicted on any person in the Navy who deserts therefrom. Where a minor between the ages of 14 and 18, without the consent of his father, then living, enlisted in the Navy, and received the usual pay from the date of his enlistment until after he deserted, was arrested and detained as a deserter, he could not be discharged from custody of the naval authorities on a writ of habeas corpus sued out by his father, though the latter was entitled to demand his son's release from the Navy as soon as he had answered and satis-



fied the charges for desertion and fraudulent enlistment, then pending against him. (*U. S. v. Reaves*, 126 Fed. Rep., 127, reversing 121 Fed. Rep., 848.)

For other cases, see note to section 761, Revised Statutes, and see note to Constitution, Article I, section 8, clause 14, under "IV. Jurisdiction of courts-martial."

**Pay and allowances under fraudulent enlistment.**—A marine enlisted without consent of his parent, stating that he was 21 years of age; subsequently, his father applied for his discharge, claiming that he was only 17 years of age, and had enlisted without his parent's consent. The Navy Department refused to discharge him, deciding to accept the age given by him at the time of enlistment; his father brought habeas corpus proceedings, and he was ordered discharged by the court: *Held*, that this was a judicial determination that his enlistment was fraudulent, and he is not, therefore, entitled to pay, travel allowances, or other allowance under said enlistment. (13 Comp. Dec., 817.)

Pay actually received by an enlisted man for services during a fraudulent enlistment can not be recovered from him. (12 Comp. Dec., 445.)

The contracts were voidable and not void, and until rescinded by the action of the Government any proper payments made by the disbursing officer must be considered as legally made, and he should be entitled to credit for the same. (11 Comp. Dec., 712; file 4640, Apr., 1906.)

A fraudulent enlistment is still an enlistment, and a man so enlisted is de facto in the service, and therefore a sentence involving loss of pay may be approved. (File 5624, Feb. 17, 1896.)

Pay continues after conviction, unless forfeited in whole or in part by sentence. (File 26254-279.)

An apprentice discharged for fraudulent enlistment is entitled to such pay as he may have received, but all pay and allowances accrued and unpaid at the time of discovery of the fraud should be checked as forfeited. (File 2792-01, Jan. 15, 1902; see also Comp. Dec., Aug. 12, 1897, 4 Comp. Dec., 54.)

A person convicted by court-martial of fraudulent enlistment in the Navy and the receipt of pay and allowances thereunder, and sentenced to be dishonorably discharged from the service, is not entitled to any arrearages of pay which accrued prior to conviction. It is not necessary that this pay should have been included in the sentence of the court, since the claimant never acquired title thereto, because of the rescission of the contract of enlistment. The Navy Department, by proceeding against the claimant through a court-martial and imposing a sentence of discharge from the service, has taken advantage of the fraud to rescind the contract of enlistment. (4 Comp. Dec., 54; file 26251-3352:1, May 19, 1910; but see file 26254-279, noted above, and 19 Comp. Dec., 470, noted under sec. 1420, R. S.)

For other cases, see note to section 1420, Revised Statutes.

**Sec. 1420. [Enlistment, prohibited classes.]** No minor under the age of fourteen years, no insane or intoxicated person, and no person who has deserted in time of war from the naval or military service of the United States shall be enlisted in the naval service.

This section was expressly amended and reenacted to read as above by act of August 22, 1912, section 2 (37 Stat., 356).

As originally enacted this section read as follows: "SEC. 1420. No minor under the age of sixteen years, no insane or intoxicated person, and no deserter from the naval or military service of the United States shall be enlisted in the naval service."—(3 Mar., 1865, c. 79, s. 18, v. 13, p. 490.—*U. S. v. Bainbridge*, 1 Mas., 71; *U. S. v. Stewart*, Crabbe, 265.)

It had previously been amended and reenacted by act of May 12, 1879 (21 Stat., 3), which changed the word "sixteen" in the original section to read "fifteen"; and was thereafter amended by act of February 23, 1881, section 2 (21 Stat., 338), the amendment made by the latter act consisting in substituting the word "fourteen" for "fifteen" as used in the previous amendatory act.

The punishment of officers who knowingly enlist persons in violation of this section is prescribed by section 1624, Revised Statutes, article 19, as amended.

**Enlistment of pardoned deserter.**—The pardon of a convicted deserter from the Navy blots out his offense, and he may legally be reenlisted, notwithstanding the provisions of

sections 1420 and 1624 (art. 19), Revised Statutes, prohibiting the enlistment of deserters in the naval service. (26 Op. Atty. Gen., 617; overruled by 31 Op. Atty. Gen., 225, noted below. See also note to Constitution, Article II, sec. 2, clause 1, under "III. Power to pardon offenses against the United States.")

Sections 1420 and 1624, article 19, Revised Statutes, as amended, relate to the general organization and efficiency of the Navy; they affect only incidentally particular classes of individuals, and obviously are not intended as punishment for offenses. They place deserters in the same category with minors, insane persons, and intoxicated persons, as not qualified for the naval service. Accordingly, *held* that a pardon does not remove the disqualification attached to the fact of desertion by Revised Statutes, sections 1420 and 1624, and that a person who has deserted in time of war from the naval or military service of the United States is not eligible, after pardon, for reenlistment in the naval service. (31 Op. Atty. Gen., 225, overruling 26 Op. Atty. Gen., 617, noted above.)

**Enlistment of deserter who has not been convicted.**—See note to Constitution, Article I, section 9, clause 3, under "Bill of attainder"; see also sections 1996 and 1998, Revised Statutes.

No one who has already been in the naval or military service of the United States shall be enlisted without showing his discharge therefrom. (Art. R-3524 (3), Navy Regs., 1913.)

Section 1420, Revised Statutes, prohibits the enlistment of deserters at large as well as convicted deserters. (File 7657-132, Feb. 17, 1912.)

**Pay and allowances of deserter who fraudulently enlists.**—The fraudulent enlistment of deserters may be waived by the Government and the deserters continued on duty in the Navy and allowed the pay of their grades. If tried by court-martial for the offense, they are entitled to so much of their pay as is reserved for forfeiture by sentence of the court, and when restored to duty are entitled to the pay of their grades. (19 Comp. Dec., 470.)

It is well settled that a fraudulent enlistment is not void, but voidable at the option of the Government, and this is based upon the general principle of law that when a contract has been procured by fraud it may be avoided by the innocent party upon the discovery of the fraud, but if the innocent party proceeds with the contract and accepts service under it after the discovery of the fraud, he is bound to pay for such services. (15 Comp. Dec., 614.)

Whether a man securing his enlistment by fraud shall be discharged for that reason or retained in the service rests in the sound discretion of the executive officers. If he is to be discharged for the fraud, no further payments should be made; if he is to be retained in the service, credit should be given him and payments made as though no fraud had occurred in his enlistment. (Comp. Dec., Apr. 29, 1903, 24 S. and A. Memo., 187; see also 15 Comp. Dec., 614; 14 Comp. Dec., 267.)

For other cases see note to section 1419, Revised Statutes.

**Enlistments in violation of this section are void, and not merely voidable.**—The fraudulent enlistment of a deserter at large is void ab initio under the provisions of section 1420, Revised Statutes, which section applies to deserters at large as well as convicted deserters. (File 7657-132, Feb. 17, 1912; see also *Hoskins v. Pell*, 239 Fed. Rep., 279.)

[Note: By section 1420, Revised Statutes, Congress has placed on the same footing, without discrimination or distinction, the various classes of persons who are embraced within the prohibition of that section, namely: 1. Minors under the age of 14 years; 2. Insane or intoxicated persons; and 3. Deserters in time of war from the naval or military service of the United States. All alike are placed under the same disqualification, and it is impossible to distinguish in this connection between a minor, an insane or intoxicated person, and a deserter in time of war. (See *U. S. v. Cottingham*, 1 Rob. (Va.), 633.) While the enlistment of an insane or intoxicated person might have been absolutely void, even in the absence of a direct prohibition against the enlistment of such persons, the fact that minors under the age of 14 years and deserters in time of war are classed with insane or intoxicated persons in the same provision is a strong indication that

it was the purpose of Congress to place them under the same absolute disqualification as to enlistment.

[A marked distinction will be noted between the language of section 1419—enlistments in violation of which section are held to be merely voidable and not absolutely void—and the language of section 1420. The former section does not absolutely prohibit the enlistment of persons between the ages of 14 and 18 years, but by its terms expressly permits the enlistment of such persons, although making it a condition that such minors have the consent of their parents or guardians. In other words, Congress has no objection to the enlistment of minors above the age of 14, but on the contrary has expressed its willingness that such persons should be enlisted, merely providing, for the benefit of parents or guardians, that their consent must be secured in cases where the minor is over 14 but under 18 years of age. It necessarily follows that if the parents or guardians of a minor between 14 and 18 years make no objection to his serving, the enlistment may be treated by the Government as valid, even though their consent was not given at the time of enlistment; or, if they make objection to the minor's continuing in the service and apply for his discharge this does not invalidate the portion of the enlistment which has actually been served. (See *In re Morrissey*, 137 U. S., 157, *Dillingham v. Booker*, 163 Fed. Rep., 696, also other cases, holding that a minor fraudulently enlisted is not only de facto but de jure in the service.)

[On the other hand, section 1420 expressly prohibits the enlistment of certain classes of persons without any exceptions or conditions whatsoever. In other words, this section differs materially from the other in that here Congress specifically designates those whom it does not desire to have in the naval service under any circumstances. And with reference to deserters in time of war the Attorney General has held, as noted above, that even the President's pardon does not remove the disqualification as to reenlistment.

[Sections 1117 and 1118, Revised Statutes, relating to enlistments in the Army, and which were generally similar to sections 1419 and 1420, except for a difference in ages, have repeatedly received a judicial interpretation similar to the above. Thus, in *Re Davison* (21 Fed. Rep., 618), which was an appeal from 4 Fed. Rep., 507, it was said, with reference to the Army laws: "The reasonable conclusion warranted by these sections would seem to be that the contract of enlistment of a minor under 16 years of age is void; but that if he is over that age it is valid, in the absence of fraud or duress as to him, but during his minority is invalid at the election of his parents or guardian."

[In the American and English Encyclopedia of Law (second edition), volume 20, page 624, the substance of the decisions bearing upon this question is stated as follows: "In the United States the binding effect of a minor's contract of enlistment will depend entirely upon the construction to be placed upon the several statutory provisions on the subject of such enlistments. Under the provision pro-



hibiting absolutely the enlistment of minors under the age of 16 years, *such enlistments are plainly void for all purposes.*"

[In support of this statement the following cases are cited: *In re Hearn*, 32 Fed. Rep., 141; *Matter of Riley*, 1 Ben. (U. S.), 408, 39 How. Pr. (N. Y.), 108, Fed. Cas. No. 11834; *In re Lawler*, 40 Fed. Rep., 233; *Seavey v. Seymour*, 3 Cliff. (U. S.), 439, Fed. Cas. No. 12596; *Wantlan v. White*, 19 Ind., 470.

[In the *Hearn* case, decided by the District Court of the United States for the Northern District of Ohio, referring to sections 1116, 1117, and 1118, Revised Statutes, the court said: "These sections are to be construed together. It is clear that Congress provided by these sections that a minor under 16 years of age can not be enlisted, and, if done, *it would be absolutely void*, and he could not be held to service; but it is also clear that if he be 16 years old he can legally enlist. Congress, having so authorized, makes such enlistment legal, and thereby confers capacity on such minor to make the contract of enlistment. If the relator was by the law made competent to enter into this contract when over 16 years of age, he can not for himself avoid it. Section 1117, requiring the written consent of parents or guardians, when under 21 years of age, was for the benefit of such parents, who might assert their right to his custody before majority, and does not affect the capacity of the minor to bind himself."

[To the same effect is the *Riley* case, which was decided by the District Court of the United States for the Southern District of New York in 1867. Referring to the laws then in force, it was held by Judge Blatchford, afterwards Associate Justice of the Supreme Court of the United States (quoting syllabus): "Enlistments of minors over 18 years of age into the Army of the United States, without the consent of their parents, masters, or guardians, are valid, but it is not lawful to muster into the service a person under 18 years of age."

[In the *Lawler* case, which was an appeal from the District Court for the Northern District of Georgia, it was said by Pardee, circuit judge, in affirming the judgment of the lower court: "In this view of the case, no issue is left except the single one as to whether or not the petitioner was under the age of 16 years when he enlisted. If he was over the age of 16 years at that time, his enlistment, according to the return, was regular and valid; if he was under 16 years of age, *the enlistment was void*, whether the father consented in writing or not."

[The case of *Seavey v. Seymour*, which was an appeal from the District Court of the United States for the District of Maine, was decided by Mr. Justice Clifford, of the Supreme Court of the United States, while sitting in the Circuit Court for the First Circuit. In an exhaustive opinion in this case Mr. Justice Clifford affirmed the decision of the lower court holding that the enlistment of a minor under the age of 18 years was made *void* by the law then in force.

[In the case of *Wantlan v. White* the question at issue was, "whether a volunteer in the Army of the United States, as a private, who is under the age of 18 years, can be held to the service by virtue of his enlistment," and the court was "unanimously of the opinion that he can not be

so held." The opinion in this case reads, in part, as follows: "Volunteers under the statutes named, before they become soldiers, have to be mustered into the service of the United States; and, on the 13th day of February, 1862, Congress enacted a law 'that hereafter no person under the age of 18 years shall be mustered into the United States service.' \* \* \* From the 13th day of February, 1862, then, no consent could give power to enlist a minor under the age of 18, or could validate such enlistment while the minor continued under 18."

[The case of *Commonwealth ex rel. Bryson v. Carter* (20 Leg. Int. (Phila.), 21), also involved the construction of the act of February 13, 1862, with reference to which the court said: "The Secretary of War, by the existing law, had the power to discharge minors. This power was exercised by that officer, and it must also be remembered by the courts. The unfortunate condition of the country rendered it exceedingly difficult for the Secretary of War to exercise this quasi judicial power in a satisfactory manner. To relieve him, therefore, Congress destroys his power. In doing so, however, it was deemed advisable, also, to declare that infants under 18 should not enlist in the Army of the United States, and that no power should hereafter be given to *any tribunal* to declare such enlistments valid. While, therefore, the power of the Secretary of War is destroyed in the body of the law, the proviso limits the power of the courts; the Secretary of War is relieved from the discharge of a most onerous duty, and *the courts are hereafter to declare contracts of enlistments made by minors under 18 years of age, either with or without the consent of parents or guardians, to be null and void.*"

[In no case has it been judicially determined by the Supreme Court of the United States that the fraudulent enlistment of a deserter at large in violation of express statutory prohibitions is merely voidable and not absolutely void. In the War Department the practice in such cases prior to 1890 was not uniform. In some cases it was held that the second enlistment was "void and of no effect"; in other cases it was the practice to hold that the enlistment was "illegal"; while it was sometimes held that the enlistment was voidable only. However, "a uniform practice was adopted in 1892, since which time it has been uniformly held by the [War] Department that in the cases of enlistments of deserters while a former enlistment contract was in force [the second enlistment] was *voidable* and not absolutely void." (See file 7657-132.)

[The present practice of the War Department was apparently based upon the decision of the Supreme Court in *Re Grimley*, decided November 17, 1890 (137 U. S., 147). The question presented in that case was whether an enlisted man could escape punishment for a military offense on the ground that at time of enlistment in the Army he was over 35 years of age, when the law (sec. 1116, R. S.) provided that "Recruits enlisting in the Army must be effective and able-bodied men, and between the ages of 16 and 35 years, at the time of their enlistment. \* \* \*." The court held that "An enlisted soldier can not avoid a charge of desertion by showing that at the time when he vol-

untarily enlisted he had passed the age at which the law allows enlisting officers to enlist recruits."

[Even though the enlistment in the Grimley case had been void, it seems clear from the authorities that this could not have been set up by him as a valid defense upon a trial by court-martial for a military offense committed while serving as a de facto enlisted man. (See *Commonwealth v. Gamble*, Supreme Court of Pennsylvania, 11 Serg. & Rawle, 93; *Ex parte Anderson*, 16 Ia., 595; *Wilbur v. Grace*, Court of Errors, New York, 12 Johns., 67; *In re Beswick*, Supreme Court of New York, 25 How. Pr., 149; *In re McVey*, 23 Fed. Rep., 878; *In re Cosenow*, 37 Fed. Rep., 668; *In re Zimmerman*, 30 Fed. Rep., 176; *In re Kaufman*, 41 Fed. Rep., 876; *Carroll v. Ball*, Fulton (Ga.) Superior Court (file 7988); see also file 7657-132, and cases noted under secs. 761 and 1419, R. S., and note to Constitution, Art. I, sec. 8, clause 14, under "IV. Jurisdiction of courts-martial.")

[It will be noted that section 1116, Revised Statutes, which was construed in the Grimley case, fixes the qualifications for enlistment in the Army, but is not expressly prohibitory in terms as is section 1420. "Prohibitory statutes must not be interpreted on a principle of leniency; if anything done is substantially that which is prohibited the thing is void, not because of its tendency, but because it is, within the true construction of the statute, the thing prohibited." (Sutherland on Statutory Construction, sec. 254.) Certain statements contained in the court's opinion in the Grimley case are broad enough to apply to cases of enlistments in violation of the express statutory prohibitions, and to suggest that such enlistments are not absolutely void; but such remarks, which are not called for by the facts of the case decided, have not the force of a decision and are disregarded by the Supreme Court itself in subsequent cases where the precise question is raised. (See *Cohens v. Va.*, 6 Wheat., 264, 399, per Chief Justice Marshall; *Carroll v. Lessee of Carroll*, 16 How., 287; *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S., 574; *Rush v. French*, 25 Pac., 816, 1 Ariz., 99, 134.)

In *Hoskins v. Pell* (239 Fed. Rep., 279), it was held that the fraudulent enlistment in the Army of a minor 15 years of age was void under section 1118, Revised Statutes, which is similar to section 1420 relating to the Navy.

[The proper conclusion supported by the authorities above cited appears to be that fraudulent enlistments in violation of section 1420 are void ab initio, and not merely voidable, differing in this respect from fraudulent enlistments in violation of section 1419, the party fraudulently enlisting under the latter statute being both de facto and de jure in the service.]

**Desertion "in time of war."**—Desertion after December 10, 1898, from a receiving ship at Boston was not desertion in time of war. The treaty of peace signed December 10, 1898, while not ratified until April 11, 1899, was effective from the date of signature, as far as exercise of sovereign powers was concerned. (File 6642-03, Sept. 1, 1903; see also file 8693-01, Nov. 23, 1901, and 6562, Jan. 24, 1907.)

Desertion after the conclusion of the protocol with Spain of August 12, 1898, but prior to the signing of the treaty of peace or the ratification thereof, is desertion in time of war. The date of the signing of the treaty is the earliest on which the war with Spain may be considered to have terminated. (File 14535-719, May 24, 1909.)

Desertion from the Navy on September 17, 1898, was desertion in time of war. (File 26516-47, May 18, 1911.)

**Payment of death gratuity in case of deserter who fraudulently enlisted.**—After the death of a man, the evidence was strong that he was serving under a fraudulent enlistment. If such evidence had been presented during the man's lifetime, the Navy Department would have taken proper action and he would have been discharged or the fraud waived and he continued in the service; but he would not have been condemned unheard. What evidence the man might have presented we know not, nor do we know what proof he might have produced that the naval authorities at some time had knowledge of the former service in the Marine Corps and, by ignoring, had waived the fraud. The man is dead and can now neither be discharged from the naval service nor any fraud waived by continuing him in it. Under the circumstances, the rule as to forfeiture of arrearages of pay on account of fraudulent enlistment has no application, nor has it the effect of depriving the widow of the gratuity given by the act of May 13, 1908, to a widow or designated beneficiary of "any officer or enlisted man on the active list of the Navy and Marine Corps" who died from "wounds or disease contracted in line of duty." (15 Comp. Dec., 614.)

**Aliens not to be enlisted.**—Only citizens of United States or natives of insular possessions shall be permitted to enlist in the Navy (Art. R-3524 (1), Navy Regs., 1913; see also Navy Dept. Circular, Sept. 1, 1908); except that men holding honorable discharges or continuous-service certificates on which is endorsed an "honorable" or "ordinary" discharge with recommendation for reenlistment, shall, if otherwise qualified, be accepted for reenlistment upon making application within four months after discharge. (Art. R-3527 (1), Navy Regs., 1913.)

Enlistments in the Marine Corps are governed by the laws and regulations relating to the Navy [see notes to sections 1418 and 1422, Revised Statutes]. There is no statute prohibiting the enlistment of aliens in either the Navy or Marine Corps, and there is nothing in the regulations which would prohibit the reenlistment in the Marine Corps of an alien enemy who had an excellent character on discharge from his last previous enlistment. However, under well-established rules of international law, the enlistment of an alien enemy would be objectionable and might lead to unfortunate results. (File 7657-488, Sept. 20, 1917.)

Aliens, not enemies of the United States, who have declared their intention to become citizens of the United States, may be enrolled in the Naval Reserve Force. (Act May 22, 1917, 40 Stat., 84.)



**Sec. 1421. [Enlisted men; transfer from military to naval service.]** Any person enlisted in the military service of the United States may, on application to the Navy Department, approved by the President, be transferred to the Navy or Marine Corps, to serve therein the residue of his term of enlistment, subject to the laws and regulations for the government of the Navy. But such transfer shall not release him from any indebtedness to the Government, nor, without the consent of the President, from any penalty incurred for a breach of military law.—(1 July, 1864, c, 201, s. 1, v. 13, p. 342.)

Transfer of marines to Hospital Corps of the Navy was authorized by acts of June 17, 1898 (30 Stat., 474), and August 29, 1916 (39 Stat., 572).

Transfer of enlisted men of the naval service to the Naval Flying Corps was authorized by act of August 29, 1916 (39 Stat., 586).

Transfer of the Marine Corps temporarily to the Army, is provided for by section 1621, Revised Statutes.

Transfer of the Coast Guard temporarily to the Navy is authorized by act of January 28, 1915 (38 Stat., 800).

Transfer of Lighthouse Service temporarily to the jurisdiction of the Navy Department is authorized by act of August 29, 1916, (39 Stat., 602).

Transfer of Coast and Geodetic Survey temporarily to the jurisdiction of the Navy Department is authorized by act of May 22, 1917, section 16 (40 Stat., 87).

Transfer of Public Health Service temporarily to the jurisdiction of the Navy Department is authorized by acts of July 1, 1902, section 4 (32 Stat., 713), July 9, 1917 (40 Stat., 242), and October 6, 1917 (40 Stat., 393).

Who are subject to military law: See section 1342, Revised Statutes, and notes thereto.

**Historical note.**—Provision for the transfer of persons in the military service to the naval service was made by resolution of February 24, 1864 (13 Stat., 402), repealed by act of June 3,

1864 (13 Stat., 119). Authority for such transfer was again given by act of July 1, 1864 (13 Stat., 342), from which the above section of the Revised Statutes is taken. In the Commissioners' Draft of the Revised Statutes, vol. 1, page 695, the following note was made to the paragraph, now section 1421: "This provision seems to have been intended to meet the exigencies of the late war. It may, perhaps, be deemed proper to repeal it, as unsuitable to the permanent relations of the military and naval branches of service." Nevertheless, the provision was retained, and has never since been repealed.

A marine, on being transferred to the **Hospital Corps of the Navy**, should not be discharged from the Marine Corps, but should sign enlistment papers for the balance of the term of his original enlistment. (File 3450-04. See also file 3796-02, 9033-02, and 5315-04. Compare cases noted under sec. 1426, R. S., "Revocation of discharge obtained by fraud.")

A marine transferred to the Hospital Corps is entitled to an honorable discharge upon expiration of original period of enlistment, with all the benefits incident thereto, including reenlistment with continuous service, or if he does not reenlist, he may be furnished transportation to his place of last enlistment in the Marine Corps. (File 5315-04, July 5, 1904; see also 11 Comp. Dec., 700, noted under sec. 1426, R. S.)

**Sec. 1422. [Enlistment, detention after expiration of; transportation home.]** *[It shall be the duty of the commanding officer of any fleet, squadron, or vessel acting singly, when on service, to send to an Atlantic port of the United States, in some public or other vessel, all petty officers and persons of inferior ratings desiring to go there, at the expiration of their terms of service, or as soon thereafter as may be, unless, in his opinion, the detention of such persons for a longer period should be very essential to the public interests, in which case he may detain them, or any of them, until the vessel to which they belong shall return to such Atlantic port.]* [That it shall be the duty of the commanding officer of any fleet, squadron, or vessel acting singly, when on service, to send to an Atlantic or to a Pacific port of the United States, as their enlistment may have occurred on either the Atlantic or Pacific coast of the United States; in some public or other vessel, all petty-officers and persons of inferior ratings desiring to go there at the expiration of their terms of enlistment, or as soon thereafter as may be, unless, in his opinion, the detention of such persons for a longer period should be essential to the public interests, in which case he may detain them, or any of them, until the vessel to which they belong shall return to such Atlantic or Pacific port. All persons enlisted without the limits of the United States may

be discharged, on the expiration of their enlistment, either in a foreign port or in a port of the United States, or they may be detained as above provided beyond the term of their enlistment; and that all persons sent home, or detained by a commanding officer, according to the provisions of this act, shall be subject in all respects to the laws and regulations for the government of the Navy until their return to an Atlantic or Pacific port and their regular discharge; and all persons so detained by such officer, or re-entering to serve until the return to an Atlantic or Pacific port of the vessel to which they belong, shall in no case be held in service more than thirty days after their arrival in said port; and that all persons who shall be so detained beyond their terms of enlistment or who shall, after the termination of their enlistment, voluntarily re-enter to serve until the return to an Atlantic or Pacific port of the vessel to which they belong, and their regular discharge therefrom, shall receive for the time during which they are so detained, or shall so serve beyond their original terms of enlistment, an addition of one-fourth of their former pay: *Provided*, That the shipping-articles shall hereafter contain the substance of this section.](17 July, 1862, c. 204, s. 17, v. 12, p. 610; 3 Mar., 1875, c. 155, v. 18, p. 484; *Wilkes v. Dinsman*, 7 How., 125.)

This section is printed above as it appears in the second edition of the Revised Statutes. The portion printed in italics is the original section as it appeared in the first edition of the Revised Statutes, and the latter portion, printed in the ordinary roman letter, is the section as amended by act of March 3, 1875, cited above in the revisers' notes. (See Introduction, ante, concerning the second edition of the Revised Statutes.)

The pay of men detained after term of enlistment in accordance with this section was formerly provided for by section 1572, Revised Statutes, which is superseded by the provisions of this section as amended by the act of March 3, 1875.

Mileage allowed for travel on shore, and transportation and subsistence allowed for sea travel, to place of actual bona fide home or residence, or original muster into the service, to men honorably discharged from the Navy or Marine Corps, and naval reservists honorably released from active service. (Act June 3, 1916, sec. 126, 39 Stat. 217, as amended by act Feb. 28, 1919, sec. 3, 40 Stat., 1203.)

Provisions similar to those contained in this section were first enacted by act of March 2, 1837 (5 Stat., 153).

The term of enlistment in the Navy is provided for by section 1418, Revised Statutes, and amendments thereto.

Transportation of discharged naval prisoners to their homes or places of enlistment is authorized by act of March 3, 1909 (35 Stat., 756).

This section is a recognition of the Government's duty to discharge persons entering the military or naval service for limited periods at the place of their appointment or enlistment. This duty was also recognized by the Court of Claims in the case of volunteer officers and enlisted men in the decision of *Daggett v. United States* (39 Ct. Cls., 218), in which it

was said: "It is well settled by statute, by regulations, by judicial decisions, that volunteer officers and enlisted men are entitled to be paid to the time of their discharge or muster out, and that they are entitled to be discharged or mustered out at the place where they were enrolled or enlisted." The same principle was recognized by the Navy Regulations of 1909 (art. 1367), which provided for the discharge of paymasters' clerks at the place in the United States which they left under their appointments. Similarly it was provided by sections 4582 and 4583 of the Revised Statutes, as amended by the act of December 21, 1898 (30 Stat., 759, 760), that seamen on merchant vessels discharged abroad should be returned home by the master or afforded by him the means for so doing. (File 2625-4-359, Nov. 9, 1909; see also *Davis v. U. S.*, 47 Ct. Cls., 195, overruling *Comp. Dec.*, July 29, 1909, 101 S. and A. Memo., 1222, upon authority of which decision of the Comptroller, and following the Attorney General's refusal to review same (28 Op. Atty. Gen., 129), art. 1367 of the Navy Regs., 1909, was annulled; and see *Allerdice v. U. S.*, 19 Ct. Cls., 511, 513.)

The act of March 3, 1875 (18 Stat., 484), made no material change in section 1422 except to provide that the persons whose terms of service were about to expire might be returned to a Pacific port if they had enlisted on that coast instead of to an Atlantic port; but it carried into said section the provisions of section 1572 regarding one-fourth additional pay, and also the provisions of sections 1423, 1424, and 1425, upon the same general subject, practically consolidating all of said sections into one. These sections were originally compiled from section 17 of the act of July 17, 1862 (12 Stat., 610), which contained the substance of the law as it now stands, except the provision for the return to a Pacific port of persons enlisting on that coast. (5 Comp. Dec., 524.)



The word "essential" means "necessary," and if a person's services were needed it follows that they were essential within the meaning of this section. Where commanding officer would not certify that man's services were "essential" to the public interest, but did certify that they were "needed," the man was held entitled to the additional pay provided by section 1422. (23 Comp. Dec., 249.)

**Detention of marines.**—Enlisted persons in the Marine Corps are entitled to an increase of one-fourth their former pay while detained beyond their terms of enlistment. (5 Comp. Dec., 524.)

The act of March 2, 1837 (5 Stat., 153), entitled "An act to provide for the enlistment of boys for the naval service, and to extend the term for the enlistment of seamen," contained substantially the same provisions relating to the return to the United States of "persons enlisted for the Navy," according to the provisions of said act, as are found in section 17 of the act of July 17, 1862 (12 Stat., 610). The act of 1837 provided, as in the present law, that persons enlisted for the Navy, detained beyond the terms of their enlistment according to said act, should while so detained and serving receive an addition of one-fourth to their former pay. Attorney General Legare (4 Op. Atty. Gen., 89) held that said act did not include marines, saying that the act "is no more than what it purports to be—an act to provide for the enlistment of boys for the naval service and to extend the term for the enlistment of seamen." However, in the case of *Wilkes v. Dinsman* (7 How., 89), which was an action for damages by a marine against his superior officer for punishment inflicted for disobedience of orders while so detained beyond his enlistment, the Supreme Court held that marines were embraced within the spirit if not the letter of the act, by the description of persons "enlisted for the Navy." There were other circumstances in that case which evidently influenced the decision of the court, and their conclusion was not based solely upon the statute. Congress, however, placed its own construction upon the statute of 1837 by enacting, in section 9 of the act of March 3, 1845 (5 Stat., 795), that the term "persons" used in the second and third sections of said act of 1837 should be "construed to include marines." After this amendment of the act of 1837, Second Comptroller Brodhead held, very properly, that marines were entitled to the benefits of the act, citing the amendatory act of March 3, 1845. This was probably the manner in which the practice arose of allowing marines one-fourth additional to their pay for detention beyond their term of enlistment, which practice has been continued, notwithstanding the subsequent changes in the law. (5 Comp. Dec., 524.)

It was provided by section 1 of the act of August 5, 1854 (10 Stat., 586), "that the non-commissioned officers, musicians, and privates of the U. S. Marine Corps shall be entitled to and receive the same pay and bounty for reenlisting as are now or may hereafter be allowed to the noncommissioned officers, musicians, and privates in the Infantry of the Army." [Section 1612, Revised Statutes.] It would seem that this provision was intended to supersede all laws then in force relating to the pay of enlisted men

of the Marine Corps and to repeal, among other provisions, that portion of the act of 1837, as amended, which gave marines one-fourth additional pay for serving beyond their enlistments. But the former practice of allowing marines this increase was continued as though the law did not apply to cases of that kind. (5 Comp. Dec., 524.)

The seventeenth section of the act of July 17, 1862, from which section 1422, Revised Statutes, was originally taken, was but a repetition in substance of the act of 1837. The latter act was not carried into the Revised Statutes, either in its original form or as amended to include marines by the act of March 3, 1845. Not having been incorporated into the Revised Statutes as thus amended, unless superseded by the act of 1854, making the pay of marines correspond to that of the infantry of the Army, it still remains in force, so far as concerns the pay of marines, by virtue of section 5566, Revised Statutes, which provides that where no part of a statute has been carried into the Revised Statutes it is not to be treated as repealed by the revision. (5 Comp. Dec., 524.)

Were the question a new one, the inclination would be strong to hold that the act of 1854 [section 1612, Revised Statutes] governed the whole subject of pay of marines, and in effect repealed the amended act of 1837, which gave one-fourth additional pay to marines for serving beyond enlistment; but the long-continued construction, since the passage of the act, allowing them this increase is entitled to great weight and as it is not clearly contrary to express provisions of law it should not be overturned. Accordingly, held that the provision regarding marines in the act of 1837 as amended, not having been superseded by the act of 1854 nor incorporated in the Revised Statutes, still remains in force, and enlisted men of the Marine Corps detained in service beyond their periods of enlistment are entitled to an increase of one-fourth to their original pay, as provided in said act. (5 Comp. Dec., 524.)

It is suggested that marines are included within the very words of the law as now embodied in section 1422, under the description "persons enlisted in the naval service," and so entitled to the increase of one-fourth to their pay when they bring themselves within the conditions which entitle seamen to such increase. However, the comptroller does not favor this construction, notwithstanding the sanction implied in the decision of the Supreme Court in the case of *Wilkes v. Dinsman* (above noted). Congress placed the opposite construction upon similar words in the act of 1837 by amending the act to include marines. (5 Comp. Dec., 524.)

Marines are not specifically mentioned in this statute, but it has been held by the Comptroller, in view of the history of the legislation condensed into section 1422, and of the long-continued practice of the accounting officers, that marines should be allowed the benefit of the statute. (Comp. Dec., Feb. 24, 1905, 48 S. and A. Memo., 492; see also Comp. Dec., Oct. 2, 1905, 55 S. and A. Memo., 1.)

For other cases concerning status of Marine Corps, see notes to sections 761, 1418, and 1621, Revised Statutes.

**Detention of men enlisted outside the United States.**—Enlisted men of the insular force are, in contemplation of law, enlisted men or apprentices of the U. S. Navy, and therefore are entitled to the one-fourth additional pay provided for by section 1422, Revised Statutes, when detained in the service after expiration of their term of enlistment. (12 Comp. Dec., 189; see also note to sec. 1417, R. S.)

Alien Chinese enlisted without the limits of the United States are entitled to the additional pay provided by this section when detained in service under the conditions specified therein. (23 Comp. Dec., 66.)

**Detention of mates.**—See note to section 1408, Revised Statutes, under "Pay and allowances of mates."

**Detention of enlisted men on shore duty.**—The practice has not been to allow the one-fourth additional pay to marines when detained on shore duty, but only when employed on vessels of the Navy and detained after the expiration of the term of their enlistment, upon the theory that section 1422 applies only to those persons attached to vessels of the Navy. If the question were a new one, unaffected by a settled practice of some years' continuance, it would be open to doubt whether, in order to entitle a marine to the extra compensation allowed by this law for detention in the service beyond the term of his enlistment, he should be serving upon and attached to a vessel during said period of detention. (Comp. Dec., Feb. 24, 1905, 48 S. and A. Memo., 492; see also Comp. Dec., Sept. 1, 1905, 55 S. and A. Memo., 1.)

This statute contemplates service upon and attachment to a vessel during the period of detention in service beyond the expiration of the term of enlistment. Enlisted men of the Navy detained at shore stations beyond the expiration of their terms of enlistment are not entitled to the one-fourth additional pay provided by section 1422, Revised Statutes. If the enlisted men of the Navy were attached to a vessel, it would make no difference whether the detention was in port or at sea, but in the case presented the men were detached from their vessels and stationed on shore. (Comp. Dec., Sept. 1, 1905, 55 S. and A. Memo., 1; see also Comp. Dec., May 23, 1916, file 26254-1969:1.)

Under the decisions and practice this statute is applicable alike to marines and enlisted men of the Navy. All persons coming within the purview of the statute must necessarily be on the same footing. If marines detained on shore duty beyond the expiration of their terms of enlistment are not entitled to the one-fourth additional pay, then it necessarily follows that enlisted men of the Navy, who are governed by the same law, are not entitled to such pay while detained on shore stations. (Comp. Dec., Sept. 1, 1905, 55 S. and A. Memo., 1.)

An enlisted man carried on the roll of the United States naval station, Olongapo, P. I., but attached to and performing duty on board the U. S. S. *General Alava*, is entitled to one-fourth additional pay for detention beyond the expiration of his term of enlistment. The ship named is not in commission in the ordinary sense of the term, but has the status of a yard craft and is used principally as a ferry between Cavite and Olongapo, making three trips a week

when weather permits. This vessel, as well as the naval station at Olongapo, is under the jurisdiction and command of the commander in chief of the Asiatic fleet. (Comp. Dec., May 23, 1916, file 26254-1969:1.)

**Detention of enlisted man under court-martial sentence.**—By sections 1422, 1423, and 1424 of the Revised Statutes, Congress has provided that in certain cases of emergency enlisted men of the Navy may be held in service for limited periods beyond their enlistments, but the law does not authorize their detention for any longer time or for any other purpose, and the implication is that a detention other than in the manner there stated would be illegal. Where jurisdiction of a court-martial has attached, it will continue for all purposes of trial, sentence, and the execution of the sentence, although in the meantime the term of enlistment of accused should expire. But if when accused's term of enlistment expired he was in confinement, undergoing punishment in obedience to the sentence of the court-martial for the offenses of which he was accused, such imprisonment and punishment would not be such a holding of him in the service beyond the term of his enlistment as would entitle him to receive thereafter pay and allowances which are given by law as compensation for personal services, nor could it be regarded as holding him in the naval service within the meaning of any law entitling him to receive pay for such service. Accordingly, *held* that the payment to an enlisted man of the Navy who was sentenced by court-martial to imprisonment for a specified term, extending beyond his term of enlistment, with forfeiture of pay and allowances of an amount excepted from forfeiture, is not authorized after the expiration of the term of his enlistment, although he was not discharged until the expiration of his term of confinement. (9 Comp. Dec., 257, affirming Comp. Dec., Nov. 22, 1902, 13 S. and A. Memo., 126. But see act Feb. 16, 1909, sec. 13, 35 Stat., 622.)

The Navy Department has authority to retain a general court-martial prisoner to serve out his sentence after his enlistment has expired and he has been given a discharge from the service. (File 26504-102, Mar. 1, 1910.)

A general court-martial prisoner may be tried by summary court-martial or deck court prior to the expiration of his period of enlistment, and may afterwards be held to serve out the sentence imposed by such court, irrespective of whether or not his enlistment expires in the meantime. (File 26504-100, Dec. 21, 1910; as to trial by court-martial of prisoners for offenses committed after expiration of enlistment, see file 26509-259, Mar. 12, 1918, recommending legislation.)

An enlisted man who absented himself without authority, and remained so absent until after expiration of his enlistment, may be tried by summary court-martial and sentenced to perform extra police duties, and may be retained in the service for the purpose of executing such sentence. (See 20 Comp. Dec., 751.)

An enlisted man detained in the service after expiration of enlistment to serve a sentence of imprisonment for desertion was restored to duty on probation prior to completion of sentence. *Held*, entitled to pay during probation-



ary period. (Comp. Dec., Nov. 20, 1908, 93 S. and A. Memo., 896.)

See also note to section 1418, Revised Statutes, under "Detention of men after expiration of enlistment."

**Detention of enlisted man on account of physical disability.**—On date of expiration of enlistment an enlisted man of the Navy was serving in foreign waters and temporarily disabled from disability incurred in line of duty, and continued on ship from such date, January 26, 1912, to February 15, 1912, when he reenlisted thereon for a full term. *Held*, that for period intervening between expiration of enlistment and reenlistment he may be paid one-fourth additional pay, if commanding officer shall certify that he detained the man as "essential for the public interests," under section 1422 Revised Statutes. (18 Comp. Dec., 724.)

An enlisted man detained in a hospital on a foreign station after expiration of enlistment and upon recovery transferred to duty on board another vessel and later transferred to the United States for discharge, is entitled to benefits of this section. (Comp. Dec., Jan. 6, 1917, file 26254-2169.)

The regulations for many years have contained a provision that the pay of an enlisted man under treatment in a hospital on a foreign station "continues until he is regularly discharged from the service, even after his term of enlistment has expired." (File 26251-5447, Dec. 8, 1911, citing art. 792, par. 7, Navy Regs., 1909; Comp. Dec., Aug. 18, 1903, 31 S. and A. Memo., 242. See also Art. R-3582 (7), Navy Regs., 1913.)

An enlisted man at a hospital in the United States should be discharged upon the expiration of his enlistment, and in such case the man should, if necessary, be retained for further treatment. If retained, he does not lose his right to transportation to his home, if he has it otherwise. (File 2274-04; 727-00; 3035-98. By article 3582(8), Navy Regs., 1913, as amended by C. N. R. No. 11, Dec. 1, 1918, it was provided that "enlisted men held for treatment at a hospital after expiration of enlistment are held for the convenience of the Government, and entitled to pay and allowances until date of actual discharge from the service.")

No legal objection exists to payment from the naval hospital fund, at the rate of 30 cents per day, to the Army and Navy General Hospital in the cases of discharged enlisted men of the Navy and Marine Corps retained for treatment after expiration of their enlistments. (File 22857-12:3, Jan. 17, 1912.)

**Detention of enlisted man for period necessary to travel home.**—An enlisted man in the Navy detained in the service for five days after the expiration of enlistment period, while on board an Army transport en route from Cavite, P. I., to San Francisco, Cal., for discharge, is not entitled to one-fourth additional pay provided by section 1422, Revised Statutes, as amended by act of March 3, 1875 (18 Stat., 484). (20 Comp. Dec., 37.)

The statute provides two alternatives: **First**, to return the man to the United States at the expiration of his enlistment or as soon thereafter as may be, and, **second**, when his services

are *essential to the public interests*, to detain him in the service. The commanding officer in this case acted upon the first alternative and sent the man to the United States by an Army transport and before the expiration of his enlistment. The second alternative of detaining him in the service was evidently not deemed essential to the public interests. During the five days for which the one-fourth additional pay is claimed the man was not performing the duties of his rating, but was traveling home for discharge as a passenger on an Army transport. (20 Comp. Dec., 37.)

**Detention of enlisted man at his own request.**—When an enlisted man is detained in the service beyond the expiration of his enlistment, at his own request, although detained longer than he requested, this is not such a detention as contemplated by section 1422, Revised Statutes, but the additional detention is incidental to and the result of the detention granted at his request. (Comp. Dec., July 24, 1907, 77 S. and A. Memo., 410.)

Where the enlistment of an enlisted man of the Navy expires while the vessel on which he is serving is making a voyage, and he is permitted at his own request to remain on the vessel until it returns to the United States, he is not detained in the service within the meaning of section 1422, Revised Statutes, and is not entitled to one-fourth additional pay thereunder. (15 Comp. Dec., 883.)

The words "detention" and "detained" as used in the statute clearly imply the use of force, physical or moral. (15 Comp. Dec., 883.)

The said statute provides for the payment of one-fourth additional pay for service beyond the expiration of their terms of enlistment, of two classes of enlisted men, viz: First, those whose terms of enlistment expire while away from the United States, and who, after the termination of their enlistment, voluntarily reenter to serve until the return to an Atlantic or Pacific port of the vessel to which they belong; second, those whose terms of enlistment expire while they are away from the United States, and who desire to go to the coast of the United States on which they enlisted at the expiration of their terms of enlistment, but who are detained in the service for the public interests. (15 Comp. Dec., 883.)

**Detention of enlisted man awaiting discharge papers.**—An enlisted man was on recruiting duty when his enlistment expired, November 16, 1906, and his discharge papers were not received by him until November 30, 1906. In the meantime he continued on duty, and reenlisted December 1, 1906, the next day after receiving his discharge: *Held*, that he was in the service and properly entitled to a discharge on November 30, 1906, to take effect on that date; that there was no authority of law for antedating his discharge and reenlistment to November 16 and 17, 1906, respectively, and that it is not only legal but entirely proper that the records should be corrected so as to show that he was discharged by reason of expiration of enlistment on November 30, 1906, and reenlisted the following day, thereby bringing him within the provisions of article 1134, paragraph 7, Navy Regulations, 1909, allowing additional pay to men reenlisting after November

27, 1906. (File 7657-65, Dec. 15, 1909; compare *U. S. v. Travers*, Fed. Cas. No. 16537, noted under Constitution, Art. I, sec. 8, clause 14, "Persons not subject to jurisdiction of Federal courts-martial;" see also file 7657-295, noted under sec. 1418, R. S., "Detention of men after expiration of enlistment.")

**Detention of enlisted men indebted to United States.**—Where a man through allotment of pay has overdrawn his account, *held* that "there is no law or regulation warranting the retention of the man in the service after the expiration of his enlistment, provided the vessel is in a United States port, but if it is in his power to return the money and he fails to do it, he might be held for court-martial." (File 3015-04; see also file 1245-01.)

It is not regarded as good economy to retain a man in the service who has been sentenced to bad-conduct discharge and who is in debt to the Government, merely in order that he may be able to earn sufficient money to cancel his indebtedness. Such men are accordingly discharged, notwithstanding the state of their accounts. (File 9770-01, Dec. 27, 1901. That discharge of man before having been fully checked amount of sentence, operates as implied remission of sentence, see Comp. Dec., Apr. 6, 1914, 158 S. and A. Memo., 3035, noted under sec. 236, R. S., "VI. Set-off." That permitting man to extend enlistment, instead of discharging him under such circumstances, does not operate as implied remission, see file 26806-131:44, Aug. 11, 1916.)

An enlisted man was overpaid on discharge. Immediately afterwards the error was discovered by the pay officer, who induced the man to return to the ship and requested the commanding officer to detain the man until he refunded amount of overpayment or had been required to work same off. *Held*, that commanding officer correctly ruled that he had no authority to detain the man under such circumstances. (File 26254-70, July 8, 1908; see also file 26251-3352:1.)

**Detention of enlisted men in other cases.**—See note to section 1418, Revised Statutes, under "Detention of men after expiration of enlistment."

**Place to which transportation should be furnished.**—The provision of section 1422, Revised Statutes, which requires that enlisted men in the Navy who so desire shall, at the expiration of their terms of enlistment, be returned to the coast, either the Atlantic or Pacific, on which they enlisted, does not require that they shall be sent to the particular port at which they enlisted, nor authorize furnishing them transportation thereto. (4 Comp. Dec., 390.)

This section was evidently intended to prevent the discharge of persons enlisting in the Navy in a foreign port, when they desired to be returned to the United States. There is nothing to show the intention that persons whose terms of enlistment were about to expire should be transported to the particular port of their enlistment. (4 Comp. Dec., 390.)

Atlantic ports are mentioned in the law in connection with Pacific ports. Both terms are used generically, and include not only ports confronting on the ocean, but also those situ-

ated upon the gulfs and bays of either coast. Within the meaning of the law a gulf port is an Atlantic port, and a man discharged at Port Tampa is not entitled to be transported to any other Atlantic port. (4 Comp. Dec., 390.)

Prior to July 1, 1902, all transportation for enlisted men of the Navy was paid from appropriations usually made in general terms, as "for the transportation of enlisted men and boys at home and abroad, and of officers accompanying them" (31 Stat., 1109), and the payments were governed as to discharged men by section 1422, Revised Statutes, and Navy regulations. The naval appropriation act of July 1, 1902 (32 Stat., 664), provided: "Bureau of Navigation: Transportation, \* \* \* transportation and subsistence en route to their homes, if residents of the United States, of enlisted men and apprentices discharged on medical survey; transportation and subsistence en route to the place of enlistment, if residents of the United States, of enlisted men and apprentices discharged on account of expiration of enlistment \* \* \*." A like appropriation was made in the same terms by subsequent annual appropriation acts. These acts specify the conditions under which transportation and subsistence shall be furnished enlisted men and apprentices on discharge, and supersede any regulations in conflict with them. (11 Comp. Dec., 336.) [The deficiency appropriation act of March 3, 1901 (31 Stat., 1030), provided that transportation to their homes, if residents of the United States, of enlisted men and apprentices discharged on medical survey, and the transportation to place of enlistment, if residents of the United States, of enlisted men and apprentices discharged on account of expiration of enlistment, shall hereafter be chargeable to the appropriation "Transportation, recruiting, and contingent."]

An enlisted man of the Navy, whose home is in Porto Rico, is a resident of the United States within the meaning of the provision in the annual appropriation for the transportation to their homes of enlisted men of the Navy on discharge from the service. (11 Comp. Dec., 336.)

**How additional pay computed.**—The one-fourth additional pay provided by section 1422, Revised Statutes, for enlisted men of the Navy detained in the service beyond the term of their enlistment should be computed upon the basis of the total pay, extra as well as regular, which they would otherwise have received. (11 Comp. Dec., 575.)

In other words, the one-quarter increase follows the pay given for the duties he may be required to perform, whether they be regular duties covered by the regular pay, or special duties for which extra pay is provided. (11 Comp. Dec., 575.)

If, then, an enlisted man detained as specified in section 1422, performs under detail the duties of gun pointer, gun captain, signalman, messman, or other detail of similar character, the extra pay allowed in such cases should be included in making up the total pay upon which the one-fourth additional is to be computed. (11 Comp. Dec., 575.)

The words "former pay" as used in section 1422, Revised Statutes, do not in the case of



a marine include the 20 per cent extra pay allowed for service in time of war to enlisted men of the Army by act of April 26, 1898 (30 Stat. 365). (5 Comp. Dec., 524.)

In computing the one-fourth additional pay a marine is not entitled to include one-fourth of the additional pay allowed for foreign service. (Comp. Dec., Feb. 24, 1905, 48 S. and A. Memo., 492; see also Comp. Dec., Sept. 1, 1905, 55 S. and A. Memo., 1.)

**Certificate of commanding officer necessary.**—In cases of detention, the commanding officer by whose order the detention is made is the proper officer to certify that such detention was essential to the public interests. (20 Comp. Dec., 37; see also 18 Comp. Dec., 724.)

**Additional pay can not be waived.**—An enlisted man of the Navy detained in service under section 1422, Revised Statutes, does not lose his right to the additional pay authorized in that section for the period of detention solely because he had voluntarily attempted to waive his right to such pay, since such attempted waiver is of no legal force or effect. (23 Comp. Dec., 249.)

**Transportation may be waived.**—The Revised Statutes, section 1422, make it the duty of the commanding officer of a fleet, squadron, or vessel, to send to an Atlantic or Pacific port enlisted men, as their terms of enlistment expire, "in some public or other vessel," "as soon thereafter as may be, unless, in his opinion, the detention of such persons for a longer period should be essential to the public interests." This is not equivalent to a statutory salary, and may be voluntarily waived by the enlisted man in consideration of his being allowed to remain on board the vessel when she is about to sail to a foreign station. (Hunt v. U. S., 38 Ct. Cls., 135, approving 5 Comp. Dec., 514.)

An enlisted man in the Navy who, in consideration of his being allowed to remain on his vessel, then about to proceed to Asiatic waters, gives a waiver of all claim to transportation home should he refuse to reenlist and be discharged in a foreign port, can not maintain an action for the value of such transportation. (Hunt v. U. S., 38 Ct. Cls., 135, approving 5 Comp. Dec., 514.)

An apprentice of the Navy, having been transferred from one vessel to another upon his request and upon his waiver of his right, on discharge in a foreign port, to transportation to the United States, is not entitled to reimbursement of the cost of such transportation procured by himself. (9 Comp. Dec., 5.)

The question here presented is not whether the Secretary of the Navy has the power to diminish or increase claimant's pay while in the service, which is the compensation fixed and established by law and given in consideration of and as compensation to claimant for his personal services. No such question is involved. The claimant having executed a proper agreement of waiver, on account of which he secured said transfer, and having received the benefit of such an agreement, the Government was under no obligation, under the circumstances, to furnish him transportation to his home or place of enlistment. (9 Comp. Dec., 5.)

**Detention of man operates as extension of his existing enlistment.**—Where a man is detained in the Navy under section 1422, Revised Statutes, his existing contract of enlistment continues in full force and effect, and does not expire until his "regular discharge." (File 26254-1227:1, Nov. 19, 1913; 20 Comp. Dec., 377, modifying 19 Comp. Dec., 819.)

When a man is detained under this section because his service is essential to the public interests, the detention is a prolongation of the four-year term, and the four-year term still exists and continues to exist so long as the detention is authorized by the statute. If the commanding officer certifies that the detention was essential to the public interests, the man's enlistment was properly extended, under the act of August 22, 1912 (37 Stat., 331), on the date that the period of his detention expired, and for one year from that date. (20 Comp. Dec., 377.)

The contract of enlistment contains the following provision: "Secondly, I oblige and subject myself to serve four years from —, 19—, unless sooner discharged by proper authority, and on the conditions provided by the act of Congress 'To amend section fourteen hundred and twenty-two of the Revised Statutes of the United States, relating to the better government of the Navy,' approved March 3, 1875, in the following words, to wit: \* \* \* And I also oblige myself, during such service, to comply with, and be subject to, such laws, regulations, and discipline of the Navy as are or shall be established by the Congress of the United States or other competent authority \* \* \*." This contract is the same as that entered into by all persons enlisting in the Navy with the exception of those enlisted for minority, and it is commonly referred to as a four-year contract of enlistment to distinguish it from enlistments for minority. It will be noted, however, that the term of enlistment under the contract quoted is not for the definite term of four years; but, on the contrary, it is expressly made "on the conditions provided by the act of Congress" quoted in the enlistment contract. One of the very important "conditions" enumerated in said act, which extends and renders indeterminate the expiration of the so-called four-year term of enlistment, is, it will be noted, that the commanding officer may, in his discretion, detain any enlisted man beyond the expiration of the period stated in the enlistment contract, under the circumstances stated in the law. During such time as the man is so detained he is, under the explicit terms of the law, "subject in all respects to the laws and regulations for the government of the Navy" until his "regular discharge." Hence, the period of enlistment could, at the discretion of the Government, in accordance with the terms of the contract and the law quoted therein, be either greater or less than the specified term of four years, and in the event of detention beyond the stated term of four years the enlistment contract was to continue in full force and effect until the man's "regular discharge." (File 26254-1227:1, Nov. 19, 1913; 20 Comp. Dec., 377.)

The status of an enlisted man detained by authority of section 1422, Revised Statutes, is just such as referred to by the Attorney General (15 Op. Atty. Gen., 152, 161) as an exception to the rule that a man who enlists for a definite period is relieved of his obligation to serve at the end of the period. The Attorney General stated in part: "Consequently, unless there exists some law when the contract is entered into providing for a contingent prolongation of the term beyond the period fixed by the statute, and the contingency happen within the term \* \* \*, with the last day

of the term his engagement necessarily expires, and with the expiration of his engagement the obligation to serve thereby imposed is also at an end." (20 Comp. Dec., 371.)

**Reentering to serve is a new enlistment.**—When a man under this section reenters to serve until the return of the vessel, it is a reenlistment, and he can not during the period of such reenlistment extend his enlistment as provided by the act of August 22, 1912 (37 Stat., 331), as that act requires the extension be made during the existing four-year term of enlistment. (20 Comp. Dec., 377.)

**Sec. 1423. [Enlisted men subject to regulations while sent home or detained. Superseded.]**

**This section provided as follows:**

"SEC. 1423. All persons sent home, or detained by a commanding officer, according to the provisions of the preceding section, shall be subject in all respects to the laws and regulations for the government of the Navy, until their return to an Atlantic port and their regular discharge."—(17 July, 1862, c. 204, s. 17, v. 12, p. 610.)

**It was superseded** by act of March 3, 1875 (18 Stat., 484), which amended section 1422, Revised Statutes, and embodied provisions superseding this section and sections 1424 and 1425. See the existing provisions of section 1422 as given above.

**Sec. 1424. [Enlisted men, limit of detention. Superseded.]**

**This section provided as follows:**

"SEC. 1424. Persons so detained by a commanding officer, or reentering to serve until the return to an Atlantic port of the vessel to which they belong, shall in no case be held in service more than thirty days after their arrival in said port."—(17 July, 1862, c. 204, s. 17, v. 12, p. 610.)

**It was superseded** by act of March 3, 1875 (18 Stat., 484), which amended section 1422, Revised Statutes, and embodied provisions superseding also sections 1423–1425, Revised Statutes. See the existing provisions of section 1422 as given above.

**Sec. 1425. [Enlistment, shipping articles to contain provisions of preceding sections. Superseded.]**

**This section provided as follows:**

"SEC. 1425. The shipping articles shall contain the substance of the three sections next preceding and of section fifteen hundred and seventy-two."—(17 July, 1862, c. 204, s. 17, v. 12, p. 610.)

**It was superseded** by act of March 3, 1875 (18 Stat., 484), which amended section 1422, Re-

vised Statutes, and embodied provisions superseding also sections 1423–1425, Revised Statutes, and likewise superseding section 1572, Revised Statutes, referred to in this section, which contained a provision for additional pay to men detained after expiration of enlistment in accordance with section 1422.

**Sec. 1426. [Enlisted men, honorable discharge of.]** Honorable discharges may be granted to seamen, ordinary seamen, landsmen, firemen, coal-heavers, and boys who have enlisted for three years.—(2 Mar., 1855, c. 136, s. 1, v. 10, p. 627. 7 June, 1864, c. 111, v. 13, p. 120.)

Amendment to this section was made by joint resolution of June 11, 1896 (29 Stat., 476), which extended the provisions of section 1426 to "all enlisted persons in the Navy"; and by act of August 29, 1916 (39 Stat., 560), which authorized honorable discharge of men who had served one year of a first enlistment. The latter act was repealed by act of March 4, 1917 (39 Stat., 1171).

As to term of enlistment in the Navy, see section 1418, Revised Statutes, and note thereto.

Bad-conduct discharges to enlisted men of the Navy and Marine Corps are authorized by

sentence of summary court-martial (sec. 1624, R. S., art. 30, as amended by act Feb. 16, 1909, sec. 8, 35 Stat., 621); and also by sentence of general court-martial (sec. 1624, R. S., art. 35).

Burial in any national cemetery, free of cost, is authorized in cases of sailors or marines dying in a destitute condition after having been honorably discharged from the service; the production of honorable discharge of a deceased man is sufficient authority for the superintendent of any cemetery to permit the interment. (Sec. 4878, R. S., as amended.)



Certificate in lieu of lost discharge was authorized to be furnished to persons who served in the Navy or Marine Corps in the War of 1812, the Mexican War, or the Civil War, by act of February 7, 1890 (26 Stat., 6).

Certificate of discharge to be furnished in Civil War cases where charge of desertion is removed from record of man who has not received a certificate of discharge. (Act Aug. 14, 1888, sec. 4, 25 Stat., 443, revived and reenacted by act May 24, 1900, sec. 1, 31 Stat., 183.)

Certificates of discharge in true names shall be issued to persons who enlisted or served under assumed names in the Navy during the Civil War, the War with Spain, the Philippine Insurrection, or during any war between the United States and any other nation or people, and were honorably discharged. (Act Apr. 14, 1890, 26 Stat., 55, as amended by acts June 25, 1910, 36 Stat., 824, and Aug. 22, 1912, 37 Stat., 324.)

Compensation under War Risk Insurance Act not to be paid in cases of persons dismissed or receiving a dishonorable or bad-conduct discharge from the service. (Act Oct. 6, 1917, sec. 308, 40 Stat., 407.)

Disability not in line of duty, refund of enlistment bounty when discharged for, may be required in certain cases. (Act Mar. 2, 1907, 34 Stat., 1176.)

Discharge of minors who fraudulently enlist by swearing falsely as to their age is required by act of March 3, 1915 (38 Stat., 931), quoted above under section 1418, Revised Statutes.

Dishonorable discharges to enlisted men of the Navy and Marine Corps are authorized by sentence of general court-martial. (See sec. 1624, R. S., art. 63.) Dishonorable discharge is bar to compensation under War Risk Insurance Act. (Act Oct. 6, 1917, 40 Stat., 407; see also act June 25, 1918, 40 Stat., 609.)

Forging, counterfeiting, or falsely altering any certificate of discharge from the military or naval service, or having same in possession, etc., punishable by fine and imprisonment. (Act Mar. 4, 1917, 39 Stat., 1182.)

Gratuity and increased pay to be allowed holder of honorable discharge from the Navy who reenlists within four months after such discharge. (Sec. 1573, R. S., as amended by act Mar. 3, 1899, sec. 16, 30 Stat., 1008, and further amended and reenacted by act Aug. 22, 1912, 37 Stat., 331.) But this did not apply to men who received an honorable discharge after completing one year of a first enlistment, as authorized by act August 29, 1916 (39 Stat., 560), which act was repealed by act March 4, 1917 (39 Stat., 1171).

Gratuity of \$60 to be paid all persons serving in the naval forces during present war who have resigned or been discharged under honorable conditions, or in the cases of reservists, been placed on inactive duty. (Act Feb. 24, 1919, sec. 1405, 40 Stat., 1151.)

Home on board any receiving ship, and one ration per day during a period of four months following discharge, to be furnished persons honorably discharged as authorized

by section 1429, Revised Statutes. (Act Feb. 8, 1889, 25 Stat., 657, as amended by act Mar. 3, 1899, sec. 16, 30 Stat., 1008, and act Aug. 22, 1912, 37 Stat., 331.) See articles R-3667 and I-4551, Navy Regulations and Instructions, 1913.

Inaptitude, refund of enlistment bounty when discharged for, may be required in certain cases. (Act Mar. 2, 1907, 34 Stat., 1176.)

Mileage allowed to men honorably discharged from Navy or Marine Corps, and naval reservists honorably released from active service. (Act June 3, 1916, sec. 126, 39 Stat., 217, as amended by act Feb. 28, 1919, sec. 3, 40 Stat., 1203.)

National Home for Disabled Volunteer Soldiers: Honorably discharged sailors who served in the regular or volunteer forces of the United States in time of war, entitled to benefits of National Home. (Acts May 26, 1900, 31 Stat., 217; Jan. 28, 1901, sec. 5, 31 Stat., 745; Mar. 4, 1909, 35 Stat., 1012.)

Naturalization: Honorable discharge from Navy or Marine Corps entitles holder to certain privileges with respect to naturalization. (Act May 9, 1918, 40 Stat., 542.)

Ordinary discharge with recommendation for reenlistment entitles Filipino to apply for naturalization after required service in the Navy. (Act May 9, 1918, 40 Stat., 542.)

Pensions: Honorable discharge from one contract of service during Civil War held for pension purposes to be honorable discharge from all previous contracts of service during said war. (Joint resolution, June 28, 1906, 34 Stat., 836, amending joint resolution, July 1, 1902, 32 Stat., 750.) Honorable discharge necessary for receipt of pension in certain cases. (Act June 27, 1890, sec. 2, 26 Stat., 182, as amended by act May 9, 1900; act Feb. 6, 1907, 34 Stat., 879; 31 Stat., 170; res., July 1, 1902, sec. 1, 32 Stat., 750; sec. 4730, R. S.; act Jan. 29, 1887, 24 Stat., 371; act Mar. 9, 1878, 20 Stat., 27, etc.) Penalty for claim agents, attorneys, etc., retaining or refusing to deliver honorable discharge papers to owners thereof is provided for by act of May 21, 1872 (17 Stat., 137).

Preference in civil service: Persons honorably discharged from military or naval service by reason of disability resulting from wounds or sickness incurred in line of duty to be preferred for appointments to civil offices. (Sec. 1754, R. S.; see also acts Jan. 16, 1883, sec. 7, 22 Stat., 406; Mar. 1, 1889, sec. 5, 25 Stat., 762; Mar. 6, 1902, 32 Stat., 52; Mar. 3, 1905, 33 Stat., 1088.) Honorably discharged soldiers, sailors, and marines, and widows and wives of such, entitled to preference in appointments to clerical and other positions under the Government. (Act Mar. 3, 1919, sec. 6, 40 Stat., 1293; see also act Mar. 1, 1919, 40 Stat., 1224; act July 11, 1919, 41 Stat., 37; act July 11, 1919, 41 Stat., 142; act Oct. 28, 1919, 41 Stat., 319.)

Preference in civil service: In making any reduction of force in any of the executive departments, preference to be given to retention of persons honorably discharged from military or naval service and to widows and orphans of deceased soldiers and sailors.

(Act Aug. 15, 1876, sec. 3, 19 Stat., 169; see also act Aug. 23, 1912, sec. 4, 37 Stat., 413.)

**Preference in private employment:** Respectfully recommended by Congress to bankers, merchants, manufacturers, mechanics, farmers, and persons engaged in industrial pursuits, to give preference in appointments to persons honorably discharged from the military or naval service by reason of wounds, disease, or the expiration of terms of enlistment. (Sec. 1755, R. S.)

**Purchase of discharge from Navy or Marine Corps in time of peace** is permitted in the discretion of the President and under such rules as he may prescribe. (Act Mar. 3, 1893, 27 Stat., 717.) Furlough for remainder of enlistment, subject to recall in time of war or national emergency, in lieu of discharge by purchase, was authorized by act of Aug. 29, 1916 (39 Stat., 580).

**Reinstatement of former Government employees** who served as drafted or enlisted men in war with Germany, if honorably discharged, was authorized by act of Feb. 25, 1919 (40 Stat., 1164). See also act July 11, 1919 (41 Stat., 142).

**Report of men entitled to honorable discharge** to be made to Secretary of the Navy by every commanding officer of a vessel. (Sec. 1429, R. S.)

**Undesirable discharge, during first year of enlistment,** may result in refund of enlistment bounty. (Act Mar. 2, 1907, 34 Stat., 1176.)

**Uniforms** may be retained and worn with distinctive insignia, by persons honorably discharged from the Navy or Marine Corps, after serving in the present war. (Act Feb. 28, 1919, 40 Stat., 1202; see also act June 3, 1916, sec. 125, 39 Stat., 216, as amended by act Aug. 29, 1916, 39 Stat., 649; and act June 4, 1920, sec. 8, 41 Stat., 836.)

**Historical note.**—The act of March 2, 1855 (10 Stat., 627), providing in the first instance for honorable discharges, is entitled "An act to provide a more efficient discipline for the Navy," and section one of that act gives authority to the Secretary of the Navy to grant the honorable discharge as a testimonial of fidelity and obedience to those of the crew who enlisted for three years he might deem entitled thereto, while section two provides that "if any seaman, ordinary seaman, landsman, or boy shall reenlist for three years, within three months after his discharge, he shall, on presenting his honorable discharge, or on accounting in a satisfactory manner for its loss, be entitled to pay during the said three months, equal to that to which he would have been entitled if he had been employed in actual service." This shows, from the origin of this legislation, the distinction between the honorable discharge per se and the honorable discharge as carrying to certain classes of enlisted men, originally only four, the three months' extra pay. (2 Comp. Dec., 608.)

The act of June 7, 1864 (13 Stat., 120), added two other classes to whom an honorable discharge carried with it the privilege of extra pay upon reenlistment, to wit, firemen and coal

heavers, the lowest grades in that branch of the service the same as the four lowest grades in the seamen branch of the service were allowed such extra pay upon reenlistment. (2 Comp. Dec., 608.)

The Navy Regulations of 1876 (p. 100, par. 13) for the first time substituted the words "any person" for the words "any seaman, ordinary seaman, landsman," etc., in providing for the payment of extra pay upon reenlistment. How this change came to be made is not apparent, and no reason can be assigned therefor, unless it be that the honorable discharge provided for in section 1429, Revised Statutes, was confounded with that of section 1426 and section 1573. (2 Comp. Dec., 608.)

The joint resolution of June 11, 1896, extended the benefits conferred by sections 1426 and 1573, Revised Statutes, to all enlisted persons now in the Navy, and authorized the passing of accounts of paymasters containing payments of extra pay to all enlisted men as though they had been included in said sections. Under this resolution payment may now be made to an enlisted man who reenlisted prior to its passage and whose claim for extra pay was pending before the paymaster but not actually paid before June 11. (2 Comp. Dec., 608.)

The purpose of this resolution of 1896 was to legalize the practice of paying all enlisted men, upon reenlistment, the extra pay, which practice had crept into the service without warrant of law. This practice doubtless arose from the fact that the honorable discharge provided for in section 1429, Revised Statutes, was confused with the honorable discharge granted under section 1426. The object of the honorable discharge provided for in section 1429 is stated in that section to be "as a testimonial of fidelity and obedience," while the honorable discharge provided for in section 1426, taken in connection with section 1573, is seen to be for the purpose of holding out the extra pay to the six lowest classes of enlisted men in the Navy as an inducement to reenlist. That this very evident intention of the law was recognized by the Navy Department appears from an examination of the older regulations of the U. S. Navy. But by the joint resolution cited, Congress has seen fit to extend the privileges arising from honorable discharges upon reenlistment far beyond what was originally provided. (2 Comp. Dec., 608.)

As to term of enlistment in the Navy, see note to section 1418, Revised Statutes.

**Classes of discharges in the Navy.**—Under the Navy Department there long have been and are now four kinds of discharges, namely, expressly honorable, dishonorable after court-martial [i. e., general court-martial], for "bad conduct," also after court-martial [i. e., either general court-martial or summary court-martial], and "ordinary," familiarly called "small" discharge. (25 Op. Atty. Gen., 83.)

**"Honorable" and "ordinary" discharges distinguished.**—The "honorable discharge" in the cases referred to in section 1573, Revised Statutes, is that provided for in sections 1426 and 1429, Revised Statutes, and is dependent upon fidelity and obedience in the service. It differs from the "ordinary" discharge in that the latter carries with it no testimonial as to the



special good qualities and fitness of the holder. It is the record shown by the "honorable" discharge, coupled with service and reenlistment, that entitles the seaman to increased pay under section 1573. (4 Comp. Dec., 281.)

The so-called "ordinary discharge" in the Navy has no express legislative authority, but is the creature of regulation and long-established administrative practice. Only the honorable discharge, bad-conduct discharge, and dishonorable discharge are provided for by laws relating to the Navy. If it were attempted to classify the ordinary discharge under one of these statutory headings, it would necessarily have to be grouped with the honorable discharge, because neither bad-conduct nor dishonorable discharges can be issued without sentence of court-martial. In some cases, however, ordinary discharges are issued under circumstances where it could hardly be said by military men that the holder left the service under honorable conditions; as one discharged prior to completion of enlistment for physical disability due to his own misconduct. (File 9209-114, Mar. 11, 1919.)

The technical "honorable discharge" in the Navy is issued with few exceptions only to those who have completed a full term of enlistment. An "ordinary discharge" may, however, constitute a man "honorably discharged" from the Navy within the meaning of the law providing for mileage on discharge. The "ordinary discharge" blank does not expressly characterize the discharge as honorable or otherwise. It does, however, state, either expressly or by reference to an order of the Department, the reason for the discharge, and at the end of the blank under the heading of "character of discharge" is a place in which is to be entered "good," "inaptitude," or "undesirable," as the case may be. In cases where the character of discharge is expressly stated to be "good," it certainly should be regarded as honorable within the meaning of the mileage law. "Inaptitude" does not import that the discharge is otherwise than honorable. Neither is the entry "undesirable" of itself sufficient to deprive the discharge of an honorable character, for the man's undesirability for the service might be due to causes in no manner reflecting upon him. It would seem that any discharge which is not honorable should contain on its face entries from which it can be determined with certainty that it is not an honorable one, and that where such does not appear upon the face of the discharge it should be regarded as honorable. (File 9209-114, Mar. 11, 1919, construing mileage, act of June 3, 1916, sec. 126, 39 Stat., 217, as amended by act of Feb. 28, 1919, sec. 8, 40 Stat., 1203; see also 25 Comp. Dec., 771; 25 Comp. Dec., 792.)

The Bureau of Navigation may properly determine what cases of ordinary discharges are regarded as constituting the holders thereof "honorably discharged" persons within the meaning of those words as used in the mileage law, as construed by the Judge Advocate General, or within the meaning which they have acquired by administration practices in the Army not incompatible with conditions existing in the Navy. (File 9209-114, Mar. 11, 1919.)

**Honorable discharges in Army and Navy not necessarily same.**—In using the phrase "honorably discharged" Congress did not necessarily intend it to have the same definition in both the Army and Navy. One department might treat one kind of conduct as inconsistent with the allowance of an honorable discharge and the other not, according to practical considerations and the traditions of the two services. In both services "dishonorable discharge" was given only after a trial by court-martial and as a punishment. In the Army, in case of discharge for cause, without court-martial, it was customary to state on the certificate that discharge was in pursuance of an order, giving the number thereof, and this order must be referred to to learn the specific cause. There seems to be no statutory provision for a certificate of express honorable discharge from the Army such as in the naval service is called for by Revised Statutes, section 1427. (28 Op. Atty. Gen., 83.)

When payment of mileage was authorized to men "honorably discharged from the Army, Navy, or Marine Corps," the words "honorably discharged" were used in the same broad sense with reference to the Navy that they have with reference to the Army. As applied to the Army these words do not have a restricted meaning such as ordinarily attaches thereto in naval parlance, and as the benefits of the law are intended to be granted to both services without discrimination, *held*, that an enlisted man of the Navy should be regarded as "honorably discharged" if his discharge was of a kind generally regarded as an honorable one "by the War and Navy Departments and military men of the branch in question at the time the separation or discharge took effect." (File 9209-114, Mar. 11, 1919.)

**Honorable discharge may be issued in cases not expressly authorized by statute.**—When Congress use the phrase "honorably discharged" with reference to persons who have served in the Navy, its language is not necessarily limited to express honorable discharges granted under sections 1426 and 1427, Revised Statutes, but may be construed as intended to adopt or act upon the actual past discharge as an honorable one if of a kind generally so regarded by the Navy Department and military men of that branch of the service at the time the separation or discharge took place. The question is not to be determined by the recent or present opinions of such department or naval men, concerning discharges happening at the time of the Civil War or shortly after; but is whether the discharge when granted belonged to a class then commonly accepted among naval men and at the Navy Department as constituting a man an "honorably discharged" person. In other words, it is not a question of what should have been granted, but what was granted. (28 Op. Atty. Gen., 83.)

The naval authorities may issue so-called "honorable discharges" as provided by Navy Regulations, but such discharges can not carry the right to pay and other benefits except when issued in conformity with the law that authorizes such extra pay. The fact that he has received an honorable discharge pursuant to Navy Regulations does not give him the status of one

receiving an honorable discharge authorized by section 1426, Revised Statutes, or the status of one in some one of the classes specified in section 1573 as entitled to extra pay for reenlistment. (2 Comp. Dec., 563.)

The three months' extra pay for reenlistment allowed by section 1573, Revised Statutes [prior to amendment of that section], to seamen, ordinary seamen, landsmen, firemen, coal heavers, and boys, was limited to the six grades of enlisted men mentioned, and could not be allowed to a person enlisted as a steward. (2 Comp. Dec., 536.)

A steward to the commander in chief was not one of the classes entitled to an honorable discharge as provided in section 1426 [prior to amendment of that section], which discharge was a prerequisite to obtaining the advantages of extra pay provided for in section 1573. (2 Comp. Dec., 536.)

A man enlisted in the Navy as a writer, third class, and granted an honorable discharge under section 1429, Revised Statutes, as a yeoman, after three years' service, was not entitled to the extra pay for reenlistment allowed by section 1573 [prior to amendment of that section], to the six classes of enlisted men named therein. (2 Comp. Dec., 563.)

**Character of discharge issued to enlisted man is question for determination by War or Navy Department.**—The War and Navy Departments are parts of the executive branch of the Government, having to do with a man's discharge from the service as an executive matter, and having special care and executive charge of the man's service and of his military honor and standing. This charge they have while the man is in the service, and until the moment he leaves it. Whether he should go with or without honor, these departments determine when they part from him. When they do so determine, they become, at least in the absence of fraud or gross mistake, *functus officio*, and the executive branch of the Government thereby becomes *functus officio*. (28 Op. Att'y. Gen., 83.)

The question whether a man was "honorably discharged" from the Navy within the meaning of the law providing for payment of mileage on discharge, although a question involving disbursements, is one for determination by the Navy Department and not by the accounting officers. (File 9209-114, Mar. 11, 1919, citing 28 Op. Att'y. Gen., 83, 90; 21 Comp. Dec., 539-547.)

In determining the pensionable status of a person who served in the Civil War, under the acts of June 27, 1890 (26 Stat., 182), and of February 6, 1907 (34 Stat., 879), the Department of the Interior is concluded by the terms of a discharge granted by the Navy Department as "honorable." (28 Op. Att'y. Gen., 83.)

By using the words "honorably discharged" in the acts above referred to, Congress intended to adopt or act upon the actual past discharges as honorable, if of a kind generally so regarded by the War and Navy departments and military men of the branches in question at the time the separation or discharge took place. (28 Op. Att'y. Gen., 83.)

In any case, in determining, long after discharge, the nature of the discharge issued,

whether what was formerly done as an executive act did or did not constitute the individual a person "honorably discharged"—"of course, from a practical standpoint, and as expert evidence, it would be well to consider any present views of the two military departments upon the question whether or not the original act was the granting of an honorable discharge. Those departments, even when no longer in charge of the person, should and do take an interest in the honor of the men who have served their country, and that honor is, with military men, the most important consideration of their lives." (28 Op. Att'y. Gen., 83.)

"It is peculiarly the province of the War Department to make deductions of fact from the records of military service of which that department is the natural and legal custodian, and to decide military questions which relate not only to the entrance into service but also the cause or manner of severance from service of officers and enlisted men." (21 Comp. Dec., 539, 547. But see 20 Comp. Dec., 751, note to sec. 236, R. S., under V, (A), "The question whether or not the record of an enlisted man in the Marine Corps is honest and faithful.") See, in this connection, cases noted under section 471, Revised Statutes, "Jurisdiction, Commissioner of Pensions."

**Effect of discharge.**—The honorable discharge of a soldier is a formal, final judgment passed by the Government on his entire military record, and an authoritative declaration that he left the service in a status of honor. (U. S. v. Kelly, 15 Wall., 34.)

The Kelly case held that an honorable discharge entitled a deserter to recover any pay or bounty earned subsequent to his restoration to duty, but it was not pretended that his honorable discharge, subsequently granted, gave him a right to pay during the period of his absence from the service, or would have dispensed with the forfeiture of pay incident to his desertion, had any pay been due at the time. (File 26251-1963:1, Aug. 17, 1910, citing U. S. v. Landers, 92 U. S., 77, 80.)

The mark of desertion entered on the record of an enlisted man is not removed by his subsequent honorable discharge. The case of U. S. v. Kelly, as explained in U. S. v. Landers, does not hold that an honorable discharge has the effect of removing an existing mark of desertion, nor that in consequence of such discharge the department's records should be altered so as to show an incorrect state of facts, and the Kelly case clearly does not authorize such action to be taken. The Landers case states that, "if the entry of desertion has been improperly made, its cancellation can be obtained by application to the War Department," thus clearly holding that the mark of desertion is not removed by the honorable discharge subsequently issued to the deserter, but that, on the contrary, its cancellation is dependent upon an express determination by the department that it was "improperly made." The fact that the deserter subsequently received an honorable discharge does not affect the question of removing the mark of desertion from his record. (File 26251-1963:1, Aug. 17, 1910.)



A discharge from the Navy operates in bar of trial for a previous desertion from the Navy, but not in bar of a previous offense committed in the Marine Corps. They are distinct branches of the service, and a discharge from the former does not operate as a discharge from the latter. (File 26251-5810:1, Feb. 20, 1912.)

The discharge of a man before having been fully checked the amount of a court-martial sentence operates as an implied remission of the unexecuted portion of the sentence. (See Comp. Dec., Apr. 6, 1914, 158 S. and A. Memo., 3035, note under sec. 236, R. S., "VI. Set-off.") [But permitting man to extend his enlistment, instead of discharging him, under such circumstances, does not operate as an implied remission. (File 26806-131:44, Aug. 11, 1916.)]

The discharge of an enlisted man, while in debt to the United States (other than indebtedness caused by sentence of court-martial not fully checked) does not remit the amount of such indebtedness, but if he is subsequently reenlisted same may be checked against pay coming due him under his current enlistment. (Comp. Dec., Apr. 7, 1914, 158 S. and A. Memo., 3037; see note to sec. 236, R. S., "VI. Set-off.")

Under the Articles of War, prescribing limitations for trials by court-martial, it would seem that a soldier may be arrested and tried after the expiration of his term of service for a military offense committed during such term of service, so that the order for the court-martial is issued within two years from the commission of such offense. The case of Lord George Sackville, as reported by Tytler in his treatise on courts-martial, goes to sustain the jurisdiction of the naval authorities to arrest and try the offender, as well after the discharge from service as before. (In re Bird, 3 Fed. Cas. No. 1428. See below, "When discharge takes effect," and see, in this connection, note to Constitution, Art. I, sec. 8, clause 14, under "IV. Jurisdiction of Courts-Martial." See also file 28550-951:3, May 13, 1919, and sec. 1624, R. S., art. 14.)

**Service as marine counted in computing three years' service for honorable discharge from Navy.**—An enlisted man of the Marine Corps who was transferred, by authority of the act of June 17, 1898 (30 Stat., 474), to the Hospital Corps of the Navy, is entitled to credit for the prior service in the Marine Corps, in the same enlistment he is serving out in the Hospital Corps, in making up the time necessary to entitle him to the honorable discharge provided for in section 1426, Revised Statutes, as amended. This section applies to enlisted men of the Navy, but when, by authority of law, the Secretary of the Navy transfers an enlisted marine to the Hospital Corps of the Navy, it is only a fair and reasonable construction of section 1426 to hold that it permits the prior service in the Marine Corps, in the same enlistment that he is serving out in the Hospital Corps of the Navy, to be credited to him in making up the time necessary to entitle him to an honorable discharge, particularly in view of the fact that this is a beneficial statute and that such construction will carry out the well-settled policy of the Government to encourage continuous service and reenlistment of efficient men, who are the only ones under Navy Regulations who can

receive such discharges, even after the full service of three years required. (11 Comp. Dec., 700; see also file 5315-04, July 5, 1904, noted under sec. 1421, R. S.)

**Honorable discharge of de facto enlisted man.**—One Kato Notoich enlisted as mess attendant, for four years; not liking the service, after one day's duty, he left; in his stead there appeared Gonhichi Yamamoto, who states that he was received on board ship as Kato Notoich; although never regularly enlisted, he served the full term of enlistment, and was honorably discharged; thereafter he reenlisted under his true name: *Held*, that he was entitled to the benefits of his de facto enlistment and honorable discharge therefrom, and that continuous service certificate should be issued to him in his true name. (File 5839-04, July 5, 1904.) In this connection, see Op., J. A. G., Army, Feb. 26, 1901, Circular, War Dept., March 18, 1901, holding that undoubtedly men can become soldiers in the military service of the United States without formal enlistment; and if a man who has signified his intention to enter the military service is clothed, fed, armed, put on duty—made a soldier of in fact—he becomes a soldier in the service of the United States, even though he is never "sworn," mustered, or otherwise formally accepted into that service.

**Power of courts to discharge enlisted men.**—In 12 Op. Atty. Gen., 258, 266, it was held that the authority conferred upon the Secretary of War in regard to the discharge of Army recruits, is not declared to be exclusive, and it may well be doubted whether such power conferred upon a merely ministerial officer can be held to oust judicial inquiry upon habeas corpus into the legality of the enlistment. (See also note to secs. 761 and 1419, R. S.; and see act of Mar. 3, 1915 (38 Stat., 931), quoted above, under sec. 1418, R. S., with reference to discharge of minors fraudulently enlisted in the Navy.)

**Naturalization of honorably discharged enlisted men.**—Section 1418, Revised Statutes, required enlistments in the Navy to be for not exceeding five years; and section 1608 declared that enlistments in the Marine Corps should be for not less than five years. At the same time honorable discharges were granted to those who had fulfilled the three-year enlistment in the Navy. (Sec. 1426, R. S.) The act of July 26, 1894 (28 Stat., 124), provided for the naturalization of aliens who served five consecutive years in the Navy and received an honorable discharge. At the time this act was passed, it was possible for persons who were in the naval service to produce evidence in the form of a certificate of honorable discharge covering a full five-year term of enlistment, or it was possible at that time to have proof of a shorter term of enlistment covered by an honorable discharge and proof of continued service under a further enlistment. It may have been the intention of Congress to require proof of five consecutive years of service and a certificate of honorable discharge covering such whole period. But by act of March 3, 1899, section 16 (30 Stat., 1008), the term of enlistment in the Navy was changed to four years, and by act of March 3, 1901 (31 Stat., 1132), enlistment in the Marine Corps was reduced to four years. The change in the term of enlistment in the Navy brings with it a cor-

responding modification in the requirements of the naturalization statute; otherwise its objects have been practically frustrated. Hence, proof of an alien's service of a four-year term of enlistment in the Navy, his honorable discharge, and his immediate reenlistment for a further term of four years, the proof showing five continuous years of service, is sufficient under the act of July 26, 1894. (In re Brykczynski, 207 Fed. Rep., 813. By act June 30, 1914 (38 Stat., 395), naturalization of aliens was authorized upon evidence of service in the Navy or Marine Corps of one enlistment "of not less than four years," followed by an honorable discharge, or an ordinary discharge with recommendation for reenlistment; and by act of May 22, 1917 (40 Stat., 84), naturalization of aliens was authorized after one year's honorable service in the Naval Reserve Force. New provisions for naturalization of persons having service in the Navy and Marine Corps were contained in act of May 9, 1918, 40 Stat., 542, which expressly repealed the act of June 30, 1914, 38 Stat., 395.)

**Necessity of certificate of discharge.**—"A soldier can not discharge himself," and until he has been discharged by competent authority his original contract continues binding upon him. It has been the practice in the Navy to enter the mark of desertion against men who leave the service without receiving a discharge, although they may have satisfactorily completed their terms of enlistment, and this practice was given legislative recognition by the act of Congress approved August 14, 1888 (25 Stat., 442), section 1 of which authorized the Secretary of the Navy to remove the mark of desertion in certain of such cases, but made it discretionary with him to do so or not. (File 26251-5447, Dec. 8, 1911; see also note to sec. 1418, R. S., under "Detention of men after expiration of enlistment.")

While there is no provision of law expressly requiring that enlisted men of the Navy be discharged in writing, as is required in the Army (sec. 1342, R. S., art. 4), Congress has repeatedly in its legislation relating to the Navy emphasized the necessity of a "discharge" for the purpose of terminating an enlisted man's obligation to the United States. (File 26251-5447, Dec. 8, 1911; Op. Atty. Gen., Feb. 27, 1922, file 26251-26615:8.)

In American and English Encyclopedia of Law, volume 20, page 628, title "Military Law," it is stated that "The connection of an enlisted man with the military or naval service is regularly terminated by his death or discharge." In support of this statement there is cited, among others, the case of *Grant v. Gould* (1792), in which it was held that "a person in pay as a soldier is fixed with the character of a soldier; and if once he becomes subject to the military character he never can be released but by a regular discharge." (2 H. Bl., 69, 104.) However, it should be remarked that when this decision was rendered enlistments in England were for life. (File 26251-5447, Dec. 8, 1911.)

The correct view appears to be that enlistment, like marriage, is not merely a contract, but a status; and although an enlisted man may have fully performed his contract he can not divest himself of his status as a person in the

military or naval service until regularly discharged by competent authority. (File 26251-5447, Dec. 8, 1911.)

**Status of enlisted men not discharged upon expiration of enlistment.**—See note to section 1408, Revised Statutes, under "Status of mates when not discharged upon expiration of enlistment." See also note to section 1418, Revised Statutes, under "Detention of men after expiration of enlistment."

**Revocation of discharge obtained by fraud.**—An honorable discharge, a certificate of which a man obtained by falsehood and perjury, must be treated as a nullity. (16 Op. Atty. Gen., 349, 352; followed 28 Op. Atty. Gen., 170.)

Where an enlisted man obtained a discharge from the Marine Corps upon condition that he would enlist immediately in the Navy as a hospital apprentice and then failed so to enlist, the discharge may be canceled and the man declared a deserter; if apprehended, he may be tried by court-martial both for desertion and conduct to the prejudice of good order and discipline. (File 7657-159, Aug. 10, 1912; C. M. O. 6, 1915, p. 9; see also file 26251-6599; compare cases noted under sec. 1421, R. S.)

The Secretary of the Navy has authority to revoke the discharge of an apprentice seaman procured by fraud, and may resume jurisdiction over the man. In this case the man made a bogus confession, claiming that he had committed a murder for which he was wanted by the civil authorities, and after his discharge and delivery to the civil authorities repudiated his confession. (28 Op. Atty. Gen., 170.)

**Revocation of discharge issued under illegal sentence of court-martial.**—Where, by the sentence of a court-martial, a soldier is discharged from the service before the expiration of his term of enlistment, and such sentence is afterwards set aside as null and void, the status of such soldier is not affected in any way by such sentence, and he is deemed to have been in the service all the time between the sentence and the order setting it aside. (In re Bird, 3 Fed. Cas. No. 1428; see also note to sec. 1624, R. S., art. 32.)

**Correction of errors in discharge.**—The War Department has power to correct mistakes made in granting discharges to soldiers. (13 Op. Atty. Gen., 201; but see 13 Op. Atty. Gen., 16.)

**When discharge takes effect.**—Until a soldier's discharge is issued and delivered to him, or until such action is taken as to make him legally chargeable with notice of his discharge, he remains in the service. (2 Comp. Dec., 95.)

A soldier having been absent on furlough at the time of the discharge of his company, and the certificate of his discharge having been mailed to him, his discharge did not take effect until he received the certificate or other notice thereof. (6 Comp. Dec., 11.)

An enlisted man of the Marine Corps remains in the service until receipt of his discharge or until such action is taken as will render him legally chargeable with notice thereof, notwithstanding the expiration of his term of enlistment during his absence on furlough granted at his own request. (2 Comp. Dec., 94; Dig. Comp. Dec., 433.)



An enlistment does not expire until midnight of the last day of the term, and a discharge by reason of expiration of enlistment is not effective prior to midnight although delivered at an earlier hour of the day. Accordingly, *held* that a man who died upon the last day of his enlistment after the delivery of his discharge by reason of the expiration of his enlistment was in the status of an enlisted man in the service at the time of his death. (File 27381-31 Feb. 5, 1917.)

A discharge as undesirable is effective when delivered, and a man who was overpaid when so discharged could not later on the same day, upon discovery of the error, be legally brought back to the ship and detained for disciplinary action by the naval authorities upon refusal to refund the amount of overpayment. (File 26254-70, July 8, 1908.)

Where an offense is committed by a man on the day but subsequent to the delivery of his discharge, if the discharge was for any cause other than expiration of enlistment, he was not in the naval service when the offense was committed, and therefore could not be tried by court-martial for such offense notwithstanding his reenlistment on the next day. If the discharge was by reason of expiration of enlistment, he was in the naval service when his offense was committed, his discharge not having become effective until midnight of that day. Although the question is not free from doubt, it is considered that, if a case of sufficient importance, the man who reenlisted the next day should, if his discharge was by reason of expiration of enlistment, be brought to trial by court-martial to the end that he might present the jurisdictional question to the civil courts by habeas corpus proceedings. If the offense is discovered, and the accused placed under arrest to await action, before his discharge takes effect, the general rule is that jurisdiction has thus attached and is not divested by any subsequent change in the status of the accused. (File 26504-298, Feb. 26, 1917. See also file 28550-9513, May 13, 1919, *In re Bird*, 3 Fed. Cas. No. 1428, and sec. 1624, R. S., art. 14.)

**Theft of honorable-discharge blanks.**—An enlisted man who steals honorable-discharge blanks and is then discharged from the naval service with a bad-conduct discharge, prior to detection of the theft, may, when apprehended, be proceeded against in the civil courts of the United States for violation of section 47 of the Federal Criminal Code (act Mar. 4, 1909, 35 Stat., 1097), or may be tried by a naval court-martial for violation of section 1624, article 14, Revised Statutes, the

same as though he had not been discharged, as is specifically provided therein. (See file 26283-977, Feb. 14, 1916. In this case, it was decided to try the accused in the civil court; see file 26283-977:10, June 2, 1916.)

From the Navy Department's point of view the theft of honorable-discharge blanks is of a quite serious nature, and the quantum of punishment to be imposed upon conviction should be governed in a measure by considerations looking to a prevention of similar thefts by others. Honorable discharges are by law and regulations awarded only to men who have earned same by years of efficient and honorable service in the Navy; and such discharges entitle the holders to numerous and substantial benefits from the Government. Furthermore, in civil life the exhibiting of an honorable discharge from the Navy opens the door for the holder to employment by private business institutions of the highest standing as well as by Federal, State, and municipal governments. Accordingly, where a man has been apprehended who is confessedly guilty of stealing such blanks, he should not be allowed to escape too lightly. (File 26283-977:10, June 2, 1916; see 8 Comp. Dec., 756.)

Where a person buys and sells honorable-discharge blanks belonging to the Navy, it would seem that he is guilty of violating sections 37 and 48 of the Criminal Code (35 Stat., 1096, 1098). (File 26509-163:2, July 29, 1916.)

**Counterfeiting honorable-discharge blanks.**—Where honorable discharge blanks are counterfeited and sold, it is possible that prosecution may be had under sections 148 or 151 of the Criminal Code (35 Stat., 1115, 1116), which relate to counterfeiting and selling "any obligation or other security of the United States." These words do not in their ordinary signification include honorable-discharge blanks, but by section 147 of the Criminal Code (35 Stat., 1115) they are given a broad definition, embracing any "representatives of value" issued under any act of Congress. That honorable-discharge certificates are "representatives of value" would seem clearly to follow from an examination of various statutes relating to such discharges. [See laws noted above, under this section.] In the opinion of the Navy Department prosecution may be had under the above sections of the Criminal Code, but this is a question to be decided by the Department of Justice. (File 26509-163:2, July 29, 1916. Congress has since provided specifically for the offense of forging, etc., certificates of discharge. See act Mar. 4, 1917, 39 Stat., 1182.)

**Sec. 1427. [Enlisted men, form of honorable discharge.]** Honorable discharges shall be granted according to a form prescribed by the Secretary of the Navy.—(2 Mar., 1855, c. 136, s. 1, v. 10, p. 627. 7 June, 1864, c. 111, v. 13, p. 120.)

**Continuous service certificates.**—On April 26, 1869, the Secretary of the Navy issued a circular providing that all enlisted men, except officers' cooks and stewards, "will receive, upon the expiration of their enlistments, if they shall so elect, continuous-service cer-

tificates in lieu of the ordinary or honorable discharges heretofore issued"; and providing additional pay for persons holding continuous-service certificates. The provisions of this circular were incorporated in Navy Regulations, 1870, as articles 1070 and 1071, and with some

verbal changes appear as paragraphs 18 and 19, Navy Regulations, 1876. These regulations were amended by General Order No. 327, dated November 21, 1884, which provided in part as follows: "From and after January 1, 1885, the form of honorable discharge from the naval service, authorized by section 1427, Revised Statutes of the United States, shall be the 'honorable discharge and continuous-service certificate.'" After this order there was no provision for issuing continuous-service certificates, except in connection with an honorable discharge, and that was clearly the purpose of the general order of November 21, 1884. (16 Comp. Dec., 354.)

"Any man who, having been honorably discharged, or discharged with a recommendation for reenlistment, shall within four months thereafter, reenlist for four years, shall receive in exchange for his discharge a continuous-service certificate; and any man who shall have agreed to extend his term of enlistment for an aggregate of four full years shall receive, after completing the original four years for which enlisted, a continuous-service certificate covering that period." (Art. R-3529, Navy Regs., 1913.)

**Form of honorable discharge.**—"Whenever any enlisted man, not holding a continuous-service certificate, is discharged from the naval service, either the form of honorable or that of ordinary discharge shall be used." (R-3611 (1), Navy Regs., 1913.)

"If the person discharged holds a continuous-service certificate, neither form of discharge will be necessary, but the appropriate column of the

certificate shall be filled out, and the character of the discharge, such as 'honorable,' 'ordinary,' 'bad conduct,' or 'dishonorable' shall be designated therein; if either of the last two, a brief statement of the cause shall be made in an indorsement." (R-3611 (3), Navy Regs., 1913.)

"Should there be no honorable discharge forms at hand upon the expiration of the term of enlistment of any person who is entitled to receive one, an ordinary discharge form may be used; the words 'entitled to honorable discharge,' however, must be written across the face and signed by the commanding officer. The holder thereof may, by communicating with the Bureau of Navigation, Navy Department, exchange such a paper for an honorable discharge." (R-3613, Navy Regs., 1913.)

The form of honorable discharge which has been prescribed by the Secretary of the Navy under authority of this section (N. Nav. 56, July, 1921) is headed "Honorable Discharge from the United States Navy," has a serial number, an engraving representing a battleship at sea, is signed by the commanding officer, bears notation as to the rating the man is best qualified to fill, and reads as follows:

"THIS IS TO CERTIFY that ..... is honorably discharged from the ..... and from the Naval Service of the United States, this ..... day of ....."

On the reverse of the discharge form is given the enlistment record and descriptive list of the man to whom issued, together with certificate of final payment.



## CHAPTER TWO.

### GENERAL PROVISIONS RELATING TO OFFICERS.

Sec.	Sec.
1428. Citizenship of officers.	1436. Sea service; staff officers who have been chiefs of bureaus.
1429. Report to be made of men entitled to honorable discharge.	1437. Detail of officers for service of War Department.
1430. Sale of wages to be discouraged.	1438. Officers to act as storekeepers on foreign stations.
1431. Leave and liberty to be granted by commanding officer.	1439. Bonds of officers acting as storekeepers.
1432. Commanding officers not required to act as pay officers.	1440. Appointments in diplomatic or consular service.
1433. Commanding officers may exercise consular powers.	1441. Officers dismissed, or resigning to escape dismissal.
1434. Commanding officers of squadrons to have rank of "flag officer."	1442. Furlough of officers.
1435. First lieutenants, navigation, and watch officers.	

**Sec. 1428. [Citizenship of officers.]** The officers of vessels of the United States shall in all cases be citizens of the United States.—(28 June, 1864, c. 170, s. 1, v. 13, p. 201.)

Acting pay clerks, pay clerks, and chief pay clerks must be citizens of United States. (See act Mar. 3, 1915, 38 Stat., 942.)

American citizenship in general. (See Constitution, fourteenth amendment, and Art. I, sec. 8, clause 4.)

Army officers appointed in time of peace not to be paid compensation unless citizens of the United States. (Act Aug. 29, 1916, 39 Stat., 649.)

Dental Corps officers must be citizens of United States. (See act Aug. 29, 1916, 39 Stat., 573, as amended by act July 1, 1918, 40 Stat., 709.)

Enlisted men of Navy required to be citizens, with certain exceptions. (See art. R-3524 (1), Navy Regs., 1913.)

Members of Naval Flying Corps must be citizens of the United States. (See act Aug. 29, 1916, 39 Stat., 582.)

Members of the Naval Reserve Force must be citizens of United States or of its insular possessions (see act Aug. 29, 1916, 39 Stat., 587); or must have declared their intention to become citizens (act May 22, 1917, 40 Stat., 84.)

Naturalization of aliens who have served in Navy or Marine Corps (act May 9, 1918, 40 Stat., 542); or in Naval Reserve Force (act May 22, 1917, 40 Stat., 84.)

**Regulations concerning citizenship.**—The Navy Regulations, 1913 (art. R-3301), provide that "no person shall be appointed to any office in the Navy unless he is a citizen of the United States."

**Alien may legally be appointed to Naval Academy as midshipman, but can not be commissioned unless naturalized.**—"There

is no statute explicitly making citizenship a condition precedent to eligibility to appointment to the Naval Academy as a midshipman, but inasmuch as officers of the Navy must be citizens, a midshipman can not be commissioned an ensign if he be an alien." (Asst. Sec. of the Navy to Hon. J. Van Vechten Olcott, M. C., Nov. 1, 1907; followed, Nov. 26, 1912, file 26252-71; Mar. 22, 1913, file 26252-71:1; Aug. 29, 1913, file 26252-71:2; May 15, 1915, file 5252-68.)

Where an alien appointed to the Naval Academy as a midshipman delays taking the necessary steps to be naturalized until it is too late for him to complete his naturalization by date of graduation, *held*, that he can not be commissioned as an ensign upon graduation, unless naturalized by a special act or joint resolution of Congress, as was done in the case of Eugene Prince, July 19, 1912 (37 Stat., 1346; file 26252-71, Nov. 26, 1912). *Held, further*, that the midshipman in this case could not be lawfully allowed to graduate as an alien, and subsequently be commissioned as an ensign, upon being naturalized, with rank from date of graduation, as this would be accomplishing indirectly what the law does not allow to be done directly. (File 26252-71:1, Mar. 22, 1913; file 26252-71:2, Aug. 29, 1913.)

It having been decided by the Navy Department, during a previous administration, that a certain midshipman could not be commissioned as ensign if he be an alien, the case has thereby become res judicata, and can not be reopened, nor should it be referred to the Attorney General for an opinion as to the correctness of the previous decision. (File 26252-71:2, Aug. 29, 1913.)

[In the case noted above, Congress passed a special act, May 9, 1914 (38 Stat., 1268), which was amended by another special act, May 21, 1914 (38 Stat., 1268), authorizing the issuance of a commission to the alien midshipman upon graduation, with a proviso that he should cease to be an officer of the Navy if not naturalized by a specified date. See hearings before Committee on Immigration and Naturalization, House of Representatives, September 11, 1913, file 26252-713.]

According to the doctrine of *stare decisis*, whose application in this country is as old as the Government itself, the department's ruling of November 1, 1907 [above noted], concerning the citizenship of midshipmen and the ineligibility of aliens for appointment as officers of the Navy, should not now be disturbed. "It is almost as important that the law should be settled permanently as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous. Vacillation is a serious evil." (Gilman v. Philadelphia, 3 Wall., 724.) Accordingly, *held* that the question of citizenship should be regarded as settled in accordance with the previous rulings of the department. (File 5252-68, May 15, 1915.)

Since the department's ruling of November 1, 1907 [above noted], the entire tendency of the Government, both in laws which have since been enacted and in regulations which have since been promulgated, has been to insist upon citizenship precedent to appointment in the naval service in any capacity, either as an officer or as an enlisted man. Accordingly, while the department has decided that the statutes do not specifically prohibit the appointment of an alien to the Naval Academy as a midshipman, such a prohibition may be embodied in the regulations, and this would avoid recurrence of the difficulties which arose out of the case above noted, in which an alien passed through the Naval Academy as a midshipman, but much voluminous correspondence and two separate acts of Congress were required before he could be commissioned as an ensign upon graduation prior to naturalization. (File 5252-68, May 15, 1915.)

Paragraph 14 of the "Regulations governing the admission of candidates into the U. S. Naval Academy as midshipmen," 1916, provides that "all candidates are required to be citizens of the United States."

**Officers of the Naval Auxiliary Service.**— "Hereafter, in shipping officers and men for service on board United States auxiliary vessels, preference shall be given to members of the Naval Reserve Force, and after two years from the date of approval of this act no person shall be shipped for such service who is not a member of the Naval Reserve Force herein provided." (Act Aug. 29, 1916, 39 Stat., 589.)

**National Naval Volunteers.**—Offices held by officers of the National Naval Volunteers (Act Aug. 29, 1916, 39 Stat., 593) being offices in the Navy within the meaning of Article R-3301, Navy Regulations, 1913 [above quoted], before anyone may be appointed to an office in the National Naval Volunteers he must not only have declared his intention to become a citizen but he must in fact be a citizen. (C.

M. O. 22-1917, p. 9; file 3973-184, Mar. 17, 1917. As to Naval Militia, see file 3973-129, Dec. 18, 1915. The laws relating to the National Naval Volunteers and Naval Militia were repealed by act July 1, 1918, 40 Stat., 708; the laws relating to the Naval Militia were partially and temporarily revived by act of June 4, 1920, 40 Stat., 817.)

**Status of officer who resumed foreign citizenship after retirement.**—Section 1428, Revised Statutes, has for many years been regarded as requiring that officers of the Navy shall be citizens of the United States. Congress has fully and completely recognized this requirement and has thereby given legislative approval to the Navy Department's practice, decisions, and regulations on the subject. Accordingly *held*, that a retired machinist forfeited and abandoned his office in the Navy by expatriating himself and resuming his foreign citizenship. Citizenship is not merely a condition precedent to appointment in the Navy, but is a qualification necessary in order to continue holding office therein. The act of an officer in voluntarily removing an essential qualification would seem to render him incompetent longer to hold office, and this is peculiarly applicable in the case of a naval officer who renounces allegiance to his own Government and assumes allegiance to a foreign state. Retired officers under the law are in time of war, under section 1462, Revised Statutes, available for any duty which may be required of them. In view of section 1428, Revised Statutes, it would be unlawful to employ this officer on board any vessel in his capacity as a machinist, whose paramount duty in time of war would be on board fighting ships. (File 26252-105:3, Oct. 19, 1916; see Gay v. U. S., No. 33756, Ct. Cls.)

**Residence of officers in foreign countries.**—It is the opinion of the Judge Advocate General that officers of the Navy, who are required to be citizens of the United States, are also required, in accordance with the customs of the service, considerations of policy, and the desirability of maintaining amicable relations with other nations, to have their legal residence in the United States or one of its possessions. The Navy Regulations (art. 234, par. 2, 1909), providing that "no officer, active or retired, shall change his usual residence without permission of the Bureau of Navigation," did not contemplate that permission would be granted for an officer to reside outside of the United States. This is made plain by other provisions of the Regulations (art. 1526, 1909) that "permission to leave the United States will be granted only by the Secretary of the Navy." Serious complications might grow out of the situation which would exist were an officer of the Navy permitted to have his legal residence in a foreign country. This is indicated by decisions of the State Department with reference to the citizenship, allegiance, right to protection in person or property, status in event of war, etc., of persons who, while citizens of the United States, voluntarily withdraw their persons and property from the country and become and remain domiciled in foreign countries. (File 17606-49, Dec. 17, 1912.)



**Appointment as officer after forfeiting citizenship by desertion.**—An appointment as a commissioned officer in the Navy, to wit, chief pay clerk, was issued by the President, by and with the advice and consent of the Senate, to a convicted deserter from the Army, who had forfeited his right of citizenship and been rendered forever incapable of holding any office of trust or profit under the United States. (Secs. 1996 and 1998, R. S.) When said commission was issued, it was of record in the Navy Department that the officer was a convicted deserter from the Army. *Held*, that, while not free from doubt, by a liberal interpretation, the President's action in commissioning this officer under the circumstances stated may be regarded as a constructive pardon so as to remove the disabilities imposed by law and which would otherwise have prevented his appointment;

and that the case in this respect is to be distinguished from one in which an officer had deliberately concealed disabilities rendering him ineligible for appointment. *Further held*, that the qualifications of the officer are presumed to have been ascertained and found satisfactory previous to his appointment to the office of chief pay clerk, and that, in the absence of fraud, his qualifications can not, under certain conditions, thereafter be inquired into, although it should be claimed that he did not possess the statutory qualifications for appointment. (File 5460-82, June 3, 1916, citing 28 Op. Atty. Gen., 180, as to conclusiveness of appointment as establishing qualifications for the office. But see 31 Op. Atty. Gen., 419, noted under Constitution, Art. II, sec. 2, clause 1, subheading "Constructive pardon.")

**Sec. 1429. [Report to be made of men entitled to honorable discharge.]**

It shall be the duty of every commanding officer of a vessel, on returning from a cruise, and immediately on his arrival in port, to forward to the Secretary of the Navy a list of the names of such of the crew who enlisted for three years as, in his opinion, on being discharged, are entitled to an "honorable discharge" as a testimonial of fidelity and obedience; and he shall grant the same to the persons so designated.—(2 Mar., 1855, c. 136, s. 1, v. 10, p. 627.)

See section 1426, Revised Statutes, and note thereto, concerning honorable discharges in general.

**Sec. 1430. [Sale of wages to be discouraged.]** Every commanding officer of a vessel is required to discourage his crew from selling any part of their prize-money, bounty-money, or wages, and never to attest any power of attorney for the transfer thereof until he is satisfied that the same is not granted in consideration of money given for the purchase of prize-money, bounty-money, or wages. [See § 4643.]—(30 June, 1864, c. 174, s. 12, v. 13, p. 310.)

Allotments of pay by officers of the Navy are authorized by act of June 10, 1896 (29 Stat., 361).

Allotments of pay by enlisted men in the military or naval forces of the United States are authorized by act of October 6, 1917, Art. II (40 Stat., 402, as amended).

Allotments of pay by enlisted men of the Army are permitted by act of March 2, 1899, section 16 (30 Stat., 981), and act of March 2, 1901 (31 Stat., 896).

Assignments of prize or bounty money were regulated by section 4643, Revised Statutes.

Assignments of wages by enlisted men of the Navy are void unless authorized by commanding and pay officers. (Sec. 1576, R. S.; but see Act Oct. 6, 1917, 40 Stat., 403, sec. 202, as to allotments.)

Assignments of claims against United States are prohibited, with certain exceptions, by section 3477, Revised Statutes.

Assignments of wages by merchant seamen are prohibited, with certain exceptions, by section 4536, Revised Statutes.

Assignments of pay by employees of the Department of Agriculture are permitted by act of March 4, 1909 (35 Stat., 1057).

Assignments of pay by employees of the Coast and Geodetic Survey are permitted by act of March 4, 1907 (34 Stat., 1322).

Assignments of pay by employees of the Geological Survey are permitted by act of June 30, 1906 (34 Stat., 727).

Assignments of pay by employees of the Reclamation Service are permitted by act of May 27, 1908 (35 Stat., 350).

Assignments of pay by commissioned officers of the Army are permitted by act of March 2, 1907 (34 Stat., 1159), and act of March 2, 1913 (37 Stat., 710).

Assignments of pay by noncommissioned officers and privates of the Army are prohibited by section 1291, Revised Statutes.

Assignments of pensions are prohibited by section 4745, Revised Statutes, as amended by act of February 28, 1883, section 2 (22 Stat., 432).

Bounty money and prize money were abolished by Navy personnel act of March 3, 1899, section 13 (30 Stat., 1006).

Deposit of savings by enlisted men of the Navy is authorized by act of February 9, 1889 (25, Stat., 657); and by enlisted men of Marine Corps by act of June 29, 1906 (34 Stat., 579).

**Attachment of wages by creditors.**—“The important question is, whether the money in

the hands of the purser, though due to the seamen for wages, was attachable. A purser, it would seem, can not in this respect, be distinguished from any other disbursing agent of the Government. If the creditors of these seamen may, by process of attachment, divert the public money from its legitimate and appropriate object, the same thing may be done as regards the pay of our officers and enlisted men of the Army and of the Navy; and also in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No government can sanction it. At all times it would be found embarrassing and under some

circumstances it might be fatal to the public service. The funds of the Government are specifically appropriated to certain national objects, and if such appropriations might be diverted and defeated by State process or otherwise, the functions of the Government might be suspended. So long as money remains in the hands of a disbursing officer, it is as much money of the United States as if it had not been drawn from the Treasury. Until paid over by the agent of the Government to the person entitled to it, the fund can not in any legal sense be considered a part of his effects. The purser is not the debtor of the seaman." (*Buchanan v. Alexander*, 4 How., 19.)

**Sec. 1431. [Leave and liberty to be granted by commanding officer.]** It shall be the duty of commanding officers of vessels, in granting temporary leave of absence and liberty on shore, to exercise carefully a discrimination in favor of the faithful and obedient.—(2 Mar., 1855, c. 136, s. 3, v. 10, p. 627.)

Deprivation of liberty on shore may be inflicted by commanding officer upon enlisted men as a punishment, by authority of section 1624, Revised Statutes, article 24.

Deprivation of liberty on shore on foreign station may be inflicted upon enlisted men by sentence of summary court-martial, under section 1624, Revised Statutes, article 30, or by sentence of deck court, under act of February 16, 1909, section 2 (35 Stat., 621).

Furlough of officers by Secretary of the Navy. (Sec. 1442, R. S.)

Furlough without pay to enlisted men, subject to recall in time of war or national emergency. (Act Aug. 29, 1916, 39 Stat., 580.)

No pay allowed officers and enlisted men, Navy or Marine Corps, absent on account of injury, sickness or disease resulting from their own misconduct. (Act Aug. 29, 1916, 39 Stat., 580, as amended by act July 1, 1918, 40 Stat., 717.)

**Liberty granted according to conduct.**—

"The granting of liberty on shore and other privileges will depend upon the conduct class, and the commander in chief shall establish rules defining the privileges or restrictions for each class, which shall be uniform throughout his command." (Art. R-3668 (8), Navy Regs., 1913.)

"First-class conduct men shall be allowed every indulgence compatible with the demands of duty and with the exigencies of the service; and in respect to privileges a clear distinction should be made between them and men in the second-conduct class. Special privileges shall be allowed to the special first class when it is possible to extend them to a small number only." (Art. R-3668 (9), Navy Regs., 1913.)

**Only commanding officer to grant leave or liberty.**—"When the sanitary or other conditions of the port do not render it inadvisable, and when authorized by the senior officer present, the commanding officer shall grant liberty or leave of absence to the enlisted men, but such liberty or leave of absence shall not be granted by other than the commanding officer." (Art. R-3710 (1), Navy Regs., 1913.)

**Leave of absence is a favor.**—Neither the Secretary of War nor any officer of the Government can force a leave of absence upon an officer or soldier. A leave of absence is a favor extended. (*Hunt v. U. S.*, 38 Ct. Cls., 709, 710; 11 Comp. Dec., 570; 16 Comp. Dec., 613; *U. S. v. Williamson*, 23 Wall., 415; see sec. 1442, R. S., and note to sec. 416, R. S., under "Suspension of employees.")

**Special duty pay not allowed men on leave.**—Enlisted men of the Navy, while on leave or liberty on shore, are not "serving" on board of submarines within the meaning of Navy Department General Order No. 20, of January 1, 1901, allowing additional pay to enlisted men "while serving on board of submarine vessels of the Navy." While upon authorized leave they are not in the performance of such service or duty of any kind. (19 Comp. Dec., 754, citing *Colhoun v. U. S.*, 38 Ct. Cls., 198, 202.) During the present war enlisted men of the Navy and Marine Corps detailed as gun pointers or gun captains shall be entitled to the additional pay provided for such detail "while temporarily absent by proper authority from the place where ordinarily required to perform duty under such detail." (Act Mar. 29, 1918, 40 Stat., 500.)

**Persons on leave or liberty; status; "line of duty."**—See note to section 1451, Revised Statutes.

**Sec. 1432. [Commanding officers not required to act as pay officers.]** No commanding officer of any vessel of the Navy shall be required to perform the duties of a paymaster, passed assistant paymaster, or assistant paymaster.—(17 July, 1861, c. 4, s. 4, v. 12, p. 258.)



As to acting appointment of pay officers, see section 1381, Revised Statutes, and note thereto.

As to appointment of special disbursing agents, see section 3614, Revised Statutes.

The words "paymaster, passed assistant

paymaster, or assistant paymaster," are interpreted in practice as meaning "supply officer." (See art. 848, Navy Regs., 1920. As to grades in Supply Corps, see note to sec. 1376, R. S.)

**Sec. 1433. [Commanding officers may exercise consular powers.]** The commanding officer of any fleet, squadron, or vessel acting singly, when upon the high seas or in any foreign port where there is no resident consul of the United States, shall be authorized to exercise all the powers of a consul in relation to mariners of the United States.—(20 Feb., 1845, c. 17, s. 2, v. 5, p. 725.)

Any naval officer accepting appointment in diplomatic or consular service, considered as having resigned his office. (See sec. 1440, R. S.)

Controversies between merchant seamen and officers of any vessel of the United States, arising at sea or in foreign ports, shall be under exclusive jurisdiction of consular officers of the United States, whenever so stipulated by treaty or convention. (Sec. 4079, R. S.)

Destitute seamen of the United States to be returned by consuls to some port in the United States. (Sec. 4577, R. S.)

Marriages may be performed by any consular officer of the United States in a foreign country, between persons who would be authorized to marry if residing in the District of Columbia. (Sec. 4082, R. S.)

Merchant seamen of the United States on foreign voyages may complain to any commanding officer of the Navy concerning unfit water or provisions furnished them, and such commanding officer shall make an investigation, and if complaint is well founded, shall make a report to the master of the ship, and to the United States judge for the district embracing the port to which such ship is bound. (Sec. 4565, R. S.) Similar action to be taken in cases of merchant seamen bound from Atlantic to Pacific port of United States or vice versa. (Sec. 4565, R. S.) Laws relating to seamen on foreign voyages shall apply to seamen on vessels going from the United States and its possessions to Philippine Islands. (Act July 1, 1902, sec. 84, 32 Stat. 711.)

Notarial acts, which any notary public is required or authorized by law to do within the United States, shall be performed by any consular officer when application is made to him therefor. (Act Apr. 5, 1906, sec. 7, 34 Stat., 101; sec. 1750, R. S.) No such act shall be valid within the jurisdiction of the Government of the United States, unless necessary stamps are affixed and canceled. (Act Apr. 5, 1906, sec. 10, 34 Stat., 102.)

Paymasters of the Navy on foreign stations shall render, when practicable, with their accounts, official certificate from resident consul, vouching that all purchases and expenditures were made at the ruling market prices. (Sec. 3723, R. S.)

Proceedings in regard to effects of deceased seamen are prescribed by sections 4539–

4541, Revised Statutes, and act of March 3, 1897, section 4 (29 Stat., 689). With reference to deceased persons in the naval service, provisions for disposition of their effects are made by act of March 29, 1918 (40 Stat., 499).

Provisions relating to consular officers are contained in Revised Statutes, sections 1689–1752.

Provisions relating to merchant seamen are contained in Revised Statutes, sections 4501 to 4612.

Testamentary disposition by citizens of United States dying abroad shall be strictly observed by consular officers, or the latter shall officially aid any person appointed by the deceased to manage his property. (Sec. 1711, R. S.) Consuls shall take possession of personal estate of citizens dying abroad and leaving no legal representative, shall inventory same, collect debts due, sell perishable articles, etc., at auction, and transmit balance of estate to the Treasury of the United States. (Sec. 1709, R. S.)

**Marriages on board naval vessels.**—"The commanding officer of a ship shall not perform a marriage ceremony on board; nor shall he permit one to be performed when the ship is outside of the territory of the United States, except in accordance with the local laws and laws of the State, Territory, or district in which the parties are domiciled, and in presence of a diplomatic or consular official of the United States, who has consented to issue the certificates and make the returns required by the consular regulations." (Art. 847 Navy Regs., 1920.)

**Destitute American seamen.**—The commanding officer of a naval vessel, by authority of the senior officer present, may, when on a foreign station, receive on board distressed seamen of the United States for passage to the United States, provided they bind themselves to be amenable in all respects to the laws and regulations for the government of the Navy. (Art. 905, Navy Regs., 1920.)

Merchant vessels needing supplies may be furnished with such as can be spared, for which charge shall be made at the average price of the supplies; or, in case of extreme distress, gratuitous assistance may be furnished. (Art. I–4554, Naval Instructions, 1913.)

The senior officer present may require the medical officers of his command to render professional aid to persons not in the naval service when necessary and demanded by the

laws of humanity. (Art. 685, Navy Regs., 1920.)

"In the absence of a diplomatic or consular officer of the United States at a foreign port the commander in chief, as senior officer present, has authority (a) To exercise the powers of a consul in relation to mariners of the United States (sec. 1433, R. S.); (b) To communicate or remonstrate with foreign civil authorities as may be necessary; (c) To urge upon citizens of the United States the necessity of abstaining from participation in political controversies or violations of the laws of neutrality." (Art. 720, Navy Regs., 1920.)

**Jurisdiction of consular and military officers.**—A member of the crew of an Army transport was held on board as a prisoner upon the charge of having committed an offense against a Japanese subject. The Japanese authorities came on board to arrest him, but the Army officer in command refused to surrender the accused. The United States consul requested the commanding officer to deliver the man to the Japanese authorities, but this was refused. The United States consul then asked the commanding officer if he would obey the consul's order to turn over the man to the Japanese authorities and was answered in the negative. Next day the Japanese procurator with a party came to take the prisoner, but was told he would only be given up by exercise of superior force. The United States consul then told the commanding officer that he would not be allowed to sail until the matter was settled between the United States and the Japanese Government, but on receiving sailing orders, the *Thomas* sailed, after the commanding officer had assured the Japanese authorities that the man would be prosecuted. The man, who was a deserter from the Navy, was later turned over

to the naval authorities for trial. (File 5542-01, Aug. 20, 1900. As to jurisdiction of diplomatic and naval authorities, see file 7760-2, Aug. 13, 1907; 4 Moore's Dig. 616, 617.)

**Duty to advance commercial interests.**—"So far as lies within their power, commanders in chief, division commanders, and commanding officers of ships shall protect all merchant vessels of the United States in lawful occupations, and advance the commercial interests of this country, always acting in accordance with international law and treaty obligations." (Art. 726, Navy Regs., 1920.)

"If the Navy Department, in order to assist in the extension of United States trade and commerce and to carry out the general purposes indicated in the application by the Department of State, thinks fit to send an officer of the Navy, skilled in matters of ordnance, to a South American capital, it is entirely competent for the Secretary of the Navy to direct him to be sent, not as the representative of a private person or company, nor in its employment, but at the expense of the Government as a representative of the Navy Department and for the purpose of assisting all Americans whose interests are such as, in the opinion of the Secretary, to justify that proceeding." (29 Op. Atty. Gen., 45.)

**Merchant seamen as prisoners on naval vessels.**—"The commanding officer of a ship shall not, while on a foreign station, receive on board as prisoners seamen from merchant vessels, unless the witnesses necessary to substantiate the charges against them are also received, or adequate means adopted to insure the presence of such witnesses on the arrival of the prisoners at the place where they are to be handed over to the civil authorities." (Art. 903, Navy Regs., 1920.)

**Sec. 1434. [Commanding officers of squadrons to have rank of "flag officers."]** The President may select any officer not below the grade of commander on the active list of the Navy, and assign him to the command of a squadron, with the rank and title of "flag-officer;" and any officer so assigned shall have the same authority and receive the same obedience from the commanders of ships in his squadron, holding commissions of an older date than his, that he would be entitled to receive if his commission were the oldest.—(21 Dec., 1861, c. 1, s. 4, v. 12, p. 329.)

Assignment of retired officers to command squadrons. (See sec. 1464, R. S.)

Pay of officers of the Navy shall be based on their rank and length of service. (Act Aug. 29, 1916, 39 Stat., 581.)

Rank of officers not to be changed, except in accordance with the provisions of existing law, and by and with the advice and consent of the Senate. (Sec. 1506, R. S., as amended by act June 17, 1878, 20 Stat., 144.)

The President may formulate appropriate rules governing assignments to command of vessels and squadrons. (Act Mar. 3, 1901, 31 Stat., 1133.)

The President may designate six officers of the Navy for command of fleets or subdivisions thereof, not more than three to have the

rank of admiral and the others the rank of vice admiral; such selections in time of war to be made from the grades of rear admiral or captain on the active list, and in time of peace from among rear admirals on the active list; but nothing in this act shall be construed to amend or repeal sections 1434, 1463, and 1464, Revised Statutes. (Act May 22, 1917, sec. 18, 40 Stat., 89.)

**Flag officers.**—See note to section 1407, Revised Statutes, as to who are flag officers.

By act of January 16, 1857, section 5 (11 Stat., 154), it was provided "that captains in command of squadrons shall be denominated flag officers." This provision is in the right direction, toward the delivery of the mind of the United States from the superstitious influences which have so long resisted the ascrip-



tion of proper names of command to superior officers in the Navy, while admitting such in the Army. In the latter it never seems to have been supposed that paramount considerations of public policy require us to stop at the rank of "captain" and to apply that appellation indiscriminately to all field and general officers. (8 Op. Atty. Gen., 337.)

**Precedence of officers appointed to act in any grade.**—See Article R-1048, Navy Regulations, 1913, noted under section 1410, Revised Statutes.

**Appointments by President without confirmation of Senate.**—Where the statute provides for the appointment of an officer by the President, without requiring the consent of the Senate, such consent is unnecessary, and the President may make such appointment without submitting the same to the Senate for confirmation. In the latter case the commission may be signed by the Secretary of the Navy as the act of the President. (22 Op. Atty. Gen., 82; see also note to sec. 1369, R. S. As to letter signed by Secretary of War, by direction of the President, constituting a commission, see *O'Shea v. U. S.*, 28 Ct. Cls., 392, noted under Constitution, Art. II, sec. 2, clause 3.)

**Form of assignment to duty as flag officer under this section.**—On September 30, 1889, a letter was addressed by the Secretary of the Navy to "Acting Rear Admiral" John G. Walker, U. S. N., as follows:

"You are hereby appointed an acting rear admiral in the Navy of the United States, such appointment to hold good while in command of the Squadron of Evolution.

"You are authorized to hoist the flag and wear the uniform of a rear admiral, and to affix the title of rear admiral to your official signature."

The following letter was addressed by the Secretary of the Navy to "Rear Admiral" William T. Sampson April 21, 1898 (File 98039, Bu. Nav.):

"Under the authority of section 1434 of the Revised Statutes of the United States you are assigned to command the United States Naval Force on the North Atlantic Station, with the rank of rear admiral.

"You will hoist the flag of a rear admiral, will wear the uniform, and will affix that title to your official signature."

On May 28, 1903, Capt. Seaton Schroeder was given an assignment by the Secretary of the Navy, as follows: "By direction of the President, you are, under authority of section 1434 of the Revised Statutes, hereby assigned to the command of the Fourth Division of the Second Squadron of the United States Atlantic Fleet with the rank and title of rear admiral. You will hoist the flag of a rear admiral, wear the uniforms of that grade, and affix that title to your official signature." (See 17 Comp. Dec., 54.)

**Officer does not become a rear admiral by operation of this section.**—The assignment of a captain of the Navy to duty as rear admiral by authority of section 1434, Revised Statutes, does not make such officer a rear admiral within the meaning of the law (act May 13, 1903, 35 Stat., 128) providing pay for an aid to a rear admiral. (17 Comp. Dec., 54.)

The chief purpose of the law, shown by its terms, was to give to the officer so assigned command over, and to require obedience from, officers of a higher rank or rate who might be serving in the squadron. It is noticed that Captain Schroeder was, by the letter above-quoted, assigned to the command of a division of a squadron, and not of a squadron, as provided in section 1434, with the rank and title of "rear-admiral," while section 1434 provides for the assignment of certain officers to command squadrons with the rank and title of "flag-officer." This assignment did not make Captain Schroeder a rear admiral within the meaning of the law allowing additional pay to officers serving as aids to rear admirals. (17 Comp. Dec., 54.)

There is no law which authorizes the payment to an officer of the pay of rear admiral while he was accorded that rank and exercised the duties of that grade by direction of the Secretary of the Navy, his commission being only that of captain or of commodore. (Comp. Dec., Dec. 16, 1899, Appeal No. 3215, case of Rear Admiral William T. Sampson. But see act of Aug. 29, 1916, 39 Stat., 581, providing that the pay of officers of the Navy shall be based on their rank and length of service.)

**Sec. 1435. [First lieutenants, navigation, and watch officers.]** Lieutenant commanders may be assigned to duty as first lieutenants of naval stations, as navigation and watch officers on board of vessels of war, and as first lieutenants of vessels not commanded by lieutenant-commanders.—(16 July, 1862, c. 183, s. 3, v. 12, p. 584. 25 July, 1866, c. 231, s. 5, v. 14, p. 223.)

Aid or executive of commanding officer of a vessel of war or naval station, may be detailed by the Secretary of the Navy. (Sec. 1469, R. S.)

Ensigns may be assigned to duty as watch officers. (See sec. 1490, R. S.)

Lieutenant commanders eligible for appointment as Chief of Bureau of Engineering (sec. 424, R. S., as amended by acts June 7, 1900, 31 Stat., 702, and June 4, 1920, 41 Stat., 828); and to assist the Chief of Naval Operations (act Aug. 29, 1916, 39 Stat., 558).

President shall formulate appropriate rules governing assignments to command of vessels and squadrons. (Act Mar. 3, 1901, 31 Stat., 1133, superseding sec. 1529, R. S., which provided, inter alia, that vessels of the fourth rate shall, as nearly as practicable, be commanded by lieutenant commanders.)

Shore duty, officers not to be employed on, except in cases especially provided by law, unless the Secretary of the Navy shall determine that employment on such duty is required by the public interests and shall so

state in the order of employment. (Act Mar. 3, 1883, sec. 2, 22 Stat., 481, amended by act July 19, 1892, 27 Stat., 245.)

Vessels in actual service shall be officered and manned as the President may direct. (Sec. 1535, R. S.)

**First lieutenants.**—"On board battleships and armored cruisers, an officer of the rank of lieutenant commander or lieutenant shall be assigned to duty as first lieutenant. If practicable, the first lieutenant shall be the line officer on board next in rank to the executive officer, but when this is impracticable he may be either senior or junior to the navigating officer, gunnery officer, and engineer officer, one or all, as the exigencies of the service may demand; but he shall be senior to all the watch and division officers. Commanding officers of battleships and armored cruisers may detail an

officer to act as first lieutenant when no regular first lieutenant has been ordered to the ship." (Art. R-2301, Navy Regs., 1913.)

"The navigating officer is the officer detailed by the department to perform the navigation duties and is the head of the navigation department of the ship. The navigating officer shall be senior to all watch and division officers." (Art. R-2401, Navy Regs., 1913.)

It is the President's right, as commander in chief, to decide according to his own judgment what officer shall perform any particular duty. Congress could not, if it would, take away from the President or in anywise diminish the authority conferred upon him by the Constitution. (9 Op. Atty. Gen., 462, noted under Constitution, Art. II, sec. 2, clause 1.)

**Sec. 1436. [Sea service; staff officers who have been chiefs of bureaus.]** Any staff officer of the Navy who has performed the duty of a chief of a bureau of the Navy Department for a full term shall thereafter be exempt from sea duty, except in time of war.—(3 Mar., 1871, c. 117, s. 10, v. 16, p. 537.)

As to appointment, etc., of chiefs of bureaus, see sections 421-426, Revised Statutes, and notes thereto.

Shore duty, officers not to be employed on, except in cases especially provided by law, unless the Secretary of the Navy shall deter-

mine that employment in such duty is required by the public interests, and shall so state in the order of employment. (Act Mar. 3, 1883, sec. 2, 22 Stat., 481, amended by act July 19, 1892, 27 Stat., 245.)

**Sec. 1437. [Detail of officers for service of War Department.]** The President may detail, temporarily, three competent naval officers for the service of the War Department in the inspection of transport vessels, and for such other services as may be designated by the Secretary of War.—(12 Feb., 1862, c. 21, v. 12, p. 338.)

Detail of officers for service with the Coast and Geodetic Survey, under the Department of Commerce, is authorized by sections 4684 and 4687, Revised Statutes, and amendments thereto.

Detail of officers to educational institutions is authorized by section 1225, Revised Statutes, as amended, and other laws noted thereunder.

Detail of officers and enlisted men, Navy and Marine Corps, to assist Republic of Haiti. (Act June 12, 1916, 39 Stat., 223.)

Detail of two officers, Navy, to assist Republic of Brazil. (Res. Oct. 13, 1914, 38 Stat., 780.)

Detail of officers to assist South American Republics. (Act June 5, 1920, 41 Stat., 1056.)

Detail of officers and enlisted men of the Navy and Marine Corps, to assist the Dominican Republic. (Act Feb. 11, 1918, 40 Stat., 437.)

Detail of medical officers, Navy, for duty with American National Red Cross (act Aug. 29, 1916, 39 Stat., 581); and for duty in connection with Bureau of War Risk Insurance (act Oct. 6, 1917, 40 Stat., 398).

Detail of officers to act in lieu of civilian lighthouse inspectors, under the Bureau of Lighthouses, Department of Commerce, was authorized for a period not exceeding three years by act of June 17, 1910, section 11 (36

Stat., 539), which act also repealed sections 4653 and 4671, Revised Statutes, providing for the detail of officers as members of the Lighthouse Board and as lighthouse inspectors.

Detail of officers to ocean mail vessels is authorized by act of March 3, 1891 (26 Stat., 832).

Detail of officers for such duties as the United States Shipping Board may deem necessary in connection with its business is authorized by act of September 7, 1916, section 4 (39 Stat., 729).

Heads of departments are required to render all practicable aid to the Bureau of Fisheries, under the Department of Commerce. (Sec. 4397, R. S.)

President is authorized to utilize the service of any department and any officer or agent of the United States in the execution of the selective-draft law. (Act May 18, 1917, sec. 6, 40 Stat., 80.)

When the Navy Department performs any service for the War Department, the funds of the War Department may be placed subject to requisition of the Navy Department for direct expenditure by the latter. (Act Mar. 4, 1915, 38 Stat., 1084.)

**Department of Justice.**—The detail of officers for special duty under the Department of Justice, is authorized in practice. (See, for example, Navy Register, Jan. 1, 1917, p. 335.)



**Duty of Navy to cooperate with Army.**—It is the duty of the Navy to cooperate with the Army, both being branches of the military service of the United States, and this duty of cooperation authorizes the detail of a naval constructor for duty under the War Department, without additional compensation. (See *Stocker v. U. S.*, 39 Ct. Cls., 300, noted under sec. 1404, R. S.; see also 7 Comp. Dec., 289.)

**Appropriation chargeable with expenses of officer detailed.**—It is the general rule that where an officer or employee of one executive department performs services for another department under proper orders, only such expenses as are extra and incurred solely by reason of such duty are to be borne by the department for which the duty is performed. However, where the officer or employee performing such duty is employed under a lump-sum appropriation and his place in his own department is filled by an additional person during the period of such duty, all expenses incident to the detached duty, including the salary of such officer or employee and his subsistence where regularly furnished under his contract of employment, are to be borne by the department for which the duty is performed. (22 Comp. Dec., 145.)

Where a lighthouse tender, with officers and crew, is used in mine-planting practice by the War Department, only extra expenses incident to such use, such as the cost of additional fuel and oil, are to be charged to the War Department, the pay of the officers and crew and their subsistence, or commutation therefor, being chargeable to the Department of Commerce, under which they are regularly employed. (22 Comp. Dec., 145.)

While the decisions have referred to transactions of the above character as details of employees, they should be viewed as the performance of service by one department, through its existing permanent organization, for another department. The custom is that such service, when small, shall be given as a matter of courtesy, and when of some substantial value, reimbursement of full cost shall be made, in order that the department securing the service shall

not secure more work than its appropriation authorizes. (22 Comp. Dec., 145.)

Where a vessel of the Naval Auxiliary Service, with officers and crew, is withdrawn from its regular duty under the Navy Department and is used for a certain period in transporting supplies for the Department of Commerce, the appropriation for that department available generally for the transportation of such supplies is chargeable with the total expenses incurred by the Navy Department in the maintenance and operation of the vessel during such period, including the pay and subsistence of the officers and crew. (23 Comp. Dec., 119, distinguishing 22 Comp. Dec., 145.)

There was no detail whatever in the case noted in the preceding paragraph. It was more in the nature of an agreement to perform a service. The officers and crew in the Naval Auxiliary Service are in the status of civilian crews. If the officers are not required for service on vessels, they are furloughed, and the crew being shipped in the same manner as for service on merchant vessels, are not shipped unless needed to man a vessel. They have no permanent tenure of office, and if a vessel of the Naval Auxiliary Service was withdrawn from active service for a period of 37 days, there would be no expense for pay and subsistence of officers and crew. This vessel was withdrawn from her regular duties to perform a service for and at the request of another department of the Government, and if the Department of Commerce had not secured the service of this vessel, it would have been necessary to secure a merchant vessel. This was a service of substantial value, for which reimbursement of full cost should be made in order that the Department of Commerce shall not secure more work than its appropriation authorizes. (23 Comp. Dec., 119.)

As to right of medical officer of the Navy to compensation from appropriations under control of the Department of Justice for professional services rendered by him to United States prisoners in a United States jail, see note to section 1368, Revised Statutes, under "Medical attendance to persons not in the Navy."

**Sec. 1438. [Officers to act as storekeepers on foreign stations.]** The Secretary of the Navy shall order a suitable commissioned or warrant officer of the Navy, except in the case provided in section fourteen hundred and fourteen to take charge of the naval stores for foreign squadrons at each of the foreign stations where such stores may be deposited, and where a store-keeper may be necessary.—(17 June, 1844, c. 107, s. 1, v. 5, p. 700; 3 Mar., 1847, c. 48, s. 3, v. 9, p. 172.)

See note to section 1414, Revised Statutes.

**Sec. 1439. [Bonds of officers acting as storekeepers.]** Every officer so acting as store-keeper on a foreign station shall be required to give a bond, in such amount as may be fixed by the Secretary of the Navy, for the faithful performance of his duty.—(17 June, 1844, c. 107, s. 1, v. 5, pp. 700, 701.)

On general subject of bonds, see note to section 1383, Revised Statutes.

**Sec. 1440. [Appointments in diplomatic or consular service.]** If any officer of the Navy accepts or holds an appointment in the diplomatic or consular

service of the Government, he shall be considered as having resigned his place in the Navy, and it shall be filled as a vacancy.—(30 Mar., 1868, c. 38, s. 2, v. 15, p. 58.)

Army officers are prohibited from holding offices in diplomatic or consular service by section 1223, Revised Statutes.

By act of March 3, 1875, section 2 (18 Stat., 512), it was provided that certain retired officers of the Army should be continued on the retired list, notwithstanding the provisions of section 2 of act of March 30, 1868, upon which sections 1223 and 1440, Revised Statutes, are based; and by act of March 3, 1891 (26 Stat., 872), the accounting officers of the Treasury were directed to allow pay to certain retired officers of the Army included in act of March 3, 1875, "notwithstanding such officer accepted and held a diplomatic or consular office."

Consular powers may be exercised by Navy officers in certain cases. (See sec. 1433, R. S.)

**Legality of accepting office in diplomatic or consular service must be determined by officer upon his own responsibility.**—"It may be, and doubtless is, a subject of reasonable interest, and perhaps of great anxiety, to officers of the United States Army on the retired list to ascertain [in view of the act of July 31, 1894, section 2, 28 Stat., 205] 'if an officer on the retired list of the Army can accept a diplomatic or consular appointment and still hold his position on the retired list with rank and pay.' But, manifestly, the solution of that question by any retired officer of the Army, and the course of conduct which he may adopt in pursuance of such solution, is a matter of his private concern only and not a subject with which the United States can be concerned until some action has been taken by such officer."

\* \* \* If Lieut. Clay, or any other retired officer, should be called upon to determine such question in his own case, the obvious course for him to pursue is that which is open to every person inclined to pursue a course as to the legal consequences of which he is in ignorance or doubt. He should seek the advice of private counsel, learned in the law, and obtain their opinion, for which, if given without due care, such counsel can be held to personal accountability. The whole matter, as it seems to me, is one strictly of private concern and in no sense of public interest." (21 Op. Atty. Gen., 510; file 9736-15, Mar. 28, 1910; file 9736-18, June 25, 1910. See also 21 Op. Atty. Gen., 506; compare 18 Op. Atty. Gen., 11; 29 Op. Atty. Gen., 397; 29 Op. Atty. Gen., 503. For other cases, see note to sec. 356, R. S., under "III. Must Arise in Administration of Department.")

**Retired officers included in prohibition of this section.**—Section 1223, Revised Statutes [which is similar to section 1440] applies to all officers of the Army, whether upon the active or retired list, and must be deemed to enact that any officer upon either list, accepting an appointment in the diplomatic or consular service, is to be treated as having resigned his place in the Army. To section 1223 there is an exception made by

the act of March 3, 1875, which provides that a certain class of officers therein described, who are "borne upon the retired list, shall be continued thereon notwithstanding the provisions of section two, chapter thirty-eight, act of March thirtieth, eighteen hundred and sixty-eight," which is embodied in section 1223, Revised Statutes. Of course, the officers therein described, even if accepting an appointment in the consular or diplomatic service, would not vacate their commissions. (15 Op. Atty. Gen., 306.)

The act of March 30, 1878, applied to officers on the retired as well as on the active list, and it made the acceptance of the diplomatic vacate the military office, eo instanti, the vacancy thus created necessarily continuing until filled in the usual way. (19 Op. Atty. Gen., 610.)

A retired officer is not precluded from holding a civil office under the United States Government except as prohibited by statute. (15 Op. Atty. Gen., 306.)

**Captain Badeau's Case.**—In 1870, Captain Adam Badeau, U. S. Army, retired, was appointed to and accepted the office of consul general at London. After his appointment, his name continued to be borne on the Army Register as a retired officer, but he was not paid as such. He was not of the class of retired officers described in the first proviso of section 2 of the act of March 3, 1875, chapter 178: *Held*, upon consideration of the provisions of sections 1094 and 1223, Revised Statutes [the former providing that the Army shall consist, inter alia, of "the officers of the Army on the retired list"], the latter embodying so much of section 2, act of March 30, 1868, chapter 38, as related to officers of the Army, advised, that Badeau has ceased to be a retired officer of the Army by effect of the statutory provision embodied in section 1223, and that his name can not legally be continued on the retired list. (15 Op. Atty. Gen., 407; see also 2 Comp. Dec., 7, citing decision of Second Comptroller Upton, June 18, 1883, and decision of Second Comptroller Gilkeson, Apr. 15, 1890; and see 17 Comp. Dec., 441.)

The cases of General Sickles and Captain Badeau are alike in all material respects. It appears that each of these officers, after being placed on the retired list, accepted in 1869 an appointment in the diplomatic service. General Sickles remained in that service until April, 1874. Captain Badeau remained therein only a few months, but subsequently, in 1870, entered the consular service, wherein he held an appointment for several years. In the meantime, they were each actually borne on the retired list and have since been continued thereon. Their right now [December 31, 1888] to be borne on the retired list depends upon the operation and effect of the provisions of the acts of 1868 and 1875 upon their respective cases, and necessarily involves a construction of those provisions. There being a suit pending in the Supreme Court (*Badeau v. U. S.*) which presents the same question precisely



that arises in those cases, involving a construction of the same statutory provisions, and which will doubtless be determined during the present term of the court, the Attorney General thinks it inadvisable to express any opinion upon the two cases referred to, and suggests that it would be proper to await the decision of the court in that suit, which will finally settle the question arising in them. (19 Op. Atty. Gen., 202.)

Captain Badeau's name was borne on the retired list until May 7, 1878, when he was "dropped" in conformity with an opinion of the Attorney General under section 1223, Revised Statutes, to date from May 19, 1869, date he accepted office in the diplomatic service. His name was restored to the retired list, July 3, 1878, by the Secretary of War, on the assumption that his case was within the first proviso to section 2, act of March 3, 1875, relating to retired officers then borne on the list. The Second Comptroller thereafter held that Captain Badeau's connection with the Army entirely ceased May 19, 1869. From this view the Acting Judge Advocate General of the Army dissents: *Held*, (1) That when Captain Badeau accepted the appointment and assumed the duties of an office in the diplomatic service he thereby, by force and effect of section 2 of the act of March 30, 1868, chapter 38, ceased to be an officer of the Army, and his place as such became vacant. The fact that his name remained on the rolls has no significance; it is simply evidence of a mistake of law in making those rolls. (2) That neither the act of March 3, 1875, nor the action of the Secretary of War above referred to operated to reinstate him as such an officer; the act of 1875, when speaking of names on the retired list, meant names there legally, not by mistake either of law or fact. That act should be construed to have a prospective effect only. And (3) That his name is not lawfully borne on the retired list of the Army. (19 Op. Atty. Gen., 610.)

The act of 1868, section 2 (secs. 1223 and 1440, R. S.), says the acceptance of the diplomatic or consular office shall operate as a *resignation* and the military office thereby be made *vacant*. Vacant when? Manifestly, immediately upon the acceptance of the other office. By the statutes, the holding of the two places in the same person is made inconsistent and impossible. The election to take one is ipso facto the relinquishment of the other. It is a complete resignation. The military officer goes into civil life; the military office is vacant, and may be filled by another appointment at once. It is a statutory resignation, yet it has all the essentials of an ordinary resignation. The officer by accepting the civil office tenders his resignation; the President, by appointing him to a civil office, consents to and accepts his resignation of the military office. This being so, the officer is as completely out of the Army as if he had resigned in the ordinary way, been dismissed from the service, or died. (19 Op. Atty. Gen., 610.)

The act of 1875 could not put a man who had resigned and been six years a civilian back into the Army. It will not do to say that by consenting to the act of 1875, the President and

Senate have consented to the appointment of Lieutenant Badeau as one of a class. First, it is a non sequitur, and the President has consented to a statute. Acts of Congress may and often do become operative as laws without his consent and over his veto. Again, the President and Senate can not make appointments by classes and general legislation. The Constitution contemplates that an appointment shall be made upon the separate consideration, first by the President and afterwards by the Senate, of each individual case by name and upon its own merits; and this constitutional requirement is in no way met by a law which would induct men into office by classes. To hold otherwise would enable a two-thirds majority of each House of Congress, acting together, to legislate any number of men, by name or by a class, into office without the consent of the President at all. Of course such legislation would be absolutely void. (19 Op. Atty. Gen., 610.)

If the act of 1875 were such as to restore to office in the Army any officer who had vacated such office, it would be clearly unconstitutional and invalid; but such is not its necessary reading. When giving legislation a retroactive effect, it is invalid, but giving it a prospective effect, it is valid, all rules of construction require that it shall be given a prospective effect only; and such is the rule which is and should be applied to the act of 1875. (19 Op. Atty. Gen., 610.)

The question seems to have been mooted for many years, and an attempt has been made to have it adjudicated in the courts, but no such adjudication has been reached. In *Badeau v. U. S.* (130 U. S., 439), the court expressly declines to decide the question, as not being necessarily involved in the case, using the following language: "Whether by order of the Secretary of War, July 3, 1878, the claimant's name was properly restored to the retired list, we are not called upon to determine in this case, because even were that so, we do not think that his petition can be sustained." The court did, however, in that case decide that the act of 1868, now embodied in section 1223 [and 1440] applies to officers upon the retired as well as upon the active list, saying, "no officer, whether on the active or retired list, could accept appointment in the latter" (diplomatic or consular service) "and remain an officer." This is practically a declaration by the highest court in the land that prior to 1875 an officer upon the retired list of the Army who accepted an appointment in the diplomatic or consular service thereby vacated his military office; and, consistently with the language of the statute, it does not appear how any other position is tenable. (19 Op. Atty. Gen., 610.)

The act of March 3, 1891 (26 Stat., 872), directing the accounting officers of the Treasury not to suspend or withhold the pay of certain retired officers therein described, whose names were borne upon the retired list prior to the passage of and retained thereon in obedience to the act of March 3, 1875, applies only to officers of the Army whose names were lawfully on the retired list, and not to those who prior to the passage of the last-mentioned act had severed themselves from the Army by force of section 2,

chapter 38, of the act of March 30, 1868, in accepting or holding a diplomatic or consular position. *Held*, that since May 18, 1869, Adam Badeau has not been an officer of the United States Army, upon either the active or the retired list; that the fact that his name was carried on the rolls as an officer on the retired list

is of no consequence, inasmuch as the same was placed there illegally, and without warrant of law, and that, therefore, he is entitled to none of the benefits claimed by him under the act of March 3, 1891 [noted above]. (2 Comp. Dec., 7.)

**Sec. 1441. [Officers dismissed, or resigning to escape dismissal.]** No officer of the Navy who has been dismissed by the sentence of a court-martial, or suffered to resign in order to escape such dismissal, shall ever again become an officer of the Navy.—(16 July, 1862, c. 183, s. 11, v. 12, p. 585.)

Acceptance of resignation must be communicated to officer before he may quit his post or proper duties without leave. (Sec. 1624, R. S., art. 10.)

Midshipmen dismissed by sentence of court-martial for hazing shall be forever ineligible for reappointment to Naval Academy. (Act June 23, 1874, 18 Stat., 203.)

Midshipmen summarily expelled from Naval Academy for hazing shall not be reappointed to the Corps of Cadets or be eligible for appointment as a commissioned officer in the Army, Navy, or Marine Corps, until two years after graduation of the class to which they belonged. (Act Mar. 3, 1903, 32 Stat., 1198.)

Officers dropped from the rolls of the Navy or Marine Corps on account of absence without leave or imprisonment under sentence of civil courts, shall not be eligible for reappointment. (Act Apr. 2, 1918, 40 Stat., 501; see note to sec. 1229, R. S.)

Officers and midshipmen who shall have left the Navy under honorable conditions and who shall have enrolled in the Naval Reserve Force, may be appointed to the grade and rank last held by them without examination other than physical. (Act Aug. 29, 1916, 39 Stat., 588.)

Officers, including midshipmen, who have left the naval service under honorable conditions, and who shall have enrolled in the Naval Reserve Force, shall be eligible for membership in the Fleet Naval Reserve. (Act Aug. 29, 1916, 39 Stat., 589.)

Reappointment of any commissioned or warrant officer who shall have been honorably discharged from the service, was authorized by act of February 16, 1914, section 21 (38 Stat., 290.)

See section 1624, Revised Statutes, article 37, and act of June 22, 1874, section 2 (18 Stat., 192), as to officers dismissed and afterwards demanding trial by court-martial.

**The spirit of the laws** is against the reappointment of any person who has been dismissed from the Navy, as will be seen from section 1441, Revised Statutes. (File 5252-43, Oct. 5, 1911.)

**Midshipmen dismissed from the Navy.**—There is no provision of law expressly prohibiting the reappointment of a midshipman who has been dismissed from the Navy, except in the single case of hazing. However, where a midshipman was dismissed for "intoxication and inaptitude," and thereafter nominated for appointment to the Naval Academy, *held*, that

if the candidate's moral qualifications are not satisfactory and such as are required for the admission of candidates generally, he may be legally rejected; and whether or not he is so qualified is a question of fact. (File 5252-43, Oct. 5, 1911.)

**Effect of pardoning.**—"Whether an officer dismissed by sentence of a court-martial who has been pardoned by the President, may again become an officer of the Navy, notwithstanding this provision is a question not without difficulty. It is not the point specifically referred to in Mr. Myer's letter, and, therefore, I refrain from discussing it. But I do not hesitate to say that I think it can be shown that Congress did not intend by this clause to preclude the President from reappointing officers of the Navy dismissed by sentence of a court-martial to whom he has extended a pardon." (11 Op. Atty. Gen., 19, 23. Compare, cases noted under Constitution, Art. II, sec. 2, clause 1, under "III. Power to Pardon Offenses against United States"; and see *Laws v. U. S.*, 27 Ct. Cls., 69.)

If Congress thinks proper to accept the fact of dismissal or enforced resignation of a naval officer as evidence of unfitness, or lack of qualification, it may do so without having its action in that regard overridden by the pardoning power of the President. An unconditional pardon abates whatever punishment flows from the commission of the pardoned offense, but can not eradicate the factum which is made a criterion of fitness. The whole context of the original act from which section 1441 is taken discloses its nonpenal character. Accordingly, *held*, "that section 1441 of the Revised Statutes is properly to be regarded as a rule relating to qualification for office in the Navy, that it does not impose a penalty as such on individual offenders, and that the incidental disabilities which they may suffer by reason of the statute are not removed by a pardon." Further, *held*, that the acts of February 16, 1914, and August 29, 1916 [above cited] do not show any purpose on the part of Congress to change the requirement of section 1441; on the contrary, they confirm it, since each of these later acts by its terms applies only to officers who have been "honorably discharged from the service," or who have "left that service under honorable conditions;" and that an officer who has been dismissed from the Navy by sentence of court martial and subsequently pardoned is not eligible for reappointment to the Navy or to membership in the Fleet Naval Reserve. (31 Op. Atty. Gen., 225, citing *Op. J. A. G., Navy*, Nov. 24, 1917, file 26282-326, *Carlesi v. N. Y.*, 233 U. S., 51, etc.)



**Resignation under charges.**—An Army officer having been charged with drunkenness, submitted an undated resignation to his commanding officer to be held and not forwarded to the War Department if he should entirely abstain from the use of intoxicants, but to be forwarded to the department if he should become intoxicated again. On again becoming intoxi-

cated his commanding officer dated and forwarded the resignation, which are duly accepted by the President and the officer notified. *Held*, that the office became vacant upon the officer's receipt of such notification, and that the subsequent action of the President in revoking his acceptance did not restore the officer to the service. (*Mimmack v. U. S.*, 97 U. S., 426.)

**Sec. 1442. [Furlough of Officers.]** The Secretary of the Navy shall have authority to place on furlough any officer on the active list of the Navy.—(3 Mar., 1835, c. 27, s. 1, v. 4, pp. 756, 757. 3 Mar., 1845, c. 77, s. 6, v. 5, p. 794. 28 Feb., 1855, c. 127, s. 3, v. 10, p. 617. 1 June, 1860, c. 67, s. 4, v. 12, p. 27.)

Furlough of civil employees, see note to section 416, Revised Statutes, under "Suspension of employees."

Furlough without pay of enlisted men, subject to recall in time of war or national emergency. (Act Aug. 29, 1916, 39 Stat., 580.)

No pay to be allowed officers or enlisted men, Navy or Marine Corps, absent from duty on account of injury, sickness or disease resulting from their own misconduct. (Act Aug. 29, 1916, 39 Stat., 580, as amended by act July 1, 1918, 40 Stat., 717.)

Pay of officers on furlough, see section 1557, Revised Statutes.

Retirement of officers on furlough pay, see sections 1451, 1593, and 1594, Revised Statutes.

Secretary of the Navy may assign officers to duty on ocean mail vessels with furlough pay, see act of March 3, 1891, section 7 (26 Stat., 832).

**Section 1442 not repealed.**—Section 1442, Revised Statutes, gives the right to furlough an officer of the Navy, and section 1557 fixes the proportion of the pay that he shall have while on furlough. These sections have not been repealed. (15 Comp. Dec., 73.)

**Status of officers on furlough.**—"When officers are furloughed by the Department in the administration of its general power, they may be restored by the same power. Their places have not been, and can not be, occupied by others. With them, to be furloughed or not to be, is only a question of duty and of pay, not of rank or place on the roll of the Navy." (8 Op. Atty. Gen., 223, 236.)

Under the act of March 2, 1895 (28 Stat., 910), authorizing the President to place "on waiting orders out of the line of promotion, with one-half active-duty pay," officers of the Revenue-Cutter Service [now Coast Guard] who are permanently incapacitated, and to fill the resulting vacancies by promotion in the order of seniority, *held*, that an officer placed on "permanent waiting orders" is withdrawn from the line of promotion but may be restored to the service in his former rank when his disability ceases, without congressional action. (21 Op. Atty. Gen., 286.)

**Officer can not be furloughed without statutory authority.**—The pay of commissioned officers of the Revenue-Cutter Service [now Coast Guard], having been assimilated by law to that of the Army, and there being no power in the Secretary of War, by order, to

reduce the pay of commissioned officers of the Army, *held*, that the order of the Secretary of the Treasury placing a commissioned officer of the Revenue-Cutter Service on leave of absence with half pay, as a punishment for an offense, was not authorized by law; and, accordingly, that the portion of the order directing the reduction of his pay to half pay, was inoperative. "Neither the Secretary of War nor any officer of the Government can force a leave of absence upon an officer or soldier \* \* \*. A leave of absence is a favor extended." (Citing *Hunt v. U. S.*, 38 Ct. Cls., 709, 710.) Compulsory absence by the order of a superior officer, which is not for the convenience or in the interest of the officer who is relieved from duty, and where there is no legal authority to direct such compulsory absence, is not leave of absence within the meaning of section 1265, Revised Statutes, fixing the pay of Army officers while absent. The power to dismiss officers of the Revenue-Cutter Service is not in the Secretary of the Treasury. Neither can he place them on leave of absence on half pay. They are entitled to their entire salaries because of the commission they hold, except in cases wherein the law, or regulations having the force of law, makes other provision. (11 Comp. Dec., 570.)

**Difference between "furlough" and "retirement."**—Officers on furlough without being retired are not included in the expression "retired naval officers." (12 Op. Atty. Gen., 222.)

**Secretary may furlough officer convicted by court-martial.**—Where a medical officer is found guilty of vulgar and indecent acts and associations such as unfit him to treat persons in the Navy and members of their families, should the court not sentence him to dismissal the Navy Department feels it would have no alternative but to place him on furlough as authorized by section 1442, Revised Statutes, although this would mean that, in accordance with section 1557, Revised Statutes, he must receive half pay, thus imposing expenditures upon the Government from its appropriations for the naval service without receiving any return therefor. (File 26251-11181, Dec. 17, 1915; G. C. M. Rec. No. 31436; C. M. O. 49-1915, p. 27.)

**Suspension from duty by court-martial sentence.**—As extended periods of severance from active duty are calculated to impair the efficiency of an officer, and are detrimental to the interests of the naval service, that part of a

court-martial sentence of an officer which involved suspension from duty on leave pay was remitted. A sentence consisting of "three months' leave of absence" with the full pay corresponding to that status, is not favorably regarded, particularly as such action would necessitate the detail of another officer to perform the duty of the one under sentence, while the latter remained idle. The granting of such leave is a privilege which would not, except under extraordinary circumstances, be accorded by the Navy Department to any officer during a tour of sea service. As to suspension from duty

with reduction in pay, this has also been held an undesirable form of punishment prejudicial to the best interests of the service and contrary to the policy of the Navy Department; the officer is probably left without employment and the Government loses his services. A sentence "to be suspended from rank and duty \* \* \* to receive during said period one-half of shore pay." is inappropriate, since it relegates to idleness for two years an officer whose services are needed, and throws his work on others. (Naval Dig., 1916, p. 623.)



## CHAPTER THREE.

### RETIRED OFFICERS OF THE NAVY.

Sec.	Sec.
1443. Retirement after 40 years' service.	1455. Officers not to be retired without a hearing.
1444. Retirement after 62 years of age, or 45 years' service.	1456. Officers not to be retired for misconduct.
1445. Officers of certain ranks to be retired only for disability.	1457. Grade and status of retired officers.
1446. Officers who have received a vote of thanks; retirement after 55 years' service.	1458. Vacancies filled by promotion according to seniority.
1447. Retirement of officers not recommended for promotion.	1459. Retired officers withdrawn from command, and from line of promotion.
1448. Retiring board.	1460. Promotions to rear admiral on the retired list.
1449. Powers and duties of retiring board.	1461. Promotion of retired officers with running mates on active list.
1450. Oath of members, retiring board.	1462. Active duty for retired officers.
1451. Findings of retiring board, cause of incapacity.	1463. Assignment of retired officers to command in time of war.
1452. Record of proceedings; revision by President.	1464. Commanding officers of squadrons to have rank of "flag officer."
1453. Disability due to an incident of the service.	1465. Restoration of retired officers to active list.
1454. Officers wholly retired, or retired on furlough pay.	

**Sec. 1443. [Retirement after forty years' service.]** When any officer of the Navy has been forty years in the service of the United States he may be retired from active service by the President upon his own application.—(3 Aug., 1861, c. 42, s. 21, v. 12, p. 290.)

Amendment to this section was made by act of May 13, 1908 (35 Stat., 128), authorizing retirement after 30 years' service upon application of officers. See also section 1445, below.

Acting assistant surgeons not entitled to retirement. (See note to sec. 1411, R. S.)

Captains, commanders, and lieutenant commanders who become ineligible for promotion on account of age shall be retired at rate of pay graded according to length of service. (Act Aug. 29, 1916, 39 Stat., 579.)

Dental Corps officers who were over 40 years of age on original appointment shall not be eligible for retirement before reaching the age of 70 years, except for physical disability incurred in line of duty. (Act Aug. 29, 1916, 39 Stat., 574, as amended by act July 1, 1918, 40 Stat., 709.)

Dental surgeon at the Naval Academy not to be retired before reaching age of 70 years, except for physical disability incurred in line of duty. (Act Mar. 4, 1913, 37 Stat., 891, as amended by act July 1, 1918, 40 Stat., 709.)

Enlisted men, retirement of. (See acts Mar. 3, 1899, sec. 17, 30 Stat., 1008; June 22, 1906, 34 Stat., 451; Mar. 2, 1907, 34 Stat., 1217;

Mar. 3, 1915, 38 Stat., 941; Aug. 29, 1916, 39 Stat., 591.)

Machinists to be retired under the provisions of existing law for warrant officers. (Act Mar. 3, 1899, sec. 15, 30 Stat., 1008.)

Marine officers, retirement of. (See sec. 1622, R. S.)

Mates, retirement of. (See note to sec. 1408, R. S.)

Midshipmen, retirement of. (See note to sec. 1445, R. S.)

Naval Reserve Force members shall not be eligible for retirement other than for physical disability incurred in line of duty. (Act July 1, 1918, 40 Stat., 710). Transferred members of the Fleet Naval Reserve shall be eligible for retirement after 30 years' service (Act Aug. 29, 1916, 39 Stat., 591); service in the Navy, Marine Corps, National Naval Volunteers and Naval Militia, shall be counted as continuous service in the Naval Reserve Force for the purpose of retirement (act July 1, 1918, 40 Stat., 710). Officers of the Naval Reserve Force physically disabled in line of duty shall be eligible for retirement under same conditions as officers of the Regular Navy. (Act June 4, 1920, sec. 2, 41 Stat., 834.)

Pay clerks and acting pay clerks shall have the same pay, allowances, and other benefits as now or hereafter allowed other warrant officers and acting warrant officers. (Act Mar. 3, 1915, 38 Stat., 942, 943.)

Pay of officers retired after 40 years' service. (See sec. 1588, R. S.)

Rank of officers on retirement. (See note to sec. 1457, R. S.)

Retiring board not necessary for retirements on account of length of service. (See sec. 1455, R. S.)

Service as officers or enlisted men in the Regular or Volunteer Army or Navy, or both, shall be credited to all officers of the Navy for all purposes, the same as if all said service had been continuous in the Regular Navy. (Act Mar. 3, 1883, 22 Stat., 473.)

Service as officers in different corps of the Navy or in the Marine Corps shall be credited to all officers for all purposes. (Act June 10, 1896, 29 Stat., 361.)

Service as a midshipman at the Naval Academy or as a cadet at the Military Academy shall not be counted in computing for any purpose the length of service of any officer in the Navy or Marine Corps hereafter appointed to either of said academies. (Act Mar. 4, 1913, 37 Stat., 891.)

Sea service to be credited to volunteer officers transferred to the Regular Navy in the same manner as if they had been in the Regular Navy during such service. (Sec. 1412, R. S.)

Service previously rendered by appointees as chief pay clerks, pay clerks, or acting pay clerks, together with their possible future service prior to attaining age of 62, must amount to at least 30 years. (Act Mar. 3, 1915, 38 Stat., 942, 943.)

Temporary officers appointed for war with Germany not entitled to retirement except for physical disability incurred in line of duty. (Act May 22, 1917, sec. 9, 40 Stat., 86; act June 4, 1920, sec. 2, 41 Stat., 834.)

Warrant officers, retirement of. (See *Brown v. U. S.*, 113 U. S., 571, noted under sec. 1448, R. S.; and see note to sec. 1405, R. S.)

**"The Secretary of the Navy represents the President, and exercises his power on the subjects confided to his department."** (*U. S. v. Jones*, 18 How. 92; see further, note to sec. 417, R. S.)

The retirement of officers of the Navy, whether occurring under section 1443 or according to the terms of the appropriation act of June 29, 1906 (34 Stat., 554), is made only by the President, not by the Secretary of the Navy. From both section 1443 and the act of 1906, it appears that, with the determination of the question of retirement, the Secretary of the Navy has nothing directly to do; it is for the President. Where, therefore, an officer of the Navy was retired, pursuant to the express direction and approval of the President, as a captain of the Navy, and at no time since such retirement has the President conferred a higher rank upon him, the Secretary of the Navy has neither duty, authority, or power to place the name of such officer upon the retired list with the rank of rear-admiral. (*Moser v. Meyer*, 38 App. D. C., 13.)

**President has discretion to deny application for retirement.**—The act of May 13, 1908 [noted above as an amendment to this section], does not declare that the officer may voluntarily retire after 30 years' service. Such an idea is in fact negated by placing his retirement entirely within the discretion of the President. The officer is vested with the right to make application for retirement, but there his right ends and the discretion of the President begins. (28 Op. Atty. Gen., 417.)

**When retirement becomes legally effective.**—See note to section 1457, Revised Statutes, under "When retirement or advancement on retired list takes effect." See also notes to sections 1444 and 1458, Revised Statutes.

**Civilian employees not entitled to benefits of Navy retirement laws.**—A clerk appointed for duty in a navy pay office is not an officer of the Navy entitled to retirement for age or length of service; he was no more an officer of the Navy than any one of the many employees of the Navy Department at Washington. (*Foreman v. Meyer*, 227 U. S., 452; 38 App. D. C., 472.)

The Navy Department can not countenance any proposed legislation seeking to engraft on the military retired list of the Navy the cost of a civil retired list made up in whole or in part of the great number of civil service employees of this department. (File 26255-295:12, Oct. 27, 1914.)

The privileges of retirement under the laws relating to the Army are confined to officers of the Army, and an applicant for retirement must bring himself within that class before he can claim the advantage of those privileges. (29 Op. Atty. Gen., 249.)

The test to distinguish between a civil officer whose duties lie in the War Department, and an officer of the Army, is that laid down in 16 Op. Atty. Gen., 13 (and see *U. S. v. Tyler*, 105 U. S., 244, 245), viz, that officers of the Army are those officers who are a part of "the military establishment," created by general acts of Congress organizing the "Army of the United States," and defining what it shall "consist of," and as such are subject to the rules and Articles of War. These acts, in so far as officers are concerned, provide for a graded, formal organization, the persons in which have rank, are in line of promotion to a higher rank, wear uniforms as the badge of that rank, are subject to military discipline and to orders issued to enforce that discipline, and have acquired, to speak generally, the status of soldiers in addition to their status as citizens or their status of officers of the United States. (29 Op. Atty. Gen., 249.)

In view of the prohibition in the act of February 24, 1899 (30 Stat., 846, 890), that "the establishment of a civil pension roll, or an honorable service roll, or the exemption of any of the officers, clerks, and persons in the public service from the existing laws respecting employment in such service is hereby prohibited," care should be taken not to extend the Army retirement acts so as in effect to create not only a "civil pension roll," but a limited and special one. (29 Op. Atty. Gen., 249.)



An expert accountant in the inspector general's department of the Army is not entitled to be placed on the retired list of the Army on the ground that he has reached the age of 64 years. Although an officer of the United States, it does not follow that he is also an officer "of the Army." It is clear that an officer of the United States may have functions and duties relating solely to the Army and may be paid entirely from appropriations for the Army, and yet not be "of the Army." (29 Op. Atty. Gen., 249, citing *Brown's Case*, 32 Ct. Cls. 379, 386, 387, 388; *Huse's Case*, 43 Ct. Cls., 24; *U. S. v. Burns*, 12 Wall., 252; *U. S. v. La Tourrette*, 151 U. S., 572, 576; 27 Op. Atty. Gen., 468, 471, 472, 475.)

The appropriation acts for the Army provide specifically "for pay of the officers in the inspector general's department," while the provision for the expert accountant is always under the heading, "Miscellaneous." He has no "actual rank," within section 1254, Revised Statutes; he has no "command," and is not in "the line of promotion," within section 1255; he has no "uniform of the rank;" he has never been "borne on the Army Register," and is not, in the time of peace and never has been, "subject to the rules and Articles of War," nor to "trial by general court-martial," within section 1256. There is no way of fixing his pay on retirement, as he has no "rank," to be used as a basis of computation within section 1274; finally, he has never been treated by the War Department in orders or regulations or in any other way as an officer "of the Army." As said in *Brown's Case* (32 Ct. Cls., 379), "the status of such an officer, the department or place to which he properly belongs, is something which can be much better determined by the legislative and executive branches of the Government, than by the judicial." (29 Op. Atty. Gen., 249.)

**Persons held to be officers within meaning of Navy retirement laws.**—Paymasters' clerks are "officers of the Navy," within the meaning of the act of May 13, 1908 (35 Stat., 128), which provides for the retirement of officers of the Navy who have been in the service 30 years. (27 Op. Atty. Gen., 157, Jan. 22 1909; compare *Ashton v. U. S.*, 51 Ct. Cls., 65, overruling *Katzer v. U. S.*, 49 Ct. Cls., 294.)

A paymaster's clerk in the Navy, who at the time of retirement was serving under an appointment issued to him since the adoption of paragraph 1751, Navy Regulations, 1900, requiring the appointment of paymasters' clerks to be made by the Secretary of the Navy, is an "officer of the Navy," for the purpose of retirement within the meaning of the act of May 13, 1908. (15 Comp. Dec., 628.)

Paymasters' clerks in the Army are officers in the regular service within the meaning of the acts of Congress respecting retirement for length of service and physical incapacity. (27 Op. Atty. Gen., 493; see also 9 Comp. Dec., 90.)

The opinion holding that Army paymasters' clerks were entitled to retirement (27 Op. Atty. Gen., 493), went upon the assumption that a paymaster's clerk has a status in the Army in all essential respects similar to the status of a paymaster's clerk of the Navy, and

as the latter officer had been considered by the courts and by the Navy Department to be an officer of the Navy and subject to the rules and regulations of the Navy, it was assumed that the same conditions prevailed as to the analogous office of paymaster's clerk in the Army. Whether that assumption was correct or not is immaterial in view of the subsequent action of Congress in specifically authorizing the retirement of such clerks. But it will be noticed that such authorization was upon the express condition that "Army paymasters' clerks shall be subject to the rules and Articles of War" (36 Stat., 1044). (29 Op. Atty. Gen., 253.)

As to retirement of pay clerks in the Navy, see act of March 3, 1915 (38 Stat., 942,) noted above; and see note to section 1386, Revised Statutes.

Civil engineers are officers in the Navy, and may be retired under this section, which applies to staff officers as well as to the line. (17 Op. Atty. Gen., 126.)

As to retirement of warrant officers, mates, etc., see references given above under this section.

**Status of officer illegally retired.**—Where the Secretary of the Navy by order retired or attempted to retire an officer of the Navy who had not had 40 years' service, and no appointment had been made to the place vacated, the officer must be regarded as still on the active list of the Navy. (21 Op. Atty. Gen., 103; see also 17 Op. Atty. Gen., 21; compare 26 Op. Atty. Gen., 615, 27 Op. Atty. Gen., 66.)

#### WHAT TIME COUNTS AS "SERVICE" IN THE NAVY.

**Commences upon date of actual entry into service of United States.**—Every department of the Government which has had occasion to construe the word "service" in connection with our military system, has, by long-continued and uniform decisions and practice held that, in case of volunteer officers commissioned by the governors of States, their entry into the military service of the United States dates from their muster in and not from date of their enrollment; and in case of volunteer officers appointed by the President, by and with the advice and consent of the Senate, their service dates from the acceptance of their commissions and oath of office. There are substantial reasons for this construction of the word "service." Accordingly, *held*, that the prior service of an officer of the Army which is entitled to be counted in determining his relative rank with other officers does not include any period prior to his actual entry into the Army, notwithstanding that Congress authorized payment of compensation from an earlier date. (23 Op. Atty. Gen., 406, modifying 23 Op. Atty. Gen., 232.)

A warrant as midshipman was issued to an officer December 11, 1812; he did not report for duty, receive orders, nor become entitled to pay as a midshipman until July 1, 1816. *Held*, that his period of service for retirement should be computed from the latter date. If the question were new, it would be open to serious doubt, but having been decided, and that decision tacitly assented to by Congress, it should stand. (13 Op. Atty. Gen., 33.)

Where an officer upon original appointment to the Army was commissioned July 27, 1866, to rank from May 11, 1866, and accepted said commission and entered upon duty September 15, 1866, *held*, that the period elapsing from the date he took rank as stated in said commission to the date that he accepted same and entered upon duty, was constructive and not actual service, and can not be counted in fixing his relative rank with other officers in cases where the statute requires that prior *actual* service shall be counted. (17 Op. Atty. Gen., 52.)

Service commences for purposes of longevity pay from the day the officer's commission was signed by the President, and not from an antecedent date mentioned in the body of the commission. (*Young v. U. S.*, 19 Ct. Cls., 145.)

The three years' service necessary for promotion of ensigns to lieutenants (junior grade) under section 7 of the Navy personnel act of March 3, 1899 (30 Stat., 1005), should be computed from the date of their rank as ensigns, this being in accordance with the existing construction of the law by the accounting officers and the Navy Department. (22 Comp. Dec., 625, citing 22 Comp. Dec., 565, 566; 18 Comp. Dec., 466; 17 Comp. Dec., 605.)

Service commences for purposes of longevity pay from date of accepting the office and not from date of taking oath of office where latter is subsequent to acceptance. (12 Comp. Dec., 245.)

Where an officer's commission is antedated on original appointment for purposes of rank, his length of service for purposes of promotion may be computed from the date so stated in his commission. (*Toulon v. U. S.*, 52 Ct. Cls., 333; see also 22 Comp. Dec., 623; 17 Comp. Dec., 605; 22 Comp. Dec., 565, 566; 24 Comp. Dec., 177; 18 Op. Atty. Gen., 393, 394.)

The service of volunteer officers does not commence until they are mustered into the United States, notwithstanding that by statute they are allowed pay from date of enrollment. (7 Comp. Dec., 617.)

**Period from date of dismissal to reappointment, not counted.**—Where an officer was dismissed from the Navy and subsequently reappointed pursuant to a joint resolution of Congress, the intervening period during which he was not in fact in the naval service can not on any theory be counted as part of said 40 years for retirement under section 1443, Revised Statutes. The act of March 3, 1883 (22 Stat., 472), which closes the gap in intermittent service so as to make it operate as continuous, shows conclusively that actual service and none other is contemplated by the law. (21 Op. Atty. Gen., 103.)

**Period of unauthorized absence not a period of service.**—A private in the Marine Corps is not entitled in computing his increase of pay for length of service to count the time he was absent from duty without leave. The period of such unauthorized absence can not be regarded as a period of service. (10 Comp. Dec., 333; file 5460-82, June 3, 1916.)

**Period of service under an illegal appointment.**—An officer of the Revenue-Cutter Service [now Coast Guard] is not entitled to credit for prior service as acting assistant

engineer, where his appointment as such was not authorized by law. (10 Comp. Dec., 854, with reference to longevity pay.)

**Prior service in Coast Guard not counted.**—Service in the Revenue Cutter Service [now Coast Guard] is in no sense service in the Army or Navy. Accordingly, *held* that officers of the Marine Corps are not entitled to credit in computing longevity pay for prior service in the Revenue-Cutter Service. (15 Comp. Dec., 807. But see act June 4, 1920, 41 Stat., 835, and note to sec. 1417, R. S.)

**Prior service in militia not counted.**—Officers of the Army are not entitled to credit for prior militia service in computing their longevity pay. (12 Comp. Dec., 522; compare 24 Comp. Dec., 120. See act of July 1, 1918 40 Stat., 710, crediting Naval Reserve Force members with service in the Naval Militia, etc., for purpose of retirement.)

**Prior service as captain's clerk.**—Service as captain's clerk in the Navy should be allowed in computing the longevity pay of an officer of the Army. (17 Op. Atty. Gen., 93.)

**Prior service as commandant's clerk.**—The proposal to count service of clerks of commandants in computing military service is an attempt to engraft on the retired list of the Navy and Marine Corps a civil retired list. Such legislation is regarded by the Navy Department as pernicious, needlessly expensive, and a dangerous precedent; the department is unqualifiedly opposed to its enactment. (File 26255-295:9, May 14 and 21, 1914; file 26255-295:8, April 29, 1914; file 26255-295:5, Mar. 30, 1914.)

Service as commandant's clerk, being strictly civilian service, should not be counted as naval service any more than any other clerical service at navy yards or in the department proper. Accordingly, the Navy Department disapproves of proposed legislation intended to credit officers with service as commandant's clerks for purposes of retirement, etc. (File 26255-274:2, Jan. 21, 1913.) The position of clerk to the governor of the Naval Home is comprehended in the class of clerks to commandants of naval stations who under the provisions of the act of July 15, 1870 (16 Stat., 332, sec. 3), are officers of the Navy and accordingly under the act of March 3, 1883 (22 Stat., 473), credit for service therein is authorized in computing the longevity increase of pay of an officer of the Navy. (25 Comp. Dec., 745.)

**Service as civilian employee.**—Service as a civilian employee in a Navy pay office can not be credited as actual naval service within the meaning of the retirement clause in the act of Congress approved May 13, 1908. (File 5460-35 and 36.)

Service as a messenger and clerk in the commissary and quartermaster's departments of the Army is not service in the Army within the meaning of the provision for longevity pay. (10 Comp. Dec., 83.)

See note to section 1417, Revised Statutes, "Apprentices at navy yards not enlisted men."

**Time under arrest, in confinement, on bail, etc.**—It has long been well settled that the time passed in arrest under military con-



trol, but not under sentence of court-martial, must be counted in making up five-year service periods for increased pay under section 1262, Revised Statutes. (3 Comp. Dec., 682; compare 3 Comp. Dec., 697; 3 Comp. Dec., 433.)

A soldier in arrest under military control may be required to perform many duties; he is entitled to a speedy trial, and if held in arrest for a long period, it is for the convenience of the Government. (3 Comp. Dec., 683.)

In view of the presumption of law that a person charged with crime is innocent until found guilty by a competent tribunal, although this rule has some limitations in military law as in cases of time lost by absence without leave or by desertion, *held*, that a soldier who is restored to duty from arrest without trial is entitled to count the time he was held in arrest under military control as service for bounty purposes (3 Comp. Dec., 676). But, if subsequently found guilty, time so in arrest can not be counted in making up the term of service necessary to obtain bounty, as during such period he is not serving within the meaning of the bounty laws. (3 Comp. Dec., 684; see also 3 Comp. Dec., 692.)

A statute providing that deserters from the Army shall be liable to "serve" for such period as necessary to make good time lost while in desertion, refers to actual military service and does not include time spent in prison under sentence of court-martial. The period during which a soldier is in arrest and confinement in pursuance of a court-martial sentence after his term of enlistment has expired should not be counted in the computation of his continuous-service pay. (12 Comp. Dec., 592.)

Pay of an enlisted man of the Navy held by the civil authorities for trial on a criminal charge should not be paid until he is acquitted, and if found guilty his pay is then forfeited to the United States from the date of his arrest. (2 Comp. Dec., 584.)

Where a carpenter's mate of the Navy was arrested by the civil authorities on a criminal charge, and admitted to bail on his own recognizance and his trial indefinitely postponed, and it was apparently not the intention of the authorities to further prosecute his case, his pay was not thereby forfeited. (10 Comp. Dec., 490.)

It is well settled that an enlisted man in the military service is not entitled to pay for time while held for trial by the civil authorities, unless subsequently tried and acquitted, or discharged without trial. (10 Comp. Dec., 490.)

A soldier arrested by the civil authorities and released without trial, is entitled to pay and allowances during the period he was in arrest, and to count said period for bounty. (3 Comp. Dec., 676; see also 9 Comp. Dec., 249.) Where convicted by the civil authorities, he is not entitled to pay and allowances from the date he was turned over to the civil authorities. (3 Comp. Dec., 334.)

An officer of the Army who was convicted by the civil courts of the Philippine Islands and released under bond, pending an appeal to a higher court, is not entitled to pay pending the final determination of the appeal. (11 Comp. Dec., 659.) The status of such officer is that of "absent without leave," within the meaning of section 1265, Revised Statutes, pending the determination of said appeal, and under the provisions of said section he is not entitled to pay during such absence. (11 Comp. Dec., 755. Overruled, *Carrington v. U. S.*, 46 Ct. Cls., 279, citing *Walsh v. U. S.*, 43 Ct. Cls., 225.)

An officer of the Navy who had previously served as an enlisted man in the Army is entitled to be credited with service for the time he was in confinement under sentence of Army court-martial for desertion. (File 5460-82, June 3, 1916.)

**Sec. 1444. [Retirement after sixty-two years of age, or forty-five years service.]** When any officer below the rank of Vice-Admiral is sixty-two years old, he shall, except in the case provided in the next section, be retired by the President from active service.—(21 Dec., 1861, c. 1, s. 1, v. 12, p. 329. 16 July, 1862, c. 183, s. 8, v. 12, p. 584. 25 June, 1864, c. 152, s. 1, v. 13, p. 183. 21 Dec., 1864, c. 6, s. 3, v. 13, p. 420. 3 Mar., 1873, c. 230, v. 17, p. 556.)

Amendment to this section was made by act August 29, 1916 (39 Stat. 579), fixing the age of retirement at 64 years, except in the cases of captains, commanders, and lieutenant commanders who, after June 30, 1920, become ineligible for promotion on account of age (56, 50, or 45 years, respectively), who shall be retired at rates of pay graded according to their length of service. (See also sec. 1445, below.)

Dental Corps officers who were over 40 years of age on original appointment shall not be eligible for retirement before reaching the age of 70 years, except for physical disability incurred in line of duty. (Act Aug. 29, 1916, 39 Stat., 574, as amended by act July 1, 1918, 40 Stat., 709.)

Dental surgeon at the Naval Academy not to be retired before reaching the age of 70 years, except for physical disability incurred in line of duty. (Act Mar. 4, 1913, 37 Stat., 891, as amended by act July 1, 1918, 40 Stat., 709.)

Naval Reserve Force members shall upon reaching the age of 64 years be disenrolled except that in time of war or other national emergency such members of the Naval Reserve Force, if in active service, may be continued therein during such period as the Secretary of the Navy may determine, but not longer than six months after said war or other national emergency shall cease to exist. (Act July 1, 1918, 40 Stat., 711.)

Pay of officers retired "after forty-five years' service after reaching the age of sixteen years, \* \* \* or on attaining the age of sixty-two years." (See sec. 1588, R. S.)

Rank on retirement of staff officers retired for age or after 45 years' service. (See sec. 1481, R. S.)

Rank on retirement of certain bureau chiefs retired for age. (See sec. 1473, R. S.; see generally, as to retirement of chiefs of bureaus, note to sec. 421, R. S.; and see note to sec. 1457, R. S., as to rank of officers on retirement under special conditions.)

Retiring board not necessary for retirements on account of age. (See sec. 1455, R. S.)

Retirement of staff officers after 45 years' service. (Sec. 1481, R. S.)

Warrant officers, mates etc. (See note to sec. 1443, R. S.)

**Historical note.**—This section, as drafted by the Commissioners for the Revision of the United States Statutes (1 Comrs. Draft, 700), was entitled, "After sixty-two years of age, or forty-five years' service," and read: "When any officer below the rank of vice admiral is sixty-two years old, or when his name has been borne on the Naval Register for a period of forty-five years since he arrived at the age of sixteen years, he shall, except in the case provided in the next section, be retired by the President from active service." The words in italics were omitted from this section as adopted by Congress, but the caption, "After sixty-two years of age, or forty-five years' service," was retained.

The laws upon which this section as drafted by the Commissioners was based, and which are cited in the marginal notes thereunder, provided as follows:

Act of December 21, 1861, section 1 (12 Stat., 329): "That whenever the name of any naval officer now in the service, or who may hereafter be in the service of the United States, shall have been borne on the Naval Register forty-five years, or shall be of the age of sixty-two years, he shall be retired from active service, and his name entered on the retired list of officers of the grade to which he belonged at the time of such retirement."

Act July 16, 1862, section 8 (12 Stat., 584): "That whenever, upon the recommendation of the President of the United States, any officer of the Navy, now upon the active list, not below the grade of commander, has received, or shall receive, by name, during the present war, a vote of thanks of Congress for distinguished service, such officer shall not be retired, except for cause, until he has been fifty-five years in the naval service of the United States."

Act June 25, 1864, section 1 (13 Stat., 183), provided that the above section of the act of December 21, 1861, "shall not be so construed as to retire any officer under the age of sixty-two years, and whose name shall not have been borne upon the Navy Register for a period of forty-five years after he had arrived at the age of sixteen years."

Act December 21, 1864, section 3 (13 Stat., 420): "That the first section of an act approved December twenty-first, eighteen hundred and sixty-one, entitled 'An act further to promote the efficiency of the Navy,' shall not be so

construed as to apply to any one holding a commission as a vice admiral in the Navy."

Act March 3, 1873 (17 Stat., 556): "That the act of Congress approved December twenty-first, eighteen hundred and sixty-one, entitled 'An act to further promote the efficiency of the Navy,' and the act approved June twenty-fifth, eighteen hundred and sixty-four, entitled 'An act to amend the act of the twenty-first December, eighteen hundred and sixty-one, entitled "An act to further promote the efficiency of the Navy,"' shall not be hereafter construed to retire any officer before sixty-two years of age."

The first section of the act of December 21, 1861 (12 Stat., 329), retired from service two classes of naval officers, firstly, those whose names may have been borne on the Naval Register 45 years, and secondly, those who had arrived at the age of 62 years. The act of June 25, 1864, provided that the act of 1861 "shall not be so construed as to retire any officer under the age of sixty-two years, and whose name shall not have been borne upon the Navy Register for a period of forty-five years after he had arrived at the age of sixteen years." The latter act had the effect of removing from the retired list officers of the Navy who were retired in pursuance of the act of December 21, 1861, but who were not liable to be retired by the provision of the act of 1864. (11 Op. Atty. Gen., 144.)

The act of December 21, 1861, prescribed that officers should be retired from active service for two separate reasons, viz, (1), whose names shall have been borne on the Navy Register for 45 years; or (2), who shall be of the age of 62 years. That act did not speak in the conjunctive but in the disjunctive; that is, if either the one cause or the other existed, an officer might be retired. This act was mandatory, and if an officer had served 45 years his retirement followed as a matter of course, without regard to his age. As a result, no doubt, officers were placed on the retired list who had not attained the age of 62 years, and this fact led to the enactment of the act of June 25, 1864, whereby the retirement of an officer was forbidden until he had reached the age of 62 years and his name had been borne on the Navy Register for 45 years. Here the act was in the conjunctive, and thereafter both conditions for retirement apparently must have concurred, i. e., both as to age and as to length of service. Later came the act of 1873, which provided that the acts above mentioned should not be construed "to retire any officer before sixty-two years of age"; but while no express mention was made therein as to any modification of the retirement as to the completion of 45 years' service, it is a fact that the Navy Department for nearly 40 years has construed the law now embodied in section 1444 of the Revised Statutes as only requiring the fulfillment of either requirement. (File 5460-32:17, Feb. 7, 1912.)

The opinion of the District of Columbia Supreme Court in the case of *Foreman v. Meyer* (mandamus against the Secretary of the Navy, file 5460-32) states the provisions of law upon which section 1444, Revised Statutes, is based, and then continues: "This legislation, antedating the enactment of said section 1444 of the



Revised Statutes of 1878, indicates that it was not contemplated by Congress that officers were to be retired on reaching the age of 62 years, unless they had been continuously in the service for 45 years; and for that reason the relator, even if he is an officer within the meaning of that section, which is questionable, fails to show a clear case entitling him to the right of retirement or a plain administrative duty on the part of the Secretary of the Navy to place his name on the list of retired officers." The court then reviewed the periods of service of petitioner and said that "taken all together, they do not seem sufficient to warrant the court in holding that he has been for 45 years in the service of the United States as a naval officer, and it is not certain but that a proper construction of the law requires such service to be shown before the President is in duty bound to act in the premises." (File 5460-32:17, Feb. 7, 1912; see also *Foreman v. Meyer*, 227 U. S., 452, 38 App. D. C., 472.)

It must be conceded that the several separate provisions of law upon which section 1444 is based are not entirely clear, but the construction given to those laws by the Navy Department during a period of 39 years under such circumstances should be controlling (citing *U. S. v. Healey*, 160 U. S., 136, 141, 145). But even if this fact were not regarded as controlling, there is other evidence of a legislative character as to what were intended to be the requirements for the kind of retirement now being considered (citing secs. 1481 and 1455, R. S.). The former section plainly provides for retirement after 45 years' service, but it also provides separately for the retirement of officers at the age of 62 years, "before having served for forty-five years," and confers a higher rank upon those of this latter class "who shall have served faithfully until retired" after 40 years' service. This is a definite legislative recognition of the department's construction of the law, and clearly shows that the provisions of the law then and now in force do not require that an officer must have served 45 years before he can be retired for age, but, on the contrary, indicate that there may be retirement for the single reason that an officer has attained the age of 62 years. Section 1473, Revised Statutes, also indicates the same construction, and section 1588 confirms it. The latter section specifically provides for retirement on attaining the age of 62 years, separate and distinct from retirement after 45 years' service. Section 1589 also confirms the views above expressed. It appears to be evident from the above that the construction placed by the Navy Department upon the law relating to retirement for age is entirely correct. (File 5460-32:17, Feb. 7, 1912.)

The act of March 3, 1873 (above quoted), in effect repealed the 45-year retirement clause in the act of December 21, 1861 (above quoted), and the latter clause has not been carried into the Revised Statutes. (File 27231-10, Feb. 9, 1910; see also sec. 5596, R. S., repealing all acts of Congress passed prior to Dec. 1, 1873, any portion of which is embraced in any section of the Revised Statutes.)

**Age retirement not automatic; action of President required.**—The Army law, providing that when an officer "is sixty-four

years of age he shall be retired from active service and placed on the retired list," does not operate, ipso facto, to place him on the retired list when he reaches the age specified, but it requires action by the President to carry it into effect. Accordingly, *held* that where an order was issued on the date that an officer became 64 years of age, retiring him from active service, which order was not received by him until more than a month later, and he was not relieved of duty until another month later, he was entitled to full pay to the date that he was relieved from duty. (9 Comp. Dec., 20; compare 9 Comp. Dec., 299, noted below.)

The delay in the above case was not unreasonable, and was not caused by any act or default of the officer. It is within the power of the War Department to issue an order in advance of the date on which an officer arrives at the age of 64 years, to take effect on that date, and also to issue an order to him in advance relieving him from duty on the active list on that date. (9 Comp. Dec., 20; compare 9 Comp. Dec., 299, noted below.)

**Retirement for age automatically detaches officer from duty.**—The retirement of an officer for age thereby detaches him from active duty, and the commanding officer of his vessel is not authorized to retain him in active service unless it is done in accordance with a decision of the Secretary of the Navy pursuant to law. Accordingly, *held* that an officer so retained in active service without authority of the Secretary of the Navy, is entitled to retired pay only, from date of his retirement. (9 Comp. Dec., 299; see also note to sec. 1462, R. S.; compare 9 Comp. Dec., 20, noted above.)

An order of the President placing an officer of the Navy upon the retired list pursuant to section 1444, Revised Statutes, changes the status of such officer wherever he may be and whatever duty he may be performing, and thereafter he is entitled to retired pay only unless such status is changed by some subsequent order of the Secretary of the Navy to perform active duty. It may be that the Secretary of the Navy might issue a preliminary order in terms assigning an officer to duty after retirement, but such order should be certain in its terms and not given that effect by strained construction. (*Terry v. U. S.*, Ct. Cls., No. 28148, 86 S. and A. Memo., 644; see also 17 Comp. Dec., 533.)

**When retirement for age becomes effective.**—An officer of the Navy becomes 62 years of age and is required to be retired within the meaning of section 1444, Revised Statutes, the moment of the beginning of the date of the sixty-second anniversary of his birth, and is not entitled to pay on the active list on that day. (3 Comp. Dec., 581. In this case the order for the officer's retirement was issued beforehand, to take effect on the date of his sixty-second birthday. Compare 16 Comp. Dec., 682, noted under sec. 1458, R. S.)

The officer ceased to be an officer on the active list of the Navy upon the very moment after midnight that the 5th day of April began, and was in accordance with the very terms of the order of April 1, transferred to the retired list "on April 5, 1897." The law does not consider fractions of a day, "and it is the same whether a thing is done upon one moment of

the day or another." He became in the eye of the law 62 years of age the moment after midnight between the fourth and fifth days of April. (3 Comp. Dec., 581.)

For other cases, see note to section 1457, Revised Statutes, "When retirement or advancement on retired list takes effect." See also note to section 1458, Revised Statutes.

**Officer who reaches retirement age while his promotion is pending.**—Where upon the retirement of a rear-admiral for age, a commodore next in line was nominated to be a rear-admiral to fill the vacancy, and before action thereon by the Senate the said commodore attained the age of 62 years and was retired under section 1444, Revised Statutes, as a commodore: Advised that, according to the law and usage of the service, the officer in this case was entitled by relation to be a rear-admiral from the date when the vacancy occurred, and to receive the pay of a rear-admiral from that date; and if the Senate should confirm his nomination he might be commissioned as a rear-admiral and placed on the retired list as of that grade. (18 Op. Atty. Gen., 393; compare 25 Op. Atty. Gen., 591, and 29 Op. Atty. Gen., 257, noted under sec. 1458, R. S., to effect that office does not vest until date of commission, notwithstanding that it is made to relate back for purposes of rank.)

Where an officer accepts a recess promotion and thereafter becomes eligible for retirement by reason of age before the adjournment of Congress and before the appointment is acted upon by the Senate, he is entitled to be retired with the rank of his new appointment. (29 Op. Atty. Gen., 598; see also note to sec. 1457, R. S.)

**Retirement by special act made to relate back.**—The words, "and to place him on the retired list of the Navy as of date June first, eighteen hundred and ninety-five," in the special enactment of Congress for the relief of a former officer, must be construed to show the legislative intent to be that he was to be retired as "on attaining the age of sixty-two years," he having attained that age on May 30, 1895. (3 Comp. Dec., 706.)

For other cases, see note to section 1457, Revised Statutes, "When retirement or advancement on retired list takes effect."

**Appointment of officer already past retiring age.**—Where Congress, by special enactment, authorizes the appointment as an officer of a designated person who is already past the retiring age, but says nothing in such enactment about placing him on the retired list, it must be held that the law relating to retirement for age has no application to his case. Should he be physically incapacitated for active service he may be ordered before a retiring board in accordance with law. There are many precedents which show that when Congress has intended to authorize the appointment of a civilian as an officer of the naval service, and immediately upon such appointment to transfer him to the retired list, it has not failed to express such intention in explicit language. In the present case Congress did not provide for the appointment of the civilian as a first lieutenant on the retired list of the Marine Corps, nor did it provide that he should

be appointed on the active list and then retired, as has been the practice in similar cases when such was the intention, but, on the contrary, notwithstanding his age, Congress authorized his appointment as an officer on the active list of the Marine Corps "as an extra number, not in the line of promotion," which language would have been unnecessary had his immediate retirement been in contemplation. (File 27231-52, May 16, 1913.)

If the laws prescribing the age for retirement of Army officers were held applicable to the volunteer service, the President would not have the right to appoint to an office in the volunteer service any one of the age of 64 or over. (22 Op. Atty. Gen., 199.)

Where the law creates new offices in the naval service, and does not prescribe any age limit for appointment thereto, *held*, that a person otherwise qualified, but who had already passed the retiring age, is not eligible for appointment. The retirement laws fix the maximum age beyond which no person may lawfully be appointed to any office in the naval service without the specific authority of Congress. (File 11112-658, Nov. 15, 1916. Compare file 26255-54-7, July 15, 1912.)

**Age retirement held inapplicable to volunteer officers.**—The law fixing the age of retirement in the Army at 64 years was not intended to operate to restrict future eligibility to serve in an emergency, nor to limit the right of the President to appoint to a new volunteer service. The Army retired lists apply to the Regular Army alone, with due credit given for the time of volunteer service of officers of the Regular Army, and do not apply to a volunteer Army. A contrary view would lead to an unreasonable consequence, such as the courts in construing legislation will reject, viz, that the President would not have the right to appoint to an office in the volunteer service anyone of the age of 64 years or over, and that an officer in the volunteer service, reaching the age of 64 years, without the continuous service contemplated by the retirement acts, and no matter how brief his period of duty, would be entitled to be retired. It is only necessary to state this position to refute it. (22 Op. Atty. Gen., 199.)

Where the law fixes no age limit for officers in the Volunteer Army, it is competent for the President to appoint as a major general or brigadier general in the Volunteer Army a person above the age of 64 years. (22 Op. Atty. Gen., 176; affirmed 22 Op. Atty. Gen., 199.)

Where the law fixes no age limit for officers in the Volunteer Army, an officer of the Regular Army, holding at the same time a commission as a general in the Volunteer Army, may continue to hold and exercise his commission in the Volunteer Army after having been placed upon the retired list of the Regular Army by reason of the age limit. (22 Op. Atty. Gen., 176; affirmed 22 Op. Atty. Gen., 199.)

**Officer retired for incapacity and subsequently reaching retiring age.**—Where the law provided for placing certain officers [Revenue Cutter Service] upon a "retired waiting orders list," when found by a retiring board to be incapacitated for active service,



and that "officers thus retired may be assigned to such duty as they may be able to perform," and further provided that when any officer "has reached the age of sixty-four years he shall be retired by the President from active serv-

ice," held, that an officer placed on the retired waiting orders list should, upon becoming 64 years of age, be retired from active service under the latter provision. (11 Comp. Dec., 612.)

**Sec. 1445. [Officers of certain ranks to be retired only for disability.]** The two preceding sections shall not apply to any lieutenant-commander, lieutenant, master, ensign, midshipman, passed assistant surgeon, passed assistant paymaster, first assistant engineer, assistant surgeon, assistant paymaster, or second assistant engineer; and such officers shall not be placed upon the retired list, except on account of physical or mental disability.—(15 July, 1870, c. 295, s. 6, v. 16, p. 333.)

Dental Corps retirements were not to be affected by provisions of this section, under a clause in the act of August 22, 1912 (37 Stat., 345), which act, in so far as it pertained to the Dental Corps, was superseded by act of August 29, 1916 (39 Stat., 573), the provisions of which latter act were in turn superseded by act of July 1, 1918 (40 Stat. 709), which also provided that section 1445, Revised Statutes, "shall not be applicable to dental officers."

"First assistant engineer," and "second assistant engineer," titles changed to passed assistant engineer and assistant engineer, and Engineer Corps afterwards abolished. (See note to sec. 1390, R. S.)

Lieutenants and lieutenant commanders, provision for compulsory retirement of, to create vacancies, was made by act of March 3, 1899, section 9 (30 Stat., 1006), repealed by act of March 3, 1915 (38 Stat., 938).

Lieutenant commanders, provision for retirement of, upon their own application, to create vacancies, was made by act of March 3, 1899, section 8 (30 Stat., 1006).

Lieutenant commanders, provision for retirement of, upon becoming ineligible for promotion on account of age (45 years), was made by act of August 29, 1916 (39 Stat., 579), effective June 30, 1920.

"Master" and "midshipman," titles changed to lieutenant (junior grade) and ensign. (See note to sec. 1362, R. S.)

Retirements on account of disability. (See sec. 1448, R. S.)

Temporary officers, appointed for service during war with Germany, not entitled to retirement except for physical disability in-

curred in line of duty. (Act May 22, 1917, sec. 9, 40 Stat., 84.)

"Physical incapacity" is defined as a condition, bodily or mental, which unfits at present, or is likely to unfit in the near future, the officer for the performance of his duties. (21 Op. Atty. Gen., 387, quoting Circular, War Department, Dec. 18, 1890, relating to examination for promotion. See further, note to sec. 1448, R. S.)

Midshipmen are retired for physical disability pursuant to special acts of Congress, and are given the rank of ensign on the retired list, these cases not being provided for by general statutes. See for example, act March 3, 1901 (31 Stat., 1792), in case of Frank B. Case; act March 4, 1907 (34 Stat., 1417), in case of Harold D. Childs; act January 5, 1909 (35 Stat., 585), in case of William Parker Sedgwick; act February 13, 1911 (36 Stat., 899), in case of John M. Blankenship; and act March 3, 1911 (36 Stat., 1079), in case of William H. Walsh.

The Navy Department is of the opinion that midshipmen who become disabled in line of duty while serving as officers at sea should have the benefit of the retirement laws in the same manner as other officers of the Navy, has recommended general legislation to that effect, and looks with favor upon the passage of a measure for the retirement of a former midshipman under such circumstances. (File 6288-1, Jan. 14, 1907; file 26255-80-2, May 9, 1910; file 9066-1, Jan. 20, 1908.) Midshipmen are now commissioned as officers on graduation from the Naval Academy, instead of serving two years as midshipmen at sea after such graduation, as was formerly the case. See act of March 7, 1912 (37 Stat., 73).

**Sec. 1446. [Officers who have received a vote of thanks; retirement after fifty-five years' service. Obsolete.]**

**This section provided as follows:**

"SEC. 1446. Officers on the active list, not below the grade of commander, who have, upon the recommendation of the President, received by name, during the war for the suppression of the rebellion, a vote of thanks of Congress for distinguished service, shall not be retired, except for cause, until they have been fifty-five years in the service of the United States."—(16 July, 1862, c. 183, s. 8, v. 12, p. 584.)

It is rendered obsolete by having been fully executed, as there are no officers now on

the active list of the Navy who are affected by its provisions.

**Civil War service.**—Increased rank and pay on retirement of officers of the Navy, with creditable records, who served during the Civil War, was authorized by act of March 3, 1899, section 11 (30 Stat., 1007), act of June 29, 1906 (34 Stat., 554), and act of March 3, 1909 (35 Stat., 753).

**Thanks of Congress, effect of.**—See sections 1365, 1465, 1508-1510, Revised Statutes.

**Officers who received thanks of Congress during Civil War.**—The following officers received the thanks of Congress by name:

Capt. Samuel F. Dupont, February 22, 1862 (12 Stat., 613).

Capt. A. H. Foote, March 19, 1862 (12 Stat., 616).

Capt. Louis M. Goldsborough, July 11, 1862 (12 Stat., 621).

Lieut. J. L. Worden, July 11, 1862 (12 Stat., 622).

Capt. David G. Farragut, July 11, 1862 (12 Stat., 622).

Capt. Andrew H. Foote, July 16, 1862 (12 Stat., 626).

Commodore Charles Henry Davis, February 7, 1863 (18 Stat., 823).

Commander John L. Worden, February 3, 1863 (12 Stat., 823).

Capt. John A. Dahlgren, February 7, 1863 (12 Stat., 824).

Capt. Stephen C. Rowan, February 7, 1863 (12 Stat., 824).

Commander David D. Porter, February 7, 1863 (12 Stat., 824).

Rear Admiral Silas H. Stringham, February 7, 1863 (12 Stat., 824).

Capt. John Rodgers, December 3, 1863 (13 Stat., 399).

Commodore Cadwalader Ringgold, March 7, 1864 (13 Stat., 403).

Admiral David D. Porter, April 19, 1864 (13 Stat., 404).

Capt. John A. Winslow, December 20, 1864 (13 Stat., 565).

Lieut. William B. Cushing, December 20, 1864 (13 Stat., 565).

Rear Admiral David D. Porter, January 24, 1865 (13 Stat., 566).

Vice Admiral David G. Farragut, February 10, 1866 (14 Stat., 349).

**What time counted as "service" in the Navy.**—See 13 Op. Atty. Gen., 33, noted under section 1443, Revised Statutes.

**Sec. 1447. [Retirement of officers not recommended for promotion.]** When the case of any officer has been acted upon by a board of naval surgeons and an examining board for promotion, as provided in Chapter Four of this Title, and he shall not have been recommended for promotion by both of the said boards, he shall be placed upon the retired list.—(21 April, 1864, c. 63, s. 4, v. 13, p. 53.)

Captains, commanders, and lieutenant commanders who fail professionally shall thereafter be ineligible for promotion; if they fail physically they shall not be considered, in the event of retirement, entitled to the rank of the next higher grade. (Act Aug. 29, 1916, 39 Stat. 579.)

"Chapter Four of this Title," refers to sections 1466–1510, Revised Statutes.

Officers not to be retired for misconduct. (Sec. 1456, R. S.)

Officers examined for promotion and found unfit to perform duties at sea, by reason of drunkenness or other misconduct, shall not be retired but shall be discharged with not more than one year's pay. (Act Aug. 5, 1882, 22 Stat., 286; see note to sec. 1456, R. S.)

Officers failing physically upon examination for promotion, to have increased rank on retirement, in certain cases. (Act Mar. 4, 1911, 36 Stat., 1267; amended by act Aug. 29, 1916, 39 Stat., 579.)

Officers below grade of commander failing professionally upon examination for promotion, to be suspended from promotion for six months, then reexamined and if found not qualified upon reexamination, to be dropped from the service. (Sec. 1505, R. S., as amended by act Mar. 11, 1912, 37 Stat., 73; but see act Aug. 29, 1916, 39 Stat., 579, noted above, as to professional failure of lieutenant commanders.)

Officers may be retired, on account of failing to be recommended for promotion, without appearing before a retiring board. (See sec. 1455, R. S.)

Physical or mental disability only ground for retirement of certain officers. (See sec. 1445, R. S., and note thereto.)

Staff officers: "Hereafter all laws relating to the examination of officers of the Navy for promotion shall be construed to apply to the regular advancement of staff officers to higher ranks on the active list the same as though such advancements in rank were promotions to higher grades: *Provided*, That examinations of such staff officers shall not be required except for such regular advancements in rank." (Act May 22, 1917, sec. 20, 40 Stat., 89.)

**This section applicable only to officers above the grade of lieutenant commander.**—The act of April 21, 1864, was the first act requiring examinations generally prior to promotion. The failure on such examination resulted in retirement, and this applied to all grades below that of commodore. The department's construction of the statute was that failure upon either examination was a proper cause for retirement. This procedure continued until 1870, when by the act of July 15 of that year (now sec. 1505, R. S.), there was substituted for retirement in certain cases a provision for suspension from promotion of officers below the grade of commander who failed professionally upon examination. Retirement upon professional failure for promotion, which theretofore had applied to all grades, thereafter applied only to the cases of officers of the grades of commander and captain. (File 26260–874, June 3, 1910; compare act Aug. 29, 1916, 39 Stat., 579, as to line officers of and above the grade of lieutenant



commander who are not recommended for promotion.)

An officer of the rank of commander was examined for promotion and found physically, mentally, and morally, but not professionally, qualified; recommended for promotion by the medical board, but not so recommended by the naval examining board. Section 1496, Revised Statutes, prohibits promotion of officers below the rank of commodore (now rear admiral) until found mentally, morally, and professionally qualified by a board of examiners. The penalty for professional failure is fixed by section 1505, Revised Statutes, which applies only to officers below the grade of commander; that section does not apply to present case, as the officer is in the grade of commander, and not below it. Question presented, What disposition should be made of this case? Section 1447, Revised Statutes, provides for retirement of officer not recommended for promotion. In general, under section 1456, Revised Statutes, and the act of August 5, 1882, misconduct is not a ground for retirement. This officer's record does not show that he is accused of anything of that nature; he would not, therefore, be subject to discharge on that ground, which could only follow as the result of a finding of moral disqualification, nor would he be subject to dismissal by a court-martial. It would appear, then, that he can not be dismissed, discharged, suspended, or promoted, nor can he be retired, unless under the provisions of section 1447. He can not, moreover, be retained at the top of the list of commanders until such time as he may be able to qualify, because of the requirements of section 1458, Revised Statutes, and yet, although the senior officer, he can not be advanced as he has not qualified therefor. The only alternative is to apply the provisions of sections 1496 and 1447, Revised Statutes. Advised, accordingly, that this officer should be retired under the provisions of section 1447, Revised Statutes. (File 26260-874, June 3, 1910. This case was disposed of by the voluntary retirement of the officer concerned in accordance with sec. 8 of the Navy personnel act approved Mar. 3, 1899, 30 Stat., 1006.)

**Action of both boards essential before retirement under this section.**—The act of April 21, 1864, section 4, chapter 63 [now embodied in section 1447, Revised Statutes], provides that "all officers whose cases shall have been acted upon by the aforesaid boards and who shall not have been recommended for promotion by both of them, shall be placed upon the retired list." This section plainly contemplates and requires that there shall have been an examination by two boards, and that both shall have failed to recommend an officer for promotion before, in the language of the act, he "shall be placed upon the retired list." One of these boards is a board of naval surgeons, the other is "a board of examining officers, to be appointed by the President of the United States." Before, therefore, a medical officer of the Navy is placed on the retired list under the provisions of this act, it should appear that his case has been acted upon by two boards, one of them a board of naval surgeons who passed upon his physical qualifications to perform all his duties at sea,

the other a board of examining officers senior in rank to him, and appointed by the President, who considered his mental, moral, and professional fitness to perform his duties at sea, and further it should appear that he was not recommended for promotion by both of such boards. If the fact be that but one board, a board of naval surgeons, has acted upon the cases of certain medical officers, it is not the duty of the department to place them on the retired list. (11 Op. Atty. Gen., 105; see also 12 Op. Atty. Gen., 347.)

**Unfavorable report by one board sufficient for retirement.**—If the finding of either board is unfavorable, the statute is peremptory that the officer shall be placed on the retired list. The statute leaves the President no discretion. (Thompson v. U. S., 18 Ct. Cls., 604, 611.)

An officer passed the examination by the board of surgeons and failed to pass the professional examination. The President approved the finding and placed the officer on the retired list. Having approved the finding, he could not do otherwise than place him there. (Thompson v. U. S., 18 Ct. Cls., 604, 611; see also Davis v. U. S., 24 Ct. Cls., 442, noted below, under "Officer not mentally, morally, and professionally qualified.")

The Attorney General, in 11 Op. Atty. Gen., 105, construed the law embodied in this section as requiring, before the retirement of an officer thereunder, that both the examining board and the medical board shall have reported adversely upon the candidate's qualifications. However, an examination of the records of officers retired both before and after the date of the Attorney General's opinion discloses that if an officer was found physically, but not professionally, mentally, or morally, qualified and consequently not recommended for promotion by the board of examiners, he was placed on the retired list (citing cases of Commodores Ellison, Lockwood, Totten, Glasson; Commanders Arnold, E. W. Henry, Wm. Gibson, Beaumont; Ensign F. H. Parker; Asst. Paymaster C. E. Boggs; also Capt. T. G. Corbin, Commander E. E. Stone, and Capt. Egbert Thompson). Further, in the cases of officers who were found not physically qualified for promotion, they have been retired under the provisions of section 4 of the act of April 21, 1864 (now sec. 1447, R. S.), (citing cases of Capt. Baldwin and Brasher, and Lieut. Commander F. H. Sheppard). Thus the department's practice both before and after the Attorney General's opinion was to retire officers under the act of 1864 when they had been found not qualified by either, and not necessarily by both, boards. (File 26260-874, June 3, 1910.)

The language of the Court of Claims in the case of Capt. Thompson (18 Ct. Cls., 604, 611) is at variance with that used by the Attorney General, as the court says that "if the finding of either board is unfavorable, the provision in section 4 is peremptory that the officer shall be placed on the retired list." (File 26260-874, June 3, 1910.)

A commander in the Navy who qualified physically, as well as mentally and morally, but failed professionally, and was not, therefore, recommended for promotion by the ex-

amining board, although so recommended by the medical board, should be retired under the provisions of section 1447, Revised Statutes. (File 26260-874, June 3, 1910. Compare file 26260-1392, June 29, 1911, page 5, in which it was remarked that, "if the candidate were found by both the medical and examining boards to be not qualified for promotion, under section 1447 of the Revised Statutes he was to be placed on the retired list.") [See in this connection section 1455, Revised Statutes, which refers to the retirement of an officer "on account of his failure to be recommended by an examining board for promotion."]

**Irregularity in proceedings cannot be remedied by courts.**—If all the steps taken in the proceedings resulting in the retirement of an officer under this section were not in order and warranted by the statute, the Court of Claims would have no power to review them. (Thompson v. U. S., 18 Ct. Cls., 604, 611.)

**President may revoke approval and set aside proceedings for irregularity.**—A naval officer having appeared before an examining board, organized and conducted under sections 1493-1505, Revised Statutes, and the examination being temporarily suspended, was granted permission to go home and to be absent until notified by the board to appear. He failed to receive this notice until after the examination, which was resumed during his absence, had been concluded. The proceedings and findings of the board were approved by the President and his order in the case duly executed by the retirement of the officer under this section, but the vacancy created by such retirement was not filled, and no rights of any other person intervened: *Held*, that the act of the President could be revoked and the officer allowed a rehearing. (16 Op. Att'y. Gen., 20.)

An officer having been examined by a board of naval surgeons, and placed on the retired list by the Secretary of the Navy, upon the failure of that board to recommend him for promotion, but not having been examined by an "examining board for promotion," as required by the law prior to promotion, *held*, that the President possesses supervisory action over the report of the board of naval surgeons, and may approve or disapprove same, notwithstanding the action of the Secretary of the Navy. (12 Op. Att'y. Gen., 347.)

Where the President possesses the power of review, he has the power as a necessary incident to the right of review, if he finds that an officer has not had such an examination as the law declares he shall have, or, in other words, if the proceedings are fatally defective, to treat the proceedings of the board as a nullity and direct an examination in accordance with law. (27 Op. Att'y. Gen., 193, 201; see also 27 Op. Att'y. Gen., 251.)

Where an officer was found by a board of examination to be physically qualified for promotion, but deficient in professional qualifications, and it afterwards developed that he was, at the time of his examination, suffering from a disability incurred in the line of duty which disqualified him for promotion, it is within the power of the Secretary of War, rep-

resenting the President, to order a new physical examination. (27 Op. Att'y. Gen., 193.)

**Difference between examining board for promotion and retiring board.**—See 21 Op. Att'y. Gen., 385, noted under section 1448, "Physical examination for promotion not sufficient for retirement."

**Retirement completed by appointment of successor.**—The act of placing an officer on the retired list under this section created a vacancy, which the statute [section 1458, Revised Statutes] required the President to fill. In obedience to the mandate of the statute, the President nominated to the Senate the ranking commander for promotion to the captaincy on the active list thus made vacant; the Senate gave its constitutional assent thereto, and upon his appointment the new appointee from that moment became one of the limited number of captains authorized by law to be on the active list of the Navy, and his predecessor became one of the captains authorized by law to be on the retired list of the Navy. (Thompson v. U. S., 18 Ct. Cls., 604, 612, citing Blake's Case, 103 U. S., 227, noted under the Constitution, Art. II, sec. 2, clause 2, under "VIII. Power of Removal \* \* \* Power of President and Senate.")

**Officer can not be restored to active list by President.**—See note to section 1465, Revised Statutes.

**Officer not mentally, morally, and professionally qualified.**—An officer was found by a retiring board "incapacitated from active service," and such incapacity was "not the result of an incident of the service." He was ordered before another retiring board, which found him not incapacitated for active service. Thereupon he was ordered before an examining board for promotion. This board reported that he had "not the mental, moral, and professional qualifications to perform efficiently all the duties of a naval officer in a higher grade, and we do not recommend him for promotion." The President approved the proceedings and findings of the examining board, and he was thereupon retired from active service. *Held*, that the officer was not entitled to a reexamination under section 1505, Revised Statutes, after a period of suspension, but was legally retired as not recommended for promotion. (Davis v. U. S., 24 Ct. Cls., 442. But see note to sec. 1456, R. S.)

**Examining board is quasi judicial.**—The examining board whose failure to recommend for promotion causes retirement is "quasi judicial." (Thompson v. U. S., 18 Ct. Cls., 604, 615.)

**Approval of President required.**—The conclusions of any military court, board, or commission must, before being carried into execution, have the approval of the commander in chief or some one representing him. Accordingly, although the law in a particular case may not expressly provide for approval of examining boards in the Army, such boards must receive the approval of the Secretary of War, whose action is conclusively presumed to be that of the President, in order to be valid and effective. It is not, however, essential that this approval should be express or indi-



cated in any formal language. It may be indicated by merely giving effect through appropriate orders to the findings of the board. (27 Op. Atty. Gen., 193; see also sec. 1502, R. S., and *Jouett v. U. S.*, 28 Ct. Cls., 266.)

Although the law embodied in this section did not expressly provide for approval by the President of the report made by the board of naval surgeons, he has a supervisory power over the action of such board and may approve or disapprove same notwithstanding the action taken in the case by the Secretary of the Navy. (12 Op. Atty. Gen., 347.)

**Pay of officer retired because not recommended for promotion.**—An officer retired because not recommended for promotion, as provided by this section, is entitled to half pay, as provided by section 1588, Revised Statutes. (*McClure v. U. S.*, 18 Ct. Cls., 347; file 26260-874, June 3, 1910; but see case of Lieut. Frank W. Nichols, noted under sec. 1448, R. S., "Physical examination for promotion not sufficient for retirement.")

**Retirement of officer found not morally qualified for promotion.**—In the case of Pay Inspector John H. Stevenson, the examining board for promotion reported as follows: "We are satisfied as to the professional abilities of the candidate. His methods of business are shown by the evidence to have been loose, reckless, regardless of law, and defiant of orders, but we believe his conduct is not shown to have been influenced by a desire for personal profit, but that, from mental peculiarities or temperament, his moral sense of the obligations of law, orders, and regulations is so obtunded as to render him unfit to conduct the important duties which pertain to the grade in the Navy to which he is a candidate for promotion. In this sense we consider him, as stated below, morally unfit for promotion. We therefore decide that the professional fitness of the candidate to perform the duties of a naval officer at sea and on shore in the next higher grade has been established, but not the mental and moral fitness, and we therefore do not recommend him for promotion."

In this case, the Judge Advocate General, in his report to the Secretary of the Navy, September 11, 1893, stated in part: "The vital question, therefore, is as to whether or not the disqualifying cause in the case of Mr. Stevenson is a cause 'arising from his own misconduct.' I am of opinion that such cannot properly be said to be the case, and that, inasmuch as Mr. Stevenson has been found to be both mentally and morally incapacitated, his moral disqualification being the result of his mental incapacity, the state of his mind may properly be considered to be diseased, and, therefore, that the case does not come under the provisions of the act of August 5, 1882 [noted under section 1456, Revised Statutes.]. \* \* \* I am of opinion that the provisions of this section [1457, Revised Statutes] properly cover the case of Pay Inspector Stevenson. If retired in accordance therewith, he will receive one-half of the sea pay at the time of his retirement (\$2,200) as prescribed by section 1588 of the Revised Statutes."

The Secretary of the Navy, in his report to the President, September 12, 1893, stated in

part: "It will be observed that this finding is peculiar. The decision is substantially and formally sufficient. It is that the candidate does not possess the mental and moral fitness required for promotion; the reasons given, however, are that 'from mental peculiarities or temperament his moral sense of the obligations of law, orders, and regulations, is so obtunded as to render him unfit to conduct the important duties which pertain to the grade in the Navy to which he is a candidate for promotion.' Carrying out what seems to be the obvious purpose of this finding, the president of the board, Commodore J. G. Walker, on behalf of the board, called upon me and requested that I should convey to you the wish of the board that Mr. Stevenson should be retired under section 1447 of the Revised Statutes, and not dismissed under the law of 1882. This request appears to be entirely proper, but the board having found the candidate morally unfit, the question as to whether he should be retired or dismissed seems to be one entirely for the decision of the President. The finding of the board is, however, undoubtedly the basis upon which your decision is to be founded. You would not have, as I conceive, the right either to retire or dismiss, unless the board had previously found the unfitness of the candidate. It will be seen from the opinion of the Judge Advocate General of the Navy that he recommends the retiring of the candidate upon half pay, and he cites a precedent. I am not inclined to agree with that opinion, when the board finds that from mental peculiarities or temperament the candidate's moral sense of the obligations of law is so obtunded as to render him unfit for promotion. This seems to be setting up the doctrine of moral insanity, which, as I understand it, the courts have refused to accept as a defense to a criminal charge. \* \* \* Now if it be true that in cases of this character the burden of proof is upon a candidate to establish his mental and moral fitness, and if, in this particular case, moral unfitness has been established, then it seems to me that the burden is also upon the candidate to establish that his moral unfitness is not the result of his own misconduct. Can one be morally unfit to perform the duties of an officer and yet not be responsible for such moral unfitness? If a court of law in a criminal case would be bound to hold that he is responsible for any conduct arising from such moral obliquity, could it be contended that he is not responsible for the state of moral obliquity into which he has fallen? I fail to see how such a conclusion could be reached and therefore have to recommend that as the candidate has been shown to be morally unfit for promotion he ought to be dismissed under the law of 1882. The precedent cited by the Judge Advocate General seems to be nearly in point. Without undertaking, however, to distinguish between this case and that, it seems to me sufficient to say that such a precedent, if it has been established, ought not to be followed. It is certainly contrary to the spirit of the law of 1882, as well as to what seems to be sound policy, to lay down as a rule that an officer who is morally unfit for promotion is nevertheless entitled to be paid by the Government as an officer of the Navy

during the remainder of his natural life. From my reading of the two statutes on this subject of retirement, above cited, I am of opinion that the theory upon which Congress legislated was that officers who, without fault of their own, were found unfit to continue in active service ought to be provided for by the Government which they faithfully served up to the time of their retirement. I cannot believe that Congress ever intended to continue in the pay of the Government those who are shown to be morally unfit to serve that Government. There is no principle of public policy that could justify such legislation, and I submit the wording of the statute does not warrant the conclusion that Congress ever intended any such result."

The President's action in the above case, September 25, 1893, was as follows: "The record, proceedings, and findings of the examining board in the case of Pay Inspector John H. Stevenson, a candidate for promotion, are hereby approved and the said John H. Stevenson is ordered to be placed upon the retired list pursuant to the provisions of section 1447 of the Revised Statutes. The retirement of this applicant for promotion is based upon the peculiar findings of the examining board and the exceptional circumstances surrounding the case. The determination reached must not be regarded as a precedent for any similar case that may hereafter arise."

Compare cases noted under section 1456, Revised Statutes; see also note to section 1448, Revised Statutes.

**Sec. 1448. [Retiring board.]** Whenever any officer, on being ordered to perform the duties appropriate to his commission, reports himself unable to comply with such order, or whenever, in the judgment of the President, an officer is incapacitated to perform the duties of his office, the President, at his discretion, may direct the Secretary of the Navy to refer the case of such officer to a board of not more than nine nor less than five commissioned officers, two-fifths of whom shall be members of the Medical Corps of the Navy. Said board, except the officers taken from the Medical Corps, shall be composed, as far as may be, of seniors in rank to the officer whose disability is inquired of.—(3 Aug., 1861, c. 42, s. 23, v. 12, p. 291.)

Acting assistant surgeons not eligible for retirement under the provisions of this section. (See note to sec. 1411, R. S.)

For citation of laws relating to retirement of specific classes of officers, see notes to sections 1443 and 1445, Revised Statutes; and see note below, "Retirement of warrant officers."

Officers not to be retired without hearing before retiring board, except in certain cases. (See sec. 1455, R. S.)

Officers not to be retired for misconduct. (See sec. 1456, R. S.)

Secretary of the Navy may empower commanding officers on foreign stations to convene retiring boards. (Act Mar. 4, 1917, 39 Stat., 1171.)

**"Physical incapacity" is defined** as a condition, bodily or mental, which unfits at present, or is likely to unfit in the near future, the officer for the performance of his duties. (21 Op. Atty. Gen., 387, quoting Circular, War Department, Dec. 18, 1890, relating to examinations for promotion; see also sec. 1445, R. S., relating to retirement for "physical or mental" disability.)

An officer is **"permanently incapacitated"** when his disability appears to be chronic or of indefinite future duration; his disability is designated as "permanent," just as an innkeeper distinguishes between "permanent" from the transients among his guests. (21 Op. Atty. Gen., 286.)

Officer must be altogether incapable of performing his duties, and not merely incapable of performing them well.—The incapacity to discharge his duties contemplated by the statute [Army retirement law] is not an

incapacity to discharge them as well as they ought, theoretically, to be discharged or as well as they are discharged by officers generally of the same rank and intrusted with similar duties. The law does not say that he must be incapable of performing his duties well but that he must be incapable of performing them at all, or in other words, he must be unable to so perform them as to reasonably fulfill the purpose of his employment. (27 Op. Atty. Gen., 14.)

**Peculiar mental temperament sufficient basis for retirement.**—An officer of the Navy was retired by the President upon the following finding of a retiring board:

"1st. That in their judgment the physical condition of Paymaster Robert Burton Rodney is good, but that his peculiar mental temperament incapacitates him from active service in the Navy of the United States.

"2d. That said temperament of Paymaster Rodney, according to the evidence laid before the board, develops itself in an entire disregard of the laws, regulations, customs, and proprieties of the service, and has been manifested persistently while said Rodney was attached to the North Atlantic Fleet, in language and conduct to the subversion of good order and discipline, and proceeds, in the opinion of the board, in part from fanaticism and in part from the groundless belief that he is a victim of persecution.

"In the judgment of the board, the incapacity of Paymaster Robert Burton Rodney results neither from long and faithful service, from wounds or injury received in the line of duty, from sickness or exposure, or from any other incident of service.



"The board are impressed with the belief that the tendency to misconduct under which Mr. Rodney labors will be revived whenever his association with the Navy shall be renewed.

"The board are unable to trace the mental incompetency of Paymaster Rodney to any special cause, but believe it to be inherent, and therefore can only recommend that he be removed from the active list of officers of the Navy."

The sole objection urged by Paymaster Rodney against the validity of his retirement upon the above finding is that it was in violation of the sixth section of the act of July 15, 1870, chapter 295 [section 1456, Revised Statutes], which forbids the retirement of an officer "because of misconduct."

The above finding of the board does not ground the incapacity for active service upon misconduct, but upon the peculiarity of his mental temperament. His language and conduct, etc., appear to be assigned only as facts and circumstances indicative of mental condition. The circumstances alluded to are apparently set forth by the board only as outward manifestations of such temperament. This peculiarity of temperament is described in the last paragraph of the finding as "mental incompetency."

The President having concurred in the finding of the board and thereupon directed the retirement of Paymaster Rodney from active service, the latter must be deemed to have been placed on the retired list, not because of misconduct, but because of incapacity for active service arising from the peculiarity of his mental temperament or inherent mental incompetency, as found by the board.

The act of August 3, 1861, section 23, chapter 42 [now embodied in section 1448, Revised Statutes], provides that whenever in the judgment of the President an officer of the Navy shall be "in any way," incapacitated from performing the duties of his office, etc. The officer's retirement was, upon the facts stated, validly made under this section. (15 Op. Atty. Gen., 446.)

An officer of the Navy having been retired for a peculiar mental temperament which incapacitated him for properly performing duties on the active list, the findings of the retiring board are not subject to review by the accounting officers, and his retirement was authorized by law. (Dig. Comp. Dec., 493.)

Compare note to section 1447, Revised Statutes, "Retirement of officer found not morally qualified for promotion."

**Temperamental unfitness must amount to actual incapacity or retirement not authorized.**—The retirement laws, while making no attempt to fix a standard of official usefulness, sound judgment, discretion, or good sense, good habits, agreeableness, good manners, self-control, or courtesy, make one criterion, and one only, for the compulsory retirement of an officer, namely, that he has become incapable of performing the duties of his office. All other subjects of criticism in an officer must be either dealt with in a disciplinary way, or borne with as unfortunate incidents of the service due to imperfect human

nature. (27 Op. Atty. Gen., 162, affirming 27 Op. Atty. Gen., 14.)

Retiring boards have nothing to do with such considerations as that the officer would, by seniority, soon become due for promotion, which would place him in a position where his infirmities of temper, disposition, and otherwise, would be of great detriment to the service. Objections to the promotion of an officer constitute no ground for retiring him from the office he now holds, unless resulting in the incapacity contemplated by the law. (27 Op. Atty. Gen., 162, affirming 27 Op. Atty. Gen., 14; compare sec. 1447, R. S.)

Question presented whether an officer of the Army may be retired when found by retiring board to be "permanently incapable of performing the duties of his office, such incapacity being temperamental in character, and the result of the operation of \* \* \* mental bias or oversensitiveness of such degree and character as to render an officer incompetent to exercise sound judgment or discretion, and as to create a marked tendency toward unjustifiably questioning the justice or motives of the acts of his superior officers touching himself personally, sometimes carried to an extent bordering on chronic insubordination; marked lack of capacity to entertain sound views as to his relations and obligations to other persons in the military service, resulting in a quarrelsome, hypercritical, and querulous disposition." *Held*, that an important distinction must be observed between actual incapacity and the cause or causes which produced it. No officer can be compulsorily retired under these sections [1245-1252, R. S., relating to the Army] because of any or all of the infirmities, peculiarities, or characteristics mentioned. He may have all of these and yet be capable of performing his official duties if he desires to do so; and the law has not said that he may be retired for any of these. But if from these or from any other causes, he has become incapable of performing the duties of his office, he may be retired for that, but not for the causes which produced the incapacity. (27 Op. Atty. Gen., 162.)

An officer of the Army was found by a retiring board to be "incapable of performing the duties of his office," such incapacity being the result of "infirmity of temper, of a gradual but serious loss of self-control, of impatience or irritability while exercising the functions of his office and in dealing with the officers and enlisted men in his command, of physical or mental deterioration due to indolence, excesses in eating and drinking, to impairment of vigor, or to indecision and want of alertness in the performance of the duties with which he is habitually charged by law and regulations." *Held*, that a person having the infirmities of temper and the mental and bodily characteristics described, might readily be a very undesirable superior, colleague, or subordinate, and might severely tax the patience of other members of the service necessarily brought into contact with him in the discharge of their military duties, but it would not follow from these facts that he was incapable of discharging his duties. A more reasonable inference would be, perhaps, that

he was unwilling to discharge them properly, and therefore that he was a suitable subject for the appropriate military discipline. Of course, if a process of mental deterioration, due to the causes above-mentioned, had culminated in a mild form of insanity or if excessive self-indulgence and disregard of the laws of health have produced such maladies as make it impossible for the officer properly to discharge his duties, the incapacity justifying his retirement would exist and the causes leading to such incapacity would be immaterial [compare, section 1456, Revised Statutes]; but except in so extreme a case, the officer might have all the infirmities and undesirable habits mentioned, and yet not be incapable of discharging his duties in the sense contemplated by the law as justifying his retirement. (27 Op. Atty. Gen., 17.)

An officer of the Marine Corps was found "incapacitated for active service by reason of excessive nervous irritability, and that his incapacity is the result of an incident of the service." The finding of the board was disapproved by the President, upon recommendation of the Secretary of the Navy, who stated: "The report of the board does not show a finding of insanity or even of neurasthenia, but refers to this officer as incapacitated by reason of 'excessive nervous irritability.' There is no evidence in the record of any specific injury. The department considers that the retirement of so young an officer in the line of duty for the reason given by the board in this case would be an abuse of the liberal retirement privileges which Congress intended primarily for those either injured in the line of duty or who, by reason of long and faithful service, are entitled to especial consideration." (File 26253-256, Jan. 9, 1913. As to retirement of Marine officers, see sec. 1622, R. S.)

**Actual incapacity only test; cause not important except incidentally.**—The grounds for compulsory retirement should be confined to cases of actual inability to perform the duties of the office, no matter what the cause of the inability. (27 Op. Atty. Gen., 162.)

It is with the actual incapacity of the officer that these sections [1245-1252, Revised Statutes, relating to Army] deal, and not with its cause or causes, except in determining what shall be done in case the officer is found incapacitated. (27 Op. Atty. Gen., 162.)

An officer, found by a retiring board duly organized and convened to be "incapable of performing the duties of his office," may be and ought to be retired in accordance with the provisions of sections 1245-1252, Revised Statutes, without regard to the causes which may have led to such incapacity on his part; but to be "incapable" in the language of the law he must be either no longer responsible for his own actions or subject to infirmities or disabilities which make the reasonable fulfillment of his military duties impossible for him, notwithstanding an earnest desire and firm purpose on his part to fully discharge them. (27 Op. Atty. Gen., 14.)

An officer of the Army could not be legally retired under the provisions of law because he frequently or even habitually became intoxicated, although such intoxication might, while it lasted, incapacitate him to discharge his

duties; instead, he would be properly subject to the punishment prescribed by military law as administered by courts-martial. If, however, as a result of such excess, his bodily and mental faculties had become seriously and permanently impaired, then, even if the habits of intemperance had ceased, he would be properly subject to retirement under the provisions of section 1252, Revised Statutes. (27 Op. Atty. Gen., 14.)

It has been held by the War Department that an officer may legally be retired by reason of an incapacity resulting from habitual drunkenness; that the law contemplated an existing and not a purely prospective and contingent incapacity; and that an inquiry into an officer's general efficiency could be pertinent only in so far as it could be regarded as going to show that his inefficiency, if found, was the result of an impairment of health; that the cause of incapacity intended in section 1249, Revised Statutes, was a physical cause, that moral obliquity was not had in view, and that the matter of financial integrity of the officer was beyond the jurisdiction of the board; accordingly, that the board was not authorized to recommend the retirement of an officer because he did not pay his debts; and that the inability of a disbursing officer to furnish a bond when duly required to do so was not sufficient ground for his retirement. These opinions of the War Department are consistent with the principles which must determine when an officer is incapable of performing the duties of his office within the meaning of the retiring law. (27 Op. Atty. Gen., 14.)

**Composition of board.**—The intent of the act is to cause disabled officers to be retired by a board composed of commissioned officers of their own branch of the service. The clause which requires that the board, except those taken from the medical staff, shall be composed as far as may be, of officers "senior in rank" to the officer whose disability is to be tried, implies that the board is to consist of commissioned officers in his own line of service; for an officer of one branch of service can not with accuracy be called senior in rank to an officer of another branch. A major in the Army is no more senior to a captain of Marines than he is to a captain in the Navy. The term in its military sense is applicable only to relatively higher grades of the same service, and its use otherwise would create confusion. (10 Op. Atty. Gen., 116, holding that the act of Aug. 3, 1861, sec. 17, chap. 42, does not authorize the Secretary of War or the Secretary of the Navy to assemble a mixed board of Army and Marine officers for inquiry into the cases of disabled officers of the Army and of the Marine Corps; that the Marine Corps is at all times subject to the laws and regulations established for the better government of the Navy, except when detached for service with the Army; and, accordingly, that the medical officers of any board assembled by the Secretary of the Navy to inquire into the cases of disabled Marine officers must be taken from the surgeons of the Navy. See sec. 1623, R. S., as to composition of retiring boards for Marine officers; and see in this connection *Brown v. U. S.*, 41 Ct. Cls., 275, affirmed 206 U. S., 240.)



**Officer to be ordered before retiring board immediately upon development of incapacity.**—"When any officer on the active list becomes physically incapacitated to perform the duties of his office, and the probable future duration of such incapacity is permanent or indefinite, he will immediately be ordered before a retiring board, and, pending final action upon the question of his retirement, will not be examined for promotion. The foregoing shall not apply to the case of an officer whose physical incapacity develops after he has become due for promotion, and who may, under such circumstances, be examined physically by a board of medical examiners before being ordered before a retiring board." (Naval Courts and Boards, 1917, sec. 679, superseding Art. R-331 (5), Navy Regs., 1913, C. N. R. 7, Sept. 15, 1916.)

**Physical examination for promotion not sufficient for retirement.**—An officer of the Army was examined for promotion and found incapacitated for active service on account of certain physical disabilities; this finding was approved by the Surgeon General and by the Major General Commanding the Army, and by the Acting Secretary of War. The officer was thereupon notified that he would be retired at the proper time, and was granted sick leave of absence until further orders. Thereafter he applied for reexamination, and the action of the Acting Secretary of War approving the finding of the examining board was canceled by the Secretary of War. It was contended that the examination when approved by the Acting Secretary of War became final and conclusive, and that no power or authority existed in the Secretary of War to direct or permit a reexamination, as the act of October 1, 1890 (26 Stat., 562), provides with reference to the examination of Army officers for promotion "that should an officer fail in his physical examination and be found incapacitated for service by reason of physical disability contracted in line of duty, *he shall be retired with the rank to which his seniority entitled him to be promoted.*" *Held*, this act was not intended to provide for the retirement of officers from the Army, but merely to fix the rank of officers and regulate promotions. The phrase italicized plainly is not a mandatory provision for the retirement of the disabled officer, but for the purpose of fixing the rank with which he should be retired. (21 Op. Atty. Gen., 385.)

Under the laws [sections 1250, 1251] regulating retirements in the Army, no officer can be retired from the Army upon the report of any board, even if such report be approved by the Secretary of War, except it "is approved by the President." (21 Op. Atty. Gen., 385.)

It is true that the physical examination of an officer who is under examination for promotion may be the same in its character and extent as the physical examination of an officer who is under examination for retirement. Nevertheless, a board constituted as a board of examination for promotion can not be invested with the power of a retiring board, which the law requires to be differently constituted. (21 Op. Atty. Gen., 385.)

The physical examination to which the officer was subjected in the above-mentioned

case was not such an examination as required by law for the retirement of an officer from active service; and he may be allowed a re-examination by the Secretary of War. (21 Op. Atty. Gen., 385.)

The officer was notified that he would be retired at the proper time; but he could not be retired without the approval of the President; and even if the action of the examining board were to be regarded and treated as that of a retiring board, still it would be inoperative to effect his retirement until approved by the President. (21 Op. Atty. Gen., 385.)

The Attorney General's opinion (21 Op. Atty. Gen., 385) applies with equal force to the provisions in the act of March 4, 1911 (36 Stat., 1267,) with reference to rank on retirement of officers of the Navy who fail physically for promotion. Accordingly, in such case, the officer should be ordered before a naval retiring board and to transfer him to the retired list without such further examination would be without authority of law. (File 26260-1732:1, Apr. 25, 1912.) The clause in the Navy law of March 4, 1911, is substantially the same as the provision in the Army act of October 1, 1890 (26 Stat., 562), and should be construed in connection with the precedents established in the Army during the twenty years that its statute was in force prior to the enactment of similar legislation for the Navy. (File 26253-200:1, Feb. 17, 1912.)

Under the act of October 1, 1890 (26 Stat., 562, sec. 3), providing that an Army officer who fails in his physical examination for promotion by reason of disability contracted in line of duty "shall be retired with the rank to which his seniority entitled him to be promoted," *held* that an Army officer who was not examined for promotion but was found by a retiring board incapacitated in line of duty, which finding was approved by the President, was entitled to the retired pay of the next higher rank, although the War Department refused to recognize him as holding that rank. "It seems to the court that the finding of the retiring board is the necessary equivalent of the only finding that could have been made by the board for promotion." (*Cloud v. U. S.*, 43 Ct. Cls., 69.)

An officer was found mentally but not physically, morally, or professionally qualified for promotion. The President's action, June 21, 1894, was as follows: "The findings of the boards in this case are disapproved, except the report and findings of the board of medical examiners dated April 2, 1894, which are hereby approved, and it appearing that the disability of Lieutenant Frank W. Nichols is due to sickness incurred in the line of duty, he is retired with seventy-five per cent of the sea pay of the rank now held by him." (But see note to sec. 1447, R. S., "Pay of officer retired because not recommended for promotion.")

Compare cases noted under section 1447, Revised Statutes.

**Irregularity in proceedings.**—After a retired naval officer has, during the remainder of his life, acquiesced in the proceedings of the retiring board, it does not lie with his administratrix to object to them for a mere irregularity. (*Brown v. U. S.*, 113 U. S., 568.)

The action of a board organized under the act of 1861 can only be valid as it accords with the law of its creation. From that law alone it must draw the breath of life. If, therefore, it is constituted without the direct authority of that law or in violation of its provisions the validity of its action would be open to very serious future question. (10 Op. Atty. Gen., 116.)

See also *Thompson v. U. S.* (18 Ct. Cls., 604, 611), noted under section 1447, Revised Statutes.

**Retirement for disability a "benefit" to officers.**—The act of June 24, 1910 (36 Stat., 606), provided that "all paymasters' clerks shall, while holding appointment in accordance with law, receive the same pay and allowances and have the same rights of retirement as warrant officers of like length of service in the Navy." If a paymaster's clerk is subject to retirement for physical disability it must be because this provision has so extended section 1453, Revised Statutes, as to make it applicable to paymasters' clerks. *Held* that retirement for physical disability is one of the "rights" of retirement extended to paymasters' clerks by this statute and accordingly that a paymaster's clerk is entitled to be retired under the provisions of section 1453, Revised Statutes (28 Op. Atty. Gen., 417.)

It can not correctly be said that section 1453 provides for a *compulsory* retirement and therefore is not extended to paymasters' clerks under the provisions giving them the "rights" of retirement possessed by warrant officers. It is both the right and the peremptory duty of the Government to retire an officer under the conditions mentioned in section 1453. On the other hand, it is the right of the officer to be retired under the same conditions. Whether retirement may be beneficial to him or not has nothing to do with his right of retirement and can only influence his determination as to whether or not he will enforce his right should the Government refuse or fail to carry out the mandate of the law. (28 Op. Atty. Gen., 417.)

It is conceded that section 1453, Revised Statutes, would be very beneficial to paymasters' clerks, much more so, in fact, than to warrant officers, because, if incapacitated for service, their appointments may be revoked and they be dismissed from the service, which can not be done with a warrant officer. That such course would be pursued goes without saying, as the Navy Department can not rely upon the labor of those who are wholly incapacitated for service. Therefore the protection and benefit of section 1453 ought to be extended to these diseased and helpless officials if any reasonable interpretation of the act of June 24, 1910, will permit this to be done. (28 Op. Atty. Gen., 417.)

That retirement for disability under this section is "compulsory," see 27 Op. Atty. Gen., 162, 164, 166.

As to retirement of pay clerks in the Navy, see act of March 3, 1915 (38 Stat., 942); and see note to section 1386, Revised Statutes.

**Retirement of warrant officers.**—A warrant officer was retired on furlough pay, for disability not incident to the service (see sec. 1454, R. S.); he acquiesced in such retirement, and drew retired pay thereunder until his death. Thereafter his widow brought suit against the United States to recover the difference between retired pay and active-duty pay on the ground that his retirement was illegal, there being no law providing for the retirement of warrant officers on account of physical disability, and the act of August 3, 1861, section 23 (12 Stat., 291) [now embodied in section 1448, Revised Statutes], being claimed to apply only to commissioned officers. "It must be conceded that were the question a new one, the true construction of the section would be open to doubt. But the findings of the Court of Claims show that soon after the enactment of the act the President and the Navy Department construed the section to include warrant as well as commissioned officers and they have since that time uniformly adhered to that construction, and that under its provisions large numbers of warrant officers have been retired. This contemporaneous and uniform interpretation is entitled to weight in the construction of the law and in a case of doubt ought to turn the scale" (citing *Edwards v. Darby*, 12 Wheat., 206; *Atkins v. Disintegrating Co.*, 18 Wall., 272, 301; *Smythe v. Fiske*, 23 Wall., 374, 382; *U. S. v. Pugh*, 99 U. S., 265; *U. S. v. Moore*, 95 U. S., 760, 763; *U. S. v. State Bank of North Carolina*, 6 Pet., 29; *U. S. v. Alexander*, 12 Wall., 177; *Peabody v. Stark*, 16 Wall., 240; and *Hahn v. U. S.*, 107 U. S., 402). "These authorities justify us in adhering to the construction of the law under consideration adopted by the executive department of the Government, and are conclusive against the contention of appellant, that section 23 of the act of August 3, 1861, did not apply to warrant officers." (*Brown v. U. S.*, 113 U. S., 568, affirming 18 Ct. Cls., 537.)

**Paymasters' clerks**, in reference to retirement are placed in precisely the same condition by the act of June 24, 1910 (36 Stat., 606), as warrant officers, and are entitled to be retired under the provisions of section 1453, Revised Statutes. (28 Op. Atty. Gen., 417. See above, "Retirement for disability a 'benefit' to officers." Pay clerks are now warrant officers in the Navy by the terms of act Mar. 3, 1915, 38 Stat., 942.)

**Dental surgeons, probationary.**—The provisions of this section have been administratively applied to a dental surgeon appointed by the President with the advice and consent of the Senate, under the act of August 29, 1916 (39 Stat., 573), while serving his probationary period of two years as required by said act, which further provided that such appointments "may be revoked at any time during the probationary period by the President." (See file 26253-550, Feb. 18, 1918; see also note to sec. 1454, R. S.)

**Acting chaplains** who fail physically upon examination for appointment as chaplains are not eligible for retirement. (File 15721-22:1, Mar. 8, 1922.)



**Sec. 1449. [Powers and duties of retiring board.]** Said retiring-board shall be authorized to inquire into and determine the facts touching the nature and occasion of the disability of any such officer, and shall have such powers of a court-martial and of a court of inquiry as may be necessary.—(3 Aug., 1861, c. 42, s. 17, v. 12, p. 290.)

Courts-martial have power to administer oaths to witnesses (sec. 1624, R. S., art. 41), to imprison witnesses for contempts (sec. 1624, R. S., art. 42), to compel attendance of civilian witnesses (act Feb. 16, 1909, sec. 11, 35 Stat., 621), to institute proceedings in civil courts against witnesses who refuse to appear or testify (act Feb. 16, 1909, sec. 12, 35 Stat., 622), and to receive depositions in evidence (act Feb. 16, 1909, sec. 16, 35 Stat., 622).

"Courts of inquiry shall have power to summon witnesses, administer oaths, and punish contempts, in the same manner as courts-martial." (Sec. 1624, R. S., art. 57.)

In trials by court-martial and proceedings before courts of inquiry, the accused or person charged "shall, at his own request but not otherwise, be a competent witness." (Act Mar. 16, 1878, 20 Stat., 30; Naval Courts and Boards, 1917, sec. 512.)

It is provided by statute with reference to naval general courts-martial and courts of inquiry, "that no witness shall be compelled to incriminate himself or to answer any question which may tend to incriminate or degrade him." (Act Feb. 16, 1909, sec. 12, 35 Stat., 622. See note to Constitution, fifth amendment, under "III. Compelling person to be witness against himself.")

**Sec. 1450. [Oath of members, retiring board.]** The members of said board shall be sworn in each case to discharge their duties honestly and impartially.—(3 Aug., 1861, c. 42, s. 23, v. 12, p. 291.)

On general subject of persons in the Navy authorized to administer oaths, see section 183, Revised Statutes, and note thereto.

**Sec. 1451. [Findings of retiring board, cause of incapacity.]** When said retiring-board finds an officer incapacitated for active service, it shall also find and report the cause which, in its judgment, produced his incapacity, and whether such cause is an incident of the service.—(3 Aug., 1861, c. 42, s. 23, v. 12, p. 291.)

**Incident of service.**—Section 1249, Revised Statutes, relating to the Army, is similar to the above section, requiring Army retiring boards to report whether the cause of disability is "an incident of service." Similar provisions are also contained in the act of April 12, 1902, section 5 (32 Stat., 100), relating to retirement of officers in the Revenue Cutter Service (now Coast Guard.)

**Line of duty.**—Section 1494, Revised Statutes, provides for the promotion of an officer failing physically upon examination for promotion, where such physical disqualification was occasioned by wounds received "in the line of his duty," and does not incapacitate him for other than sea duty. The act March 4, 1911 (36 Stat., 1267), provides for the rank on retirement of an officer who fails upon examination for promotion by reason of physical disability contracted "in the line of duty." The act of May 22, 1917, section 9 (40 Stat., 86), provides for retirement of officers of Navy and Marine Corps, temporarily appointed or promoted, for physical disability incurred "in line of duty." The act of June 4, 1920 (41 Stat., 834), provides for retirement of officers of the Naval Reserve Force and temporary officers of the Navy for disability incurred "in line of duty." Section 1588, Revised Statutes, provides for

the pay of officers retired on account of incapacity resulting from wounds or injuries received "in the line of duty," or from sickness or exposure "therein." The pension laws provide for payment of pension in cases of disability, by reason of any wound or injury received, or disease contracted, while in the service of the United States and "in the line of duty" (sec. 4693, R. S.; see also secs. 4697, 4698, R. S.; act July 14, 1892, 27 Stat., 149; act Apr. 8, 1904, 33 Stat., 163, etc.) The War Risk Insurance Act of October 6, 1917, section 300 (40 Stat., 405), as amended by act of June 25, 1918 (40 Stat., 609), provides compensation for death or disability "Resulting from personal injury suffered or disease contracted 'in the line of duty \* \* \* but no compensation shall be paid if the injury or disease has been caused by his own willful misconduct." Section 1754, Revised Statutes, prefers for civil appointment persons disabled in the military or naval service "in the line of duty."

**Not misconduct.**—Act of May 13, 1908 (35 Stat., 128), provided for payment of gratuity to dependents, upon death of any officer or enlisted man on the active list of the Navy or Marine Corps, from wounds or disease contracted "in line of duty." This was amended by act of August 22, 1912 (37 Stat.,

329), providing for payment of gratuity where the death was from wounds or disease "not the result of his own misconduct." (The act last cited was repealed by act Oct. 6, 1917, sec. 312, 40 Stat., 408, and reenacted with amendments by act of June 4, 1920, 41 Stat., 824). The act of August 29, 1916, as amended by act of July 1, 1918, provided for withholding pay in cases of officers or enlisted men absent from duty, because of injury, sickness or disease resulting from "misconduct." (39 Stat., 580; 40 Stat., 717.) Section 1456, Revised Statutes, prohibits the retirement of officers "because of misconduct." The act of August 5, 1882 (22 Stat., 286), prohibits retirement of officers unfit for sea duty by reason of drunkenness, or from any cause arising from "his own misconduct." Sections 4756 and 4757, Revised Statutes, provide for payment from Navy pension fund to persons discharged from the Navy other than for "misconduct."

**Failure of board to report cause of incapacity.**—The report of the board that there was no evidence that the officer's incapacity was the result of any incident of the service, "is to all intents and purposes a report that the incapacity was not the result of an incident of the service, and justifies an order retiring the officer on furlough pay." (*Brown v. U. S.*, 113 U. S., 568, 573.)

**Effect of officer's acquiescence in irregularity of board's proceedings.**—"If there had been any irregularity or defect in the report of the board, it was the duty of Brown to object to it without unreasonable delay. After his acquiescence in the proceedings during the remainder of his life, it does not lie with his administratrix to object to them, even for a substantial defect, much less for such an irregularity, if it be an irregularity, as is set up in this case. Our opinion is, therefore, that the order of the President retiring Brown was authorized by law, and was regular and valid." (*Brown v. U. S.*, 113 U. S., 568, 573.)

**Surplusage in board's finding is of no legal effect.**—Section 3 of the act of February 21, 1861, provided for the retirement of medical officers "permanently incapable, from physical or mental infirmity, of further service at sea," to receive "leave of absence pay." A medical officer was retired in 1861 under said law for disability which "did not occur in the line of his duty." Under the provisions of this law, it was immaterial whether the infirmity of the officer originated in line of duty or not. Hence, in so far as the cause for retirement thereunder is concerned, the statement of the board of 1861 that it did not occur in the line of duty, must be deemed to be mere surplusage. An allegation of error in such statement, therefore, furnished no ground for reexamination of his case, if indeed a reexamination could have been had on any ground after his retirement. (17 Op. Atty. Gen., 178.)

The act of March 3, 1873 (sec. 1588, R. S.), provided 75 per cent of sea pay for officers retired for disability incurred in the line of duty. In 1873 the officer mentioned in the preceding paragraph made application for a further ex-

amination of his case, based on new evidence tending to show, as he alleged, that the opinion of the board as to the cause of his disability was erroneous. Thereupon the Secretary of the Navy ordered a new board, which found that his disability "had its origin in the line of duty." This finding was, on January 1, 1879, approved by the Secretary of the Navy. *Held*, that the Secretary of the Navy was not authorized by law to submit the case of this officer to a medical board for reexamination as to the origin of the disability for which he was retired, and that the Secretary's decision based on the report of that board is without any legal effect as regards the cause for retirement in the case of said officer or his right to pay. (17 Op. Atty. Gen., 178.)

By act of August 3, 1861, Congress made new and enlarged provisions for the retirement of naval officers, both of the line and staff. These provisions superseded all others previously in force, but had no application to officers already retired under former laws. This statute divided the causes for retirement into two classes. The provisions of the act of August 3, 1861, are reproduced in sections 1448-1455, Revised Statutes. The retiring board under this latter law was authorized to inquire into the disability only of officers of the active list. There is no provision authorizing the case of an officer retired under the act of February 21, 1861, to be investigated by a board with a view to determining the cause of his retirement. A reinvestigation of such case without authority of Congress could not be made the basis of any change in regard to the cause of the officer's retirement, nor confer upon him any rights to which he would not otherwise be entitled. (17 Op. Atty. Gen., 178.)

The acts of July 15, 1870, and March 3, 1873 (sec. 1588, R. S.), provided 75 per cent of sea pay for certain classes of retired officers, and provided that "the pay of all other officers on the retired list" shall be one-half sea pay. This latter phrase is broad enough to include officers retired under the act of February 21, 1861. (17 Op. Atty. Gen., 178.)

**Finding made under a misconstruction of the law.**—An opinion and recommendation of an examining board made under a misconstruction of the law can not control distinct statutory provisions, and accordingly the retirement of an officer in accordance with such erroneous finding may be corrected by the President. (17 Op. Atty. Gen., 7.)

**Reconsideration of finding by board of its own initiative.**—Where a naval retiring board convened to inquire into the nature and cause of the disability of an officer has once finished its work, rendered a complete judgment in the case, and adjourned, a subsequent reconsideration of its judgment by the board, unless authorized or directed by proper authority, can have no legal effect. Accordingly, upon examination of the record of the proceedings before a naval retiring board in the case of Paymaster Rodney, *held*, that the paper attached to the record, called a reconsideration of the finding of the board, was without legal effect, and that the officer was properly retired under the original finding of the board on furlough pay. (16 Op. Atty. Gen., 104.)



**Findings not subject to review by accounting officers.**—An officer of the Navy having been retired for a peculiar mental temperament which incapacitated him for properly performing duties on the active list, the findings of the retiring board are not subject to review by the accounting officers, and his retirement was authorized by law. (Dig. Comp. Dec., 493.)

**"INCIDENT OF THE SERVICE" AND "LINE OF DUTY" COMPARED.**

**"Incident of the service" synonymous with "line of duty."**—[It will be noted from the laws cited above that while section 1451, Revised Statutes, requires retiring boards to report whether an officer's incapacity resulted from "an incident of the service," section 1588, Revised Statutes, in prescribing the rate of retired pay speaks of officers retired for disabilities incurred "in the line of duty," the act of March 4, 1911, provides increased rank for officers retired in certain cases by reason of disability contracted "in the line of duty," and the act of May 22, 1917, speaks of retirement of officers for physical disability incurred "in line of duty." These statutes obviously use the words "incident of the service," and "line of duty," as synonymous terms. That they have been so regarded in the past is shown by records of naval retiring boards which have frequently reported the disability of officers as having been incurred in the "line of duty" instead of using the statutory phrase, "incident of the service." In the decisions of the courts and law officers of the Government such reports of retiring boards have been accepted without questioning their compliance with the statute. For example, in the case of *Burchard v. United States* (19 Ct. Cls., 137; 125 U. S., 176) the retiring board reported the officer "incapacitated for duty by disability which did not originate in the line of duty," which report was approved by the President and held by the courts not subject to be changed either by the Secretary of the Navy, by the President, or by Congress, although the question of terminology was not considered. Similarly, in the case of *Potts v. United States* (125 U. S., 176), the board reported that the incapacity of the officer did not "originate in the line of duty," and it was held by the courts that this report, having been duly approved, could not afterwards be changed to make the cause of the officer's retirement "the result of an incident of the service." To the same effect, see 27 Op. Atty. Gen., 221. So also, in the case of *Morse v. United States* (229 U. S., 208), the report of the board was that the incapacity did not originate "in the line of duty"; see also, 15 Comp. Dec., 534. These and many other cases show that in practice the terms "incident of the service" and "line of duty," have been used interchangeably by naval retiring boards, as well as by Congress, although at the present time these boards in their reports are required to conform to the statutory language in cases under this section, and report whether or not the disability is caused by "an incident of the service." (See Naval Courts and Boards, 1917, p. 461.) However, the same publication (p. 316) states that

the phrase "line of duty" should be construed as having the same meaning with "incident of the service." In the Army the decision upon this point is as follows: "The phrases 'in line of duty' and 'incident of the service,' while not synonymous, are not widely separate in meaning. Held, that the efficient execution of a statute involving the one would give reasonable operation to the other. In other words, the several 'incidents' which go to make up the daily or yearly routine of military service constitute, when added together, the 'line of duty' which is contemplated in the pension laws, and no public interest will suffer if either understanding be applied by a retiring board in the determination of a particular case." (Army Dig., 1912, p. 986 c.) Definitions and illustrations of "line of duty" would in view of the above seem equally applicable to "incident of the service" under this section.]

**"LINE OF DUTY" DEFINED.**

**Intention of Congress.**—The question of what constitutes "line of duty" within the meaning of the pension laws was exhaustively considered and authoritatively construed by Attorney General Cushing in 1855 (7 Op. Atty. Gen., 149, noted below). The fact that after this construction Congress has retained this expression for more than forty years, although it has repeatedly revised and amended the pension laws, amounts to a demonstration that Mr. Cushing properly interpreted its meaning. (*Rhodes v. U. S.*, 79 Fed. Rep., 740.)

The phrase, "in the line of duty," has been uniformly used in the statutes from 1799 to the present time in defining the right to pensions. It received elaborate discussion from Mr. Attorney General Cushing in 1855 (7 Op. Atty. Gen., 149), and as Congress, since the publication of that opinion, has not seen proper to substitute any other expression, we are justified in concluding that it stands in the statutes invested with the meaning expressed by Mr. Cushing. (17 Op. Atty. Gen., 172.)

[The opinion of Attorney General Cushing was adopted by the Navy Department, and his definition of "line of duty" was published, July 10, 1914, in a circular of changes and corrections in "Forms of Procedure for Courts and Boards in the Navy and Marine Corps, 1910," pages 224 and 225. (See also, Naval Courts and Boards, 1917, and see file 26250-1372, Mar. 3, 1919 and file 26250-1491:1 Oct. 29, 1918.) It was approved by the Circuit Court of Appeals in the case of *Rhodes v. United States* and 17 Op. Atty. Gen., 172, both above noted. However, it was departed from by the Court of Claims in *Moore v. United States*, 48 Ct. Cls., 110 (noted below), in which case, however, the Court of Claims did not discuss or cite the Attorney General's opinions, nor the decision of the United States Circuit Court of Appeals in the *Rhodes* case, above noted. The opinion of Attorney General Cushing is also modified by opinions of Attorney General Palmer, August 21, 1919, and June 2, 1920 (32 Op. Atty. Gen. 12, 193), both noted below. "Both the Circuit Court of Appeals and the Court of Claims have jurisdiction, in proper cases, to decide the question. I can not say

that the decision of either is binding on the other. In so far as they are in accord, I would, in the absence of a ruling by the Supreme Court, feel bound to accept their decision. In so far as either has made a decision on a point not considered by the other, and not in necessary conflict with its rulings, I think you should follow such decision. In so far as the two courts are in conflict, it can not be said that there has been a binding determination, and you should adopt the rule which is deemed most consistent with reason and general authority whether in entire accord with the ruling of either court or not." (Atty. Gen. Palmer to Secy. Treas., 32 Op. Atty. Gen., 12, 22.)

The question of what constitutes "line of duty" must have existed almost from the foundation of the Government, in the naval service and also in the military, and in such varieties of form as to afford ample means of ascertaining the true legal intentment of the several acts of Congress. Thus, in regard to the Navy, we have the old provision of the act of March 2, 1799, which is the original act for the government of the Navy, to the effect that "every officer, seaman, or marine disabled in the line of his duty, shall be entitled to receive for his own life, and the life of his wife, if a married man at the time of receiving the wound, one-half his monthly pay" (1 Stat. 716). Coming down to a later period, we have a series of acts in which the same idea appears. (7 Op. Atty. Gen., 149, 151.)

Congress, if it had so pleased, might have prescribed an arbitrary general rule, as, for example, pension to all cases of disability or death in service, except in the contingency of misconduct; or pension in all cases, except where the cause of disability or death should occur while the party is in arrest or under sentence, on furlough or leave of absence. Such a rule, like all other rules of an assumed arbitrary standard, might have been easier to administer than a natural rule, for the latter demands, in use, discriminating examination and just appreciation of the nature of the included subject-matter; but the natural rule is the only just and equitable one, whether as regards the rights of persons in the service, and their families, or the policy of the Government. (7 Op. Atty. Gen., 149, 163.)

Where precedents exist in the files of a department which are apparently not in accord with the meaning of the words "line of duty," as intended by Congress, such precedents avail nothing; decisions in the public offices of the Government are facts, not rules of law. (7 Op. Atty. Gen., 149, 153.)

**Definition of "line of duty."**—The phrase "line of duty," is an apt one, to denote that an act of duty performed must have relation of causation, mediate or immediate, to the wound, the casualty, the injury, or the disease, producing disability or death. (7 Op. Atty. Gen., 149, 161; 17 Op. Atty. Gen., 172; Rhodes v. U. S., 79 Fed. Rep., 740.)

Was the cause of disability or death a cause within the line of duty or outside of it? Was the cause appertaining to, dependent upon, or otherwise necessarily and essentially connected with, duty within the line, or was it unappurtenant, independent, and not of necessary and

essential connection? That is the true test-criterion. (7 Op. Atty. Gen., 149, 162; 17 Op. Atty. Gen., 172.)

The phrase, "line of duty," is definite, though comprehensive. He who contracts disease or dies in consequence of the ordinary performance of his military duty, or in the performance of any special act of military duty, whether at the moment of performance he were on duty or off duty, in active service or on furlough, of habits virtuous or habits vicious, gallantly fighting his country's enemy or expiating an offense in the guardhouse or prison bay, he who in these or any other circumstances contracts disease in the performance of an act of duty, contracts it "in the line of his duty." On the other hand, neither the bad man who dies of his incorrigible vices, nor the good man who, at the full maturity of blameless life, dies in the course of nature of any of the maladies incident to old age, can be said to die of disease contracted while in the line of duty. (7 Op. Atty. Gen., 149, 161.)

Speaking generally, a soldier who, between the date of his entry into the service and the date of his discharge, suffers injury or contracts disease resulting in disability, is entitled to compensation under the War Risk Insurance Act of June 25, 1918 (40 Stat., 611, sec. 300), unless such injury is caused by (1) his own willful misconduct, or (2) some act or course of conduct of his disconnected with his military duties. (32 Op. Atty. Gen. 12, 21.)

**The service must have been the cause of the disability, and not merely coincident with it in time.**—Nor was there any error in the definition which the court gave to the jury of a "disease contracted in the line of duty," when he declared that "the service must have been the cause of the disease, and not merely coincident with it in time." This is the patent and natural meaning of the language of the statute. It places the service and the discharge of duty in the relation of causes to the injuries and diseases that warrant the grant of pensions. (Rhodes v. U. S., 79 Fed. Rep., 740.)

Regarding what was said in the Rhodes case in the light of the opinions upon which it is based, the following general rule may be deduced: "The mere fact that an injury or disease is coincident in time with service is not sufficient to class it as suffered or contracted 'in the line of duty.' It must have been caused by the presence of its victim in the line of duty when it was received or contracted. But the relation of causation is sufficiently shown when it appears that the victim was at a place and doing what was required or permitted by his duty as a soldier, and that between his presence and conduct and the injury or disease, no adequate and sufficient cause, for which he is responsible, intervened." (32 Op. Atty. Gen., 12, 19, 194.)

The soldier will be responsible for the intervening cause if (1) it consists of his own willful misconduct or (2) it is something which he is doing in pursuance of some private avocation or business. (32 Op. Atty. Gen., 12, 23, 195.) The two intervening causes mentioned are not intended to exclude all others. (32 Op. Atty. Gen., 195.)



The cause of disability (or of death), must be a cause connected by some line of co-ligation with the performance of duty of an official or professional nature. (7 Op. Atty. Gen., 149, 159.)

To pension disabilities or deaths occurring in the mere course of nature, and having no relation of casualty in duty, or disabilities or deaths produced by diseases or casualties happening to an officer or soldier in the prosecution and pursuit of his private affairs and amusements, or whilst employed on furlough in lucrative occupation not official, is not required by any consideration of public service. (7 Op. Atty. Gen., 149, 163.)

The true theory of reason, of right, and of public policy in these matters is to bestow disability or death pensions only in those cases, but in all those cases, where the cause of disability or death is the logical incident or provable effect of duty in the service. (7 Op. Atty. Gen., 149, 163.)

No one would seriously contend that every wound, injury, or disease received or contracted during the term of service is pensionable under the law. A wound or injury inflicted upon himself by a soldier, or received by him while hunting wild animals, or squabbling with his comrades for his own amusement, or while doing any other act not in the line of his duty, would form no basis for a pension. The reason is that it would not be caused by his presence in the line of duty. (Rhodes v. U. S., 79 Fed. Rep., 740.)

The letter of the law prescribes that the quality of the act or condition, as whether in line of duty or not in it, shall determine the question of pension; that alone is just and wise; and that is the thought which has from the beginning of this course of legislation to the end, held its place with unchangeable constancy in all the acts of Congress. (7 Op. Atty. Gen., 149, 164.)

The law does not say "disease contracted while in the service," and therefore is not coextensive with the mere status of an officer in commission, or an enlisted soldier, sailor or marine. (7 Op. Atty. Gen., 149, 160.)

It would not have answered to say merely "in the service," for that would have made the right of pension more extensive than the right of pay, so as, in all circumstances, to comprehend not only deaths of private misadventure, but even the case of criminality, arrest, or suspension under sentence. (7 Op. Atty. Gen., 149, 160, 161.)

The connection between the cause and the effect need not always be so direct or instantaneous as in cases where the party is in the immediate and obvious discharge of his duty. It suffices if the disability be plainly, though remotely, the incident and result of the military profession. The performance of duty may be received as the original cause of disability in some cases where it is not the proximate cause. It is not necessary that the casualty or disease should be in its nature peculiar to the employments of military men; it may be loss of eyesight, occasioned by exposure, or consumption, the result of a cold aggravated by the labors and hazards of the profession, or palsy, attributable to the change

of habits in the transition from civil to military life. These are cases of disability in the line of duty, though they might have happened to the party in any other occupation. There is not one of these cases which has not relation of consequence or effect, either remote or proximate, to the performance of military duty. (7 Op. Atty. Gen., 149, 158.)

**Not restricted to battle or some hazardous enterprise.**—"The expression 'wounds received in the line of his duty' found in section 1494, Revised Statutes, which provides for the promotion of officers of the Navy whose physical disqualifications do not incapacitate them for other duties, means precisely what it says—namely, wounds received in the line of duty—and is not restricted to any particular part of that duty, as to wounds received in battle or in some hazardous enterprise." (23 Op. Atty. Gen., 324.)

**Private affairs not embraced by "line of duty."**—"When the acts speak of 'line of duty,' they mean, of course, public duty. (7 Op. Atty. Gen., 150, 155.)

It is impossible to say that the phrase casualties or injuries received "in the line of duty," comprehends all the possible misadventures of mere private life, which may happen to an officer in his personal affairs, and wholly disconnected from his public duty, though he be not on furlough. (7 Op. Atty. Gen., 149, 156.)

Every person who enters the military service of the country—officer, soldier, sailor, or marine—takes upon himself certain moral and legal engagements, which constitute his official or professional obligations. Whilst in the performance of those things, which the law requires of him as military duty, he is in the line of his duty. But, at the same time, though a soldier or sailor, he is not the less a man and a citizen, with private rights to exercise and duty to perform; and while attending to these things, he is not in the line of his public duty. (7 Op. Atty. Gen., 149, 162.)

Suppose that an officer is a proprietor of a stock farm, as he has a perfect right to be, to which private property, without neglect of any of his public duties, he gives occasional attention, and suppose that in the care of his property he is killed by the kick of a vicious horse of his stock, most assuredly it can not be pretended that such a casualty or injury occurs "in the line of duty." (7 Op. Atty. Gen., 149, 156.)

A soldier in attempting to pass the guard with a written permit was injured by the sentinel. If the pass was given to him solely for the purpose of enabling him to attend to his private affairs, and if, at the time he was injured he was going about his private business, he can in no sense be considered as in the public service. (7 Op. Atty. Gen., 149, 155; 2 Op. Atty. Gen., 590.)

Around all these acts of the soldier or sailor which are official in their nature, the pension law draws a legislative line, and then it says to the soldier or the sailor—If, while performing acts which are within that line, you thereby incur disability or death, you, or your widow, or children, as the case may be, shall receive a pension or other allowance; but not

if the disability or death arise from acts performed outside of that line, that is, absolutely disconnected from, and wholly independent of, the performance of duty. (7 Op. Atty. Gen., 149, 162.)

To illustrate, a soldier in camp may, during a rest hour, be employing his time by working on an invention wholly disconnected with the military service. He is, in general, in the line of duty, but at the moment is exercising a private right for private purposes. An explosion is produced by chemicals which he is using. There has intervened a cause for which he is responsible and the injury is not suffered in the line of duty. But while so employed he is struck by lightning, or is suddenly stricken with appendicitis; clearly there has been no intervening cause for which he is responsible and the injury is suffered in the line of duty. In either case, what he was doing was in no way inconsistent with the performance of his military duty. While he was doing it, the duties of a soldier still rested on him. He was not free from their obligations, nor was he necessarily deprived of the rights which grow out of their performance. This would result only in the event the thing he was doing, outside of his duty, caused the injury he received. (32 Op. Atty. Gen., 12, 20.)

**May be in "line of duty" although not "on duty."**—The law does not say, "disease contracted while on duty," and is therefore independent of the condition of watch on deck, or turn of detail in camp or garrison. (7 Op. Atty. Gen., 149, 160.)

Nor would the wise intentions of the law have been fulfilled by merely saying, "while on duty," for on one hand a party, though on duty, might contract disease or come to his death by vice or crime; and on the other hand, although not on duty, although on furlough, on leave of absence, in arrest, under sentence of punishment for breach of duty, civil or military, in all these conditions his general military obligations continue in full force and he has the faculty and may have the occasion in any of these conditions to perform acts of pure military duty and in the performance thereof to incur disease or death, in circumstances devolving on his widow or children the highest moral and the amplest legal right of pension allowance. (7 Op. Atty. Gen., 149, 161.)

When it is remembered that no commissioned officer, or enlisted soldier, seaman, or marine, has power to cast off his obligation at will; that whether he be on duty or off, in glory as in disgrace, still the banner of his country is over him and its oath upon his conscience; when this great fact shall be remembered, it must be inevitable to concede that any rule based on the assumption of its being impossible for an officer or soldier on furlough, on leave of absence, in arrest, under sentence, to perform acts, suffer casualties, receive wounds, or incur causes of disease, in the line of his duty, is not a truth and like all things not true, can not be conformable to justice or wisdom. (7 Op. Atty. Gen., 149, 163.)

As while on duty he may do or suffer things not in the line of his duty, so whilst off duty or on furlough or under censure, he may do,

and suffer things which are in the line of duty. (7 Op. Atty. Gen., 149, 164.)

The law does not say "disease contracted while in active service," and therefore is not designed to raise the question of whether on furlough, or leave of absence, or not. Nor would it have been satisfactory to say, "in active service," for that is descriptive only of the orders under which a party may happen to be, and affords no sufficient indication of what is the nature or the quality of his acts. (7 Op. Atty. Gen., 149, 160, 161.)

The idea that furlough or leave of absence must of necessity exclude an officer from all benefit of the pension laws may have arisen from the fact that officers are furloughed or put on leave of absence from time to time for the purpose of enabling them to enter into lucrative private pursuits or for some other cause which implies negation of public duty. In such cases the officer will, of course, be excluded from the purview of the pension laws, not because of the furlough or leave of absence per se, but because of the special occasion or consequences thereof. (7 Op. Atty. Gen., 149, 164.)

A soldier is not in line of duty if absent on a furlough which by its terms authorized him to enter into some form of civil employment. He is not, therefore, entitled to compensation for injury suffered or disease contracted while so furloughed, regardless of what may have caused it. (32 Op. Atty. Gen., 24, 26, 197.)

A soldier or sailor while "under arrest" or "in confinement" is not discharged from the obligation of duty, and is occasionally called upon to perform duty in which he may distinguish himself and die honorably, as, for example, in the contingency of a post or a camp attacked by the enemy, or a ship in peril at sea. So, still more, of an officer on furlough. So it may be in the case of a soldier temporarily "absent on leave," nay, even of one compromised in some grave military offense. (7 Op. Atty. Gen., 149, 154.)

In regard to arrest, again: Suppose that on march, in camp, or garrison, or on a voyage, an officer is put in arrest on charges. In the first place, those charges may not be substantiated, and then it would be manifestly unjust that the mere fact of his being charged should operate to deprive himself or his family of pension. Or, while he is in arrest, he dies of camp fever or ship fever, and then it is unjust to presume a criminality not proved in the course of the law. Or, whether guilty or not, if he die of wounds, casualty, or disease contracted while in arrest, still the death is not the consequence of the arrest, but of the public service. If not dying in arrest, and on trial being convicted and sentenced, and that sentence be of death or dismissal for some grave military crime, that of course terminates the question of pension; but, if his offense be a light one, with a sentence of reprimand, for instance, and he should have happened to contract disability or mortal disease while in arrest, as by the hazards of a long march or voyage, it seems not just to add to his legal sentence the serious, indirect aggravation of incapacity of pension. All these difficulties are avoided or conciliated by directing inquiry



to the question—Was the cause of disability or death, or was it not, an act of his official military duty? (7 Op. Atty. Gen., 149, 164, 165.)

A leave of absence, an ordinary furlough, or an arrest does not remove a soldier from the active service. But, on duty, on furlough, or under arrest, he may do things both within or without the line of duty which, though entirely free from the imputation of misconduct, may cause injury or disease. (32 Op. Atty. Gen., 12, 22, 25, 197.)

**May be not "line of duty," although "on duty."**—A party, though on duty, might contract disease or come to his death by vice or crime. (7 Op. Atty. Gen., 149, 161.)

While on duty, he may do or suffer things not in the line of his duty. (7 Op. Atty. Gen., 149, 164.)

An officer or soldier who is neither under arrest nor in confinement nor on furlough, nor absent without leave, may yet die in a thousand ways which will be neither of disease contracted nor of casualties by drowning or otherwise, nor of wounds received while in the line of duty; as, for example, in a chance quarrel, or in dangerous amusements. The conditions of inclusion, as well as of exclusion, must have relation to the line of duty. (7 Op. Atty. Gen., 149, 155.)

A soldier or sailor, like any other man, has the physical faculty of doing many things which are in violation of duties, either general or special; and in doing these things he is not acting in the line of his duty. (7 Op. Atty. Gen., 149, 162.)

**Misconduct or violation of duty can not be line of duty.**—It is conceded that if the cause of death intervene as the incident, or be the result, of any misconduct or violation of duty, as by drunkenness or other vicious course of life, or in the act of mutiny, desertion, or other breach of military obligations, then the party does not die by disease contracted, casualty occurring, or injury received while in the line of duty. No man, it is clear, is acting in the line of duty while the act he performs is a violation of his duty. All such cases we exclude at once, and by common consent, from the purview of the pension laws. (7 Op. Atty. Gen., 149, 153.)

A soldier in attempting to pass the guard with a written permit was injured by the sentinel. If the assault was brought on by his own misconduct, he can not be said to have been disabled while in the line of his duty. (7 Op. Atty. Gen., 149, 155; 2 Op. Atty. Gen., 590.)

**Misconduct or violation of duty must have relation to the cause of disability, to exclude line of duty.**—When violation of duty is taken as a rule of exclusion, it operates only where the violation of duty has probable relation to the cause of death; and not where these are independent facts. (7 Op. Atty. Gen., 149, 154.)

A sailor who is laboring under all the worst effects of vicious indulgence, and subject to die at any moment of disease occasioned by that cause, may yet happen to die of other disease contracted, or of casualty occurring, or of injury received while indubitably in the line of his duty. In a word, these assumed causes of exclusion should operate, not per se, but only

where they affirmatively exclude the line of duty. (7 Op. Atty. Gen., 149, 154.)

**Contributory negligence.**—An injury suffered by a person otherwise in the line of duty shall not be held to have been suffered "not in the line of duty" for the reason that the negligence of such person contributed to the injury. (32 Op. Atty. Gen., 14, 24.)

**The question of remote and proximate cause,** although frequently treated as a question of law, is in reality one of fact, and which in an individual case can receive but little light from the numerous adjudications. In every chain of circumstances each step is, to a greater or less degree, the consequence of its predecessor. (17 Op. Atty. Gen., 172.)

Thus, an officer of volunteers, while in the service of the United States, went to a depot in Ohio, and while expediting the checking of his baggage, was struck by the baggage-master on the head with a hatchet, from the results of which he was seriously disabled. The officer's assumption of the duties of his office caused him to be subject to orders; the order caused him to come in contact with the baggage-master. If there did not intervene between this contact and the injury an adequate and sufficient cause for which the officer was responsible, he is entitled to his pension. (17 Op. Atty. Gen., 172.)

But it seems that, while expediting the checking of his baggage, he used abusive language; as he was responsible for this, the question arises whether it was an adequate and efficient cause of the injury. If he attempted or threatened violence, or if, after an altercation, he used such gestures or placed his hands in such a position as to lead his opponent to apprehend immediate personal danger, his conduct would be the immediate, adequate cause of the injury and performance of duty could not be treated as the cause, either mediate or immediate. (17 Op. Atty. Gen., 172.)

It is impossible to lay down a general rule applicable to all cases of this kind, or to the different aspects which the present claim might present as the facts shall be developed by the evidence. It can not be said, on the one hand, that a soldier is entitled to a pension unless the provocation he gave was such as to acquit the assailant in a court of law; nor, on the other hand, that the slightest departure from the rules of proper conduct, followed by an injury, shall preclude allowance of his claim. Between the two are an infinite variety of supposable cases involving different degrees of provocation which can not be measured, so, as to determine as a matter of law their adequacy to produce the result. It is in determining, not the legal justification of the baggage-master but the adequacy of the provocation, that, in view of the benevolent purposes of the law, a wise and liberal discretion is to be exercised. (17 Op. Atty. Gen., 172.)

The real question is, whether the officer's conduct in the baggage room was reasonably calculated to lead to violence, dangerous to himself. If it was so calculated, his misconduct brought its own punishment, and if the punishment was greater than he deserved, legal proceedings against the baggage-master would furnish him his remedy. If his misconduct

caused the injury, he is not entitled to a pension. (17 Op. Atty. Gen., 172.)

If, while in the performance of his duty, he had been injured by the fall of a carelessly piled lot of baggage, the performance of his duty would have been the mediate cause, for no responsibility would rest on him for the intervening cause. Otherwise, if in an interference with the baggage-master's province and duties he had seized a trunk and brought it down on his head: (17 Op. Atty. Gen., 172.)

"Line of duty" and "not misconduct," are not synonymous terms.—Is it the intent of the law to give a pension generally, as the normal fact, and with exception only of the few extraordinary cases of death proved to be the consequence of a palpable violation of duty? Or is the right of pension to be restricted to the cases of death having some proved or probable relation to duty, whether as causation or as a consociated circumstance? (7 Op. Atty. Gen., 149, 153.)

The law does not say, any disease "not the consequence of misconduct;" and if that had been the category contemplated by the legislator, he would have propounded it in simple and apt phraseology. (7 Op. Atty. Gen., 149, 160.)

The Attorney-General can not yield assent to the proposition that every person in the service, who is not on furlough nor under arrest, and who dies of ordinary death in the course of nature not traceable to mere vice or other specific misconduct, in other words, that all cases of natural death, with some rare exceptions of disease of provable misbehavior, are deaths by disease contracted in the line of duty. This doctrine is not a thing adjudicated, nor as a question of novel impression, is it good law. (7 Op. Atty. Gen., 149, 156.)

It is not a satisfactory definition to say that "every officer in full commission, and not on furlough, must be considered in the line of his duty, although, at the moment, no particular or active duty is devolved upon him," and "the same of a soldier (or sailor) who is kept in pay," even though such definition be qualified by introducing the exceptions of "voluntary absence," from duty, and of "vicious or unjustifiable conduct," while on duty. This definition is faulty by reason of its regarding the "line of duty" as an absolute status of the party in service, when it is, in truth, a status relative to certain specific legal conditio s. (7 Op. Atty. Gen., 149, 159.)

The words "line of duty" can not properly be held to embrace every cause of death not due to the misconduct of the deceased, but are used by Congress in a more limited sense in its various enactments relating to the disability or death of persons in the Army or Navy. This conclusion is supported by the fact that the law providing for the allowance of six months' pay to the widow or designated beneficiary of deceased officers or enlisted men of the Navy [act May 13, 1908, 35 Stat., 128] originally applied by its terms to cases where the death was due to "wounds or disease contracted in line of duty," but by act of August 22, 1912 [37 Stat., 329], Congress substituted the words "not the result of his own misconduct" for the words "contracted in the line of duty,"

this amendment being made for the express purpose of giving the law a broader application. (See Navy Department's circular of July 10, 1914, publishing changes and corrections in "Forms of Procedure for Courts and Boards in the Navy and Marine Corps, 1910," pp. 224, 225; see also Naval Courts and Boards, 1917. An identical change had previously been made in the similar legislation relating to the Army. See 43 Cong. Rec., 2688.)

Rule applicable to diseases, same as in cases of injuries.—In all the statutes the condition of "line of duty" stands in exactly the same relation to wounds, to drowning, or other casualty and to personal injuries as it does to diseases; and if it were held that all possible deaths by disease happening to a person in the service are of disease in the line of duty in public service, it must in like manner be held that all possible wounds and casualties happening to a person in the service are in the line of duty in the public service. That the latter is not so, is proved by what is the well-established and well-understood rule of law in regard to contingencies of personal encounter producing wounds or death. (7 Op. Atty. Gen., 149, 157.)

The true meaning of the phrase "line of duty" is the same whether the cause of disability or of death to be considered is a wound, a casualty, an injury, or a disease. Whatever is of the essence of "line of duty" in any one of these cases is so in the others. It being established or admitted that a "wound" or death by personal violence, in order to become the foundation of pension, must have logical correlation with military duty, it must be so in the case of "casualty" and of "disease." (7 Op. Atty. Gen., 149, 160.)

The same rule applies to wounds, injuries, and disease; for in the law they stand together in a single class. The result is that neither injury nor disease can authorize the granting of a pension under the acts of Congress unless it is caused by the presence of its victim in the line of duty when it was received or contracted. (*Rhodes v. U. S.*, 79 Fed. Rep., 740.)

#### "LINE OF DUTY" AS DEFINED BY COURT OF CLAIMS.

"Line of duty" is synonymous with "not misconduct."—As a general proposition, a soldier is in line of duty until separated from the service by death or discharge, if during such time he is submitting to all of its laws and regulations. While on leave of absence he may be ordered to active duty at any time, and to this end the department is to be kept constantly informed as to his address and all changes in same. The provisions for furloughs or leaves of absence are a part of the disciplinary regulations of the military service and no more separate a man from the service than an order to report to a different command. The statute confers its benefits whenever the soldier dies while in the service generally, and submitting to its rules and regulations, from wounds or disease not the result of his own misconduct. The amendment of the Army death gratuity law so as to read "not the result of his own misconduct," instead of "con-



tracted in the line of duty," did not broaden the application of the original statute in the least. It only made absolutely certain, in unmistakable terms, the intent which the Court of Claims' construction afterwards gave the original law, and thereby reinforced that construction. It is not necessary to decide in any case when and where the soldier contracted the disease. The court is not called upon to take evidence and decide when the germs of typhoid fever, tuberculosis, or other disease first began to incubate. Otherwise, the evidence might show that a soldier engaged in active war duties for years, and in the midst of which he died of tuberculosis, contracted the disease before he entered the service. In this case the soldier died while on leave of absence from disease. *Held*, that it must be regarded as "disease contracted in line of duty," although it does not specifically appear when or where he contracted the disease. (*Moore v. U. S.*, 48 Ct. Cls., 110. But see above, under "Line of Duty Defined," sub-heading "Intention of Congress".)

The Attorney General is unable to agree that the correct rule is as broad as the language of the Court of Claims makes it. That construction makes "line of duty" practically synonymous with "in active service" and robs it of all meaning, since the act uses both expressions with the evident intention that the one shall limit the other. The soldier must be in active service, and the disease must be contracted in line of duty. (32 Op. Atty. Gen., 12, 22, construing War Risk Ins. Act of June 25, 1918, sec. 300, 40 Stat., 611.)

The Attorney General agrees with the Court of Claims that "the provisions for furloughs or leaves of absence are a part of the disciplinary regulations of the military service, and no more separate a man from the service than an order to report to a different command." (32 Op. Atty. Gen., 12, 25, 197.)

For discussion of the foregoing decision of the Court of Claims, see file 26250-1491:1, Oct. 29, 1918, and file 26250-1372, Mar. 3, 1919.

#### EVIDENCE IN LINE OF DUTY CASES.

**Testimony of medical experts.**—Casualty is a question of fact, to be proved according to the ordinary rules of evidence and to the reasonable satisfaction of the inquiring and deciding mind. That mind is entitled to have the full facts before it, and is not bound to accept as final the opinions even of an expert. Such opinions are evidence, but neither conclusive nor exclusive proof. Every person of judicial training well knows that the opinions of medical or other scientific or practical experts often differ, and that they sometimes err in a body as if by some epidemic contagion. There is a judicial case involving scientific inquiry, in the printed record of which are the answers of 23 experts to the same question; 22 of them give decision one way, and a single one of them gives a reverse decision; and in the conclusion it was proved beyond all controversy, that he alone was right and that all others erred. In general, the opinions of an expert are of more or less weight and value, according to the person's constitution of mind,

and the degree of completeness of the collection of pertinent facts on which his mind acts. But it may happen that the great body of the wisest and learnedest men of science shall be possessed by an erroneous opinion, while the true secret of nature is revealed to some discoverer who as yet is unknown to the world and is painfully struggling up into the sunlight of greatness and of fame. In a word, no witness, whether expert or not, can rightfully claim to have his opinion take the place of the facts, and so to substitute his judgment for that of the officer who is vested by law with the authority to decide. (7 Op. Atty. Gen., 150, 165.)

The question was presented to a court of inquiry in the case of a naval officer who committed suicide, "whether he was insane at the time of committing suicide, and if so, whether such insanity was incident to the service." Celebrated medical experts testified in behalf of petitioner that in their opinion the deceased was insane, his insanity being due partly to the nature of the work (indexing) on which he had been engaged for some time prior to his death. One of these experts testified to having himself performed work of the same character, and was asked by the court: "Did you ever have suicidal impulses or fear that you would have them?" To which he replied: "I have had the fear very strongly indeed at the top of high buildings, and standing alongside the rushing water of the Yosemite Falls at the top of the cliff, so strongly that I laid down on the ground and so retreated." Another expert witness for the petitioner having also testified to his opinion that the deceased was insane, was examined by the court in part as follows: "Q. If a man admitted having suicidal impulses, such as jumping from high buildings, jumping into waterfalls, etc., to such an extent that he avoided places of this sort, and lay flat on the ground when in such positions, would you consider him as having a mental disorder, and if so, what? A. Yes, I should say that he had a mental disorder to the degree of his phobia or obsessions, which would be the technical description of it. Q. Could you classify this as insanity in court? A. Technically and correctly speaking, yes. Practically you would explain what you meant by it." In recording its finding that the deceased "was not insane at the time of committing suicide," the court remarked with reference to the testimony of these witnesses for the petitioner: "As regards the conclusions to be drawn from the existence of these minor psychical manifestations, we are confronted by the picture of an acknowledged authority in psycho-pathology diagnosing a mental disorder in a man as positively sane as Doctor \* \* \*. It is true that this diagnosis was qualified, yet it shows the difficulty of distinguishing in a medico-legal way those conditions which, while not strictly normal, are nevertheless of insufficient severity to permit their classification under the head of insanity." (Ct. Inq. Rec. No. 5777.)

Where the proofs are balanced, presumption should be in favor of line of duty.—The question of the quality or degree of proof requisite, is a question clearly for the conscience of the deciding officer. If called

upon to suggest any rule for the guidance of his discretion in the matter, it would be obvious to say that the pension laws are beneficial in their nature, and therefore to be construed beneficially in matters of inevitable doubt. In this view, the mere fact of an officer having died in the service, and with utter absence of proof as to the origin or cause of his death, is not sufficient to raise a pension; but where the proofs are balanced, and it is impossible to determine by them as to the fact of "disease contracted," and the fact of "line of duty" found in juxtaposition, whether this collocation be of contiguity only, or of actor and subject—of contemporaneity or sequence only, or of cause and consequence—it would be reasonable to presume in favor of pension; and also to presume in favor of pension in cases where the line of duty appears to enter potentially into the cause of the death, although it should happen not to be certainly provable that it was the exclusive or predominant cause; so that a possible error of absolute and mere uncertainty shall not be suffered to defeat the liberal intentions and beneficial policy of the Government. (7 Op. Atty. Gen., 150, 166.)

**Evidence in cases of suicide.**—Suicide is not of itself a pensionable cause of death and if the suicide is alleged to have been produced by insanity, and thus insanity be put forward as the *causa causans*, then it must be shown that the insanity was the result of or incidental to acts of duty. (7 Op. Atty. Gen., 150, 155.)

Suicide is so unlikely a result of an act of duty that the presumption in such cases must be against line of duty in the absence of evidence affirmatively showing that it was caused by the service. (File 26250-230.3.)

See also above, "Testimony of medical experts;" and see below, "Specific cases involving 'line of duty' or 'incident of the service.'"

**Burden of proof.**—When an officer is examined for retirement, it is incumbent upon him to show, in order to secure a report which will entitle him to be placed on the retired list, rather than on the retired list on furlough pay, that his incapacity was the result of some incident of the service. (*Brown v. U. S.*, 113 U. S., 568, 573.)

#### SPECIFIC CASES INVOLVING "LINE OF DUTY" OR "INCIDENT OF THE SERVICE."

**Injury from accidental causes while on leave of absence.**—Decedents, while on leave of absence, went to a hotel together, engaged a room, and were later found asphyxiated as the result of a gas jet in the room having been left turned on and unlighted when they retired. *Held*, not line of duty. (File 26250-238, 239, and 240.)

Deceased, while on leave of absence and not performing any act connected with the service, was run over by a train. *Held*, not line of duty. (File 26250-228.)

An enlisted man on authorized leave of absence from his ship at Brest, France, was injured while en route to Paris by the accidental discharge of a pistol in the hands of a soldier riding beside him on the train. *Held*, line of duty. This man was in Europe solely because he was in active service under the Navy Department.

As part of the disciplinary regulations of the service he was given a temporary leave of absence and permitted to visit Paris. On the way to Paris the accident occurred and he was injured just as any other passenger on the train might have been injured. There was no intervening cause for which he was responsible. (32 Op. Atty. Gen., 193, 198.)

**Attempting to save life while on liberty.**—An officer of the Naval Reserve Force while on leave of absence was injured by a pistol shot in attempting to assist a woman in distress. *Held*, not in line of duty, because due to an intervening cause having no connection with the service. It resulted from the performance of a duty which he owed not as a soldier but as a member of society. (32 Op. Atty. Gen., 193, 198. But see, *contra*, C. M. O. 71, 1918, p. 19.)

**Injury due to performance of specific act of duty while on liberty.**—An enlisted man, while on liberty, was stabbed by a drunken cabman while endeavoring to get an injured shipmate back to his vessel, an act in the line of his duty performed while on liberty. *Held*, line of duty. (File 9331, Apr. 10, 1908.)

**Status during intervals between hours of duty.**—A yeoman in the Navy on duty at the U. S. Naval Headquarters, London, England, was killed by a motor bus in the immediate vicinity of said headquarters but about three hours after he had completed his duty for the day. *Held*, line of duty. A soldier in camp is not always occupied in the actual performance of some military duty. During periods of rest he is more or less free to walk around within the limits of the camp. When assigned to duty not in a camp, but in a city, he has like freedom, and was just as much in line of duty as if walking around in camp, and such an accident as is liable to happen to any one pursuing such a course is the logical incident of his service. (32 Op. Atty. Gen., 193, 196.)

**Status while traveling from and returning to post of duty.**—"All the consequences of the absence of an officer or a soldier from his post of duty on his own motion for his own purposes of business or of pleasure must be regarded as outside the line of duty. While traveling from and returning to the post of duty on an ordinary furlough, given for such purposes, he is at his own risk as to causes of disability to which he may be subjected." (4 P. D., 54; 7 P. D., 102; 16 P. D., 21; House Doc. No. 5, 54th Cong., 2d sess., p. 74.)

A soldier, in attempting to pass the guard with a written permit, was injured by the sentinel. If the pass was given to him solely for the purpose of enabling him to attend to his private affairs, and if, at the time he was injured, he was going about his private business, he can in no sense be considered as in the public service. (7 Op. Atty. Gen., 149, 155; 2 Op. Atty. Gen., 590.)

When a person returning from leave or liberty, and prior to expiration thereof, enters a boat provided by the Government for his transportation back to his vessel he is once more within the control of the naval authorities, and if killed or injured without the intervention of any cause for which he was responsible, a finding of line of duty would be proper. But if he is returning to his vessel in a private conveyance



of his own selection he would not be in a line of duty status unless actually engaged in the performance of an act of duty. (See Navy Department's circular of July 10, 1914, publishing changes and corrections in "Forms of Procedure for Courts and Boards in the Navy and Marine Corps, 1910," pp. 224, 225; see also Naval Courts and Boards, 1917.)

A man returning to his post of duty after an ordinary furlough, and killed in consequence of the automobile in which he was traveling being struck by a railroad train, was in the line of duty at the time of death. It was the duty of the man to return to his post before expiration of his furlough. He was doing this when the accident happened, and there was no intervening cause for which he was responsible. (32 Op. Atty. Gen., 193, 197.)

**Homicide.**—A yeoman (female) in the Naval Reserve Force was killed by her husband while she was returning to her home upon the completion of her duty for the day. Her death was not the result of her own misconduct. But it was not in line of duty, as it resulted from jealousy on the part of her husband; in other words, it grew out of the domestic relations of the yeoman, entirely separate and distinct from her relations to the Government. (32 Op. Atty. Gen., 193, 196.)

Deceased, while on liberty, was murdered by a shipmate in consequence of some difficulty between the two men of a wholly personal nature. *Held*, not line of duty. (File 26250-214.)

**Liberty granted for specific purpose encouraged by Navy Regulations.**—If a man is given permission to go on shore for the express purpose of engaging in athletic sports or exercises encouraged by the Navy Regulations, or permission to go swimming or boating, and is injured or killed without negligence or other cause for which he was responsible, the finding should be line of duty. Where, however, a man is granted liberty for his own purposes, and while on liberty goes in swimming and is drowned, the mere fact that swimming is encouraged by the regulations is not sufficient ground for holding that his death occurred in line of duty. In such a case the general rule applies and it must be held that his death resulted from the exercise of his private rights and was not caused by "an act of duty performed." (File 26250-277:1; 14 P. D., 114. See Navy Department's circular of July 10, 1914, publishing changes and corrections in "Forms of Procedure for Courts and Boards in the Navy and Marine Corps, 1910," pp. 224, 225; see also Naval Courts and Boards, 1917. But see 32 Op. Atty. Gen., 12, 193, noted above.)

**Death as result of medical treatment.**—An enlisted man, suffering from a disease which resulted from his own misconduct, died in consequence of salvarsan poisoning resulting from medical treatment administered by proper medical authority. *Held*, line of duty; death was not the result of the disease but of the medical treatment for the disease. (File 26543-213, Apr. 29, 1918, C. M. O. 37, 1918, p. 23. Compare 32 Op. Atty. Gen., 24, 199.)

**Exercising.**—Surgeon Thomas Hiland was found by a retiring board, March 1, 1883, to

be incapacitated for active service by reason of the amputation of his right leg, as the result of an injury caused by taking horseback exercise in Chile, which was shown to be necessary for his health, he having been ill. The injury was held to have "originated in the line of duty." (See Ret. Bd. Rec., vol. 21, 1881-82, case No. 284.)

"As swimming is an exercise prescribed by the regulations in the routine of exercises and drills," where an ordinary seaman was drowned while in swimming, and was not guilty of contributory negligence or gross negligence, "his death occurred in line of duty." (File 2195-63, June 7, 1907.)

Harrison Henry Foster, mess attendant third class, died as the result of injuries received during a boxing match on board the U. S. S. *Vermont*, June 31, 1909. The board of inquest reported that Foster "died in line of duty \* \* \* and that no blame is attached to any person or persons connected with this occurrence." The report of the board was "not approved" by the commander in chief of the U. S. Atlantic Fleet. The disapproval, however, evidently related to the responsibility for Foster's death, and not to the finding that it was in line of duty. The death gratuity provided by the act of May 13, 1908 (line of duty), was paid to Foster's beneficiary by check No. 72274, of September 21, 1909.

In the case of A. J. Horgan, oiler, U. S. Navy, the question arose whether an injury to his teeth during a football game on November 23, 1907, was "in line of duty." The Bureau of Navigation made the following report in the case: "The policy of the Navy Department is to foster athletics in the Navy, and the bureau considers that football and other athletic contests of enlisted men on shore are conducive to their physical development and well-being and better fit them for the performance of their duties on board ship, and that injuries received in these contests may be but justly considered in the line of duty." The papers were forwarded to the Bureau of Medicine and Surgery January 3, 1908 (file 458-5), with the following indorsement: "The department considers that the within-mentioned injury occurred in the line of duty."

A board of inquest, August 18, 1909 (file 26250-89), in the case of Joseph Martin Seithel, coal passer, U. S. Navy, found that the deceased "died from injuries received while exercising in the gymnasium; that the deceased met his death in line of duty, and that no one is in any way responsible for same."

An injury suffered by a person otherwise in the line of duty shall not be held to have been suffered "not in the line of duty" for the reason that the negligence of such person contributed to the injury, or that it was the result of participation in some form of lawful sport or recreation not contrary to regulations or orders. (32 Op. Atty. Gen., 14, 24.)

**Prisoner.**—While a prisoner may be injured or killed in line of duty, as shown by the examples given by the Attorney General in his opinion [quoted above, under "May be in line of duty although not on duty"], such cases must be exceptional ones rather than the rule. Thus, where an enlisted man is per-

forming hard labor under sentence of general court-martial, and an injury received by him is wholly due to the execution of such sentence, it can not be held line of duty. (15 P. D., 54; 5 P. D., 151.) If an enlisted man is arrested or imprisoned but on trial is adjudged not guilty, a disease incurred during his arrest and imprisonment is within the line of duty (4 P. D., 103). If the man died while awaiting trial, a disease so contracted is held to have been incurred in line of duty. (14 P. D., 213). But in a case where a private in the Marine Corps was burned to death while in confinement by the civil authorities awaiting trial, and the evidence showed that his imprisonment was the result of misconduct (drunkenness) while on liberty, his death was held not to have occurred in line of duty. (File 26250-218. Compare file 26285-30, Apr. 7, 1909; file 26543-20, Jan. 28, 1909. Navy Department's circular of July 10, 1914, publishing changes and corrections in "Forms of Procedure for Courts and Boards in the Navy and Marine Corps, 1910," pp. 224, 225; see also Naval Courts and Boards, 1917, p. 290; and C. M. O. 71, 1918, p. 20, stating that the decision of Apr. 7, 1909, is no longer in force.)

A soldier who died while in confinement in pursuance of the sentence of a court-martial, did not die "while on duty," within the meaning of the act of March 3, 1899 (30 Stat., 1224, 1225), which provides for the payment of transportation and burial expenses of soldiers who die "while on duty away from home." (6 Comp. Dec., 453.)

"Suppose that on march in camp or garrison, or on a voyage, an officer is put in arrest on charges. In the first place those charges may not be substantiated, and then it would be manifestly unjust that the mere fact of his being charged should operate to deprive himself or his family of pension. Or, while he is in arrest, he dies of camp fever or ship fever, and then it is unjust to presume a criminality not proved in the course of law. Or, whether guilty or not, if he die of wounds, casualty, or disease contracted while in arrest, still the death is not the consequence of the arrest, but of the public service. If not dying in arrest, and on trial being convicted and sentenced, that sentence be of death or dismissal for some grave military crime, that of course terminates the question of pension; but if his offence be a light one, with a sentence of reprimand, for instance, and he shall have happened to contract disability or mortal disease while in arrest, as by the hazards of a long march or voyage, it seems not just to add to his legal sentence the serious indirect aggravation of incapacity of pension." (7 Op. Atty. Gen., 149, 164.)

When confined under sentence one becomes a prisoner and, for the time being, ceases to be a soldier employed in active service. Not so as to one under strict confinement or arrest involving suspension from duty while awaiting trial and disposition of his case, even if the trial results in conviction, provided he is not resisting lawful arrest. (32 Op. Atty. Gen., 14, 24.)

**Violation of duty.**—Death resulted from injuries received by the deceased while on

board ship in a duty status, "entering a bunker and striking a match there," which acts "were both against orders." *Held*, that death was the result of "misconduct or violation of duty," and was not, therefore, the result of an injury received in the line of duty. (File 26543-55.)

**Horseplay.**—An enlisted man is not in line of duty while engaged in scuffling or squabbling with his companions, or voluntarily engaged in what is commonly known as "horseplay," although at the time on board the ship to which he is attached. (5 P. D., 47; 6 P. D., 22; 14 P. D., 81; 14 P. D., 506; *Rhodes v. U. S.*, 79 Fed. Rep., 740; file 25250-66. But see 32 Op. Atty. Gen., 12, noted above.)

**Overdose of poison.**—"It has repeatedly been held that where the death of the soldier \* \* \* was caused by an overdose of a narcotic or other poison, which had been either prescribed originally by a physician in the United States service, or taken upon the soldier's own responsibility through mistake, and with no suicidal intent, such death cause can not be accepted as a competent basis for claim." (1 P. D., 111, case of Travers, hospital steward; file 26250-288:2, case of Pasteur, hospital apprentice.)

**Disability existing prior to enlistment.**—Death or injury while on duty, resulting from disability existing prior to enlistment, does not come within the "line of duty" category. (16 P. D., 172.)

However, when a disability which originated prior to and at the date of enlistment, is revived and aggravated as the immediate result of an accident or of an incident in the line of duty, the injurious consequences of such aggravation may amount to line of duty. (3 P. D., 41.)

In the latter case, it is necessary to establish some cause or injury resulting from or incurred in service in line of duty sufficient to produce a recurrence of said disability—some cause without which the recurrence would not have happened—and not merely natural aggravation of an already existing disability. (3 P. D., 187.)

For the purpose of compensation under the War Risk Insurance Act for death or disability resulting from personal injury suffered or disease contracted in the line of duty, the "officer, enlisted man, or other member shall be held and taken to have been in sound condition when examined, accepted, and enrolled for service." (Act June 25, 1918, sec. 300, 40 Stat., 611, amending act Oct. 6, 1917, sec. 300, 40 Stat., 405.)

**Predisposition to disease** is no bar to pension if the disease did not develop until after claimant's admission to the service. (3 P. D., 228; 16 P. D., 413.)

**Suicide.**—In a proper case, death by suicide may be held to have occurred in the line of duty, but the facts supporting such a conclusion must be definitely ascertained and established. (File 26250-86; 1 P. D., 111; 1 P. D., 108; 5 P. D., 32; 17 P. D., 50.)

In the case of F. C. McKeehan, chief yeoman, U. S. Navy, the board of inquest reported, July 13, 1909, that the deceased "committed suicide by shooting himself through the head while temporarily insane." The medical mem-



ber of the board stated that "There is good evidence that the injury was in line of duty, as the patient was insane at the time of committing the act. He shot himself through the head while temporarily insane from close, constant, and continuous application to the books and records of this ship. He evidenced symptoms of marked depression verging on melancholia before the arrival of the ship in San Francisco." The record was returned for an expression of the board's opinion as to how far the death of McKeehan was due to any act of duty. On August 14, 1909, the board reassembled and made the following report: "The board concurs in the opinion expressed by Dr. Bacon, assistant surgeon, U. S. Navy, and believes that the death of McKeehan, chief yeoman, U. S. Navy, was directly due to the worries and exactions of his official duties for which duties the board feels that he was never mentally qualified." After consideration by the Department, the record was again returned to the board with the following indorsement by the Acting Secretary of the Navy, September 3, 1909: "It would appear that there is a decided lack of definite and authoritative evidence in the record to warrant the statement of opinion that McKeehan's death was 'directly due to the worries and exactions of his official duties for which duties the board feels that he was never mentally qualified.' The main point in question, in view of the board's finding that McKeehan 'committed suicide by shooting himself through the head,' is whether the cause of the suicide was directly traceable to the service. Therefore, it is directed that the board be ordered to reconvene and, after a further and more complete investigation upon the above-mentioned point of information required, render their opinion after spreading upon the record, full and completely, the reasons leading to the formulation of such opinion." The board thereupon reconvened and reported that: "After examining witnesses 'who were most closely in touch, either personally or officially, with Mr. McKeehan, the board adheres to its former opinion that McKeehan's death was directly due to the worries and exactions of his official duties, for which duties the board feels that he was never mentally qualified. Although the board is of the opinion that McKeehan might have taken his life at some time later, it is of the opinion that the direct cause was the worry about his work not being properly performed, his fear of being disrated, and also his worry about his physical condition, all of which are fully brought out in the testimony.'" The finding of the board was approved by the Department, October 25, 1909. (File 26250-86.)

In the case of John L. Cunningham, master at arms, first class, (file 26250-132), the board of inquest reported, January 15, 1910, that the deceased "died a natural death, caused in part, however, by a pulmonary and cerebral oedema, subsequent to attempt at suicide. The death of J. L. Cunningham, master at arms, first class, United States Navy, was in the line of duty, following attempt at suicide during an attack of melancholia, which was incident to over 13 years in the United States Navy."

**Refusal of officer to submit to operation.**—The finding of a retiring board that the present incapacity of an officer "is due to the fact that he will not submit to an operation recommended by responsible medical officers of the Navy, and is therefore not the result of an incident of the service," should be disapproved. The officer was injured by a fall in leaving a recruiting station where he was on duty, resulting in hernia; he was operated on the next day at a local hospital; thereafter he was incapacitated for duty, the medical members of the board finding that his incapacity consisted of a chronic intestinal obstruction, probably due to adhesions, and possible chronic appendicitis, the chronic intestinal obstruction having followed an operation for strangulated inguinal hernia, right side, the said hernia having been contracted in line of duty. In the earlier or preliminary part of the finding, the board says, after stating the cause of this officer's present condition, "that this condition could *probably* be relieved by an operation \* \* \*." Here, as well as throughout the testimony and findings of previous boards in the case, there is no assurance as to relief. Various expressions are used, indicating a caution of expression on this point which in such cases as this is probably reasonable; but which are, nevertheless, significant. The evidence given before the board does not show that the operation would be a harmless or minor one. On the contrary, from the expressions relative to the matter as given in the testimony of the medical officers, it appears to be one of considerable gravity. A capital operation is said to be "one involving some danger to life;" a major operation is defined as "an important and serious operation;" and a minor operation as "a comparatively trivial" one. Any surgical procedure that involves an opening into one of the large cavities of the body is presumably serious, especially as in this case when there is much doubt as to the exact nature of the ailment. In this case the procedure advised is one attended with sufficient risk to take it out of the class of minor operations and put it into the class, at least, of major if not of capital operations. No law or regulation of the Navy is known which applies directly to the conditions involved in the case here under consideration; nor is any custom or usage known which would require that an officer submit to a major or capital operation. Under such circumstances it is not perceived upon what exact ground the officer should be compelled to submit to the operation advised. *Held*, that the finding should be disapproved, the operation being one to which the officer should not be required to submit. The result arrived at does not necessitate an inquiry into the question whether, if the disability of this officer was one which required for his relief an operation to which he might be compelled to submit, he should under such circumstances be regarded as suffering from a disability not the result of an incident of the service. A review of the opinions of Attorneys General (1 Op. Atty. Gen., 181, 7 Op. Atty. Gen., 149, 17 Op. Atty. Gen., 172) relating to the subject of "line of duty," does not appear to show that such

might be the case. If the officer in this case should die at the present time, without having submitted to the advised operation, it could hardly be held, if his demise was due to his injury in question, that his death was not the result of an incident of the service. (File 26253-98, May 17, 1910. See, also, note to sec. 1368 R. S., under "Compulsory medical treatment of persons in Navy.")

**Sec. 1452. [Record of proceedings; revision by President.]** A record of the proceedings and decision of the board in each case shall be transmitted to the Secretary of the Navy, and shall be laid by him before the President for his approval or disapproval, or orders in the case.—(3 Aug., 1861, c. 42, s. 23, v. 12, p. 291.)

Judge Advocate General shall, under the direction of the Secretary of the Navy, receive, revise, and have recorded, the records of all retiring boards in the Navy and Marine Corps. (Act June 8, 1880, 21 Stat., 164, amended by act June 5, 1896, 29 Stat., 251.)

President may direct the Secretary of the Navy to take such action on the records of proceedings of naval examining boards and boards of naval surgeons for the promotion of officers of the Navy, as is now required by law to be taken by the President. (Act May 22, 1917, sec. 20, 40 Stat., 90.)

**Cannot be retired without President's approval.**—The conclusions of any military court, board, or commission, must, before being carried into execution, have the approval of the commander in chief or of some one representing him. Accordingly, even where the law does not expressly provide for approval of boards in the Army, such boards must receive the approval of the Secretary of War, whose action is conclusively presumed to be that of the President, in order to be valid and effective. It is not, however, essential that this approval should be express or indicated in any formal language; it might be indicated by merely giving effect, through appropriate orders, to the findings of the board. (27 Op. Atty. Gen., 193; see also 12 Op. Atty. Gen., 347.)

Action of the President is necessary before retirement can be made; and an officer accordingly can not be deprived of active-duty pay as of a prior date. (12 Comp. Dec., 628; see note to sec. 1457, R. S.)

Under the laws regulating retirements in the Army (secs. 1250, 1251, R. S.), no officer can be retired from the Army upon the report of any board, even if such report be approved by the Secretary of War, except it "is approved by the President." (21 Op. Atty. Gen., 385.)

An officer of the Army was examined for promotion and found incapacitated for active service on account of certain physical disabilities; this finding was approved by the Surgeon General and by the Major General Commanding the Army, and by the Acting Secretary of War; the officer was notified that he would be retired at the proper time, and was granted sick leave of absence until further orders. *Held*, even if the action of the examining board were to be regarded and treated as that of a

**Ordered to hospital while on furlough.**—As the furlough of a soldier is terminated by being ordered by competent authority to a hospital for treatment, he is while in the hospital in obedience to said orders "on duty" within the meaning of the laws allowing payment of expense of his medical care and treatment. (12 Comp. Dec., 562; compare 6 Comp. Dec., 444.)

retiring board, still it would be inoperative to effect his retirement until approved by the President. (21 Op. Atty. Gen., 385.)

**No power of review exists after President's approval.**—Whether the finding of the board was warranted by the evidence adduced is an inquiry that can not now be gone into, as no power of review over the proceedings of the retiring board exists by law where its finding has been once approved by the President and his "orders in the case" executed. The result is that the objection urged by Paymaster Rodney can not be considered in connection with any part of the record of proceedings of the board except the finding, and this affords no foundation for such objection. Accordingly, *held* that there is no legal ground for setting aside the proceedings of the retiring board and revoking the order of retirement in this case. (15 Op. Atty. Gen., 446; see also Dig. Comp. Dec., 493, noted under sec. 1451, R. S., "Findings not subject to review by accounting officers;" and see notes to secs. 1454 and 1457, R. S.)

**Newly discovered evidence.**—Where an officer was found by a board of examination to be physically qualified for promotion, but deficient in professional qualifications, and it afterwards developed that he was at the time of his examination suffering from a disability incurred in the line of duty, which disqualified him for promotion, it is within the power of the Secretary of War, representing the President, to order a new physical examination. (27 Op. Atty. Gen., 193.)

**Proceedings contrary to law.**—Where the President possesses the power of review, he has the power, as a necessary incident to the power of review, if he finds that an officer has not had such an examination as the law declares he shall have, or, in other words, if the proceedings are fatally defective, to treat the proceedings of the board as a nullity and direct an examination in accordance with law. (27 Op. Atty. Gen., 193, 201.)

An opinion and recommendation of an examining board made under a misconstruction of the law cannot control distinct statutory provisions which limit retirements. Accordingly, where an officer has been erroneously retired in accordance with the board's finding which was contrary to law, it is the duty of the President to correct such action. (17 Op. Atty. Gen., 7.)



**Delay in President's action.**—An officer of the Army was found incapacitated for active service by a retiring board in April, 1879. This finding was not approved by the President until February 26, 1891, whereupon he was placed on the retired list pursuant to section 1251, Revised Statutes [which is similar to

section 1453, Revised Statutes, relating to the Navy]. In the meantime he was granted extended sick leave until July 20, 1889, when he was ordered to duty: *Held*, that his retirement was strictly in accordance with section 1251 of the Revised Statutes. (*Steinmetz v. U. S.*, 33 Ct. Cls., 404. See also note to sec. 1502, R. S.)

**Sec. 1453. [Disability due to an incident of the service.]** When a retiring-board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of the service, such officer shall, if said decision is approved by the President, be retired from active service with retired pay, as allowed by Chapter Eight of this Title.—(3 Aug., 1861, c. 42, s. 23, v. 12, p. 291.)

"Chapter Eight of this Title" refers to sections 1556–1595, Revised Statutes.

Incident of the service defined. See note to section 1451, Revised Statutes.

Pay of officers retired for disability incident to the service. See section 1588, Revised Statutes, and note thereto.

Pay of retired officers on active duty. See note to section 1462, Revised Statutes.

Rank of officers on retirement for disability incurred in line of duty. See note to section 1457, Revised Statutes.

**Retirement for disability a "benefit" to officers.**—See note to section 1448, Revised Statutes.

**The pay to which officers on the retired list are entitled** is usually a certain per cent of the pay to which they would be entitled if on the active list with the rank and length of service they had at the date of retirement. (15 Comp. Dec., 72.)

See note to sections 1448 and 1451, Revised Statutes, for citations bearing upon this section.

**Sec. 1454. [Officers wholly retired, or retired on furlough pay.]** When said board finds that an officer is incapacitated for active service and that his incapacity is not the result of any incident of the service, such officer shall, if said decision is approved by the President, be retired from active service on furlough-pay, or wholly retired from service with one year's pay, as the President may determine.—(3 Aug., 1861, c. 42, s. 23, v. 12, p. 291.)

Furlough pay of retired officers. See section 1593, Revised Statutes.

Misconduct, officers can not be retired for. See section 1456, Revised Statutes, and note thereto.

Names of officers wholly retired shall be omitted from the Navy Register (sec. 1457, R. S.).

Transfer from furlough to retired pay list was authorized by section 1594, Revised Statutes. (But see act Aug. 5, 1882, 22 Stat., 286, and see cases noted below.)

**Constitutionality of statute.**—The jurisdiction of the President over the relations of an officer to the Army and his right to determine whether an officer incapacitated for service be placed on the retired list or wholly retired, are created by statute, and the President's authority therefore is wholly dependent upon the letter of positive enactment. (*McBlair v. U. S.*, 19 Ct. Cls., 528.)

The regulation of the retired list by Congress can in no wise interfere with the constitutional power of the President as Commander-in-Chief. As to such enactments he becomes an executive officer, and is limited in the discharge of his duty by statute. (*McBlair v. U. S.*, 19 Ct. Cls., 528.)

The purpose of the law embodied in sections 1229 and 1624, article 36, Revised Statutes, restricting the dismissal of officers of the Army and Navy, was not to attach a life tenure or element of vested right to the office, but to save

officers in time of peace from the ignominy of a hasty and dishonorable dismissal. It was an exercise of the legislative power "to make rules for the government and regulation of the land and naval forces" [Constitution, Article I, section 8, clause 14]; related to the punishment or protection of individual officers; and was intended to secure to each officer a trial by court-martial in all cases "in time of peace." On the other hand, the act of July 15, 1870 (16 Stat., 314), providing for the reduction of the Army and the mustering out by the President, with one year's pay, of officers found by a board to be unfit for the proper discharge of their duties "for any cause except injuries incurred or disease contracted in the line of their duty," was an exercise of the legislative power "to raise and support armies" [Constitution, Article I, section 8, clause 12]; related to the Army at large; and was intended to reduce the Army of the United States from 45 to 25 regiments. The two laws are neither in conflict nor in *pari materia*; they spring from different provisions of the Constitution, and have entirely different purposes. (*Street v. U. S.*, 24 Ct. Cls., 230.)

See notes to Constitution, Article I, section 8, clause 14, and Article II, section 2, clause 1, "Powers of Congress and of the President."

**Not repealed by later general laws.**—Section 1442, Revised Statutes, gives the right to furlough an officer of the Navy, and section 1557 fixes the proportion of the pay that he

shall have while on furlough. Section 1454 provides for retiring officers of the Navy on furlough pay, and section 1593 provides specifically that such officers shall receive only one-half of the pay to which they would have been entitled if on leave of absence on the active list. These sections have not been repealed. (15 Comp. Dec., 73; see also *Hannum v. U. S.*, 226 U. S., 436.)

Congress having for the past 30 years preserved a distinction between naval officers "on the retired list," and such officers "on the retired list with furlough pay," a statute providing for the pay of naval officers on the "retired list" will not be held to abolish the furlough-pay list. (*Brown v. U. S.*, 113 U. S., 568).

An officer was retired in conformity with the provisions of section 1454, Revised Statutes, on furlough pay, upon finding of retiring board that he was incapacitated for active service, not as a result of an incident of the service. *Held*, that laws regulating the pay of commissioned officers of the Navy do not apply to officers "who were retired because of their own misconduct, as provided by section 1454," but only to commissioned officers on the active list. (*Hannum v. U. S.*, 43 Ct. Cls., 320; affirmed, 226 U. S., 436.) [That court was in error in treating section 1454 as providing for the retirement of officers "because of their own misconduct," see section 1456, Revised Statutes, and note thereto. That incapacity due to misconduct is not the only class of physical disability which is not the result of any incident of the service, see note to section 1451, Revised Statutes.]

The act of July 16, 1862, provided that the annual pay of retired naval officers shall be as follows, viz: Admirals, \$2,000; commodores, \$1,800; captains, \$1,600; etc., etc., embracing the several grades down to and including ensigns. It was held that under that act all officers on the retired list were classified for pay purposes according to rank only, and that when the rank of an officer in any case was determined, the law itself declared in dollars what should be his annual pay, notwithstanding that he may have been placed on the retired list expressly on the footing of a rate called furlough pay; that by said act of 1862 a new and uniform rule for the pay of retired officers was adopted, which superseded furlough pay; that opinions in regard to repeals by implication not being favored, have no application to this question; and that where the law made no exception none could be made by construction; it covers the whole subject of pay of the officers enumerated, and makes no exception as to furlough pay. (12 Op. Atty. Gen., 222.) [It would seem that this opinion held the law of August 3, 1861, to be repealed by the act of July 16, 1862, but that nevertheless said law of 1861 was incorporated into the Revised Statutes as section 1454; see *Brown v. U. S.*, noted above.]

**Meaning of "wholly retired."**—"What is it to be wholly retired from the service? It is nothing less than to be put out of the Army and out of office." (*Miller v. U. S.*, 19 Ct. Cls., 338, 353.)

Any form of removal of an officer from his office without his consent is a dismissal. (29 Op. Atty. Gen., 600; but see note to sec. 1456, R. S., and see file 26260-1392, noted below.)

The various methods by which persons in the military or naval service of the United States may be involuntarily separated therefrom are embraced in the terms "discharged," "dismissed," and "wholly retired" [and "dropped from the service": see section 1505, Revised Statutes, as amended; or dropped "from the rolls": see section 1229, Revised Statutes, and note thereto. The word "discharged" is properly limited in its application to those who have enlisted for definite periods (citing *Emory v. U. S.*, 19 Ct. Cls., 254, 262), and unless qualified by other words, as, for example, "dishonorable" discharge, "bad conduct" discharge, discharge "without honor," it does not carry with it any stigma of disgrace or punishment. "Dismissed" is a term peculiarly applicable to officers and is the equivalent of dishonorable discharge. "Wholly retired" is a phrase coined for the purpose of conveying, with reference to officers, the same idea as attaches to the word "discharged" when applied to enlisted men. The meaning of these terms and the importance of distinguishing between them was discussed by the Court of Claims in the case of *Emory v. U. S.* (19 Ct. Cls., 254, 263), in which it was said: "Other instances can be found in the statute-books where the legislative draftsman has been embarrassed by the technical meanings which the Army attaches to these words. Thus the act 3d August, 1861 (12 Stat. L., p. 289, sec. 17), provided a method for clearing the Army of officers incapacitated for service. As to those who were incapacitated from long and faithful service, by wounds, &c., it provided that they should be placed on the retired list. As to those whose incapacity was not the direct result of their service the statute intended that they should be removed from office with one year's pay. But the draftsman manifestly could not find a term or phrase to express that idea. If the statute should say 'discharged' it would use a term applicable to enlisted men; if it should say 'dismissed' it would use a term savoring of punishment and disgrace. He therefore avoided these and used the curious euphemism 'wholly retired.'" (File 26260-1392, June 29, 1911, p. 25.)

**Status of officer "wholly retired."**—Officers wholly retired from the service are "ex" or "ci-devant" officers; their case is very different from that of officers merely retired from active service. (29 Op. Atty. Gen., 401.)

An officer on being wholly retired becomes a civilian. (*Miller v. U. S.*, 19 Ct. Cls., 338, 353.)

Where the law provided for honorably discharging from the Army certain officers with "one year's pay and allowances," *held* that "all officers discharged in pursuance of this provision were remitted to civil life, free from all obligation to the Government other than such as concerns every citizen. No condition except that of honorable discharge is prescribed by it, and there is nothing in it indicating that such officers should not thereafter be eligible to any office, civil or military, no



matter how great might be its emoluments, unless what had been thus received should be refunded." (14 Op. Atty. Gen., 230; see also 15 Op. Atty. Gen., 177.)

**Status of officer retired on furlough pay.**—An officer, though retired on furlough pay, is an officer on the retired list, being specifically so recognized by section 1593 of the Revised Statutes. (15 Comp. Dec., 73.)

**President's action can not be revoked.**—The President having once "determined" whether the officer shall be retired from active service or wholly retired, can not review his decision nor correct an error of judgment. (*McBlair v. U. S.*, 19 Ct. Cls., 528.)

The President has the right upon the report of a retiring board to retain an officer in active service or retire him from active service or wholly retire him. But this is not a continuing power and is performed to the extent of its existence by the one act of the President. (*McBlair v. U. S.*, 19 Ct. Cls., 528.)

The right of the President to review his own action, if it exist, must be subject to reasonable limitations. A change of an order after two distinct recognitions of approval would be an unreasonable exercise of the right of review. (*McBlair v. U. S.*, 19 Ct. Cls., 528.)

An officer of the Army was found incapacitated by sickness "not incident to the service." By direction of the President he was wholly retired and his successor appointed and confirmed. The officer asks a rehearing which is granted by the President, in consequence of which the President revokes his former order and places the officer upon the retired list. *Held*, that upon the order of the President approving a report and "wholly retiring" an officer, there is in law and in fact a vacancy, the legal status of the officer becoming that of a private citizen; and that he can not again be restored to office except by a new appointment in pursuance of a nomination to and confirmation by the Senate; and that the President has no power to reinstate by mere revocation, without the advice and consent of the Senate, after the complete severance of the individual and the office. *Held, further*, that the nomination and confirmation of an officer as the successor of one "wholly retired" operates in law to supersede the retired officer, who thereby ceases to have any connection with the Army. (*Miller v. U. S.*, 19 Ct. Cls., 338.)

A retiring board found an officer "incapacitated for duty by disability which did not originate in the line of duty." The finding was approved by the President, and the claimant was thereupon retired upon furlough pay, as required by section 1454, Revised Statutes. About two years later the Secretary of the Navy decided that "the department is of the opinion that the causes which incapacitated him for active duty were incident to the service." Unfortunately for the claimant, the retiring board, by the President's approval, and not "the department," was authorized by law to settle that fact (secs. 1451 and 1454, R. S.). At the time the opinion of the department was promulgated, the Secretary had no more power to revise the finding of the board and to reverse the approval and action of the President thereon than he had to overrule a decision of

the Supreme Court. (*Burchard v. U. S.*, 19 Ct. Cls., 137.)

Neither the department nor the President could then change the findings, as they had already been approved and were no longer open to review. The action of the President was equivalent to the judgment of an appropriate tribunal upon the facts as found. That judgment, as a judgment, could not be disturbed. (*U. S. v. Burchard*, 125 U. S., 176; 27 Op. Atty. Gen., 225.)

An officer of the Army was found by a retiring board "incapacitated for active service from insanity, which insanity is not incident to the service." By direction of the President he was retired from active service. Thereafter, by direction of the President, this order was so amended as to wholly retire him from the service with one year's pay, this amendment being made at the officer's request. Thereafter, by direction of the President the order wholly retiring the officer was declared void on the ground that he was insane when he made the request, and he was restored to the retired list in accordance with the original order. The President, under the law, had power (1) to place the officer on the retired list, or (2) to wholly retire him from the service with one year's pay and allowances. Having once acted under that power upon the report of the board by retiring the officer, his power as to this particular case was thereby exhausted. In general, where power is given by statute to enable an officer to do a particular act which would otherwise be beyond the scope of his authority, after such power has once been exercised it is deemed exhausted and can not be exercised again. Accordingly, the order wholly retiring this officer from the service was void, for want of authority in the President thus to retire him. The circumstance that such order was issued in compliance with a request made by the officer when insane may afford additional ground for holding it void. (19 Op. Atty. Gen., 202, 207.)

In *People v. Waynesville* (88 Ill., 470, 475) it is observed: "As a general rule, where the general assembly confers a power, and the persons upon whom it is conferred act under it, the power is exhausted, unless power is given to act again under the same authority." And in *Ex parte Randolph* (2 Brock., 473, 474) the court says: "I take it to be a sound principle, that when a special tribunal is created, with limited power and a particular jurisdiction, whenever the power is once executed the jurisdiction is exhausted and at an end—that the person thus invested with power is, in the language of the law, *functus officio*." These cases are cited by the Court of Claims in *McBlair v. U. S.* (19 Ct. Cls., 528) in holding that the President's power is performed to the extent of its existence by the one act of approval of the proceedings of a retiring board. (19 Op. Atty. Gen., 202, 207.)

None but officers in active service being eligible for retirement, the action of the President revoking a previous order dropping an officer from the rolls, and putting him on the retired list of the Army, was ineffectual for that purpose. (19 Op. Atty. Gen., 202, 205.)

Whether the finding of the board was warranted by the evidence adduced is an inquiry that can not now be gone into as no power of review over the proceedings of the retiring board exists by law where its finding has been once approved by the President and his "orders in the case" executed. (15 Op. Atty. Gen., 446.)

For other cases, see notes to sections 1452, 1456, and 1457, Revised Statutes.

**Transfer of officer from furlough to retired pay list does not change cause of retirement.**—A retiring board reported that an officer was incapacitated for active service and that in its judgment the incapacity did not originate "in the line of duty." In this report the President concurred, and directed a retirement on furlough pay. *Held*, that the finding of the retiring board, approved by the President, is the judgment of the tribunal, created under the law for the government of the Navy to determine such questions, that the officer be retired from active service for incapacity which "did not originate in the line of duty." This made him a retired officer on furlough pay, and gave him one-half the leave of absence pay of an officer on the active list. When he was afterwards transferred by the action of the President and Senate, under section 1594, Revised Statutes, "from the furlough to the retired pay list," his status as a retired officer was not changed. He still remained an officer retired for incapacity which did not originate in the line of duty, but his pay was raised from that of an officer retired "on furlough pay" to that of an officer retired on half sea pay. The object of the statute was not to enable the President and Senate to vacate the finding of the retiring board that the incapacity of the officer did not "originate in the line of duty" and to decide that it was "the result of an incident of the service," but to afford a means for his relief from the consequences of such a finding to the extent of adding to his pay the difference between the half of leave of absence pay and the half of sea pay. "It may have been intended as a provision for a remedy for wrongs done by retiring boards, but it limited the power of the President and Senate in that behalf to a transfer of the name of the officer from 'the furlough to the retired pay list.' The cause of his retirement still remains the same and determines his position on the 'retired-pay list.'" (*Potts v. U. S.*, 125 U. S., 173; 27 Op. Atty. Gen., 221.)

The transfer of the claimant "from the furlough to the retired pay list" did not have the effect to abrogate the finding of the retiring board and insert in its place that the cause of his incapacity did originate from the service. (*Burchard v. U. S.*, 19 Ct. Cls., 137; 125 U. S., 176.)

**Cause of retirement cannot be changed by Congress.**—In 14 Comp. Dec., 161, it was held that a private act of Congress which authorized the Secretary of the Navy to transfer an officer on the retired list "from the half-pay list to the seventy-five per centum list under section fifteen hundred and eighty-eight Revised Statutes," operated to change the status of the officer from that of one retired for incapacity not incident to his service

to that of one retired for an incapacity of service origin. In 27 Op. Atty. Gen., 221, the Attorney General stated that he could not concur in this decision; that it may be questioned whether or not Congress has the authority to change the findings of the retiring board approved by the President, even if it so intended; and that the private act did not make the beneficiary an officer of the Navy who had theretofore been retired on account of wounds or disability incident to the service. Thereafter, in 15 Comp. Dec., 584 (97 S. & A. Memo. 1004), the Comptroller of the Treasury reversed his previous decision (14 Comp. Dec., 161) and followed the opinion of the Attorney General. The opinion of the Attorney General, thus followed by the Comptroller of the Treasury, was sustained by the Court of Claims in *Morse v. U. S.*, 46 Ct. Cls., 361, affirmed by the Supreme Court in 229 U. S., 208.

Where an officer of the Navy was retired under section 1454, Revised Statutes, for incapacity not originating in the line of duty, and upon a full review of the facts the Secretary of the Navy found that the causes of his incapacity were incident to the service, and he was accordingly transferred by the President, by and with the advice and consent of the Senate, from the furlough to the 50 per cent retired pay list, under sections 1594 and 1588, Revised Statutes, and later, pursuant to a private act of Congress, was transferred to the 75 per cent pay list of retired officers under section 1588, Revised Statutes, he can not thereafter be placed on the retired list with the retired pay of one grade above that actually held by him at the time of his retirement, under the act of June 29, 1906 (34 Stat., 554), which authorizes such advancement to certain officers of the Navy who have been retired on account of wounds or disability incident to the service. The status of this officer was fixed by the findings of the retiring board, approved by the President, and it may be questioned whether or not Congress has the authority to change the finding of the retiring board, even if it so intended, although it is undoubtedly within the power of Congress to give him all the benefits which he would have received had he been correctly retired. The private act gave him all the benefits of persons who were entitled to the emoluments prescribed therein, but it did not make him an officer of the Navy who had theretofore been retired on account of wounds or disability incident to the service, the fact being, as the record shows, that, although unadvisedly or erroneously, he was definitely retired for a physical disability which was not due to an incident of the service. (27 Op. Atty. Gen., 221.)

A special act of Congress which authorizes the Secretary of the Navy to transfer an officer on the retired list "from the half-pay list to the 75 per centum list under section fifteen hundred and eighty-eight Revised Statutes," will not operate to change his status from that of an officer retired for incapacity not incident to the service to that of an officer retired for incapacity incident to the service. (*Morse v. U. S.*, 46 Ct. Cls., 361, 229 U. S., 208.)

**Courts without power to review finding of board.**—Where an officer of the Army has



been examined for promotion, and upon failure to qualify is honorably discharged from the service, the courts are without jurisdiction to order him placed on the retired list upon his petition setting forth that he had been found by a board physically incapacitated for service and that he was thereby entitled to be retired and entitled to retired pay during life, instead of being dismissed with one year's pay. The report of the board is not final, but must be approved or disapproved by the President. This is the only relief from the errors or injustice that may be done by the board which is provided. The courts have no power to review. The courts are not the only instrumentalities of the Government. They cannot command or regulate the Army. To be promoted or retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country and it may be, even its safety, through the efficiency of the Army. Decisions of State courts relating to the militia cannot sustain the right to review examining boards in the Army. There is a wide difference between the Regular Army of the Nation and the militia of a State when not in the service of the Nation; and more rigid rules and a higher state of discipline are required in the one case than in the other. (*Reaves v. Ainsworth*, 219 U. S., 296.)

**Transfer from furlough to retired pay list no longer authorized.**—An officer retired on furlough pay under section 1454, Revised Statutes, can not be transferred to the retired pay list under section 1594, Revised Statutes, with increase of pay; such increase is forbidden by the act of August 5, 1882 (22 Stat., 286), providing that "hereafter there shall be no promotion or increase of pay in the retired list of the Navy, but the rank and pay of officers on the retired list shall be the same that they are when such officers shall be retired." (18 Op. Atty. Gen., 96.)

Nor can an officer be simultaneously retired on furlough pay and transferred to the retired pay list, so as to give him the pay of the latter. (18 Op. Atty. Gen., 96.)

The provision of the act of August 5, 1882 (22 Stat., 286), prevents either rank or pay of officers on the retired list from being increased in any way after such officers shall have been placed thereupon. (18 Op. Atty. Gen., 96.)

The power of the President to make such transfer depends by the section upon the fact that the officer is already upon the retired list, whether he has been so for a minute or longer. Whatever time, therefore, may have elapsed since the officer has been put upon that list has elapsed, of course, *after* that point of time which fixes the pay of all retired officers. There can be no contemporaneous occurrence of the act by which an officer is retired upon the furlough-pay list and of that by which he is transferred therefrom. The former precedes the latter necessarily; and so its effect in fixing pay precedes the existence of any question as to the effect of transfer thereupon. In other words, the transfer finds the pay already fixed by the act of August 5, 1882. (18 Op. Atty. Gen., 96.)

[There is now no increase of pay involved by the transfer of an officer from the furlough to the retired pay list, as furlough pay is now the

same as the 50 per cent retired list. See note to section 1593, Revised Statutes.]

**One year's pay allowed officer wholly retired is not a gratuity.**—The one year's pay provided for by section 1275, Revised Statutes, for an officer of the Army wholly retired from the service is not in the nature of a gratuity, but is compensation for services rendered, and upon the death of the officer before payment thereof it is payable to his legal representative. (7 Comp. Dec., 404; see also *Hotchkin v. U. S.*, 24 Ct. Cls., 18; but see note to sec. 1456, R. S., under "Act of Aug. 5, 1882, not a penal statute.")

**Officer wholly retired not required to refund year's pay upon reappointment.**—Where an officer who had been honorably discharged from the Army with one year's pay and allowances was reappointed to the Army, upon nomination and confirmation by the Senate, he was not required to refund the amount of his pay on discharge, though the War Department attempted to require same as a condition precedent to his second appointment. As a condition it is void and of no effect. (14 Op. Atty. Gen., 230; see also 15 Op. Atty. Gen., 177; *Katzer v. U. S.*, 52 Ct. Cls., 32.)

**Reconsideration by board of its finding.**—Where a naval retiring board convened to inquire into the nature and cause of the disability of an officer has once finished its work, rendered a complete judgment in the case, and adjourned, a subsequent reconsideration of its judgment by the board, unless authorized or directed by proper authority, can have no legal effect. Accordingly, upon examination of the record of proceedings before a naval retiring board in the case of Paymaster Rodney, *held*, that the paper attached to the record called a reconsideration of the finding of the board was without legal effect and that the officer was properly retired under the original finding of the board on furlough pay. (16 Op. Atty. Gen., 104; see also 15 Op. Atty. Gen., 316.)

**A probationary dental surgeon serving under appointment issued by the President, by and with the advice and consent of the Senate, in accordance with the act of August 29, 1916 (39 Stat., 573), may be wholly retired under this section, notwithstanding the provision in said act that such appointments "may be revoked at any time during the probationary period by the President."** (See file 26253-550, Feb. 18, 1918.)

**Order retiring marine officer on furlough pay is without authority of law.**—An officer of the Marine Corps was examined by a retiring board convened by the Secretary of the Navy and found incapacitated for active service for causes "not an incident of the service." The President made the following indorsement on the record of the proceedings and finding of the board: "I concur in opinion with the retiring board in the case of First Lieut. George M. Welles. Let him be retired on furlough pay." The officer was advised of this action by the Acting Secretary of the Navy, and notified that he would be considered as retired on furlough pay from that date. The retirement of officers of the Marine Corps was governed by sections 1622 and 1623, Revised

Statutes. The board was lawfully convened in accordance with those sections. For officers of the Marine Corps who are retired from active service, as for officers of the Army who are so retired, there is but one rate of pay established by law, and it is not competent for the President to place these retired officers on a different rate of pay than that which the law has fixed. The first sentence of the indorsement of the President upon the record admits of no other construction than that it was meant to express his approval of the finding of the board. Having thus approved the finding of the board, it rested entirely in his discretion whether Lieut. Welles should be retired from active service or wholly retired from the service. But it was necessary that one or the other be done, as the law is imperative that when the decision of the board is approved by the President the

officer "shall be retired," etc. The direction given in the last sentence of the indorsement clearly indicates that it was the determination of the President that Lieut. Welles be retired from active service simply. The compensation of an officer thus retired being fixed by statute and not left to be determined by the President, in so far as that direction applies to the pay of Lieut. Welles on the retired list it must be treated as of no effect. It may well be that the indorsement was prepared inadvertently, it being supposed that the law which applies to officers of the Navy (who may be retired upon furlough pay if the reason for their retirement was not an incident of the service) applies to officers of the Marine Corps. Such, however, is not the case; for the Marine Corps different legislation is provided. (15 Op. Atty. Gen., 442.)

**Sec. 1455. [Officers not to be retired without a hearing.]** No officer of the Navy shall be retired from active service, or wholly retired from the service, without a full and fair hearing before such Navy retiring-board, if he shall demand it, except in cases where he may be retired by the President at his own request, or on account of age or length of service, or on account of his failure to be recommended by an examining board for promotion.—(3 Aug., 1861, c. 42, s. 23, v. 12, p. 291.)

Retirement of officers upon their own request is provided for by section 1443, Revised Statutes; act of May 13, 1908 (35 Stat., 128); and act of March 3, 1899, section 8 (30 Stat., 1006).

Retirement of officers for age is provided for by section 1444, Revised Statutes, as amended by act of August 29, 1916 (39 Stat., 579); see also section 1481, Revised Statutes.

Retirement of officers not recommended for promotion is provided for by section 1447, Revised Statutes.

Retirement of officers upon selection by a board of rear admirals, for the purpose of creating vacancies, was provided for by act of March 3, 1899, section 9 (30 Stat., 1006), since repealed.

"Wholly retired from the service:" Authority for such retirements is contained in section 1455, Revised Statutes.

**Full and fair hearing.**—The statute providing that no officer of the Army shall be retired, either partially or wholly, without having had a full and fair hearing, does not authorize the President to send a case back to a retiring board if he has once approved and acted upon its report. When the President approves and acts upon the report of a retiring board, he thereby determines that the officer has had "a full and fair hearing." (Miller v. U. S., 19 Ct. Cls., 338. Compare note to sec. 1503, R. S.)

**Failure of officer to demand hearing as constituting waiver.**—See note to section 1503, Revised Statutes.

**Sec. 1456. [Officers not to be retired for misconduct.]** No officer of the Navy shall be placed on the retired list because of misconduct; but he shall be brought to trial by court-martial for such misconduct.—(15 July, 1870, c. 295, s. 6, v. 16, p. 333.)

Similar provisions with reference to officers failing upon examination for promotion by reason of drunkenness or other misconduct, and a requirement that such officers shall be discharged with not more than one year's pay, are contained in act of August 5, 1882 (22 Stat., 286).

Statute of limitations for trials by court-martial: See section 1624, Revised Statutes, articles 61 and 62, which articles were added to that section by act of February 25, 1895 (28 Stat., 680).

Trials of officers by general courts-martial are provided for by section 1624, Revised Statutes.

**"Offenses shall not be allowed to accumulate, in order that sufficient matter may thus**

be obtained for a trial, without giving due notice to the offender." (Art. R-1411, Navy Regs., 1913.)

**Misconduct not ground for retirement.**—Section 1456, Revised Statutes, specifically prohibits retirement of officers of the Navy on account of misconduct and requires they be brought to trial therefor by court-martial; and there is no doubt that the same principle must be recognized in the construction of the laws relating to the retirement of officers of the Army. (27 Op. Atty. Gen., 14.)

An officer of the Army can not be retired under the provisions of sections 1245-1252, Revised Statutes, if he could have been properly brought to trial by court-martial for the same acts or omissions which are alleged as evidence of the



incapacity justifying his retirement. If he displays impatience or irritability, imperfect control of his temper, indolence, indecision, and want of alertness to such an extent as to destroy or gravely impair his usefulness, it would seem almost, indeed quite, incredible that he should not have been guilty of some breach of the Articles of War. If his excesses in eating and drinking have been sufficient to incapacitate him for the discharge of his duties, this may constitute a clearly appropriate ground for disciplinary action, but inasmuch as these indiscretions are evidently voluntary on his part, they can not of themselves constitute an incapacity justifying retirement. (27 Op. Atty. Gen., 14.)

If any of the matters referred to as objectionable in an officer are in violation of the law or regulations of the service, he is subject to its discipline; but they do not subject him to compulsory retirement unless they render him incapable of performing the duties of his office when he is willing and desires to do so. (27 Op. Atty. Gen., 162.)

The provisions of the retirement laws are in no sense disciplinary or punitive in their purpose. The punishment of officers for willful failure to discharge their duty can not be legally effected through the agency of a retiring board; and in dealing with questions of this character, the law assumes the freedom of the human will in a person *compos mentis* and legally responsible for his actions. (27 Op. Atty. Gen., 14.)

**Retired list intended only for the worthy.**—All officers who in the judgment of the board and of the President were unworthy of official confidence and public favor have from time to time been excluded entirely from the Navy; the reserved list being presumably composed of persons whose professional education and standing are deserving of respect and available for the benefit of the Government, though in different degrees, depending partly on the personal merit of the officers, partly on opportunity and exigency, partly on their relative numbers, partly on public economy. (12 Op. Atty. Gen., 222.)

In regard to the contention that officers mentally, morally, and professionally disqualified are often found upon the retired list, I would suggest that it was never contemplated by the legislature that the retired list would to any extent be occupied except by those who had performed honorable service and were retired by reason of disability incurred in that service. (17 Op. Atty. Gen., 36.)

**Temperamental unfitness not misconduct.**—See note to section 1448, Revised Statutes.

**OFFICERS TO BE DISCHARGED, AND NOT RETIRED, WHEN FOUND BY PROMOTION BOARD UNFIT FROM CAUSES DUE TO MISCONDUCT.**

**Historical: Act August 5, 1882, applies to moral unfitness.**—At the time the act of 1882 (22 Stat., 286) was pending in Congress, officers of the Navy, prior to promotion, were required by sections 1493, 1496, 1497, and 1504, Revised Statutes, to establish by examination their physical, mental, moral, and professional

fitness to perform all the duties at sea of the grade to which they were to be promoted. Should the candidate on examination fail physically, his case was provided for by other statutes establishing retiring boards and defining their powers; if, on the other hand, he failed professionally, his case came within section 1505, providing that officers so failing should be suspended from promotion and then reexamined, and in case of failure upon reexamination, "shall be dropped from the service;" if the candidate was found by both the medical and examining boards to be not qualified for promotion, under section 1447 of the Revised Statutes he was to be placed on the retired list [but see note to section 1447, Revised Statutes, as to whether both boards must have reported unfavorably]. Where, however, he was found not *morally* qualified for promotion, although physically, mentally, and professionally competent, his case was not specifically provided for by law. He could not be promoted, because of the provisions of section 1 of the act of April 21, 1864 (13 Stat., 53), now incorporated in section 1496 of the Revised Statutes. Neither could he be discharged from the service, because of the act of July 13, 1866 (14 Stat., 92), now section 1229, and article 36 of section 1624, Revised Statutes. On the other hand, under the laws, customs, and usages of the naval service, no officer who is unable to establish his fitness for promotion can be retained indefinitely in a fixed position on the Navy list delaying promotions all along the line, but an officer who is due for promotion must either be promoted or make way for those below him, as the law requires all promotions in the Navy to be made according to seniority. [But see notes to sections 1458 and 1480, Revised Statutes, to effect that promotions are no longer required to be made by seniority in all cases.] Under these circumstances the practice developed in the cases of officers who failed morally upon examination for promotion, although otherwise qualified, of placing them on the retired list "under the first section of the act of April 21, 1864, as not recommended for promotion" (e. g., case of Master Fred'k E. Upton, vol. 28, Ex. Bd. Recs., No. 34, morally disqualified because "insubordinate in disposition;" p. 174 Navy Register, 1910; Davis *Admr. v. U. S.*, 24 Ct. Cls., 442). Under this state of law the bill now incorporated in the act of 1882 was introduced in Congress "to promote the efficiency of the Navy," and was attached as an amendment to the naval appropriation bill in the House by unanimous consent. That the purpose of this legislation was to abolish the practice of placing upon the retired list of the Navy officers who had failed to qualify for promotion by reason of *moral* deficiency can hardly be seriously questioned. However, if a doubt could exist it would be set at rest once for all by reference to the report of the Committee on Naval Affairs of the House in recommending favorable action upon this measure [citing *Holy Trinity Church v. U. S.*, 143 U. S., 465, noted in "Introduction," under "Statutory Construction," VI, D, 3]. The committee report stated: "Under the law, as it now exists, many officers who have been educated at the expense of the Government and

who have during their service contracted habits of intemperance and other immoral practices which disqualify them for the honorable position of an officer in the United States Navy, are placed on the retired list, and their services are lost to the Government, when, but for their conduct, they would remain on the active list. Therefore, your committee recommend the passage of this bill with an amendment, so that the Government may rid itself of a lot of useless official material." (File 26260-1392, June 29, 1911, pp. 5, et seq.)

The report of the committee shows that this legislation was not intended to be limited in its scope to officers who are physically or mentally unfit for sea service by reason of their own misconduct, but was intended to apply to those officers who, while physically, mentally, and professionally qualified in every respect to perform the duties of their grade, might still be unfit to maintain discipline and exercise command over hundreds of men whose respect they had forfeited by habits resulting in a reputation discreditable to the "honorable position of an officer of the Navy." Such officers were not entitled to be placed on the retired list of the Navy, which was intended as a reward for long and faithful service, and not as a refuge for "a lot of useless official material," whose worthlessness was due to their own misconduct, and the practice of retiring such officers was the evil which Congress intended to remedy. (File 26260-1392, June 29, 1911, p. 8.)

This very provision of the act of 1882 has been before the courts and held to authorize the discharge of an officer who was found by the promotion boards to be physically, mentally, and professionally, but not morally qualified for promotion. (File 26260-1392, June 29, 1911, p. 18, citing *Jouett v. U. S.*, 28 Ct. Cls., 257.)

In general, under section 1456, Revised Statutes, and the act of August 5, 1882, misconduct is not a ground for retirement. However, an officer who fails to qualify for promotion is subject to discharge under the latter act only as the result of a finding of moral disqualification. (File 26260-874, June 3, 1910.)

**Retirement of officer found not morally qualified for promotion.**—See note to section 1447, Revised Statutes.

**What constitutes moral unfitness.**—Any discussion of the question whether an officer can be morally unfit for promotion without his mental, professional, or physical qualifications being affected, becomes purely idle and academic in view of the fact that Congress has itself, by express language in the act of April 21, 1864 (sec. 1496, R. S.), provided that no officer shall be promoted to a higher grade until his moral, as well as his mental, professional, and physical fitness shall have been established to the satisfaction of the board of examining officers. (File 26260-1392, June 29, 1911, p. 10.)

"An officer may be 'incapable,' either mentally, physically, or morally; for although he may possess a strong mind and robust frame, yet if his moral perception of right and wrong be so blunted and debased as to render him unreliable, he could hardly be regarded

as the capable officer to be intrusted with the lives of his countrymen and the property and honor of his country." (8 Op. Atty. Gen., 223, 233.)

No specific definition of what constitutes moral unfitness is desirable or should be attempted. A similar question was considered by the Court of Claims in the case of *Swaim v. U. S.* (28 Ct. Cls., 173), with reference to what constitutes conduct unbecoming an officer and a gentleman or conduct to the prejudice of good order and discipline, the court stating that this is "beyond the bounds of exact formula, and must depend more or less upon the circumstances and peculiarities in each case." The question should, accordingly, be left to be determined by "a board of experienced, intelligent, impartial, military experts \* \* \* in the exercise of a sound discretion." (File 26260-1392, June 29, 1911, p. 10.)

That the legislation was not intended to apply only to officers whose misconduct resulted in actual want of *capacity* to serve at sea is shown by the fact that, as it passed the Senate, it read "from any cause arising from his misconduct or want of capacity not caused by or in consequence of the performance of his duty," but the House Committee on Naval Affairs, in accordance with its views on the subject as stated in its report above quoted, recommended that the words italicized be stricken from the bill, which recommendation was followed and the bill as thus amended was passed with certain immaterial changes as a clause of the naval appropriation act. (File 26260-1392, June 29, 1911, p. 9.)

In any event, a case of repeated failure to discharge indebtedness is obviously an instance of moral unfitness for promotion. (File 26260-1392, June 29, 1911, p. 11.)

It is not a private matter of concern to the officer only, but in the Navy an officer's neglect to pay just indebtedness is a matter of concern to the entire service, of which he is a part, and renders him unfit for the duties of his position. (File 26260-1392, June 29, 1911, p. 11.)

Evidence that included a list of cases in which an officer had failed to liquidate indebtedness admitted to be just; that he had been convicted by general court-martial upon the charges of scandalous conduct tending to the destruction of good morals and conduct unbecoming an officer and a gentleman, in that he had been expelled from an Army and Navy club for nonpayment of his indebtedness to the club and for breaking his promise to arrange for such payment, clearly justified the finding of the board that he was not morally qualified for promotion. (File 26260-1392, June 29, 1911, p. 12. But see President Taft's ruling in this case, noted below.)

In the case noted in the preceding paragraph, it was reported by the examining board, June 21, 1911: "After duly deliberating on all the matters herein referred to, the board believes that the candidate did not use his utmost exertions toward liquidating his debts as quickly as possible, but that from the contraction of the first debts to the payment of the last one, on June 14, 1911, he has shown a degree of moral turpitude which unfits him for



promotion." The Secretary of the Navy recommended approval of the board's finding. President Taft's decision in the case was as follows: "I am not satisfied from the showing made that Lieut. Burt's character has been shown to be such as to unfit him morally for promotion. Of course, the failure to pay debts and the circumstances under which the debts were contracted, when their payment is postponed or neglected, may constitute conduct unbecoming an officer. But here the debts have been paid; and they were not so great in amount or so many as to indicate utter recklessness when it is considered that Lieut. Burt is a married man and, necessarily, had the expense of a family upon him in addition to that attendant upon his sea service; I am bound to say that the specifications which were handed to me as to the immorality involved in his relation to debts seem to be, many of them, strained, and I can not think that it is just to eliminate him from the naval service for such delinquency." (File 26260-1392:15, Jan. 2, 1912.)

Passed Asst. Paymaster Louis A. Yorke was examined for promotion December 14, 1886; on December 17, 1886, the board reported him mentally but not professionally or morally qualified. The evidence upon which the board based its findings that he was not morally qualified for promotion consisted principally of "several complaints which had been made against him to the department, consisting of alleged indebtedness to individuals, and of neglect, refusal, or evasion to pay the same." He was found by the medical board to be "physically qualified to perform all his duties at sea." In accordance with the Navy Department's recommendation, the President approved the findings of the boards, February 19, 1887, and the officer was discharged with one year's pay. Subsequently bills were repeatedly introduced in Congress "for the relief of Louis A. Yorke," one of which, providing for his restoration to the Navy and immediate retirement, passed both Houses during the Fifty-third Congress, second session, but was vetoed by the President. The message of the President, returning the bill to Congress without his approval, August 11, 1894 (26 Cong. Rec., 8411), was in part as follows: "Considerable evidence was before the board showing quite a large amount of personal indebtedness owing by the candidate, and it appeared that in a few instances his accounts with the Navy Department had not been promptly settled. It was also shown that he did not at all times deposit the Government money intrusted to his care in the places required by law and the regulations of the Navy. In connection with his personal indebtedness, incidents and circumstances were brought to light which certainly indicated that he entertained very lax ideas of honest dealing and fairness, and which developed a disregard of the obligations and requirements of his position as an officer in the Navy. He was given abundant opportunity to meet and explain every damaging allegation and every adverse inference arising from the evidence, and his claim, not without foundation it appeared, that the charges against him were instigated by malice, was doubtless given full weight. \* \* \*

On the facts as presented he would seem to be out of place among those who, though still compensated by the Government, have been, on account of age, long and honorable service, or disabilities incurred in the discharge of duty, relieved from further activity. \* \* \* I have no doubt malicious feeling, growing out of domestic difficulties, entered into the affair and gave impetus to the search after inculcating evidence; but facts were nevertheless established beyond any reasonable doubt which abundantly uphold these findings." Bills to the same effect were subsequently introduced in Congress from time to time, but the measure was never again passed by both Houses. (See file 26260-1392, June 29, 1911.)

Boatswain Louis W. Sopp was examined for promotion March 1, 1906; the examining board found that he had "the mental and professional, but not the moral qualifications, by reason of his failure to pay his debts, which is a result of his own misconduct, to perform efficiently all his duties, both at sea and on shore, of the grade to which he is to be promoted," and the board therefore did not recommend him for promotion. The Secretary of the Navy recommended President's approval, April 9, 1906, stating: "Approval of this finding would result in his discharge from the service pursuant to the act of August 5, 1882, \* \* \*. Persistent failure, without adequate cause, to meet just pecuniary obligations is regarded as a proper basis for a finding of moral disqualification under this provision. The Bureau of Navigation and the Judge Advocate General recommend approval of the finding. In this recommendation I concur. Mr. Sopp has afforded no satisfactory explanation of his many delinquencies in paying his debts. In all the cases above mentioned payment was unduly delayed \* \* \*; and in some instances promises of prompt payment appear to have been lightly broken. Such conduct as that of Mr. Sopp in these matters can not but bring discredit upon the service, both at home and abroad, and it shows, in the judgment of the department, that the offender is out of place as an officer in the Navy. I advise that the finding of the naval examining board be approved, and that Mr. Sopp be discharged with one year's pay pursuant to the act of 1882." On April 10, 1906, the finding and recommendation of the naval examining board were approved by the President, and Boatswain Sopp directed to be discharged with one year's pay. (See file 26260-1392, June 29, 1911.)

Gunner George L. Mallery was examined October 12, 1904. Board found "that Gunner George L. Mallery, U. S. Navy, has the mental and professional, but not the moral qualifications, by reason of failure to pay his just debts, which is the result of his own misconduct, to perform efficiently all the duties, both at sea and on shore, of the grade to which he is to be promoted, and do not recommend him for promotion." The Secretary of the Navy, February 28, 1905, recommended President's approval, stating: "The act of August 5, 1882, provides that \* \* \*. The department regards this provision of law as applicable to the case under consideration. I advise that the findings of the naval examining board

be approved, and that Mr. Mallory be discharged with one year's pay, pursuant to the act cited." This recommendation was approved and the officer discharged accordingly. (See file 26260-1392, June 29, 1911.)

Lieut. Robert H. Osborne, U. S. Navy, was examined for promotion, June 9, 1908, and found mentally but not morally or professionally qualified, his moral failure being due to indifference in contracting financial obligations which he was unable to discharge. Upon reconsideration the board reported: "The board respectfully adheres to its original decision, and in doing so respectfully invites attention to the fact that the deficiency found in moral qualifications was not the failure of Lieut. Osborne to pay the debt owed Mr. W. E. Rouse as such, but his failure to keep his written promise to pay in a certain time and method, his failure to show any practical reason for such neglect of his promise, and his failure to meet his obligations in the sense of making any arrangement with his creditor after the matter had been brought to his attention by the department. In the opinion of the board such absolute neglect and indifference to his obligations and to his promise show a standard of morals below that which should be required of naval officers." It was contended that, "while liability to intoxication would undoubtedly render an officer unfit, it is inconceivable that the existence of indebtedness would impair his ability to perform sea duty" within the meaning of the act of August 5, 1882. The Judge Advocate General and the Secretary of the Navy recommended that the finding of the board be approved by the President, and that Lieut. Osborne be discharged with one year's pay. Counsel submitted an additional brief to the President, who advised the Secretary of the Navy that he was inclined to be as lenient as possible for the reason that this officer had contracted a physical disability in the line of duty and in the face of the enemy; but in view of the finding of the board, he did not think it to the interest of the Navy that the officer be retained on the active list; and added: "Would it not be possible to make an arrangement whereby he would be retired, of course provided that his debts should be paid before he is retired." In response, the Secretary of the Navy, June 29, 1908 (file 26260-38), informed the President that the case of this officer was within the provision of the act of August 5, 1882, "and it is therefore mandatory, if you approve the proceedings and findings of the majority of the board, that he be not retired." The Secretary further stated: "The only alternative would be that you disapprove the proceedings and findings, or the findings, of the board of which Rear Admiral Richardson Clover, U. S. Navy, is president, in which case the status of Mr. Osborne would revert to that which he occupied before he was examined, and a new examining board would be ordered before which he would be required to appear as in the first instance." The President thereupon approved the findings and recommendation of the board, July 3, 1908, and the officer was accordingly discharged with one year's pay. (See file 26260-1392, June 29, 1911.)

Boatswain Alfred H. Hewson was examined by a naval examining board, May 3, 1909. Board found: "That Boatswain Alfred H. Hewson, U. S. Navy, has the mental, but not the moral nor the professional qualifications, to perform efficiently all the duties, both at sea and on shore, of the grade to which he is to be promoted, and do not recommend him for promotion." The Acting Secretary of the Navy, May 17, 1909, recommended approval of the board's finding, stating as follows: "Upon reviewing the case it appears that Mr. Hewson has been habitually intemperate and that he has shown a lack of proper and officer-like appreciation in his methods of dealing with his financial affairs. \* \* \* I have, therefore, to advise that the findings of the naval examining board be approved, and that Boatswain Alfred H. Hewson, U. S. Navy, be discharged with one year's pay in conformity with the provisions of the act of August 5, 1882." This recommendation was approved by the President and the officer discharged accordingly. (See file 26260-1392, June 29, 1911.)

Gunner Edmund DuB. Gould was examined for promotion April 4, 1908; the examining board found that he had the mental, but not the professional fitness, and from the unfavorable evidence before it the board was not satisfied as to his moral fitness and did not recommend him for promotion. Upon a second appearance before an examining board it was found that he had the mental, but not the moral and professional qualifications, by reason of his failure to pay his debts, and not making the percentage necessary to qualify, and he was not recommended for promotion. The Judge Advocate General, in his comment on the above case, said in part: "There are eight cases in which the Bureau of Navigation referred communications to this officer concerning instances of indebtedness which had been brought to the bureau's attention, to none of which did he make reply. With regard to these debts, it appears that the one due \* \* \* was contracted prior to April, 1907, and probably some time before that, but it was only discharged on October 18, 1908, shortly before being ordered to appear for examination. Concerning the bill owed to \* \* \* it appears that it had been running for at least a year, and that Mr. Gould only paid it so recently, if at all, that he was awaiting a receipt. The candidate was given an opportunity to show by documentary evidence or otherwise that he had liquidated all claims against him, but instead of doing so he made no further communications to the board until he was again ordered to appear by the department. Even then he could present no receipts, or at least did not do so, which did not create a favorable inference. In view of this persistent neglect to pay his debts, and his further neglect to reply to the letters addressed to him upon these matters, \* \* \* and his failure to adduce anything while before the examining board to substantiate the statements that he had paid certain of his debts, it is recommended that the finding of the naval examining board in this case be approved." The Secretary of the Navy recommended approval of the board's finding, stating in part: "From a review of the record of proceedings of the naval examin-



ing board, it would appear that this officer has persistently neglected to pay his debts, that he has failed to reply to communications addressed to him officially upon these matters, and that he has failed to make any satisfactory explanation or excuse for his remissness in the above particulars." The board's finding was approved by the President, and the officer discharged accordingly. (See file 26260-1392, June 29, 1911.)

In the case of Passed Asst. Surg. Frederick W. Olcott, December 4, 1900, the board stated: "We hereby certify that Passed Asst. Surg. Frederick W. Olcott, United States Navy, has the mental but not the moral or professional qualifications to perform efficiently all the duties, both at sea and on shore, of the grade to which he is to be promoted, and we do not recommend him for promotion. This conclusion is based upon adverse reports furnished by the Navy Department, embraced in reports on fitness, special reports, and record of a general court-martial, charging drunkenness, improper use of drugs, unreliability, neglect of duty, and failure to pay bills. These reports and Passed Asst. Surg. Olcott's replies thereto, have been carefully considered. Taken separately they indicate a feeble sense of official responsibility, and collectively a degree of moral dullness that does not warrant recommendation for promotion." Board's finding approved by the President and officer discharged. (See file 26260-1392, June 29, 1911. Note: This officer was restored to the Navy and placed upon the retired list, pursuant to a special act of Congress, approved Feb. 13, 1911.)

In the case of Passed Asst. Paymaster Edwin B. Webster, January 6, 1898, the report was as follows: "The board decided that Passed Asst. Paymaster Edwin B. Webster, U. S. Navy, has the mental and professional, but not the moral qualifications, by reason of the facts mentioned in the charges formulated by the board from the record, which are a result of his own misconduct, to perform efficiently all his duties, both at sea and on shore, of the grade to which he is to be promoted, and do not recommend him for promotion." The charges formulated by the board were as follows: "1st. Habits of gambling, as indicated by the letter of F. L. Crompton, of Shanghai, China, dated July 26, 1897. 2d. Carelessness in the settlement of debts, as indicated by the correspondence between the candidate and his creditors and the Navy Department. 3d. Transactions of the candidate characterized as 'disgraceful' and 'scandalous,' by the Secretary of the Navy, and published in General Court-Martial Order No. 76, dated July 28, 1896." The members of the board recommended, in a letter to the Navy Department, that "he be put on probation for the period of one year," etc. March 4, 1898, the finding of the naval examining board was approved by the President, and the officer ordered discharged with one year's pay. (See file 26260-1392, June 29, 1911.)

Commander George W. Wood, June 29, 1893, board reported: "By reason of the facts adduced by the evidence as to his habits of drunkenness, and the contracting of debts beyond his means, and neglect of creditors since his last promotion, we find that Commander Wood is morally unfit for promotion to the next

higher grade \* \* \*. We hereby certify that Commander George W. Wood, U. S. Navy, has the mental, but not the moral and professional qualifications, to perform efficiently all the duties, both at sea and on shore, of the next higher grade, and do not recommend him for promotion." Board's finding approved, and officer discharged. In this case there was a minority report to the effect that the officer was mentally, morally, and professionally qualified. (See file 26260-1392, June 29, 1911.)

**Evidence of moral unfitness.**—From a legal point of view, evidence of reputation is to be accepted in preference to evidence of specific acts of immorality. (File 26260-1392:29, Feb. 12, 1912, p. 42.)

The law provides that no officer of the Navy shall be promoted to a higher grade "until his mental, moral, and professional fitness to perform all his duties at sea have been established to the satisfaction of a board of examining officers appointed by the President (secs. 1496, 1497, R. S.). The same rule therefore applies to the officer's moral qualifications as to his mental and professional qualifications. All alike must be "established" to the satisfaction of the board. The result of failing morally is discharge under the act of 1882; the result of failing professionally is suspension from promotion or discharge under section 1505 Revised Statutes. There is no reason for a distinction with reference to the burden of proof as to the method of determining the candidate's moral and his professional qualifications, even if such a distinction were possible under the law. If an officer's unfitness for promotion had to be proved by the Government beyond a reasonable doubt, the law would so obviously not "promote the efficiency of the Navy" that it is unnecessary to comment upon the deplorable results which would follow such a construction. (File 26260-1392, June 29, 1911, p. 32.)

It is axiomatic that an officer upon examination for promotion in the American Navy is not being tried for his misdeeds or crimes, which must be proved against him beyond a reasonable doubt, but is availing himself of an opportunity to establish his qualifications for a reward which is to be conferred only upon those who can affirmatively demonstrate their absolute fitness therefor. (File 26260-1392, June 29, 1911, p. 26½.)

The question of an officer's amenability to trial by court-martial for acts affecting his moral fitness can not have any bearing upon the question, for should the officer be so tried and convicted, or even acquitted, by court-martial the examining board would still have the duty cast upon it, by express provisions of law, of examining into the facts and outcome of such trial in order to determine for itself the effect, if any, that should be given thereto with reference to the officer's qualifications for promotion in the Navy. (File 26260-1392, June 29, 1911, p. 16; C. M. O. 13-1916, p. 6.)

The Government will not, and should not, appoint an officer to a higher grade unless satisfied beyond a reasonable doubt of his fitness. It is fundamental error to contend that candidates for promotion have a property in the offices they hold and are entitled to promo-

tion to still higher offices unless the Government shall be able to defend itself against such claim by an amount of evidence that would suffice to convict the candidates of crime; and even that, if the Government has been negligent in the matter of defending itself against the claim of candidates to serve it, and has not proven its case against them within two years, then it is helpless and must keep in employment and promote to still higher grades officers about whose fitness the gravest doubts exist. No one has a vested right to an office, especially if such office be a creature of statute. Such offices Congress creates, abolishes, and limits at will. The act of August 5, 1882, is therefore entirely constitutional. Congress having complete power might, if it wishes, stop all promotions. It did actually impede promotions by the act of 1882. It might declare that no one should hereafter be promoted who was not over six feet high, or it might even direct that all officers not of the required height should be discharged. A fortiori, it can pass an act like that of 1882, directing the discharge of officers whose unfitness arises from their own misconduct. The burden of establishing his fitness should be upon an officer who asks to be promoted to a higher grade, just as it is on one who seeks original appointment, and when the time comes for these stated examinations, the same rule should apply to one who seeks to hold on to an office. He must be discharged unless he shows his fitness to serve the Government. (Letter of Secretary of the Navy to the President, June 29, 1893, in case of Pay Inspector John H. Stevenson's examination for pay director.)

"The testimony in this case seems to the department to sustain the finding of the board. It is true there is much conflict in the evidence, and it is perhaps also true that a majority of the witnesses testified in favor of the applicant; but the proper method of arriving at the truth is to weigh evidence, and not to count witnesses. It is within the experience of every lawyer that habitual drunkenness is a most difficult fact to establish. The evidence of the witnesses who did testify to the applicant's habits of intemperance is so full and complete as to largely outweigh in the opinion of the department, the negative testimony offered by the applicant." (File 1223-94, Apr. 18, 1894, examination of Frank W. Nichols.)

The evidence requisite to establish before a naval examining board the unfitness of a candidate for promotion by reason of habits of intemperance need not be of such a positive and conclusive character as would be necessary to convict an officer on trial for similar offenses before a court-martial. In the latter case the burden rests upon the Government to establish the offense while in the former case it rests upon the candidate, who must demonstrate affirmatively his fitness for promotion. (Memo. of J. A. G., May 27, 1898, p. 34, examination of Asst. Paymaster Francis J. Semmes.)

**Improvement of officer's moral qualifications.**—The fact that an officer had improved the condition of his financial affairs prior to his examination could not have much bearing on his case. "Such improvement \* \* \* is

not unusual in cases where an officer whose record has heretofore been bad is soon to be due for promotion, but, unfortunately, the reformation is usually of short duration." (File 26260-1392, June 29, 1911, p. 13, quoting Memo. of J. A. G., Mar. 3, 1898, examination of Passed Asst. Paymaster Edwin B. Webster, U. S. N.)

Lieut. Charles P. Burt, U. S. Navy, was examined January 26, 1912, and found mentally, morally, and professionally qualified to perform efficiently all the duties, both at sea and on shore, of the grade to which he was to be promoted, the board stating: "Comparing the evidence as to the candidate's conduct and habits during the early part of the period under investigation for the purpose of determining his fitness for promotion, and his financial methods and habits now, the board is of the opinion that so great a change for the better has taken place, a process of rehabilitation which has extended over a period of five years, that the candidate has shown strength of character and a strong determination to correct and avoid the error of his former ways." (The board's finding was approved by the President, Feb. 13, 1912.)

**Act of August 5, 1882, not a penal statute.**—The power to formulate articles for the government of the Navy and to provide punishment for individual officers for violation thereof is conferred upon Congress by the clause of the Constitution authorizing it "to make rules for the government and regulation of the land and naval forces;" the power to provide what persons may be appointed or enlisted in the naval service, the qualifications they must possess, and the total number of the entire force, is conferred by the clause authorizing the Congress "to provide and maintain a Navy." Statutes passed under the first clause mentioned are penal and are to be enforced by courts-martial; those passed under the second clause are enacted in the interest of the Navy at large and are to be administered by the President, either alone or with the aid of examining boards or such other instrumentalities as may be determined upon by Congress. Persons excluded from appointment for lack of any required qualification—health, age, nationality, height, temperament, or any other condition that Congress might see fit to impose—are not being punished under penal laws for their failure to measure up to the necessary requirements but are merely incidentally affected by the Government's policy as defined by Congress in the exercise of its undoubted right to say who shall and who shall not be appointed to the military or naval service. Such statutes are not penal in their nature any more than those providing that no man shall be allowed to vote unless he possesses a given amount of property or is of certain age or has resided in the State or district for a specified period, etc. (File 26260-1392, June 29, 1911, p. 24, citing *Street v. U. S.*, 24 Ct. Cls., 230, noted under sec. 1454, R. S. Op. Atty. Gen., Feb. 15, 1918, file 26282-326:2.)

Even if the act of 1882 be regarded as a penal statute, nevertheless the words should be given the sense which "promotes in the fullest manner the policy and objects of the legislature." (File 26260-1392, June 29, 1911, p. 18, citing, *U. S. v. Hartwell*, 6 Wall., 385, 395, and *U. S.*



v. Lacher, 134 U. S., 624; see also, "Introduction," under "Statutory Construction," VI, E, 3, "Penal laws.")

The purpose of Congress was to promote the efficiency of the Navy by ridding it of officers who, for any cause arising from their own misconduct, did not measure up to that high standard which should be demanded of a candidate for appointment or promotion in the American Navy. So far from intending to impose any punishment upon the officer who was weighed and found wanting, Congress in this same act exhibited a remarkably liberal policy toward such officers by providing that they should be given on discharge "one year's pay." No stronger evidence could be desired to establish that the act of 1882 was not intended as a penal statute. If the finding of the examining board had been intended by Congress to be the equivalent of a conviction by court-martial, it would not have provided that the officer so found deficient should be presented, as an absolute gratuity, with "one year's pay," amounting in the present case to \$3,120. Officers resigning from the service with the most honorable records are not given any gratuity whatever; and it was not until the act of May 13, 1903, that the widows or other beneficiaries of officers killed or otherwise dying in the line of duty were given a gratuity, and in their cases it was provided that the amount should be equal only to six months' pay. (File 26260-1392, June 29, 1911, p. 22; compare 7 Comp. Dec., 404, noted under sec. 1454, R. S., "One year's pay allowed officer wholly retired is not a gratuity.")

**Examination of moral fitness not a "trial."**—An officer upon examination for promotion is not on trial for crime and therefore the application of constitutional limitations upon the procedure of such trials is in no sense pertinent. With reference to the Army board convened under the act of July 15, 1870 (16 Stat., 314), providing for the mustering out by the President, with one year's pay, of officers found by a board to be unfit for the proper discharge of their duties "for any cause, except injuries incurred or disease contracted in the line of their duty," it was stated by the Court of Claims in the case of *Duryea v. U. S.* (17 Ct. Cls., 24): "It may be that the board did not proceed with that strict regard to the rules of evidence which are required in courts-martial and civil courts of justice, but it is not necessary for us to consider how far its irregularities extended. In our opinion the board was not a court of any kind." (File 26260-1392, June 29, 1911, p. 30; see also, note to Constitution, fifth amendment, "Due process of law.")

It was stated by the Court of Claims that the act of 1870, providing for mustering out officers of the Army, did not contemplate discharges for offenses; that the cause prescribed therein and for which the claimant in the case under consideration was discharged, was "unfitness;" that if the claimant had been guilty of conduct unbecoming an officer or prejudicial to the service, there were abundant provisions of law for bringing him to trial before a court-martial and dismissing him from the service without the bounty of additional pay; that the

act of 1870 was intended to reach an entirely different class of officers; it was in no sense penal, the officers against whom it operated were not criminals, the advisory board had no jurisdiction of offenses, and was without authority to put officers upon their trial for any fault. The foregoing is directly applicable to the act of 1882 relating to the Navy. (File 26260-1392, June 29, 1911, p. 22, citing *Sherburne v. U. S.*, 16 Ct. Cls., 491.)

The only question before an examining board when considering an officer's moral qualifications is his fitness for promotion. The board is in no sense a court before which the candidate is on trial for his misdeeds. The punishment for such misdeeds is provided for by other statutes and is not a question to be considered by examining boards; but the bearing, if any, which such misconduct may have upon the officer's fitness for promotion is a question before the board and must be determined by it wholly independent of any disciplinary proceedings to which the officer has rendered himself liable. In considering this question and submitting its report the examining board is not administering a penal statute. (File 26260-1392, June 29, 1911, p. 23.)

The purpose of the act of August 5, 1882, as shown by the title of the bill as it first passed the Senate, was "to promote the efficiency of the Navy" and not to provide for the administration of justice, nor to provide for the punishment of drunkenness. This was to be done by discharging, instead of promoting or retiring, officers who were found on examination not qualified "for the honorable position of an officer in the United States Navy." (File 26260-1392, June 29, 1911, p. 21.)

The contention that cases of moral unfitness should be disposed of by court-martial proceedings is based upon an utter misconception of the causes involving such moral unfitness, as well as the duties and powers of examining boards. As the history of the service shows, moral disqualification in a vast majority of cases is due to a series of matters, each perhaps trivial in itself, but which, taken as a whole, amount to a habit sufficiently serious to disqualify an officer for promotion in the U. S. Navy. But an officer of the Navy can not be court-martialed for a "habit." The Navy Regulations provide that "offenses shall not be allowed to accumulate in order that sufficient matter may thus be collectively obtained for a trial." And article 61, Articles for the Government of the Navy (sec. 1624, R. S.), provides that "no person shall be tried by court-martial or otherwise punished for any offense, except as provided in the following article [desertion], which appears to have been committed more than two years before the issuing of the order for such trial or punishment." Furthermore, a naval examining board has authority and exercises functions as extensive in their nature as those exercised by courts-martial, and in its consideration of an officer's qualifications for promotion it determines for itself all questions arising, independently of any disciplinary action that may or could have been taken in the premises. (File 26260-1392, June 29, 1911, p. 14, citing *Op. J. A. G.*, Dec. 4, 1897, case of *Passed Asst.*

Paymaster Harry R. Sullivan, file 5878-97, 9 Op. J. A. G., 296, 316, 319; *Davis v. U. S.*, 24 Ct. Cls. 442.)

It is further contended that, if the act of 1882 is held to apply to an officer's moral qualifications for promotion, this would be equivalent to investing examining boards with the powers of a court-martial, thereby authorizing the dismissal of an officer by indirection, without the sentence of a court-martial, which is forbidden by the Articles for the Government of the Navy. If Congress sees fit to provide that officers not possessing certain qualifications which it has made a prerequisite to promotion shall be discharged from the service upon the finding of an examining board, its power to do so can not successfully be questioned. (File 26260-1392, June 29, 1911, p. 17, citing *Crenshaw v. U. S.*, 134 U. S., 99.)

**Character of discharge issued under act of 1882.**—As has been held by the Attorney General (13 Op. Atty. Gen., 16, 18), "an officer or soldier, upon his discharge from the service, may be regarded as entitled to an honorable discharge, unless he is under sentence of dishonorable dismissal, or unless he has been convicted of an infamous offense, and is sentenced to punishment therefor during the remainder of his term of service, such as cowardice, etc., with either of which conditions an honorable discharge would be incompatible." Officers discharged under the act of 1882 can not, therefore, be regarded as having been dishonorably discharged, which conclusively shows, even aside from the gratuity accompanying it, that the act of 1882 is not in any aspect a penal statute imposing "punishment" in a legal sense upon the officer found not morally qualified for promotion. (File 26260-1392, June 29, 1911, p. 26.)

It is evident that the word "discharged" as used in the act of 1882 was intended to be synonymous with the words "wholly retired," and it has been given that construction by the Navy Department and by Congress. Thus, a bill (S. 1438), which passed both Houses during the Fifty-third Congress, second session, provided that Passed Assistant Paymaster Louis A. Yorke, who had been discharged from the service under the act of 1882, should be restored to the Navy as of the date that he was "wholly retired." The Secretary of the Navy in reporting upon the bill in question (Senate Rept. No. 265, 53rd Cong., 2d sess.), stated "that his retirement (wholly) from the service was justified by the finding of the board." The Senate and House naval committees, in reporting upon the same bill (Senate Rept. No. 489; House Rept. No. 1990; 53d Cong., 1st sess.), stated with respect to the history of Mr. Yorke's case, that "by this board he was wholly retired from the naval service." (File 26260-1392, June 29, 1911, p. 25½; as to meaning of "wholly retired," see note to sec. 1454, R. S.)

**One year's pay not a gratuity.**—See note to section 1454, Revised Statutes, under "One year's pay allowed officer wholly retired is not a gratuity"; compare note to this section, above, under "Act of August 5, 1882, not a penal statute" and "Character of discharge issued under act of 1882."

**Amount of pay on discharge.**—Section 1505, Revised Statutes, as amended by the act March 11, 1912 (37 Stat., 73), provides for dropping an officer from the service "with not more than one year's pay" upon failing to qualify professionally for promotion. *Held*, that said provision is indefinite and authority is not given to the accounting officers to determine how much pay, if any, shall be received by an officer so dropped, but the discretion in determining the amount is left to the executive, through the administrative department. Where the President directed that the officer be dropped under said statute, without directing any pay be given him, none can be allowed by the accounting officers, and he is, therefore, entitled to pay to the date he received notice of discharge, and no more. (18 Comp. Dec., 922.)

**Revocation of President's action.**—A naval examining board finds an officer morally disqualified for promotion. The finding is approved by the President, and under the provisions of the act of August 5, 1882, it is directed that he be discharged with one year's pay. The President thereafter revokes his approval, stating that he inadvertently signed the order confirming the report of the board, because it was supposed to be a case in which the formal approval would follow as of course, instead of one in which there was a dispute and to which his attention had previously been particularly invited. *Held*, that because of the multiplicity and variety of cases requiring the action of the President, it is manifestly impossible for him to give careful consideration to each one, and when he inadvertently, by mistake of fact, takes action, as shown in this case, that he did not intend to take, it would seem to be a case to which the legal principle authorizing correction of a mistake of fact, is peculiarly applicable. Accordingly, *held*, that the President had power to cancel the approval of the board's recommendation, and to remit the case for the consideration of another board, and having so exercised his power, such action had the effect of placing the officer in the same situation he would have been in if the President had not approved said recommendation and issued said order directing that he be discharged; the officer was never out of the service by reason of the President's action, and is therefore entitled to pay accordingly. (18 Comp. Dec., 676.)

In the above case the officer was, November 2, 1911, discharged by the Navy Department in accordance with the President's order; January 2, 1912, the President directed that his signature be canceled; January 4, 1912, the Secretary of the Navy notified the officer that, by direction of the President, his discharge had been canceled; January 6, 1912, the Secretary of the Navy wrote requesting the officer to return for cancellation the Navy Department's letter notifying him of his dismissal from the service of the United States. The letter was received by the officer January 8, 1912, and the request complied with. In the meantime, no successor was appointed. (18 Comp. Dec., 676.)

It has been repeatedly decided by the courts that when, by any of the legal methods, an officer of the Army or Navy goes out of the service by the act of the President, his connection



with the service is severed, and no revocation by the President of his legal acts of dismissal can have the effect to restore the person to his former office (citing *Mimmack v. U. S.*, 10 Ct. Cls., 584, 97 U. S., 426, 437; *Corson v. U. S.*, 17 Ct. Cls., 344, 114 U. S., 619; *McBlair v. U. S.*, 19 Ct. Cls., 528). These cases are inapplicable to the facts stated in the case noted above. (18 Comp. Dec., 676.)

Lieut. Charles P. Burt was examined for promotion November 22, 1909, and found physically and mentally, but not morally or professionally, qualified; the finding as to moral disqualification was disapproved, the finding as to professional disqualification approved, and he was suspended from promotion in accordance with section 1505, Revised Statutes. Upon expiration of the period of suspension he was again examined and found mentally and professionally, but not morally, qualified; the record was returned to the board for further consideration as to his moral qualifications; the board again reported that he was not morally qualified for promotion. A minority report

stated that he was mentally, morally, and professionally qualified. The majority finding of the board was approved by the President, October 28, 1911, and the officer accordingly discharged from the Navy. On January 4, 1912, the Secretary of the Navy, by direction of the President, canceled the President's approval, for reasons stated above. The President's letter of January 2, 1912, directing that his signature be canceled, stated: "I am aware, in directing the cancellation of my signature as inadvertent, I am exercising a power the legality of which may be questioned, but as the action is in the interest of equity and justice I have taken it, leaving it to the courts, should the question ever be brought to them, to pass upon its legality." (File 26260-1392:15. The Comptroller of the Treasury, in his decision above noted, sustained the legality of the President's action, and the officer's consequent right to pay thereunder, and the question was thus not raised in the courts.)

**For other cases.**—See notes to sections 1447, 1452, 1454, Revised Statutes.

**Sec. 1457. [Grade and status of retired officers.]** Officers retired from active service shall be placed on the retired list of officers of the grades to which they belonged respectively at the time of their retirement, and continue to be borne on the Navy Register. They shall be entitled to wear the uniform of their respective grades, and shall be subject to the rules and articles for the government of the Navy and to trial by general court-martial. The names of officers wholly retired from the service shall be omitted from the Navy Register.—(16 Jan., 1857, c. 12, s. 4, v. 11, p. 154. 3 Aug., 1861, c. 42, ss. 22, 23, 24, v. 12, pp. 290, 291. 30 Jan., 1875, c. 30, v. 18, p. 304.)

**Active duty for retired officers.**—See section 1462, Revised Statutes, and note thereto.

**Articles for the government of the Navy** are embodied in section 1624, Revised Statutes, and amendments thereto.

**Command, retired officers withdrawn from.**—See section 1459, Revised Statutes.

**Commissions with advanced rank to be issued to officers of the Army, Navy, and Marine Corps on the retired list advanced in rank by operation of or in accordance with law.** (Act Mar. 4, 1911, 36 Stat., 1354.)

**Marine officers retired generally with the "rank" held on the active list.**—See sections 1254 and 1622, Revised Statutes.

**Officers retired as captain, promoted to rear admiral, and subsequently having war service, were to be regarded as having been retired as rear admirals, under the provisions of section 1589, Revised Statutes, now obsolete.**

**Officers temporarily advanced in rank or grade during war with Germany, and retired while holding such temporary rank, except for physical disability incurred in line of duty, shall be retired with grade or rank to which permanently entitled.** (Act May 22, 1917, sec. 9, 40 Stat., 86; see also act June 4, 1920, sec. 2, 41 Stat., 834.)

**Officers may be wholly retired when incapacity is not an incident of the service.**—See section 1454, Revised Statutes.

**Pay of retired officers.**—See section 1588, Revised Statutes. When employed on active duty.—See section 1592, Revised Statutes and note to section 1462, Revised Statutes.

**Promotion or increase of pay on the retired list, prohibited by act August 5, 1882 (22 Stat., 286); see note to sections 1460, 1461, and 1591, Revised Statutes. Promotion on retired list under certain specified conditions was authorized by act of July 1, 1918 (40 Stat., 717).**

**Promotion on retired list, without increase in pay, was authorized by sections 1460, 1461, and 1591, Revised Statutes.**

**Rank and pay of officers on retired list shall be the same as when they are retired.** (Act Aug. 5, 1882, 22 Stat., 286.)

**Rank of officers retired under section 8, Navy personnel act of March 3, 1899 (30 Stat., 1004), to create vacancies, shall be same as when retired.** (Act Aug. 22, 1912, 37 Stat., 328.)

**Rank on retirement, increased on account of civil-war service.** (Act Mar. 3, 1899, sec. 11, 30 Stat., 1007; act June 29, 1906, 34 Stat., 554; and act Mar. 3, 1909, 35 Stat., 753.)

**Rank on retirement, increased in cases of officers failing in physical examination for promotion.** (Act Mar. 4, 1911, 36 Stat., 1267.) But this does not apply to officers of the rank of lieutenant commander and above. (Act Aug. 29, 1916, 39 Stat., 579, as amended by act July 1, 1918, 40 Stat., 718.)

Rank on retirement of staff officers, increased in certain cases. (Sec. 1481, R. S.)

Rank on retirement of chiefs of bureaus, increased in certain cases.—See section 1473, Revised Statutes, and note to section 421, Revised Statutes.

Rank on retirement of midshipmen.—See note to section 1445, Revised Statutes.

Rank of officers shall not be changed, except in accordance with the provisions of existing law, and by and with the advice and consent of the Senate. (Sec. 1506, R. S., as amended by act June 17, 1878, 20 Stat., 144.)

Restoration of retired officers to active list.—See section 1465, Revised Statutes.

Rules for the government of the Navy are contained in Navy regulations, issued under authority of sections 161 and 1547, Revised Statutes. See notes to said sections.

Staff officers are retired generally with rank held on active list. (Sec. 1482 R. S. See also, as to retirement of staff officers, secs. 1473 and 1481, R. S.)

Trial of retired officers by general court-martial. See note to Constitution, article I, section 8, clause 14, under "IV. Jurisdiction of courts-martial."

Unauthorized wearing of the uniform was prohibited by act June 3, 1916, section 125 (39 Stat., 216), as amended by act August 29, 1916, section 1 (39 Stat., 649), and June 4, 1920, sec. 8 (41 Stat., 836.) See also act February 28, 1919 (40 Stat., 1202).

**Historical note.**—The reserved, or as it is sometimes with more accuracy called, the retired list of the Navy, was created under the provisions of the act of February 28, 1855 (10 Stat., 616), to promote the efficiency of the Navy. The second section of that act declared that those officers so placed on the reserved list should receive the leave of absence pay, or the furlough pay to which they might be entitled when so placed, according to the report of the board and approval of the President, and should be ineligible to further promotion, but subject to the orders of the Navy Department at all times for duty, and it limited the reserved list to the grades of captain, commander, lieutenant, masters, and passed midshipmen. The 22d section of the act of August 3, 1861 (12 Stat., 290), providing for the better organization of the military establishment, enacted that if any officer of the Navy shall have become or shall hereafter become, incapable of performing the duties of his office, he shall be placed upon the retired list, and withdrawn from active service and command, and from the line of promotion, with certain pay and emoluments therein specified, graduated according to the rank of the different classes of officers. The officers named are captains, commanders, lieutenants, surgeons, paymasters, engineers, masters, and passed midshipmen. (10 Op. Atty. Gen., 107.)

**Application to Navy of decisions relative to Army retired list.**—The status of the retired list appears to be fundamentally the same in the Army and Navy, and the nature and bearings of a case as to the authority conferred upon the President with reference to the

one may be taken as indicative of the character of legislation with reference to the other. (25 Op. Atty. Gen., 316.)

**Civilian can not be placed on retired list under general laws.**—A person can not legally be placed on the retired list, unless he is an officer of the description to which the retired provisions extend. Accordingly, a former officer no longer in the service can not claim the benefits of retirement. (14 Op. Atty. Gen., 506; affirmed 17 Op. Atty. Gen., 9.)

An officer on being wholly retired becomes a civilian and can be readmitted to the service only by a new appointment; but he can not be appointed at once to the retired list. A civilian can not be appointed as a retired officer. He must first be appointed an officer on the active list, of a certain rank. None but a commissioned officer on the active list of the Army can be placed on the retired list. (Miller v. U. S., 19 Ct. Cls., 338, 353.)

None but officers in active service being eligible for retirement, the action of the President revoking a previous order dropping an officer from the rolls and putting him on the retired list of the Army was inefficient for this purpose. (19 Op. Atty. Gen., 202, 205.)

By section 1094 of the Revised Statutes the officers of the Army on the retired list are a part of the Army of the United States, therefore no one can be upon that list who is not an officer appointed in the manner required by the Constitution. (Wood v. U. S., 15 Ct. Cls., 151; affirmed 107 U. S., 414.)

Congress has frequently exercised the power of changing the mere rank of officers without invoking the Constitutional power of the Executive to appoint the incumbents to new offices. But when it has been the purpose to place on the retired list one who has been discharged from the service, who no longer holds an office in the Army, Congress has provided for his restoration or reappointment in the manner pointed out by the Constitution, generally by the President alone, and then has authorized his retirement. (Wood v. U. S., 15 Ct. Cls., 151, citing Collins v. U. S., 15 Ct. Cls., 22.)

For other cases see note to section 1443, Revised Statutes.

**Status of retired officers; part of the Navy.**—Officers on the retired list of the Navy are still in the Navy, and remain subject to the Rules and Articles for the Government of the Navy, as well as to trial by court-martial. (13 Comp. Dec., 590.)

A retired naval officer is a "salaried officer" within the meaning of the act of July 9, 1888 (25 Stat., 243), providing for actual necessary expenses to be allowed salaried officers of the United States under certain conditions. (Franklin v. U. S., 29 Ct. Cls., 6.)

Pay is a fixed and direct amount given by law to officers in the Navy in consideration of and as compensation for their personal service. Retired pay is given partly for past service, partly for present liability to military discipline, and partly because the officer may be assigned to active duty. Although he has been placed on the retired list he is still an officer of the Navy, is liable to discipline, and



may be assigned to active duty. (17 Comp. Dec., 919.)

A retired naval officer who has not been wholly retired from the service is an officer of the United States. (30 Op. Atty. Gen., 298.)

A retired officer of the Army or Navy holds an office with a salary or annual compensation attached. His pay is not a mere pension. (19 Comp. Dec., 160, citing 11 Comp. Dec., 422, 29 Op. Atty. Gen., 397, 29 Op. Atty. Gen., 503; but see contra, *Geddes v. U. S.*, 38 Ct. Cls., 428, and Comp. Dec., Sept. 26, 1910, file 26254-539, noted in Annual Report of the U. S. Civil Service Commission, 1911, p. 126.)

An officer of the U. S. Army or Marine Corps, retired from active service only and not wholly retired from service, is an officer in the employ of the Government and so within the prohibition of section 1782, Revised Statutes [superseded and repealed by Criminal Code, act Mar. 4, 1909, 35 Stat., 1109, 1153]. (29 Op. Atty. Gen., 397.)

Officers of the Navy are not entitled to increased retired pay for length of service after retirement; time on the retired list is not to be counted as service in computing longevity pay. (15 Comp. Dec., 767.)

An officer on the retired list is "serving" in the Army within the meaning of section 1262, Revised Statutes, providing that "there shall be allowed and paid to each commissioned officer below the rank of brigadier general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years' service." The years so passed in the service after retirement as well as before are included in the provision for increased pay for each five years' service. (*U. S. v. Tyler*, 105 U. S., 244; *Tyler v. U. S.*, 16 Ct. Cls., 223; the rule prescribed in this decision was modified by act Mar. 2, 1903, 32 Stat., 932.)

The retired pay of officers of the Army is "salary," within the meaning of the act of May 10, 1916, section 6, restricting payment of more than one salary. (22 Comp. Dec., 643.)

Pay of a retired officer of the Coast Guard is salary within the meaning of the act of May 10, 1916, prohibiting under certain conditions the payment of more than one salary to an officer or employee. (22 Comp. Dec., 673.)

The law under which these officers are retired does not require their consent, nor does it require that the order for their retirement shall be based upon any absolute incapacity for further service. It may be based upon age, which, being fixed at a minimum of 62 years, by no means implies such incapacity. It may be based upon wounds received in battle, but the person retired for this cause may for many purposes be a very useful officer. The provisions of the statutes and the uniform treatment of these officers conform to this view, and necessarily imply that, while not required to perform full service, they are a part of the Army, and may be assigned to such duty as the laws and regulations permit. (*U. S. v. Tyler*, 105 U. S., 244; 29 Op. Atty. Gen., 403.)

An officer of the Army is still an officer of the United States when placed on the retired list. (In re Winthrop, 31 Ct. Cls., 35.)

Officers on the retired list are a part of the Army. They may be assigned to duty and wear uniforms, and continue to be borne on the Army Register, and are subject to trial by court-martial. (*Murphy v. U. S.*, 39 Ct. Cls., 178.)

A retired officer of the Army, not being a civilian, is not entitled to payment from the appropriation for "civilian lecturers" at the Naval War College. (14 Comp. Dec., 663.)

A retired officer in the Revenue-Cutter Service [now Coast Guard] holds an "office." (26 Op. Atty. Gen., 460.)

Officers of the Army on the retired list hold public office; but an advancement of such an officer as authorized by act of April 23, 1904 (33 Stat., 264), on account of civil-war service, does not create an office and is not accomplished by an exercise of the appointing power. (25 Op. Atty. Gen., 185; 25 Op. Atty. Gen., 312.)

An officer when transferred to the retired list is not divested of one office and appointed to another. He continues as a retired officer under the appointment which he held on the active list and even where he acquires a higher rank on retirement this does not call for an exercise of the appointing power. The situation, accurately stated, is that when an officer is transferred from the active to the retired list there is no change in the office which he holds but merely a change in his status and functions under his existing appointment. The fact of his retirement creates a new office in the military service, the number of officers of his grade thereby being increased by one and a new office coming into existence on the moment that his retirement becomes legally effective. The number of officers in any given grade in the Navy is not limited by law but only the number of such officers who may be on the active list is so limited, the remainder being on the retired list. (File 28687-22-3, Jan. 9, 1919.)

"The general rule undoubtedly is that the status of retired officers who are withdrawn from command and the line of promotion rests fundamentally on the office and rank held at the date of retirement \* \* \*. The President may be authorized to *appoint* on the retired list one not in the service, and in such case there would seem to be an office and an exercise of the appointing power, because it would not constitute a transfer to the retired list from the active list." (25 Op. Atty. Gen., 312, 315.)

For other cases see below. "Retired officers may be included in general legislation."

**Signatures of retired officers should have word "retired" appended.**—The word "retired" may appropriately and should be appended to the signatures of officers on the retired list. (File 3575-03.)

**Persons appointed to retired list from civil life must take oath of office.**—A former Army officer appointed from civil life to the position of major of engineers, and thereupon placed on the retired list of the Army as of that grade, must take the oath of office required by section 1756, Revised Statutes. (19 Op. Atty. Gen., 283.)

**General legislation not applicable to retired officers.**—While retired officers are in the Navy, yet they are not serving as such.

They are a distinct class, and when Congress legislates in reference to them they are usually referred to as retired officers or officers on the retired list. *Held*, therefore, that section 1588, Revised Statutes, fixing the pay of Navy chaplains on the retired list, and the act of August 5, 1882 (22 Stat., 286), which prohibits any increase of pay for retired officers, are not affected by the act of June 29, 1906 [fixing new rates of pay for Navy chaplains], in so far as concerns the pay of Navy chaplains who were on the retired list when the act of 1906 went into effect. (13 Comp. Dec., 116.)

The act of March 3, 1899, section 1 (30 Stat., 1001), providing that "the officers constituting the Engineer Corps of the Navy be, and are hereby, transferred to the line of the Navy, and shall be commissioned accordingly," did not transfer to the line of the Navy officers of the Engineer Corps who were on the retired list at the time of the passage of said act. Accordingly, where such officers subsequently became entitled to advancement to the rank of the next higher grade for civil-war service, such advancement was properly made to the grades of the old Engineer Corps. (13 Comp. Dec., 630; compare 4 Comp. Dec., 628, noted below.)

An officer who has the rank of commander conferred upon him for the purpose of retirement does not "attain" that rank within the meaning of section 5 of the Navy personnel act, March 3, 1899 (30 Stat., 1004), which provides "that engineer officers transferred to the line to perform engineer duty only who rank as, or above, commander, or who subsequently attain such rank, shall perform shore duty only." This section had in contemplation officers who subsequently attained the rank of commander on the active list; in order to attain the rank of commander in the line of the Navy on the active list it is necessary for the officer to be appointed to the office of commander. The rank goes with the office. (12 Comp. Dec., 185.)

Section 13 of the Navy personnel act of March 3, 1899 (30 Stat., 1007), providing that commissioned officers of the Navy shall receive the same pay and allowances as provided by law for the officers of corresponding rank in the Army, did not affect the provision in the act of June 7, 1900, concerning pay of retired officers of the Navy ordered to active duty. (13 Comp. Dec., 83.)

The act of June 22, 1874 (noted under sec. 1561, R. S.), which provided that "any officer of the Navy who may be promoted in course to fill a vacancy in the next higher grade shall be entitled to the pay of the grade to which promoted from the date he takes rank therein, if it be subsequent to the vacancy he is appointed to fill," was manifestly designed to fix the commencement of the increased pay of promoted officers in active service only, and did not apply to the promotion of officers on the retired list under section 1460, Revised Statutes, as amended by act of August 16, 1876 (19 Stat., 204). (17 Op. Atty. Gen., 497.)

The provision in the Army act of June 12, 1906, "that hereafter fuel may be furnished to commissioned officers on the *active list*," did not repeal the provision in the act of April 23, 1904, to the effect that retired officers while assigned to active duty should receive "the full

pay and allowances of their respective grades," nor exclude a retired officer of the Marine Corps from the receipt of a fuel allowance while employed on active duty. (13 Comp. Dec., 168.)

The provisions of section 8 of the act of June 18, 1878, chapter 263, giving to Army officers the privilege of purchasing fuel at the rate of \$3 per cord for standard oak wood, do not extend to retired officers of the Army. (16 Op. Atty. Gen., 92.)

An officer of the Navy was retired as a midshipman; by act of March 3, 1883 (22 Stat., 472), the title of the grade of midshipman was changed to that of ensign, constituting a junior grade; by act of June 26, 1884 (23 Stat., 60, sec. 2), the grade of junior ensign was abolished and it was provided that the junior ensigns then on the list should be commissioned as ensigns in the Navy. The latter act operated to promote officers who had been retired in the grade of midshipman or of ensign (junior grade) to ensign, but did not have the effect of giving them a corresponding increase of pay, that being still governed by section 1591, Revised Statutes, and the act of August 5, 1882 (sec. 4, 22 Stat., 284), forbidding such increase of pay. (4 Comp. Dec., 628.)

**Retired officers may be included in general legislation.**—The act of May 22, 1917, sec. 7 (40 Stat., 86) provided "That upon the termination of temporary appointments in a higher grade or rank as authorized by this act the officers so advanced, \* \* \* shall revert to the grade, rank, or rating from which temporarily advanced \* \* \*." The language of this act is general, making no specific reference to retired officers, and there are authorities both ways upon the question whether such general legislation includes the retired list. However, it sufficiently appears that general legislation relating to officers of the Navy may, upon the highest authority, be held to include officers on the retired list. As there is nothing in the act of May 22, 1917, which requires that retired officers be excluded from its provision with reference to "officers" reverting to the grades or ranks from which temporarily advanced, it is concluded that they may so revert to their former places on the retired list if temporarily appointed to higher grades or ranks during the present war, as authorized in said act. (File 27231-103, July 17, 1917.)

In *Badeau v. U. S.* (130 U. S., 439, 449), it was held that retired officers were included in the terms of the act of March 30, 1868 (15 Stat., 56, 58, sec. 2) now embodied in sections 1223 and 1440, Revised Statutes, which provided: "That any officer of the Army or Navy of the United States who shall, after the passage of this act, accept or hold any appointment in the diplomatic or consular service of the Government, shall be considered as having resigned his said office, and the place held by him in the military or naval service shall be deemed and taken to be vacant, and shall be filled in the same manner as if the said officer had resigned the same. (File 27231-103, July 17, 1917.)

Inasmuch as the Government is to be reimbursed for stores dispensed under the act of May 13, 1903 ("Provisions, Navy") no reason



exists for giving this law other than a liberal construction, and it should therefore be held to apply to retired officers, who are "officers \* \* \* of the Navy and Marine Corps." The Attorney General's opinion to the Secretary of War (16 Op. Atty. Gen., 92) holding that a statute authorizing the sale of fuel to officers below cost did not apply to retired officers, was based upon the wording of the law and certain conditions indicating that such was the intention of Congress. (File 26815, Oct. 2, 1908.)

For other cases, see above, "Status of retired officers; part of the Navy."

**Power of Congress to remove officers from retired list.**—The first section of the act of December 21, 1861 (12 Stat., 329), retired from service two classes of naval officers, firstly, those whose names may have been borne on the naval register 45 years, and secondly, those who had arrived at the age of 62 years. The act of June 25, 1864, provided that the act of 1861 "shall not be so construed as to retire any officer under the age of sixty-two years, and whose name shall not have been borne upon the Navy Register for a period of forty-five years after he had arrived at the age of sixteen years" (13 Stat., 183). The latter act had the effect of removing from the retired list officers of the Navy who were retired in pursuance of the act of December 21, 1861, but who were not liable to be retired by the provision of the act of 1864. (11 Op. Atty. Gen., 144.)

It may be questioned whether the Congress could, without abolishing the office, constitutionally remove an officer from an office into which he had been legally inducted. (Thompson v. U. S., 18 Ct. Cls., 604, 612.)

**Retired pay not "pension."**—The retired list of the Army is regulated by positive law, being a form of compensation adopted by the Government. (McBlair v. U. S., 19 Ct. Cls., 528.)

The retired pay of an inmate of a naval hospital is not a "pension." The difference in the meaning of the terms "retired pay" and "pension" is so clearly recognized in the laws that one can hardly be confused with the other. (12 Comp. Dec., 407.)

Upon question whether retired pay is compensation or pension, see file 5362-35, June 29, 1911; see also cases noted above, under "Status of retired officers; part of the Navy."

**Distinction between "rank" and "grade."** See note to sections 421 and 1362, Revised Statutes.

The word "grade" as used in this section means "rank," and entitles an officer retired while serving as chief of bureau or Judge Advocate General in the Navy Department to the rank held by him while so serving. (31 Op. Atty. Gen., 505, 509, 516, 518.)

This section shows that the names of officers find their place upon the retired list only according to grade at the time of retirement. The terms "rank" and "grade" are not synonyms. (Moser v. Meyer, 38 App. D. C., 13, 19.)

The distinction between rank and grade in both the Army and Navy is so long and so well understood that we cannot suppose Congress ignorant or unmindful of it. On the contrary, in the absence of anything to indicate a dif-

ferent meaning, we must take it that Congress used those words in their well known and appropriate sense. It is significant that section 1457 provides that officers shall be placed on the retired list of officers of the *grade* to which they belonged, etc., and section 1487 that officers shall "have the *rank* of commodore." In the Navy personnel act of March 3, 1899, section 9 (30 Stat., 1004), officers shall be retired with the *rank* of the next higher grade, and in section 11, the language is the same. In the act of June 29, 1906 (34 Stat., 554), the language is, with the *rank* of one grade above that *actually* held at the time of retirement. It is quite safe to say that in these carefully prepared enactments, when Congress said "grade" it meant "grade," and that when it said "rank" it did not mean grade. (26 Op. Atty. Gen., 57.)

Section 1457 retired officers generally in their then grade and rank, while by section 1481 the staff officers there referred to were retired with the rank of the next higher grade, thus making a distinction in favor of the latter class. (26 Op. Atty. Gen., 57.)

Staff officers retired with the rank of a higher grade are not entitled to bear the title of that rank. They retain the grade and title actually held by them on retirement. A retired staff officer retired with the rank of commodore is not above the *grade* of captain. (26 Op. Atty. Gen., 57.)

Staff officers having the rank of captain on the active list, but retired with the rank of commodore under section 1481, Revised Statutes, are not thereby advanced to the grade of commodore. Accordingly, the act of June 29, 1906 (34 Stat., 554), providing for advancement in rank of officers on the retired list of the Navy who served during the civil war, and excluding from its benefits officers who received an advance in grade at or since retirement, did not debar a staff officer who was retired with the rank of commodore under section 1481. An officer so retired received an advance in rank, but not an advance in grade. (26 Op. Atty. Gen., 57.)

A staff officer retired with the rank of rear admiral under section 11 of the Navy personnel act of March 3, 1899 (30 Stat., 1007), would not enter the grade of rear admiral. If recalled to active duty under section 1462, Revised Statutes, he would reenter the service with the rank and pay of the next higher grade; that is to say, a medical director who has been retired with the rank of rear admiral if recalled to the service would enter with the rank and pay of a rear admiral, but he would enter only from the medical corps and as a medical director. (22 Op. Atty. Gen., 436.)

The grade which a professor of mathematics had at the time of his retirement was that of professor of mathematics and not that of captain, which was his rank. (13 Comp. Dec., 241.)

In the Navy there are grades for duty, for honor, and for pay. Some of them are made grades by name, others by description. (McClure v. U. S., 18 Ct. Cls., 348.)

The next higher grade to captain, under section 11 of the Navy personnel act of March 3, 1899 (30 Stat., 1007), is rear admiral of the

lower half. Congress has created for purposes of pay a difference in the rank or grade of rear admiral. Taking one step upward for the purpose of pay, he passes into and not over the next pay grade, which is that of the nine lower numbers. (*Gibson v. U. S.*, 194 U. S., 182; *Lowe v. U. S.*, 38 Ct. Cls., 170; see also *Terry v. U. S.*, 39 Ct. Cls., 353, and note to sec. 1362, R. S.).

The grade of an officer in the Navy is his official station, by which are regulated his powers, duties, and pay. His pay may be further governed by his time of service within a grade, either in fact rendered within the grade or constructively performed therein through the force of statutes. The office of professor of mathematics is a grade. (*Roget v. U. S.*, 148 U. S., 167. Pay is now regulated by "rank" instead of grade. See act of May 13, 1908 (35 Stat., 127), providing that "hereafter all commissioned officers of the active list of the Navy shall receive the same pay and allowances according to rank and length of service," and (35 Stat., 128) that "the pay of all commissioned, warrant, and appointed officers and enlisted men of the Navy now on the retired list shall be based on the pay, as herein provided for, of commissioned, warrant, and appointed officers and enlisted men of corresponding rank and service on the active list.")

A captain in the line is merely a captain, and has but one title to designate both his office and his rank. An officer of the staff has an official title to identify his position in his corps, and also a relative rank in addition, the latter being arbitrarily fixed by Congress to designate his relative rank in the service in accordance with the line standard. (22 Op. Atty. Gen., 433; "relative" rank has now been abolished and actual rank substituted in the staff corps. See act Mar. 3, 1899, sec. 7, 30 Stat., 1005.)

In the engineer corps of the Navy there were the grades of chief engineer, passed assistant engineer, and assistant engineer. In the first of these there were four ranks—captain, commander, lieutenant commander, and lieutenant; and in the second there were two ranks—lieutenant and lieutenant (junior grade). Certain passed assistant engineers with the rank of lieutenant were, on account of civil-war service, entitled to be retired with the rank of the next higher grade, viz, chief engineer. There being four ranks in the higher grade, *held*, that the rank to which the officers concerned were entitled, on account of civil-war service, was the rank next above that which they held in the lower grade, and that the provisions of sections 1485 and 1486, Revised Statutes, relating to precedence of staff officers, did not operate to entitle them to a higher rank. (26 Op. Atty. Gen., 496. See also note to sec. 1390, R. S.)

The retirement of an officer with a higher rank than that held by him on the active list, pursuant to an act of Congress authorizing it, does not confer upon him a new office. He retains his former office, to which he had been duly appointed, and acquires only new and higher rank by the act of Congress authorizing his retirement. The rank which is conferred upon him by act of Congress upon his retire-

ment is in no sense a constitutional appointment to a new office. (*Wood v. U. S.*, 15 Ct. Cls., 151; affirmed 107 U. S., 414.)

Congress may transfer an officer from the active to the retired list, and may change his rank and pay on the active or retired list at any time, without coming in conflict with the Constitution. (*Wood v. U. S.*, 15 Ct. Cls., 151; affirmed 107 U. S., 414.)

An officer on the active list may be retired with a different rank from that which belongs to his office, when Congress so provides, without a new appointment, as he continues to hold the same office, but is transferred to the retired list with a different rank. (*Wood v. U. S.*, 15 Ct. Cls., 151; affirmed 107 U. S., 414.)

The effect of advancement of an officer on the retired list on account of civil-war service, in accordance with the act of June 29, 1906 (34 Stat., 554), is not to place him in a different grade, but to give him the rank and retired pay belonging to that grade. (26 Op. Atty. Gen., 433; 26 Op. Atty. Gen., 615.)

A lieutenant in the Navy retired with the rank of lieutenant commander under section 9 of the Navy personnel act of March 3, 1899 (30 Stat., 1006), continued to hold the office of lieutenant subsequent to his retirement. (14 Comp. Dec., 471.)

An officer properly appointed to any grade on the active list may be retired with a rank higher or lower than that which belongs to his office, if Congress see fit so to enact; but Congress can not appoint to a new and different office without coming in conflict with the Constitution. (*Moser v. U. S.*, 42 Ct. Cls., 86.)

Officers of the Navy advanced in rank on the retired list, even where such advancement is by law made subject to the advice and consent of the Senate, are not entitled to commissions in such advanced rank, as no exercise of the appointing power is involved, the effect thereof being merely a change of rank and not promotion to a new and higher office. (File 26509-33, Mar. 24, 1910, citing *Wood v. U. S.*, 15 Ct. Cls., 151, 107 U. S., 414; 25 Op. Atty. Gen., 185; 25 Op. Atty. Gen., 312, 317; 26 Op. Atty. Gen., 433; 26 Op. Atty. Gen., 487; 26 Op. Atty. Gen., 615; file 26254-89, Aug. 11, 1908; see also *Cloud v. U. S.*, 43 Ct. Cls., 69; War Dept., Gen. Order No. 191, Dec. 21, 1904. But see act Mar. 4, 1911, 36 Stat., 1354, providing that "commissioned officers of the Army, Navy, and Marine Corps on the retired list whose rank has been or shall hereafter be advanced by operation of or in accordance with law shall be entitled to and shall receive commissions in accordance with such advanced rank.")

Rank as well as pay of retired officers is entirely within the control of Congress; and a new commission is not necessary where an officer is entitled to be retired with the rank to which his seniority entitled him to be promoted. (*Cloud v. U. S.*, 43 Ct. Cls., 69; but see act Mar. 4, 1911, 36 Stat., 1354, quoted in preceding paragraph.)

The President may send to the Senate for approval of his action the names of officers on the retired list of the Army nominated by him for advancement under the act of April 23, 1904 (33 Stat., 264), after the adjournment of



the last session of Congress, but who died before the convening of the present session; and upon approval by the Senate, the personal representatives of the deceased officers will be entitled to receive the advanced pay due such officers, without further action by Congress. Where, however, a person is appointed to office, either during a session or in a recess of the Senate, and dies before confirmation, his personal representatives must be remitted to Congress for the payment of salary earned by such officer. (25 Op. Atty. Gen., 312. See also 23 Op. Atty. Gen., 413, concerning *nunc pro tunc* advancement of officers no longer in the naval service.)

A retired officer of the Army who was placed on the retired list by the President, under the provisions of the act of April 23, 1904, with the rank and retired pay of the next higher grade, became entitled to the pay of the higher grade from the date he was appointed and confirmed to take the higher rank; and where the officer died after his advancement by the President but prior to the concurrence of the Senate, his heirs are entitled to the increased pay due him at the time of his death. (11 Comp. Dec., 693, following, 25 Op. Atty. Gen., 312, and citing 25 Op. Atty. Gen., 185 and 299.)

Where, under the provisions of the act of April 23, 1904, a retired officer of the Army is placed on the retired list with the rank and retired pay of the next higher grade, such increased pay attaches to said office from the date he was actually placed on the retired list, and neither requires an acceptance by the officer nor permits of a declination by him. This was not an appointment to a different office. The rank and pay of officers of the Army are subject to the control of Congress and such action does not require a new appointment by the President. This is merely a change of rank and pay. When an officer is so placed on the retired list, the act of the President is complete and irrevocable. (11 Comp. Dec., 448.)

An officer of the Navy was retired as a midshipman; by act of March 3, 1883 (22 Stat., 472), the title of the grade of midshipman was changed to that of ensign, constituting a junior grade, but without changing the rate of pay; by act of June 26, 1884 (23 Stat., 60, sec. 2), the grade of junior ensign was abolished, and it was provided that the junior ensigns then on the list should be commissioned as ensigns in the Navy. *Held*, that the act last cited operated to promote officers who had been retired in the grade of midshipman or of ensign (junior grade), to ensigns. (4 Comp. Dec., 628.)

The advancement in rank of an officer on the retired list as a reward for civil-war service does not create or constitute an office and is not accomplished by an exercise of the appointing power. In this case there is rank and pay without the corresponding office. (25 Op. Atty. Gen., 312; 25 Op. Atty. Gen., 185.)

Under a special act of Congress providing for the advancement on the retired list from a prior date "to the next higher grade" of a chief engineer with the rank of captain, *held*, that since he already occupied the highest grade and rank as a chief engineer officer, it was not possible to give him a higher grade in that corps, and in order to give any effect to the act it must be construed as authorizing an advancement of

one grade in rank above that which he already occupied; accordingly, that this officer became entitled to the rank of rear-admiral from the date stated in the act, and to the pay of a rear-admiral of the lower half from that date. (9 Comp. Dec., 515; see also 22 Op. Atty. Gen., 433.)

Under the acts of March 3, 1899, section 11 (30 Stat., 1007), and June 29, 1906 (34 Stat., 554), authorizing the advancement under certain conditions of any retired officer who served during the civil war to "the rank \* \* \* of one grade above that actually held by him at the time of retirement," the officers affected should receive an increase in rank; accordingly, where there exists more than one rank in the next higher grade, although the language is susceptible of the meaning that the officer shall be given some one of the ranks in said grade and might be literally complied with by giving him any rank of the higher grade although it might be no higher than that already held, the provision manifestly intended an advancement in rank and must be construed to require that the officer be retired with a rank higher than that already held. (26 Op. Atty. Gen., 487.)

Under the provisions of the act of June 29, 1906, providing for the advancement of officers of the Navy not above the grade of captain, for civil-war service, an officer of a staff corps in the highest grade of his corps is entitled to the pay of the next higher grade in the line of the Navy. (13 Comp. Dec., 617.)

[Congress frequently does not observe the distinction between "rank" and "grade" in legislating for the Navy. Thus, in the case of chaplains, Congress by act of June 29, 1906 (34 Stat., 554), as amended by act of June 30, 1914 (38 Stat., 404), provided for their promotion to the "grades" of lieutenant, lieutenant-commander, commander, and captain. In the case of H. H. Rousseau, who occupied the grade of civil engineer in the Navy with the rank of commander, Congress, by act of March 4, 1915 (38 Stat., 1191), provided for his advancement from "commander" to the "grade" of rear-admiral of the lower nine. In the case of Guy K. Calhoun, Congress, by act of May 6, 1910 (36 Stat., 352), provided for his appointment as a professor of mathematics, and his subsequent promotion to the "grade" of lieutenant in the corps of professors of mathematics. By section 423, Revised Statutes, Congress provided that the chief of the Bureau of Construction and Repair should be an officer not below the "grade" of commander and a "skillful naval constructor." Numerous other instances exist in the statutes in which "grade" is used in the sense of "rank." "The interchangeability of the words rank and grade throughout the statutes leads me to the conclusion that they are used synonymously,—especially when we find them, as in section 1588, connected by a disjunctive, and with no indication that either shall control." (17 Op. Atty. Gen., 154.) See also 20 Comp. Dec., 199, holding that the words "grade" and "rank" as used in the act of March 4, 1913 (37 Stat., 892), relating to pay on promotion, are interchangeable and the equivalent of "office," and that the advancement contemplated by that act is an advancement in office; and 19 Op. Atty. Gen., 171,

where use of word "grade" in section 1480, Revised Statutes was held to be obvious error of the revisers; and see notes to sections 421, 422, 423, and 1362, Revised Statutes. On the other hand Congress has repeatedly legislated with specific reference to the recognized distinction between "rank" and "grade", as, for example, in the act of May 22, 1917, section 20 (40 Stat., 89), providing that "hereafter all laws relating to the examination of officers of the Navy for promotion shall be construed to apply to the regular advancement of staff officers to higher ranks on the active list the same as though such advancements in rank were promotions to higher grades."]

**When retirement or advancement on retired list takes effect.**—See note to section 1444, Revised Statutes; see also note to section 1458, Revised Statutes, "Antedating rank on promotion."

The retirement of an officer of the Navy, on his own application under section 1443, Revised Statutes, becomes legally effective so as to create a vacancy on the active list to which a promotion may be made, upon the President's approval of the officer's application for retirement. (32 Op. Atty. Gen., 176; this is contrary to the decision previously made by the Navy Department in the same case. See file 28687-22:3, Jan. 9, 1919.)

The law does not recognize fractional parts of a day in the matter of retirements, promotions, and appointments in the Army. Vacancies caused by the retirement of officers from active service do not begin to run until the day following the date their retirement becomes legally effective. (16 Comp. Dec., 682.)

An officer of the Army who is retired is entitled to the full pay of the active list until he receives notice of his retirement, unless receipt of such notice is prevented by his own act or default. (Dig. Comp. Dec., 170; 12 Comp. Dec., 628; file 26260-3237:1, Aug. 25, 1915; Comp. Dec., Aug. 21, 1918. Appeal No. 28230, file 28687-22:3.)

An officer of the Marine Corps was found incapacitated for active service, resulting from an incident of the service. The finding was approved by the President May 4, 1908. On May 11, 1908, the following order was issued to him: "The President of the United States having placed you on the retired list of officers of the United States Marine Corps from and including May 4, 1908, you are hereby detached from Headquarters, United States Marine Corps, will proceed to your home, and report your arrival and address to this office." *Held*, that claimant having been placed on the retired list by order of the President on May 4, 1908, is not thereafter entitled to active-duty pay and allowances. Having been paid active-duty pay to and including May 11, 1908, the overpayment of difference between active-duty and retired pay from May 5, 1908, to May 11, 1908, should be disallowed. (17 Comp. Dec., 533. But see *contra* Dig. Comp. Dec., 170, 12 Comp. Dec., 628, and Comp. Dec., Aug. 21, 1918, noted above.)

While in the case of an officer who resigns his commission it is necessary to communicate to him the acceptance of such resignation, yet the same conditions do not exist where a change

of status is involved, such as the transfer of an officer from the active to the retired list, and the fact is communicated to the officer concerned only to inform him that he *has been* retired on or from a certain date. (File 26543-62:1 Aug. 28, 1911.)

Under section 9 of the Navy personnel act of March 3, 1899 (30 Stat., 1004), a lieutenant commander (Alfred A. Pratt) was designated for retirement by the Board for Selection for Retirement, convened on June 1, 1911. Said act provided that the findings of said board should be transmitted to the President, "who shall thereupon, by order, make the transfers of such officers to the retired list as are selected by the board." On July 3, 1911, the President approved the proceedings, findings, and recommendation of the board and directed that the officers selected, including Lieutenant Commander Pratt, "will be retired from active service in accordance with section 9 of the act approved March 3, 1899, above referred to." *Held* that this action of the President had the effect of removing Lieutenant Commander Pratt from the active list, although not communicated to him, and accordingly that on the date of his death, July 4, 1911, he was no longer on the active list but was an officer on the retired list, and therefore the provision of law (act May 13, 1908, 35 Stat., 128) for the payment of a death gratuity to beneficiaries of officers who die while on the active list would not be applicable to his case. It would seem, upon authority of 22 Op. Atty. Gen., 657, that Lieutenant Commander Pratt's retirement was effective from June 30, 1911, as section 9 of the Navy personnel act provided that "the promotions to fill the vacancies thus created shall date from the thirtieth day of June of the current year," but, irrespective of this, it is clear that his retirement was effective prior to his death, which occurred after the President's action. (File 26543-62:1, Aug. 28, 1911.)

Retirements made under sections 8 and 9 of the Navy personnel act of March 3, 1899 (30 Stat., 1004), were legally effective on the thirtieth day of June of the current year, although the President's order approving such retirements may have been dated subsequent to June 30, and the Secretary of the Navy may have notified the officers concerned that they would be placed on the retired list from July 12. The intention of Congress was plainly expressed in these two sections of the personnel act, that the vacancies provided for were to occur or be created for the fiscal year ending June 30. If there were any doubt about this interpretation of the law, it would be removed by the provision in section 9, that "the promotions to fill vacancies thus created shall date from the thirtieth day of June of the current year." This construction is not only warranted by the language of the law, but it conduces to a methodical and orderly administration of these sections. It results in making all the vacancies created under the provisions of the two sections take effect on the last day of the fiscal year, and the promotions made to fill such vacancies go into effect on the day immediately following the last day of the fiscal year, viz, on the first day of July of the current year. Accordingly, *held* that the order of the President, though dated on July 1, 1899, had the effect to retire



Lieutenant Commander William H. Driggs on June 30, 1899, under the provisions of section 8 of the Navy personnel act of March 3, 1899, and thus create a vacancy for and within the fiscal year ending with that day, and that the promotion of Lieutenant Walter McLean to fill the vacancy thus created should date from said 30th day of June. In other words, his promotion and his commission in pursuance thereof should bear date as of July 1, 1899; and he is entitled to the grade and rank indicated in his said commission, together with the emoluments attached, from and including that date. (22 Op. Atty. Gen., 657.)

By special act of Congress, March 4, 1911 (36 Stat., 1346), it was provided: "That the President of the United States be, and he is hereby, authorized to place Civil Engineer Robert E. Peary, U. S. Navy, on the retired list of the Corps of Civil Engineers with the rank of rear admiral, to date from April sixth, nineteen hundred and nine, with the highest retired pay of that grade under existing law \* \* \*." Pursuant to this act the President commissioned Peary on March 13, 1911, as a civil engineer in the Navy, with the rank of rear admiral on the retired list from April 6, 1909, and it was held by the Comptroller of the Treasury, in a decision dated June 5, 1911 (17 Comp. Dec., 919), that he should be given the retired pay of a rear admiral under the act in his case from April 6, 1909, the date specified therein. As to the date of the vacancy in the Corps of Civil Engineers created by Peary's retirement, *held* that Mr. Peary was, in law and in fact, a civil engineer on the active list of the Navy until March 13, 1911; that Congress did not by the above act effect any change in the status of Mr. Peary prior to its enactment; that Congress undoubtedly had the authority to provide that Peary should be treated as a retired officer with the rank of rear admiral during the period from April 6, 1909, to March 13, 1911, but it could not, by legislative enactment, change the fact as it actually existed, that during all of said period he was a civil engineer on the active list of the Navy (citing *Potts v. U. S.*, 125 U. S., 173; *Burchard v. U. S.*, 125 U. S., 176; 27 Op. Atty. Gen., 222; and file 26256-10a, Jan. 25, 1909); and accordingly that the officers promoted because of the retirement of Civil Engineer Peary should be given the date of the vacancies caused by the actual retirement of that officer and not the date from which his retirement was made to take effect. Had Congress intended that the officers promoted to fill vacancies caused by the retirement of Peary should be given the same date as that from which his retirement was made to take effect, it might easily have so stated in the act, as was done in section 9 of the Navy personnel act of March 3, 1899 (30 Stat., 1004), which provided in express terms that "the promotions to fill the vacancies thus created shall date from the thirtieth day of June of the current year." By so doing Congress would have produced all the results which would have followed had Peary actually been retired on April 6, 1909; but even then the fact as it actually existed would not have been changed. Mr. Peary was not retired on April 6, 1909, and there accordingly existed no vacancy on that

date by reason of his retirement, and nothing that Congress might say in an act passed nearly two years later could change this fact. (File 26255-83:4, Aug. 4, 1911, overruling file 26255-83:3, Mar. 25, 1911.)

An officer of the Navy who, by authority of a special act of Congress, is placed on the retired list with the rank and highest retired pay of a rear admiral from a prior date, is entitled to the retired pay of a rear admiral of the upper half from the date of his taking rank on the retired list, this being a higher rate than he has received. When Congress authorizes the dating back of a commission, it intends to give the officer pay from such date, unless otherwise expressed. (17 Comp. Dec., 919, citing *McAlpine v. U. S.*, 27 Ct. Cls., 493.)

The advancement in rank of an officer on the retired list of the Army for civil-war service may be made to relate back to the date of the act authorizing such advancement. The general rule is that laws speak from the date of their enactment, and where something remains to be done (nomination and concurrence of the Senate) not inconsistent with a relation back when it is done, the general rule may be applied. (25 Op. Atty. Gen., 299.)

In accordance with a special act of Congress approved January 30, 1903, the President by and with the advice and consent of the Senate appointed a designated person to the office of passed assistant engineer on the retired list of the Navy, from October 13, 1868. At the date of said act the officer was on the retired list of the Navy as a second assistant engineer, having been so retired in 1873. *Held*, that in this case, while the commission pursuant to the special statute was dated in February, 1903, the appointment related back to October 16, 1868, and was a *nunc pro tunc* appointment, having the same effect as if the appointment had been made originally on that date. (9 Comp. Dec., 572.)

A retired officer of the Navy, under a special act of Congress, was appointed to a higher grade on the active list and immediately transferred to the retired list with the retired pay of that grade. This did not effect a new retirement, nullifying the original retirement, but merely effected an advancement on the retired list in pursuance of the usual legislative method adopted for that purpose. The obvious intention, meaning, and effect of the act simply was to advance the officer already on the retired list one grade on that list. He is therefore debarred from the benefits of an act which applies only to officers who have not received an advance of grade at or since the date of their retirement. (26 Op. Atty. Gen., 111.)

Where an officer of the Army is retired with the rank to which his seniority entitled him to be promoted, in accordance with the act of October 1, 1890 (26 Stat., 562), his advancement in rank and retirement are, for practical purposes, simultaneous, for when the officer is retired he is also promoted, and it can not, therefore, be accurately described as "an advance in grade since the date of his retirement." The use of the word "since" would be inappropriate when no appreciable period of time intervenes between the two events. The promotion of officers at the moment of retirement, under the

act of October 1, 1890, can hardly be said with propriety to be a favor. They would have been entitled to the same promotion on the active list but for causes creditable to them and establishing a claim to the country's gratitude, which operated to prevent such promotion. By giving the promotion at the moment of or as an incident to retirement, the Government is just rather than generous. Accordingly, *held* that the officers in question did not receive an advance of grade since the date of their retirement, but are entitled to the benefits of the act of April 23, 1904 (33 Stat. 264), relating to advancement on the retired list for civil-war service. (27 Op. Atty. Gen., 212, overruling 25 Op. Atty. Gen., 158, which was affirmed in 25 Op. Atty. Gen., 514, both of which latter opinions are noted below.)

An officer who fails physically upon examination for promotion and is retired with the rank to which his seniority entitled him to be promoted, in accordance with the act of October 1, 1890 (26 Stat., 562), thereby receives an advance of grade after the date of his retirement, and is accordingly excluded from the benefits of a statute which is restricted in its application to an officer who has not "received an advance of grade since the date of his retirement." (25 Op. Atty. Gen., 158; overruled by 27 Op. Atty. Gen., 212, noted above.) The act of October 1, 1890, does not authorize the advancement of an officer found physically disqualified to the next higher grade on the active list, and his retirement, after having been so advanced, with the rank of such higher grade. (25 Op. Atty. Gen., 514, affirming 25 Op. Atty. Gen., 158, which was subsequently overruled by 27 Op. Atty. Gen., 212.)

An officer of the Navy examined for promotion who fails physically and is retired, is properly given the rank of the higher grade on the retired list, under the act of March 4, 1911 (36 Stat., 1267), from the date of the vacancy to which he would have been promoted on the active list, if qualified. (File 27231-89, Apr. 19, 1917.) The same rule has been applied to the retirement of officers of the Marine Corps under the same conditions. (File 26260-3237:1, Aug. 25, 1915; C. M. O. 29-1915, p. 9; see also file 26260-3604:2, Oct. 16, 1916.) However, date of rank should not be changed where already fixed under a different rule previously existing. (C. M. O. 35-1915, p. 11; file 27231-89, Apr. 19, 1917.)

The actual retirement of an officer who fails physically in line of duty upon examination for promotion should not take place before the occurrence of the vacancy to which he would have been promoted if qualified, he having been examined prior to the existence of the vacancy. (File 26260-1658, May 6, 1912, case of First Lieut. E. S. Yates, U. S. M. C.)

Action of the President is necessary before the retirement of an Army officer can be made; the provision of the act of February 2, 1901, section 32 (31 Stat., 756), that "if upon examination the officer be found disqualified for promotion, he shall, upon the approval of the proceedings by the Secretary of War, be treated in the same manner as if he had been examined prior to promotion" does not have the effect of depriving the officer of the difference between retired pay and active-duty pay from the date of the

vacancy to which he would have been promoted had he successfully passed the examination. In this case the officer, a second lieutenant, was retired with the rank of first lieutenant on March 15, 1906, "to date from June 18, 1904," the date he would have been promoted to the grade of first lieutenant had he been found qualified. (12 Comp. Dec., 628; file 26260-3237:1, Aug. 25, 1915.)

**Rank on retirement of officer holding recess appointment.**—The acceptance by an Army officer of a recess appointment is provisional only and leaves to the officer a reversionary right to his former office in case his new appointment is not confirmed by the Senate. An Army officer who accepts a recess promotion and thereafter becomes eligible for retirement by reason of age before the adjournment of Congress and before the appointment is acted upon by the Senate, is entitled to the rank of his new appointment. (29 Op. Atty. Gen., 598. See also note to sec. 1458, R. S., "Status of officer pending confirmation by Senate of his promotion.")

**Rank on retirement of officer failing to qualify for promotion.**—The privilege which an officer has of retirement "with the rank to which his seniority entitles him to be promoted," given by the act of October 1, 1890 (26 Stat., 562), is limited to cases where the officer fails in his physical examination only. (Steinmetz v. U. S., 33 Ct. Cls., 404.)

Under the clause in the act of March 4, 1911 (36 Stat., 1267), providing that officers of the Navy who fail physically, in line of duty, upon examination for promotion, shall be retired with the rank to which their seniority entitled them to be promoted. *Held*, that an ensign examined for promotion to lieutenant (junior grade), found not physically qualified, and subsequently ordered to appear before a retiring board, which latter board finds him incapacitated by reason of physical disability incurred in line of duty, should be retired in the rank of lieutenant (junior grade), although in the meantime a vacancy occurred in the grade of lieutenant to which he would have been entitled to promotion by seniority had he qualified but for which he was never examined or ordered up for examination. (File 26253-200:1, Feb. 17, 1912.)

It may be true that if Ensign Allen had qualified for promotion to lieutenant (junior grade) and been commissioned in that grade, he would have become the senior lieutenant (junior grade) and thereby entitled to the vacancy in the grade of lieutenant, provided he qualified therefor. But the fact remains that Ensign Allen never qualified for the grade of lieutenant (junior grade), and was never commissioned therein, and the question of his rights if he had so qualified and been promoted cannot now be considered. Never having occupied a position in the grade of lieutenant (junior grade) on the active list, it follows that he never acquired seniority in that grade. The fact is, at the time the vacancy occurred in the grade of lieutenant to which it is suggested he was entitled to promotion by seniority, there were officers in the grade of lieutenant (junior grade) senior to Allen, who was then only in the grade of ensign, notwithstanding that he



would have become senior to them had he been promoted to the grade of lieutenant (junior grade). (File 26253-200:1, Feb. 17, 1912).

A captain in the Navy, found disqualified by reason of physical disability contracted in the line of duty, upon examination for promotion by seniority to the grade of rear admiral, and retired in accordance with the provisions of the act of March 4, 1911, is entitled to the retired pay of a rear admiral of the lower half only, notwithstanding that, had he been qualified for promotion and actually been promoted, he would have been, at the time of his retirement, a rear admiral of the upper half. (22 Comp. Dec., 671).

It may be true that if Captain Tappan had been found qualified on examination he would have been promoted to the grade of rear admiral, and by the time of his retirement would have been entitled by seniority to be a rear admiral of the upper half. But as a matter of fact he was not found qualified on examination. He never attained the rank of rear admiral of the lower half on the active list, and therefore never acquired by seniority the right to be promoted to rear admiral of the upper half. The seniority of Capt. Tappan entitled him to be promoted to the next higher grade or rank; the next higher grade or rank to that of captain in the Navy is rear admiral of the lower half (citing *Gibson v. U. S.*, 194 U. S., 182). (22 Comp. Dec., 671; *Tappan v. U. S.*, 54 Ct. Cls., 76.)

The "seniority" to which the officer is entitled is that of the rank for which, upon "examination for promotion," he has been "found incapacitated for service by reason of physical disability contracted in the line of duty." The grade or rank for promotion to which the officer has been found physically disqualified upon his examination is the only one within the intent of the law to which he is entitled to be promoted. Not only seniority for a particular grade but also the finding of an examining board that the officer is not physically qualified for that very grade, are both requisite to entitle him to retirement in such grade. (File 26253-200:1, Feb. 17, 1912.)

A captain in the Marine Corps became due for promotion to the grade of major from August 29, 1916, by reason of the naval appropriation act of that date which created a number of original vacancies in the various grades of the Marine Corps. He failed physically for promotion and was retired. In the meantime, an officer in the grade of major failed upon examination for promotion to the grade of lieutenant colonel, to fill a vacancy created in that grade on August 29, 1916. Had the captain been promoted to the grade of major, he would have been number one in that grade and would thus have become due by seniority for promotion to the grade of lieutenant colonel from August 29, 1916, to fill the vacancy for which his senior had failed to qualify. *Held*, that under the act of October 1, 1890, made applicable to the Marine Corps by act of July 28, 1892, the captain mentioned was entitled by reason of his seniority to be retired with the rank of major and not with the rank of lieutenant colonel. (File 26260-3604:2, Oct. 16, 1916).

A passed assistant paymaster was examined for promotion to the grade of paymaster, and found not physically qualified, which finding was approved by the President February 10, 1916. The candidate was then ordered before a retiring board, which found him incapacitated, due to disability incurred in line of duty, which finding was approved by the President March 14, 1916. Under the act of March 4, 1911, he became entitled on retirement to the rank to which his seniority entitled him to be promoted. In the grade of paymaster there were the ranks of lieutenant and lieutenant commander. Under the law as it then stood staff officers were examined for promotion in grade, without regard to the rank which they would receive on promotion, the rank being governed by the status of the line officer next after whom they took precedence. Usually, if qualified, the officer's rank on promotion would be the lower rank in the upper grade. However, where his examination was delayed it might happen that the officer, if qualified, would on promotion be entitled to the higher rank in the grade to which promoted. In this case, on the date that the officer became due for promotion, he would have been entitled, if promoted, only to the rank of lieutenant, but by reason of delay in his examination, on February 10, 1916, the date on which he was found not physically qualified for promotion, he would have been entitled, if promoted, to the rank of lieutenant commander in the grade of paymaster, that being the rank of his "running mate" in the line. *Held*, that the rank to which his seniority entitled him to be promoted, within the meaning of the act of March 4, 1911, was the rank of lieutenant commander, and accordingly that this officer should receive that rank on the retired list. (File 26253-465:2, Mar. 16, 1916).

For other cases, see above, "When retirement or advancement on retired list takes effect," and see 21 Op. Atty. Gen., 385, noted under section 1448, Revised Statutes, "Physical examination for promotion not sufficient for retirement."

**Restoration of retired officer to active list.**—See section 1465, Revised Statutes, and note thereto; see also note to section 1459, Revised Statutes.

**Status of officer illegally retired.**—An officer whose name is placed on the retired list of the Army by the Secretary of War, in apparent compliance with provisions of law, is an officer de facto if not de jure, and money paid to him as salary can not be recovered back by the United States. (*Badeau v. U. S.*, 130 U. S., 439.)

**Correction of erroneous retirement.**—See notes to sections 1408, 1452, and 1454, Revised Statutes.

The President has no power to correct the retirement of an officer so as to give him increased rank from the date of his original retirement, where the law which is claimed to entitle the officer to the higher rank has been repealed; mistakes, if any, made in the execution of an act which is subsequently repealed, can not be rectified by executive action after such repeal. (17 Op. Atty. Gen., 60.)

Where an officer was found incapacitated for active service by reason of wounds received in battle, and the President directed that, in accordance with such finding, he be placed on the retired list of the Army with the higher rank to which such disability entitled him: *Held*, that the President had the right to revoke said order before it was actually executed and before it had reached the officer concerned, it appearing that the officer's disability was not caused by wounds received in battle; *held further*, that even had the original order been executed and delivered to the officer and his name placed on the retired list with increased rank, it would be the duty of the President to correct such action and place the officer on the retired list with the actual rank which he held at the time of retirement. (17 Op. Atty. Gen., 7, construing act July 28, 1866, sec. 32, relating to the Army.)

On February 22, 1869, by direction of the President, Paymaster Gen. Benjamin W. Brice was retired from active service, and on the same day Asst. Paymaster Gen. Nathan W. Brown was nominated to be Paymaster General vice Brice, retired; Deputy Paymaster Gen. Hiram Leonard to be Assistant Paymaster General vice Brown, promoted; Paymaster Benjamin Alvord to be Deputy Paymaster General, vice Leonard, promoted; and Virgil S. Eggleston to be paymaster, vice Alvord, promoted. On March 3 the Senate advised and consented to the appointment of Eggleston to be a paymaster in the Army. The nominations of the others were not consented to by the Senate. On March 5, by direction of the President, the order placing Paymaster Gen. Brice upon the retired list was revoked, and he was to be considered as on duty as Paymaster General from February 22, the date of his retirement. *Held*, that there was and is no vacancy in the office of paymaster to which Eggleston could be appointed, as Alvord was not removed from the office of paymaster unless he was appointed Deputy Paymaster General, and had accepted the appointment, and he was not so appointed, as the Senate had not advised and consented thereto, and the law provides that no officer in the Army shall, in time of peace, be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect or in commutation thereof. (13 Op. Atty. Gen., 44; but see 23 Op. Atty. Gen., 30, noted under sec. 1363, R. S., "Effect of nomination and confirmation of an officer for appointment to grade already full.")

The retirement of an officer of the Marine Corps on furlough pay, under section 1454, Revised Statutes, was in error, as said section does not apply to the Marine Corps. Accordingly, so much of the President's order relating to this officer's retirement, as provided that he should receive only furlough pay, must be treated as of no effect. (15 Op. Atty. Gen., 442.)

Executive orders accomplish retirement only as they apply to particular cases and when not in conflict with the law. It is the law which gives the right, which fixes the officer's status, and consequent pay, and not the recommendation of a retiring board, even though supplemented by orders which have met the approval

of the President. And where the decision will turn exclusively upon the proper construction of a statute, an executive order is not final nor binding on the court. (Cloud v. U. S., 43 Ct. Cls., 69.)

The refusal of the head of the administrative department to recognize a retired officer as of the rank to which he is entitled by law, does not deprive the Court of Claims of jurisdiction to allow the officer the pay of such rank. (Cloud v. U. S., 43 Ct. Cls., 69.)

**Courts can not order retirement of officers.**—Where an officer of the Army has been examined for promotion, and upon failure to qualify is honorably discharged from the service, the courts are without jurisdiction to order him placed on the retired list upon his petition setting forth that he had been found by a board physically incapacitated for service and that he was thereby entitled to be retired and entitled to retired pay during life, instead of being dismissed with one year's pay. The report of the board is not final, but must be approved or disapproved by the President. This is the only relief from the errors or injustice that may be done by the board which is provided. The courts have no power to review. The courts are not the only instrumentalities of the Government. They can not command or regulate the Army. To be promoted or retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and it may be, even its safety, through the efficiency of the Army. (Reaves v. Ainsworth, 219 U. S., 296.)

Where it was provided by law that retired officers who served during the civil war should be entitled to the rank and retired pay of the next higher grade, and the Navy Department decided that a particular officer was not entitled to the benefits of the act, a decision of the Court of Claims (*Moser v. U. S.*, 42 Ct. Cls., 86), holding that the officer was entitled to the retired pay of the next higher grade, and purporting to decide that he was also entitled to the rank of such grade, does not estop the Secretary of the Navy from contesting the officer's claim to the rank of such higher grade. (28 Op. Atty. Gen., 352; *Moser v. Meyer*, 38 App. D. C., 13.)

For other cases, see note to section 417, Revised Statutes.

**Authority of the Secretary of the Navy to determine grade of retired officer.**—

Whatever, if any, duty the Secretary of the Navy has about the matter of placing names upon the retired list, it is not that he himself shall settle the question of grade or of retirement, but after a determination of those questions by the President, with whom they lie, to give effect to his directions. Should the President in fact retire an officer with a certain grade, and the Secretary of the Navy decline to enter the name of the officer upon the list as of that grade, there might be room to make a good argument showing that his duty to do so was ministerial and ought to be controlled by mandamus; but when the President retires one with a certain grade, or in a certain grade, there is no where in the law any authority at all for the placing of that name on the retired list as of another or dif-



ferent grade. (*Moser v. Meyer*, 38 App. D. C., 13.)

An officer was retired pursuant to the express direction and approval of the President, who by order did retire the officer as a captain of the Navy, and at no time at or since such retirement did the President confer a higher rank or office upon said officer. The President, then, having actually retired the officer with the grade of captain, it can not be said that there rested upon the Secretary of the Navy a duty to accord to the officer upon the Navy Register a different grade. In short, the position of the officer comes to no more than this; that he has been retired by the President with the grade of captain, while he conceives himself to be entitled to retirement with the rank of rear admiral; he asks that the Secretary of the Navy be required, through the writ of mandamus, to place his name upon the retired list with the rank of rear admiral, which the President declined to accord him. For this, there is neither duty, authority, nor power in the Secretary of the Navy; therefore, no room for a mandamus to go. (*Moser v. Meyer*, 38 App. D. C., 13.)

**Physical examination for promotion not sufficient for retirement.**—See note to section 1448, Revised Statutes.

**Difference between retirement and waiting orders.**—There is a well-recognized distinction between "retirement" and "waiting orders" (see secs. 1443, et seq.; sec. 1556); and an officer [Revenue-Cutter Service—now Coast Guard] placed on "permanent waiting orders" was not thereby retired. (21 Op. Atty. Gen., 286; see also 11 Comp. Dec., 762.)

**Difference between retirement and discharge.**—An Army officer by his retirement is not discharged from service or out of the service. (*U. S. v. Gillmore*, 189 Fed. Rep., 761.)

For other cases, see above, "Status of retired officers; part of the Navy."

**Residence of retired officer.**—A retired officer of the Navy or Marine Corps is not required to remain at his official residence; he may go at his pleasure to any point within the United States, or travel from point to point, the only requirement being that he keep the Navy Department advised of his present address, his official residence remaining as recorded at the Department. Under the Navy Regulations he is not authorized to change his official residence without permission of the Bureau of Navigation. A retired officer of the Marine Corps relieved from duty and ordered to his home is entitled to mileage only from the place he is relieved from duty to his official residence. (17 Comp. Dec., 952.)

There is no law or regulation which limits the selection of the home of an officer on retirement from active service to a place within the continental limits of the United States. (18 Comp. Dec., 638.)

The Army mileage law of June 12, 1906 (34 Stat., 246), which provided "that when the station of an officer is changed while he is on leave of absence he will, on joining the new station, be entitled to mileage for the distance to the new station from the place where he received the order directing the change providing the distance be no greater than from the old to the new station; but if the distance be

greater he will be entitled to mileage for a distance equal to that from the old to the new station only," is applicable in principle to the mileage of an Army officer placed on the retired list and ordered to his home, where he selects a home abroad. (18 Comp. Dec., 634.)

When an officer is retired and ordered to proceed to his home, if the order is not obeyed within a reasonable time it loses its character as an order to travel on public business, and if the travel is subsequently performed, it is at the officer's pleasure and convenience, and not under orders within the meaning of the statute allowing mileage. (13 Comp. Dec., 112.)

As to status of retired officer residing abroad, with reference to acts by him amounting to expatriation or abandonment of his office in the U. S. Navy, see note to section 1428, Revised Statutes.

A retired officer who resides at a place where it is inconvenient or impossible for him to receive his pay in person must, in the discretion of the disbursing officer on whose roll he is carried, furnish evidence of his right to receive his pay in accordance with Art. 1338, Navy Regulations, 1909 [Art. R-4385, Navy Regs., 1913]. (File 27231-26.)

**Retired officer cannot be appointed to office limited to active list.**—The permanent designation of the superintendent of the State, War, and Navy Building is an imperative order to continuous duty, and this is quite incompatible with the selection of a retired officer, who is generally exempt from such orders. It cannot be held that the act authorized an appointment, which is an order from which such officers were exempt. It is easy to see here that the fact that the duties imposed upon this superintendent require for their performance an officer fully qualified for active duty is a sufficient reason why this appointment was required to be made from the active list, and not from those who have already passed the period of their full usefulness and have on that account been retired from active service. (25 Op. Atty. Gen., 508.)

For other cases, see notes to sections 421, 1225 and 1462, Revised Statutes.

**Retired officer holding position as Congressman.**—The question whether a Congressman can receive pay as a retired Army officer is one of grave doubt, which only a determination of the Supreme Court can satisfactorily settle. (20 Op. Atty. Gen., 686; see also file 27231-74, May 12, 1916.)

**Veto of bill to make retired officers of Army not amenable to court-martial.**—"The original act establishing the retired list of the Army (act of Aug. 3, 1861), referred to the personnel therein included as only partially retired, and provided that a retired officer should be entitled to wear the uniform of his grade, should be borne on the Army Register, and should be subject to the rules and Articles of War, and to trial by general court-martial for any breach of these articles. By the act of July 24, 1876, officers of the Army on the retired list were specifically declared to constitute a part of the Regular Army, a provision which is found repeated in subsequent acts affecting the organization of the Army; and other stat-

utes enacted during this period made retired officers of the Army available for certain classes of active duty, in time of peace with their consent, and in time of war without their consent. By the recently enacted National Defense Act, the authority of the President over retired officers has been further extended, so as to make them subject to his call in time of war for any kind of duty without any restriction whatever. Courts and Attorneys-General have, in a long line of decisions, held that officers of the Army on the retired list hold public office. It thus appears that both the legislative and judicial branches have drawn a sharp distinction in status between retired officers, who are regarded and governed at all times as an effective reserve of skilled and experienced officers and a potential source of military strength, and mere pensioners, from whom no further military service is expected. Officers on the retired list of the Army are officers of the Army, members of the Military Establishment distinguished by their long service, and, as such, examples of discipline to the officers and men in active service. Moreover, they wear the uniform of the Army, their education and service hold them out as persons especially qualified in military matters to represent the spirit of the Military Establishment, and they are subject to active duty in time of national emergency by the mere order of the Commander-in-Chief. They are, therefore, members of the Army, officers of the United States, exemplars of discipline, and have in their keeping the good name and the good spirits of the entire Military Establishment before the world. Occupying such a relation, their subjection to the rules and Articles of War and to trial by general court-martial have always been regarded as necessary, in order that the retired list might not become a source of tendencies which would weaken the discipline of the active land forces and impair that control over those forces which the Constitution vests in the President.

"The purpose of the Articles of War in times of peace is to bring about a uniformity in the application of military discipline which will make the entire organization coherent and effective, and to engender a spirit of cooperation and proper subordination to authority which will in time of war instantly make the entire Army a unit in its purpose of self-sacrifice and devotion to duty in the national defense. These purposes can not be accomplished if the retired officers, still a part of the Military Establishment, still relied upon to perform important duties, are excluded, upon retirement, from the wholesome and unifying effect of this subjection to a common discipline. I am persuaded that officers upon the retired list would themselves regard as an invidious and unpalatable discrimination which in effect excluded them from full membership in the profession to which they have devoted their lives, and in which by the laws of their country they are still members. So long as Congress sees fit to make the retired personnel a part of the Army of the United States, the constitutionality of the proposed exemption of such personnel from all liability under the Articles of War is a matter of serious doubt, leaving the President, as it does, without any means sanctioned by

statute of exercising over the personnel thus exempted the power of command vested in him by the Constitution.

"Convinced, as I am, of the unwisdom of this provision and of its baneful effect upon the discipline of the Army; doubting, as I do, the power of Congress wholly to exempt retired officers from the control of the President, while declaring them to be a part of the Regular Army of the United States, I am constrained to return this bill without my approval." (Veto message of President Wilson, Aug. 18, 1916, 53 Cong. Rec., 14950.)

"**Navy Register,**" history and definition of, etc.—"An exhaustive research has failed to disclose any statute requiring the publication by the Secretary of the Navy of a Navy register. Many references are found in the laws to the 'Navy register,' or to the 'official Navy register,' or 'official register of the Navy,' etc. Thus the act of June 29, 1906 (34 Stat., 554), provides for the advancement in rank and pay of officers who served during the civil war. One of the conditions of such advancement, as stated in this act, is that the officer's name must be 'borne on the official register of the Navy.' The act was nevertheless held to apply to mates, whose names are not included in the published Navy Register, as that publication includes only 'commissioned and warrant officers of the United States Navy and Marine Corps,' and mates do not come within these designations. In connection with the cases of mates, it was decided that the 'official register of the Navy' was the official record or register of officers of the Navy kept in the Bureau of Navigation, and not the published register. This seems to be the obvious construction of the expressions referring to the Navy register which are found in the various acts of Congress, and laws requiring the Secretary of the Navy to enter certain officers' names on the Navy register, or to omit certain other names from the Navy register, are not, therefore, construed as requiring the publication of such a register." (File 27231-8, Feb. 7, 1911.)

"An examination of the records discloses that lists of officers of the Navy, with certain information pertaining thereto, were sent to the respective houses of Congress at various times in pursuance of resolutions, one of which was House of Representatives resolution of January 23, 1812 (Annals of Congress, 12th Cong. 1st sess. pt. 1, p. 929), which read as follows: 'Resolved, That the Secretary of the Navy be directed to lay before this House a statement of the names, rank, pay, and rations of the commissioned officers and midshipmen belonging to the Navy of the United States.'" (File 27231-8, Feb. 7, 1911.)

"Reference is next found to a resolution of the House, dated March 3, 1813, reading as follows: 'Resolved, That the Secretary of the Navy be, and he is hereby, directed to report to this House at the next session of Congress a statement of the number of \* \* \* officers in the naval service of the United States, their rank, pay, and employ.'" (File 27231-8, Feb. 7, 1911.)

["There appears to have been a Senate resolution, dated August 2, 1813, on this subject,



but I have been unable to locate a copy thereof." (Memo. of J. A. G., Feb. 7, 1911, file 27231-8.)

"Next in order is Senate resolution of December 13, 1815, as follows: 'Resolved, That the Secretary of War and the Secretary of the Navy be requested to furnish annually, on the first of January, each Member of the Senate with a copy of the Register of the Officers of the Army and Navy of the United States.'—Annals of Congress, 14th Congress, 1st session, 1815-16, pages 21, 22." (File 27231-8, Feb. 7, 1911.)

"Following this resolution [last above quoted] the Navy Register appears to have been printed annually, 'by order of the Secretary of the Navy,' and, as late as 1860, it was stated on the title page of the Register 'Printed by order of the Secretary of the Navy, in compliance with a resolution of the Senate of the United States of December 13, 1815.'" (File 27231-8, Feb. 7, 1911.)

"The duty of printing the Navy Register and furnishing one copy to each Member of the Senate is not now required of the Secretary of the Navy, as, by act of January 12, 1895, entitled 'An act providing for the public printing and binding and the distribution of public documents (28 Stat., 601), provision is made for the printing and distribution of the Navy Register as a public document by the 'Joint Committee on Printing.' Section 1 of the act cited reads as follows: 'That there shall be a joint committee on printing, consisting of three Members of the Senate and three Members of the House of Representatives, who shall have the powers hereinafter stated.' Section 54 of this act provides: 'Whenever any document or report shall be ordered printed by Congress, such order to print shall signify the "usual number" of copies for binding and distribution among those entitled to receive them. No greater number shall be printed unless ordered by either House, or as hereinafter provided. When a special number of a document or report is ordered printed, the usual number shall also be printed, unless already ordered. The usual number of documents and reports shall be one thousand six hundred and eighty-two copies, which shall be distributed as follows: \* \* \*. And section 73: 'Extra copies of documents and reports shall be printed promptly when the same shall be ready for publication, and shall be bound in paper or cloth as directed by the Joint Committee on Printing, and shall be of the number following in addition to the usual number: \* \* \*. Of the Registers of the Army and Navy, fifteen hundred copies of each; five hundred for the Senate and one thousand for the House.'" (File 27231-8, Feb. 7, 1911.)

"It does not appear from any of the foregoing that the secretary has ever been required by law to 'publish' an annual Navy Register. At one time he was requested by the Senate to furnish each of its members, annually, with a copy of the 'Register of the Officers of the \* \* \* Navy of the United States,' in compliance with which request the Navy Register was printed annually and the necessary number furnished to the Senate. Now, however, it is

no longer required of the Secretary of the Navy to print any copies whatever of the Navy Register, as the printing thereof comes under the Joint Committee on Printing and the Public Printer. The most that is required of the Secretary of the Navy is to furnish Congress with a list of the officers of the Navy and Marine Corps, after which the matter passes out of the Secretary's hands and the printing is done under the direction of Congress through its joint committee." (File 27231-8, Feb. 7, 1911.)

The "Official Register of the United States" is published by the Director of the Census in pursuance of the act of June 7, 1906 (31 Stat., 219), and contains a list of "persons in the civil, military, and naval service of the United States, and list of vessels." The Director of the Census is the only official expressly required by law to publish an official register of persons in the naval service. (File 27231-8, Feb. 7, 1911.)

The judiciary will not, by mandamus, compel the Secretary of War to change the position of an officer's name in the Army Register, even though it be conceded that an error exists therein. (*Edwards v. Root*, 24 App. D. C., 419, 431; as to the Navy, see file 27231-8, Feb. 7, 1911, and *Moser v. Meyer*, 38 App. D. C., 13.)

"The mere designation of lineal or relative rank in the Official Army Register does not fix and determine his rank in the Army and his right to promotion. That right depends upon other conditions. It is true the Official Army Register, is an official record of the War Department, that furnishes evidence of the rank and status of officers in the various grades and classes of the officers in the Army organization; but it does not per se establish and determine any right to particular rank, much less to promotion. This latter rank depends upon quite different conditions, and apart from the evidence furnished by the Official Army Register. Promotion in a certain sense is a new appointment, and, to the position of captain, can only be effected by the nomination of the President, with the advice and consent of the Senate. The mere entry, therefore, in the Official Army Register of the name and rank of the appellant would not operate to entitle him to or to control such promotion. That must rest primarily in the judgment and discretion of the President." (*Edwards v. Root*, 24 App. D. C., 419, 431; see file 27231-8, Feb. 7, 1911.)

In the published Navy Register "various methods are adopted to indicate the rank of officers whose rank is higher than that belonging to their grade. Thus, in the case of officers on active duty, serving as chiefs of bureau and as Judge Advocate General, the higher rank held by them under their commissions as such chiefs of bureau or Judge Advocate General is indicated merely by a footnote, the names of such officers being placed in their regular places in their respective grades. Thus \* \* \* an officer of the Navy on the active list, whose actual grade is that of captain, but who has the rank of rear-admiral while serving as Chief of the Bureau of Navigation, is placed in his regular position in the grade of *captain* in the Navy Register, and not placed in the grade of *rear-admiral*, an appropriate footnote being made to indicate his higher rank. In the case

of a large number of retired officers, whose grade on the active list was that of captain, but who were given the rank of rear-admiral on the retired list by reason of civil-war service their names are collected under the heading 'Rear-Admirals,' and the fact that they enjoy a higher rank than that belonging to their grade on the active list is indicated by a letter of the alphabet in a column under the heading 'Law governing retirement.' On the other hand, there are a number of officers whose actual grade is that of mate, but who have the rank of warrant officer on the retired list because of civil-war service. Their names will be found on page 158 of the Register for 1910, under the heading of 'Mates' and not 'Warrant Officers.' In their cases, however, there is a subheading reading 'Rank of Warrant Officer.' This latter method is followed in the case of the various staff officers who received the rank of a higher grade on retirement, as, for example, in the case of Medical Director Francis M. Gunnell, whose name is printed under the heading of 'Medical Directors' with a subheading, 'Rank of Rear Admiral,' and not under the heading of Rear-Admirals. In the cases of mates and certain staff officers, it was specifically held by the Attorney General in several published opinions that these officers did not obtain an advance in grade by virtue of their civil-war service, but retained their old grade with the addition of a higher rank. This, however, was merely the application to certain specific cases of general principles already well understood." (File 27231-8, Feb. 7, 1911.)

Formerly the register of officers of the Navy, kept in the Navy Department, was kept in bound record books, and after the name of an officer was once entered in the book, its position was not changed, but changes in his rank were indicated by notation on the page where his name appeared. It follows that there was no list of rear admirals, or list of captains, kept in the department, nor list of retired officers, as, even after retirement, the officer's name and

record was kept in the same position. References in acts of Congress which would indicate that the names of officers were kept by rank, and retired officers placed in a separate list, may be explained on the ground that Congress was not informed as to the method in which the official register was kept in the Navy Department. Now, the register of officers is kept by the card-index system, the positions of the cards being changed upon corresponding changes in the officer's rank. Under this arrangement, the names of retired officers are kept in a separate place, but the cards in their cases are arranged alphabetically, instead of by rank as in the case of officers on the active list. (File 27231-8:8, Mar. 9, 1911.)

The Secretary of the Navy is not required to publish a Navy Register at all. For a number of years prior to and including the year 1907, such a register was published semiannually by the Navy Department, on the first day of January and July, respectively. In the July register, the names of retired officers were omitted altogether, with the exception of such retired officers as were employed on active duty. Beginning with 1908 the publication of a register in July has been omitted. The publication of a register in January could also be omitted, should the Secretary of the Navy so decide. There is also a Navy Register or "directory" published monthly by the Navy Department, and in this register the names of all officers are alphabetically arranged, whether on the active or retired list. The names of officers could be so arranged also in the annual register, should the Secretary of the Navy so decide, as there is nothing in the law which requires him to publish any officer's name in any particular list. (File 27231-8:8, "Notes upon argument of Mr. George A. King, for petitioner, Mar. 10, 1911," in case of *United States of America ex rel. Jefferson F. Moser v. George von L. Meyer*, Secretary of the Navy, At Law, No. 53302, Supreme Court of the District of Columbia.)

**Sec. 1458. [Vacancies filled by promotion according to seniority.]** The next officer in rank shall be promoted to the place of a retired officer, according to the established rules of the service; and the same rule of promotion shall be applied successively to the vacancies consequent upon the retirement of an officer.—(3 Aug., 1861, c. 42, s. 22, v. 12, p. 291. 21 Dec., 1862 [should be "1861"], c. 1, s. 6, v. 12, p. 330.)

Amendment to this section was made by act of August 29, 1916 (39 Stat., 578), which provided that all promotions to the grades of rear admiral, captain, and commander, in the line of the Navy, should be made by selection only, from the next lower respective grade. By act of July 1, 1918 (40 Stat., 718), advancement by selection to the ranks of rear admiral, captain, and commander was extended to the Staff Corps of the Navy.

Pay of officers on promotion, see section 1561, Revised Statutes, and act of March 4, 1913 (37 Stat., 892).

Promotion by seniority in the Army was provided for by section 1257, Revised Stat-

utes, and act of October 1, 1890, section 3 (26 Stat., 562).

Promotion by seniority in certain Staff Corps of the Navy was specifically provided for by section 1480, Revised Statutes, as amended by act of February 27, 1877 (19 Stat., 244). Advancement by selection to certain ranks in the Staff Corps of the Navy was authorized by act of July 1, 1918 (40 Stat., 718). Advancement of staff officers to the ranks below commander is regulated by act of Aug. 29, 1916 (39 Stat., 576).

Promotions not to be made to fill vacancies occasioned by retirement of officers who are additional numbers in grade. (Sec. 1510, R. S.)



**Historical note.**—By act of February 28, 1855 (10 Stat., 616), it was provided that “vacancies created in the active-service list by placing officers on the reserved list shall be filled by regular promotion in the order of rank or seniority.”

Act of February 21, 1861, section 3 (12 Stat., 150), provided for retirement of medical officers, and section 4 provided “that all vacancies in the Medical Corps of the Navy caused by the foregoing section shall be filled in accordance with established usage.”

Act of August 3, 1861, section 22 (12 Stat., 291): “The next officer in rank shall be promoted to the place of the retired officer according to the established rules of the service. And the same rule of promotion shall be applied successively to the vacancies consequent upon the retirement of an officer.”

Act of December 21, 1861, section 6 (12 Stat., 330): “That promotions shall be made in place of the officers retired under the provisions of this bill as is now provided by law.”

Promotion by seniority in the Navy was not originally established by Congress, but was adopted as a rule by the executive, and subsequent acts of Congress were enacted with reference to the rule already existing. This is shown by section 1458, Revised Statutes, which in purporting to provide for promotions by seniority, makes reference in that connection to “the established rules of the service.” (File 28687-4:1, Sept. 12, 1916; C. M. O. 3-1917, p. 8; Op Atty. Gen., Dec. 27, 1916, file 28687-4:8.)

**Constitutionality of legislation requiring promotions by seniority.**—See note to section 1480, Revised Statutes; and see cases noted under the Constitution, Article II, section 2, clause 2, “III. Power of Congress,” and “IV. Statutory requirements and qualifications,” see also note to section 1372, Revised Statutes, “Promotion by seniority and not competitive examination.”

The law requiring promotions in the Army to be made by seniority does not make it obligatory upon the President to promote to a vacancy existing in the grade of lieutenant colonel the senior officer in the next lower grade, if in his opinion the record of the officer has been such as to indicate that he is disqualified for promotion, but under the law he can not be eliminated either through the agency of a retiring board or a court-martial. (30 Op. Atty. Gen., 177.)

Congress has undoubtedly confined the President's discretion in the matter of promotions in the Army, to the extent at least of designating the class from which the appointment for promotion must be made. It has even been argued that the power both of appointment and promotion in the army is solely in Congress, under its power “to declare war,” “to raise and support armies,” and “to make rules for the government and regulation of the land and naval forces,” being withdrawn from the President's jurisdiction by the words, “whose appointments are not herein otherwise provided for,” in Article II, section 2, of the Constitution. If this view be correct, it might be claimed with some force that the effect of the Army Regulations and acts of Congress on the sub-

ject of promotion is to give the senior officer a vested right to promotion at the moment a vacancy occurs, and to make confirmation by the Senate and appointment by the President unnecessary, or at most merely formal and evidential acts (citing 10 Op. Atty. Gen., 144; 22 Op. Atty. Gen., 480). However, the correctness of this view can not be admitted. Promotion in the Army is in the last analysis merely an appointment to a higher office therein; and this fact is illustrated and confirmed by the long-established practice of submitting nominations for promotion in the Army to the Senate for confirmation and of thereafter issuing a commission for the higher office. Promotion, therefore, having regard to its real nature, is as much or as little within the President's constitutional power of appointment as an original appointment, and is subject, in so far as that matter is concerned, to the same considerations. Now, appointment in the Army, as in any other department of the Government, is an executive and not a legislative act; and the provisions of the Constitution are satisfied by giving Congress the power to make the general rules, prescribing the organization and government of the Army, leaving to the President, with the advice and consent of the Senate, the designation of the particular individuals who are to fill the offices created by Congress therein. Congress may point out the general class of individuals from which an appointment must be made, if made at all, but it can not control the President's discretion to the extent of compelling him to commission a designated individual (citing President Harrison's veto, Feb. 26, 1891, Messages of the Presidents, vol. 9, p. 138; Attorney General Brewster's opinion in Fitz John Porter's Case, 18 Op. Atty. Gen., 18). Mandamus would not lie against the President in such a case. The matter is really concluded, in so far as the Department of Justice is concerned, by Attorney General Moody's opinion in 25 Op. Atty. Gen., 591 [noted below], relying on 13 Op. Atty. Gen., 13. It follows, therefore, that while promotion is a “right” inhering in the officer next in line of promotion, and practically almost certain to vest in him, it is yet inchoate in its nature and its legal vesting is subject to the fundamental condition of an appointment by the President. (29 Op. Atty. Gen., 254, holding that a commission can not be issued in the name of an officer whose death occurred after he was nominated by the President but prior to his confirmation by the Senate; compare 12 Op. Atty. Gen., 229, noted under Constitution, Art. II, sec. 2, clause 2, “VI. What constitutes appointment,” holding that where an officer died before accepting a commission, acceptance is conclusively presumed.)

The authorities upon this question establish the following: First, that Congress has not the power to designate an appointee by name (citing 18 Op. Atty. Gen., 18; U. S. v. Ferreira, 13 How., 40); second, that Congress has not the power to require the appointment of an individual who stands highest upon a competitive examination (citing 13 Op. Atty. Gen., 516); third, that Congress can not require the President to appoint to a vacancy in the military service the senior officer in the next lower

grade (citing 30 Op. Atty. Gen., 177). The above propositions all rest upon the underlying principle that "the power of appointment of officers, the duty to appoint whom devolves directly on the President and Senate by virtue of the Constitution itself, is one involving a discretion not entirely to be controlled by Congress. This power is from a source above Congress, namely, the Constitution, and can not be destroyed by the inferior power" (citing 30 Op. Atty. Gen., 177). The foregoing authorities, therefore, if they do not clearly define the respective powers of Congress and the President, at least leave no doubt that Congress has not the power to require the appointment of a particular individual, either by name or description. This, of course, applies equally to promotions, for a promotion is "an appointment to a higher office" (citing 30 Op. Atty. Gen., 177). (File 28687-44, Sept. 12, 1916; C. M. O. 3, 1917, p. 7.)

Where Congress does not merely limit the President's power of selection to a class of officers, but proceeds to the very point of requiring that a particular individual be appointed to fill a vacancy existing in a higher grade, viz, "the next officer in rank," there is hardly room for doubt that such legislation is necessarily an attempted infringement upon the constitutional power of the President, and therefore can not be binding upon him. (File 28687-44, Sept. 12, 1916; C. M. O. 3, 1917, p. 8. See also to same effect, Op. Atty. Gen., Dec. 27, 1916, noted under sec. 1480, R. S.)

Compare 17 Op. Atty. Gen., 36, noted under section 1461, Revised Statutes, with reference to the promotion of retired officers as their several dates upon the active list were promoted, and compare cases noted under section 1372, Revised Statutes.

**Whether officer has vested right to promotion upon occurrence of vacancy.**—The right to promotion inhering in one who is a commissioned officer is, under existing legislation, in the nature of a vested right, subject nevertheless to being defeated in accordance with the provisions of the laws. (20 Op. Atty. Gen., 433.)

By the law and usage of the service a line officer of the Navy has as good a right to promotion, if found qualified for it, and to his proper rank in the grade to which he belongs, as he has to his pay, and questions involving the right to rank or promotion are always important because of the bearing they have on the efficiency of the service. (18 Op. Atty. Gen., 393.)

Where it was required by statute that promotions to certain offices in the Army be made by seniority, the senior officer was of right entitled to be promoted to a vacancy occurring in the next higher grade on the date that such vacancy occurred. But his right can not be held to have vested and become complete until his actual appointment. The law did not operate of itself to make him a lieutenant-colonel on the date he became entitled to the advancement; it was necessary that there should be an exercise of the appointing power to confer the office upon him, and until his commission was signed by the President the office did not vest. A similar view has al-

ways been taken by the Attorneys-General. In 13 Op. Atty. Gen., 13, it was held, respecting certain acts and Army regulations requiring vacancies in established regiments and corps to the rank of colonel to be filled by promotion according to seniority, that the laws and regulations prescribed only the mode in which vacancies should be filled; "they do not confer upon the officer next in the order of succession any right to the vacant place. This he can acquire only by virtue of a new commission." And in 13 Op. Atty. Gen., 44, it was held that the right to an office in the Army is not a vested one until the commission is signed by the President. (25 Op. Atty. Gen., 591.)

For other cases, see 29 Op. Atty. Gen., 254, noted above, under "Constitutionality of legislation requiring promotions by seniority;" and 17 Op. Atty. Gen., 36, noted under section 1461, Revised Statutes.

**Promotions required to be made from next lower grade.**—The practice and usage of the Navy, prescribed and sanctioned by law, require that in the grades of the service, except in cases otherwise especially provided, promotions be made from the lower to the next higher rank or grade. (26 Op. Atty. Gen., 496.)

The higher grades on the active list were to be constantly supplied by streams of promotion from below, the fountain being at the lowest grade of all and supplied from without. (Thompson v. U. S., 18 Ct. Cls., 604, 612, noted more fully under sec. 1457 R. S., "Restoration of retired officer to active list.")

By act of August 29, 1916 (39 Stat., 578), promotions to the grades of rear admiral, captain, and commander, in the line of the Navy, were required to be made by selection from the next lower respective grade. (Similarly as to advancement of staff officers to the same ranks: Act July 1, 1918, 40 Stat., 718.)

**Filling vacancy by transfer from another office of equal grade.**—Where there are two or more offices of the same grade in a corps, each requiring a separate commission, on a vacancy occurring in one of them an incumbent of the other may be transferred by appointment to said vacancy, without prejudicing the rights of the senior in next grade below, whose claim to promotion would be fully met by appointing him to either. (17 Op. Atty. Gen., 465.)

**"Vacancy" defined.**—The word "vacancy" means a legal vacancy, that is, one to which a person could be appointed under existing law, and not a numerical vacancy, that is, an official position which is vacant but which could not be filled at the time, under existing laws and regulations. (23 Op. Atty. Gen., 331, construing act Feb. 24, 1897, 29 Stat., 593, relating to the constructive muster of volunteer officers into the Army.)

**When law is changed, whether existing vacancies should be filled according to the old law.**—In accordance with the practice under which an "officer is promoted in due course to fill a vacancy," it is clear that for a period of eighteen days the officers referred to were entitled by law to promotion, without examination under the act of October 1, 1890 (26 Stat., 562), made applicable to the Marine Corps by act of July 28, 1892 (27 Stat., 321). No



suggestion is made that the failure to promote the three officers in question occurred from any act or omission of their own. The act of 1892 speaks only from July 28, and creates new conditions as to promotions thereafter to be made in the Marine Corps. It would be going very far to say that Congress intended that a right of promotion earned by long service and actually accrued may, by force of this enactment be taken away from the officer who has performed the service. The executive construction of the act of 1890 is of much weight. Vacancies then existing in the Army were filled under the law as it existed prior to October 1, without the examination prescribed by that act. This was a practical executive construction. "In a case of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling." (citing *Schell's Ex. v. Fauche*, 138 U. S., 572.) Although the practice under the act of 1890 had not had sufficient time to ripen into the principle quoted, it should clearly appear that the executive action stated was contrary to law, to justify the overruling of this departmental decision. It must be understood that the legislation of 1892 was made by Congress with a full knowledge of the executive construction which had been previously made upon the act of 1890, and the inference is a necessary one that if this construction had not been in accordance with the intent of Congress, the act of 1892 would have contained a provision requiring a different executive rule. A construction which requires the three officers specified to be examined under the provisions of the act of July 28, 1892, will disregard rights which ought to be treated as vested rights of the officers affected, and will run counter to the established determination of the War Department, and will reverse a decision which has been practically acquiesced in by Congress. (20 Op. Atty. Gen., 433.)

The act of August 29, 1916 (39 Stat., 578), provided that thereafter promotions to the upper grades in the line of the Navy should be by selection only. Examinations and promotions by seniority under prior laws, which were not consummated prior to the act of August 29, 1916, were of no legal effect in view of the change in the law. (File 26260-3663:2, Oct. 9, 1916; file 26260-3648:3, Sept. 22, 1916; file 26260-3630, Jan. 18, 1917.)

The act of May 22, 1917, section 20 (40 Stat., 89), which provided that examinations for staff officers should not be required except for advancements in rank, operates on and after May 22, 1917, to exclude statutory examinations for promotions to higher grades in the Staff Corps, such as were theretofore required by law. (File 26521-203, July 31, 1917, citing and following file 26260-3663:2, Oct. 9, 1916, noted above.)

Officers of the Medical Corps, due for promotion to higher grades from August 29, 1916, and January 10, 1917, but who had not been examined for such promotions prior to May 22, 1917, could not after the last-named date be required to take the statutory examinations for promotion in grade in accordance with laws in

effect prior to May 22, 1917. (File 26521-203, July 31, 1917.)

A medical officer due for promotion to the grade of surgeon from August 29, 1916, examined therefor on March 12, 1917, and found not professionally qualified, could not be required, after May 22, 1917, to undergo a further statutory examination for promotion in grade in accordance with prior laws, although the penalty consequent upon his professional failure, namely, loss of numbers equal to the average six months' rate of promotion to the grade for which said officer was examined, must be considered as having been attached under laws then in effect, and as not being disturbed by the subsequent change in the laws relating to promotion in grade made by the act of May 22, 1917. (File 26521-203, July 31, 1917.)

A medical officer due for promotion in grade from August 29, 1916, examined May 8, 1917, and found not qualified professionally, which finding, however, had not been approved on May 22, 1917, could not thereafter be required to undergo further statutory examination for promotion in grade, nor did any penalty attach in his case in consequence of the proceedings already had, owing to the fact that such proceedings were not completed by the President's approval, which is necessary to make the finding legally effective. (File 26521-203, July 31, 1917, citing *Jouett v. U. S.*, 28 Ct. Cls., 257.)

**Date of vacancy created by retirement.**—Vacancies caused by the retirement of officers from active service do not begin to run until the day following the date their retirement becomes legally effective. (16 Comp. Dec., 682.)

A vacancy in an office does not arise until the officer having the legal title to it ceases legally to hold it. (16 Comp. Dec., 682.)

Officers promoted by seniority, or receiving original appointments to fill vacancies caused by retirement of officers of a higher grade, are only entitled to the pay of the higher grade from and including the day succeeding the date the retirement of their predecessors becomes legally effective. If officers receiving original appointments in the Army accept the same on a date later than the day succeeding the date the retirement of their predecessors becomes legally effective, they are entitled to pay from the date of their acceptance only. (16 Comp. Dec., 682.)

For other cases, see notes to sections 1444 and 1457, Revised Statutes.

**Antedating rank on promotion.**—By the settled practice of the service promotion to a higher grade includes the right to the rank of that grade from the date of the vacancy filled by the promotion. This practice has the distinct recognition of Congress. Section 1562 of the Revised Statutes, and the act of June 22, 1874 (18 Stat., 19), not only recognize the practice of making the rank to antedate the time of appointment to which the rank belongs, but extend it so as to give pay from the time rank begins. Before the legislation referred to, several of the Attorneys General had decided that it was competent for the appointing power to give rank by relation in making promotions

(citing 4 Op. Atty. Gen., 124; 8 Op. Atty. Gen., 237). (18 Op. Atty. Gen., 393.)

Under an immemorial custom, officers of the Army promoted by seniority are given rank from the date of the vacancy which they are promoted to fill, and although not specifically authorized by statute, are allowed the pay of the higher grade from that date. (7 Comp. Dec., 506.)

The practice of antedating commissions for purposes of rank is an old one, and has been repeatedly recognized and sustained by the Attorney General and the courts. The sum total of the precedents is that the antedating of commissions, both on original appointment and on promotion, is an established custom of which Congress must be aware; that so far as concerns rank this practice has repeatedly been sustained, and under some circumstances is held proper even for purposes of pay. (File 26280-68, Apr. 12, 1916.)

In 1836 it was held by Justice Story, in *U. S. v. Vinton* (2 Sumn., 299, 28 Fed. Cas., 382) that the President and Senate had the right to antedate the brevet commission of an Army officer, and that the date so stated in the commission was binding upon the courts and entitled the officer to back pay. In 1842 it was held by Attorney General Legare (4 Op. Atty. Gen., 123) that the executive has the power to antedate the commissions of officers on promotion in cases of delay. In 1847 Attorney General Clifford (4 Op. Atty. Gen., 603, 608) recognized that "usage has strengthened the practice of antedating rank." In 1873 it was held by Attorney General Williams (14 Op. Atty. Gen., 191) that "where a fictitious date in an officer's commission would be attended with prejudice to other officers in the same grade, it must be deemed improper to thus date the commission, unless there is clear authority of law for so doing;" but that, while "there is no more authority under the statutes to antedate the commission in the one case than there is in the other," where no other officers are thereby adversely affected, the antedating of commissions is practically "unimportant." (File 26280-68, Apr. 12, 1916.)

By law persons competent to contract with reference to a given subject matter may give their contract a retroactive operation, and have its legal effect antecedent to the time when the contract was actually made; and so the President, for some purpose, may give to an instrument which he issues an effect in law prior to the date of its execution. Sections 1561 and 1562, Revised Statutes, provide for certain cases wherein the pay of officers shall commence from a date anterior to that of the commission. The specification in those cases implies the exclusion of all others. From the practice of the executive of inserting an antedate in the numerous cases arising under those sections for convenience to indicate when the officer's pay is to commence or to be increased by law, it is easy to see how it might be sometimes inserted for convenience for other purposes, or even inadvertently in some cases where it might have no practical application. Where an officer was advanced in rank for eminent and conspicuous conduct in battle, under section 1506, Revised Statutes, and the date

of his rank in his new commission was, for convenience, fixed as a date between that of the commission of the highest of the officers whom he was thus made to outrank and that of the lowest next above him, in order to indicate his position and rank with reference to the other officers of his grade; this was not a case in which he was entitled to pay from such antecedent date under sections 1561 and 1562, Revised Statutes. (*Young v. U. S.*, 19 Ct. Cls., 145.)

Officers of the Revenue-Cutter Service [now Coast Guard] promoted by seniority in accordance with the established rules and practice of the service to fill certain additional offices created by act of April 16, 1908, are entitled to the pay of the higher grades to which promoted from April 16, 1908, the date the offices were created, which is the date the vacancies occurred. (15 Comp. Dec., 157.)

That an appointment to an office in the Army, when validly made, may, in so far as concerns rank and pay, relate back, either by force of a particular statute or regulation (citing sec. 1562, R. S., *Howell's Case*, 25 Ct. Cls., 288, 7 Comp. Dec., 506, 15 Comp. Dec., 157), or perhaps by executive act (citing *U. S. v. Vinton*, 2 Sumn. 299 [28 Fed. Cas. No. 16624]; 3 Op. Atty. Gen., 124, but compare 4 Op. Atty. Gen., 608), does not prove that the office itself vests at an earlier time than the date of commission. (29 Op. Atty. Gen., 257; see also, note to Constitution, Art. II, sec. 2, clause 2, "VI. What constitutes appointment." Compare 18 Op. Atty. Gen., 393, noted below, under "Status of officer pending confirmation by Senate of his promotion.")

The fact that the officer's appointment in this case conferred rank from the date of the vacancy, and that he was allowed pay in the higher grade from the date of the vacancy to the date of commission does not affect the view that until his commission was signed by the President the office did not vest. Rank and office are not identical. The former is merely an incident of the office, and is used as a designation or distinction conferred upon an officer in order to fix his relative position with reference to other officers or to determine his pay and emoluments. The allowance of pay to the officer in this case from the date of the vacancy appears to have been made in accordance with an immemorial custom of the War Department which has been followed by the accounting officers, although it rests on no statutory authorization. (25 Op. Atty. Gen., 591, citing 7 Comp. Dec., 506, 511; see also *Downes v. U. S.*, 52 Ct. Cls., 237.)

The act of August 29, 1916 (39 Stat., 581), provided for an increase in the commissioned personnel of the Navy, but required that promotions to the grades of commander, captain, and rear admiral of the line should be made by selection only upon recommendation of a board of rear admirals to be convened during the month of December of each year. (39 Stat., 578.) Held, that no officers could be promoted to the grades named until after next January first, but that when so promoted their dates of rank in commissions should be the dates on which the vacancies occurred to which promoted. With reference to the additional positions in said grades authorized by said act, the



dates of rank in commissions should be August 29, 1916, that being the date on which such vacancies occurred. As to one vacancy in the grade of rear admiral which existed prior to August 29, 1916, the officer selected therefor should be given date of rank in commission as of the vacancy which he is promoted to fill. (File 28687-4:1, Sept. 16, 1916.)

The act of August 29, 1916 (39 Stat., 609), created certain original vacancies in the grade of brigadier general in the Marine Corps, and the question arose as to date of rank to be inserted in the commissions of officers promoted thereto. *Held*, that to give the officers said higher rank from the date of the vacancies which are filled by their promotion is a custom which obtains in all branches of the service, and this custom has received the approval of Congress in various enactments, either expressly or by implication. Nevertheless, where the filling of vacancies is discretionary with the President, the commissions need not be made to date from the occurrence of the vacancies unless the appointing power so decides. (File 28687-7, Oct. 7, 1916, citing file 7151-03. The promotions in these cases were dated from August 29, 1916; see Navy Register, 1917, pp. 230, 231.)

The act of August 29, 1916 (39 Stat., 609) provided that the authorized number of commissioned officers in the Marine Corps should be based on the authorized number of enlisted men, distributed between the various ranks in the proportions therein prescribed; and further provided (39 Stat., 612), that the President might increase the number of enlisted men whenever, in his judgment, this should become necessary to place the country in a complete state of preparedness. By Executive Order of March 26, 1917, the President exercised his power by authorizing an increase in the number of enlisted men. Further increases in the number of enlisted men, for the period of the war, were authorized by act of May 22, 1917. (40 Stat., 84.) *Held*, that vacancies in commissioned ranks resulting from the President's order increasing the number of enlisted men, were created on the date of said order, and vacancies resulting from the temporary increase in the number of enlisted men authorized by the act of May 22, 1917, were created on the date of said act; *held, further*, that the date of rank to be given officers promoted to vacancies so created should ordinarily be the date of vacancy to which promoted. In no case, however, should any officer permanently or temporarily promoted be given rank from a date earlier than his date of rank in the lower grade. (File 28687-5:1, Sept. 7, 1917.)

For other cases, see note to section 1457, Revised Statutes, "When retirement or advancement on retired list takes effect"; and see note to section 1561, Revised Statutes.

**Status of officer pending promotion.**—Where, upon the retirement of a rear admiral, a commodore next in line was nominated to be a rear admiral to fill the vacancy, and before action thereon by the Senate the said commodore attained the age of 62 years and was retired under section 1444, Revised Statutes, as a commodore: Advised, that according to the law and usage of the service, the officer was entitled

by relation to be a rear admiral from the date when the vacancy occurred and to receive the pay of a rear admiral from that date; and if the Senate should confirm his nomination he might be commissioned as a rear admiral and placed on the retired list as of that grade. (18 Op. Atty. Gen., 393; compare 29 Op. Atty. Gen., 257, and 25 Op. Atty. Gen., 591, noted above, under "Antedating rank on promotion.")

Where an officer accepts a recess promotion, and thereafter becomes eligible for retirement by reason of age, before the adjournment of Congress and before the appointment is acted upon by the Senate, he is entitled to be retired with the rank of his new appointment. (29 Op. Atty. Gen., 598.)

While, if an officer is not confirmed, he falls back into his former office, until that event happens his actual office is that to which he has been appointed by the President under his constitutional power to fill offices where vacancies exist during the recess of Congress. All such recess appointments, while they continue in force, confer an absolute title to the office named and to the rank thereof, and such appointments continue until rejected by the Senate or until the Congress adjourns without any action being taken thereon. (29 Op. Atty. Gen., 598.)

The acceptance by an Army officer of a recess appointment is provisional only, and leaves to the officer a reversionary right to his former office in case his new appointment is not confirmed by the Senate. An Army officer who accepts a recess promotion and thereafter becomes eligible for retirement by reason of age before the adjournment of Congress and before the appointment is acted upon by the Senate, is entitled to the rank of his new appointment. (29 Op. Atty. Gen., 598.)

Under the laws requiring promotion by seniority and the practice of the Presidents and the War Department in conformity therewith, in case of such a promotion the officer next in seniority, if qualified, would be promoted to fill the vacancy thus created, and then the next one, and so on down the line. Then, if the vacating of the office by the officer first thus promoted (recess of the Senate) be but provisional, and dependent upon his confirmation, so also would be those of the succeeding officers. It might happen that the Senate should adjourn without confirming the appointment of an officer promoted to a higher grade, while confirming that of a junior officer nominated to the office which the senior officer had held. This, if effectual, would put the officer whose promotion was not confirmed out of office and out of the service, despite the provisions of section 1229, Revised Statutes; but such a case can hardly be supposed; the injustice of the case would certainly restrain the Senate from taking action which would have that result. (29 Op. Atty. Gen., 600.)

An officer due for promotion by seniority to the grade of captain, to fill a vacancy in said grade which occurred prior to August 29, 1916, was examined for promotion to said vacancy but his examination was not finally acted upon prior to the date mentioned. *Held*, that his promotion had not been consummated on August 29, 1916, and upon the approval of the

act of that date (39 Stat., 578) requiring subsequent promotions to the grades of rear admiral, captain, and commander, to be made by selection only, the proceedings which had been taken in the case of this officer became null and void. (File 26260-3663:2, Oct. 9, 1916.)

An officer became due for promotion to the grade of rear admiral on March 26, 1913, was examined and found qualified, but was not commissioned in the higher grade, nor was the board's finding as to his qualifications approved by the President. *Held*, that the officer continued in the status of a captain on the active list of the Navy, and was therefore legally available for selection for compulsory retirement from the grade of captain under the provisions of section 9 of the Navy personnel act of March 3, 1899 (30 Stat., 1006). (File 26297-14, June 7, 1913.)

A second lieutenant in the Marine Corps became due for promotion to first lieutenant on May 13, 1908; he was examined for such promotion in April, 1909, was found not qualified, and the finding of the board approved on April 23, 1909. In the meantime, in March, 1909, he was tried by general court-martial and sentenced among other things to lose 30 numbers in his grade, which sentence was approved March 30, 1909. During this period the officer had been carried in the Navy Register as a first lieutenant "subject to examination and confirmation," standing No. 53 in a list of 92. *Held*, that the officer's grade at the time of the approval of his sentence was that of second lieutenant and not first lieutenant, and that his lineal position was No. 1 in the grade of second lieutenant, awaiting promotion; accordingly, *held* that the sentence requiring him to lose 30 numbers in his grade must be executed by reducing him 30 numbers in the grade of second lieutenant. (File 26260-308:D, June 4, 1909.)

A second lieutenant in the Marine Corps, having been nominated by the President and confirmed by the Senate, was appointed by the President a temporary first lieutenant in the Marine Corps, on August 14, 1917, to rank from May 22, 1917. His commission was mailed to his commanding officer for delivery on August 23, 1917. In the meantime, on August 18, 1917, the officer was reported to have committed certain offenses for which his trial by court-martial was ordered on August 29, 1917, subsequent to his appointment but prior to his notification and acceptance thereof. The act of appointment was complete when the commission was signed. If the office to which he was appointed was one from which he could not be removed by the President, the action of the Chief Executive in making the appointment would be irrevocable. However, in this case the temporary appointment was, under the terms of the law, revocable at the will of the President, and accordingly, the commission, although complete when signed and sealed, might nevertheless be withheld and revoked by the Secretary of the Navy, acting for the President. (File 26260-4837, Sept. 13 and 15, 1917.)

For other cases, see note to Constitution, Article II, section 3.

**Death of officer before promotion complete.**—A commission can not be issued in the name of an officer whose death occurred after he was nominated by the President but prior to his confirmation by the Senate. (29 Op. Atty. Gen., 254.)

Where a person is appointed to office, either during a session or in a recess of the Senate, and dies before confirmation, his personal representatives must be remitted to Congress for the payment of salary earned by such officer. (25 Op. Atty. Gen., 312; see sec. 1761, R. S.)

Where an officer died before accepting a commission promoting him to a higher grade, his acceptance will be conclusively presumed. (12 Op. Atty. Gen., 229; see also Comp. Dec., Sept. 23, 1915, 175 S. and A. Memo., 3780.)

The President may send to the Senate for approval of his action the names of officers on the retired list of the Army nominated by him for advancement in rank on account of civil-war service (act Apr. 23, 1904, 33 Stat., 264) after the adjournment of the last session of Congress, but who died before the convening of the present session; and upon approval by the Senate, the personal representatives of the deceased officers will be entitled to receive the advanced pay due such officers without further action by Congress. Such advancement in rank on the retired list does not constitute a promotion to a higher office. (25 Op. Atty. Gen., 312; see also 25 Op. Atty. Gen., 185.)

**Promotion of officer accomplished by confirmation of his successor.**—See 23 Op. Atty. Gen., 30, noted under section 1363, Revised Statutes, "Effect of nomination and confirmation of an officer for appointment to grade already full," and see 13 Op. Atty. Gen., 44, noted under section 1457, Revised Statutes, "Correction of erroneous retirement."

**How seniority is determined.**—Promotion among officers in the line of the Navy goes by seniority, and seniority is determined by the date of commission—that is to say, the date from which the commission recites that the appointment to a given grade begins. (18 Op. Atty. Gen., 393; see also *Toulon v. U. S.*, 52 Ct. Cls., 333; 24 Comp. Dec., 177; 22 Comp. Dec., 623; 17 Comp. Dec., 605; 22 Comp. Dec., 565, 566.)

**Precedence of officers promoted by selection instead of seniority.**—The act of July 25, 1866, section 1 (14 Stat., 222), enlarged the number of line officers in higher grades of the Navy, created original vacancies in each grade above that of lieutenant, and provided that appointments to fill such vacancies be made as follows: "That the increase in the grades authorized by this act shall be made by selection from the grade next below of officers who have rendered the most efficient and faithful service during the recent war, and who possess the highest professional qualifications and attainments." When officers are promoted by selection they should be considered as having gained length of service according to their promotion in determining their relative rank with other grades of the Navy, to a sufficient extent to place them above the officers over whom they were thus advanced. But in



no case do the officers over whom they are thus advanced lose anything in length of service which they had already rendered. (17 Op. Atty. Gen., 56.)

When the report of the Board of Rear Admirals for selection for promotion, created by act of August 29, 1916 (39 Stat., 578), is approved by the President, "the officers recommended therein shall be deemed eligible for selection, and if promoted shall take rank with one another in accordance with their seniority in the grade from which promoted." (Act Aug. 29, 1916, 39 Stat., 579.)

"Promotion" and "appointment" compared.—"A promotion in the Army is an appointment to a higher office therein. The custom, so far as I am aware, has always been to nominate the promoted officer to the Senate and subsequently to appoint and commission him anew." (30 Op. Atty. Gen., 177.)

"Promotion in the Army is, in the last analysis, merely an appointment to a higher office therein; and this fact is illustrated and confirmed by the long established practice of submitting nominations for promotion in the Army to the Senate for confirmation, and of thereafter issuing a commission for the higher office. Promotion, therefore, having regard to its real nature, is as much or as little within the President's constitutional power of appointment as an original appointment, and is subject, in so far as that matter is concerned, to the same considerations." (29 Op. Atty. Gen., 254; see also Op. Atty. Gen., Dec., 27, 1916, file 28687-4:8.)

Promotion is a mode of appointment, and it is not the less an appointment because the person promoted has previously held another appointment in the service. When a second lieutenant is promoted to the rank of first lieutenant, he is appointed to such rank by and with the advice and consent of the Senate. (17 Op. Atty. Gen., 34, holding that the word "appointment" as used in sec. 1219, R. S., "applies to appointments on promotion as well as to original appointments," notwithstanding the prior construction of the War Department to the contrary. This opinion was overruled in 17 Op. Atty. Gen., 196, noted below.)

A clear and well-defined distinction between appointment and promotion has existed, and been recognized in the War Department continuously since the establishment of the Army. Appointment is the selection of persons, not now in the Army, as officers of it, or the designation by selection of an officer already in the Army to a vacancy which is not required by the law or the regulations to be filled by promotion according to seniority. Promotion is the advancement of officers already in the Army, according to seniority, to vacancies happening in the different arms of the service and according to rules prescribed by law or by regulations having the force of law. (17 Op. Atty. Gen., 196; affirmed 24 Op. Atty. Gen., 74—holding that the word "appointment" in section 1219, R. S., applies only to the original entry of the officer into the regular service or subsequent appointment by selection; but that it does not apply to promotions by seniority as defined in the regulations of the Army—

overruling 17 Op. Atty. Gen., 34, noted above. See also file 11130-35, Dec., 20, 1916.)

The advancement of a line officer of the Marine Corps to major and paymaster, and the advancement of another line officer to major, adjutant and inspector, were "appointments by selection at the discretion of the appointing power, and were not promotions under the statutes regulating such promotions." Their subsequent advancement to a higher rank in their respective branches of the Marine Corps was a promotion in the case of each officer, and not an "appointment" within the meaning of section 1219, Revised Statutes, fixing the relative rank between officers "having the same grade and date of appointment and commission." "To hold that promotions are appointments where the officers thus promoted are in different departments, but are not appointments where they are in the same department, is to narrow the application of the statute by reading into its general provisions a substantial qualification of which its language gives no suggestion." (24 Op. Atty. Gen., 74, affirming 17 Op. Atty. Gen., 196, noted above.)

As to the difference between promotion and appointment, in fixing the relative rank of officers, it may be observed that what is technically called an appointment may be in every practical sense a promotion. Without vouching for the strict accuracy or completeness of the definitions of "appointment" and "promotion" in 17 Op. Atty. Gen., 196 [quoted above] it is apparent that the advancement of an officer to a higher grade, and to which he could not then succeed in due course by seniority, while called an appointment, is in fact and effect a promotion, and it would seem that an officer thus advanced should be entitled to whatever benefit attaches to promotion. The advancement of a captain in the Marine Corps to assistant adjutant and inspector, with the rank of major, by whatever name it be technically called, is in fact a promotion. (23 Op. Atty. Gen., 155.)

"Gen. McClernand was given and accepted a recess appointment which has not been confirmed or acted upon. This, I assume, was an appointment by way of promotion to a higher office." (29 Op. Atty. Gen., 598, 601.)

It has been the rule of the accounting officers to hold that the appointment of an officer in one branch of the service to an office in another branch is an "original entry into the service" within the meaning of section 1560 of the Revised Statutes. (Comp. Dec., May 31, 1907, 76 S. and A. Memo., 372.)

The appointment of an officer from the office of ensign in the Navy to the office of assistant naval constructor, an office belonging to another branch of the naval service, clearly was not a promotion in course to fill a vacancy in the next higher grade, but was an appointment which must, in the absence of any special provision of statute, be governed by the rules which apply to appointments to office generally, with reference to commencement of pay, which is held to be the date of acceptance of the office. (Comp. Dec., Sept. 20, 1907, 79 S. and A. Memo., 462; but see Comp. Dec., Aug. 12, 1915, 174 S. and A. Memo., 3756, noted below.)

An ensign in the line of the Navy, who was appointed as an assistant naval constructor with the rank of lieutenant (junior grade) was not "advanced in grade or rank" within the meaning of the act of March 4, 1913, (37 Stat., 892); but his appointment as an assistant naval constructor is regarded as a new appointment. (20 Comp. Dec., 186, Sept. 19, 1913; but see, Comp. Dec., Aug. 12, 1915, 174 S. and A. Memo., 3756, noted below.)

Since the act of March 3, 1915 (38 Stat., 928, 945), which provided for transfer of ensigns to the grade of assistant naval constructor, such transfer involving an advance in rank, ensigns so transferred are advanced in rank pursuant to law, and are entitled, under the act of March 4, 1913 (37 Stat., 892), to the pay and allowances of assistant naval constructors from the dates stated in their commissions, although prior to the date of actual appointment in the construction corps. (Comp. Dec., Aug. 12, 1915, 174 S. and A. Memo., 3756.)

The appointment of a midshipman as an assistant civil engineer was an "original entry into the service" within the meaning of section 1560, Revised Statutes, and not a "promotion in course to fill a vacancy in the next higher grade" within the meaning of the act of June 22, 1874 (18 Stat., 191), superseding section 1561, Revised Statutes. (13 Comp. Dec., 606, Mar. 12, 1907.)

The appointment of a warrant officer to be a temporary ensign in the Navy, pursuant to the act of May 22, 1917 (40 Stat., 85), was an advancement in grade or rank pursuant to law, within the meaning of the act approved March 4, 1913 (37 Stat., 892), and entitles the officer to the pay of the higher grade or rank from the date stated in his commission, (24 Comp. Dec., 401.)

The temporary appointment of a pay clerk as an assistant paymaster is substantially a promotion, and pay under such appointment is authorized from date of rank and prior to date of approval of his bond. (25 Comp. Dec., 550. Followed and extended, Comp. Dec., May 5, 1919, file 26254-2795:1.)

For other cases see note to section 1407, Revised Statutes, under "Appointment of enlisted man as warrant officer not a promotion"; and note to section 1408, Revised Statutes, "Appointment as warrant officers."

**Acceptance of promotion.**—The acceptance of a promotion is not necessary to consummate the appointment of an officer in the naval service to a higher grade. The acceptance of a promotion does not, as the acceptance of an original appointment does, invest an unofficial person with official character. It exalts his rank alone. If it devolves upon him official duties which were inaccessible to him before, it was not from defect of official responsibility on his part that the higher duties could not have been demanded of him by the Government, but rather because the Government had chosen to vest to that extent in his superior officers the privilege of performing such higher duties. As a commissioned officer of the Navy,

he had already bound himself to obey all lawful orders of his superiors, and no accession of dignity to his rank could augment this obligation. The acceptance of a promotion, then, is not the act of accepting an office in the sense in which that phrase is used to denote the assumption of official responsibility. In so far as his acceptance of the promotion bears any analogy to the acceptance per se of an office he may be said to have accepted all promotions to which he might attain when he entered into the naval service under his first commission. On the other hand, while a promoted officer may not, and in some situations certainly could not, decline the performance of duties of corresponding grade, it is plain that he might decline the rank with its honors and emoluments. But in doing so it is clear that his action would in substance be less a declination than a resignation. (12 Op. Atty. Gen., 229, holding that where an officer died before accepting his promotion, the presumption is conclusive in law that it would have been accepted by him had he lived to receive it; see also Comp. Dec., Sept. 23, 1915, 175 S. and A. Memo., 3780.)

**Oath of office on promotion.**—A transfer, promotion, or reduction from one grade to another is an appointment to that grade, and a clerk in an executive department so transferred, promoted, or reduced is required to take the oath of office prescribed in section 1757, Revised Statutes. (8 Comp. Dec., 521.) [Note: By act of May 13, 1884, section 2 (23 Stat., 22), the oath of office prescribed by section 1757, Revised Statutes, must be taken by every person appointed to any office of honor or profit either in the civil, military, or naval service. See also act Mar. 3, 1899, sec. 25 (30 Stat., 1009).]

A clerk in an executive department who is appointed to another position or to a clerkship of another grade must take the oath of office prescribed in section 1757, Revised Statutes. The fact that these clerks may have taken an oath of office when originally appointed does not relieve them from taking a new oath upon every new appointment for each new appointment they receive is to a new office, and before entering upon that office they are required by the provisions of section 1757, Revised Statutes, and of Article VI of the Constitution to take an oath of office. It was held by the Attorney General (19 Op. Atty. Gen., 221) that a person who was his own successor in office must take the oath which the law requires shall be taken upon every new appointment before entering upon the duties. It necessarily follows that if a person, instead of being his own successor, is appointed to another position and in another place, he must take a new oath of office. (1 Comp. Dec., 4.)

The promotion of an officer from the grade of ensign to that of lieutenant (junior grade) "was not an original entry into the service, requiring a formal acceptance or oath of office." (Comp. Dec., Sept. 23, 1915, 175 S. and A. Memo., 3780.)

For other cases, see note to section 1757, Revised Statutes.

**Sec. 1459. [Retired officers withdrawn from command, and from line of promotion.]** Officers on the retired list shall be withdrawn from command, except in the case provided in sections fourteen hundred and sixty-three and



fourteen hundred and sixty-four, and from the line of promotion on the active list.—(3 Aug., 1862 [should be “1861”], c. 42, s. 22, v. 12, p. 290; 21 Dec., 1861, c. 1, ss. 3, 4, v. 12, p. 329.)

Active duty for retired officers.—See note to section 1462, Revised Statutes.

Promotion on retired list.—See notes to sections 1460 and 1461, Revised Statutes.

Restoration of retired officers to active list.—See section 1465, Revised Statutes.

**Promotion on retired list.**—The act of February 28, 1855 (10 Stat., 616), declared that officers placed on the reserved list should be ineligible to further promotion. But the third section of the act of January 16, 1857, to amend the first-named act, expressly repealed this provision, and the fourth section declared that reserved officers might be promoted on the reserved list, by and with the advice and consent of the Senate, but no such promotion should entitle them to any pay beyond that to which they were entitled when so reserved, nor should they, by such promotion, take any higher rank than they would have taken had they been retained in the active service of the Navy. The twenty-second section of the act of August 3, 1861, providing for the better organization of the military establishment enacts that “if any officer of the Navy shall have become or shall hereafter become, incapable of performing the duties of his office, he shall be placed upon the retired list, and withdrawn from active service and command, and from the line of promotion,” with certain pay and emoluments therein specified, graduated according to the rank of the different classes of officers. The clause of that section which withdraws officers who may be placed on the retired list from “the line of promotion,” does not

destroy the right to promotion “on the reserved list.” The line of promotion referred to in that act is plainly that which exists for officers in active service, involving increased rank and pay. From this line retired officers are very properly withdrawn, because it would be unjust to the officers in active service if their right to promotion should be obstructed by the claims of those who are relieved from duty. But in its stead they may receive promotion “on the reserved list.” (10 Op. Atty. Gen., 107; see notes to sections 1461 and 1465, R. S.)

**Restoration of officers to “line of promotion.”**—Under the act of March 2, 1895 (28 Stat., 910), authorizing the President to place “on waiting orders out of the line of promotion, with one-half active-duty pay,” officers of the Revenue-Cutter Service [now Coast Guard] who are permanently incapacitated, and to fill the resulting vacancies by promotion in the order of seniority, *held*, that an officer placed on “permanent waiting orders” is withdrawn from the line of promotion, but may be restored to the service in his former rank when his disability ceases, without Congressional action. (21 Op. Atty. Gen., 286.)

For other cases, see note to section 1465, Revised Statutes.

**Employment on active duty.**—From sections 1459 and 1462, Revised Statutes, it appears to be the policy of the law to prevent the employment of officers on the retired list of the Navy save under some exceptional circumstances. (3 Comp. Dec., 581. For other cases, see sec. 1462, R. S.)

### Sec. 1460. [Promotions to rear-admiral on the retired list. Superseded.]

**This section provided as follows:**

“SEC. 1460. There may be allowed upon the retired list of the Navy nine rear-admirals by promotion on that list: *Provided*, That this section shall not prevent the Secretary of the Navy from promoting to the grade of rear-admiral on the retired list, in addition to the number herein provided, those commodores who have commanded squadrons by order of the Secretary of the Navy, or who have performed other highly meritorious service, [or who, being at the outbreak of the late war of the rebellion citizens of any State which engaged in such rebellion, exhibited marked fidelity to the Union in adhering to the flag of the United States.]” (16 July, 1862, c. 183, s. 14, v. 12, p. 585; 25 July, 1866, c. 231, s. 1, v. 14, p. 222. 15 Aug., 1876, c. 302, v. 19, p. 204.)

It was superseded by act of August 5, 1882 (22 Stat., 286), providing that “hereafter there shall be no promotion or increase of pay in the retired list of the Navy but the rank and

pay of officers on the retired list shall be the same that they are when such officers shall be retired.” (See 17 Op. Atty. Gen., 495; also see note to sec. 1461, R. S.)

**Pay of officers on retired list** was to be based on pay which they received on the active list at the date of retirement, under provisions of section 1588, Revised Statutes. (See also sec. 1591, R. S.)

**Advancement for meritorious service.**—The act of March 2, 1867, section 9, chapter 174, providing “that no promotion shall be made to the grade of rear-admiral upon the retired list while there shall be in that grade the full number allowed by law,” does not forbid the advancement to that grade on the retired list, under section one of the act of July 25, 1866, of any commodore who may have commanded a squadron by order of the Secretary of the Navy, or performed highly meritorious service. (13 Op. Atty. Gen., 544.)

### Sec. 1461. [Promotion of retired officers with running mates on active list. Superseded.]

**This section provided as follows:**

“SEC. 1461. Officers on the retired list of the Navy shall be entitled to promotion as their several dates upon the active list are promoted:

*Provided*, That no promotion shall be made to the grade of rear-admiral upon the retired list while there shall be in that grade nine rear-admirals by promotion on that list, exclusive

of those so promoted by reason of having commanded squadrons by order of the Secretary of the Navy, or of having performed other highly meritorious service. No promotion to the grade of rear-admiral on the retired list while there shall be in that grade the full number allowed by law."—(16 Jan., 1857, c. 12, s. 4, v. 11, p. 154; 2 Mar., 1867, c. 174, s. 9, v. 14, p. 517; 30 Jan., 1875, c. 30, v. 18, p. 304.)

It was superseded by act of August 5, 1882 (22 Stat., 286), quoted in note to section 1460, Revised Statutes. (26 Op. Atty. Gen., 501.)

**Promotion on the retired list** under certain specified conditions was authorized by act of July 1, 1918 (40 Stat., 717). Advancement to the pay of higher ranks was authorized for retired warrant officers and chief warrant officers by act of April 10, 1918, (40 Stat., 516.) See also notes to sections 1459 and 1465, Revised Statutes

**Pay of officers on retired list** was to be based on pay which they receive on the active list at date of retirement, under provisions of section 1588, Revised Statutes. (See also sec. 1591, R. S.) But see acts of April 10, 1918, and July 1, 1918 (40 Stat., 516, 717).

**Advancement in rank of retired officers.**—See note to section 1457, Revised Statutes.

**Promotion under this section was mandatory, and not subject to examination.**—Section 1461, Revised Statutes, gives to naval officers on the retired list a right to promotion on that list as their several dates on the active list are promoted. The Navy Department ruled that the law authorizing such promotions on the retired list was not strictly imperative, but left the matter in some degree sub-

ject to the discretion of the President to select such officers as in his opinion might be "entitled" to promotion on the retired list. And although a few such officers were afterwards promoted no general promotions of retired officers were made. In view of the fact that there are officers retired from active service who in case of war would be entirely unfit for any duty, this interpretation seemed to the Navy Department to be justified. However, the law makes no discrimination and authorizes no examination in the cases of retired officers to determine their fitness for advancement to higher grades than those in which they were retired for causes disqualifying them for active service. The language of section 1461 is explicit and distinct in its character. The word "entitled," which it is thought may be construed as giving a right of selection to the President, will hardly bear that interpretation. There is undoubtedly force in the argument which is suggested against this system of indiscriminate promotion; but it is not a question of what the law ought to be, but of what the law is. A practical effect of the law which would be undesirable cannot be allowed to overcome its express terms. Such operation of the law presents a question for the legislative and not the executive branch of the Government. (17 Op. Atty. Gen., 36. But see notes to sec. 1458, R. S., as to constitutionality of legislation requiring promotions by seniority on the active list.)

**Promotion on retired list an exception to settled policy.**—Promotion in the case of a retired officer is necessarily an exceptional incident, due to the generosity of the Government, and not contemplated by the system of retirement. (27 Op. Atty. Gen., 214.)

**Sec. 1462. [Active duty for retired officers.]** No officer on the retired list of the Navy shall be employed on active duty except in time of war.—(3 Mar., 1873, c. 230, v. 17, p. 547.)

Active duty for retired officers was authorized by act of June 7, 1900 (31 Stat., 703), which expired by its terms at the end of 12 years from date of its enactment.

Active duty for retired officers, with their consent, was authorized by act of August 22, 1912 (37 Stat., 329).

Active duty for retired officers of the Navy, Marine Corps, or Coast Guard, during the existence of war or national emergency, was authorized by act of July 1, 1918 (40 Stat., 717.)

Army officers retired for physical disability are to be examined from time to time, and if found able to perform service of value to the Government shall be assigned to such duty as the Secretary of War may approve. (Act Aug. 29, 1916, 39 Stat., 629.)

Assignment of retired officers to command, in time of war, was authorized by sections 1463 and 1464, Revised Statutes.

Detail of retired officers to educational institutions, was authorized by section 1225, Revised Statutes, as amended, and other laws noted under that section.

Pay of retired officers employed on active duty, was fixed by section 1592, Revised Statutes, by acts of August 29, 1916 (39 Stat., 581), and April 10, 1918 (40 Stat., 516), and also by the particular enactments, above cited, authorizing their employment on active duty.

Promotion on retired list of officers employed on active duty pursuant to act of July 1, 1918 (40 Stat., 717), was authorized by that act.

Retired enlisted men may be assigned to active duty in time of war or when a national emergency exists. (Act Aug. 29, 1916, 39 Stat., 591; see also act Mar. 3, 1915, 38 Stat., 941.) Promotion of men so employed on active duty is authorized by act of July 1, 1918 (40 Stat., 719.)

**Historical note.**—By act of March 3, 1873 (17 Stat., 556), it was provided "that no officer on the retired list of the Navy shall be employed on active duty except in time of war." At the date of this enactment, certain retired officers were employed on active duty, and the question arose whether they were entitled to be continued on such duty. It was held



by the Comptroller of the Treasury, March 28, 1873 (see "Acts and Resolutions Relating Chiefly to the Navy and Navy Department," 1872-1873, pp. 42, 43), that the prohibition in the act quoted applied only to putting officers on duty after the date of the act, and although it became immediately effective upon date of its approval, did not operate to deprive retired officers of duty pay for the period that they were continued on active duty after its enactment, but that, "any officer, however, on the retired list, who, at the date of the act, was on duty under orders from the Navy Department, will be entitled to his duty pay until relieved, up to any period previous to the first of July next."

By act of June 7, 1900 (31 Stat., 703), it was provided that any retired officer might be "ordered" to active duty "during a period of twelve years from the passage of this act." Upon expiration of the period mentioned, all retired officers on active duty under orders issued during the said period, were detached from such duty, and thereafter no retired officers were employed on active duty until approval of the act of August 22, 1912 (37 Stat., 329), and in accordance with the terms of said act. (See records of Bureau of Navigation, Navy Department, and Headquarters, U. S. Marine Corps.)

**Employment on active duty exception to general policy.**—At the time of the passage of the act of June 7, 1900 [above noted], section 1462, Revised Statutes, prohibited the employment of retired officers on active duty except in time of war. There is no other statute in effect now [October 13, 1908], which authorizes the employment of such officers on active duty in time of peace. The act of June 7, 1900, made a specific exception to the statute then in force, and provided that during a limited period certain officers on the retired list, viz, those who might be selected by the Secretary of the Navy, might be ordered to such active duty as they are able to perform. The said act is, therefore, a special act relating to a particular subject, and makes exception to the general law in effect at its passage. (15 Comp. Dec., 235.)

From sections 1459 and 1462, Revised Statutes, it appears to be the policy of the law to prevent the employment of officers on the retired list of the Navy, save under some exceptional circumstances. (3 Comp. Dec., 581.)

The act of 1900 making retired naval officers subject to be ordered to such active duty as they are able to perform must be read in connection with and as part of the act authorizing their retirement, and read in view of the manifest purpose of that act. So read, it is certain that it does not mean that while a naval officer by his retirement is debarred from further promotion and its better pay, he still remains, in time of peace, subject to orders to the same permanent, continuous active duty at sea and on shore as before his retirement. On the contrary, it means, generally, that he is relieved and retired from active duty, but subject in times of need (of which the Secretary is the judge) to be temporarily ordered to such active duty as he is able to perform. But these cases are exceptions, arising from necessity,

and do not contemplate any general, permanent or continuous assignment of a retired naval officer to active duty or for a longer period than the necessity of the service requires. Taken literally, this provision of the act of 1900 would authorize the assignment of every retired naval officer to the same continuous and permanent active service, both at sea and on shore, as that upon which he first entered, while by his nominal retirement he is debarred from that promotion and better pay which, but for his retirement, he might have earned by the same service. This is not what the law means. (25 Op. Atty. Gen., 508; but see laws noted above.)

**Examination of retired officer before employment on active duty.**—It is not to be presumed that the President will exercise the power of ordering retired officers to active duty in time of war unless, upon full examination, he shall be satisfied that they are competent for the higher grade on the active list which they have reached by promotion on the retired list. Such investigation will undoubtedly be made in view of the fact that these promotions on the retired list are not accompanied with the careful examinations which attend those upon the active list. (17 Op. Atty. Gen., 36, construing sec. 1461, R. S.)

**Consent of Senate required before orders to active duty in time of war.**—Retired officers can be ordered to active duty in time of war only by the President, by and with the advice and consent of the Senate. (17 Op. Atty. Gen., 36, citing sec. 1463, R. S. But see laws noted above.)

**Retired officer on active duty is not an officer of the active list.**—It will be observed that retired officers called upon active duty do not return to the active list unless under circumstances of a peculiar character. (17 Op. Atty. Gen., 36, citing sec. 1465, R. S.)

The act of June 7, 1900, authorizes the employment of retired officers on active duty, but it does not restore them to the active list. (15 Comp. Dec., 230.)

A retired officer of the Navy on active duty under the provisions of the act of June 7, 1900, was held not on the active list of the Navy, within the meaning of the act of May 13, 1908 (35 Stat., 128), which allowed a gratuity of six months' pay to the widow or any designated beneficiary upon the death of an officer on the active list of the Navy in line of duty; and the widow of a retired officer of the Navy dying while on such active duty was held not entitled to the benefits of said provision of the act of May 13, 1908. (15 Comp. Dec., 230.)

A retired officer of the Army assigned to active duty is not restored to the active list, and where such an officer dies on duty his burial expenses can not be defrayed from an appropriation for disposition of the remains of officers on the "active list." (19 Comp. Dec., 540.)

When a retired officer is assigned to active duty and subsequently detached therefrom, this does not operate as a new retirement. The retirement of an officer is a proceeding that can only take place in a prescribed manner, and it is not pretended that such proceeding occurred, with reference to the officer in

this case, more than once. (*Roget v. U. S.*, 148 U. S., 167.)

**Retired officer practically restored to active list while on duty.**—The effect of the act of June 7, 1900, is practically to restore retired officers, when employed on active duty, to the active list for pay purposes, and their pay is not affected by the circumstance of their retirement or by the grade or rank which they may hold on the retired list. (13 Comp. Dec., 241; see also 11 Comp. Dec., 376.)

**Can not be ordered to duty or appointed to office limited to active list.**—The act of June 7, 1900 (31 Stat., 703), did not operate nor was it intended to transfer back to the active list any retired officer when ordered to active duty. On the contrary, he is still a retired officer and is borne as such upon the retired list, though temporarily performing active duty. Hence, if any law requires that a certain duty be performed, or a certain place be filled, by an officer of the active list, this provision does not authorize the assignment of a retired officer thereto. This does not mean that a retired officer may not, under this provision, be assigned to duties usually performed by officers on the active list, but only that he can not be so assigned where any law requires the duty to be performed by an officer of the other class. (25 Op. Atty. Gen., 508.)

If the act of June 7, 1900 (31 Stat., 703), applies to retired officers of the Marine Corps, nevertheless, it would not have the effect of authorizing a retired marine officer to be detailed to active duty as commandant of the Marine Corps when the law expressly requires that the commandant shall be selected from officers on the active list of the Marine Corps. (23 Op. Atty. Gen., 486; see below, "Employment of retired marine officers on active duty.")

At the time the act of March 3, 1883 (22 Stat., 553), was enacted, providing for the detail as superintendent of the State, War, and Navy Building of an officer of the Engineer Corps of the Army or Navy, there was no warrant for the employment on active duty of retired officers of either branch of the service in time of peace, nor does that act profess to give such warrant. Such officers were then exempt from active service; therefore, this act would not refer to them nor authorize their appointment. Hence, the only conclusion possible is that this appointment was intended to be made from the active list, the only engineer officers who were then subject to that duty. (25 Op. Atty. Gen., 508.)

The question is not as to the duties to which a retired officer may be ordered in general, but is as to the class of officers from which, under the act of 1883, the President must designate this superintendent. It is unimportant that under the later act a retired officer may be ordered to any active duty, so long as the earlier act requires this particular appointment to be made from the other class. This act of 1883 means today just what it meant when enacted. The fact that the later law has made retired officers generally subject to be ordered to any active duty, has not amended or changed the previous law in this case. (25 Op. Atty. Gen., 508.)

Again, the permanent designation of this superintendent is an imperative order to con-

tinuous duty, and this is quite incompatible with the selection of a retired officer, who is generally exempt from such orders. It can not be held that this act authorized an appointment, which is an order from which such officers were exempt. It is easy to see here that the fact that the duties imposed upon this superintendent require for their performance an officer fully qualified for active duty is a sufficient reason why this appointment was required to be made from the active list, and not from those who have already passed the period of their full usefulness, and have on that account been retired from active service. (25 Op. Atty. Gen., 508.)

For other cases, see notes to section 421, Revised Statutes, "1. Appointment of Chiefs of Bureaus," and section 1225, Revised Statutes.

**Requiring retired officer to prepare affidavit is an employment on active duty.**—The act of June 7, 1900 (31 Stat., 703), contains no specification as to the character of the duties to which a retired officer may be ordered, except "such as he is able to perform," and there is no limit as to the time he may be employed, except the life of the act, so that he may be employed in the discretion of the Secretary of the Navy as well for one day as for any longer period, and at his home as well as any other place. *Held*, that a letter from the Secretary of the Navy, addressed to a retired officer at his home, enclosing a large batch of papers with the following statement: "It is desired that you will, as soon as practicable, prepare and forward to the Department for transmission to the Secretary of State your affidavit as requested by him in rebuttal of the German case," and not stating that "this employment on shore duty is required by the public interest," employed the officer on active duty within the meaning of the act of June 7, 1900, and entitled him to active-duty pay. (10 Comp. Dec., 467.)

**Attending court-martial as witness or accused.**—The duty of attending as a witness before a general court-martial is not one of the duties to which a retired Army officer may be assigned by the Secretary of War in time of peace. But a retired officer, under section 1256, Revised Statutes [providing that retired Army officers shall be subject to trial by court-martial] can be ordered before a general court-martial for a breach of the Articles of War, and would be entitled to mileage for travel in obeying such order. (10 Comp. Dec., 51, citing 7 Comp. Dec., 97.) An order issued in such a case, however, is to be distinguished from an order to attend such a court as a witness. It is a duty enjoined upon him by statute in one case while in the other it is a duty which can only be required of him by subpoena as in the case of a civilian witness. (10 Comp. Dec., 51.)

For other cases, see note to section 850, Revised Statutes.

**Orders to perform active duty after retirement must be specific.**—An order of the President placing an officer of the Navy upon the retired list on account of age changes the status of such officer wherever he may be and whatever duty he may be performing, and thereafter he is entitled to retired pay only, unless such status is changed by some subsequent order of the Secretary of the Navy



pursuant to law. It may be that the Secretary of the Navy, under the act of June 7, 1900, might issue a preliminary order in terms assigning an officer to duty after retirement, but such order should be certain in its terms and not given that effect by strained construction. (*Terry v. U. S.*, Ct. Cls., No. 28148, 86 S. and A. Memo., 644; see also 17 Comp. Dec., 533.)

The retirement of an officer for age thereby detaches him from active duty, and unless thereafter assigned to active duty by the Secretary of the Navy in accordance with law, he is entitled only to retired pay, notwithstanding that he was retained on active duty by the commanding officer of his vessel. The latter is not authorized to retain in active service an officer who has been retired pursuant to section 1444, Revised Statutes, unless it is done in accordance with a decision of the Secretary of the Navy in a particular case. It may be true that in some cases the acts of subordinate officials are taken as the acts of the head of the department to which they belong; where, however, the statute requires the exercise of judgment or discretion, as the act of June 7, 1900, the officer in whom such discretion is vested must act for himself, and he can not delegate that power to another. (9 Comp. Dec., 299; compare 9 Comp. Dec., 20, noted under sec. 1444, R. S.)

An officer, while under treatment in hospital, was placed on the retired list and ordered to proceed at his convenience to his home: *Held*, that an officer placed on the retired list is entitled to retired pay only, no matter what his previous status may have been, unless placed on duty by some subsequent order; the above order did not have the effect of placing the officer on duty while traveling to his home. (File 26254-2, Apr. 29, 1908.)

**Detachment from active duty without express orders.**—Notice of the dissolution

of a court-martial on which a retired officer of the Marine Corps was ordered to duty as a member is sufficient to terminate his assignment to active duty under that order, although no orders were issued expressly detaching him from active duty. (Comp. Dec., Sept. 29, 1910, 115 S. and A. Memo., 1578; *Gibson v. U. S.*, 47 Ct. Cls., 554.)

A formal order detaching or relieving retired officers from active duty is not necessary; when the duty to which the officer is assigned ends the order assigning him to active duty expires. (*Gibson v. U. S.*, 47 Ct. Cls., 554.)

**Leave of absence does not detach from active duty.**—A retired officer of the Navy who is granted a leave of absence is not by such grant returned to his former condition as a retired officer, but is in the leave status of an officer on the active list, and he is entitled while on such leave to the pay provided for officers of the active list on leave of absence. (11 Comp. Dec., 376, construing act of June 7, 1900.)

When, in the discretion of the Secretary of the Navy, the services of a retired officer are no longer required on active duty, his order will relegate such officer to the retired status, but an order granting leave of absence for a specified time does not have that effect. (11 Comp. Dec., 376.)

**Employment of retired Marine officers on active duty.**—The assignment to active duty of retired Marine officers is governed by statutes relating to the Navy. Section 1622, Revised Statutes, does not authorize the assignment of Marine officers to active duty in accordance with laws pertaining to the Army. (*Jonas v. U. S.*, 50 Ct. Cls., 281; file 27231-47, May 31, 1912; see also sec. 1622, R. S.)

**Pay and allowances while employed on active duty.**—See laws noted above; and see section 1592, Revised Statutes.

**Sec. 1463. [Assignment of retired officers to command in time of war.]** In time of war the President, by and with the advice and consent of the Senate, may detail officers on the retired list for the command of squadrons and single ships, when he believes that the good of the service requires that they shall be so placed in command.—(21 Dec., 1861, c. 1, s. 3, v. 12, p. 329. 3 Mar., 1873, c. 230, s. 1, v. 17, p. 547.)

**Active duty in general.**—See section 1462, Revised Statutes, and note thereto.

**Assignment of officers on active list to command of squadrons, with rank and title of "flag officer."** was authorized by section 1434, Revised Statutes.

By act of March 3, 1901 (31 Stat., 1133), it was provided that the President may formulate appropriate rules governing assignments to command of vessels and squadrons.

**Designation of officers for the command of fleets or subdivisions thereof, with the rank and pay of admiral or vice admiral, shall be made in time of war from the grades of rear admiral or captain on the active list, and**

in time of peace from the grade of rear admiral on the active list, but this shall not be held to amend or repeal sections 1434, 1463, and 1464, Revised Statutes. (Act May 22, 1917, sec. 18. 40 Stat., 89.)

**Powers of President as Commander in Chief** can not be impaired by Congress.—See note to Constitution, Article II, section 2, clause 1.

**President's power with reference to the retired list** depends upon laws enacted by Congress.—See note to Constitution, Article II, section 2, clause 1, under "I. Powers of Commander in Chief."

**Effect of orders under this section.**—Retired officers can be ordered to active duty in time of war only by the President, by and with the advice and consent of the Senate. The power of the President with the consent of the Senate is in reality, although not in form, a power to give a new commission to a retired

officer in time of great public emergency. It will be observed that retired officers thus called upon active duty do not return to the active list unless under circumstances of a peculiar character. (17 Op. Atty. Gen., 36, citing sec. 1465, R. S.)

**Sec. 1464. [Commanding officers of squadrons to have rank of "flag-officer."]** In making said details the President may select any officer not below the grade of commander and assign him to the command of a squadron, with the rank and title of "flag-officer;" and any officer so assigned shall have the same authority and receive the same obedience from the commanders of ships in his squadron holding commissions of an older date than his that he would be entitled to receive if his commission were the oldest.—(21 Dec., 1861, c. 1, s. 4, v. 12, p. 329.)

See section 1434, Revised Statutes, and note thereto, with reference to officers of the active list assigned to command of squadrons.

This section not amended or repealed by act of May 22, 1917, section 18 (40 Stat., 89), noted above, under section 1463, Revised Statutes.

**Sec. 1465. [Restoration of retired officers to active list.]** Retired officers so detailed for the command of squadrons and single ships may be restored to the active list, if, upon the recommendation of the President, they shall receive a vote of thanks of Congress for their services and gallantry in action against the enemy, and not otherwise.—(21 Dec., 1861, c. 1, s. 3, v. 12, p. 329.)

Restoration to active list is authorized by special enactment of Congress in individual cases, as for example, act of August 29, 1916 (39 Stat., 602).

Veto by President of bill to restore retired officers to active list.—See note to Constitution, Article I, section 7, clause 2.

Vote of thanks, effect of.—See sections 1365, 1446, 1508–1510, Revised Statutes, and notes thereto.

**Restoration of retired officer to active list.**—See note to section 1457, Revised Statutes, "Correction of erroneous retirement"; and note to section 1459, Revised Statutes.

It may be questioned whether Congress has constitutional power to authorize executive action which should result in setting aside the legal effect of the proceedings of a naval board and in restoring to the active list of the Navy one who had been retired thereunder. The law divides the Navy into two distinct classes, with distinct duties and distinct grades of pay. The retired list was to be filled from the active list, and an officer once placed upon it was off the active list and not a subject of promotion. The higher grades on the active list were to be constantly supplied by streams of promotion from below, the fountain being at the lowest grade of all and supplied from without. The practical construction put upon the statute by the executive has been that officers are placed upon each of these lists by the action of the President in conjunction with the Senate, the concurrence of the Senate to the appointment of an officer on the retired list being obtained

by its approval of the nomination of his successor in his place by name. It may be questioned whether the Congress could, without abolishing the office, constitutionally remove an officer from an office into which he had been legally inducted, and still more whether it could place him in another office without the constitutional action of the President. These points not decided. (Thompson v. U. S., 18 Ct. Cls., 604, 612.)

An officer of the Army who has been retired from active service in accordance with law can not be reinstated in his former place by an order of the President, though the vacancy caused by his retirement may not have been filled. (13 Op. Atty. Gen., 209, citing 8 Op. Atty. Gen., 223.)

Army officers who have been retired from active service by the President under the twelfth section of the act of July 17, 1862, can not be reinstated on the active list except by a new appointment with the advice and consent of the Senate, and where vacancies on the active list exist which may lawfully be filled. (13 Op. Atty. Gen., 99.)

Section 2 of the act of June 18, 1878 (20 Stat., 165), provided that the President may in certain cases, where a prescribed procedure has not been followed in the retirement of an officer not recommended for promotion, "Order and direct the reexamination of the same." It was not intended by this provision to restore the officer to the active list and thereby to repeal the laws limiting the active force of the Navy. If such had been the intention, Congress would have said so. (Thompson v. U. S., 18 Ct. Cls., 604, 615.)



The law which makes retired officers of the Navy "ineligible to further promotion," intends only that they shall cease to be eligible to promotion as a matter of course in the routine of naval usage, and according to rank. It must be so, because their places have been filled, and the statute-aggregate has been attained by the promotion of those who remain on the active-service list. It does not follow that they may not be promoted to independent vacancies. No act of Congress could limit to that degree the constitutional power of appointment. The true solution of the problem is to renominate to the Senate, and commission anew such of the officers of the reserved list, if any there be, as it may be desired to restore to their previous status in the Navy. (8 Op. Atty. Gen., 223, 236.)

Retired officers of the Navy may legally be restored to the active list by temporary ap-

pointment where vacancies exist which may lawfully be filled by temporary appointment in accordance with the act of May 22, 1917 (40 Stat., 84). (File 27231-103, July 17, 1917.)

Full effect may be given to section 1465, Revised Statutes, by holding that it authorizes the restoration of retired officers to the active list under the circumstances there prescribed without reference to the condition of the active list at the time; that is to say, whether or not vacancies exist which might otherwise lawfully be filled. This construction is particularly warranted by the ruling of the Attorney General that no act of Congress could limit the constitutional power of appointment to the extent of rendering retired officers ineligible for appointment to vacancies existing on the active list. (File 27231-103, July 17, 1917, citing 8 Op. Atty. Gen., 223, 236.)

## CHAPTER FOUR.

### RANK AND PRECEDENCE, PROMOTION AND ADVANCEMENT.

#### OF RANK AND PRECEDENCE.

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**Sec. 1466. [Relative rank of Navy and Army officers.]** The relative rank between officers of the Navy, whether on the active or retired list, and officers of the Army, shall be as follows, lineal rank only being considered:

The Vice-Admiral shall rank with the Lieutenant-General.

Rear-admirals with major-generals.

Commodores with brigadier-generals.

Captains with colonels.

Commanders with lieutenant-colonels.

Lieutenant-commanders with majors.

Lieutenants with captains.

Masters with first lieutenants.

Ensigns with second lieutenants.—(16 July, 1862, c. 183, s. 13, v. 12, p. 585.

21 Dec., 1864, c. 6, s. 1, v. 13, p. 420. 25 July, 1866, c. 231, s. 1, v. 14, p. 222.

2 Mar., 1867, c. 174, s. 1, v. 14, pp. 515, 516.)

As to grades of admiral, vice admiral, and commodore, see notes to section 1362, Revised Statutes.

As to change in designation of "masters" to "lieutenants (junior grade)," see note to section 1362, Revised Statutes.

By act of October 6, 1917, section 3 (40 Stat., 410), the President was authorized for the period of the existing emergency only to appoint as generals the Chief of Staff and

the commander of the United States forces in France; and as lieutenant generals each commander of an Army or Army Corps organized as authorized by existing law.

By act of October 6, 1917, sections 3 (40 Stat., 411), it was provided that "brigadier generals of the Army shall hereafter rank relatively with rear admirals of the lower half of the grade."



**Admiral of the Navy ranks with General in the Army.**—This section provides for relative rank between officers of the Navy and officers of the Army, from the vice admiral, who ranks with the lieutenant general of the Army, to ensigns, the lowest commissioned officers of the Navy, who rank with second lieutenants in the Army; but no such relative rank was provided for the Admiral of the Navy. The grade of Admiral in the Navy is the grade next above that of vice admiral, and the next grade in the Army above that of lieutenant general, with which the grade of vice admiral corresponds in rank, was that of General of the Army. The latter grade ceased to exist August 5, 1888, by the death of Gen. Philip H. Sheridan, the then incumbent, and has not since been revived. [But see act of Oct. 6, 1917, noted above.] Although the law does not specify any grade in the Army with which the grade of Admiral is to be ranked, the reasonable intent of section 13 of the Navy personnel act approved March 3, 1899 (30 Stat., 1007), providing that, subject to certain exceptions, the commissioned officers of the Navy should receive the same pay and allowances as officers of corresponding rank in the Army, was that the grade of Admiral should be regarded as corresponding in rank with the grade of General as the latter grade formerly existed, and that the Admiral of the Navy should receive the same pay and allowances which the General of the Army formerly received. (6 Comp. Dec., 868.)

By Navy Regulations, 1913 (Art. R 1010); it was provided that "Admiral shall rank with General."

By a resolution of the Continental Congress November 15, 1776, it was provided "That the rank of the naval officers be, to the rank of officers in the land service, as follows:

"Admiral, as a general.

"Vice admiral, as a lieutenant general.

"Rear admiral, as a major general.

"Commodore, as a brigadier general.

"Captain of a ship of 40 guns and upwards, as a colonel.

"Captain of a ship of 20 to 40 guns, as a lieutenant colonel.

"Captain of a ship of 10 to 20 guns, as a major.

"Lieutenant in the Navy, as a captain."

**Aid to Admiral of the Navy does not rank with aid to General in the Army.**—A lieutenant (junior grade) in the Navy serving as aid to the Admiral of the Navy is entitled only to the pay of his rank, which corresponds to that of a first lieutenant in the Army. The fact that by law (sec. 1096, R. S.) aids on the staff of the General of the Army were entitled to the rank of colonel of Cavalry does not entitle an officer of the Navy to the rank of captain in the Navy, corresponding to that of colonel in the Army, while serving as aid to the Admiral of the Navy. By section 1096 a lieutenant or captain selected as aid by the General of the Army had conferred upon him while serving as such aid the rank of colonel of Cavalry, and by section 1261 he was entitled to the pay of a colonel. In 16 Op. Atty. Gen., 551, it was held that the rank conferred by section 1096 entitled such aids to the precedence, when serving upon courts-martial, courts of inquiry, military

boards, and the like, to which the same rank would entitle an officer of the line of staff (independent of the office of aid) when thus serving. There is no statute or regulation which confers upon an officer of the Navy, while serving as aid to the Admiral, any different rank from that which he held while not so serving. To allow him the pay of a colonel while so serving would be to assume that his rank was changed from that of a lieutenant (junior grade) to that of a captain in the Navy. Accordingly, *held* that such officer can not be allowed any pay in addition to the pay of the office and rank of lieutenant (junior grade) which he held while serving as aid to the Admiral. (11 Comp. Dec., 733; see also 21 Comp. Dec., 840, as to officer serving as aid to a rear admiral temporarily holding the rank of admiral as commander in chief of a fleet.)

While section 1094, Revised Statutes, provided that the Army of the United States should consist, among other officers, of "one General," said section concluded with the following: "*Provided*, That when a vacancy occurs in the office of General or lieutenant general such office shall cease, and all enactments creating or regulating such offices shall, respectively, be held to be repealed." Upon a vacancy occurring in the office of General under this proviso that office ceased to exist and section 1096, Revised Statutes, providing for aids to the General of the Army, who should have while so serving the rank of colonel of cavalry, was thereby repealed. Even conceding that section 1096 was revived as the result of the act of June 1, 1888 (25 Stat., 165), by virtue of which Lieut. Gen. Sheridan was made for life the General of the Army, said section did not remain in force after the death of Gen. Sheridan, since which time there is no officer of the Army to which pay of aids to the Admiral of the Navy can be assimilated under section 13 of the Navy personnel act of March 3, 1899 (30 Stat., 1007). (*Wood v. U. S.*, 224 U. S., 132, affirming 44 Ct. Cls., 611.)

**Grade of commodore abolished on the active list.**—Section 7 of the Navy personnel act of March 3, 1899 (30 Stat., 1005), in effect abolishes the rank of commodore, at least so far as respects the active list of the line of the Navy, and lifts those in that rank to that of rear admiral. Prior to the act of 1899 the corresponding ranks of officers of the Navy and the Army were rear admiral and major general, commodore and brigadier general, captain and colonel. By that act the rank of commodore was abolished, although that of brigadier general was undisturbed. No change was made in the relative rank of captain and colonel or of rear admiral and major general, but the legislation left one rank in the Army to which there was no corresponding rank in the Navy. The statute in effect lifted the rank in the Navy, which was corresponding to that of brigadier general in the Army, to that of rear admiral, corresponding with that of major general in the Army. The individuals thus raised in rank were not so raised on account of distinguished services or for any personal reason, but simply in consequence of the abolishing of the official rank they had held. (*Rodgers v. U. S.*, 185 U. S., 83.)

In the case of *Rodgers v. United States* (185 U. S., 83), it was stated with reference to the act of March 3, 1899: "The statute in effect lifted the rank in the Navy, which was corresponding to that of brigadier general in the Army, to that of rear admiral and corresponding with that of major general in the Army." The Supreme Court in the above quotation was speaking of the active list of the Navy. (File 3980-1402, Oct. 31, 1917.)

The grade of commodore was omitted from the active list by the Navy personnel act of March 3, 1899, section 7 (30 Stat., 1005). That act, however, while thus abolishing the grade of commodore on the active list, did not thereby affect the rank of officers then on the retired list having the rank of commodore, and it contained several provisions for the future retirement of officers with that rank under certain prescribed conditions, viz, by section 7 of said act it was provided "that nothing contained in this section shall be construed to prevent the retirement of officers who now have the rank or relative rank of commodore with the rank and pay of that grade;" by section 8 (30 Stat., 1006) it was provided that officers retired on their own applications for the purpose of creating a prescribed minimum of annual vacancies should be placed on the retired list with the rank and retired pay of the "next higher grade, as now existing, including the grade of commodore;" by section 9 (30 Stat., 1006), it was provided that officers retired by selection for the purpose of creating a prescribed minimum of annual vacancies should be placed on the retired list with the rank and retired pay of the "next higher grade, including the grade of commodore, which is retained on the retired list for this purpose." None of these provisions for retirement with the rank of commodore is now in force. Under section 1481, Revised Statutes, certain staff officers are retired with the rank of commodore, this being the only case in which any officers are now placed on the retired list with that rank, retirements under section 1473, Revised Statutes, being made in practice with the rank of rear admiral instead of commodore as was provided therein. The naval appropriation act of May 13, 1908 (35 Stat., 127), which established new rates of pay for the Navy, provided that "hereafter all commissioned officers of the active list of the Navy shall receive the same pay and allowances according to rank and length of service, and the annual pay of each grade shall be as follows: \* \* \* rear admiral, second nine, or commodore, six thousand dollars." There were no commodores on the active list at the time of the enactment last cited, but there were then and are now a number of officers on the retired list with the rank of commodore, and, as above stated, retirements are still being made with that rank under section 1481, Revised Statutes. The rank of commodore has continued to be assimilated with that of brigadier general by the Navy Regulations (Art. R 1010, 1913), notwithstanding the expression of the Supreme Court in the *Rodgers* case that the legislation of March 3, 1899, "left one rank in the Army to which there was no corresponding rank in the Navy." Inasmuch as section 1466 provides that the

"relative rank between officers of the Navy, whether on the active or retired list, and officers of the Army," shall be as specified therein, the Navy Regulations have been correct in continuing to show the rank of commodore as assimilated with that of brigadier general. (File 3980-1402, Oct. 31, 1917.)

Section 7 of the Navy personnel act of March 3, 1899 (30 Stat., 1005), eliminated the rank or grade of commodore from the active list of the Navy. (11 Comp. Dec., 547.)

The commodores on the active list and the rear admirals of the Navy were amalgamated on account of international relationships the consideration of which caused the Navy Department to regard the complications confronting it as inimical to the honor and dignity of this Nation because of the adverse effect upon its high ranking representatives in their association with foreign officers. (File 3980-1402:3, Mar. 4, 1918.)

**Two grades of rear admirals for pay purposes.**—Rear admirals were divided into two grades for pay purposes by section 7 of the Navy personnel act of March 3, 1899 (30 Stat., 1005), rear admirals of the "nine lower numbers" being given the pay and allowances of brigadier generals of the Army, while rear admirals of the upper nine numbers were not specifically provided for, but under the general provisions contained in section 13 of the same act they received the same pay and allowances as officers of the corresponding rank in the Army, viz, major general, that being the rank corresponding to the rank of rear admiral according to section 1466. This division of rear admirals into two grades for pay purposes was continued in effect by the act of May 13, 1908 (35 Stat., 127), which provided different rates of pay for "rear admirals, first nine," and "rear admirals, second nine"; also by the act of August 29, 1916 (39 Stat., 577), which provided that "hereafter pay and allowances of officers in the upper half of the grade or rank of rear admiral, including the staff corps and including staff officers heretofore permanently commissioned with the rank of rear admiral, shall be that now allowed by law for the first nine rear admirals, and the pay and allowances of officers in the lower half of the grade or rank of rear admiral, including the staff corps, shall be that now allowed by law for the second nine rear admirals." (File 3980-1402, Oct. 31, 1917.)

The provision fixing the pay of the rear admirals of the lower half of that grade to correspond with the pay of a brigadier general arose from the fact that the relative rank of officers of the Army and Navy had been so adjusted by statute as to rank commodores with brigadier generals, and the rank of commodore being dropped from the service by said Navy personnel act of March 3, 1899, section 7, the pay of a brigadier general was given to the nine lower numbers of rear admirals, who would otherwise have had the rank of commodore with the corresponding pay of brigadier generals. (*Gibson v. U. S.*, 194 U. S., 182.)

Is it unreasonable to suppose that Congress thought it unwise to give to those officers (who had neither by length of service or by personal distinction become entitled to the position of rear admiral as it had stood in the past) all the



benefits of such position? Would it be unnatural for Congress to bear in mind those who by length of service or by personal distinction had already earned that position, and provide that in at least the matter of pay there should be some recognition of the fact? Again, is it unreasonable to believe that Congress intended that those officers whose past services placed them according to their prior relative rank side by side with brigadier generals of the Army should not by a mere change of statute be given a benefit in salary which was not at the same time accorded to brigadier generals in the Army? May not this explain its action in so dividing the rear admirals into two classes, one composed substantially of former rear admirals, equal both in rank and pay with major generals in the Army, and the other of those who in the past were only commodores, to whom was given the rank of rear admirals but the pay of brigadier generals in the Army? (*Rodgers v. U. S.*, 185 U. S., 83.)

Rear admirals being divided into two classes for the purpose of pay, and there being no question that had plaintiff been promoted in the active service from captain to rear admiral he would have passed into the lower grade of rear admirals, so far at least as his pay was concerned, and would have received so long as within that number the pay of a brigadier general, notwithstanding that for all other purposes he was entitled to the rank and privileges of a rear admiral, *held* that the advancement of plaintiff on the retired list in accordance with section 11 of the Navy personnel act of March 3, 1899 (30 Stat., 1007), to receive "the rank and three-fourths the sea pay of the next higher grade," entitled him to the pay of the next higher rank, and but for the difference made in the pay of rear admirals would entitle him to three-fourths the full pay of that rank, but taking one step upward for the purpose of pay he passes into and not over the next pay grade, which is that of the nine lower numbers. (*Gibson v. U. S.*, 194 U. S., 182.)

**All rear admirals rank with major generals.**—Rear admirals of the lower half, except for purposes of their own pay and allowances, are rear admirals with the relative rank, under section 1466, Revised Statutes, of major generals in the Army; and their aids are entitled under section 1261, Revised Statutes, to the additional pay provided by law for aids to major generals in the Army, and not merely to the additional pay provided for aids to brigadier generals in the Army. It will be noted that the proviso to section 7 of the Navy personnel act of March 3, 1899 (30 Stat., 1005), does not specify that a rear admiral of the lower half shall have the relative rank and pay of a brigadier general, but merely that he shall receive the same pay and allowances. This proviso does not affect the rank given them. If Congress had intended to assimilate their rank as well as pay and allowances to that of a brigadier general it might easily have said so. (11 Comp. Dec., 547.)

It is established that while there are two divisions in the grade of rear admiral for pay purposes, nevertheless all officers in that grade for all other purposes are entitled to the same

rank and privileges. (File 3980-1402, Oct. 31, 1917.)

The rank of all rear admirals is assimilated by section 1466 to that of major generals in the Army. (6 Comp. Dec., 960.)

A rear admiral whether on the active or retired list corresponds in rank with a major general in the Army. Accordingly *held* that a retired officer on active duty as aid to a retired rear admiral employed on active duty is entitled to the additional pay provided by law for aids to major generals in the Army. (14 Comp. Dec., 471.)

**Temporary assignment to rank of rear admiral.**—The assignment of a captain of the Navy to duty in command of a squadron with the rank and title of rear admiral, by authority of section 1434, Revised Statutes, does not make him a rear admiral within the meaning of the act of May 13, 1908 (35 Stat., 128), providing additional pay for aids to rear admirals. (17 Comp. Dec., 54; see also note to sec. 1434, R. S.)

**Relative rank of brigadier generals and rear admirals of the lower half.**—The act of October 6, 1917, section 3 (40 Stat., 411), provides that "brigadier generals of the Army shall hereafter rank relatively with rear admirals of the lower half of the grade." This is materially different from stating, conversely, that "rear admirals of the lower half of the grade shall hereafter rank relatively with brigadier generals of the Army." If, for example, the pay of rear admirals of the lower half had been in the past higher than that allowed brigadier generals in the Army, and the act of October 6, 1917, had provided that brigadier generals should thereafter receive the same pay as rear admirals of the lower half, it is apparent that this would have resulted in increasing the pay of brigadier generals to that provided for rear admirals of the lower half; whereas, had it been provided under the same circumstances that rear admirals of the lower half should thereafter receive the same pay as brigadier generals of the Army, this would have resulted in reducing the pay of rear admirals of the lower half to that fixed for brigadier generals. The same distinction exists with reference to the rank of the officers concerned. In the past the rank of rear admirals of the lower half has been higher than that of brigadier generals, viz, it has been the same in all respects as that of major generals. Under these circumstances Congress did not provide that hereafter the rank of rear admirals of the lower half shall be the same as that of brigadier generals, which would have resulted in reducing the rank previously enjoyed by such rear admirals, but on the contrary it provided that hereafter the rank of brigadier generals shall be the same as that of rear admirals of the lower half, thereby elevating the rank of brigadier generals while leaving the rank of rear admirals of the lower half the same as it previously had been. In other words, rear admirals of the lower half continue by law to rank with major generals in the Army, the only change being that now brigadier generals of the Army rank with rear admirals of the lower half. Unless this were so, rear admirals of the lower half who prior to the act of October 6, 1917, ranked ahead of all major generals of a later date of commission would now be required

to take rank behind all major generals, including those of a later date of commission whom they had previously outranked. This would amount to nothing more nor less than a reduction in the rank of rear admirals of the lower half, and that without any corresponding advantage to brigadier generals for whose benefit the amendment of October 6, 1917, was enacted. (File 3980-1402, Oct. 31, 1917.)

Section 1466 provides that commodores, whether on the active or retired list, shall rank with brigadier generals. If the rank of brigadier generals is elevated, as it has been by the act of October 6, 1917, the necessary consequence is to elevate correspondingly the rank of commodores, just as any increase in the pay of brigadier generals must have resulted in automatically increasing the pay of commodores if the pay of the latter, instead of their rank, had been assimilated to that of brigadier generals. In other words, commodores have ranked with brigadier generals in accordance with explicit statutory enactment, and must continue so to rank unless and until otherwise provided by Congress. It follows that under the law commodores rank with brigadier generals, brigadier generals rank with rear admirals of the lower half, and rear admirals of the lower half rank with major generals. Had this been a question of pay instead of rank there would be no difficulty in giving the law full force and effect. That is, had it been provided that commodores should have the same pay as brigadier generals, brigadier generals the same pay as rear admirals of the lower half, and rear admirals of the lower half the same pay as major generals, it is evident that the pay of all four grades would have been identical. However, in the matter of rank insurmountable obstacles exist to giving effect to this legislation as thus construed. The case is the same as though it were stated that major generals, rear admirals of the lower half, brigadier generals, and commodores are all on precisely the same footing in relation to rank with its resulting precedence; and inasmuch as the precedence of officers of the same or corresponding rank is determined, in the absence of statutory provision to the contrary, by date of commission, it would follow that commodores must take precedence ahead of all the others when the commissions of the commodores are of an earlier date than those of officers in the other grades mentioned. From a practical point of view it would be an impossible situation to have commodores as a class preceding major generals of a later date of commission. If the law could be construed so that nothing contained therein should operate to give any officer of a lower grade precedence of an officer of a higher grade, one impossible situation would merely be substituted for another, as in that event we would have a brigadier general preceding rear admirals of a later date of commission, while the rear admirals in turn would precede major generals of a later date of commission, while the major generals in turn would precede the brigadier general because holding a higher grade. (File 3980-1402, Oct. 31, 1917.)

The situation created by the act of October 6, 1917, can be corrected only by legislation. Under the present law it is indisputable that

major generals and brigadier generals both take rank and precedence with rear admirals; and that commodores take rank and precedence with brigadier generals. Major generals and brigadier generals must be treated as but one grade for purposes of precedence with rear admirals; while at the same time as between themselves they must be treated as officers of separate and distinct grades, different in degree. This creates two conflicting rules for determining the precedence of officers who may be associated together at the same time and place. Two grades in the Army or Marine Corps can not be made equal to one grade in the Navy without at the same time making them equal to each other. The difficulty is more pronounced in the Navy than in the Army, because of the fact that the Marine Corps is normally a part of the Navy, its officers serving habitually on courts and boards with other officers in the naval service. In other words there are under the jurisdiction of the Navy Department officers having all of the ranks involved, namely, rear admiral, major general, brigadier general, and commodore; while under the War Department the only grades involved are major general and brigadier general; so that the War Department can never have jurisdiction of the entire question. In the case of a commodore being associated on duty with a rear admiral of the Navy and a brigadier general of the Marine Corps, it would follow that by date of commission the commodore would most likely rank ahead of the brigadier general who, in turn, might be entitled to precedence ahead of the rear admiral, whom the commodore could not precede. (File 3980-1402:4, Feb. 19, 1918.)

The act of October 6, 1917, can not be given effect fully by construction not extending to executive legislation. Administrative officers can not make law but must take the law as it stands. If the law as made by Congress is defective either in what it contains or what it omits, the remedy can be furnished only by Congress. In the present case the legislative intent is too plain for discussion that brigadier generals should be elevated in rank to the level of rear admirals of the lower half, and not that the latter should be reduced. This can not be an accomplished fact so long as rear admirals continue by law to rank with major generals, and commodores continue by law to rank with brigadier generals. If there were any warrant for the executive by regulations to make commodores rank after brigadier generals, instead of with brigadier generals as provided by statute, and make rear admirals of the lower half rank after major generals instead of with major generals as provided by statute, a solution would thereby be reached; but where the rank of these officers has been definitely fixed by explicit legislation, the executive can no more change the rank to which they are thus entitled than it could change their pay as fixed by statute. (File 3980-1402, Oct. 31, 1917.)

The War Department is in complete agreement with the Secretary of the Navy that the law upon this subject (Act of Oct. 6, 1917) should be repealed, and has accordingly recommended such repeal to the Senate and House



military committees. (File 3980-1402 : 7, Apr. 10, 1918.) A bill for this purpose (H. R. 12512) was introduced in the House of Representatives on June 19, 1918, and referred to the Committee on Military Affairs. (File 3980-1402 : 8, Aug. 1, 1918.)

**Midshipmen not included by this section.**—Section 1466 provides for relative rank between officers of the Navy and officers of the Army, but no such relative rank is given to cadets (now midshipmen). Although officers of the Navy, naval cadets (midshipmen) do not correspond in rank with any officer of the Army, and therefore are not entitled to the allowance of mileage for travel on shore duty abroad. (7 Comp. Dec., 2.)

**Professors at Naval Academy do not rank with professors at Military Academy.**—A line officer of the Navy of the rank of lieutenant commander corresponds in rank to a major in the Army; his detail to duty as head of the department of modern languages of the United States Naval Academy does not entitle him to the rank of commander, corresponding to lieutenant colonel in the Army, because under the law certain professors at the Military Academy are entitled to the rank and pay of lieutenant colonel. The position of professor at the Military Academy is an office separate and distinct from any other office in the Army, the incumbent of which is appointed by the President and not detailed from the officers of the Army. There is no law entitling a naval officer, by virtue of his assignment, to the rank or pay of a professor either at the Naval Academy or Military Academy; nor any law providing that an Army officer may be detailed to perform the duties of a professor at the Military Academy and thereby become entitled to the rank and pay of a professor at that institution. (11 Comp. Dec., 591.)

**Staff officers included by this section.**—Section 1466 fixes the relative rank of officers of the Army and officers of the Navy. This section is general, with no exception or limitation, and therefore it applies equally to all officers of the Navy of the grades there mentioned, whether of the line or staff. That section contains the clause, "lineal rank only being considered," but that simply means that it is not necessary to specify and fix relative staff rank, since staff officers in both services possess assimilated lineal rank. (26 Op. Att'y. Gen., 16.)

As staff officers are, equally with those of the line, "officers of the Navy," as stated in section 1466, the provisions of that section apply as well to them as to officers of the line, and thus defines the rank in both branches of the naval service. And since the Navy personnel act has eliminated the word "relative" in this connection, this is their actual rank. This merely defines the rank of these officers, by making the rank of a captain the same as that of a colonel, and so on. (26 Op. Att'y. Gen., 496, 499.)

Section 1466, Revised Statutes, assimilates in rank lieutenants in the Navy with captains in the Army. Under the Navy personnel act of March 3, 1899 (30 Stat., 1007), and section 1466, Revised Statutes, passed assistant surgeons of the Navy, as well as assistant surgeons, rank with captains in the Army. (U. S. v. Farenholt, 206 U. S., 226.)

**Officers of the Marine Corps and line officers of the Navy.**—By section 1603, Revised Statutes, officers of the Marine Corps are in relation to rank on the same footing as officers of similar grades in the Army. Accordingly, they take precedence with line officers in the Navy according to grade; and if of similar grade, then according to date of commission. (25 Op. Att'y. Gen., 517.)

**Officers of the Marine Corps and staff officers of the Navy.**—Staff officers of the Navy take precedence with officers of the Army of corresponding rank according to date of commission. Accordingly, officers of the Marine Corps, who by section 1603, Revised Statutes, are in relation to rank on the same footing as officers of similar grades in the Army, take precedence with officers of the staff corps of the Navy of corresponding rank according to dates of commission; and the Navy Department would not have the authority, with the approval of the President, to amend the Navy Regulations so as to do away with the practice as to the relative rank of officers of the Marine Corps and line officers of the Navy established in accordance with the Attorney General's opinion of October 7, 1905 (25 Op. Att'y. Gen., 517). (26 Op. Att'y. Gen., 16.)

**Relative rank when of same or corresponding grade.**—Section 1466 fixes the relative rank by grades only of line officers of the Navy and of the Army. But this merely tells what grades in each service, designated by their titles, shall be of corresponding or equal right and dignity, and does not fix the relative rank of these officers when of the same or corresponding grades. This is left undetermined, so far as express statute or regulation is concerned. But the unwritten law of the Army and Navy—a rule of action governing in both branches of the service—derived from long established and uniform practice, has settled this. From the earliest days of the Army and Navy it has been the rule and practice that officers in the same grade in the Army and Navy have relative rank and precedence between themselves according to the dates, respectively, of their commissions; the senior in commission ranking the junior. The same rule applies in such cases as that which governs officers of the Army and officers of the Navy as between themselves in each case, namely, that seniority in commission or appointment gives precedence in the same grade. This has become a well-understood rule of action and practice, which, in fact, governs and controls officers of the Army and Navy with the same force and precision as if embodied in statute or regulation. (25 Op. Att'y. Gen., 517; see also, 26 Op. Att'y. Gen., 16, and 29 Op. Att'y. Gen., 264.)

In so far as the precedence of officers of the same rank is not regulated by statute, the Secretary of the Navy may determine same with the force and effect of law, by virtue of his general authority under the President to make rules and regulations for the government of the Navy. Usually this, of course, is better done by general rules than by decisions in particular cases, but it may be done either way. It would seem that, according to the preference given throughout the statutes and by the rules and practice of the War and Navy Departments to seniority of

service, the longer service of an officer would, other things being equal, give him precedence in rank with reference to another officer promoted to corresponding rank from the same date. (23 Op. Atty. Gen., 156.)

**Relative rank when of same or corresponding grade and same date of commission.**—"In fixing the relative rank of officers of the Army, officers of the Navy, and officers of the Marine Corps, of the same grade and date of appointment and commission, the time which each may have actually served as a commissioned officer of the United States, whether continuously or at different periods, shall be taken into account." (Art. R 1010 (2), Navy Regs., 1913; see also sec. 1219, R. S., relating to the Army.)

This rule for determining precedence between officers of the same grade and date is statutory in the Army, and the rule so prescribed by statute for the Army is extended to the Navy by the foregoing regulation. Such a regulation for the Navy is almost a necessity in view of the law governing the Army, as should a different rule be prescribed for the Navy than that which governs by law in the Army, such rules would necessarily conflict where officers of the Army and Navy serve or associate together, and it would be impossible to fix their relative precedence except by the adoption of the same rule to govern all. Nevertheless no statute limits the Secretary of the Navy in fixing the precedence of such officers of the Navy as between themselves, where they are of the same grade and date of rank, and therefore the regulation above quoted might by authority of the Secretary be departed from and some different rule of precedence adopted. (File 11130-53:1, June 25, 1919.)

**Command of joint forces of the Army and Navy.**—There is no law which purports

to provide who shall command joint forces of the Army and Navy doing duty together, this matter having been left by Congress, where it properly belongs, to the President, who, as commander in chief of the Army and Navy, is the only authority vested by the Constitution with the power to determine what officers shall take command of such forces, either by virtue of rank or by special designation. Article 1050 of the Navy Regulations, 1913, issued with the written approval of the President, provides: "An officer of the Navy can not assume command of Army forces on shore, nor can an officer of the Army assume command over any ship of the Navy, or over its officers or men afloat, except in either case by special authority for a particular service; but when officers of the Navy are on duty on shore with the Army they shall be entitled to the precedence of the rank in the Army to which their own corresponds, except command as aforesaid, and this precedence will regulate their right to quarters." (File 3980-1402:3, Mar. 4, 1918.)

For other cases, see note to section 1342, Revised Statutes, article 120.

**Corresponding rank did not give corresponding pay.**—While the act of July 16, 1862, sec. 1466, R. S., had fixed the relative rank of Army and naval officers, no provision for similarity of pay was made until the passage of the Navy personnel act of March 3, 1899 (30 Stat., 1004), which act, while providing against a reduction of then existing pay of commissioned officers of the Navy, undertook to equalize the pay of naval officers (theretofore generally below that paid to officers of corresponding rank in the Army) with that of officers in the Army of equal rank. (U. S. v. Crosley, 196 U. S., 327, citing U. S. v. Thomas, 195 U. S., 418.)

**Sec. 1467. [Rank according to date.]** Line officers shall take rank in each grade according to the dates of their commissions.—(16 July, 1862, c. 183, s. 1, v. 12, p. 583. 21 April, 1864, c. 63, s. 7, v. 13, p. 54. 24 Jan., 1865, c. 19, s. 1, v. 13, p. 424.)

Graduates of Naval Academy, precedence of. See section 1483, Revised Statutes.

Precedence of Marine officers. See section 1603 and note to section 1466, Revised Statutes.

Precedence of officers selected to command squadrons. See sections 1434 and 1464, Revised Statutes.

Precedence of commanding officers of vessels and stations. See section 1468, Revised Statutes.

Precedence of staff officers of Navy. See sections 1466, 1485, 1486, and 1489, Revised Statutes, and notes thereto.

Precedence of officers promoted by selection to the ranks of commander, captain, and rear admiral in the line or staff of the Navy. See act of August 29, 1916 (39 Stat., 579), as amended by act of July 1, 1918 (40 Stat., 718).

Rank of officers advanced for distinguished conduct in battle. See sections 1506-1510, Revised Statutes.

Special provisions governing the precedence of temporary, reserve, and Coast Guard officers transferred to the line or staff of the regular Navy, are contained in act of June 4, 1920, sections 3, 4, and 5 (41 Stat., 835, 836).

**Date of commission defined.**—Seniority among line officers of the Navy is determined by date of commission—that is, the date from which the commission recites that the appointment to a given grade begins. (18 Op. Atty. Gen., 393; see also *Toulon v. U. S.*, 52 Ct. Cls., 333; 24 Comp. Dec., 177; 22 Comp. Dec., 623; 17 Comp. Dec., 605; 22 Comp. Dec., 565, 566; compare *Young v. U. S.*, 19 Ct. Cls., 145.)

**Officer suspended from rank by sentence of court-martial.**—Where an officer is sentenced by court-martial "to be suspended for two years from rank and duty, on furlough pay, and to retain his present number on the list of lieutenant commanders during that time," officers in the same grade, although of a later date of commission, may pass above him on the



list by reason of the sentence which held said officer to the number which he held at the time of the sentence. The sentence rendered by authority of law gives the law in this case, and section 1467, Revised Statutes, must, in its application, accord with the sentence. An order thereafter issued by the Secretary of the Navy, remitting "the unexecuted portion of the sentence," does not operate to restore the officer to the position in the list to which his date of commission would entitle him. The form of the remitting order was not a nullification of the original sentence, neither was it an absolute pardon for the offense committed. The sentence is neither declared void nor vacated; the "unexecuted portion" is "remitted"; that portion of the sentence which previous to the remitting order operated to place two officers above the officer sentenced was executed at the date of the order of remission, and was therefore by the terms of the order not affected by it. While an absolute pardon might reinstate the officer sentenced (citing 12 Op. Atty. Gen., 547, and 17 Op. Atty. Gen., 31 and 656), an order by the Secretary remitting the unexecuted portion of the sentence can not produce that result. (20 Op. Atty. Gen., 243; compare notes to Constitution, Art. II, sec. 2, clause 1, "When pardon may be granted.")

**Loss of date for failure to qualify for promotion.**—See note to section 1505, Revised Statutes, as amended.

**Precedence of officers promoted by selection.**—When officers are promoted by selection they should be considered as having gained length of service according to their promotion in determining their relative rank with other grades of the Navy, to a sufficient extent to place them above the officers over whom they were thus advanced. (17 Op. Atty. Gen., 56. See section 1486, R. S., as to officers who have gained or lost numbers.)

When the report of the Board of Rear Admirals for selection for promotion created by act of August 29, 1916 (39 Stat., 578), is approved by the President, "the officers recommended therein shall be deemed eligible for selection, and if promoted shall take rank with

one another in accordance with their seniority in the grade from which promoted." (Act Aug. 29, 1916, 39 Stat., 579.)

**Where officer has been issued more than one commission in the same rank.**—See file 4649-02, July 17, 1902, noted under section 421, Revised Statutes, "Precedence of chiefs of bureaus."

An officer who receives a permanent commission in the grade of commander while already holding a temporary commission in the same grade of an earlier date, continues to take precedence from the date of his temporary commission so long as that commission remains in force and is not expressly revoked or terminated by operation of law. (C. M. O. 237, 1919, p. 28, citing file 11130-47:1, July 18, 1919; see also C. M. O. 72, 1917, p. 20, citing file 11130-47, Nov. 28, 1917).

An officer given a temporary commission as assistant surgeon with the rank of lieutenant (junior grade), and afterwards given a permanent commission in the same grade and rank from a later date, takes precedence from the date stated in his permanent commission and not from the earlier date stated in his temporary commission. (C. M. O. 30, 1918, p. 31, citing file 11130-37:4, Mar. 12, 1918.)

**Antedating rank on promotion.**—See note to section 1458, Revised Statutes.

**Precedence of officers commissioned on same date.**—See note to section 1466, Revised Statutes.

When naval officers are commissioned on the same date, the numbering of the commissions to determine the relative rank of the officers is, in the absence of statutes, a matter of practice in the Navy Department, and not governed by law. (1 Op. Atty. Gen., 325.)

**A fictitious date** can not properly be inserted in an officer's commission, where this would be attended with prejudice to other officers in the same grade, unless there is clear authority of law for so doing. (14 Op. Atty. Gen., 192.)

**For other cases,** see notes to Constitution, Article II, section 3, "Duty to commission officers."

**Sec. 1468. [Commanding officers of vessels and stations.]** Commanding officers of vessels of war and of naval stations shall take precedence over all officers placed under their command.—(3 Mar., 1871, c. 117, s. 12, v. 16, p. 537.)

Command of hospital ships. See note to section 1488, Revised Statutes.

Command of vessels and navy yards. See sections 1529 and 1542, Revised Statutes.

Marine officers not to exercise command over any navy yard or vessel of the United

States. See section 1617, Revised Statutes.

Precedence of officers commanding squadrons. See sections 1434 and 1464, Revised Statutes.

Staff officers, exercise of military command by. See section 1488, Revised Statutes.

**Sec. 1469. [Aid or executive officer.]** The Secretary of the Navy may, in his discretion, detail a line officer to act as the aid or executive of the commanding officer of a vessel of war or naval station, which officer shall, when not impracticable, be next in rank to said commanding officer. Such aid or executive shall, while executing the orders of the commanding officer on board the vessel or at the station, take precedence over all officers attached to the vessel

or station. All orders of such aid or executive shall be regarded as proceeding from the commanding officer, and the aid or executive shall have no independent authority in consequence of such detail.—(3 Mar., 1871, c. 117, s. 12, v. 16, p. 537.)

**“Aid or executive” is not entitled to additional pay as aid to a rear admiral.**—Section 1469, Revised Statutes, has no reference to the designation of aids on the personal staff of a Navy officer like that provided for officers of the Army in sections 1096–1098, Revised Statutes. (6 Comp. Dec., 154.)

The provision in the act of May 13, 1908 (35 Stat., 128), for additional pay for aids is: “Aids to rear admirals embraced in the nine lower numbers of that grade shall receive one hundred and fifty dollars additional per annum, and aids to all other rear admirals two hundred dollars per annum each.” The statutory aid or executive to a commandant of a naval station, or “captain of the yard” as he is styled by Navy Regulations, is not an aid of the kind contemplated by the act of May 13, 1908, and therefore is not entitled to the additional pay which that act provides for “aids to rear admirals,” even though the particular commandant with whom he serves may incidentally be a rear admiral. An officer detailed as aid or executive officer to the commandant of a naval station under the conditions of section 1469 corresponds by the terms of that statute to an executive officer of a war vessel. He acts as an aid or executive officer to the commandant as commandant, whomsoever the commandant may be and whatever grade he may hold, and independently of his personality. The mutual official relationship between them is simply that of a superior officer and an officer of an inferior rank attached for duty purposes to a common station, as distinguished from the individual, personal, or social relationship of an aid and a rear admiral, which is the basic relationship between an aid and a rear admiral of the kind of aid contemplated by the act of May 13, 1908, and for whose service in such relationship that act has provided additional pay. The duties performed by the former for the commandant are the routine executive duties of a naval station, while the duties performed by the latter for a rear admiral are personal or social in their character. (23 Comp. Dec., 327, following 21 Comp. Dec., 561, which overruled 21 Comp. Dec., 431.)

An aid to an admiral in the Navy, whose pay is provided for in the act of May 13, 1908, is an officer legally ordered to duty with an admiral, vice admiral, or rear admiral to perform for him strictly personal, confidential, and routine duties. These duties can not be combined with the duties of a fleet ordnance

officer or any other officer who has other duties to perform separate and distinct from the duties of an aid. (*Knox v. U. S.*, 52 Ct. Cls., 22.)

A captain in the Navy ordered to duty as captain of the yard, where the commandant of the navy yard was a rear admiral, is not entitled to additional pay as aid to a rear admiral. (*Helm v. U. S.*, 52 Ct. Cls., 32.)

A lieutenant in the Navy ordered to duty as “aid to the commandant, captain of the yard, and also as engineer officer of the yard,” is entitled to the additional pay provided by the act of May 13, 1908 (35 Stat., 128), as aid to a rear admiral, the navy yard being under the command of an officer with the rank of rear admiral. (*Frucht v. U. S.*, 49 Ct. Cls., 570.)

The decision of the Court of Claims in the *Frucht* case (noted above) turned upon the character of duties actually shown to have been performed by the claimant in that case, which were personal duties in addition to and aside from his duties as captain of the yard. In that case it was specifically stated in the findings of fact: “While stationed as aid to the commandant of the navy yard at Pensacola, Fla., the claimant performed the usual duties required of aids to the commandant \* \* \* and in addition performed other duties of a more personal character and such as are usually required of aids to rear admirals in the Navy and generals in the Army.” (File 26254–1643:1, Jan. 19, 1915.)

Where an officer was detailed by the Secretary of the Navy to duty as “aid to Rear Admiral William F. Fullam,” Superintendent of the Naval Academy, he was not detailed for duty as aid or executive under section 1469, Revised Statutes, and regulations based thereon; but was an aid to a rear admiral and his duties were in no way the same as those provided for under the laws and regulations relating to aids or executives, and captains of the yard. There is no law or regulation which prevents a rear admiral on duty ashore from having an aid, and if the Secretary of the Navy specifically designates an officer to serve in such capacity he is entitled to the additional pay provided by the act of May 13, 1908. (23 Comp. Dec. 329; see also 24 Comp. Dec., 558.)

For other cases, see note to section 1556, Revised Statutes, “Additional pay for special duty.”

**Staff officer can not be assigned to duty as “aid or executive.”**—See note to section 1404, Revised Statutes.

**Sec. 1470. [Staff officers, when to communicate directly with commanding officer.]** Staff officers, senior to the officer so detailed, shall have the right to communicate directly with the commanding officer.—(3 Mar., 1871, c. 117, s. 12, v. 16, p. 537.)

**Sec. 1471. [Chiefs of Bureaus.]** The chiefs of the Bureau of Medicine and Surgery, Provisions and Clothing, Steam Engineering, and Construction and



Repair shall have the relative rank of commodore while holding said position, and shall have, respectively, the title of Surgeon-General, Paymaster-General, Engineer-in-Chief, and Chief Constructor.—(3 Mar., 1871, c. 117, s. 12, v. 16, p. 537.)

Amendment to this section was made by act of March 3, 1899, section 7 (30 Stat., 1005), which provided that "when the office of chief of bureau is filled by an officer below the rank of rear admiral, said officer shall, while holding said office, have the rank of rear admiral." By act of July 1, 1918 (40 Stat., 717), it was provided that "hereafter chiefs of bureaus of the Navy Department, including the Judge Advocate General of the Navy, shall, while so serving, have corresponding rank and shall receive the same pay and allowances as are now or may hereafter be prescribed by or in pursuance of law for chiefs of bureaus of the War Department and the Judge Advocate General of the Army." By act of October 6, 1917 (40 Stat., 411), it was provided with reference to the Army that "hereafter, the chief of any existing staff corps, department, or bureau, except as is otherwise provided for the Chief of Staff, shall have the rank, pay, and allowances of major general."

As to rank, title, and precedence of chiefs of bureaus, see note to section 421, Revised Statutes.

Bureau of Provisions and Clothing was designated as Bureau of Supplies and Accounts by act of July 19, 1892 (27 Stat., 243, 245).

Bureau of Steam Engineering was designated as Bureau of Engineering by act of June 4, 1920 (41 Stat., 828).

**Historical note.**—On December 24, 1862, the Attorney General rendered an opinion to the Secretary of the Navy (10 Op. Atty. Gen., 413), holding that the latter had authority under the law to issue regulations fixing the "relative rank of the line and civil or staff officers of the Navy." Following this opinion it was provided by regulation that chiefs of bureaus of the staff corps were "to rank with commodores, and to take precedence of each other, according to their dates of commission as surgeons, paymasters, naval constructors, and engineers, and not according to the date of appointment as \* \* \* chief of bureau." (Navy Regs., 1865, Art. II, par. 25; Navy Dept. order Mar. 3, 1863.) On March 31, 1869, the Attorney General (13 Op. Atty. Gen., 10) dissented from the previous opinion of his department, above cited, and held that certain regulations issued by the Secretary of the Navy, with the approbation of the President, on March 13, 1863, "establishing and increasing the relative rank of the staff officers of the Navy," were invalid. By General Order No. 120 of April 1, 1869, the Secretary of the Navy published this latter opinion of the Attorney General, and stated that, in accordance therewith, "the order of March 3, 1863, and the Navy Regulations, Article II, paragraphs 6 to 28 (both inclusive), are hereby revoked and annulled." Thereafter, by act of March 3, 1871 (16 Stat., 537, sec. 12), Congress provided

that the chiefs of the Bureaus of Medicine and Surgery, Provisions and Clothing (now Supplies and Accounts), Steam Engineering (now Engineering), and Construction and Repair, shall have the relative rank of commodore while holding said position, "or if heretofore or hereafter retired therefrom by reason of age or length of service." The same act provided that when the office of chief of bureau is filled by a line officer below the rank of commodore, said officer shall have the relative rank of commodore during the time he holds said office.

**Titles of chiefs of bureaus.**—The head of a department for his own purposes as such has authority to designate offices therein and to cause his subordinates to designate them in official communications by names other than those theretofore borne by such offices. There is no statute or rule of law which forbids the employment of certain names in such cases, where the head of the department considers that new relations acquired by such branches of business under a reorganization of his department requires. Congress has not seen fit to so hamper a coordinate branch of the Government. Its own use of names is not such a prohibition. There is no legal objection to the employment of two names or many names for the same object nor will it be "inconsistent with law" for the head of the department under section 161, Revised Statutes, to make use of other names than those used by Congress. Names are ordinarily free for the person speaking or writing to choose. (24 Op. Atty. Gen., 697.)

Persons in the public service may be officially designated by titles other than those used in the law to identify their offices or positions under the Government, it being necessary to adhere to the statutory designation only in making their appointments to office. The mere assignment of a different title for official purposes to one occupying an authorized position under the Government does not by any means constitute an attempt by the executive to create a new grade or to change the office or position held by one whose designation has thus been changed for administrative reasons. (C. M. O. 92, 1918, p. 27; file 18141-24, July 9, 1918.)

"The chiefs of the Bureaus of Medicine and Surgery, Supplies and Accounts, Steam Engineering (now Engineering), Construction and Repair, and Yards and Docks, while holding these offices, shall have, respectively, the title of Surgeon General of the Navy, Paymaster General of the Navy, Engineer in Chief of the Navy, Chief Constructor of the Navy, and Chief of Civil Engineers of the Navy. Each such chief of bureau, however, shall be addressed and designated by the title of his rank; in written communications the title of his office to be stated next after his name." (Art. R. 1006 (2), Navy Regs., 1913, C. N. R. 12, Sept. 12, 1918.)

**Staff bureaus.**—The bureaus mentioned in section 1471 are the staff bureaus of the Navy, under the existing organization, except that the Engineer Corps (Steam Engineering) has now been transferred to the line by the person-

nel act of March 3, 1899 (30 Stat., 1005). (25 Op. Atty. Gen., 122.)

**For other cases concerning chiefs of bureaus, their titles, etc.** see note to section 421, Revised Statutes.

**Sec. 1472.** [Chief of bureau, when below rank of commodore. Superseded.]

This section provided as follows:

"Sec. 1472. When the office of chief of Bureau is filled by a line officer below the rank of commodore, said officer shall have the relative rank of commodore during the time he holds said office."—(3 Mar., 1871, c. 117, s. 12, v. 16, p. 537.)

It was superseded by the following provision in the act of March 3, 1899, section 7 (30 Stat., 1005): "When the office of chief of bureau is filled by an officer below the rank of rear admiral, said officer shall, while holding said office, have the rank of rear admiral." The latter provision was in turn superseded by act of July 1, 1918 (40 Stat., 717), which provided that "hereafter chiefs of bureaus of the Navy

Department, including the Judge Advocate General of the Navy, shall, while so serving, have corresponding rank and shall receive the same pay and allowances as are now or may hereafter be prescribed by or in pursuance of law for chiefs of bureaus of the War Department and the Judge Advocate General of the Army." By act of October 6, 1917 (40 Stat., 411), it was provided with reference to the Army that "hereafter, the chief of any existing staff corps, department, or bureau, except as is otherwise provided for the Chief of Staff, shall have the rank, pay, and allowances of major general."

See note to section 421, Revised Statutes, for cases concerning the rank status, etc., of chiefs of bureaus.

**Sec. 1473.** [Retired from position of chief of bureau.] Officers who have been or who shall be retired from the position of chiefs of the Bureau of Medicine and Surgery, of Provisions and Clothing, of Steam Engineering, or of Construction and Repair, by reason of age or length of service, shall have the relative rank of commodore.—(3 Mar., 1871, c. 117, s. 12, v. 16, p. 537.)

Amendment to this section was made by act of July 19, 1892 (27 Stat., 243, 245), by which the Bureau of Provisions and Clothing was designated as Bureau of Supplies and Accounts; also by act of March 3, 1899, section 7 (30 Stat., 1006), which changed the words "the relative rank of" to "the rank of," and provided that chiefs of bureaus, while so serving, shall have the rank of rear admiral; and by act of June 4, 1920 (41 Stat., 828), which changed the designation of the Bureau of Steam Engineering to Bureau of Engineering.

By act of May 13, 1908 (35 Stat., 128), it was provided that "any officer of the Navy who is now serving or shall hereafter serve as chief of a bureau in the Navy Department, and shall subsequently be retired, shall be retired with the rank, pay and allowances authorized by law for the retirement of such bureau chief."

Rank of staff officers retired for causes incident to the service. See section 1482, Revised Statutes.

See generally note to section 421, Revised Statutes, as to retirement of chiefs of bureaus.

**Rank on retirement now rear admiral.**—The Navy personnel act of March 3, 1899, section 7 (30 Stat., 1005), has now substituted the rank of rear admiral in the cases of retirement of staff officers, in which such retirement was authorized by the Revised Statutes with the relative rank of commodore. (25 Op. Atty. Gen., 294, 296, citing 22 Op. Atty. Gen., 433; compare 5 Comp. Dec., 821.)

Retirements under section 1473, Revised Statutes, are made in practice with the rank

of rear admiral instead of commodore, as was provided therein. (File 3980-1402, Oct. 31, 1917.)

For other cases, see note to section 1466, Revised Statutes.

**Retirement of a chief of bureau creates a vacancy,** but is not a vacancy created by death, resignation, absence, or sickness which may be filled in accordance with sections 178-181, Revised Statutes. Congress having made no provision for the temporary discharge of his duties in this case, the bureau remains without a head until the place is filled pursuant to the provisions of section 421, Revised Statutes. The order of the President designating the Chief Constructor as Acting Chief of the Bureau of Steam Engineering [now Engineering], upon the retirement of the chief of that bureau, was unauthorized. (27 Op. Atty. Gen., 337; compare cases noted under sec. 179, R. S.)

**"Retired" defined.**—There is a difference between retiring from the office and retirement in the sense of section 1473. All staff bureau chiefs who are entitled to retirement under the statutes when serving as Paymaster General, etc., have the right to bear the appropriate title followed by the word "retired"; but of course this is not so when the service as bureau chief is followed, not by retirement but by return to other active duties. (25 Op. Atty. Gen., 294.)

**Retirement affects tenure of office.**—That the retirement of an officer from active service affects his tenure of office as bureau chief, as well as his office in the line, is recognized by Congress in the provisions of section 1473, Revised Statutes. (27 Op. Atty. Gen., 337.)



**Retirement in cases not covered by this section.**—The contention that, since section 1473, Revised Statutes, specifically provides that chiefs of four of the bureaus shall be retired with the rank of commodore, therefore Congress can not have intended to confer the same privilege on the chiefs of the other four bureaus, or on the Judge Advocate General, besides imputing to Congress an intention to make a discrimination for which no possible reason can be suggested, loses its force when the act of March 3, 1871 (which is the source of R. S. 1471, 1472, 1473, and 1482), is read as a whole in the light of the situation existing when it was passed. When this is done with a desire to ascertain the actual intention of Congress, the proper inference will be seen to be that Congress intended, not to discriminate between one chief of bureau and another, but to confer upon the chiefs of the so-called staff bureaus a grade or rank on retirement which it thought already appertained to the chiefs of the so-called line bureaus. (31 Op. Atty. Gen., 505.)

It seems clear when the statutes relating to this subject are considered as a whole and in their order, that Congress intended: (a) As a general thing to equalize the grade or rank of an officer of the Navy on retirement with that enjoyed by him at the moment of his retirement; (b) to use the word "grade" in section 1457, Revised Statutes, as a general term indicating any marked distinction fixed by law among officers which would be expressed in their commission, title, or pay, not excluding chiefs of bureaus having a certain rank; (c) not to make any distinction between one occupant of a bureau office and another because of the line or staff source from which he came. (31 Op. Atty. Gen., 505, holding that "a line officer of the Navy, retired while serving as Chief of Bureau or Judge Advocate General, should be placed on the retired list with the rank attached by law to the said position of Chief of Bureau or Judge Advocate General.")

For other cases relating to retirement of chiefs of bureaus, etc., see note to section 421, Revised Statutes.

**Sec. 1474. [Medical Corps.]** Officers of the Medical Corps on the active list of the Navy shall have relative rank as follows:

Medical directors, the relative rank of captain.

Medical inspectors, the relative rank of commander.

Surgeons, the relative rank of lieutenant-commander or lieutenant.

Passed assistant surgeons, the relative rank of lieutenant or master.

Assistant surgeons, the relative rank of master or ensign.—(3 Mar., 1871, c. 117, s. 5, v. 16, p. 535.)

Amendment to this section was made by act of June 7, 1900 (31 Stat., 697), which provided that "assistant surgeons shall rank with assistant surgeons in the Army"; by section 1168, Revised Statutes, the lowest rank of an assistant surgeon in the Army during the first three years of service was that of a lieutenant of cavalry; the effect of the act of 1900 was therefore to give to assistant surgeons in the Navy the rank of lieutenant (junior grade) instead of ensign. (*Plummer v. U. S.*, 224 U. S., 138.) The act of March 3, 1903 (32 Stat., 1197), authorized the appointment of additional passed assistant and assistant surgeons "with the rank, respectively, of lieutenant and lieutenant (junior grade)." Further amendment to this section was made by act of August 29, 1916 (39 Stat., 577), which provided that "all assistant surgeons shall from date of their original appointment take rank and precedence with lieutenants (junior grade)." The act last cited further created the rank of rear admiral for medical directors, in addition to the rank of captain, the distribution to be "one-half medical directors with the rank of rear admiral to four medical directors with the rank of captain, to eight medical inspectors with the rank of commander, to eighty-seven and one-half in the grades below medical inspector." (See note to sec. 1368, R. S.) The words, "the relative rank of," as used in this section, were changed to read, "the rank of," by act of March 3,

1899, section 7 (30 Stat., 1006). The title "master" was changed to "lieutenant (junior grade)" by act of March 3, 1883 (22 Stat., 472).

By act of August 29, 1916 (39 Stat., 576), it was provided that "officers of the lower grades of the Medical Corps, \* \* \* shall be advanced in rank up to and including the rank of lieutenant commander with the officers of the line with whom or next after whom they take precedence under existing law." By act of May 22, 1917, section 17 (40 Stat., 89), it was enacted that the above clause in the act of August 29, 1916, shall not operate "to disturb the relative position of officers in the Medical Corps with reference to precedence or promotion, but all such officers otherwise qualified shall be advanced in rank with or ahead of officers in said corps who were their juniors on the date of said act."

By act of July 1, 1918 (40 Stat., 718), it was provided that the advancement of staff officers of the Navy to the ranks of commander, captain, and rear admiral, shall be by selection in the manner therein provided.

Examinations were discontinued for promotion of staff officers in grade by act of May 22, 1917, section 20 (40 Stat., 89), which act and section also reenacted a provision in the act of March 4, 1917 (39 Stat., 1182), requiring examinations of staff officers for advancement in rank.

See sections 1368-1375, Revised Statutes, and notes thereto, concerning the organization of the Medical Corps, and appointments, promotions, etc., therein.

**Historical note.**—It is obvious that every military establishment, whether Army or Navy, must have connected with it certain organizations of business or scientific men whose services, although auxiliary to the combatant force of such establishment, are yet necessary to its efficiency. These constitute the staff corps as distinguished from the line. It is also necessary that the officers of such a corps, being gentlemen who render important and valuable services, should be brought into such relations with the officers of the line that their own dignity shall be preserved, and the proper order of a military establishment maintained. While, therefore, rank is primarily established with reference to those who are entitled to command, with a view to determining the order in which they are to command, it is necessary to give to the grades created in other corps a rank which shall either be the same with the rank of the officers of the line, or which, by relation to the rank of the officers of the line, shall entitle those holding it to such honor, attention, and respect as is accorded to officers of the line of the rank to which it relates or is assimilated. Such rank, whether it be absolute in terms, or whether it be termed assimilated or relative rank, may, of course, be always subject to such exceptions as the legislative power may deem proper. Orders were early passed by various secretaries of the Navy providing that certain officers of the staff should rank with certain officers of the line, the same orders providing that this should not give them authority to exercise military command, and should give no additional right to quarters. Two general orders of this nature, of Secretary Bancroft and Secretary Mason, relating to surgeons and pursers, were confirmed by the act of August 5, 1854 (sec. 4, 10 Stat., 587). A similar order by Mr. Toucey in relation to engineers was also confirmed by a subsequent statute. These orders did not give to the staff officers to whom they referred the same rank as that held by officers of the line, but a rank equal to and assimilated with that of officers of the line. In January 1871 a bill was passed by the House of Representatives which gave to each staff officer definite or absolute rank, the phrase used in regard to such officers, e. g., being "13 pay inspectors who shall have the rank of commander." This bill was the subject of much discussion, and in the Senate it was amended and finally passed by both houses of Congress in a form which gave to the officers of the staff relative rank, the phrase used in regard to such officers being, e. g., "13 pay inspectors who shall have the relative rank of commander." This statute is embodied in sections 1474-1480, Revised Statutes. It is impossible to conceive why this change was made if Congress, when it finally passed the bill, did not suppose that the "relative" rank of commander was something different from the rank or grade of commander. The terms seem almost to force the conclusion that the pay inspector was to have the rank of commander by reference or relation to the rank held by a commander in the line. While un-

doubtedly Congress might provide that he should have the absolute rank of commander and might annex to it appropriate conditions considering the duties expected to be performed by him, such as that he should not exercise military command, it is apparent that in inserting the word "relative" Congress has made the provision which it deemed necessary for the respect which was undoubtedly to be accorded to him. In the Army it is no doubt true that certain officers whose duties are strictly those of staff officers, like the officers of the Pay Corps of the Army, have absolute rank (see sec. 1182, R. S.), but it will be observed that neither the word "relative" nor any word expressive of the same idea is found in the section. These officers of the Army are identified with certain grades of the line by appropriate words conferring absolutely the rank of those grades, but by the use of the word "relative" Congress indicates its intention to make the grades of the Pay Corps of the Navy equal to but not identical with the grades of the line with which they are connected by relation. (16 Op. Atty. Gen., 414.)

On December 24, 1862, the Attorney General rendered an opinion to the Secretary of the Navy (10 Op. Atty. Gen., 413) holding that the latter had authority under the law to issue regulations fixing the "relative rank of the line and civil or staff officers of the Navy." Following this opinion it was provided by regulation that "surgeons, paymasters, naval constructors, chief engineers, chaplains, professors of mathematics, passed assistant surgeons, secretaries, assistant surgeons, assistant naval constructors, assistant paymasters, first assistant engineers, second assistant engineers, third assistant engineers, clerks, carpenters, and sailmakers are to be regarded as staff officers, and all other officers of the service as line officers. The relative rank between the officers of these two classes is to be as follows: Assistant surgeons to rank with masters," etc. (Navy Regs., 1865, Art. II; par. 5 et seq.; Navy Dept. order Mar. 3, 1863.) On March 31, 1869, the Attorney General (13 Op. Atty. Gen., 10) dissented from the previous opinion of his department, above cited, and held that certain regulations issued by the Secretary of the Navy, with the approbation of the President, on March 13, 1863, "establishing and increasing the relative rank of the staff officers of the Navy," were invalid. By General Order No. 120 of April 1, 1869, the Secretary of the Navy published this latter opinion of the Attorney General, and stated that, in accordance therewith, "the order of March 3, 1863, and the Navy Regulations, Article II, paragraphs 6 to 28 (both inclusive), are hereby revoked and annulled." The same general order also published the rank of staff officers as then established by law. Thereafter by act of March 3, 1871 (16 Stat., 535, et seq.), embodied in sections 1474-1480, Revised Statutes, Congress established the relative rank of various staff officers.

By the Navy personnel act of March 3, 1899, section 7 (30 Stat., 1006), it was provided "that all sections of the Revised Statutes which, in defining the rank of officers or positions in the Navy, contain the words 'the relative rank of' are hereby amended so as to read 'the rank of,'



but officers whose rank is so defined shall not be entitled, in virtue of their rank to command in the line or in other staff corps."

**Command of hospital ships by medical officers.**—See note to section 1488, Revised Statutes.

**Clerical error in stating rank of medical officer in commission.**—An assistant surgeon was nominated to the Senate for appointment as a passed assistant surgeon without mention of the rank, whether lieutenant or lieutenant (junior grade), to be held under such appointment; by clerical error he was commissioned as passed assistant surgeon with the rank of lieutenant instead of the rank of lieutenant (junior grade). While it is true that section 1474, Revised Statutes, provides that passed assistant surgeons shall have the rank of lieutenant or lieutenant (junior grade), without specifying the number in each rank, yet the rank is not left to the discretion of the appointing power but is determined by section 1485, Revised Statutes. To have given this officer the rank of lieutenant at the time of his promotion would have advanced him about 20 numbers in rank, which, without the advice and consent of the Senate, is specifically prohibited by section 1506, Revised Statutes, as amended by act of June 17, 1878 (20 Stat., 143). Accordingly, *held* that the officer in question is entitled only to the pay of lieutenant (junior grade). (11 Comp. Dec., 43; compare 26 Op. Atty. Gen., 496, noted under sec. 1485, R. S., holding that secs. 1485 and 1486, R. S., have nothing whatever to do in determining whether an officer should be advanced in one rank or more than one.)

**Retirement of medical officer with higher rank than that provided for the active list.**—Under section 1474, Revised Statutes, the highest grade in the Medical Corps was that of medical director with the relative rank of captain; and under section 1475, Revised Statutes, the highest officers of the Pay Corps were pay directors with the relative rank of captain. In the active list there was no higher relative rank to be attained in either of these corps than that of captain. Nevertheless, *held* that under section 11 of the Navy personnel act of March 3, 1899 (30 Stat., 1007), providing for the retirement of certain officers with the rank "of the next higher grade," a pay director and a medical director having the rank of captain were entitled to be retired with the rank of rear admiral, although this will result in a higher rank than that to which it would be possible for them to attain in the active service. Of course, one occupying the highest rank in the Navy could not by retirement or other means be promoted to a higher grade when none exists. But section 11 of the act cited refers to the rank or grade of officers of the Navy generally, without respect to the limitations of rank placed upon the different branches of staff service. (22 Op. Atty. Gen., 433.)

The officers of different staff corps, such as the Medical Corps and the Pay Corps, have separate and distinct titles appropriate to the nature of their service and to their rank in the corps; and in addition thereto are given relative rank by the same title that is applied to

officers of the line. The line furnishes the standard of rank for officers of all classes. A captain of the line is merely a captain and has but one title to designate both his office and his rank. An officer of the staff has an official title to identify his position in his corps and also a relative rank in addition, the latter being arbitrarily fixed by Congress to designate his relative rank in the service in accordance with the line standard. The rank conferred upon a person holding the position of medical director is purely statutory and arbitrary, and there is no reason why a retired medical director should not hold a higher relative rank than that which is permitted on the active list. That Congress has in other instances contemplated a similar result is apparent from the provisions of section 1481, Revised Statutes, which provides that certain staff officers shall when retired have the relative rank of commodore. (22 Op. Atty. Gen., 433.)

**Rank of acting assistant surgeons.**—By act of May 4, 1898 (30 Stat., 369, 380), the President was authorized to appoint for temporary service 25 acting assistant surgeons "who shall have the relative rank and compensation of assistant surgeons." The act of June 7, 1900 (31 Stat., 697), raised the rank of assistant surgeons in the Navy by providing that "assistant surgeons shall rank with assistant surgeons in the Army." Prior to that act the rank of assistant surgeons in the Navy, upon entrance into the Navy, was that of ensign. By Revised Statutes 1168 the lowest rank of an assistant surgeon in the Army, during the first three years of service, was that of a lieutenant of cavalry. The effect of the act of 1900 was, therefore, to give assistant surgeons in the Navy a higher rank—that is, to raise them from the rank of ensign to that of lieutenant (junior grade). By circular of the Surgeon General of the Navy, December 29, 1902, it was stated that acting assistant surgeons would have the same rank and pay as assistant surgeons in the regular service. Claimant was commissioned as an acting assistant surgeon, the commission stating his rank to be that of lieutenant (junior grade). *Held*, that the act of 1898 provided for a standard by which to determine the rank and pay of the acting assistant surgeons, and that under said act the standard was the rank and pay of assistant surgeons in force at the time when the services of the acting assistant surgeons were rendered, and not the rank and pay in force when the act of 1898 was enacted, which had become a nonexistent or obsolete standard. The relation which the act of 1898 established between the rank and pay of acting assistant surgeons and assistant surgeons in reason must rest upon the substantial identity of the services to be rendered by the incumbents of both offices. (*Plummer v. U. S.*, 224 U. S., 137.)

**A passed assistant surgeon in the Navy with the rank of lieutenant (junior grade)** corresponds in rank with an assistant surgeon in the Army with the rank of a first lieutenant, and a passed assistant surgeon in the Navy with the rank of lieutenant corresponds in rank with as assistant surgeon in the Army with the rank of captain. His pay is attached to his rank by section 7 of the Navy personnel act of March 3, 1899. Therefore a passed assistant surgeon in

the Navy with the rank of lieutenant is entitled to the pay of an officer of corresponding rank in the Army, to-wit, that of an assistant surgeon with the rank of captain. (9 Comp. Dec., 676, modifying 5 Comp. Dec., 943.)

There is no ground for distinction between assistant surgeons and passed assistant surgeons that would give mounted pay to one and deny it to the other. (9 Comp. Dec., 676.)

Section 1466, Revised Statutes, assimilates in rank lieutenants in the Navy with captains

in the Army. Under the Navy personnel act of March 3, 1899 (30 Stat., 1007), and section 1466, Revised Statutes, passed assistant surgeons of the Navy as well as assistant surgeons rank with captains in the Army. (*U. S. v. Farenholt*, 206 U. S., 226.)

As to status of passed assistant surgeons, see note to section 1368, Revised Statutes.

**Advancement in rank and promotion of staff officers.**—See note to section 1480, Revised Statutes.

**Sec. 1475. [Supply Corps.]** Officers of the Pay Corps on the active list of the Navy shall have relative rank as follows:

Pay directors, the relative rank of captain.

Pay inspectors, the relative rank of commander.

Paymasters, the relative rank of lieutenant-commander or lieutenant.

Passed assistant paymasters, the relative rank of lieutenant or master.

Assistant paymasters, the relative rank of master or ensign.—(3 Mar., 1871, c. 117, s. 6, v. 16, p. 536.)

Amendment to this section was made by act of March 3, 1883 (22 Stat., 472), which changed the title of "master" to "lieutenant (junior grade)"; by act of March 3, 1899, section 7 (30 Stat., 1006), which changed the words, "the relative rank of," to read, "the rank of;" by act of July 11, 1919 (41 Stat., 147), which provided that "hereafter the Pay Corps shall be called the Supply Corps"; by act of August 29, 1916 (39 Stat., 577), which created the rank of rear admiral for pay directors, in addition to the rank of captain, the distribution to be "one-half pay directors with the rank of rear admiral to four pay directors with the rank of captain, to eight pay inspectors with the rank of commander, to eighty-seven and one-half in the grades below pay inspector." (See note to sec. 1376, R. S.)

By act of August 29, 1916 (39 Stat., 576), it was provided that "officers of the lower grades of the \* \* \* Pay Corps \* \* \* shall be advanced in rank up to and including the rank of lieutenant commander with the officers of the line with whom or next after whom they take precedence under existing law."

By act of July 1, 1918 (40 Stat., 718), it was provided that the advancement of staff officers of the Navy to the ranks of commander, captain, and rear admiral shall be by selection in the manner therein provided.

Examinations were discontinued for promotion of staff officers in grade by act of May 22, 1917, section 20 (40 Stat., 89), which act and section also reenacted a provision in the act of March 4, 1917 (39 Stat., 1182), requiring examinations of staff officers for advancement in rank.

See sections 1376-1389, Revised Statutes, and notes thereto, concerning the organization of the Supply Corps, and appointments, promotions, etc., therein.

**Historical note.**—See note to section 1474, Revised Statutes.

**Retirement with higher rank than that provided for the active list.**—See note to section 1474, Revised Statutes.

**Rank of paymasters and assistant paymasters.**—The act of June 7, 1900 (31 Stat., 697), provides that "assistant surgeons shall rank with assistant surgeons in the Army." There is no statute which makes assistant paymasters having the rank of ensign and lieutenant (junior grade) rank with assistant paymasters in the Army. Nor is there any law whereby paymasters in the Navy shall rank with paymasters in the Army, yet there is a direct correspondence under these laws between the paymaster with the rank of lieutenant in the Navy and the paymaster with the rank of "captain, mounted," in the Army. Under section 1466, Revised Statutes, lieutenants in the Navy rank with captains in the Army, lieutenants (junior grade) with first lieutenants, and ensigns with second lieutenants. The lowest grade or rank in the pay corps of the Army is that of captain, who is given by law the rank of "captain, mounted." There is not, and never has been, any rank in the Pay Corps of the Army below that of captain. Accordingly, *held*, that under the Navy personnel act of March 3, 1899, section 13 (30 Stat., 1007), providing that officers of the Pay Corps of the Navy shall receive the same pay provided by or in pursuance of law for the officers of corresponding rank in the Army, a paymaster in the Navy with the rank of lieutenant has corresponding rank with a "captain, mounted," in the Pay Corps of the Army, and that, there being no corresponding grade in the Pay Corps of the Army to that of assistant paymaster in the Navy with the rank of ensign, or lieutenant (junior grade), the latter corresponds in rank to second lieutenant or first lieutenant in the Infantry of the Army, and is entitled only to Infantry pay. (*Stevens v. U. S.*, 43 Ct. Cls., 484; 15 Comp. Dec., 124.)

**Advancement in rank and promotion of staff officers.**—See note to section 1480, Revised Statutes.



The permanent rank of rear admiral on the active list of the Pay Corps (now Supply Corps) was first authorized by act of June 24, 1910 (36 Stat., 607) which provided that chiefs of bureaus eligible for retirement after 30 years' service should be entitled to the permanent rank, title, and emoluments of a chief of bureau, while on the active list, the same as they would have received if retired for age or length of service; this provision was repealed by act of August 22,

1912 (37 Stat., 328), which contained a proviso that no officer who had received the benefits of the act of 1910 should be deprived thereof on account of such repeal; prior to its repeal two officers of the Pay Corps, Paymaster General Eustace B. Rogers (file 22724-18) and Paymaster General Thomas J. Cowie, had been permanently commissioned with the rank of rear admiral. (See note to sec. 421, R. S., under "Rank of chiefs of bureaus.")

### Sec. 1476. [Engineer Corps. Superseded.]

This section provided as follows:

"Sec. 1476. Officers of the Engineer Corps on the active list shall have relative rank as follows:

"Of the chief engineers, ten shall have the relative rank of captain, fifteen that of commander, and forty-five that of lieutenant-commander or lieutenant.

"First assistant engineers shall have the relative rank of lieutenant or master, and second assistant engineers that of master or ensign."—(3 Mar., 1871, c. 117, s. 7, v. 16, p. 536. 24 Feb., 1874, c. 35, v. 18, p. 17.)

It was amended by act of February 24, 1874, section 1 (18 Stat., 17), which changed the title of first assistant engineer to passed assistant engineer and changed the title of second assistant engineer to assistant engineer.

It was superseded by act of August 5, 1882, section 1 (22 Stat., 286), which provided that

the active list of the Engineer Corps should thereafter consist of 10 chief engineers with the relative rank of captain, 15 chief engineers with the relative rank of commander, 45 chief engineers with the relative rank of lieutenant commander or lieutenant, 60 passed assistant engineers and 40 assistant engineers with the relative rank for each as previously fixed by law.

The act of March 3, 1883 (22 Stat., 472), changed the title of "master" to "lieutenant (junior grade)."

The act of March 3, 1899 (30 Stat., 1004), abolished the Engineer Corps and transferred the members thereof to the line of the Navy. (See note to sec. 1390, R. S.) The appointment and assignment of line officers for engineering duty only are authorized by act of August 29, 1916 (39 Stat., 580).

### Sec. 1477. [Constructors. Superseded.]

This section provided as follows:

"Sec. 1477. Of the naval constructors, two shall have the relative rank of captain, three of commander, and all others that of lieutenant-commander or lieutenant. Assistant naval constructors shall have the relative rank of lieutenant or master."—(3 Mar., 1871, c. 117, s. 9, v. 16, p. 536.)

It was amended by act of March 3, 1883 (22 Stat., 472), which changed the title "master" to "lieutenant (junior grade)."

It was superseded by act of March 3, 1899, section 10 (30 Stat., 1006), which provided "that of the naval constructors five shall have the rank of captain, five of commander, and all others that of lieutenant commander or lieutenant. Assistant naval constructors shall have the rank of lieutenant or lieutenant (junior grade)."

The act of August 29, 1916 (39 Stat., 577), created the rank of rear admiral for naval constructors in addition to the ranks theretofore authorized, the distribution to be "one-half naval constructors with the rank of rear admiral to eight and one-half naval constructors with the rank of captain, to fourteen naval constructors with the rank of commander, to seventy-one naval constructors and assistant naval constructors with rank below commander." (See note to sec. 1402, R. S.) The permanent rank of rear admiral on the active list in special cases was previously authorized in the Construction Corps by act of June 24, 1910 (36 Stat., 607), which provided that chiefs of bureaus eligible for retirement after 30 years' service should be entitled to the permanent rank, title, and emoluments of a chief of bu-

reau, while on the active list, the same as they would have received if retired for age or length of service; this provision was repealed by act of August 22, 1912 (37 Stat., 328), which contained a proviso that no officer who had received the benefits of the act of 1910 should be deprived thereof on account of such repeal; prior to its repeal one officer of the Construction Corps, Chief Constructor Washington L. Capps, had been permanently commissioned with the rank of rear admiral (see note to sec. 421, R. S., under "Rank of chiefs of bureaus").

See sections 1402-1404, Revised Statutes, and notes thereto, concerning the organization of the Construction Corps, and appointments, promotions, etc., therein.

**Historical note.**—See note to section 1474, Revised Statutes.

**Advancement in rank and promotion of staff officers.**—See note to section 1480, Revised Statutes.

By act of August 29, 1916 (39 Stat., 576), it was provided that "officers of the lower grades of the \* \* \* Construction Corps, \* \* \* shall be advanced in rank up to and including the rank of lieutenant commander with the officers of the line with whom or next after whom they take precedence under existing law."

By act of July 1, 1918 (40 Stat., 718), it was provided that the advancement of staff officers of the Navy to the ranks of commander, captain, and rear admiral shall be by selection in the manner therein provided.

Examinations were discontinued for promotion of staff officers in grade by act of May 22, 1917, section 20 (40 Stat., 89), which act and

section also reenacted a provision in the act of March 4, 1917 (39 Stat., 1182), requiring examinations of staff officers for advancement in rank.

**Rank of naval constructors held to be their grade.**—Naval constructors belong to the staff; nevertheless they have been treated as eligible under section 423, Revised Statutes, for appointment as Chief of the Bureau of Construction and Repair, which section provided that the chief of the bureau shall be appointed from the list of officers of the Navy "not below the grade of commander," and shall be a skillful naval constructor. Thus under the prac-

tical interpretation of section 423, naval constructors are treated as officers of the Navy, and their relative rank as the actual rank or grade required by the section; but it is to be observed that in no other way could compliance be had with the explicit requirement that the officer appointed Chief of the Bureau of Construction and Repair be a "skillful naval constructor." Faults in expression were disregarded in order to carry out the manifest intention of the law-maker. (22 Op. Atty. Gen., 47. As to difference between rank and grade, see notes to secs. 421, 422, 423, 1362, 1457, and 1479, R. S.)

### Sec. 1478. [Civil engineers. Superseded.]

This section provided as follows:

"SEC. 1478. Civil engineers shall have such relative rank as the President may fix."—(3 Mar., 1871, c. 117, s. 9, v. 16, p. 536.)

It was amended by act of March 3, 1899, section 7 (30 Stat., 1006), which changed the words, "the relative rank of," as contained in all sections of the Revised Statutes defining the rank of officers or positions in the Navy, to read, "the rank of"; and by act of March 3, 1903 (32 Stat., 1197), which provided for the appointment of 12 assistant civil engineers, "of whom six shall have the rank of lieutenant (junior grade) and six the rank of ensign."

It was superseded by act of August 29, 1916 (39 Stat., 577), which created the rank of rear admiral for civil engineers, in addition to the ranks theretofore authorized, the distribution to be "one-half civil engineers with the rank of rear admiral to five and one-half civil engineers with the rank of captain, to fourteen civil engineers with the rank of commander, to eighty civil engineers and assistant civil engineers with the rank below commander." The permanent rank of rear admiral on the active list of the Civil Engineer Corps had previously been authorized for the benefit of Commander H. H. Rousseau by act of March 4, 1915 (38 Stat., 1191), which same act also extended the thanks of Congress to said officer for distinguished service rendered by him as a member of the Isthmian Canal Commission in constructing the Panama Canal.

By act of March 4, 1917 (39 Stat., 1184), it was provided that "officers of the Corps of Civil Engineers hereafter appointed shall, from the date of their original appointment, take rank and precedence with lieutenants (junior grade)."

**See note to section 1413, Revised Statutes,** as to organization of Civil Engineer Corps, and appointments, promotions, etc., therein.

**Advancement in rank and promotion of staff officers.**—See note to section 1480, Revised Statutes.

By act of August 29, 1916 (39 Stat., 576), it was provided that "officers of the lower grades of the \* \* \* Corps of Civil Engineers shall be advanced in rank up to and including the rank of lieutenant commander with the officers

of the line with whom or next after whom they take precedence under existing law."

By act of July 1, 1918 (40 Stat., 718), it was provided that the advancement of staff officers of the Navy to the ranks of commander, captain, and rear admiral shall be by selection in the manner therein provided.

By act of March 3, 1903 (32 Stat., 1197), it was provided that "promotions in the Corps of Civil Engineers shall be after such examination as the Secretary of the Navy may prescribe." Examinations were discontinued for promotion of staff officers in grade by act of May 22, 1917, section 20 (40 Stat., 89), which act and section also reenacted a provision in the act of March 4, 1917 (39 Stat., 1182), requiring examinations of staff officers for advancement in rank.

**Historical note.**—See note to section 1474, Revised Statutes.

By section 1478, Revised Statutes, which is a reenactment of the statute of March 3, 1871, "civil engineers shall have such relative rank as the President may fix." An examination of the original statute shows that the authority was given to the President "in his discretion." This discretion has never been exercised and no relative rank has been assigned to these officers. It is difficult to conceive that those can be considered as officers in the Navy who have no rank by which their relation to the other officers, or to the men, can be determined. In the absence of such action by the President *Held* that civil engineers are civil officers. (16 Op. Atty. Gen., 203.)

The authority of the President under the act of March 3, 1871 (sec. 1478, R. S.), "to determine and fix the relative rank of civil engineers," was not exercised until February 24, 1881, when their rank was fixed by him as follows: One with the relative rank of captain, two with the relative rank of commander, three with the relative rank of lieutenant commander, and four with the relative rank of lieutenant, which action was promulgated by a general order issued by the Secretary on that date. (17 Op. Atty. Gen., 126, holding that civil engineers are officers of the Navy and eligible for retirement as such. The general order referred to is G. O. No. 263, Feb. 24, 1881.)

For other cases as to status of civil engineers, see note to section 1413, Revised Statutes.



## Sec. 1479. [Chaplains. Superseded.]

This section provided as follows:

"SEC. 1479. Chaplains shall have relative rank as follows: Four, the relative rank of captain; seven, that of commander; and not more than seven, that of lieutenant-commander or lieutenant."—(3 Mar., 1871, c. 117, s. 9, v. 16, p. 536.)

It was amended by act of March 3, 1899, section 7 (30 Stat., 1006), which changed the words "the relative rank of" to read "the rank of"; by section 13 of the same act (30 Stat., 1007), which provided that "naval chaplains, who do not possess relative rank, shall have the rank of lieutenant in the Navy"; and by act of June 29, 1906 (34 Stat., 554), which provided that "naval chaplains hereafter appointed shall have the rank, pay, and allowances of lieutenant (junior grade) in the Navy until they shall have completed seven years of service, when they shall have the rank, pay, and allowances of lieutenant in the Navy; and lieutenants shall be promoted, whenever vacancies occur, to the grade of lieutenant commander, which shall consist of five numbers, and when so promoted shall receive the rank, pay, and allowances of lieutenant commander in the Navy; *Provided further*, That nothing herein contained shall be held or construed to increase the number of chaplains as now authorized by law or to reduce the rank or pay of any now serving."

It was superseded by act of June 30, 1914 (38 Stat., 404), which fixed the "total number of chaplains and acting chaplains in the Navy," and provided that "of the total number of chaplains and acting chaplains herein authorized ten per centum thereof shall have the rank of captain in the Navy, twenty per centum the rank of commander, twenty per centum the rank of lieutenant commander, and the remainder to have the rank of lieutenants and lieutenants, junior grade."

The same act (38 Stat., 403, 404) provided that "while so serving acting chaplains shall have the rank, pay, and allowances of lieutenant, junior grade, in the Navy. After three years' sea service on board ship each acting chaplain before receiving a commission in the Navy shall establish to the satisfaction of the Secretary of the Navy by examination by a board of chaplains and medical officers of the Navy his physical, mental, moral, and professional fitness to perform the duties of chaplain in the Navy, and if found so qualified, shall be commissioned a chaplain in the Navy with the rank of lieutenant, junior grade. \* \* \* Naval chaplains hereafter commissioned from acting chaplains shall have the rank, pay, and allowances of lieutenant, junior grade, in the Navy until they shall have completed four years' service in that grade, when, subject to examination as above prescribed, they shall have the rank, pay, and allowances of lieutenant in the Navy, and chaplains with the rank of lieutenant shall have at least four years' service in that grade before promotion to the grade of lieutenant commander, after which service, chaplains shall be promoted as vacancies occur to the grades of lieutenant commander, commander, and captain."

The same act (38 Stat., 404) provided "that no provision of this section shall operate to reduce the rank, pay, or allowances that would have been received by any person in the Navy except for the passage of this section, and that all laws or parts of laws inconsistent with the provisions of this section be, and the same are hereby, repealed."

**Advancement in rank and promotion of chaplains.**—See note to section 1480, Revised Statutes.

By act of July 1, 1918 (40 Stat., 718), it was provided that the advancement of staff officers of the Navy to the ranks of commander, captain, and rear admiral shall be by selection in the manner therein provided.

Examinations were discontinued for promotion of staff officers in grade by act of May 22, 1917, section 20 (40 Stat., 89), which act and section also reenacted a provision in the act of March 4, 1917 (39 Stat., 1182), requiring examinations of staff officers for advancement in rank.

Chaplains with the rank of lieutenant and chaplains with the rank of lieutenant (junior grade) advanced since June 30, 1914 to the rank of lieutenant shall not be advanced in rank to lieutenant commander until they have served at least four years with the rank of lieutenant; except that this requirement of a minimum of four years' service with the rank of lieutenant shall not operate to reduce the rank, pay or allowances that would have been received by any person in the Navy except for the passage of the section relating to chaplains in the act of June 30, 1914. This prohibition as to promotion being retarded applies only to those chaplains in the service on June 30, 1914. (File 15721-7, Aug. 13, 1914.)

Naval chaplains commissioned after June 30, 1914, from acting chaplains, after at least four years' service in the rank of lieutenant shall be promoted to the rank of lieutenant commander, subject to the restrictions placed on the number of officers in the Corps of Chaplains who may have the rank of lieutenant commander. Thereafter they are promoted to the higher authorized ranks as vacancies occur therein without restriction as to the period of service in the intervening ranks before such advancements. (File 15721-7, Aug. 13, 1914.)

The act of June 30, 1914, makes no provision for the advancement of chaplains with the rank of lieutenant (junior grade) who were in the service on that date; the requirement of four years' service in the grade of chaplain with the rank of lieutenant (junior grade) applies only to those chaplains thereafter commissioned from acting chaplains. Said act, however, provides for the advancement of chaplains with the rank of lieutenant without regard to the date of their appointment as such. The advancement of chaplains with the rank of lieutenant (junior grade) in the service on June 30, 1914, is governed by the provisions of the laws in force prior to that date, which are not modified in this respect by the said act of June 30, 1914. The provision that nothing in said enactment shall operate to reduce the rank,

etc., that would have been received by any person in the Navy except for the passage thereof prevents advancement from being retarded, but does not provide for accelerating advancement in rank to lieutenant in their cases. In other words, they are required to serve seven years as chaplain with the rank of lieutenant (junior grade), as required by the act of June 29, 1906, before being advanced in rank to lieutenant. (File 15721-7, Aug. 13, 1914.)

The requirement of four years' service with the rank of lieutenant prior to advancement to the rank of lieutenant commander is not waived in order that vacancies created by reason of the passage of the act of June 30, 1914, may be immediately filled, but it is waived where its effect would be to delay promotions that would have been made irrespective of that act, such as to fill vacancies created by death, resignation or retirement of officers occupying the limited number of positions. (File 15721-7, Aug. 13, 1914.)

Chaplains with the rank of lieutenant commander in the service on June 30, 1914, are advanced in rank to commander and captain as vacancies occur in those ranks, without regard to length of service with the rank of commander or lieutenant commander. (File 15721-7, Aug. 13, 1914.)

The requirement of four years' service in the grade of chaplain with the rank of lieutenant before promotion to the grade of chaplain with the rank of lieutenant commander, should not be held to retard the promotion of chaplains in the service on June 30, 1914, who have completed seven years in the rank of lieutenant (junior grade), as required by the act of June 29, 1906, such promotion being to fill vacancies in the higher ranks in the grade of chaplain; because the act of June 30, 1914, provides that no provision thereof shall operate to reduce the rank, pay or allowances that might have been received by any person in the Navy except for the passage of the chaplain section therein. However, a chaplain would not be entitled to promotion to any rank above that of lieutenant, even after four years' service as a lieutenant, unless a vacancy occurred in the higher rank. Although the act of August 29, 1916, changed the retiring age from 62 to 64 years, and if this had not been done a vacancy would have been created by the retirement of a chaplain for age upon his reaching 62 years, nevertheless the

provision in said act of August 29, 1916, that "nothing contained in this act shall be construed to reduce the rank, pay, or allowances of any officer in the Navy or Marine Corps as now provided by law," does not entitle a junior officer to promotion in rank which he would have received had the senior officer been retired for age at 62 years. On the date of said act of August 29, 1916, the chaplain in question had the rank, pay, and allowances of lieutenant, none of which has been reduced by the operation of said act. The act of August 29, 1916, changing the retirement age, may have operated to retard his advancement by delaying the retirement of the senior chaplain for age, but it did not operate to reduce the rank, pay, and allowances to which he was then or is now entitled by law. Accordingly, held that the chaplain in question is not entitled to promotion to the rank of lieutenant commander, and will not be entitled to such advancement until after a vacancy occurs in said rank for which he qualifies on examination as required by section 20 of the act of May 22, 1917. (File 15721-20, Sept. 24, 1918.)

**"Grade" and "rank" in the Chaplain Corps.**—The word "grade" as used in the act of June 30, 1914, is an obvious error. There are but two grades in the Corps of Chaplains; first, the grade of chaplain, in which officers are distributed in the "ranks" of captain, commander, lieutenant commander, lieutenant, and lieutenant (junior grade); and secondly, the grade of acting chaplain, in which the officers have the "rank" of lieutenant (junior grade). It is necessary to read the word "grade" as "rank" in said act in order to conform to the well-established meaning and usage of the words "grade" and "rank." (File 15721-7, Aug. 13, 1914. For other cases concerning "rank" and "grade" see notes to secs. 421, 422, 423, 1362, 1457, 1477, and 1480, R. S.)

**Pay of chaplains.**—See act of August 29, 1916 (39 Stat., 581), providing that "hereafter all commissioned officers of the active list of the active list of the Navy shall receive the same pay and allowances according to rank and length of service." It had previously been provided by act of May 13, 1908 (35 Stat., 128), that "the pay and allowances of chaplains in the Navy shall in no case exceed that provided for lieutenant commanders." The pay of the various ranks in the Navy is provided for by act of May 13, 1908 (53 Stat., 127). See note to section 1556, Revised Statutes.

**Sec. 1480. [Professors of Mathematics. Promotions in staff corps.]** Professors of mathematics shall have relative rank as follows: Three, the relative rank of captain; four, that of commander; and five, that of lieutenant-commander or lieutenant. [The grades established in the six preceding sections for the staff corps of the Navy shall be filled by appointment from the highest members in each corps, according to seniority; and new commissions shall be issued to the officers so appointed, in which the titles and grades established in said sections shall be inserted; and no existing commission shall be vacated in the said several staff corps, except by the issue of the new commissions required by the provisions of this section; and no officer shall be reduced in rank or lose seniority in his own corps by any change



which may be required under the provisions of the said six preceding sections: *Provided*, That the issuing of a new appointment and commission to any officer of the pay corps under the provisions of this section shall not affect or annul any existing bond, but the same shall remain in force, and apply to such new appointment and commission.]—(31 May, 1872, c. 240, s. 1, v. 17, p. 192. 27 Feb., 1877, c. 69, v. 19, p. 244.)

Amendment to this section as originally embodied in the Revised Statutes was made by act of February 27, 1877 (19 Stat., 244), which added thereto the portion printed in brackets above, and which in this form was embodied in the second edition of the Revised Statutes. (See "Introduction," ante, under "II. The Revised Statutes.")

Amendment to this section was also made by act of March 3, 1899, section 7 (30 Stat., 1006), which changed the words, "the relative rank of," to read, "the rank of;" and by act of August 29, 1916 (39 Stat., 577), which provided that "hereafter no further appointments shall be made to the Corps of Professors of Mathematics, and that corps shall cease to exist upon the death, resignation, or dismissal of the officers now carried in that corps on the active and retired lists of the Navy."

By act of July 1, 1918 (40 Stat., 718), it was provided that the advancement of staff officers of the Navy to the ranks of commander, captain, and rear admiral, shall be by selection in the manner therein provided.

Examinations were discontinued for promotion of staff officers in grade by act of May 22, 1917, section 20 (40 Stat., 89), which act and section also reenacted a provision in the act of March 4, 1917 (39 Stat., 1182), requiring examinations of staff officers for advancement in rank.

"Pay Corps" is to be called the "Supply Corps," by act of July 11, 1919 (41 Stat., 147). As to bonds of officers in the Supply Corps, see note to section 1383, Revised Statutes.

See notes to sections 1399-1401, Revised Statutes, concerning organization of Corps of Professors of Mathematics, duties of professors of mathematics, etc.

**Constitutionality of amended section 1480.**—Section 1480 as amended being applicable to advancement from grade to grade in the staff corps, it seems plain that Congress sought thereby to restrict the President to the nomination of a single person of its own choosing, and this without regard to his comparative fitness for the larger responsibilities of the higher office. The attempt so to do is in opposition to that provision of the Constitution (Art. II, sec. 2), requiring him to nominate and by and with the advice and consent of the Senate to appoint. (31 Op. Atty. Gen., 80, citing and affirming 30 Op. Atty. Gen., 177 and 29 Op. Atty. Gen., 254.)

The President's power in regard to appointments and the Senate's check thereon was exhaustively canvassed in the Constitutional Convention. It was at one time moved that his power be restricted to "those cases not otherwise provided for by this Constitution or by law." The very ground urged in support of the motion was that otherwise the President would be given too much control over the

Army. The motion was decisively defeated (citing Ferrand Records, Federal Convention, Vol. II, p. 405). "Argument is unnecessary to demonstrate how idle it would have been to have conferred the power on the President if, in practice, it might have been taken from him by statute, as would be the case if section 1480, as amended, were to be applied. (Hamilton in the Federalist, No. 76; Story on the Constitution, Vol. II, secs. 1526-1533; and Judge Cooley's note to the last section.) Moreover the alleged right to a statutory promotion could never be enforced by mandamus or injunction, if the President should refuse to nominate, or the Senate should refuse to confirm the senior officer." (31 Op. Atty. Gen., 80.)

The provisions of section 1480, Revised Statutes, as amended, considered, and *held* (1) that advancement of staff officers in the Medical, Pay, and Construction Corps, and Corps of Civil Engineers, from the rank of captain to the rank of rear admiral, may be made upon selection by the President, whether or not such advancement be regarded as an advancement in rank only, or as an advancement in grade; and (2) that the promotion of all staff officers of the Navy to higher offices may be made upon selection by the President. (31 Op. Atty. Gen., 80. Note that this opinion was rendered by the Attorney General prior to the act of July 1, 1918, above cited, authorizing promotion by selection to certain higher ranks in the staff corps.)

For other cases, see note to section 1458, Revised Statutes; and see cases noted under Constitution, Article II, section 2, clause 2, "III. Power of Congress," and "IV. Statutory requirements and qualifications;" see also note to section 1372, Revised Statutes, "Promotion by seniority and not competitive examination."

**"Grades established," meaning of.**—The reference in section 1480 to "the grades established" in the six preceding sections for the staff corps of the Navy is the identical language of the ninth section of the act of March 3, 1871 (16 Stat., 536), which refers to the previous sections of that act in which grade and relative rank in the staff department of the Navy are created together *uno flatu*; whereas in the Revised Statutes the two subjects are treated in distinct chapters. This effectually disposes of the argument that there was any establishing of grades in the sections assigning relative rank; the mistake of the revisers in using the expression, "grades established," being too evident to admit of doubt. Accordingly, *held* that in the organization of the Medical Corps of the Navy there is no such grade as passed assistant surgeon, but that passed assistant surgeon is merely a class in the grade of assistant surgeon, notwithstanding that section 1480 as amended refers to "grades established" in the six preceding sections, and

that section 1474 provides for passed assistant surgeons with the relative rank of "lieutenant or master." (19 Op. Atty. Gen., 169; see note to sec. 1368, R. S., as to status of passed assistant surgeons.)

**Rank of rear admiral in the staff corps not a new "grade."**—The act of August 29, 1916 (39 Stat., 577), providing for the rank of rear admiral in certain staff corps of the Navy, is regarded as creating a new rank of rear admiral within the old grade of, e. g., medical director, rather than as creating a new grade of, e. g., "medical director with the rank of rear admiral." Accordingly, section 1480, Revised Statutes, as amended, because in terms applicable to such old grade, would apply to advancement thereto from a lower grade. (31 Op. Atty. Gen., 80, noted above, holding unconstitutional the requirement that promotions be made by seniority.)

The act of August 29, 1916 (39 Stat., 577), did not create new grades. The words in that act, "the total number of commissioned officers \* \* \* shall be distributed in the various grades," etc., while apt for distribution among existing, are inapt for the creation of new grades. (31 Op. Atty. Gen., 80.)

In each of the 16 different grades created by sections 1474-1479, inclusive, there was a separate and distinctive word title for each. Had the purpose been to create a new grade in the act of 1916, a new word title other than, e. g., "medical director," such as, for example, "surgeon general," would have been used. (31 Op. Atty. Gen., 80.)

**Advancement in rank without change of grade.**—Section 1480, Revised Statutes, being limited to grade can not affect advancement in rank; and because it is limited to those grades established by sections 1474-1479, Revised Statutes, it can not affect advancement in the staff corps from captain to rear admiral. (31 Op. Atty. Gen., 80.)

Whenever Congress creates a new grade or rank, without making any provision for filling it, the selection, in the case of a vacancy in grade, is made by the President by and with the advice and consent of the Senate (citing 29 Op. Atty. Gen., 117); while in the case of a vacancy in rank, it is made by the President as commander in chief of the Navy, without any action on the part of the Senate. (Citing Gen. Ainsworth's case, 22 Op. Atty. Gen., 480.) Neither in the act of August 29, 1916, nor in the old law is there any provision for advancement from the rank of captain to that of rear admiral in any of the various staff corps; and the function of selection in every such case must be exercised by the President alone under the rule stated. (31 Op. Atty. Gen., 80.)

Under section 1480, as amended, it is not necessary to issue new commissions or appointments to staff officers receiving an advance in rank within the same grade; the rank of such officers changes with their seniority in grade, and as they hold the same office, such change in rank may be indicated by a notification from the Secretary of the Navy. (20 Op. Atty. Gen., 358; see also 16 Op. Atty. Gen., 652; and see note to Constitution, Art. II, sec. 3, under "II. Duty to commission officers.")

The law requires that commissions shall be issued to officers appointed or promoted to different offices or grades in the Pay Corps of the Navy, but there is no law which requires a commission to be issued on mere change of rank without change of office (citing 20 Op. Atty. Gen., 358, 363). The mere advancement in rank without a change in office does not create an office and is not accomplished by an exercise of the appointing power. (17 Comp. Dec., 255.)

In the absence of a specific law for the advancement of a paymaster of the Navy from one rank to another within the grade of paymaster, such advancement is primarily within the discretion of the Executive, limited by the rule of seniority (sec. 1480) and subject to the consent of the Senate (sec. 1506, amended). This discretion has been exercised under a rule of many years' practice in determining the date when such officer attains a higher rank by the laws providing for precedence of officers of the line and staff corps (secs. 1485, 1486). The staff officer takes precedence next below a certain line officer of the same credited service. This line officer is known in the service as the staff officer's "running mate"; and by the practice referred to when the "running mate" is regularly promoted or fails in examination the staff officer is advanced to the higher rank. When the date for advancement of a paymaster with the rank of lieutenant to the rank of lieutenant commander has been determined by the rule aforesaid and his advancement to that rank on the date ascertained has been consented to by the Senate, he becomes entitled to the pay and emoluments of the higher rank from the date he so took rank. (16 Comp. Dec., 662; see also 17 Comp. Dec., 255. Compare note to sec. 1485, and note to Constitution, Art. II, sec. 3, under "II. Duty to commission officers.") By act of August 29, 1916 (39 Stat., 576), it was provided that "officers of the lower grades of the Medical Corps, Pay Corps, Construction Corps, and Corps of Civil Engineers shall be advanced in rank up to and including the rank of lieutenant commander with the officers of the line with whom or next after whom they take precedence under existing law"; and by act of July 1, 1918 (40 Stat., 718), it was provided that the advancement of staff officers of the Navy to the ranks of commander, captain, and rear admiral shall be by selection in the manner therein provided.

**Advancement in rank of professors of mathematics.**—There is no statute which limits the discretion of the Executive with regard to the division of the five junior officers of the Corps of Professors of Mathematics between the grades of lieutenant commander and lieutenant. If the President deems it appropriate to nominate one or more of the professors of mathematics of the Navy now commissioned in the grade of lieutenant to be commissioned in the grade of lieutenant commander, it is entirely within his discretion so to do. (Op. Atty. Gen., Mar. 2, 1909, file 26289-5a, following 26 Op. Atty. Gen., 511, noted under sec. 1376, R. S., in which it was held, with reference to the Pay Corps, that where the law fixes an aggregate number



of officers, in two grades, without providing for the distribution of such officers between said grades, the number to be appointed in each of the two grades is necessarily left to Executive discretion, to be controlled by the general laws and regulations providing for the advancement of officers in the naval service. See also file 26289-9, Mar. 30, 1912.)

**"Grade," "rank," and "title" in staff corps.**—While "grade" has the same meaning as "office," "rank" is merely a classification to fix the position of officers with respect to other officers in the same or in other grades as to command, precedence, privilege, or pay. "Rank" may be conferred by mere notification and without either examination, confirmation, or commission (Gen. Wood's case, 15 Ct. Cls., 151, 159; Wood v. U. S., 107 U. S., 414; 20 Op. Att. Gen., 358, 362, 363; 19 Op. Att. Gen., 169; 27 Op. Att. Gen., 376); so also while "grade" is only partially, "rank" is wholly, within the control of Congress (Wood v. U. S., 107 U. S., 414, 417; Senate Rep. 2163, 38th Cong., 2d sess.). (31 Op. Att. Gen., 80.)

The naval appropriation act of March 3, 1871 (16 Stat., 535-538), reorganized to some extent the staff corps of the Navy. As to the Medical Corps it provided, for example, for "medical directors who shall have the relative rank of captain," as to the Engineer Corps, for example, "chief engineers who shall have the relative rank of captain," "chief engineers who shall have the relative rank of commander." Of the naval constructors it said "two shall have the relative rank of captain, three of commander, and all others that of lieutenant commander or lieutenant." Section 10 then provided: "That the foregoing grades hereby established for the staff corps of the Navy, shall be filled by appointment from the highest numbers in each corps according to seniority, and that new commissions shall be issued to the officers so appointed, in which commissions the titles and grades herein established shall be inserted. Here we have created offices of, for example, "medical directors," "pay inspectors," "chief engineers," "naval constructors," with no provision for their position in the general scheme of the Navy, unless the added words, for example, "with the relative rank of captain" cover this omission. We then have the reference in section 10 to the foregoing establishment as one of "grades" and "titles" which must be specified in the commission. What "grades" and "titles" are referred to? It is clear both as a matter of common sense and of authority that the "grades" referred to in section 10 of the act of March 3, 1871, are, for example, "pay directors with the rank of captain," "chief engineers with the rank of commander," "chief engineers with the rank of lieutenant commander," etc. (31 Op. Att. Gen., 505, 513.)

Previous Attorneys General have held with respect to the phrases corresponding to "medical director with the rank of rear admiral," that the first two words represent the *title* to the office, while the latter words merely give it *rank* (citing 10 Op. Att. Gen., 377; 20 Op. Att. Gen., 358, reversing 16 Op. Att. Gen., 414, 417; 28 Op. Att. Gen., 429, 526; Op. Att.

Gen., Mar. 15, 1911, file 22724-16:3). (31 Op. Att. Gen., 80.)

The grade of chief engineer is one grade; they hold the same office; their relative rank among the chief engineers changes with their seniority in that grade, but the office of chief engineer remains the same. It is clear that the mere fact that different relative rank is assigned to officers whose office is designated by the same title does not necessarily put such officers in different grades. (20 Op. Att. Gen., 358, explaining 16 Op. Att. Gen., 414.)

Section 1475, Revised Statutes, does not give to a pay inspector the grade of commander. It confers upon him the rank of commander by relation only to the rank of a line officer of that grade. By the use of the terms, "relative rank," in that section, Congress intended to make the grades of the Pay Corps of the Navy equal to, but not identical with, the grades of the line with which they are by those terms associated. As generally used in reference to the naval and military service, the word "title" signifies the name by which an office or the holder of an office is designated and distinguished, and by which the officer has a right to be addressed; "grade" one of the divisions or degrees in the particular branch of the service according to which officers therein are arranged; and "rank" the position of officers of different grades or of the same grade, in point of authority, precedence, or the like, of one over another. Sometimes "rank" is used as synonymous with "grade," and the title of an officer, for example, admiral, vice admiral, etc., may denote both his grade and his rank. The designation, "pay inspector," expressed both title and grade in the Pay Corps. *Held*, that a commission in the following form, "John Doe, a pay inspector from the — day of —, A. D. 187—, with the relative rank of commander," gives the appropriate title and grade of the officer named therein, and fully satisfies the requirement of section 1480, Revised Statutes. (16 Op. Att. Gen., 414.)

A commission gives the officer, by the words "pay inspector," the title and grade to which he has a right. The addition of the relative rank, while not positively required by the statute, is eminently appropriate. Especially is this the case in view of the fact that, with reference to certain officers of the staff corps, this would be necessary, as their grade would be determined by the addition of their relative rank. (16 Op. Att. Gen., 414, citing secs. 1390 and 1476, R. S.)

The act of August 29, 1916 (39 Stat., 577), makes reference to the "grade of assistant surgeon," showing that the title of the grade was "assistant surgeon" and that the added words in section 1474, "the relative rank of master or ensign," were no part of the definition of the grade but merely a classification within it. (31 Op. Att. Gen., 80.)

The rank conferred upon professors of mathematics by section 1480, Revised Statutes, does not confer upon them the corresponding grade. A professor of mathematics with the rank of captain, placed on the retired list with the rank of rear admiral on account of civil war service (act Mar. 3, 1899, sec. 11, 30 Stat., 1007), held at the time of his retirement the grade of pro-

fessor of mathematics and not the grade of captain. (13 Comp. Dec., 211.)

The grade of an officer in the Navy is his official station, by which are regulated his powers, duties, and pay. His pay may be further governed by his time of service within a grade, either in fact rendered within the grade, or constructively performed therein through the force of statutes. That the office of professor of mathematics is a grade, is recognized by the act of April 17, 1866, section 7 (14 Stat., 38), which provides, "That hereafter no vacancy in the grade of professor of mathematics in the Navy shall be filled." (*Roget v. U. S.*, 148 U. S., 167, 171.)

Where the word "grade" is used in a statute relating to the Army to designate, indiscriminately, first an office and then a rank, it does not signify "office" in its first employment and "rank" in the second, but refers to a quality which may be common to both, viz, that of conferring relative superiority of position. The place of assistant surgeon is a step in promotion; so is that of captain on the medical staff. They are not steps as regards each other. The latter is a step within the former, a subgrade. It is a step above another grade. Those who have been advanced to it stand above those who have not been; and such seems to have been plainly the intent of the legislature. It is unnecessary to issue commissions to assistant surgeons in the Army upon their passing from the grade of lieutenant to that of captain. The office for which in these cases the President issues a commission is that of assistant surgeon; the grades of lieutenant and captain are not offices but are incident to the office of assistant surgeon. It appears that by section 1480, Revised Statutes, certain officers of the Navy receive a new commission for every grade which they attain. This is by an express statute that is limited to the cases named therein. Although it would require but a slight recognition by Congress to develop these grades (lieutenant and captain in the Army Medical Department) into separate offices, this has not been done as yet; and in the meantime the absence of a statutory provision like that in section 1480 is significant. (16 Op. Atty. Gen., 652.)

The officers of different corps of the staff, such as the Medical Corps and the Pay Corps, have separate and distinct titles appropriate to the nature of their service and to their rank in the corps, and in addition thereto are given relative rank by the same title that is applied to officers of the line. The line furnishes the standard of rank for officers of all classes. A captain in the line is merely a captain and has but one title to designate both his office and his rank. An officer of the staff has an official title to identify his position in his corps, and also a relative rank in addition, the latter being arbitrarily fixed by Congress to designate his relative rank in the service in accordance with the line standard. The rank conferred upon a person holding the position of medical director is purely statutory and arbitrary, and there is no reason why a retired medical director should not hold a higher relative rank than that which is permitted on the active list. That Congress has in other instances contemplated a similar

result is apparent from the provisions of section 1481, which provides that certain staff officers shall, when retired, have the relative rank of commodore. (22 Op. Atty. Gen., 433.)

A class exists in the Army and Navy which does not have to do with the actual maneuvering of a regiment or ship of war, but which performs services deemed equally essential to that end, for example, paymasters, surgeons, chaplains, constructors, etc. There were and are reasons, based upon the efficiency of the service looked at as a whole, why a rank should be given to this class commensurate with the rank given to the class which actually exercised command. The difficulty was that in the case of an officer actually exercising command, his office or title correctly represented his rank except in exceptional cases. In the case, however, of, for example, paymasters, surgeons, etc., the title or office indicated no rank in the Navy as a whole. It was deemed necessary, therefore, to attach to the title or office of such persons a rank which should fix their precedence, pay, etc., and thus bring them in line with the rest of the service. (31 Op. Atty. Gen., 505, citing 16 Op. Atty. Gen., 414.)

"Every officer in the Navy shall be designated and addressed by the title of his rank without any discrimination whatever. In written communications, the name of the corps to which any staff officer belongs will be stated immediately after his name; for example: Lieutenant John Doe, Medical Corps, U. S. Navy; Lieutenant John Doe, Pay Corps, U. S. Navy; Lieutenant John Doe, Construction Corps, U. S. Navy; Lieutenant John Doe, Civil Engineer Corps, U. S. Navy." (Art. R 1001 (2), Navy Regs., 1913, C. N. R. 12, Sept. 12, 1918. The designation of the "Pay Corps" was changed to "Supply Corps," by act of July 11, 1919, 41 Stat., 147.) "All officers on the retired list have the titles of the rank with which retired." (Art. R 1002 (5), Navy Regs., 1913.) "Officers in oral official communications shall be addressed by the title of their rank, except that those below the rank of commander may be addressed by the title of their rank or as Mr.; and, in the case of officers of the Medical Corps, as Dr." (Art. R 1008, Navy Regs., 1913, C. N. R. 12, Sept. 12, 1918.) On general subject of titles, and powers of head of department with reference thereto, see note to section 1471, Revised Statutes, under "Titles of chiefs of bureaus."

For other cases concerning "rank," "grade" and "title," see notes to sections 421, 422, 423, 1362, 1457, 1477, 1479, and 1481, Revised Statutes. See also, above, "Grades established, meaning of."

**Examinations required for promotion, in addition to seniority.**—The Revised Statutes contained no specific provisions for filling grades in the staff corps, but by act of February 27, 1877 (19 Stat., 244), the following was added to section 1480: "The grades established by the six preceding sections for the staff corps of the Navy shall be filled by appointment from the highest members in each corps, according to seniority; and new commissions shall be issued to the officers so appointed, in which the titles and grades established in said sections shall be inserted." Sections



1498-1510, Revised Statutes, provide for examinations for promotion as an additional requisite to seniority. (31 Op. Atty. Gen., 80. Examinations were discontinued for promotion of staff officers in grade by act of May 22, 1917, sec. 20 (40 Stat. 89), which act and section also reenacted a provision in the act of Mar. 4, 1917 (39 Stat., 1182), requiring examinations of staff officers for advancement in rank.)

**Competitive examinations for promotion not authorized under this section.—**

The custom and practice of the Navy Department, sanctioned by section 1372, Revised Statutes, of requiring competitive examinations of assistant surgeons, and assigning them positions on the Navy Register in the order of their relative merit as ascertained and reported by the board of examiners, is not, under section 1480, Revised Statutes, as amended by act of February 27, 1877, correct; the effect of the latter law being to adopt the rule of seniority in regard to promotions from one grade to another in the Medical Corps of the Navy. (17 Op. Atty. Gen., 48.)

**Promotions required to be by seniority under this section.—**A passed assistant surgeon in the Navy having passed the necessary examination for promotion to surgeon, his claim to be promoted according to seniority is well founded. (17 Op. Atty. Gen., 48.)

The act of February 27, 1877, embodied in section 1480, is prospective in its character, and is only to take effect from the date of its enactment. Its language contemplates that the rule prescribed by it may not have theretofore always been followed in reference to rank or seniority. (17 Op. Atty. Gen., 48.)

The act of March 3, 1871, section 10 (16 Stat., 536), which is substantially identical with the act of February 27, 1877 (19 Stat., 249), embodied in section 1480, Revised Statutes, contemplated by the use of the words "highest

numbers in each corps according to seniority," that the promotions should be by seniority and not by competitive examination; and the provision that "no officer shall be reduced in rank or lose seniority" etc., contemplated also that unless this provision were inserted changes would be made in grades or numbers which had been theretofore fixed, which it was not the intention of Congress to disturb. This clause of the act of March 3, 1871, did not find its way into the original edition of the Revised Statutes, but is now in the second edition, section 1480. It was, however, reenacted by the act of February 27, 1877, which is a substantial reenactment with the exception that the word "members" is used instead of "numbers," and the words, "under the provisions of the said six preceding sections" are substituted for the words, "under the provisions of this act," which appeared in the original statute. These changes apparently have no other object than to adapt the statute to its place in the revision. The effect of it is to adopt the rule of seniority in regard to promotions from one grade to another in the staff corps. (17 Op. Atty. Gen., 48.)

For other cases, see above, under "Constitutionality of amended section 1480."

**Corps of Civil Engineers.—**Civil engineers are plainly included among those contemplated by the amended section 1480, as belonging to the "staff corps of the Navy." (17 Op. Atty. Gen., 126.)

**Errors in commission.—**Where through a clerical error an officer of the Navy was commissioned a passed assistant surgeon with the rank of lieutenant, instead of with the rank of lieutenant (junior grade), he is only entitled to the pay of the lesser grade. (11 Comp. Dec., 43. See also note to sec. 1474, R. S., and see note to Constitution, Art. II, sec. 3, under "II. Duty to commission officers.")

**Sec. 1481. [When retired for age or length of service.]** Officers of the Medical, Pay, and Engineer Corps, chaplains, professors of mathematics, and constructors, who shall have served faithfully for forty-five years, shall, when retired, have the relative rank of commodore; and officers of these several corps who have been or shall be retired at the age of sixty-two years, before having served for forty-five years, but who shall have served faithfully until retired, shall, on the completion of forty years from their entry into the service, have the relative rank of commodore.—(3 Mar., 1871, c. 117, s. 11, v. 16, p. 537.)

Amendment to this section was made by act of March 3, 1899 (30 Stat., 1004), which abolished the Engineer Corps (see note to sec. 1390, R. S.); by the same act, section 7 (30 Stat., 1006), which changed the words "the relative rank of," to read "the rank of"; by act of August 29, 1916 (39 Stat., 579), which changed the retirement age from 62 to 64 years; and by act of July 11, 1919 (41 Stat., 147), which provided that "hereafter the Pay Corps shall be called the Supply Corps."

By act of August 5, 1882 (22 Stat., 286), it was provided that "hereafter there shall be no promotion or increase of pay in the retired

list of the Navy, but the rank and pay of officers on the retired list shall be the same that they are when such officers shall be retired."

By act of August 29, 1916 (39 Stat., 611), provision was made for retirement of colonels in the Marine Corps with the rank of brigadier general after 45 years' service, or on retirement for age after 40 years' service, or on completion of 40 years from date of entry in the cases of those retired on account of age, in language similar to section 1481. The said enactment of August 29, 1916, was repealed by act of May 22, 1917, section 14 (40 Stat., 87.)

This section was repealed in part by the act of August 5, 1882 [above cited], prohibiting promotions on the retired list. There were three classes of officers to which the act of March 3, 1871 (16 Stat., 537), embodied in section 1481, applied at the time of its enactment: (1) Officers of the several staff corps enumerated "who shall have served faithfully for forty-five years"; (2) officers of the several staff corps retired after attaining the age of 62 years, who had not completed 45 years' service, but who had completed 40 years' service and had served faithfully until retired; and (3) officers of the several staff corps retired from the service after attaining the age of 62 years, who had not served 45 years or 40 years; officers of this last class were entitled to the relative rank of commodore on the completion of 40 years from the date of their entry into the service; the first two classes were entitled to the relative rank of commodore when retired. The Navy Registers from March 3, 1871, to August 5, 1882, show that officers of each of the foregoing classes were advanced to the rank of commodore under section 1481; and that in the cases of officers in class 3, time on the retired list was counted in computing the 40 years' service in order to give them the increased rank (see 26 Op. Atty. Gen., 57). However, the act of August 5, 1882, put an end to promotions of officers of class 3, and since that date the Navy Registers do not show that any officers of class 3 have been promoted to the rank of commodore under this section, although the records of the Navy Department show that there have been many applications from such officers for increased rank under said section, which applications have been denied. It is clear that the Navy Department has, since the enactment of August 5, 1882, construed it as prohibiting all promotions on the retired list, including those previously authorized by section 1481, Revised Statutes, and this construction is supported by the Attorney General's opinions with reference to promotions on the retired list under sections 1460 and 1461, Revised Statutes (see 17 Op. Atty. Gen., 495; 26 Op. Atty. Gen., 498, 501). Accordingly, *held*, that an officer retired at the age of 62 years, before having served 45 years, but who served faithfully until retired, and who, after retirement, completed 40 years from the date of his entry into the service, is not entitled to be advanced to the rank of commodore on the retired list under section 1481. (File 27231-112, Apr. 1, 1918.)

The act of August 5, 1882, expressly declares in the plainest language that no officer shall be promoted after his retirement, thereby repealing section 1481, to the extent that it conflicts with that section. The act in terms applies to all officers irrespective of the time when they entered the service, and is not limited to those who entered the service subsequent to its passage. (Op. Atty. Gen., Jan. 28, 1921, file 27231-141.6.)

**Retirement of officer after 45 years' service.**—Under the provisions of section 1481, Revised Statutes, an officer of the Pay Corps [now Supply Corps] who has "served faithfully for forty-five years," may be retired with the rank of commodore. In computing said 45

years' service, an officer in the Navy may count service in the regular Navy, service as a student at the Naval Academy prior to March 4, 1913, and service in the United States Army. (File 27231-141, June 10, 1919. See notes to secs. 1443, 1444, R. S.)

**Rank of rear admiral substituted for relative rank of commodore.**—By sections 1481 and 1482 the retirement of staff officers is particularly provided for. Under the scheme at that time of relative rank (secs. 1474-1480, inclusive), and the survival then of the office of commodore, long service and faithful service in the staff corps gave the right of retirement with that relative rank. The Navy personnel act (Mar. 3, 1899, 30 Stat., 1006) has now substituted (sec. 7) the rank of rear admiral in such case. (25 Op. Atty. Gen., 294, 296, citing 22 Op. Atty. Gen., 433. See note to sec. 421, R. S., under "VI. Retirement of chiefs of bureaus.")

**Retired with rank of commodore in practice.**—Under section 1481, Revised Statutes, certain staff officers are retired with the rank of commodore, this being the only case in which any officers are now placed on the retired list with that rank, retirements under section 1473, Revised Statutes, being made in practice with the rank of rear admiral instead of commodore, as was provided therein. (File 3980-1402, Oct. 31, 1917, noted more fully under sec. 1466, R. S., "Grade of commodore abolished on the active list.")

A civilian professor at the Naval Academy was appointed to the corps of professors of mathematics, with the rank of lieutenant, pursuant to a special act of Congress (37 Stat., 906), which provided that such appointee should be an extra number, "not in the line of promotion." Subsequently he was retired with the rank of lieutenant. At the time of his retirement he had completed 45 years' service, including his civilian service which under the special enactment was to be counted "as service in the Navy" for "pay and other purposes." *Held*, that under section 1481, he was entitled to the rank and pay of commodore on the retired list. (32 Op. Atty. Gen., 129.)

**Retirement with higher rank not a change in grade.**—By section 1481, Revised Statutes, officers of the staff of the Navy having the relative rank of captain are retired with the relative rank of commodore, or that of the next higher grade. This is not an advancement in grade. The distinction between rank and grade in both the Army and Navy, is so long and so well understood that we can not suppose Congress unmindful of it in this enactment. Section 1481, without any apparent intention to change the actual grade of the officers referred to, uses the language, "shall, when retired, have the relative rank of commodore." Had Congress here intended a change of grade and not of rank merely, it would have used the word "grade" instead of "rank." But Congress said rank and not grade, and this leaves the officers there referred to in the same grade as before, but with the relative rank of the next higher grade. (26 Op. Atty. Gen., 57.)

The act of June 29, 1906 (34 Stat., 554), provided an advancement in rank and pay on the



retired list for certain officers who served during the civil war, with the proviso that said act should not apply to any officer who had received an advance of "grade" at or since the date of his retirement. *Held*, that a medical director whose rank on the active list was that of captain, and who was retired under section 1481 with the relative rank of commodore, did not receive an advance of "grade" at or since the date of his retirement; that he is not, by virtue of his relative rank of commodore, an officer above the "grade" of captain; and that he is entitled to the increased pay provided for in the act of 1906. (26 Op. Att'y. Gen., 57.)

For other cases, see note to section 1480, Revised Statutes, under "'Grade,' 'rank,' and 'title,' in staff corps," and references there cited.

**Sec. 1482. [Retired for causes incident to service.]** Staff-officers, who have been or shall be retired for causes incident to the service before arriving at sixty-two years of age, shall have the same rank on the retired list as pertained to their position on the active list.—(3 Mar., 1871, c. 117, s. 11, v. 16, p. 537.)

See note to section 1457, Revised Statutes, concerning the rank and grade of retired officers.

**Sec. 1483. [Graduates of Naval Academy.]** Graduates of the Naval Academy shall take rank according to their proficiency as shown by their order of merit at the date of graduation.—(23 May, 1872, c. 195, s. 1, v. 17, p. 153.)

See note to section 1521, Revised Statutes, for references to laws concerning commissioning of midshipmen after graduation from the Naval Academy.

**"Graduation" defined.**—The act of July 16, 1862, section 11 (12 Stat., 585), provided that "the students at the Naval Academy shall be styled cadet-midshipmen until their final graduating examination, when, if successful, they shall be commissioned ensigns, ranking according to merit." The act of July 15, 1870, section 12 (16 Stat., 334), provided that "the students at the Naval Academy shall hereafter be styled cadet-midshipmen \* \* \*. When cadet-midshipmen shall have passed successfully the graduating examination at said academy, they shall receive appointments as midshipmen, ranking according to merit, and may be promoted to the grade of ensign as vacancies in the number allowed by law in that grade may occur." *Held*, that the words "final graduating examination" in the former statute, and "graduating examination" in the latter, signify that examination which, under the regulations of the Naval Academy, takes place after the prescribed term of sea service which forms a part of the course at the Naval Academy. Although graduation is used in a local and peculiar sense at the Naval Academy, referring to an examination held during and not at the end of the academic course, that is, to an examination which originally was intended to certify that the student might well be "sent to sea," and the examination at the end of the whole course was called the "final examination," so that in the vocabulary at Annapolis the adjectives "final" and "graduating," in connection with "examination" have a technical meaning, the former corresponding with graduating as ordinarily employed at institutions of learning and

**Policy of retirement with higher rank.**—Section 1481 and other retirement statutes indicate in general the principle that creditable retirement carries an advance in rank and pay (allowing for the difference between the active and inactive status). (25 Op. Att'y. Gen., 294.)

There is no reason why a retired medical director should not be given a higher rank on the retired list, as a reward for Civil War service, than that which is permitted on the active list. That Congress has in other instances contemplated a similar result is apparent from section 1481, which provides that certain staff officers shall, when retired, have the relative rank of commodore, the highest rank on the active list for the Medical Corps (at that time) being captain. (22 Op. Att'y. Gen., 433.)

the latter differing materially from its common acceptance, being no more graduating as usually understood than the diploma then given is a diploma as usually understood, nevertheless the mere fact that the act of 1870 concerned an institution at which graduating has a peculiar meaning does not make it an exception to the rule requiring that word to be taken in its usual meaning. (15 Op. Att'y. Gen., 637; see also 11 Op. Att'y. Gen., 158.)

The "final graduating examination" within the meaning of the act of July 16, 1862, was that examination to which the members of the graduating class were subjected after they had performed a term of duty on shipboard, with a view to their becoming practically proficient in the arts of seamanship, naval tactics, gunnery, and navigation. The numbers assigned to them respectively by the examining board as the result of the examination on the subjects indicated, when added to the numbers which had previously been assigned to them on the "graduating merit-roll" of the academy, determined their respective standing as passed midshipmen, the highest number taking precedence. This last examination upon the subjects to which the service of the students on board of ship was especially directed after the completion of the more purely academic studies, was the "final graduating examination" under the system devised by the department. After they had passed this examination they took rank in the Navy conformably to their standing thus ascertained in the academy. Such was the system in operation when the act of 1862 was passed. That act gave distinct legislative sanction to the regulation of the department by which this final graduating examination was appointed. Accordingly, *held*, that under said act, students or midshipmen at the Naval

Academy are not entitled to be commissioned ensigns until they have performed the term of duty on shipboard and passed their final examination on practical navigation and seamanship. (11 Op. Atty. Gen., 158.)

The construction given to the statute of 1870 by the authorities at the academy has been that midshipmen, although graduates, were nevertheless not entirely emancipated from probationary study, but that after "graduating" they were still, as theretofore, to be students at sea; that while such students at sea a provisional relative rank was assigned them by the statute, but that it was not intended by such legislation to abolish the old discipline by which a final graduating examination was to have effect upon the relative rank which they should bear after emancipation. There is no reason for disturbing this conclusion, by whatever course of argument it may be attempted to be met. (16 Op. Atty. Gen., 296, affirming 15 Op. Atty. Gen., 637.)

In 15 Op. Atty., 637, and 16 Op. Atty. Gen., 296, this entire subject is elaborately discussed and clearly and distinctly decided, and it is not compatible with the proper administration of the Department of Justice that a third opinion upon the legal questions involved should be rendered, unless very exceptional circumstances should exist requiring so unusual a course to be pursued. The Attorney General discovers no circumstances which would justify him in considering the question in these opinions, twice considered and twice decided in the same way, as open questions for examination and decision. (17 Op. Atty. Gen., 193.)

See note to section 1520, Revised Statutes, as to the "academic course" of midshipmen.

**Precedence of graduates commissioned in the line of the Navy and in the Marine Corps.**—It is very clear that officers of the Marine Corps and officers of the Navy take precedence, when of the same rank, according to date of commission. (See sec. 1603 and note to sec. 1466, R. S.) But the question is, What rule should be applied to determine the precedence of officers of the Marine Corps and officers of the Navy of the same rank, when their dates of commission are also the same? By section 1219, Revised Statutes, relating to the Army, and article R 1010 (2), Navy Regulations, 1913, previous commissioned service must be taken into account under such circumstances. This does not cover the case where date of commission is the same and neither party has had prior commissioned service. By a regulation of the Army (Art. 11, Army Regs., 1913), "when periods of service are equal, precedence will, except when fixed by order of merit on examination, be determined, first, by rank in service when appointed; second, by former rank in the Army or Marine Corps; third, by lot." There is no similar regulation with reference to the Navy: *Suggested*, that the precedence of ensigns and second lieutenants who are graduates of the Naval Academy be fixed by order of merit on final examination at the Academy. (File 11130-27, Aug. 26, 1915.)

The Attorney General has held that "there is no law making any distinction as to relative rank and precedence between the officers of the

Marine Corps who are, and those who are not, graduates of the United States Naval Academy, either as respects themselves, or officers of the line of the Navy." (See 25 Op. Atty. Gen., 517.) However, there is no statute which prevents the adoption of a rule that officers of the Navy and Marine Corps commissioned from graduates of the Naval Academy on the same date shall take precedence according to their order of merit on final examination at the academy. Indeed, so far as the statutes go they indicate that this is the rule which should be applied. Thus, section 1483 provides that "graduates of the Naval Academy shall take rank according to their proficiency as shown by their order of merit at the date of graduation." Again, the act of August 5, 1882 (22 Stat., 285), authorized the appointment of graduates of the Naval Academy "to fill vacancies in the lower grades of the line and Engineer Corps of the Navy and of the Marine Corps," with the express provision that such appointments were to be made "in the order of merit, as determined by the academic board of the Naval Academy." This was followed by the act of March 2, 1889 (25 Stat., 878), which contained other provisions for appointments from graduates of the Naval Academy to the line and Engineer Corps of the Navy and the Marine Corps, with the proviso: "Such appointments to be made from the final graduates of the year, in the order of merit as determined by the Academic Board of the Naval Academy." Also, the act of July 26, 1894 (28 Stat., 124), provided for appointments of graduates of the academy to the grades of ensign and assistant engineer in the Navy, with the proviso that they should take rank "among themselves according to merit as determined by the academic board." It would thus seem entirely proper to adopt the proposed rule fixing the precedence of second lieutenants and ensigns according to their order of merit at final graduation from the academy. (File 11130-27, Aug. 26, 1915.)

**Graduation temporarily delayed.**—When the date of final graduation arrives the graduating midshipmen may be scattered in various parts of the world where they happen to be on the date of the expiration of the two years' sea service period. It may happen that there is a delay in the receipt of their cruise reports, or that additional cruise reports are called for, or that there is a failure in the physical examination and a reexamination had upon the recommendation of the academic board at a later date to determine the permanency of the physical disability, or that there is a failure in some subject of professional examination and a reexamination ordered upon the recommendation of the board. When the midshipman, aside from the defect thus occasioned, is entitled to be graduated with his class, upon the curing or overcoming of such defect he becomes entitled to the title of graduate from the date of "final graduation" as fixed by the statute, that is, at the end of the six years' course. In this case the midshipman graduated from the four years' course at the Academy with his class on June 6, 1907; his two years' sea service from such date expired on June 5, 1909; his title as a graduated midshipman dates from June 6, 1909. (17 Comp. Dec., 298.)



**Rule for determining date of precedence.**—A rule that in each class of graduates from the Naval Academy the “date of precedence” of members of such class shall be determined by ascertaining the member having the earliest date of admission to the Academy and imputing that date of admission to every other member who stands above him in the class; and then taking the member below him who has the next earliest date of admission and imputing that date to all who stand above him but below the first date, and so on down in that order, but preserving to the members of each date their relative class standing in the order of merit, is in conflict with the act approved August 5, 1882 (22 Stat., 284). (21 Op. Atty. Gen., 46; compare file 11130-2, Aug. 10, 1908, 11130-2/B, July 31, 1909, 11130-2/B&C, Jan. 5, 1910.)

When midshipmen enter the Naval Academy there is no means of determining their relative position other than by their respective dates of entry. At the termination of six years their relative position is fixed by their order of merit, among themselves, and those members who entered at later dates may be placed by such order of merit above their fellows who entered earlier. By this operation they have been advanced on the Navy Register over classmates who entered the Academy at earlier dates. A constructive length of service is necessary to be attributed to officers so advanced, and they

are correctly given the same date of precedence as that of the officer standing below them who entered on the earliest date. (File 11130-2, Aug. 10, 1908, citing 17 Op. Atty. Gen., 58.)

By act of March 4, 1913 (37 Stat., 891), it was provided that “hereafter the service of a midshipman at the United States Naval Academy, or that of a cadet at the United States Military Academy, who may hereafter be appointed to the United States Naval Academy, or to the United States Military Academy, shall not be counted in computing for any purpose the length of service of any officer in the Navy or in the Marine Corps.” See also note to section 1486, Revised Statutes.

**Importance of questions involving precedence.**—Cases are of more than usual interest and importance which involve questions of rank and precedence amongst members of a profession in which rank and precedence form high motives to heroism and self-devotion. The country calculates upon the existence and force of these motives. They are recognized and fostered both by the law and by public opinion. Therefore it is that public action tending to disappoint these motives, and consequently to impair their effect in general, must be treated as of universal concern; and any action duly arraigned upon such account must be subjected to more than ordinary scrutiny. (15 Op. Atty. Gen., 637.)

#### Sec. 1484. [Engineers graduated at Naval Academy. Superseded.]

This section provided as follows:

“SEC. 1484. Engineer officers graduated at the Naval Academy shall take precedence with all other officers with whom they have relative rank, according to the actual length of service in the Navy.” (3 Mar., 1873, c. 230, s. 1, v. 17, p. 555.)

It was superseded by act of August 5, 1882 (22 Stat., 285), which provided in part “that hereafter there shall be no appointments of cadet-midshipmen or cadet-engineers at the Naval Academy, but in lieu thereof naval cadets shall be appointed from each congressional district and at large, as now provided by law for cadet-midshipmen, and all the undergraduates at the Naval Academy shall hereafter be designated and called ‘naval cadets;’ and from those who successfully complete the six years’ course appointments shall hereafter be made as it is necessary to fill vacancies in the lower grades of the line and Engineer Corps of the Navy and of the Marine Corps: \* \* \* such appointments to be made from the graduates of the year, at the conclusion of their six years’ course, in the order of merit, as determined by the academic board of the Naval Academy \* \* \*.” Prior to this act of August 5, 1882, the course of “cadet engineers” was four years (sec. 1524, R. S.) and cadet

engineers graduated from the Naval Academy were appointed as assistant engineers (sec. 1394, R. S.); while the course of other students at the Naval Academy was six years (sec. 1520, R. S.), and section 1484 was intended to prevent cadet engineers when commissioned at the end of their four years’ course from gaining precedence over other students at the academy not commissioned until the end of their six years’ course (15 Op. Atty. Gen., 336, noted under sec. 1486, R. S.). The provisions of section 1484 were superseded and rendered obsolete by the act of August 5, 1882, which made the course for all students at the Naval Academy six years and provided that they should be commissioned “in the order of merit, as determined by the academic board of the Naval Academy.”

**Subsequent laws** relating to the appointment of engineer officers from graduates of the Naval Academy were enacted on March 2, 1889 (25 Stat., 878), and July 26, 1894 (28 Stat., 124), noted under section 1521, Revised Statutes. The act of March 3, 1899 (30 Stat., 1004), abolished the Engineer Corps, while the appointment and assignment of line officers for engineering duty only was authorized by act of August 29, 1916 (39 Stat., 580). See note to section 1390, Revised Statutes.

**Sec. 1485. [Precedence by length of service.]** The officers of the staff corps of the Navy shall take precedence in their several corps, and in their several grades, and with officers of the line with whom they hold relative rank according to length of service in the Navy.—(3 Mar., 1871, c. 117, s. 10, v. 16, p. 537.)

Amendment to this section was made by act of March 4, 1913 (37 Stat., 892), which provided that officers who enter the Navy "after the passage of this act" shall take precedence when of the same grade according to their respective dates of commission in that grade; and by act of August 29, 1916 (39 Stat., 578), which provided "that officers shall take rank in each staff corps according to the dates of commission in the several grades, excepting in cases where they have gained or lost numbers."

"Relative" rank was abolished and actual rank substituted therefor by act of March 3, 1899, section 7 (30 Stat., 1006).

**Section 1485 modified by subsequent legislation.**—The act of August 29, 1916 (cited above), superseded and repealed the following words in section 1485: "The officers of the staff corps of the Navy shall take precedence in their several corps, and in their several grades, \* \* \* according to length of service in the Navy." (File 22724-40, Apr. 24, 1919.)

Section 1485 was modified by section 1486, as amended by act of March 3, 1881 (21 Stat., 510), relating to constructive service to be credited to staff officers for purposes of precedence, and was superseded with reference to the younger officers of the Navy by act of March 4, 1913 (37 Stat. 892), providing that all officers who enter the Navy after said act of March 4, 1913, "shall take precedence when of the same grade according to their respective dates of commission in that grade." (File 22724-40, Apr. 24, 1919.) Under this amendment of March 4, 1913, all officers thereafter commissioned, including midshipmen who were under instruction on March 4, 1913, should take precedence with other officers of the same rank "according to their respective dates of commission." (File 11130-37, Jan. 19, 1917.)

When of the same grade, line officers of the Navy take precedence with each other according to date of commission, officers of the Marine Corps take precedence with each other according to date of commission, and officers of the Army take precedence with each other according to date of commission. Officers of the Army, Navy, and Marine Corps, of corresponding rank, take precedence with each other according to date of commission. The date-of-commission rule is the unwritten law of the Army and Navy (citing 25 Op. Atty. Gen., 517; see also 26 Op. Atty. Gen., 16). This unwritten law was changed by section 1485 with reference to staff officers of the Navy, whose precedence as between themselves was by that section made to depend upon length of service, and based upon this latter rule for determining precedence of staff officers with each other, and evidently recognizing the impracticability of having a different rule applied to determine their precedence with officers of the line, Congress by the same section made the length-of-service rule applicable in determining the precedence of staff officers with the officers of the line. By act of August 29, 1916, Congress reverted to the general and established date-of-commission rule as applicable to the precedence of staff officers with each other. As a result,

staff officers now take precedence in each rank according to date of commission, the same as line officers take precedence in each rank according to date of commission, and the same as officers of the Army and Marine Corps take precedence with each other and with all officers of the Navy according to date of commission. (File 22724-40, Apr. 24, 1919.)

The act of August 29, 1916, having destroyed the very foundation upon which the length-of-service rule was made applicable as between officers of the staff and officers of the line, the retention of that rule would be impossible of enforcement as it would mean two inconsistent rules for determining the precedence of staff officers as between themselves and with officers of the line. (File 22724-40, Apr. 24, 1919.)

Section 1485, Revised Statutes, in so far as it provided that officers of the staff corps should take precedence with officers of the line and other staff corps by length of service is absolutely and irreconcilably repugnant to the provision in the act of August 29, 1916, that officers shall take precedence in each staff corps according to date of commission; both laws can not stand; if staff officers are to take precedence with each other in the same corps according to date of commission they can not take precedence with the line and other staff corps according to length of service; if on the other hand the length-of-service rule is to be retained and applied in determining the precedence of staff officers with officers of the line and other staff corps, then the date-of-commission rule for determining precedence of officers in each staff corps must give way and the act of August 29, 1916, is rendered nugatory. Where it is impossible to harmonize the provisions of two statutes, the rule is settled that the later statute operates of necessity as an implied repeal of the earlier. (File 22724-40, Apr. 24, 1919; but see 32 Op. Atty. Gen., 476, noted below.)

*Held*, that the act of August 29, 1916, repeals by necessary implication section 1485 of the Revised Statutes, and that officers of the staff corps must now take precedence in each staff corps, and with officers of the line and other staff corps, as well as with officers of the Army and Marine Corps, according to date of commission and in no case by length of service. (File 22724-40, Apr. 24, 1919; file 11130-63, Sept. 23, 1919; C. M. O. 280, 1919, p. 19; affirmed on reconsideration, file 11130-63:1, Mar. 16, 1920, C. M. O. 74, 1920, p. 16, and file 11130-63:3, Dec. 11, 1920; see also file 11130-67, Apr. 26, 1920; file 11130-63:5, Feb. 14, 1921; file 11130-63:5, Feb. 28, 1921. But see 32 Op. Atty. Gen., 476, noted below.)

The Attorney General having been requested to render an opinion as to the effect of the act of August 29, 1916, upon section 1485, Revised Statutes, *held*: (1) That since said act of August 29, 1916, staff officers who entered the Navy prior to March 4, 1913, take precedence with officers of other staff corps, as well as with officers of their own corps, according to date of commission; (2) that such staff officers take precedence with officers of the line according to date of commission in cases where they are associated with line officers and it would be



impracticable to give them precedence among themselves by date of commission and at the same time to give them precedence with the line officers by length of service; (3) that such staff officers take precedence with officers of the line according to length of service, as provided by section 1485, in cases where they are associated with line officers and it would not be impracticable to give them precedence among themselves by date of commission and with the line officers by length of service. (32 Op. Atty. Gen., 476, Mar. 3, 1921; C. M. O. 4, 1921, p. 19.)

The conflict between section 1485, Revised Statutes, and the act of August 29, 1916, was illustrated by the Attorney General as follows: "Suppose Captain A of the Construction outranks Captain B of the same corps by date of commission, Captain B outranks Captain C of the line both by date of commission and by length of service, and Captain C outranks Captain A by length of service. Obviously the order of precedence of these officers can not be determined by applying either or both of the above statutes. Under the act of August 29, 1916, Captain A outranks Captain B, but that act does not define the relative rank of these officers to Captain C; that is done by Revised Statutes, section 1485, according to which Captain B outranks Captain C, who in turn outranks Captain A. But Captain B does not out-

rank Captain A, because that is contrary to the express command of the act of August 29, 1916." In the situation thus supposed, it was held by the Attorney General that all three officers would take precedence by date of commission; but that "Revised Statutes section 1485 is repealed only as applied to that situation," that "it does not follow that section 1485 is repealed as to those situations to which it can be applied without coming in conflict with the act of August 29, 1916, as, for instance, between Captains A and C or Captains B and C," notwithstanding that "the result will be that Captain A will outrank Captain C in some circumstances, while in others the order of precedence will be reversed," and that "if there is one rule of precedence for staff officers among themselves and a different one between staff and line officers it may happen that an officer will find that his inferior of yesterday is his superior to-day, and that because of this fact great difficulty will be experienced in administering the laws applicable to the Navy." (32 Op. Atty. Gen., 476, Mar. 3, 1921; compare 22 Op. Atty. Gen., 255, 257, holding in another connection that "to so legislate as to prevent the application of previous legislation is to repeal the previous legislation by implication;" see also *South Ottawa v. Perkins*, 94 U. S., 267.)

For other cases see note to section 1486, Revised Statutes.

**Sec. 1486.** [Length of service, how estimated.] In estimating the length of service for such purpose, the several officers of the staff corps shall, respectively, take precedence in their several grades and with those officers of the line of the Navy with whom they hold relative rank who have been in the naval service six years longer than such officers of said staff corps have been in said service; and officers who have been advanced or lost numbers on the Navy Register shall be considered as having gained or lost length of service accordingly.—(3 Mar., 1871, c. 117, s. 10, v. 16, p. 537.)

Amendment to this section was made by act of March 3, 1881 (21 Stat., 510), which added thereto the following: "Provided, That nothing in this section shall be so construed as to give to any officer of the staff corps precedence of, or a higher relative rank than that of, another staff officer in the same grade and corps, and whose commission in such grade and corps antedates that of such officer." It was further modified by act of March 3, 1899, section 7 (30 Stat., 1006), which abolished "relative" rank and substituted therefor actual rank. By act of March 4, 1913 (37 Stat., 892), it was provided that "section fourteen hundred and eighty-six of the Revised Statutes shall not apply in the case of officers who enter the Navy after the passage of this Act and all such officers shall take precedence when of the same grade according to their respective dates of commission in that grade." The same act of March 4, 1913 (37 Stat., 891), provided that "hereafter the service of a midshipman at the United States Naval Academy, or that of a cadet

at the United States Military Academy, who may hereafter be appointed to the United States Naval Academy, or to the United States Military Academy, shall not be counted in computing for any purpose the length of service of any officer in the Navy or in the Marine Corps."

By act of March 3, 1899, section 13 (30 Stat., 1007), it was provided "that all officers, including warrant officers, who have been or may be appointed to the Navy from civil life shall, on the date of appointment, be credited, for computing their pay, with five years' service." By act of March 4, 1913 (37 Stat., 891), it was enacted that said provision in the act of March 3, 1899, "shall not apply to any person entering the Navy from and after the passage of this act."

By act of August 29, 1916 (39 Stat., 578), it was provided "that officers shall take rank in each staff corps according to the dates of commission in the several grades, excepting in cases where they may have gained or lost numbers."

By act of July 11, 1919 (41 Stat., 140), it was provided that "any officer with the permanent rank of rear admiral who has heretofore served a full term and is now serving as chief of any bureau of the Navy Department shall be credited with service for all purposes as provided by section 1486 of the Revised Statutes, and nothing herein contained shall operate to increase the rank or pay of any such officer as now authorized by law."

See note to section 1485 upon question whether that section is repealed by subsequent legislation. See also note below, under "Officers who have been advanced or lost numbers."

**Constructive service.**—It will be noted that section 1485, Revised Statutes, standing alone, made actual length of service in the Navy the rule of precedence in the cases of staff officers in their several corps and with officers of the line of corresponding rank. By section 1486 this was modified, and provision was made for crediting officers with what is known as "constructive service" in determining their precedence under section 1485. This so-called "constructive service" was credited in two cases, namely, first: Officers upon their original appointment to a staff corps were credited with six years' constructive service so that they would take precedence, in the language of section 1486, "with those officers of the line of the Navy with whom they hold relative rank who have been in the Navy six years longer than such officers of said staff corps have been in said service;" and second: Officers advanced on the Navy Register were credited with constructive service in fulfillment of the requirement in section 1486 that officers so advanced "shall be considered as having gained \* \* \* length of service accordingly." (File 11130-63:5, Feb. 14, 1921.)

Prior to March 4, 1913, the precedence of officers of the Navy was determined as follows: (a) Line officers took precedence in each grade according to dates of commission (sec. 1467, R. S.); (b) staff officers took precedence in each corps and grade according to length of service in the Navy (sec. 1485, R. S.); (c) officers of the line and officers of the staff corps took precedence with each other, first, according to rank (sec. 1489, R. S.), and when of the same rank, according to length of service in the Navy (sec. 1485, R. S.); (d) in determining length of service under (c), officers of the staff corps were given precedence with officers of the line of the same rank who had been in the naval service six years longer than such officers of said staff corps had been in said service; in other words, staff officers were credited with constructive service approximating six years (sec. 1486, R. S.); (e) the constructive service credited to staff officers for purposes of precedence was not to operate to give any officer of the staff corps precedence of another officer in the same grade and corps whose commission in such grade and corps antedated that of such officer (act Mar. 3, 1881, 21 Stat., 510, amending sec. 1486, R. S.). (File 11130-37, Jan. 19, 1917; see also file 11130-63:5, Feb. 14, 1921.)

In determining the precedence of line and staff officers (under (d) above noted), time spent by officers of the line while under instruction as

midshipmen was credited to them as service in the Navy. When the midshipman's course of instruction was six years, this had the approximate effect of placing a staff officer, entering the service with the rank of ensign, on an equality for purposes of precedence with line officers commissioned as ensigns at the same time. It occasionally happened that the staff officer was disadvantaged under the practical application of the various provisions under (c), noted above; and when the course at the Naval Academy was reduced to four years, by act of March 7, 1912 (37 Stat., 73), the staff officer gained an advantage in consequence of his continuing to be credited with constructive service of about six years. However, the general purpose of the legislation prior to March 4, 1913, was to equalize the precedence of line and staff officers commissioned in the Navy with the rank of ensign at approximately the same time. (File 11130-37, Jan. 19, 1917, citing 15 Op. Atty. Gen., 336; see also file 11130-63:5, Feb. 14, 1921.)

A line officer transferred to a staff corps could not under section 1486 as amended be assigned a date of precedence earlier than that of the junior officer in said corps at the time of such transfer. Thus an ensign commissioned as an assistant naval constructor with the rank of lieutenant (junior grade), two and one-half years before his former classmates were promoted to the grade of lieutenant (junior grade) in the line, could not retain his original date of precedence where this was earlier than that of an officer previously commissioned in the Construction Corps. (File 11130-28, Feb. 5, 1916, citing file 1667, Apr. 25, 1900.)

In determining the precedence of staff officers with officers of the line, under section 1486, Revised Statutes, line officers who gained numbers as the result of their final graduating examination at the Naval Academy (see sec. 1483, R. S.) were considered to have gained length of service accordingly, and a staff officer could not claim the right to precedence ahead of a line officer so advanced in numbers because of the fact that such line officer's actual date of entry into the service was not six years prior to the date such staff officer was commissioned. (File 11130-2, Aug. 10, 1908.)

The amendment of March 4, 1913, was intended to place commissioned officers of the line and staff on an absolute equality in the future, by abolishing credit for midshipman's service in the one case, and credit for constructive service in the other, and requiring that all officers thereafter entering the Navy should take precedence "according to their respective dates of commission." At the same time Congress did not intend to deprive midshipmen already at the Naval Academy of substantial benefits which were promised them in the matter of pay and retirement when they were appointed; and accordingly, in providing that service at the Naval Academy should not thereafter be credited "for any purpose," it limited the application of this provision to midshipmen thereafter appointed to the Naval Academy. Thus was saved to other midshipmen the longevity credit to which they were entitled under previous laws for pay and retirement. But the act of March 4, 1913, did



not preserve to midshipmen then serving the credit to which they were entitled under previous laws for purposes of precedence with officers of the staff. It destroyed the inequality then existing, under which midshipmen were credited with four years' service at the Academy while staff officers were credited with six years' constructive service; but it did not create a new inequality as would be the case if midshipmen then at the Academy were credited with four years' service for precedence, while staff officers appointed from civil life received no credit whatever. (File 11130-37, Jan. 19, 1917.)

**Scope of section 1486.**—This section has on occasions been regarded as applying only to appointments from civil life. This, however, is in error, the correct statement being that section 1486 applies to all officers who are not graduates of the Naval Academy. (File 11130-22, Nov. 17, 1913.)

A careful reading of section 1486 will disclose that its benefits are not limited to staff officers appointed from civil life, or from the enlisted personnel. On the contrary, it applies to all staff officers however appointed, except in so far as its operation is restricted by section 1483, Revised Statutes, fixing the precedence of graduates of the Naval Academy. Had it been intended to limit the provisions of section 1486 to staff officers appointed from civil life, Congress would doubtless have so stated, as it did in the Navy personnel act of March 3, 1899, section 13 (30 Stat., 1007), providing that "all officers, including warrant officers; who have been or may be appointed to the Navy from civil life shall, on the date of appointment, be credited for computing their pay with five years' constructive service." (File 11130-22, Nov. 17, 1913.)

The department's records disclose that persons commissioned as officers in the staff corps of the Navy, while serving as midshipmen, paymasters' clerks, or enlisted men, were given a date of precedence six years prior to date of commission, or the earliest date that could be assigned without giving them precedence of senior officers in the same corps. (File 11130-22, Nov. 17, 1913.)

**Purpose of section 1486.**—This provision, which gave the benefit of six years of constructive service in determining the question of precedence among officers, was undoubtedly intended to equalize the officers of the staff with those of the line by provision which would give them, in determining the question of rank, a period which would be supposed ordinarily to answer to the time which was expended by the line officers in their education, and before their proper duties as officers commenced. Were it not for some such provision, the officers of the line would have an advantage over those of the staff in this, that the period of their education would be counted in determining their precedence as the term of their service. As, according to the construction which had been given to the regulations of the Navy, six years were expended by the line officers in their education, it was undoubtedly deemed proper to fix this as the time which should be given to the staff officers, in order to equalize them

with the line officers. (15 Op. Atty. Gen., 336; see also file 11130-63:5, Feb. 14, 1921.)

At this time certain cadet-engineers were receiving education at the Naval Academy, but then had only a term of education amounting to two years. This term was subsequently increased to four years; and it was, of course, observed that, if the engineer officers graduated at the Naval Academy were entitled to have, in determining the question of rank, the constructive service of six years, they would obtain too great an advantage over the line officers, because the term of their education would be counted as a term of service, while in addition, they would have what may be termed the fictitious or constructive term of service allowed to the officers of the staff corps. The act of March 3, 1873 (sec. 1484, R. S.), therefore, provided that "engineer officers graduated at the Naval Academy shall take precedence with all other officers with whom they have relative rank, according to the actual length of service in the Navy." While, therefore, in the Revised Statutes section 1484 precedes section 1486, it is in fact a limitation or exception to section 1486; and when thus read together it will be seen that all staff officers are entitled to the benefit of the six years' term of service, with the exception of those engineer officers who graduate at the Naval Academy. (15 Op. Atty. Gen., 336; see also 21 Op. Atty. Gen., 46.)

**Changes in dates of precedence.**—It has heretofore been held by the department that no change in dates of precedence should be made except in cases where it is necessary so to do for the purpose of rectifying palpable errors (citing indorsement Sec. Nav. to Bu. Nav., file 3126-97); it has also been held that the statutes and regulations governing precedence having once been determined in any particular case, considerations of repose intervene and become important; that disturbance of the Navy lists is prejudicial to the service, and should not be sanctioned where doubt exists respecting the appropriate action, and where a considerable length of time has elapsed. (File 11130-22, Nov. 17, 1913, citing cases.)

Where only a short time has elapsed, and there are exceptional circumstances, the date of precedence assigned an officer of the Pay Corps should be corrected and the proper date of precedence assigned him, thereby avoiding great injustice which would otherwise result to such officer. (File 11130-22, Nov. 17, 1913.)

**Effect of officer's precedence upon promotion.**—The actual rank of all officers of the Navy has been fixed by section 1466, Revised Statutes. But as there are in the staff corps several officers of the same grade and rank, it was necessary that their relative rank as between themselves and officers of the same rank in the line be fixed and determined. This is done by sections 1485 and 1486, and is determined not by relative dates of commission but by length of service in the Navy. These sections do not attempt to fix the actual rank which staff officers hold in the Navy, or to change that rank as fixed by section 1466, but merely define the relative rank which these officers have as between themselves and with officers of the same rank in the line. That is, officers of the

same rank shall, as between themselves, take precedence according to their length of service. Thus, a captain in a staff corps will take precedence of a captain in the same or a different corps, or a captain in the line whose service in either case has been for a shorter time than his. But in estimating his length of service the staff officer is, under section 1486, credited with six years more of service than the line officers, this giving the staff officer precedence of line officers of the same rank but who have not served six years more than he; while as between staff officers actual length of service determines the order of precedence. But there is nothing in these sections which gives to length of service, either actual or comparative, the effect of promoting an officer to a higher actual rank. Promotions in rank are regulated by different provisions. They merely fix the relative rank or precedence between officers of the same rank and who, but for this, would have been equal in rank and precedence. And the use of the word "precedence" instead of "rank" is also significant as showing that this was the purpose of the section. Accordingly, *held* that the act of June 29, 1906 (34 Stat., 554), providing for the retirement of certain officers of the Navy, authorizes their retirement with the rank of the next higher grade, and where there are more ranks than one in the next higher grade, as in the staff corps of the Navy, the officer is entitled on the retired list to the rank next above that held by him at the time of retirement, and is not entitled on the retired list to a rank more than one step above that held at retirement because of length of service in the Navy; and that sections 1485 and 1486 have nothing whatever to do with determining whether the advancement of such officer should be that of one rank or more than one; nor do those sections interfere with or affect the usual order of promotion of such officers in the Navy. (26 Op. Atty. Gen., 496.)

In the absence of some specific provision of law the distribution of paymasters between the ranks allowed in said grade is primarily within the discretion of the Executive. Sections 1485 and 1486, Revised Statutes, provide for establishing the precedence of officers of the staff corps between officers of the same corps, officers of the different staff corps, and officers of the same rank in the line of the Navy. It has been the practice of the Navy Department for many years to use the statutes to fix the date on which staff officers shall attain a higher rank. The staff officer takes precedence next below a certain line officer of the same credited service. This line officer is known in the service as the staff officer's "running mate" and by the practice referred to, when the "running mate" is regularly promoted, or fails in examination, the staff officer is advanced to the higher rank. The Executive having the discretion as to the changing of ranks in the grade of paymaster may, of course, act directly in each case and appoint or notify the officer that he is appointed or advanced on the date of the notification or on a date subsequent thereto. He may also make regulations providing for the ascertainment of the date upon which the staff officer is entitled to advancement. He has not made such regulations; but by a practice which

is said to have existed for 60 years has established the rule above stated by which to determine the date upon which the officer shall be advanced. Such long-established practice is the equivalent of a regulation. (16 Comp. Dec., 662.) NOTE.—At the time this decision was rendered the Navy Regulations (1913) provided (art. R 1005) that "civil engineers shall be advanced in rank to the two grades of lieutenant commander and lieutenant on the same date and with the line officers with whom they take precedence, in the same manner as officers of the other staff corps of the Navy." It has since been provided by law that "officers of the lower grades of the Medical Corps, Pay Corps (now Supply Corps), Construction Corps, and Corps of Civil Engineers shall be advanced in rank up to and including the rank of lieutenant commander with the officers of the line with whom or next after whom they take precedence under existing law" (act Aug. 29, 1916, 39 Stat., 576), and that the advancement of staff officers of the Navy to the ranks of commander, captain, and rear admiral shall be by selection (act July 1, 1918, 40 Stat., 718).

Section 1485 fixes precedence of officers of the staff corps without affecting their rank or office. (31 Op. Atty. Gen., 80.)

**"Officers who have been advanced or lost numbers."**—A line officer promoted by selection to the next higher grade is to be regarded as having been advanced in numbers on the Navy Register and gained length of service accordingly; he should be credited with a constructive length of service necessary and sufficient to place him above the officers over whom he was thus advanced. The officers over whom he was advanced are not to be regarded as having lost numbers and length of service. The promotion by selection is to be accomplished, not by inflicting any injury upon officers who had been less fortunate, perhaps, in their opportunities; but by conferring promotion upon the officer advanced. The proceeding is one of advancement strictly, and in no case operates to degrade any officer or deprive him of anything which he had already obtained by length of service. Cases might be supposed in which it might do him incidental injury by placing above him an officer who stood below him, but his own position with reference to all grades of the Navy would be that which it originally was. Therefore in regulating the relative rank of the staff and the line, under section 1486, Revised Statutes, no officer of the line would be found to have lost anything of his actual length of service. *Quare*: Whether the phrase, "officers who have been advanced or lost numbers on the Navy Register shall be considered as having gained or lost length of service accordingly," is intended to use the words "gained" and "lost" as terms which are the converse of each other and refers to such incidental loss as occurs by change in relative position between officers, or whether the expression, "lost length of service," is to be considered as referring to those officers who may have been degraded, as by sentence of court-martial? (17 Op. Atty. Gen., 56.)

In 17 Op. Atty. Gen., 56 (noted above), the case was presented of a line officer, Francis M.



Ramsay, who entered the service on October 5, 1850, and who, under the act of July 25, 1866 (14 Stat., 222), was promoted by selection and thereby advanced on the Navy Register next above a line officer, Richard L. Law, who entered the service February 17, 1841. The Attorney General held that Ramsay should, under section 1486, "be considered as having gained length of service according to his promotion." Following this opinion there was published in the Navy Register of 1882, for the first time, a precedence list of officers of the Navy, and reference to this list (p. 167) shows that Capt. Ramsay was given, pursuant to the Attorney General's opinion, a date of precedence as February 17, 1841, being the same date as that held by Capt. Law, next above whom Ramsay was so advanced. Thus Ramsay was credited with constructive service of more than nine years for purposes of precedence. This opinion of the Attorney General continued to be followed by the Navy Department until a comparatively recent date in the publication of precedence tables in the annual Navy Register. (File 11130-63:5, Feb. 14, 1921, citing precedents.)

The first departure from the rule required by the Attorney General's opinion (17 Op. Atty. Gen., 56) appears to have occurred in certain cases of staff officers who were advanced to the rank of rear admiral in 1910, without any change in their dates of precedence. No explanation of this departure is forthcoming, other than that the Attorney General's opinion and the mandatory provision of section 1486 must have been overlooked or disregarded without authority of law. Similarly, in the cases of certain officers, line and staff, who have been advanced to the ranks of commander, captain, and rear admiral by selection in accordance with the acts of August 29, 1916 (39 Stat., 578), and July 1, 1918 (40 Stat., 718), such advancement has not been accompanied by any change in their dates of precedence as required by the Attorney General's opinion and section 1486. (File 11130-63:5, Feb. 14, 1921.)

*Held*, that officers of the line and staff of the Navy, who entered the Navy prior to March 4, 1913, and who have been advanced on the Navy Register, should be credited, for purposes of precedence, in accordance with section 1486, with "constructive service" sufficient to place

them ahead of all others, line and staff, over whom they have been so advanced. This applies as much where officers have been advanced by selection over officers in their own corps as in any other case. (32 Op. Atty. Gen., 476, Mar. 3, 1921, following 17 Op. Atty. Gen., 56.)

The advancement of an officer in numbers pursuant to a special act of Congress (Sept. 30, 1890, 26 Stat., 552, case of Chief Engineer George Wallace Melville), operates to make him gain length of service under section 1486, Revised Statutes, but this provision of that section has reference only to the question of rank and precedence mentioned in section 1485, and does not operate to increase his length of service for purposes of pay. The act of March 3, 1883 (22 Stat., 473), providing that officers shall be credited with "the actual time they may have served as officers or enlisted men in the Regular or Volunteer Army or Navy, or both," relates to crediting actual service which is distinct from constructive service which an officer gains under section 1486 by advance in numbers. (5 Comp. Dec., 756.)

Where a warrant officer is sentenced by court-martial to loss of numbers, the effect of which is to place him below an officer of a later date of appointment, he is to be regarded as having lost length of service accordingly, and is not entitled to promotion under the act of April 27, 1904 (33 Stat., 346), which authorizes the promotion of warrant officers "after six years from date of warrant," until the officer next above him in the list has become due for promotion. (File 17789-20, Dec. 18, 1913; approved by President, Feb. 18, 1914.)

**Miscellaneous.**—A Navy regulation providing that, "in all cases where commissioned officers of the different corps have the same date of precedence, they shall take rank as follows: 1. Line officers. 2. Medical officers. 3. Pay officers. 4. Engineer officers," is within the authority conferred upon the Secretary of the Navy by Revised Statutes 1547. (21 Op. Atty. Gen., 46.)

**Quære:** Whether the question could be presented in any form for judicial determination, whether the practice of the Navy Department with regard to the rank and precedence of officers conforms to section 1485 of the Revised Statutes? (U. S. v. Alger, 152 U. S., 384, 397.)

**Sec. 1487. [Quarters.]** No staff officer shall, in virtue of his relative rank or precedence, have any additional right to quarters.—(3 Mar., 1871, c. 117, s. 10, v. 16, p. 537.)

Amendment to this section was made by act of March 3, 1899, section 7 (30 Stat., 1006), which abolished "relative" rank and substituted actual rank therefor.

Allowances for officers of the Army are made applicable to officers of the Navy by act of March 3, 1899, section 13 (30 Stat., 1007), which provided that commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same allowances, except forage, as may be provided by or in pursuance of law for the officers of corresponding rank in the Army. By act of May 13, 1908 (35 Stat., 128), it

was provided that "hereafter all commissioned officers of the active list of the Navy shall receive the same pay and allowances according to rank and length of service." However, the same act made an exception in the cases of chaplains, by providing that "the pay and allowances of chaplains in the Navy shall in no case exceed that provided for lieutenant commanders." This exception was removed by act of August 29, 1916 (39 Stat., 581), which reenacted the provision in the act of May 13, 1908, without such exception. The corresponding ranks of officers of the Army and officers

of the Navy are prescribed by section 1466, Revised Statutes. The designation of the "Pay Corps" was changed to "Supply, Corps" by act of July 11, 1919 (41 Stat., 147).

"During the war, in such cases as may be approved by the Secretary of the Navy, this appropriation shall be available for the hire of quarters for officers attached to submarines when they are required to be on shore and Government quarters are not available." (Act July 1, 1918, 40 Stat., 728, proviso to appropriation for "Pay of the Navy," which appropriation also makes provision "for hire of quarters for officers serving with troops where there are no public quarters belonging to the Government, and where there are not sufficient quarters possessed by the United States to accommodate them, or commutation of quarters not to exceed the amount which an officer would receive were he not serving with troops and hire of quarters for officers and enlisted men on sea duty at such times as they may be deprived of their quarters on board ship due to repairs or other conditions which may render them uninhabitable.")

"During the present emergency every commissioned officer of the Army of the United States on duty in the field, or on active duty without the territorial jurisdiction of the United States, who maintains a place of abode for a wife, child, or dependent parent, shall be furnished at the place where he maintains such place of abode, without regard to personal quarters furnished him elsewhere, the number of rooms prescribed by the Act of March second, nineteen hundred and seven (Thirty-fourth Statutes, page eleven hundred and sixty-nine), to be occupied by, and only so long as occupied by, said wife, child, or dependent parent; and in case such quarters are not available every such commissioned officer shall be paid commutation thereof and commutation for heat and light at the rate authorized by law in cases where public quarters are not available; but nothing in this Act shall be so construed as to reduce the allowances now authorized by law for any person in the Army." (Act Apr. 16, 1918, 40 Stat., 530.) By naval appropriation act of July 11, 1919 (41 Stat., 140), it was provided that said act of April 16, 1918, "granting under certain conditions, to every commissioned officer of the Army the right to quarters in kind for their dependents or the authorized commutation therefor, including the allowances for heat and light, shall hereafter be construed to apply to officers of the Navy and Marine Corps only during the period of the war and in no event beyond October 1, 1919." Said enactment of July 11, 1919, was expressly repealed by Joint Resolution of December 24, 1919 (41 Stat., 384), which further provided that officers of the Navy and Marine Corps "shall be entitled to all the rights and benefits under said act of April 16, 1918 (Public, numbered 129), from and after

October 1, 1919, and during the present emergency." By act of May 18, 1920 (41 Stat., 602), said allowances under the Act of April 16, 1918, were continued until June 30, 1922.

"Hereafter the Secretary of the Navy may determine where and when there are no public quarters available for persons in the Navy and Marine Corps, or serving therewith, within the meaning of any acts or parts of acts relating to the assignment of quarters or commutation therefor." (Act July 1, 1918, 40 Stat., 718.)

"Hereafter officers temporarily absent on duty in the field shall not lose their right to quarters or commutation thereof at their permanent station while so temporarily absent." (Act Feb. 27, 1893, 27 Stat., 480.)

Marine officers are entitled to receive the same allowances as are or may be provided by or in pursuance of law for the officers of like grades in the infantry of the Army. (Sec. 1612, R. S.)

Special allowances for maintenance to officers serving under unusual conditions may be paid from the appropriation "Pay, Miscellaneous." (Act June 4, 1920, 41 Stat., 813.)

The allowance for quarters to officers of the Army is prescribed by act of March 2, 1907 (34 Stat., 1168, 1169), amending act of June 17, 1878, section 9 (20 Stat., 151), to read as follows: "That at all posts and stations where there are public quarters belonging to the United States officers may be furnished with quarters in kind in such public quarters, and not elsewhere, by the Quartermaster's Department, assigning to the officers of each grade, respectively, such number of rooms as is stated in the following table, namely: Second lieutenants, two rooms; first lieutenants, three rooms; captains, four rooms; majors, five rooms; lieutenant colonels, six rooms; colonels, seven rooms; brigadier generals, eight rooms; major generals, nine rooms; lieutenant general, ten rooms: *Provided further*, That at places where there are no public quarters commutation therefor may be paid by the Pay Department to the officer entitled to the same at a rate not exceeding twelve dollars per month per room."

The same act of March 2, 1907 (34 Stat., 1167), also provided "that hereafter the heat and light actually necessary for the authorized allowance of quarters for officers and enlisted men shall be furnished at the expense of the United States under such regulations as the Secretary of War may prescribe."

By act of March 4, 1915 (38 Stat., 1069), it was provided "that hereafter, at places where there are no public quarters available, commutation for the authorized allowance therefor shall be paid to commissioned officers, acting dental surgeons, veterinarians, members of the Nurse Corps, and pay clerks at the rate of \$12 per room per month." (As to the corresponding ranks between officers of the Army and officers of the Navy, see sec. 1466, R. S.)



Transportation to be furnished families of officers ordered to make a permanent change of station. (Act May 18, 1920, sec. 12, 41 Stat., 604.)

Warrant officers and mates "shall hereafter receive the same commutation for quarters as second lieutenants of the Marine Corps" (act Mar. 3, 1901, 31 Stat., 1107); and "shall receive the same allowances of heat and light as are now or may hereafter be allowed an ensign, United States Navy." (Act Aug. 29, 1916, 39 Stat., 578.)

**Army laws fixing the allowance for quarters are applicable to the Navy** under the act of March 3, 1899, section 13 (30 Stat., 1007), and May 13, 1908 (35 Stat., 127, 128), as amended by act of August 29, 1916 (39 Stat., 581). (24 Comp. Dec., 610.)

Under the law all commissioned officers of the Navy are now entitled to the same allowances, except forage, as provided by law for commissioned officers of the Army under corresponding conditions. (File 26255-471:2, Apr. 13, 1918; see also 15 Comp. Dec., 809, 812, citing 27 Op. Atty. Gen., 261; and see 150 S. & A. Memo., 2753.)

**Commutation of quarters authorized prior to specific legislation.**—In *Whittlesey v. United States* (5 Ct. Cls., 99), it was held that the right of an officer of the Army to commutation of fuel and quarters did not, at that time, rest upon any specific legislation; that it sprang out of the general authority of the War Department, and had been indirectly sanctioned by Congress from the origin of the Government. In *United States v. Philbrick* (120 U. S., 52), it was held that an order of the Secretary of the Navy, issued May 23, 1866 (G. O. No. 75), allowing officers who were not provided with quarters on shore stations a sum equal to one-third of their pay in lieu of all allowances except for mileage or traveling expenses under orders, was a valid order under the law as it then stood. (See also *Allen v. U. S.*, 22 Ct. Cls., 300.)

**Authority for quarters does not imply authorize commutation.**—Commutation for quarters, fuel, and light not furnished to an officer or enlisted man can not be paid unless authorized by some statute or regulation—that is, the right to commutation does not arise automatically but must be based upon some specific provision of law. Accordingly, where an enlisted man was entitled by Army Regulations to quarters at the rate of one room, and by statute was entitled to heat and light for the same, and was not furnished the quarters or heat and light, he is not entitled to commutation in the absence of any statute or authorized regulation providing for the payment of such commutation. (*Smith v. U. S.*, 47 Ct. Cls., 313, holding that the second leader of the Marine band, who under statutes then in force was entitled to the pay and allowances of a sergeant major, was not entitled to commutation for quarters as there was no law or regulation authorizing such commutation in the case of a sergeant major.)

**Assignment of quarters.**—Where there are different classes of public officers entitled to quarters in kind or commutation thereof, the Secretary of the Navy must be the judge of how the interest of the Government may best be served in assigning the available quarters. If

civilian professors at the Naval Academy are allowed quarters in kind or commutation thereof as part of their compensation fixed by the Secretary of the Navy, they would have an equal right thereto with commissioned officers entitled to quarters in kind or commutation thereof; and the Secretary of the Navy may exercise his discretion in determining whether it is to the best interest of the Government to assign the available quarters at the Naval Academy to the civilian professors or to the commissioned officers. (File 11168-4, Feb. 1, 1917.)

The question of assignment of quarters is an administrative one, under the control of the Secretary of the Navy, whose orders, regulations, and decisions thereon are binding upon all persons in the naval service; and is not a question under the jurisdiction of the Comptroller of the Treasury. The Secretary of the Navy is prepared to safeguard to the fullest extent the interests of officers who make payments in accordance with any regulation or order issued by him. (File 26254-2134, Dec. 19, 1916.)

Quarters permanently assigned are not available for temporary assignment during periods that they become vacant in consequence of changes of stations, etc., and no quarters assigned any officer are available for reassignment during the temporary absence of the occupants on duty for which the law permits them to be absent without reduction of pay and allowances. (File 26254-2134, Dec. 19, 1916; see also file 26254-2120:1, Nov. 15, 1916. See below under "Officer temporarily absent from station.")

The commandant of a navy yard is not authorized to assign to other than Marine officers quarters at the navy yard under his command which were constructed for the use of Marine officers attached to said yard, even though such quarters may be temporarily unoccupied by Marine officers, in the absence of an order by the Secretary of the Navy permitting the transfer of such quarters for the use of officers of the Navy. In the absence of such order, officers of the Navy for whom no quarters are available are entitled to commutation of quarters. (File 26254-2134, Dec. 19, 1916.)

Where quarters at a navy yard are permanently assigned for the use of officers detailed to specified positions at said yard, and such quarters are temporarily vacant by reason of the change of station of said occupants or other similar exigency of the service, such temporarily vacant quarters should not be assigned to officers reporting for duty in the interim, unless such officers occupy positions at the navy yard which would entitle them to such quarters permanently. (File 2743-247, Bu. Nav., 26254-1418, Sec. Nav., Feb. 19, 1914; see also file 26254-2134, Dec. 19, 1916.)

**Hire of quarters.**—The amount to be paid for hire of quarters for officers has no relation whatever to the amount of commutation of quarters to which they may be entitled under certain circumstances. In hiring quarters the officer representing the Government is supposed to procure necessary, reasonable, and assuitable quarters as may be obtained, and on the best terms possible, and when thus procured they are to be assigned to the officers entitled to the same in the same manner as quarters owned by

the Government. (Comp. Dec., Feb. 2, 1917, 192 S. & A. Memo., 4155. *NOTE*.—The specific question decided in this case was overruled by Comp. Dec., Apr. 12, 1917, file 26254-2131:7, noted below.)

The Secretary of the Navy authorized the commandant of the navy yard, Mare Island, to hire quarters for the officers of the third submarine division, temporarily, while the vessels of that division were undergoing repairs which made them uninhabitable, there being no tender on which they could be quartered and no quarters available at the yard. The commandant directed the yard pay officer to arrange for the hire of the quarters required, and to pay for them from the appropriation "Contingent, Navy," stating that the payment in no case should exceed the amount that each officer would be allowed as commutation of quarters according to his rank and for the time that quarters should be occupied. The quarters were hired by the officers concerned, and in no case did the cost thereof exceed the allowance for the number of rooms to which their respective ranks entitled them, nor were the prices paid in excess of those usually charged the general public for temporary occupancy. The amounts so paid for said quarters were disallowed by the Comptroller on the ground that the officers occupying the quarters, being directly and personally interested, could not properly represent the Government but only themselves. (Comp. Dec., Feb. 2, 1917, file 26254-2131:6, 192 S. & A. Memo., 4155.) On reconsideration, the Comptroller allowed the payments for hire of quarters in these cases, but stated: "It is expected that in future when it becomes necessary to hire quarters for officers the Government will be represented in making the contract for hire by some properly designated official other than the officer or officers who are to occupy the hired quarters." (Comp. Dec., Apr. 12, 1917, file 26254-2131:7.)

The Army Regulations provide for the renting of quarters where the public buildings are inadequate, but the authority to rent is reserved expressly to the Secretary of War and can not be exercised without his approval. Under the Army Regulations the practice has been for the proper officers to obtain the necessary authority to hire quarters as prescribed in the Regulations, and deal directly with the landlord, making disbursements directly to him through the Department of War, thus precluding the making of individual contracts of rental for quarters. There is no regulation permitting individual discretion or opinion as to the inadequacy of Army quarters. Accordingly, where an officer has quarters assigned him which are inadequate for himself and wife, and rents rooms outside his station without approval of the Secretary of War, he can not recover commutation or hire of quarters. (*Moses v. U. S.*, 41 Ct. Cls., 27.)

There is no authority of law for the hire of quarters on shore for naval officers on sea duty, the law presuming that officers on sea duty shall have quarters on board the vessel on which they are serving. This applies in the case of officers ordered to duty on board a submarine tender, where there are no public quarters available for such officers either on board said

vessel or on shore. (23 Comp. Dec., 109. But see act July 1, 1918, quoted above.)

The annual naval appropriation act provides for "hire of quarters for officers and enlisted men on sea duty at such times as they may be deprived of their quarters on board ship due to repairs or other conditions which may render them uninhabitable." (See Act June 4, 1920, 41 Stat., 824.)

**"No public quarters" defined.**—Under the act of June 18, 1878, section 9, providing with reference to the Army "that at places where there are no public quarters, commutation therefor may be paid by the Pay Department to the officer entitled to the same," etc., held that officers are entitled to commutation of quarters at places where the public quarters are "insufficient" in quantity, "for at such stations, in regard to all officers necessarily excluded from public quarters, there are, within the meaning of the proviso, 'no public quarters.'" (16 Op. Atty. Gen., 611.)

Under the law commissioned officers of the Navy are entitled to commutation of quarters "at places where there are no public quarters available" (act Mar. 4, 1915, 38 Stat., 1069); and the question whether or not there are "public quarters available," is to be determined by the Secretary of the Navy in proper cases. (File 28479-141, Nov. 15, 1915; see act July 1, 1918, quoted above.)

**Public quarters are any suitable quarters provided by the Government.**—Any suitable quarters provided by the Government for the use of an officer answers the requirement for "public quarters," though not expressly built for Army officers and an officer assigned to duty as an Indian agent and furnished a suitable building on the reservation for his quarters, without charge, is not entitled to receive commutation for quarters. (*U. S. v. Dempsey*, 104 Fed. Rep., 197.)

**Officer occupying tent.**—An officer detached from duty at a station where he was in receipt of commutation of quarters and ordered to duty with the Navy rifle team and furnished a tent for quarters while on such duty, is not entitled to commutation of quarters. The fact that he was put to the expense of providing quarters elsewhere for his family does not affect his right to quarters or commutation therefor while on duty with the Navy rifle team. (Comp. Dec., Aug. 15, 1914, 162 S. & A. Memo., 3336.)

**Officer occupying room as guest.**—Where an officer of the Medical Corps of the Navy requests to have quarters assigned him at his station, but there are no quarters that can be assigned, and he occupies a room in the Marine Barracks as a guest, with the understanding that he will vacate it whenever required to do so, he can not recover commutation for quarters. Commutation is a form of reimbursement; where there was no expense for quarters, as in this case (the occupied quarters being a part of the naval establishment of the United States), there can be no reimbursement in fact and therefore none allowed by law. If the officer had occupied quarters not belonging to the United States and was otherwise entitled to quarters, the fact that he was not charged for the use of the quarters would not be material



and would not affect the right and obligation of the parties, but when the quarters occupied belonged to the United States, there is no legal right of recovery. (*Odell v. U. S.*, 38 Ct. Cls., 194.)

**Officer assigned less than full number of rooms to which entitled.**—An officer on duty at a station where public quarters are available is not entitled to commutation of quarters, even though he can not be assigned the full number of rooms to which his rank entitles him. (Comp. Dec., Oct. 31, 1913, 153 S. & A. Memo., 2854. See also file 9886-16, Oct. 15, 1908, 20032-4, Nov. 27, 1908, and 28479-141, Nov. 15, 1915.)

A naval officer whose rank entitles him to four rooms, but who had but one room furnished him for quarters, because there were no other public quarters available at his station, can not be allowed commutation for quarters. The theory of commutation is compensation or reimbursement for something paid out. In this case the officer was relieved from expense and did not become entitled to recover the value of quarters not paid for by him. (*Irwin v. U. S.*, 38 Ct. Cls., 87, 103.)

The quarters fitted up at the aeronautic station, Pensacola, Fla., for officers attending the flying school were intended to accommodate one officer in each room. It is desirable to quarter as many officers at the station as possible in order that they may be available at all times for flying. The hours of flying must conform to the weather conditions, especially for student aviators. There are not sufficient quarters available to assign each officer at the station the number of rooms authorized for his rank. Under these circumstances, an officer whose rank entitles him to four rooms, and who has been assigned one room at said station, is not entitled to the assignment of three additional rooms or to commutation of quarters if the Secretary of the Navy decides that he should be quartered at the station and that there are quarters available for him at said station. (File 28479-141, Nov. 15, 1915.)

In the assignment of quarters to officers at the Naval Academy the determining factor should be whether it is necessary for the proper performance of the officer's duties that he reside inside the academy limits. If in the judgment of the superintendent this is necessary the officer should be assigned such quarters as may be available; if not necessary and there are no quarters available commensurate with his rank, the officer may be permitted to reside outside the grounds and he will be entitled to commutation of quarters upon certificate of the superintendent that there were no quarters available during the period. (File 9886-18, Dec. 11, 1908.)

**Officer attached to vessel of the Navy.**—An officer serving on board a vessel of the Navy, under orders, can not acquire any right to commutation of quarters for the reason that Congress has not attached any such allowance to his office for service at sea on board of a vessel. (Comp. Dec., Aug. 28, 1917, 198 S. & A. Memo., 4357.)

When an officer of the Navy is on receiving-ship duty, and the ship acting as receiving ship is detached from such duty, no other ship

being designated in its place, if the situation is to be permanent in character, the officer is in a shore-duty status and becomes entitled, in the event that quarters in kind are not furnished him, to commutation of quarters; but if such situation is only temporary, the officer remains in a sea-duty status and is not entitled to commutation of quarters but must provide his own quarters. (Comp. Dec., July 3, 1917, 197 S. & A. Memo., 4300.)

A retired officer was ordered to active duty in time of war as commanding officer of a receiving ship. Under the regulations then in force governing the receiving-ship system, ships in commission were designated as receiving ships, retaining their own commanding officer as such ships in commission and in addition thereto having a commanding officer in their added function as receiving ships. There was a ship in commission actually designated as receiving ship at the station in question. The retired officer did not actually assume command of the receiving ship as such, but served on shore in a building used for such purpose, where he performed the duties of commanding officer of a nominal receiving ship. His orders to duty as commanding officer of a receiving ship assigned him to sea duty and did not entitle him to commutation of quarters, even though said orders referred to this duty as "shore duty." However, upon the detachment of the ship which had been designated as receiving ship, and during the period thereafter while there was no ship actually designated as receiving ship at said station, the officer may be allowed commutation of quarters, in view of the emergency conditions which existed, although it would seem that his orders to duty as commanding officer of the receiving ship were in effect canceled by the detachment of the ship, and new orders not having thereafter been issued to him, the duties he thereafter performed as commanding officer of a nominal receiving ship were not in obedience to any orders. (Comp. Dec., Aug. 28, 1917, 198 S. & A. Memo., 4357.)

Service of naval officers on board vessels is "duty in the field" within the meaning of the act of April 16, 1918 (40 Stat., 530, quoted above), relating to commutation of quarters for officers of the Army, which act applies to the Navy by virtue of section 13 of the Navy personnel act of March 3, 1899 (30 Stat., 1007), and the act of August 29, 1916 (39 Stat., 581). Under these laws all commissioned officers of the Navy are now entitled to the same allowances, except forage, as provided by law for commissioned officers of the Army, under corresponding conditions. (File 26255-471: 2, Apr. 13, 1918, citing 12 Comp. Dec., 291, 293, and *Ex parte Gerlach*, 247 Fed. Rep., 616.)

Commissioned officers of the Navy on the active list on duty on vessels of the Navy are "on duty in the field" and possess the same right to commutation of quarters under the act of April 16, 1918 (above quoted), as is conferred by said act upon officers of the Army. (24 Comp. Dec., 610.)

For other cases, see below, "Officer temporarily absent from station," and see above, "Hire of quarters."

**Officer awaiting orders.**—An officer of the Army “unassigned” and “awaiting orders” at headquarters, who makes no application for fuel and quarters, and who does not show at the trial of his claim in court that no quarters were to be had at headquarters, is not entitled to commutation therefor; but upon showing that there were no quarters at headquarters, he is entitled to commutation. (*Crosby v. U. S.*, 13 Ct. Cls., 110.)

An officer of the Army who pursuant to orders reported to the headquarters of a department, there to “await further orders,” and while awaiting orders was not furnished fuel or quarters, is entitled to recover their commuted value. It is immaterial that he performed no active duty while thus awaiting orders. He was subject to assignment to such duty, and the responsibility for his nonemployment rested with his superior officer. Where an officer is directed to proceed to a place specified, there to await orders, it is his duty to go to that place and to remain there; he can not go elsewhere; he can not return until ordered; he is as much under orders and can no more question the duty of obedience than if ordered to an ambush to lie in wait for the enemy. (*U. S. v. Lippitt*, 100 U. S., 663, affirming *Lippitt v. U. S.*, 14 Ct. Cls., 148, quoting *U. S. v. Williamson*, 23 Wall., 411, and distinguishing *U. S. v. Phisterer*, 94 U. S., 219.)

**Officer at home awaiting orders.**—An officer of the Army at his own home awaiting orders, having been ordered there at his own request and having no public duty whatever to perform, is not entitled to commutation of quarters. Quarters are expected to be furnished by the Government to its officers; when it can not thus furnish, it allows them to be obtained otherwise, and pays a money compensation therefor, called commutation. This is upon the assumption, first, that the officers are actually engaged in the public service; and, second, that such quarters are necessary to the discharge of their duty. It is upon the latter idea that commutation for fuel and quarters is not allowed to officers when in the field. The duty there is public not only, but of the most necessary character; still, apartments, kitchen, and offices are not there necessary, and can not be commuted for. The officer's home is not a station in the sense that he is entitled to public quarters or to a compensation in the form of commutation therefor. (*U. S. v. Phisterer*, 94 U. S., 219.)

**Officer at home performing duty.**—A paymaster in the Navy detached from his vessel and ordered, “Proceed to your home in the United States, settle your accounts, and await orders,” is on duty during the period prescribed by the regulations and orders of the department for the making out of his accounts, and for that period he is entitled to commutation of quarters, there being no public quarters at his home which can be furnished to him. So much of the order as provides that the officer shall “await orders” at his home does not take effect until the period allowed for settling his accounts has expired. (*Colhoun v. U. S.*, 41 Ct. Cls., 31.)

A retired officer ordered to active duty in connection with the Naval War College, whose

orders did not specify where the shore duty on which he was to be employed should be performed, and who selected his home as his station for the performance of such duty, is entitled to commutation of quarters notwithstanding that he reported at the War College by letter instead of in person. The assignment of an officer to duty at any place makes that place his post or station within the meaning of those terms as used in the law granting commutation of quarters. Where the choice is left to the officer, the selection of his home for the performance of the duty assigned him makes it a post or station; the fact that he reported by letter, as directed, does not defeat his right to commutation of quarters. (Comp. Dec., Apr. 14, 1910, 110 S. A. Memo., 1379.)

**Officer undergoing trial by court-martial or by civil authorities.**—An officer of the Army ordered to report for trial by court-martial at a place where quarters can not be assigned to him is entitled to commutation for quarters during his trial and while awaiting orders after the trial. The mere fact that an officer is under charges does not deprive him of his pay and allowances. Such forfeiture can only be imposed by the sentence of a court-martial. It is conceded that the officer was ordered before the court-martial for trial; that his status was that of an officer under suspension from duty during the existence of such trial. He was under charges during the pendency of his trial, and the result of the trial alone could determine his status as a volunteer Army officer. He could not absent himself from the place of trial without disobeying the orders of his superiors. He was not absent from his post of duty without leave. On the contrary, he was present at the court-martial in obedience to orders, awaiting the result of the trial and such orders as would necessarily follow. Aside from this, it has been held in a number of cases that the mere fact that an officer or soldier is under charges does not deprive him of his pay and allowances, and that such forfeiture can only be imposed by the sentence of a lawful court-martial (citing *Smith v. U. S.*, 2 Ct. Cls., 206; *Winters v. U. S.*, 3 Ct. Cls., 136; *Collins v. U. S.*, 15 Ct. Cls., 22; *Sullivan v. U. S.*, 32 Ct. Cls., 402; and *Dodge v. U. S.*, 33 Ct. Cls., 35). In *Sullivan's* case, *supra*, it was held that, “when an officer is suspended and ordered in arrest, it is as much his duty to obey as it is to perform or execute any other order requiring affirmative action. He ceases by order of his superior officer to perform the active duties incident to his office. He is not to do anything in the discharge of his official obligations in the form of military duty until relieved of the disability incident to his arrest. He is ‘awaiting orders’ emphatically. The official duties pertaining to his position have been transferred to some other officer, and so far as the right to perform the duties of his office goes, he is *functus officio*.” This case differs from that of *Swaim v. United States* (165 U. S., 553), in which it was held that when an Army officer was suspended from rank by sentence of a court-martial he was not entitled to emoluments or allowances; and differs also from the case of *Phisterer v. United States* (94 U. S., 219), in which it was held that an Army officer ordered by proper authority



from a military post where he was rendering service to proceed to his home and await orders was not entitled to commutation for quarters. (*Wales v. U. S.*, 43 Ct. Cls., 225, holding that the court-martial in the case under consideration was illegally constituted and its sentence void.)

An officer of the Army for some months is in the custody of the civil authorities in Manila awaiting trial, on bail and not actually restrained of his liberty; subsequently he is under military arrest and confined to the limits of the city of Manila; during all this period he is under orders assigning him to temporary duty in Manila and resides in a private house, not having been furnished with quarters. Until his arrest he receives pay and commutation of quarters. He is tried and convicted in the civil courts at Manila, but the judgment is reversed by the Supreme Court of the United States. He is subsequently tried, convicted, and dismissed from the Army by a military court-martial, and is thereafter reinstated and retired. *Held*, that it requires the decision of a court-martial to deprive an Army officer of his pay and emoluments, and that where an officer is awaiting trial before either a civil or military tribunal, under waiting orders issued by authority of the War Department, he is entitled to the emoluments of his office, including commutation for quarters. Further *held* that although this officer was first tried by a civil tribunal and afterward tried by a general court-martial, he was under waiting orders issued by authority of the War Department which covered the time involved in both trials, and is entitled to all the emoluments allowed by the Army Regulations, which include commutation for quarters. (*Carrington v. U. S.*, 46 Ct. Cls., 279.)

**Officer detailed as professor in a college.**—Where an officer of the Army is detailed by peremptory order to act as professor in a college he is entitled to be furnished fuel and quarters by the Government or commutation therefor. The order detailing him is one which he is bound to obey, and his right to commutation can not be affected by the fact that his detail was procured by the president of the college with his cooperation. In such a case, if there be no quarters at the place it will be a station without troops within the meaning of Army Regulations, and he need not make requisition for quarters. (*Long v. U. S.*, 8 Ct. Cls., 398; see also note to sec. 1225, R. S.)

**Civilian professors at Naval Academy.**—The act of August 29, 1916 (39 Stat., 607), provides "that the Secretary of the Navy is authorized to employ at the Naval Academy such number of professors and instructors, including one professor as librarian, as, in his opinion, may be necessary for the proper instruction of the midshipmen; and that professors and instructors so employed shall receive such compensation for their services as may be prescribed by the Secretary of the Navy." This law clearly leaves it entirely to the discretion of the Secretary of the Navy to prescribe the "compensation" of civilian professors and instructors, and the Secretary, in exercising such discretion, may, in accordance with the authorities, prescribe that such civilians shall be

allowed public quarters, heat and light, or commutation thereof. (File 11168-4, Feb. 1, 1917, citing cases. See below, under "Whether commutation of quarters is salary, compensation, or pay proper.")

**Officer temporarily absent from station.**—An officer of the Navy on temporary duty in the United States away from his station beyond seas, if entitled to commutation of quarters at such station continued to be so entitled during the period of his temporary absence in the United States; he is not entitled, however, to commutation of heat and light during such absence, unless his quarters at his permanent station are occupied by his family or persons dependent upon him for support. (Comp. Dec., Jan. 17, 1916, 179 S. and A. Memo., 3570.)

An officer of the Pay Corps in receipt of commutation of quarters at his permanent station at Washington, D. C., as general inspector of the Pay Corps, may continue to receive such commutation while temporarily absent under orders requiring him to proceed to Yokohama, Japan, and to various other points outside the continental limits of the United States, including points lying within the island possessions of the United States, for the purpose of inspecting the accounts of the pay officers stationed at the points designated, including the accounts of paymasters of vessels with which he might fall in during his entire trip, and upon completion of said duty to return to his former station by way of the Suez Canal. (Comp. Dec., Sept. 26, 1901, to Paymaster Livingston Hunt; compare 21 Comp. Dec., 604.)

The Navy Regulations, 1913 (art. R-4511 (5)), provide that "the quarters to which an officer is entitled when on duty may be continued in kind, at his proper station, during the period for which the law permits him to be absent without reduction of pay and allowances." This regulation is based upon the act of February 27, 1893 (27 Stat., 480), which provides "that hereafter officers temporarily absent on duty in the field shall not lose their right to quarters or commutation thereof at their permanent stations while so temporarily absent." In the Comptroller's decision of August 3, 1907 (see 125 S. and A. Memo., 1850), it was held that "this statute authorizes the payment of commutation of quarters to naval officers, who are entitled to that allowance during the time they are temporarily absent on duty from their permanent stations, provided they were receiving such commutation at the permanent stations, or, if they were occupying public quarters, it gives them the right to retain their quarters during such absence." In the Comptroller's decision of July 26, 1911 (125 S. and A. Memo., 1854), it was said: "The act of February 27, 1893, *supra*, contemplates the temporary absence of an officer from his permanent station, and a temporary absence presupposes the intention to return to the permanent station and resume his duties there. If the absence of Lieut. Commander Trench from the academy was only temporary, under the act of February 27, 1893, he did not lose his right to retain his quarters there during such absence." (File 26254-2134, Dec. 19, 1916; see also file 26254-2120:1, Nov. 15, 1916.)

**Agreement of officers for exchange of quarters and commutation.**—An agreement whereby an officer who has been regularly assigned to public quarters undertakes to permit another officer to occupy such quarters and to exchange his right thereto for the other officer's right to commutation of quarters, is not authorized and in such case the officer who was assigned to public quarters but did not occupy them is not entitled to any commutation whatever in lieu thereof. (22 Comp. Dec., 707; see also file 26254-2052, July 7 and Aug. 7, 1916.)

**Services of laborer in caring for quarters.**—Service performed by a laborer at a navy yard, under the direction of the general storekeeper, in and about the quarters of that officer is not authorized by law, and the general storekeeper is liable to the United States for the value of services thus unlawfully converted to his personal use. (12 Comp. Dec., 697.)

**"Duty without troops" defined.**—The Army regulation concerning commutation of quarters for officers "on duty without troops," extends to officers on detached service, such as recruiting service, although there may be enlisted men on duty, such as guards, orderlies, clerks, and messengers. Such cases are distinguishable from those of officers of the line serving in the field or with their commands at a fort or in barracks. (Anderson v. U. S., 39 Ct. Cls., 316.)

Prior to the act of March 4, 1915, commutation of quarters was only allowable where an officer was detailed for duty without troops. (Moses v. U. S., 41 Ct. Cls. 27, citing Hunt v. U. S., 38 Ct. Cls., 704, and Anderson v. U. S., 39 Ct. Cls., 316.) Under the act of March 4, 1915, commissioned officers of the Navy are now entitled to commutation of quarters "at places where there are no public quarters available." (File 28479-141, Nov. 15, 1915.)

The annual naval appropriation acts make provision for "hire of quarters for officers serving with troops where there are no public quarters belonging to the Government, and where there are not sufficient quarters possessed by the United States to accommodate them or commutation of quarters not to exceed the amount which an officer would receive were he not

serving with troops." (See act June 4, 1920, 41 Stat., 824.)

**Application for quarters not necessary to allowance of commutation.**—Commutation can be allowed an officer without previous demand by him for fuel and quarters and reply that they can not be furnished. (Whittlesey v. U. S., 5 Ct. Cls., 99.)

Where the headquarters of a military department are in a large city in which there are no quarters assignable to officers on duty, it is not necessary for an officer ordered there to make a demand that quarters be assigned to him. He will be entitled to recover commutation if it appear that there were no quarters which might have been assigned. (Lippitt v. U. S., 14 Ct. Cls., 148. See also Crosby v. U. S., 13 Ct. Cls., 110; Long v. U. S., 8 Ct. Cls., 398.)

**Whether commutation of quarters is salary, compensation, or pay proper.**—Commutation of quarters is part of the "official salary" of an Army officer within the meaning of those words as used in the act of June 28, 1902 (32 Stat., 483), relating to employment of Army officers under the Isthmian Canal Commission. (12 Comp. Dec., 343.)

Under the law providing that the Secretary of the Navy may prescribe the "compensation" of civilian professors and instructors at the Naval Academy, he may prescribe that such civilians shall be allowed public quarters, heat and light, or commutation thereof. (File 11168-4, Feb. 1, 1917, citing cases.)

Commutation is a form of reimbursement and is not part of the compensation of an officer. (Odell v. U. S., 38 Ct. Cls., 194.)

The theory of commutation is compensation or reimbursement for something paid out. (Irwin v. U. S., 38 Ct. Cls., 87, 103.)

The allowances provided for in General Order No. 75, Navy Department, May 23, 1866, namely, a sum to be paid officers not provided with quarters on shore stations, equal to one-third of their pay, in lieu of all allowances except for mileage or traveling expenses, constitute no part of the pay proper of officers and were designed to meet certain expenses they would necessarily incur in the discharge of their duties. (U. S. v. Allen, 123 U. S., 345.)

**Sec. 1488. [Military command.]** The relative rank given by the provisions of this chapter to officers of the Medical, Pay, and Engineer Corps shall confer no authority to exercise military command.—(General Orders 31 Aug., 1846, and 27 May, 1847. 5 Aug., 1854, c. 268, s. 4, v. 10, p. 587. 3 Mar., 1859, c. 76, s. 2, v. 11, p. 407.)

Amendment to this section was made by act of March 3, 1899, section 7 (30 Stat., 1006), which abolished "relative" rank and substituted actual rank therefor, with the proviso that "officers whose rank is so defined shall not be entitled, in virtue of their rank to command in the line or in other staff corps." The same act, section 1 (30 Stat., 1004), transferred the Engineer Corps to the line of the Navy, and thereby abolished the Engineer Corps (see note to sec. 1390, R. S.).

By act of July 11, 1919 (41 Stat., 147), it was provided that "hereafter the Pay Corps shall be called the Supply Corps."

By act of June 24, 1910 (36 Stat., 614), it was provided that "line officers may be detailed for duty under staff officers in the manufacturing and repair departments of the navy yards and naval stations, and all laws or parts of laws in conflict herewith are hereby repealed."

By act of March 3, 1915 (38 Stat., 930), it was provided that "hereafter officers who now perform engineering duty on shore only and officers of the Construction Corps shall be eligible for any shore duty compatible with their rank and grade to which the Secretary of the Navy may assign them." (See note to sec. 1404, R. S.) A



similar provision was contained in the act of June 30, 1914 (38 Stat., 394).  
 Command of vessels. See note to section 1529, Revised Statutes.

**Command of hospital ships by medical officers.**—The words "military command" in section 1488 have been supplanted by the later act of March 3, 1899 (quoted above), which provides that staff officers shall not "command in the line or in other staff corps." The command of a hospital ship by a medical officer is not a "command in the line or in other staff corps;" it is a command in the medical officer's own staff corps, and in their own staff corps medical officers have always had a command. (27 Op. Atty. Gen., 571. NOTE.—In practice officers of the Supply Corps of the Navy were later detailed on hospital ships under the command of medical officers; see for example Navy Register of January 1, 1917, page 298; when the Attorney General's opinion cited was rendered, officers of the line or other staff corps were not, under the regulations then existing, to be assigned to duty on hospital ships commanded by medical officers.)

Prior to March 3, 1901, assignments to command of naval vessels were governed by section 1535, Revised Statutes, and regulations made in accordance therewith. The position of staff officers during the same period with regard to military command was restricted by the acts of August 5, 1854 (10 Stat., 587), and March 3, 1859 (11 Stat., 407), now section 1488, Revised Statutes. The act of March 3, 1899 (30 Stat., 1006), amending the words "the relative rank of" in the Revised Statutes to read "the rank of," provided that "officers whose rank is so defined shall not be entitled, in virtue of their rank to command in the line or in other staff corps." By act of March 3, 1901 (31 Stat., 1133), Congress declared "that the President of the United States be, and he is hereby, authorized to establish, and from time to time to modify, as the needs of the service may require, a classification of vessels of the Navy, and to formulate appropriate rules governing assignments to command of vessels and squadrons." This act is plainly intended to amend the previous statutes on the subject and is designed to allow the President to reclassify the vessels of the Navy that had theretofore been fixed by section 1529, Revised Statutes; and to authorize him to assign the command of vessels, omitting all restrictions. He is by this act given the full power contemplated in that provision of the Constitution which makes him commander in chief of the Army and Navy. The act of March 3, 1901, is a complete substitute for prior laws or customs. The language of that act is clear and unambiguous, and was enacted with a full knowledge of the conditions brought about by prior laws and of the necessity of a new and elastic system by which the President could from time to time make such regulations as the necessities of the changing conditions in the service should require. (27 Op. Atty. Gen., 571.)

A joint board of Army and Navy medical officers convened by the President, under orders of January 11, 1906, recommended the construction of hospital ships for both the Army

and the Navy, the personnel of which should consist of one medical officer in command of the ship, four medical officers to attend the patients, and a number of enlisted men of the Hospital Corps, it being "recommended that the crews of hospital ships be composed entirely of civilians." This recommendation was approved by the Secretary of War and by the Surgeon General of the Navy, and disapproved in toto by the Chief of the Bureau of Navigation, in part for the reason that "it would be impracticable, dangerous, and inimical to the service, and contrary to laws, regulations, and customs of long standing," to have medical officers in command of such ships. The Surgeon General of the Navy again approved the recommendation of the board on September 24, 1906, stating that—"The bureau concurs in the recommendation of the joint board that a medical officer should be placed in command of a hospital ship, but does not contemplate nor consider it advisable that such command should give him control of her navigation \* \* \*. The medical officer in command is to receive all orders from the commander in chief or from the department and to transmit them to the captain of the ship. His command should be absolute, the captain of the ship taking his directions from the senior medical officer. The captain should not be a naval officer, but should belong to the merchant marine, and should have entire control of the navigation of the ship and of the civilian crew and regulate discipline and matters pertaining to them. The discipline of the medical branch should be in the hands of the medical officer in command \* \* \*." The Bureau of Navigation on September 27, 1906, declined to add anything to its previous statement on the subject. Thereupon the Secretary of the Navy on December 12, 1906, made the following order: "\* \* \* Second. The department holds that such a ship, when in commission, should be treated as a floating hospital, and as such placed under the command of a medical officer, her navigation being controlled by a competent sailing master. In war time, the entire crew should be, so far as possible, specially enlisted from civilians, as men of the Hospital Corps, and for such time only as their services will probably be needed. In time of peace, the crew, except such as are engaged in hospital duties, could be organized substantially as is that of a naval auxiliary, but subject to the provision above set forth as to the command." The President on January 4, 1908, approved the Secretary's decision of December 12, 1906, and orders issued thereunder, and ordered as to the future: "The hospital ships of the Navy will hereafter, unless otherwise directed by Congress, be placed under the control and command of medical officers of the Navy, their navigation being exclusively controlled by a competent sailing master having the complete responsibility for everything connected with the navigation of the ship \* \* \*." Naval regulations were made, issued, and approved by the President, and published for the government of the Navy, as follows (art. 37, par. 2, Navy Regs., 1909): "A hospital ship may be commanded by a naval medical officer not below the grade of surgeon." The law provides that such regulations, when so approved,

shall be the regulations of the Navy (sec. 1547, R. S.), and they shall have the force of law when not inconsistent therewith (21 Op. Atty. Gen., 46; *Gratiot v. U. S.*, 4 How., 80). *Held*, that the orders preceding this regulation and the regulation itself were issued and adopted in accordance with law, and under this authority the Secretary of the Navy may now assign a medical officer, not below the grade of surgeon,

to the command of a naval hospital ship. (27 Op. Atty. Gen., 571.)

**Construction officer can not be assigned to purely military duties.**—See note to section 1404, Revised Statutes.

**For other cases**, as to command on shore by engineer officers and construction officers, see notes to sections 1390 and 1404, Revised Statutes.

**Sec. 1489. [Processions, boards, &c.]** In processions on shore, or courts-martial, summary courts, courts of inquiry, boards of survey, and all other boards, line and staff officers shall take precedence according to rank.—(3 Mar., 1871, c. 117, s. 12, v. 16, p. 537.)

See notes to sections 1467, 1485, and 1486, Revised Statutes.

**The precedence of line officers, active or retired**, serving as members of courts-martial, is determined, first, by their rank, and, second, by their respective dates of commission, except in cases where they have gained or lost numbers, in which event they gain or lose seniority accordingly. (File 28025-495:1, May 2, 1917.)

**Precedence of line and staff officers on courts-martial.**—Prior to the act of August 29, 1916, noted under section 1485, Revised Statutes, it was decided that a rear admiral of the line of the Navy, serving as member of a general court-martial, preceded a rear admiral of the Pay Corps (now Supply Corps) of the Navy,

serving on the same court-martial, notwithstanding that the latter's date of commission was earlier than that of the line rear admiral, because of the fact that the rear admiral of the line had greater length of service than the rear admiral of the staff, even crediting the latter with the constructive service of six years provided for by section 1486, Revised Statutes, and that length of service governs, and not date of commission, in fixing the precedence of these officers. (File 28025-385:5, Oct. 30, 1915, re precedence of Rear Admiral Bradley A. Fiske and Pay Director T. J. Cowie. See notes to sections 1485 and 1486, Revised Statutes, for later cases.)

**Sec. 1490. [Ensigns as steerage officers.]** Ensigns shall be steerage officers, unless assigned to duty as watch and division officers.—(15 July, 1870, c. 295, s. 10, v. 16, p. 334.)

See note to section 1435, Revised Statutes.

**"Steerage officer.**—An officer living or messing in the steerage. Steerage officers in the U. S. Navy are clerks, midshipmen, cadet-midshipmen, mates, cadet-engineers, ensigns when not in charge of a watch and division, and all officers ranking with ensign." (Hammersly's Naval Ency., 1884. **NOTE.**—The grades of midshipmen and cadet-engineers have been abolished, and the title of "cadet-midshipmen" has been changed to "midshipmen.")

**"Junior officers** of the line are those below the rank of lieutenant, junior grade, not assigned permanently to duty as watch and division officers." (Navy Regs., 1913, Art. R 2701 (1).)

**Wardroom officers.**—"All commissioned officers not in command, above the rank of ensign, shall be wardroom officers. Ensigns assigned to duty as watch and division officers, either on deck or in the engineer department, shall also be wardroom officers." (Art. I 803, Naval Instructions, 1913.)

**Sec. 1491. [Warrant officers.]** The President may, if he shall deem it conducive to the interests of the service, give assimilated rank to boatswains, gunners, carpenters, and sailmakers, as follows: After five years' service, to rank with ensigns, and after ten years' service to rank with masters.—(2 July, 1864, c. 219, s. 1, v. 13, p. 373.)

By act of March 3, 1899, section 12 (30 Stat., 1007), boatswains, gunners, carpenters, and sailmakers were, after 10 years from date of warrant, to be commissioned as chief boatswains, chief gunners, chief carpenters, and chief sailmakers, to rank with but after ensign. This provision was amended by act of April 27, 1904 (33 Stat., 346), providing for the promotion of the officers mentioned after 6 years from date of warrant, instead of 10 years, as theretofore. By act of August 29, 1916 (39 Stat., 578), it was provided that commissioned

warrant officers on the active list, with creditable records, shall, after 6 years from date of commission, receive the pay and allowances of a lieutenant (junior grade), and after 12 years from date of commission, the pay and allowances of a lieutenant. Similar provision for pay of retired warrant officers and chief warrant officers while employed on active duty was made by act of April 10, 1918 (40 Stat., 516).

Officers holding permanent warrant or permanent commissioned warrant ranks on June 4,



1920, and who are transferred to permanent higher ranks in accordance with the act of that date shall, if they thereafter fail professionally on examination for promotion, revert to their permanent warrant or permanent commissioned warrant status. (Act June 4, 1920, sec. 4, 41 Stat., 835.)

See note to section 1405, Revised Statutes, for laws relating to appointment of warrant officers and commissioned warrant officers to the grade of ensign, and for laws creating additional grades of warrant officers, etc.

**The President never exercised the discretion** placed in him by the act of July 2, 1864,

and section 1491, Revised Statutes, in which that law is now embodied. (File 17789-21, Jan. 30, 1914.)

Section 1491 has been regarded by the Navy Department as having been repealed by the act of March 3, 1899 (above quoted), providing for the commissioning of warrant officers to rank with but after ensign, section 26 of that act having provided "that all acts and parts of acts, so far as they conflict with the provisions of this act, are hereby repealed." (File 17789-21, Jan. 30, 1914.)

**Masters.**—Now lieutenants (junior grade). See note to sec. 1362, R. S.

### Sec. 1492. [Coast Guard officers serving as part of the Navy. Superseded.]

#### **This section provided as follows:**

"Sec. 1492. The officers of the revenue-cutter service when serving, in accordance with law, as a part of the Navy, shall be entitled to relative rank, as follows: Captains, with and next after lieutenants commanding in the Navy; first lieutenants, with and next after lieutenants in the Navy; second lieutenants, with and next after masters in line in the Navy; third lieutenants, with and next after ensigns in the Navy."—(2 Mar., 1799, c. 22, s. 98, v. 1, pp. 699, 700. 16 July, 1862, c. 183, ss. 1, 11, v. 12, pp. 583, 585. 4 Feb., 1863, c. 20, s. 4, v. 12, p. 640.)

It was superseded by act of April 12, 1902, section 2 (32 Stat., 100), which provided that the commissioned officers of the Revenue-Cutter Service shall rank as follows: "Captains with majors in the Army and lieutenant commanders in the Navy; first lieutenants with captains in the Army and lieutenants in the Navy; second lieutenants with first lieutenants in the Army and lieutenants (junior grade) in the Navy; third lieutenants with second lieutenants in the Army and ensigns in the Navy: *Provided*, That whenever forces of the Navy and Revenue-Cutter Service shall be serving in cooperation pursuant to law (section twenty-seven hundred and fifty-seven, Revised Statutes), the officers of the Revenue-Cutter Service shall rank as follows: Captains with and next after lieutenant commanders in the Navy; first lieutenants with and next after lieutenants in the Navy; second lieutenants with and next after lieutenants (junior grade) in the Navy; third lieutenants with and next after ensigns in the Navy."

**Other changes were made** by act of April 16, 1908 (35 Stat., 61), which authorized in the Revenue-Cutter Service one captain commandant "with the rank of a colonel in the Army and a captain in the Navy", six senior captains, "each with the rank of lieutenant colonel in the Army and a commander in the Navy", one engineer in chief "with the rank of a lieutenant colonel in the Army and a commander in the Navy", and six senior engineers "each with the rank of a major in the Army and a lieutenant commander in the Navy."

**Coast Guard created.**—By act of January 28, 1915 (38 Stat., 800), the Revenue-Cutter Service and the Life-Saving Service were consolidated and established as the Coast Guard, "which shall constitute a part of the military

forces of the United States and which shall operate under the Treasury Department in time of peace and operate as a part of the Navy, subject to the orders of the Secretary of the Navy, in time of war or when the President shall so direct \* \* \* : *Provided*, That no provision of this act shall be construed as giving any officer of either the Coast Guard or the Navy, military or other control at any time over any vessel, officer, or man of the other service except by direction of the President." The same act, section 3, provided that all existing laws affecting rank in the Revenue-Cutter Service shall apply to the corresponding positions in the Coast Guard.

**Precedence by date of commission.**—By act of August 29, 1916 (39 Stat., 600), it was provided that, "whenever the personnel of the Coast Guard, or any part thereof, is operating with the personnel of the Navy in accordance with law, precedence between commissioned officers of corresponding grades in the two services shall be determined by the date of commissions in those grades"; and that "whenever, in time of war, the Coast Guard operates as a part of the Navy in accordance with law, the personnel of that service shall be subject to the laws prescribed for the government of the Navy."

**Temporary ranks established.**—By act of July 1, 1918 (40 Stat., 732), the temporary promotion was authorized of the captain commandant "to the rank of commodore in the Navy and brigadier general in the Army," and the engineer in chief of the Coast Guard "to the rank of captain in the Navy and colonel in the Army." The same act also authorized temporary promotion of other officers in the Coast Guard.

**Titles of officers.**—An act of June 5, 1920 (41 Stat., 879), provided that "titles of commissioned officers of the Coast Guard are hereby changed as follows: Senior captain to commander, captain to lieutenant commander, first lieutenant to lieutenant, second lieutenant to lieutenant junior grade, third lieutenant to ensign, captain of engineers to lieutenant commander (engineering), first lieutenant of engineers to lieutenant (engineering), second lieutenant of engineers to lieutenant junior grade (engineering), and third lieutenant of engineers to ensign (engineering): *Provided*, That all laws applicable to the titles hereby abolished in the Coast Guard shall apply to the titles hereby established."

**Coast Guard a part of the Navy when so serving.**—Revenue cutters are placed under the direction of the Secretary of the Navy and for all practical purposes are, during the time they cooperate with the Navy, a part of the Navy. This seems entirely clear from the provisions of section 1492, Revised Statutes, which designates the relative rank of officers of the Revenue-Cutter Service when serving in accordance with law “as a part of the Navy.” (3 Comp. Dec., 543.)

It is a matter of history that during the war with Spain vessels of the Revenue-Cutter Service fought side by side with vessels of the Navy proper. If men were appointed to office or enlisted in the Revenue-Cutter Service for the war only, and under the provisions of section 2757, Revised Statutes, the President directed them to cooperate with the Navy, and they were placed under the direction of the Secretary of the Navy and the expenses thereof were defrayed by the Navy Department, and they served creditably in cooperation with the Navy during the war with Spain, and were honorably discharged at the close of the war. *Held*, that such officers and enlisted men so serving, so paid, so directed, and so governed, constituted a part of the temporary force of the Navy during the war with Spain within the meaning of the act of March 3, 1899, granting extra pay to “the officers and enlisted men comprising the temporary force of the Navy during the war with Spain.” *Held*, further, that this decision is not applicable to officers and enlisted men who may have been appointed to office or enlisted in the Revenue-Cutter Service for the war only, who did not serve by order of the President under the direction of the Secretary of the Navy in cooperation with the Navy during the war. (5 Comp. Dec., 671.)

It is clear that the Revenue-Cutter Service, neither in its inception nor in its more recent development, is to be regarded as a part of the Navy, to which it would naturally be assigned, unless it is cooperating therewith in accordance with the express provision of law on the subject (28 Op. Atty. Gen., 543).

Despite the military character given the Revenue-Cutter Service by existing legislation, it is still an organization separate and distinct from the Navy, under the control of the Secretary of the Treasury, and assigned to duty in connection with the collection of the customs revenue. Now as formerly it can only be regarded as part of the Navy when serving therewith in accordance with law (secs. 1492 and 2757, R. S.). (28 Op. Atty. Gen., 543.)

The word “Navy” as used in the act of February 28, 1919, section 3 (40 Stat., 1203), providing for the payment of mileage to men honorably discharged from the Navy since November 11, 1918, is broad enough to include men honorably discharged from the Coast Guard at any time when the Coast Guard operates, pursuant to law, as a part of the Navy. (File 28762-329, Mar. 10, 1919, C. M. O. 114-1919, p. 16.)

A registrant under the selective draft law who has served in the Coast Guard in time of war should be considered as having “served in the Navy of the United States” so as to bring him within the purview of the act of August 31, 1918, section 3, providing “that men registered under the provisions of this act who have served in the Navy of the United States shall, upon their own application, be permitted to reenlist in the naval or marine service of the United States with and by the approval of the Secretary of the Navy.” (File 28798-773, Nov. 23, 1918, C. M. O. 174-1918, pp. 21, 22; compare C. M. O. 141-1918, pp. 27, 28, holding that enlisted men of the Coast Guard while operating as a part of the Navy are not eligible for appointment to the Naval Academy as midshipmen under the act of June 30, 1914, 38 Stat., 410, which authorized such appointments to be made “from the enlisted men of the Navy.”)

The Navy of the United States, in law and in fact, embraces the Coast Guard in time of war just as certainly as it does any other military force operating under the orders of the Secretary of the Navy. Accordingly the word “Navy” is broad enough to include the Coast Guard in time of war, service in the Coast Guard at such time is service in the Navy, and enlisted men of the Coast Guard are enlisted men of the Navy. However, it has repeatedly been held that the meaning of the word “Navy” may vary as used in different statutes; thus it may be used in a restricted sense as including only what may be called the Navy proper and excluding the Marine Corps, Coast Guard, and other organizations which would be embraced by the term “Navy” when given its extended meaning. Where the language of the law, its purpose and spirit, and the object which it was intended to accomplish, indicate that it was the intention of Congress to include the Coast Guard as well as the Navy proper, the word “Navy” will be construed accordingly as embracing the Coast Guard. (File 28798-773, Nov. 22, 1918.)

**Miscellaneous.**—Wherever the expenses of the Coast Guard are paid by the Navy Department, in accordance with law, any naval appropriations from which payments are so made shall be reimbursed from available appropriations for the Coast Guard. (Act Aug. 29, 1916, 39 Stat., 600; but see acts June 15, 1917, 40 Stat., 212, July 1, 1918, 40 Stat., 731, and July 11, 1919, 41 Stat., 150.)

Purchase of naval supplies by Coast Guard personnel. (See act Mar. 6, 1920, 41 Stat., 506.)

Pay and allowances of Coast Guard personnel same as Navy. (See act May 18, 1920, sec. 8, 41 Stat., 603.)

Commissioned officers of Coast Guard empowered to serve on naval courts-martial in time of war. (Act Oct. 6, 1917, 40 Stat., 393.)

Assignment to duty of Coast Guard personnel. (See act Aug. 29, 1916, 39 Stat., 601.)

Enlisted personnel of Coast Guard not to be detailed to the office of the Coast Guard. (Act May 29, 1920, 41 Stat., 650.)



## OF PROMOTION AND ADVANCEMENT.

**Sec. 1493. [Physical examination.]** No officer shall be promoted to a higher grade on the active list of the Navy, except in the case provided in the next section, until he has been examined by a board of naval surgeons and pronounced physically qualified to perform all his duties at sea.—(21 Apr., 1864, c. 63, s. 4, v. 13, p. 53. 28 July, 1866, c. 312, s. 1, v. 14, p. 344.)

Amendment to this section was made by act of August 29, 1916 (39 Stat., 611), which provided that "the provisions of sections fourteen hundred and ninety-three and fourteen hundred and ninety-four of the Revised Statutes of the United States shall apply to the Marine Corps;" and by act of May 22, 1917, section 20 (40 Stat., 89), which provided "that hereafter all laws relating to the examination of officers of the Navy for promotion shall be construed to apply to the regular advancement of staff officers to higher ranks on the active list the same as though such advancements in rank were promotions to higher grades: *Provided*, That examinations for such staff officers shall not be required except for such regular advancements in rank."

Boards of medical examiners may be convened by senior officer present or other commanding officer on a foreign station when so authorized by the Secretary of the Navy. (Act Mar. 4, 1917, 39 Stat., 1171.)

Retirement of officers for physical incapacity. See sections 1448-1457, Revised Statutes, and notes thereto.

Retirement with higher rank of officers failing in physical examination for promotion is authorized by act of March 4, 1911 (36 Stat., 1267); but this does not apply to officers of the rank of lieutenant commander and above (act Aug. 29, 1916, 39 Stat., 579, as amended by act July 1, 1918, 40 Stat., 118).

Selection of officers for promotion does not dispense with examinations required for promotion by seniority. (Act Aug. 29, 1916, 39 Stat., 579.)

**Authority to convene boards of medical examiners on foreign stations.**—The words "on a foreign station," as used in the act of March 4, 1917 (above noted), are construed by the Navy Department to mean "outside of the continental limits of the United States." Accordingly, the Secretary of the Navy may empower commanding officers of fleets to convene boards of medical examiners, such authority to become effective when their commands are outside the continental limits of the United States, and not merely when they are in waters, ports, and stations in foreign countries. (File 26521-18630, Oct. 8, 1920.)

**Examinations in the Marine Corps.**—The act of July 28, 1892 (27 Stat., 321), provided that "promotions to every grade of commissioned officers in the Marine Corps below the grade of Commandant shall be made in the same manner and under the same conditions as now are or may hereafter be prescribed, in pursuance of law, for commissioned officers of the Army: *Provided*, That examining boards which may be organized under the provisions of this

act to determine the fitness of officers of the Marine Corps for promotion shall in all cases consist of not less than five officers, three of whom shall, if practicable, be officers of the Marine Corps, senior to the officer to be examined, and two of whom shall be medical officers of the Navy: *Provided further*, That when not practicable to detail officers of the Marine Corps as members of such examining boards, officers of the line in the Navy shall be so detailed." Under this law the medical officers examined the candidate as to his physical and mental fitness for promotion and made a written report thereof to the examining board. The mental and physical fitness of the candidate, and all questions which arose in connection therewith, were then voted upon by each member of the entire board. This part of the examination preceded the moral and professional examination. When the candidate was found mentally and physically qualified for promotion, the medical officers were excused from further attendance with the board. Thus the board which passed upon the mental and physical fitness of an officer of the Marine Corps for promotion was not "a board of naval surgeons," but a board consisting partly of officers of the Marine Corps or nonmedical officers of the Navy and partly of medical officers of the Navy. (File 28687-14, Dec. 14, 1916.)

To comply with the provision in the act of August 29, 1916 (39 Stat., 611), extending section 1493, Revised Statutes, to the Marine Corps, the physical examination of an officer of the Marine Corps preliminary to promotion must be conducted by a "board of naval surgeons," and this board must consist of more than one medical officer. The board should convene separately from the board for the moral and professional examination. It may consist of the same two medical officers who are also on the examining board as required by the act of July 28, 1892. (File 28687-14, Dec. 14, 1916.)

There is no doubt that the act of August 29, 1916, has the effect of adding the words "or Marine Corps" after the word "Navy," in section 1493. This section provides that the candidate, before promotion and except as provided in the next section, must be examined by a board of naval surgeons and pronounced physically qualified to perform all his "duties at sea." The quoted words were not repealed by the act of August 29, 1916. While the paramount duties of a Marine officer are "field duties" and not "sea duties," yet Marine officers perform sea duty. Such duties being the minor part of a Marine officer's duties, and the "board of naval surgeons" being empowered to examine the candidate only as to his physical qualifications to perform "his duties at sea," the mental and physical examination required

by the act of July 28, 1892, is still necessary to determine the officer's fitness to perform all the other duties of the grade to which he is to be promoted. (File 28687-14, Dec. 14, 1916.)

The act of July 28, 1892, is not expressly or impliedly repealed by the act of August 29, 1916, but is still in force. Suggested that sections 1493 and 1494, Revised Statutes, be amended so as to avoid the complications resulting from the application of those sections as they now exist to the Marine Corps. (File 28687-14, Dec. 14, 1916.)

Prior to the act of August 29, 1916, it was held that the cases which a board of naval surgeons constituted under section 1493 was authorized to examine and pronounce upon were cases of officers in the line of promotion on the active list of the Navy, exclusively, and that such board was not invested by law with authority to examine and pronounce upon the physical qualifications of a Marine officer for duty at sea; that section 1621, Revised Statutes, which declares that the Marine Corps shall at all times be subject to the laws and regulations established for the government of the Navy, except when detached for service with the Army by order of the President, does not warrant the inference that it was intended to subject that corps to any other laws and regulations of the Navy than such as relate to discipline and maintenance, within which category section 1493 did not fall. (17 Op. Atty. Gen., 117.)

The Secretary of the Navy is of the opinion that the laws regulating promotions in the Navy and Marine Corps should be identical; that is, that promotions in the Navy and Marine Corps should be regulated by one law and the provisions thereof should be identical. At present there are numerous differences in the methods and conditions of promotion between the Navy and Marine Corps, and between different branches of the Navy proper, itself. (File 28687-14, Feb. 5, 1917.)

Physical examinations prior to promotion to all grades in the Marine Corps without exception are required by the Navy law contained in section 1493 of the Revised Statutes as extended and applied to the Marine Corps by the act of August 29, 1916. This requirement is not repealed by anything contained in the act of June 4, 1920 (41 Stat., 774), relating to promotions in the Army. (File 26521-405:1, Sept. 15, 1920.)

**"Board of naval surgeons."**—In interpreting section 1493, Revised Statutes, it is held that the wording, "a board of naval surgeons," means that a board of two medical officers, or more, of the Navy is empowered to act in the case of examination of officers for promotion. (Naval Courts and Boards, sec. 665, citing file 26521-30; see also file 28687-10, Oct. 31, 1916.)

Other than the section itself, there is no provision of law as to the number of officers which shall constitute the "board of naval surgeons" required by section 1493, Revised Statutes. It was the opinion of the Judge Advocate General of the Navy, under date of January 25, 1912 (file 26521-30), that the board of naval surgeons prescribed by section 1493 "should consist of more than one medical officer." Medical boards for the physical

examination of officers in the Navy for promotion, convened pursuant to this section of the Revised Statutes, in general consist of three medical officers. (File 28687-14, Dec. 14, 1916.)

**Section 1493 applicable to staff officers.**—Prior to the act of July 16, 1862 (12 Stat., 583), there was no law which required officers in any branch of the naval service, including the Marine Corps, to pass a physical examination as a preliminary to promotion. The fourth section of that act directed the Secretary of the Navy to appoint an advisory board of naval officers, whose duty was to carefully scrutinize the active list of line officers in the Navy, above and including the grade of master, and report to the Secretary in writing those found to be worthy of promotion. The board, in recommending an officer for promotion, was to certify that he "has the moral, mental, physical, and professional qualifications to perform efficiently all his duties, both at sea and on shore, of the grade to which he is to be promoted." By the sixth section of the same act a similar advisory board was to be appointed at least once in every four years. These provisions, which applied solely to line officers of the Navy, were superseded by other provisions on the same subject contained in the act of April 21, 1864, chapter 63. The latter provisions are embodied in section 1493 et seq. of the Revised Statutes. They include both line and staff officers, but in terms extend to those only who are "on the active list of the Navy." (17 Op. Atty. Gen., 117.)

Examinations were discontinued for promotion of staff officers in grade by act of May 22, 1917, section 20 (40 Stat., 89), which act and section also reenacted a provision in the act of March 4, 1917 (39 Stat., 1182), requiring examinations of staff officers for advancement in rank, "the same as though such advancement in rank were promotions to higher grades." Prior to the act last cited it had been held that sections 1493 and 1496 which provide that no officer shall be promoted to a higher "grade" on the active list until his physical, mental, moral, and professional fitness theretofore has been established to the satisfaction of the board of examining officers appointed by the President, does not require that a staff officer be subjected to examination prior to advancement to a higher relative rank in the same grade, where more than one rank is attached to said grade; the office remains the same, and the change in relative rank may be indicated by a notification from the Secretary of the Navy, no examination or new appointment or confirmation by the Senate being necessary. (20 Op. Atty. Gen., 358.)

**Erroneous promotion of officer not physically qualified.**—An ensign in the Navy who failed to pass the physical examination for promotion to lieutenant (junior grade) but whose name was inadvertently included in the list of officers who had passed such examination, and who because of such inadvertence was not advised by the Navy Department of his failure to pass such examination but was appointed and commissioned as a lieutenant (junior grade) and performed service as such, was a de facto lieutenant (junior grade) for the period of per-



formance of such service, viz, from date of receipt by him of his commission as lieutenant (junior grade) to date of notification of the erroneous issuance of such commission, and is entitled to retain pay as a lieutenant (junior grade) received by him for such period. (19 Comp. Dec., 747.)

The physical qualification required by section 1493, Revised Statutes, as a condition precedent to the promotion of naval officers is not unconstitutional (citing 13 Op. Atty. Gen., 516, 520, 524, 525), nor is it directory merely; and an ensign who was nominated, confirmed, and commissioned as a lieutenant (junior grade), without having qualified for such promotion by passing the physical examination required by said section, did not become legally invested with the office of lieutenant (junior grade). (20 Comp. Dec., 13, citing *Jouett v. U. S.*, 28 Ct. Cls., 266. Compare note to Constitution, ante, Art. II, sec. 2, clause 2.)

**Pay of officer while undergoing examination.**—Sections 1493 and 1496, Revised Statutes, provide for an examination of certain officers of the Navy as a prerequisite to their promotion. The temporary absence of an officer from his vessel, not on special duty, or on duty consistent with the exercise of the duties of his position on the vessel, does not alter his sea status. The officer in this case was not ordered to the performance of any specific duty as such. The examination for his promotion was rather in the nature of an incident to his service of whatever character it might be at the time. To hold that his absence while engaged in examinations under the law for his promotion separated him from his ship would be virtually to exclude officers at sea from the benefits intended to apply alike to all grades and classes of the service. Examination for promotion is incident to sea service as well as to shore service, and is not a special duty inconsistent with serv-

ice in any grade or class. Accordingly, held that an officer of the Navy attached to a sea-going vessel is entitled to sea pay while temporarily absent from his vessel attending examinations for his promotion, unless his absence is under such circumstances that it operates to detach him from his vessel; but he is not entitled to commutation of rations for the reason that he is not then "doing duty on board," as required by section 1579, Revised Statutes. (4 Comp. Dec., 455.)

**This section not applicable to temporary promotions.**—See note to section 1496, Revised Statutes.

**New physical examination not required in case of delayed promotion.**—An officer having qualified physically upon examination for promotion by a board of naval examiners, he may thereafter be promoted when found mentally, morally, and professionally qualified without any further physical examination, notwithstanding that considerable delay may occur before his qualifications are established upon examination by a naval examining board in accordance with section 1496, Revised Statutes. A new physical examination in such cases of delay is customarily required by the executive for the good of the service, in order that an officer may not be advanced to a higher grade when not physically in condition to perform the duties thereof; but another formal examination by a board of medical examiners might be dispensed with if the officer has once fully qualified physically for promotion, notwithstanding that delay may occur in the actual promotion of such officer, or he might under such circumstances be examined and promoted upon the informal report of a single medical officer or a non-statutory board. (File 26266-627:1, Jan. 30, 1919; see also 22 Comp. Dec., 153; compare *Hooper v. U. S.*, 53 Ct. Cls., 90.)

**Sec. 1494. [Physical disqualification by wounds.]** The provisions of the preceding section shall not exclude from the promotion to which he would otherwise be regularly entitled any officer in whose case such medical board may report that his physical disqualification was occasioned by wounds received in the line of his duty, and that such wounds do not incapacitate him for other duties in the grade to which he shall be promoted.—(21 April, 1864, c. 63, s. 4, v. 13, p. 53. 28 July, 1866, c. 312, s. 1, v. 14, pp. 344, 345.)

Amendment to this section was made by act of August 29, 1916 (39 Stat., 611), which provided that "the provisions of sections fourteen hundred and ninety-three and fourteen hundred and ninety-four of the Revised Statutes of the United States shall apply to the Marine Corps;" and by act of May 22, 1917, section 20 (40 Stat., 89), which provided "that hereafter all laws relating to the examination of officers of the Navy for promotion shall be construed to apply to the regular advancement of staff officers to higher ranks on the active list the same as though such advancements in rank were promotions to higher grades: *Provided*, That examinations for such staff officers shall not be required except for such regular advancement in rank." It

is further provided by the act of August 29, 1916 (39 Stat., 579), that "no captain, commander, or lieutenant commander shall be promoted unless he has had not less than two years' actual sea service on seagoing ships in the grade in which serving."

By act of July 11, 1919 (41 Stat., 147), it was provided "that the provisions of the act of August 29, 1916, regarding the promotion of captains in the line of the permanent Navy shall not restrict the promotion of such captains as may have been wounded in line of duty and who are now on the active list, and such captains shall be entitled to the benefits of the provisions of section 1494, Revised Statutes of the United States, and also to the benefits of the act of March 4, 1911 [36 Stat., 1267]."

The expression "wounds received in the line of his duty," found in section 1494, Revised Statutes, means precisely what it says, and is not restricted to any particular part of that duty, as to wounds received in battle or in some hazardous enterprise. The statute is plain and unambiguous, and therefore neither calls for nor admits of construction. It must be read as it is written. An officer thus disqualified for sea duty is eligible for promotion if his wounds do not incapacitate him for other duties in the grade to which he seeks promotion. The words "other duties" in section 1494 refer to duties other than duties at sea. (23 Op. Atty. Gen., 324.)

For definition of "line of duty" see note to section 1451, Revised Statutes.

**Precedents of Navy Department.**—In 1898 Ensign Wilfred V. Powelson was so seriously injured in both legs by falling through a hatch, as to be physically disqualified for duty on shipboard, yet he was under this section promoted to lieutenant (junior grade), the board having found that his wounds did not incapacitate him for other duties in that grade. (23 Op. Atty. Gen., 324.)

In 1895 Assistant Engineer Walter S. Burke, while on duty on shipboard, had his arm crushed in the machinery, resulting in amputation of the forearm. In August, 1896, upon examination for promotion, the board found that solely from the facts above stated he was disqualified for the performance of his duties at sea but that he was not incapacitated for the other duties of his profession in the grade to which he sought to be promoted and he was promoted accordingly. (23 Op. Atty. Gen., 324.)

In 1868 Passed Assistant Engineer Cooper lost a leg from having it crushed in machinery while on duty on shipboard. Though incapacitated for sea service, he was afterward promoted, under this section, and performed satisfactorily the shore duties to which he was assigned. In November, 1877, he was ordered before a retiring board, which found that he was not incapacitated for active service, in the meaning of the law, and therefore did not recommend him for retirement. Upon the record of these proceedings, President Hayes made this endorsement: "This report and finding are approved. Mr. Cooper will not be retired." This could only have been upon the ground that the officer, though disqualified for "duties at sea," was not incapacitated for the "other duties" mentioned in section 1494. (23 Op. Atty. Gen., 324.)

The precedents of the Navy Department under section 1494, Revised Statutes, are correct; such precedents should not be departed from in the case of a particular officer, unless they are clearly wrong or detrimental to the service, even if there were doubt as to their correctness. (23 Op. Atty. Gen., 324.)

**Purpose of section 1494.**—There are various duties other and no less important than those on shipboard; and these under existing regulations must be performed by officers of various grades. This being so, Congress may well fill these places from meritorious officers whose wounds received in the service have incapacitated them for active duty at sea, and provide for their promotion in due course as it has done. There is no reason why an officer wounded in the service should not be promoted as well as his more fortunate brother, if there are duties in the higher grade which he can satisfactorily and sufficiently perform; and this is recognized in the section under consideration. (23 Op. Atty. Gen., 324.)

**Practical objections cannot be remedied by administrative action.**—The real objection, if there be any, to the promotion of an officer physically disqualified for duty on shipboard is that such promotion would to a great extent prevent the service from receiving in that grade all the benefit it would receive from the service of a sound man; and as the number of such officers is limited, the whole may be required for sea duty, and the filling of one or more vacancies by promotion of men fit for shore duty alone might be detrimental to the service. If the statute under consideration (sec. 1494) were ambiguous and it were clear that such promotion of officers who are capable of shore duty only was seriously detrimental to the service, this might be a reason for giving it another construction, if possible. But the statute is not ambiguous, and no rule of interpretation permits us to do violence to its plain terms in order to avoid what is at best only a remote possibility and one which Congress could not have overlooked in framing these sections (secs. 1493 and 1494); and one which has not been a serious menace to the service in the 30 or more years since the legislation was enacted. All these considerations are exclusively in the discretion of Congress. If it shall be found that under existing laws and practice the number of officers of a certain grade fit for sea duty is not adequate to the requirements of that branch of the service, Congress may correct the evil by either increasing the number or requiring full qualification for promotion. (23 Op. Atty. Gen., 324.)

**The act of July 11, 1919** (above quoted), waives the provisions of the selection law in the case of any captain who was on the active list on the date of said act and who had been wounded in line of duty. Any such captain was thereby made eligible for promotion by seniority, under the law as it stood prior to August 29, 1916; and under section 1494 may be promoted if physically qualified for duties other than at sea; or, if not so qualified, is entitled, on retirement, to the rank to which his seniority entitled him to be promoted. (File 26521-351, July 31 and Sept. 19, 1919.)

**Marine Corps examinations.**—See note to section 1493, Revised Statutes.

**Sec. 1495. [Examinations, when; and effect of.]** Officers subject to examination before promotion to a grade limited in number by law shall not be entitled to examination in such a sense as to give increase of pay until desig-



nated by the Secretary of the Navy to fill vacancies in the higher grade; and officers eligible for promotion to a grade not limited in number shall not be entitled to examination until ordered to present themselves for examination or until a class, in which they are included, has been so ordered by the Secretary of the Navy.—(3 Mar., 1873, c. 230, s. 1, v. 17, p. 555. 22 June, 1874, c. 392, v. 18, p. 191.)

Examination of staff officers for advancement in rank. See act of May 22, 1917, section 20 (40 Stat., 89), quoted in note to section 1494, Revised Statutes.

See notes to sections 1505 and 1562, Revised Statutes.

**Examinations in Marine Corps.**—The act of October 1, 1890 (26 Stat., 562), relating to the Army, directs that examinations be conducted at such times anterior to the accruing of the right to promotion as may be best for the interests of the service. This provision is made to apply to the examination for promotion of commissioned officers in the Marine Corp below the grade of commandant by the act of July 28, 1892 (27 Stat., 321). The act of February 2, 1901 (31 Stat., 756, sec. 32), relating to the Army, provides that “when the exigencies of the service of any officer who would be entitled to promotion upon examination require him to remain absent from any place where an examining board could be convened, the President is hereby authorized to promote such officer, subject to examination, and the examination shall take place as soon thereafter as practicable. If upon examination the officer be found disqualified for promotion, he shall, upon the approval of the proceedings by the Secretary of War, be treated in the same manner as if he had been examined prior to promotion.” By the act of July 28, 1892, *supra*, this provision of the act of February 2, 1901, is undoubtedly made applicable to

examinations for promotion of officers in the Marine Corps. (25 Op. Atty. Gen., 568.)

**Engineer officers.**—Under the law and the regulations a first assistant engineer became eligible to examination for promotion when he had served two years at sea upon a naval steamer. But he was merely eligible. He was not entitled to be examined until his turn for promotion had arrived or was near at hand. In no event therefore could he demand that the increased pay of his new grade should begin until he had a right to be examined for promotion. (Hunt v. U. S., 116 U. S., 394, 397.)

**Examination of ensigns.**—The grade of lieutenant (junior grade) being a grade “not limited in number” within the meaning of section 1495, Revised Statutes, an ensign is not entitled to be examined for promotion to the grade of lieutenant (junior grade) on his termination of three years’ service in the grade of ensign unless ordered to present himself for examination or until a class in which he is included has been so ordered by the Secretary of the Navy. (18 Comp. Dec., 466.)

The grade of lieutenant (junior grade) is a grade not limited in number. The right of officers to examination for promotion to a grade “not limited in number” prior to their being ordered to present themselves therefor is governed by section 1495, Revised Statutes. (22 Comp. Dec., 565, citing 18 Comp. Dec., 466, 17 Comp. Dec., 605, Hunt v. U. S., 116 U. S., 394, 397, Doyle v. U. S., 48 Ct. Cls., 142; see also 24 Comp. Dec., 639.)

**Sec. 1496. [Mental, moral, and professional examination.]** No line officer below the grade of commodore, and no officer not of the line, shall be promoted to a higher grade on the active list of the Navy until his mental, moral, and professional fitness to perform all his duties at sea have been established to the satisfaction of a board of examining officers appointed by the President.—(21 April, 1864, c. 63, s. 1, v. 13, p. 53.)

Amendment to this section was made by act of May 22, 1917, section 20 (40 Stat., 89), which provided “that hereafter all laws relating to the examination of officers of the Navy for promotion shall be construed to apply to the regular advancement of staff officers to higher ranks on the active list the same as though such advancements in rank were promotions to higher grades: *Provided*, That examinations for such staff officers shall not be required except for such regular advancements in rank.” Also by act of March 4, 1917 (39 Stats., 1171), providing that the senior officer present or other commanding officer on a foreign station may be authorized by the Secretary of the Navy to order boards for examination of candidates for promotion in the Navy and Marine Corps.

Officers who fail upon examination for promotion by reason of drunkenness or other misconduct, to be discharged with not more than one year’s pay. (Act Aug. 5, 1882, 22 Stat., 286.)

Officers selected for promotion to the grades of commander, captain, and rear admiral shall undergo the examinations prescribed by law for officers promoted by seniority. (Act Aug. 29, 1916, 39 Stat., 579.)

Suspension from promotion of officers failing professionally upon examination, is provided for by section 1505, Revised Statutes, as amended, which also provides for the discharge of such officers failing upon reexamination after period of suspension.

The grade of commodore on the active list of the Navy was abolished by act of March 3, 1899, section 7 (30 Stat., 1005). See note to section 1362, Revised Statutes.

**Questions of law arising before examining board.**—The existing regulations with reference to examining boards provide that "any question of law arising before the board, \* \* \* shall be submitted to the Judge Advocate General" (see Naval Courts and Boards, sec. 634). While this, no doubt, is intended to apply to specific questions arising in concrete cases, it is quite evident that it contemplates the same distinction with reference to questions of law and fact arising before examining boards as is made by the department with reference to questions of law and fact arising before courts-martial; in other words, that while questions of fact are properly to be left to the exclusive determination of the board in the first instance, upon questions of law the board should ascertain and be guided by the decisions of the department, opinions of law officers of the Government, and other authorities which will be furnished by the Judge Advocate General when required. (File 26521-179, Feb. 19, 1917.)

In construing laws relating to the naval service, the board will be guided by the construction placed upon them by the Navy Department, and will not qualify its recommendation by any proviso concerning the legality of the department's decisions. (File 26260-3362, Mar. 21, 1916.)

**"Mental," "moral," and "professional," defined and distinguished.**—As to moral qualifications, see note to section 1456, Revised Statutes.

An exact definition of the words "mental, moral, and professional" is not desirable and should not be attempted. Such a definition would likely prove defective and a source of embarrassment in the future, not only with reference to the subject matter included therein, but also in respect to matters of exclusion. This is the view which has heretofore been taken by the department, and also by the courts with reference to similar questions. (File 26521-179, Feb. 19, 1917, citing file 26260-1319, June 29, 1911, p. 10, and Swaim v. U. S., 28 Ct. Cls., 173.)

With reference to the words "mental incapacity," as used in connection with civil transactions, it has been judicially stated: "No clear and definite rule can be laid down, defining mental incapacity \* \* \* which will apply in all cases \* \* \*. Each case, therefore, must, to a certain extent, rest upon its own peculiar circumstances." (File 26521-179, Feb. 19, 1917, citing *Allen v. Allen*, 64 Atl., 1115.)

With reference to what constitutes mental, moral, and professional incapacity certain principles have been settled or may be deduced from the law, regulations, and precedents which will be helpful in arriving at a proper conclusion. (File 26521-179, Feb. 19, 1917.)

"There can be no doubt as to the nature of so much of the inquiry as regards professional fitness for the naval service. That is a question of specialty, which speaks for itself. So it is in the matter of physical condition, which is the familiar subject of the pension law. But the law also calls for investigation of mental and moral fitness \* \* \*. As to this point, there is nothing of innovation, or contradiction of pre-existing law, in either of the acts. Qualities of mind, things moral as distinguished from things

physical, not only courage, promptitude, efficiency, but patriotism, honor, virtue, and the opposites of each, as cowardice, negligence, insufficiency, disaffection, dissoluteness, are expressly mentioned, either for praise or blame, as the case may be, in the rules for the government of the Navy." (8 Op. Atty. Gen., 337, 352.)

The Navy Regulations draw a marked distinction between "professional" fitness on the one hand, and "mental and moral" fitness on the other. This distinction and classification is not original with the regulations, for as early as January 31, 1857, the Attorney General, in an opinion to the Secretary of the Navy (8 Op. Atty. Gen., 337, 352), separated "mental and moral" on the one hand from "physical and professional" fitness on the other. (File 26521-179, Feb. 19, 1917.)

The Navy Department's precedents are in harmony with the Attorney General's opinion (8 Op. Atty. Gen., 337, 352), in which "mental and moral" qualifications are grouped and classified together as "qualities of mind, things moral as distinguished from things physical." (File 26521-179, Feb. 19, 1917.)

The so-called "Naval Efficiency Act," approved February 28, 1855 (10 Stat., 616), provided in part for the separation from the active service of officers found by an examining board to be "incapable" of performing their duties. Instructions were issued by the Secretary of the Navy to the board of officers to the effect that "an officer may be 'incapable,' either mentally, physically, or morally; for although he may possess a strong mind and robust frame, yet, if his moral perception of right and wrong be so blunted and debased as to render him unreliable, he could hardly be regarded as being the capable officer, to be intrusted with the lives of his countrymen, and the property and honor of his country." Here the department's instructions regarded "mental" fitness as meaning "possessing a strong mind," and "moral" fitness as implying a correct "perception of right and wrong." In other words, these instructions classified "mental" and "moral" qualifications as "qualities of mind," the same as did the subsequent opinion of the Attorney General (8 Op. Atty. Gen., 337, 352). These instructions of the Secretary of the Navy were upheld by the Attorney General December 10, 1856 (8 Op. Atty. Gen., 223, 233), as being well within the scope of the statute. (File 26521-179, Feb. 19, 1917. NOTE.—The question submitted to the Attorney General in the opinion last cited was whether, among other things, "any error of law was committed by the Secretary of the Navy, in his instructions to the board of officers"; and the Attorney General held that "no error of law has been committed on which to base claim for the reversal of the finding of the board or of the approval of the President," stating in the course of his opinion that, as compared with the letter of the act, the instructions seem to be not enabling, but on the contrary restrictive, so as to caution the board in their dealing with moral, as distinguished from physical or mental inability or incompetency to perform, promptly and efficiently, all the possible duties of an officer of the Navy.)



The law requires that both the moral and professional fitness be established. The use of both words suggests that the moral qualifications to be shown are such as are independent of the professional; those qualities which may exist and yet are such as do not appear in a purely professional examination, however searching that examination may be. (File 29260-2969, June 12, 1915.)

Clearly the written examination of a candidate on professional subjects goes to demonstrate his professional fitness, and a failure in any professional subject inquired into on the written examination is a professional failure within the meaning of the law. It is only where one or more reports on fitness which are considered by the examining board are found to be so unsatisfactory that the board for that reason, independent of the written examination, determines that an officer is not qualified for promotion, that a decision must be made as to whether his disqualification rests on moral or professional grounds. (File 29260-2969, June 12, 1915.)

It is recognized that the line of demarcation between professional and moral fitness in some instances is not clearly drawn, either by law or regulations, and that consequently confusion results in applying a uniform standard to all cases where a decision must be made as to whether the character of the reports on fitness of the candidate establish his moral or professional unfitness for promotion. Especially is the standard a varying one where officers appear before different examining boards. It is obvious that in justice to the service no officer who has been found to be morally disqualified to be promoted should be continued therein and that in justice to the officer, no summary severance from the service should be made on the ground of moral failure when the disqualification is in fact a professional one, to which the law attaches a less severe penalty without the stigma which attaches in the former case. (File 26260-2969, June 12, 1915.)

To be continued in the commissioned personnel, one must be "an officer and a gentleman." The standard as an officer to which one must measure is a professional standard, and the test usually laid down is a written examination on professional subjects, coupled with a satisfactory professional record. The standard as a gentleman to which an officer must measure is nothing more or less than the standard of a gentleman in any walk of life, and the test of moral fitness of an officer is, in the opinion of the department, the test necessary to determine the moral fitness of one purporting to be a gentleman who is not in the naval service. (File 29260-2969, June 12, 1915.)

"Moral" may be defined as pertaining to those intentions and actions on which right and wrong, virtue and vice, are predicated, or to the rules by which such intentions and actions ought to be directed; "relating to the practice, manners, or conduct of men as social beings in relation to each other, as respects right and wrong, so far as they are properly subject to rules" (citing Webster's Int. Dic.). Accepting this definition and keeping in mind that the professional examinations cover all questions of right and wrong in a professional sense, we find

that moral fitness in the sense of gentlemanly fitness relates "to the practice, manners, or conduct of men as social beings in relation to each other, as respects right and wrong (in a moral as distinguished from a professional sense), so far as they are properly subject to rules" (i. e., so far as they are subject to a recognized or established moral procedure). (File 29260-2969, June 12, 1915.)

A quite clear distinction can be drawn between professional and moral qualifications. As to mental qualifications, the distinction between it and professional, moral, or even physical qualifications is far more difficult of determination, to say nothing of definition; and it seems impossible to state any clearline of demarcation between them that will cover all cases, inasmuch as the term "mental" is broader than the others and may be included in one or all of the other terms. (File 26521-179, Feb. 19, 1917.)

Referring to the board's definition of mental fitness, as follows, "In this connection, the term refers only to the general intelligence of the candidate as shown in his written examination, or by his personal attitude and bearing before the board, or by his record," it is hardly considered that a candidate's "personal attitude and bearing before the board" should be a basis of judgment as to mental qualifications, unless accompanied by a display of temperamental qualities properly to be considered as affecting mental or other qualifications. Also in the same definition it would be well to include impressions gained from the oral examination. In addition also to the "general intelligence" of a candidate, it is considered that his mental qualifications must include also the character, power, and qualities of his mind and his temperamental qualities. It is clear that mental qualifications refer essentially to temperamental qualities, and it is therefore considered that the examples of professional unfitness cited by the board, as follows, "Poor judgment, inaccuracy, slovenliness, insubordination, indolence, unreliability, capriciousness, lack of force, lack of initiative, or any other temperamental unfitness which in civil life would not be considered as indicating mental abnormality or moral obliquity," might well, in many cases, be regarded as indicative also of mental unfitness. As emphasized before, however, each case must be settled on its own particular merits. If one or more of these traits is present to an extent rendering the candidate, in the opinion of the board, professionally unfit for promotion, a complete finding would seem to be that he is morally, but not mentally or professionally, qualified for promotion. (File 26521-179, Feb. 19, 1917.)

The lack of proper mental or moral qualifications may, and usually does, affect an officer's professional or physical qualifications. This is best shown by the fact that an examination of the department's records for a period of 24 years (1880-1904) has disclosed only a few isolated cases in which an officer who was found not mentally qualified for promotion was reported at the same time to possess all the necessary professional, moral, and physical requirements. The almost invariable rule has been that the lack of the necessary mental qualifica-

tions is coupled with other deficiencies and it seems altogether reasonable that, as a general thing, this should be the case. Nevertheless it will not be contended that lack of mental qualifications, in the sense of the statute, can not exist independently of professional, moral, or physical unfitness. Otherwise it would not have been necessary for Congress to specify all four requirements for promotion in the Navy as it has done for more than 50 years. A diseased brain, although properly classified as physical unfitness, would seem necessarily to be accompanied by lack of the mental, moral, or professional qualifications for promotion; but it is entirely possible for an officer to be mentally, morally, or professionally unfitted for promotion without disease of the brain. In short, as has heretofore been remarked by the Judge Advocate General in a similar connection (file 26260-1319, June 29, 1911), "any discussion of the question whether an officer can be morally unfit for promotion, without his mental, professional or physical qualifications being affected, however interesting it may be, becomes purely idle and academic when we remember that Congress has itself, by express language in the act of April 21, 1864 (sec. 1496, R. S.), provided that no officer shall be promoted to a higher grade until his moral, as well as his mental, professional and physical fitness, shall have been established to the satisfaction of the board of examining officers." (File 26521-179, Feb. 19, 1917.)

**Navy department's precedents.**—The department's precedents in which the question of mental, moral, or professional fitness is involved may be cited quite as much to indicate the somewhat varying interpretation of what constitutes mental disqualifications as to offer matter from which a clear definition thereof may be deduced. Incidentally, they confirm the more easily marked distinction between professional and moral disqualifications. It is believed that it will be very rare when according to the department's views a case will arise in which mental unfitness would not be coupled with professional, moral, or physical disqualifications. (File 26521-179, Feb. 19, 1917.)

The following precedents are quoted from the Secretary of the Navy's letter of February 19, 1917, to the Naval Examining Board, Navy Yard, Washington, D. C. (file 26521-179):

#### MENTAL QUALIFICATIONS.

(a) Commodore William K. Mayo, examined for promotion, February 12, 1886. Board reported as follows: "The candidate having failed to establish his mental fitness in all respects, the board can not give the certificate required by section 1504 R. S., that he has the mental, moral, and professional qualifications to perform efficiently all the duties, both at sea and on shore, of the next higher grade, and therefore we do not recommend him for promotion." This finding was adhered to by the board after further proceedings.

Commodore Mayo's reports on fitness contained among other things the following unfavorable entries: "The general impression seems to be that he is a difficult person to get along harmoniously with." "While, in my

opinion, possessing the requisite qualifications, I am afraid, judging from my personal experience with him, that his temperament and disposition are such as would militate against the chances of his efficiency and usefulness in any position." "His mental faculties are such as to qualify him for promotion but, in my opinion, his judgment is apt to be warped by his suspicions and prejudices." As to the general reputation of the candidate, "it is that of a man who, by his suspicions and prejudices makes it exceedingly unpleasant for those who have the misfortune to serve with him." "In my judgment Commodore Mayo is so peculiarly constituted that his judgment is often so warped by his strong prejudices and suspicions as to unfit him for the calm consideration and solution of important questions that may come before him. Holding this opinion I can not conscientiously think him a fit officer to perform all his duties at sea in a higher grade." Other matters of record related to "rudeness in speech," "discourtesy of demeanor," "severity and harshness," etc. Fifteen specific cases of complaint against Commodore Mayo were given thorough consideration by the board. Referring to these cases the board stated in its first report:

"Any one of the foregoing cases, taken by itself, might be considered as of minor importance and as exhibiting on the part of Commodore Mayo a mere error of judgment, which all men are, at one time or another, liable to fall into. But, aggregated, they indicate unmistakably a habit and condition of mind the manifestation of which, in a commanding officer, is demoralizing in its tendency and subversive of discipline. If, while in command of a shore station, and under the restraining influences of the Navy Department, Commodore Mayo has displayed such mental peculiarities as are shown by the evidence, the board is forced to the conclusion that he ought not to be intrusted with the duties and responsibilities inseparable from a command in foreign waters."

In its second report the board stated:

"In the several citations made the candidate claims that he was acting in the interest of discipline—while the board considers the majority of those acts to be subversive of discipline. And it is this failure on the part of the candidate, even after a deliberate view of his case—assisted as he was by able counsel and expert advice—to apprehend the true direction to which the whole mass of the documentary evidence points—that furnishes the strongest corroborative evidence of the candidate's imperfect ideas in regard to discipline, and adds to the proof of his incapacity to exercise at all times the discretion looked for in a commandant."

No action was taken by the President upon the record of the board's finding, as the case was disposed of by the retirement of Commodore Mayo upon his own application after 40 years' service, under section 1443, Revised Statutes.

(b) Asst. Surg. Frederick Joaquin Barbosa Cordeiro, examined for promotion, July 23, 1887. Board reported as follows:

"The board, after carefully considering all the evidence in the case of the candidate, including his single testimonial, the records on



file at the Navy Department, the interrogatories addressed to various naval officers and the answers thereto, and the letter and statement of the candidate, all of which, including copies of the records on file at the department, are herewith appended, concluded the examination of the candidate, and decided that the mental fitness of the candidate to perform all his duties, at sea and on shore, has not been established to the satisfaction of the board; therefore we certify that Asst. Surg. Frederick Joaquin Barbosa Cordeiro, United States Navy, does not possess the mental qualifications to perform efficiently, at sea and on shore, all the duties of the grade to which he seeks promotion.

"The board are led to the above conclusion by the evidence herewith appended, which establishes clearly to their minds the fact that Asst. Surg. Frederick Joaquin Barbosa Cordeiro, United States Navy, has an insubordinate disposition and is therefore lacking in one of the most essential qualifications of an officer of the Navy. In view of this fact we do not recommend him for promotion."

The board reassembled November 10, 1887, pursuant to orders, and further examined the candidate. December 22, 1887, the board completed its proceedings and reported that it

"Decided that the candidate has exhibited professional qualifications as well as literary and scientific attainments of more than the average excellence and that his moral fitness has also been established to the satisfaction of the board, but that his mental fitness for promotion has not been so established.

"After carefully reviewing the subject of the mental fitness of the candidate for promotion the board see no reason to change their opinion as expressed in their report made July 23, 1887. The board arrived at this conclusion for the reasons that the candidate has failed to present any favorable testimony or letter from any senior medical officer with whom he has served since he has been in the service, that two of these officers have pronounced him unfit for promotion, that the records on file at the Navy Department contain opinions from the Surgeon General and from Rear Admiral L. A. Kimberly, United States Navy, of the same nature, and that the service would be benefited by his resignation, and that he has been severely reprimanded by the Secretary of the Navy. The board also consider that the answers to 10 of the interrogatories are unfavorable to the candidate as contributing to the evidence exhibiting his mental tendency as insubordinate and unduly self-asserting, that four—at least are negative, and that the rest, while in his favor, are chiefly from officers with whom his association on duty has been indirect, seven of them having had no association with him on duty at all.

"The board do not consider the testimony sufficient to prove any defect in the moral character of the candidate, although his action in showing the Medical Journal to Ensign Dent without first obtaining the consent of Surgeon Kidder, his statement as to the time he spent before the board of investigation at the Boston Navy Yard, 'about one minute,' and his estimate of the time necessary to obtain a medical officer's presence at the dispensary at the

Boston Navy Yard when the latter was on board the receiving ship at that place, 'six minutes,' both of which periods are manifestly underestimates and his accusation, in his defense, against Lieut. Nazro of being influenced by unworthy motives in answering the interrogatories as he did, would seem to indicate a feeble moral sense, but the board prefer to regard these points as additional evidence of his mental unfitness for promotion.

"The candidate seems to have been on terms of hostility with two out of three medical officers to whom he has been subordinate since his entry into the service. The testimony in these cases, although somewhat conflicting in some respects, nevertheless leads the board to the opinion that he has been guilty of insubordination and disrespect, and the board are well satisfied that harmony and concert of action, so desirable for the benefit of the service, did not exist in the medical departments of the Boston Navy Yard and of the U. S. S. *Powhatan*, owing to the mental inability of the candidate to fully appreciate his position as a junior officer and his disregard of the opinions of his seniors.

"The full tenor of his defensive argument is to the effect that he has been misrepresented in every instance, and that in every instance he has been the victim of unjust animus, prejudice, or absolute falsehood.

"In examining the testimony of those officers who have reported against either his mental or professional fitness, the board have been unable to detect any animus of an unjust nature against him, and believe that such animus existed only in the imagination of the candidate. These animadversions in his defense in the opinion of the board are still further evidence of the disqualifying condition of the mental constitution of the candidate.

"The plea of ignorance of the customs of the service, on the part of the candidate is insufficient to account for all the trouble he has given those in authority over him, since all young medical officers, upon entering the service, must have labored under the same disadvantage, and yet it is a very uncommon thing to hear of such curious complaints against them as those made against the candidate.

"The candidate, in the opinion of the board, although possessing a high grade of information and accomplishment as a physician is unquestionably too vain of his attainments, and is unwilling to give others credit for whatever proficiency they may possess. This defect in his mental constitution in civil life might be of small moment, but the board considers it a grave defect in one belonging to the service, since it could only result in destruction of harmony and scandalous conflict in a department in which all personal considerations should subordinate themselves to the endeavor to do all things for the benefit of the sick and for the best interests of the service.

"In conclusion, the board do not believe that the interests of the service would be subserved by the promotion of the candidate, and therefore they do not recommend Asst. Surg. Frederick Joaquin Barbosa Cordeiro, United States Navy, for promotion."

The President's action in this case, June 15, 1888, was as follows:

"A case is here presented of a medical officer, concededly of unusual skill and attainments, held unfit for promotion for no established neglect of duty or anything else more substantial (so far as facts are developed), than instances of disrespect or insubordination which are almost frivolous. This officer is not the most agreeable man in the Navy in his intercourse with his superiors, but he should not be denied promotion for that; he has probably very high ideas of his ability and perhaps is dogmatic; but these things, while disagreeable, may exist in a man to whom it would be very unjust to deny promotion.

"Besides all this, I am perfectly satisfied that everything stated in the foregoing abstracts that has caused unhappiness to the applicant's superior officers might have been avoided if they themselves had exercised a little tolerance and forbearance.

"I can not approve the findings of the board in this case."

(c) Pay Insp. John H. Stevenson, examined for promotion to pay director. Board reported as follows:

"We are satisfied as to the professional abilities of the candidate. His methods of business are shown by the evidence to have been loose, reckless, regardless of law, and defiant of orders, but we believe his conduct is not shown to have been influenced by a desire for personal profit, but that, from mental peculiarities or temperament, his moral sense of the obligations of law, orders, and regulations is so obtunded as to render him unfit to conduct the important duties which pertain to the grade in the Navy to which he is a candidate for promotion. In this sense we consider him, as stated below, morally unfit for promotion. We therefore decide that the professional fitness of the candidate to perform the duties of a naval officer at sea and on shore in the next higher grade has been established, but not the mental and moral fitness, and we therefore do not recommend him for promotion."

The proceedings and finding of the examining board in the above case of Pay Insp. Stevenson were approved by the President September 25, 1893.

(d) Asst. Paymaster S. J. Semmes, examined for promotion February 4, 1898. Found mentally, morally, and professionally qualified. Finding disapproved by the President, and the case ordered before another board, which found the candidate professionally, but not mentally or morally qualified. Record returned by the department with instructions, among others, that the board "place upon record whatever matter, in its opinion, tends to disqualify the candidate mentally for promotion." Pursuant to these instructions, the board caused the following entry to be made in the record:

"In the matter of the previous finding of the board, that the candidate was mentally disqualified for promotion, the board wishes to state that it was then and still is of the opinion that the habits of Asst. Paymaster Semmes mentally disqualify him, and further that the transaction of the check, as shown on page 5 of

the candidate's affidavit, appended and marked 'H,' exhibits a mental obliquity and apparent inability to see that, in cashing that check himself, as he stated he did, he used Government funds for his own purposes in a manner which it is deemed shows want of moral and mental sense."

The Judge Advocate General in his review of the above case made the following remarks:

"It is noted that the board finds Mr. Semmes mentally disqualified for promotion, stating that in its opinion his habits 'mentally disqualify him,' and also that 'he exhibits a mental obliquity and apparent inability to see that, in cashing' his personal check out of the funds in his possession as paymaster, 'he used Government funds for his own purposes in a manner which it is deemed shows want of moral and mental sense,' and yet finds him professionally qualified for promotion. Although somewhat peculiarly expressed, the adverse purport of this finding is sufficiently clear.

"A careful examination of the record does not, in my judgment, disclose any evidence whatever showing that Mr. Semmes was guilty of dishonest conduct, but it does exhibit, first, a carelessness in handling his accounts that is inexcusable in an officer whose duties demand the greatest care and exactness; and, second, that he is addicted to habits of intemperance to such a degree as to unfit him for efficient service as an officer of the Navy."

No action was taken by the President upon the record in the above case, as the matter was disposed of by the candidate's resignation from the service.

#### MORAL QUALIFICATIONS.

(e) Passed Asst. Paymaster Louis A. Yorke, examined for promotion December 14, 1886. Found mentally, but not professionally or morally qualified. The evidence upon which the board based its finding that he was not morally qualified for promotion consisted principally of "several complaints which had been made against him to the department, consisting of alleged indebtedness to individuals, and of neglect, refusal, or evasion to pay the same." Finding approved by the President, February 19, 1887.

(f) Boatswain Louis W. Sopp, examined March 1, 1906. Found that he had "the mental and professional, but not the moral qualifications, by reason of his failure to pay his debts, which is a result of his own misconduct, to perform efficiently all his duties, both at sea and on shore, of the grade to which he is to be promoted." The Secretary of the Navy recommended approval by the President, April 9, 1906, stating in part: "Persistent failure, without adequate cause, to meet just pecuniary obligations is regarded as a proper basis for a finding of moral disqualification \* \* \*. In all the cases above mentioned payment was unduly delayed \* \* \*; and in some instances promises of prompt payment appear to have been lightly broken. Such conduct as that of Mr. Sopp in these matters can not but bring discredit upon the service, both at home and abroad, and it shows, in the judgment of the department, that the offender is out of place as an officer in the Navy." Finding



of board approved by the President April 10, 1906.

(g) Gunner George L. Mallery, examined October 12, 1904. Found mentally and professionally, but not morally qualified, "by reason of failure to pay his just debts, which is the result of his own misconduct." Finding approved by the President.

(h) Lieut. Robert H. Osborne, examined June 9, 1903. Found mentally but not morally or professionally qualified, his moral failure being due to indifference in contracting financial obligations which he was unable to discharge. Upon reconsideration, the board reported:

"The board respectfully adheres to its original decision, and in doing so respectfully invites attention to the fact that the deficiency found in moral qualifications was not the failure of Lieut. Osborne to pay the debt owed Mr. W. E. Rouse as such, but his failure to keep his written promise to pay in a certain time and method, his failure to show any practical reason for such neglect of his promise, and his failure to meet his obligations in the sense of making any arrangement with his creditor after the matter had been brought to his attention by the department. In the opinion of the board such absolute neglect and indifference to his obligations and to his promise show a standard of morals below that which should be required of naval officers." Finding approved by the President, July 3, 1903.

(i) Boatswain Alfred H. Hewson, examined May 3, 1909. Board found: "That Boatswain Alfred H. Hewson, United States Navy, has the mental, but not the moral nor the professional qualifications, to perform efficiently all the duties, both at sea and on shore, of the grade to which he is to be promoted, and do not recommend him for promotion." The Acting Secretary of the Navy, May 17, 1909, recommended approval of the board's finding, stating as follows: "Upon reviewing the case it appears that Mr. Hewson has been habitually intemperate and that he has shown a lack of proper officer-like appreciation in his methods of dealing with his financial affairs." Finding approved by the President.

(j) Gunner Edmund DuB. Gould, examined April 4, 1903. Found mentally but not professionally qualified, and from the unfavorable evidence before it the board was not satisfied as to his moral fitness and did not recommend him for promotion. Upon a second appearance before an examining board it was found that he had the mental, but not the moral and professional qualifications, by reason of his failure to pay his debts, and not making the percentage necessary to qualify, and he was not recommended for promotion. The Secretary of the Navy recommended approval of the board's finding, stating in part: "From a review of the record of proceedings of the Naval Examining Board, it would appear that this officer has persistently neglected to pay his debts, that he has failed to reply to communications addressed to him officially upon these matters, and that he has failed to make any satisfactory explanation or excuse for his delinquencies in the above particulars." The board's finding was approved by the President.

(k) Passed Asst. Paymaster Edwin B. Webster, examined January 6, 1898. The board reported as follows:

"The board decided that Passed Asst. Paymaster Edwin B. Webster, United States Navy, has the mental and professional, but not the moral qualifications, by reason of the facts mentioned in the charges formulated by the board from the record, which are a result of his own misconduct, to perform efficiently all his duties, both at sea and on shore, of the grade to which he is to be promoted, and do not recommend him for promotion."

The charges formulated by the board were as follows: "First. Habits of gambling, as indicated by the letter of F. L. Crompton, of Shanghai, China, dated July 26, 1897. Second. Carelessness in the settlement of debts, as indicated by the correspondence between the candidate and his creditors, and the Navy Department. Third. Transactions of the candidate characterized as 'disgraceful,' and 'scandalous' by the Secretary of the Navy, and published in General Court-Martial Order No. 76, dated July 28, 1896." The finding of the board was approved by the President.

(l) Commander George W. Wood, examined June 29, 1893. Board reported: "By reason of the facts adduced by the evidence as to his habits of drunkenness, and the contracting of debts beyond his means, and neglect of creditors, since his last promotion, we find that Commander Wood is morally unfit for promotion to the next higher grade \* \* \* We hereby certify that Commander George W. Wood, United States Navy, has the mental, but not the moral and professional qualifications, to perform efficiently all the duties, both at sea and on shore, of the next higher grade, and do not recommend him for promotion." Board's finding approved.

(m) In a case more recent than those noted above the candidate was found not morally qualified for promotion, the board in its report June 21, 1911, stating in part:

"After duly deliberating on all the matters herein referred to, the board believes that the candidate did not use his utmost exertions toward liquidating his debts as quickly as possible, but that from the contraction of the first debts to the payment of the last one, June 14, 1911, he has shown a degree of moral turpitude which unfits him for promotion."

The Secretary of the Navy recommended approval of the board's finding. President Taft's decision in the case was as follows:

"I am not satisfied from the showing made that Lieutenant Burt's character has been shown to be such as to unfit him morally for promotion. Of course, the failure to pay debts and the circumstances under which the debts were contracted, when their payment is postponed or neglected, may constitute conduct unbecoming an officer. But here the debts have been paid; and they were not so great in amount or so many as to indicate utter recklessness when it is considered that Lieutenant Burt is a married man and, necessarily, had the expense of a family upon him in addition to that attendant upon his sea service; I am bound to say that the specifications which were handed to me as to the im-

morality involved in his relation to debts seem to be, many of them, strained, and I can not think that it is just to eliminate him from the naval service for such delinquency." (File 26260-1392:15, Jan. 2, 1912.)

In connection with moral qualifications, see also note to section 1456, Revised Statutes.

#### PROFESSIONAL QUALIFICATIONS.

(u) Machinist Martin M. Schreiber, examined May 17, 1909; found morally and professionally but not mentally qualified for promotion. The record in this case was returned to the board with the following remarks:

"The board is directed to reconsider this record, keeping in mind the fact that the educational qualifications of the candidate should be considered under the head of the professional qualifications, and that after considering his professional and educational qualifications together, they will report as to whether or not he is professionally qualified." (File 26260-438.)

On revision the board found the candidate morally qualified, "but because of the character of his answers to the written examination, and the lack of knowledge shown throughout his paper, that his mental and professional fitness is not established, this despite the candidate's excellent reports of fitness." Finding approved by the President.

(o) Boatswain Edward Allen, examined October 28, 1908; found morally and professionally but not mentally qualified, owing to his lack of knowledge of the English language, orthography, punctuation, etc., and because a perusal of his papers shows a marked degree of illiteracy. The record was returned to the board with the following remarks:

"After careful consideration of the matter the record of proceedings is returned to the board with the information that the department regards the above-mentioned disqualifications as constituting part of the professional examination, and not as exhibiting mental deficiency."

On revision the board found the candidate morally and mentally, but not professionally, qualified. Finding approved by the President.

**Consideration by board of court-martial proceedings.**—As early as 1897 the specific question [right of examining board to consider court-martial proceedings against candidate] was raised and decided by the department. In that case an examining board treated "as closed" certain matters brought to its attention for which the candidate had been tried by court-martial. The decision in that case embodied the following statement: "The fact that a case has been finally acted upon by the highest authority, or that no action whatever has been taken, does not close that portion of the officer's record to which it relates in such a manner as to relieve an examining board from the responsibility of scrutinizing it. Where an officer's record is found not good, it seems \* \* \* then to become the especial duty of the board to make a thorough and exhaustive examination." (File 5878-97.) The same question has been judicially decided in accordance with the Navy Department's precedents and practice. With reference to the authority of an examining board to

consider the proceedings of a court-martial and other facts shown by the officer's record bearing upon his moral fitness for promotion, the court in the case of *Davis v. United States* (24 Ct. Cls., 442) said: "The board was charged with the duty of examining into his mental, moral, and professional qualifications for advancement. What better evidence could it have of these qualifications than the candidate's actual career in his then grade? It was natural and proper for the board to look into his record. If a good officer he would proudly rely upon it and demand its examination as a right." In 1911 the question was again considered by the department (file 26260-1392, 26260-697, June 29, 1911, p. 17), and it was held: "The question of an officer's amenability to trial by court-martial for acts affecting his moral fitness can not \* \* \* have any bearing upon the question now under consideration. For should the officer be so tried and convicted, or even acquitted, by court-martial, an examining board would still have the duty cast upon it by express provisions of law, of examining into the facts and outcome of such trial, in order to determine for itself the effect, if any, that should be given thereto with reference to the officer's qualifications for promotion in the Navy." Accordingly, when an officer is examined for promotion, all papers relating to his service since the last examination whereby he was promoted, including the complete record of the officer's trial by court-martial, where he has been so tried, are sent to the examining board by the department, and it is the duty of the board to review all the papers so furnished and determine whether or not in the members' own minds the officer has the mental, moral, and professional qualifications for promotion to the next higher grade. In a case where the officer has been tried by court-martial, were the examining board bound by the result at which the court had arrived, it would be unnecessary to forward the entire record of the trial, as merely the findings of the court would be sufficient. But the law specifically empowers the examining board "to examine into all matters on the files and records of the Navy Department" relating to the service of the officer since the last examination whereby he was promoted (sec. 1499, R. S., as amended), and requires that the whole record and finding of the board, together with "any matter on the files and records of the Navy Department, touching each case," shall be presented to the President for his approval or disapproval of the finding (sec. 1502, R. S.). It follows that, regardless of the finding which may have been reached by a court-martial, the entire record and all evidence which it contains, concerning the service of the candidate since the last examination whereby he was promoted, must be considered by the board, and that no member is justified in recommending the candidate's promotion unless, in his own opinion, the officer is qualified therefor. (File 26260-3342 : 1, Mar. 27, 1916.)

It is the province of the board to find the candidate either morally qualified or not morally qualified for promotion; the board's finding must, however, under the law, express the



opinion which the members themselves entertain, and a finding which states that the candidate is morally qualified for promotion, not because the board so believes but because the board feels itself bound by the opinion which it attributes to others, is in law no finding at all. (File 26260-3342 : 1, Apr. 7, 1916.)

In its first action in this case the board stated in effect that "no matter what its personal feelings may be," it found the candidate morally qualified for promotion because the members of a court-martial had acquitted him of the serious offenses with which he had been charged, and the board "has not the power to question the findings of said board." The department returned the record, instructing the board that no "member is justified in recommending the candidate's promotion unless, in his own opinion, the officer is qualified therefor;" that the Navy Regulations specifically provide that "it shall be held obligatory upon any member of the board to decline to recommend the promotion of an officer until he is satisfied of the officer's entire mental, moral, and professional fitness for promotion"; that the so-called acquittal of the court-martial in this case had been disapproved and thereby set aside and nullified by the convening authority; and that the board has not only the "power" but the duty of making a full examination of the facts in the case and determining for itself whether the matters disclosed by the record render the candidate qualified, or not qualified, for promotion." The board disregarded the above instructions and in its revised finding stated: "The members of this board, who are subordinate in rank to the court who acquitted this candidate, feel from their training and association with commissioned officers, that the members of the court must have been influenced by extenuating circumstances as well as by the testimony that appears in the record of the court \* \* \*. The board is of the opinion that the court-martial board, being commissioned officers of high rank under oath, upon their honor, acquitted the candidate, and in view of the above accepts the findings of the court." The court here makes the same error as previously. The department expects, and the law contemplates, that the members of an examining board shall be competent to judge for themselves whether a candidate is qualified for promotion, and to assume the responsibility placed upon them by law of so doing. It would be useless to convene such boards if they are merely to reflect the opinion which they think has been entertained by others. The board is required to make an independent investigation of the evidence before it, in order to determine the candidate's fitness for promotion, and if the evidence before the board is not sufficient, the board is by law given authority to obtain additional evidence. The board should know that the members of a court-martial are sworn to try each case before them "according to the evidence which shall come before the court," and could not lawfully make a decision based upon circumstances not appearing in the record. Also that courts-martial can not make a finding of guilty unless the evidence establishes the guilt of the accused

beyond a reasonable doubt, while on the other hand, members of an examining board are not required to be satisfied beyond a reasonable doubt that a candidate is not qualified for promotion, but instead are forbidden to recommend any officer for promotion "as to whose fitness a doubt exists." In other words, before a court-martial every doubt must be resolved in favor of the accused, while before an examining board such doubts, if any, must be resolved against the candidate, and the existence even of a doubt as to his fitness requires that he be not recommended for promotion. For this reason the finding of a court-martial, even if approved, would not be conclusive upon an examining board. (File 26260-3342 : 1, Apr. 7, 1916.)

The matter of determining an officer's moral fitness for promotion is not analogous to the question of determining whether he should be brought to trial by court-martial for alleged offenses. On the contrary, an examining board is required to report the opinion of its individual members concerning the fitness of a candidate for promotion, regardless of whether unfavorable matters upon the candidate's record have been acted upon by a court-martial or not, and regardless of the finding reached by the court-martial if one has been convened. (File 26260-3628:1, Aug. 25, 1916.)

**Consideration of misconduct by candidate which is not within the reach of a court-martial.**—Misconduct in private life may be the subject of trial by court-martial and the department endeavors to take appropriate disciplinary action whenever such cases are brought to its attention. However under ordinary circumstances the domestic relations of an officer, unless there has been misconduct on his part reflecting discreditably on the naval service and justifying a recourse to disciplinary proceedings under the Articles for the Government of the Navy, are not regarded as matters falling within the jurisdiction of the Navy Department, but are properly under the jurisdiction of civil courts. Instances, however, may arise where misconduct in private life would not be within the reach of law or discipline to the extent of court-martial proceedings. Such matters are nevertheless subject to investigation by an examining board in determining an officer's fitness for promotion, where they have occurred since the last examination whereby he was promoted or where they have not previously been inquired into and decided upon, or where they constitute a "fact continuing" affecting his present fitness for promotion. (File 26521-179, Feb. 19, 1917.)

**Consideration of matters under investigation by civil courts.**—The members of an examining board are forbidden to recommend any officer for promotion "as to whose fitness a doubt exists." The board has the duty devolved upon it of making a thorough investigation into the matters which are the subject of correspondence referred to it by the department, examining witnesses with reference thereto if necessary, and of determining as the result of such investigation, together with any other matters of an unfavorable character which may be upon the candidate's record, whether or not the candidate is morally qualified for promotion; and

the board is not authorized to delay its proceedings pending a determination of litigation in the civil courts involving the relations between the candidate and his wife. It is possible that a final adjudication upon the merits of the controversy may never be reached in the civil proceedings, and even if it were this would not relieve the board of its duty to make an independent investigation of the matters at issue in so far as they may affect the moral fitness of the candidate for promotion. (File 26260-3628:1, Aug. 25, 1916.)

**Duty of board to weigh evidence without requesting department's instructions.—**

"With regard to the request contained in your letter above-mentioned, that the board be instructed as to whether or not it should consider the report of the court of inquiry referred to, the report of Paymaster Allen, dated November 22, 1888, and the action of the department relative thereto, as a final disposition of the matters, you are informed that it is for the board to examine and determine as to whether or not these reports have been finally acted upon by the department; if acted upon, what weight should be given to the department's action; and if not acted upon, what weight should be given to them in the absence of such action by the department." (File 1966-93, May 16, 1893.)

"The determination of the question of the fitness of an officer for promotion is vested by law in the examining board and in the President, and it is the duty of the examining board unembarrassed by instructions from this department, to give such consideration to all facts occurring since the examination of the candidate for his last promotion as well as to all such as appear upon the file and records of the department, as will enable it to reach a just conclusion." (File 1966-93, May 16, 1893.)

An examining board having been duly appointed and organized in pursuance of law, it becomes its duty, in accordance with the requirements of section 1496 of the Revised Statutes, to ascertain and report upon the mental, moral, and professional fitness of the candidate for promotion. As sections 1499 and 1502 of the Revised Statutes empower the board to examine any matter on the files and records of the Navy Department touching each case which may in the opinion of the board be necessary to assist it in making up its judgment relative to the case of any officer under consideration, and it being understood that all such matters upon the files and records of the department are placed at the disposal of the board, it is deemed proper that the board should be left to the performance of its duties untrammelled by instructions from the department. (File 1966-93, May 16, 1893.)

**Burden of proof.**—The following is quoted from "General Instructions" formulated by the Secretary of the Navy on December 14, 1894, concerning proof of moral fitness, as a result of questions presented in the case of Lieut. Commander Frederick W. Crocker (see also file 26260-1392, June 29, 1911):

"6. The lieutenant commander whose case is now being considered, having arrived at the point where he is entitled to promotion to the next higher grade, under conditions fixed by the

statute, stands in the position of an applicant for an appointment. He is no longer to be a lieutenant commander, but is an applicant for appointment to the position of a commander in the Navy of the United States, an office of great responsibility. He is to be appointed by the President and confirmed by the Senate, provided he is competent and worthy. The burden of proof is upon him to show that he complies with these conditions. He is the actor in these proceedings, which are instituted simply to ascertain the facts upon which the President shall act in sending his name to the Senate, and by which that body is to be guided in confirming or refusing to confirm him.

"7. Any reasonable doubt that may arise out of the evidence offered is, in all cases of this kind, to be resolved in favor of the Government and against the applicant. Should the applicant fail of appointment under these rules, the law directs that he is to be discharged from the service, unless circumstances exist which authorize his retirement. If the refusal to appoint were intended as a punishment, the law would not contemplate payment of a year's or any other salary on his discharge. Such discharge simply means that the Government no longer needs the applicant's services.

"8. It follows, therefore, from the nature of these proceedings, that the statutes of limitation, quoted by counsel, have no application whatever. Everything that has occurred during the applicant's term of office as lieutenant commander, or at any other time, inquiry into which is not prohibited by the law and regulations [see sec. 1499, R. S., as amended], may be adduced for the purpose of showing that he is not competent, or, if competent, is not worthy of the appointment to the office of commander which he now seeks. It can not be contended that because the Government has not instituted proceedings by court-martial it has, therefore, been negligent in the matter of defending itself against a claim of a candidate to serve it, and is, by reason of its own neglect, compelled to appoint an unworthy or incompetent person to office. The Government has a right, when an inquiry of this nature is instituted, to satisfy itself of the fitness of the candidate for promotion, to introduce in evidence records made in accordance with the regulations lawfully prescribed by the Secretary of the Navy, and any other testimony that may be necessary to satisfy itself of the fitness or unfitness of candidates for office.

"9. The department has, however, decided that the members of an examining board should reach their conclusions respecting the mental and moral qualifications of the candidate upon the evidence of record only, independently of any personal knowledge which they may have on the subject. Any facts within the personal knowledge of members of the board, important to be considered, should be made matter of record and the candidate given an opportunity to meet them. Paragraph 8, article 1715, United States Navy Regulations, is accordingly amended so as to read as follows:

"The onus of establishing professional fitness shall be held to rest entirely upon the officer under examination. The mental and moral fitness of the candidate shall be assumed



unless a doubt shall be raised on either head in the mind of any member of the board, from the answers contained in any of the interrogatories or reports on fitness, from the general reputation of the candidate, or from other sources of evidence of record. It shall be held obligatory upon any member of the board to decline to recommend the promotion of an officer until he be satisfied of the officer's entire mental, moral, and professional fitness for promotion. The board, while careful not to do injustice to an officer regarding whom there is any doubt, shall take equal care to safeguard the honor and dignity of the service, recommending no officer for promotion as to whose fitness a doubt exists.' " (This regulation is now embodied in Naval Courts and Boards, 1917, secs. 620, 643.)

**Finding of majority of board governs.**—The board may find an officer qualified for promotion by a majority, and one member (a minority) may find him not so qualified, and such a majority finding, when approved, is valid. (File 26260-1244, Apr. 14, 1911.)

In case of dissent the record must show those of the members who concurred in, and those who dissented from, the opinion of the board, with the reasons for dissent. (Sec. 650, Naval Courts and Boards.)

**This section not applicable to temporary promotions.**—Sections 1493 and 1496, Revised Statutes, clearly relate to promotions in the permanent Navy. The act of May 22, 1917 (40 Stat., 84), authorizes temporary promotions to all grades in the Navy above the lowest grades, and provides (sec. 8) that all temporary promotions "shall continue in force until otherwise directed by the President \* \* \*." Said act however makes no express provision as to the manner in which such temporary promotions shall be made. On the other hand, said act in several places refers to existing law with reference to permanent promotions. The fact that the act of May 22, 1917, makes repeated references to the "permanent" Navy or Marine Corps, that it also makes repeated references to existing law in connection with permanent promotions, that it says nothing about existing

law with reference to temporary promotions, and that it expressly makes such temporary promotions revocable by the President at any time, leads irresistibly to the conclusion that the provisions of existing law with reference to promotions in the permanent Navy are not controlling as to the temporary promotions provided for in said act, but that such temporary promotions may be made during the war in accordance with such rules and regulations as the President may prescribe. Accordingly *held*, that an officer before being temporarily promoted is not required by law to pass any examination either as to his mental, moral, professional, or physical qualifications; but that it is within the discretion of the President to determine what examinations if any preliminary to temporary promotions are advisable for the proper protection of the interests of the Government. (File 28687-22, June 14, 1917, citing *Taylor v. U. S.*, 38 Ct. Cls., 155, noted under sec. 1370, R. S. Compare 25 Op. Atty. Gen., 341, noted under sec. 1370, R. S., "Application of statutory requirements to appointments under subsequent laws." See also 31 Op. Atty. Gen., 173, as to provisional advancements in rank in the Naval Reserve Force.)

The act of May 22, 1917 (40 Stat., 84), clearly indicates that it did not contemplate the passing of statutory examinations prior to temporary promotions authorized therein, for it expressly requires examination of all officers prior to permanent promotion, notwithstanding that they have in the meantime been temporarily promoted to higher grades; and it would be an absurdity in the case, for example, of an officer holding a permanent commission as lieutenant and temporarily promoted during the war to the grades of lieutenant commander and commander, and who had been required to pass the statutory examinations prior to such temporary promotions, to require him thereafter to pass the prescribed examinations for permanent promotion to the grade of lieutenant commander when he became due for such permanent promotion. (File 28687-22, June 14, 1917.)

### Sec. 1497. [Promotion to rear admiral in time of peace. Superseded.]

**This section provided as follows:**

"Sec. 1497. In time of peace no person shall be promoted from the list of commodores to the grade of rear-admiral, on the active list, until his mental, moral, and professional fitness to perform all his duties at sea has been established as provided in the preceding section."—(16 July, 1862, c. 183, s. 7, v. 12, p. 584. Amended by 21 April, 1864, c. 63, v. 13, p. 53.)

It was superseded by the act of March 3, 1899, section 7 (30 Stat., 1005), which abolished the grade of commodore on the active list of the Navy (see note to sec. 1362, R. S.). Thereafter promotions to the grade of rear admiral were made by seniority from the grade of captain (see sec. 1458, R. S.), subject to the examinations required by sections 1493 and 1496, Revised Statutes. New provisions for promotion to the grade of rear admiral, by selection from the grade of captain, were contained in the act of August 29, 1916 (39 Stat., 578), which said act further provided (39 Stat., 579), that officers selected for promotion thereunder "shall prior

to promotion be subject in all respects to the examinations prescribed by law for officers promoted by seniority."

**Selection of rear admirals during war** was provided for by section 1365, Revised Statutes.

**Selection by the President of officers to command squadrons** with the rank and title of "flag-officer" is provided for by sections 1434, 1463, and 1464, Revised Statutes. The act of May 22, 1917 (40 Stat., 89), provided that said sections of the Revised Statutes were not to be construed as amended or repealed by the provisions of that act authorizing the designation of officers to command fleets and subdivisions thereof with the rank of admiral and vice admiral while so serving. The act last cited further provided that in time of war selections under the provisions thereof were to be made from the grades of rear admiral or captain on the active list, and in time of peace from among the rear admirals on the active list. The rank of "flag-officer" under section 1434, Revised Statutes, is now rear admiral (see note to said section).

**Sec. 1498. [Examining boards.]** Such examining board shall consist of not less than three officers, senior in rank to the officer to be examined.—(21 April, 1864, c. 63, s. 2, v. 13, p. 53.)

**Provisions of this section held mandatory.**—Where a naval examining board consisted of three officers, one of whom was not senior in rank to the officer to be examined, *held* that the proceedings of said board should be disap-

proved as fatally defective. The law being mandatory in its terms, all the members of the board must be senior to the officer under examination before them. (File 26260-1244, Apr. 14, 1911.)

**Sec. 1499. [Powers of.]** Said board shall have power to take testimony and to examine all matter on the files and records of the Navy Department relating to any officer whose case may be considered by them. The witnesses, when present, shall be sworn by the president of the board.—(21 April, 1864, c. 63, s. 1, v. 13, p. 53.)

Amendment to this section was made by act of June 18, 1878 (20 Stat., 165), which provided "that hereafter in the examination of officers in the Navy for promotion no fact which occurred prior to the last examination of the candidate whereby he was promoted, which has been enquired into and decided upon, shall be again enquired into, but such previous examination, if approved, shall be conclusive, unless such fact continuing shows the unfitness of the officer to perform all his duties at sea."

**Refusal of Navy Department to furnish board with records prior to last examination of candidate.**—As has been judicially stated (Davis v. U. S., 24 Ct. Cls., 442), the above section of the Revised Statutes "opened up the whole past life of an applicant for promotion, and made him liable at each step in his career to a fresh investigation, long after the event, of charges before 'enquired into and decided upon.' To remedy any injustice this may have caused, probably, the statute of June 18, 1878, was passed. This statute places a bar in the way of a new examination into old accusations or facts, and starts the officer in his higher grade with a clean record, unless the fact be a continuing one, showing the candidate's unfitness to 'perform all his duties at sea.' " Again, in the same case (Davis v. U. S., 24 Ct. Cls., 445), it was stated: "The limit placed by Congress upon the scope of inquiry was that past issues, old charges, once enquired into by competent authority, decided upon and the decision approved, should not be reopened. When promoted to the grade of pay inspector Davis's record as paymaster had been investigated by an examining board and passed upon. The finding had been approved. The statute holds that decision to be final; it closes forever, so far as examining boards are concerned, one period of the officer's professional career, unless a 'fact continuing shows the unfitness of the officer to perform all his duties at sea.' " The record of the candidate in this case prior to his last promotion does not contain any matter which the board is authorized to inquire into by the act of June 18, 1878, and the Navy Regulations, consequently the department does not deem it advisable to furnish such record to the board as requested by the president thereof. (File 26521-173, Jan. 25, 1917.)

Upon the examination of officers for promotion the law in explicit language prohibits inquiry into any fact which occurred prior to the last examination whereby the candidate was promoted, which has already been inquired into and decided upon, and specifically provides that "such previous examination, if approved, shall be conclusive." Only one exception to this mandatory rule is contained in the statute, and that is where the "fact continuing shows the unfitness of the officer to perform all his duties at sea." The record of the candidate in this case prior to his last examination is entirely clear of all offenses of the character mentioned by the board, and therefore does not contain any matters into which the board is authorized by law to inquire, and for this reason it is held that the department has not the right to furnish the same to the board in response to its request. Such action would produce a deviation from the statutory provisions, and the precedent thus established might some time in the future result in the proceedings of a naval examining board being set aside and annulled as fatally irregular and defective. (File 26521-173:1, Feb. 1, 1917.)

For other cases, see note to section 1496, Revised Statutes, under "Consideration by board of court-martial proceedings."

**Records submitted to Board on Selection for Promotion.**—The act of August 29, 1916 (39 Stat., 578, 579), relating to the selection of officers for promotion, provides that the selection board shall be furnished by the Secretary of the Navy "with the record of each officer." Under this law the board must be furnished with the entire record of the officer since his appointment to the Navy, and not merely the record of the officer in his existing grade. The act of June 18, 1878, modifying section 1496, Revised Statutes, is inapplicable to the selection board, whose examination of the entire record would seem to be almost essential to determine comparative fitness. The act of June 18, 1878, can still have effective operation with reference to the promotion of officers to grades below commander, and also with reference to the promotion of officers to the grades of commander, captain, and rear admiral, as the act of August 29, 1916, continues in force the provisions of the Revised Statutes relating to the promotion board, as supplement-



tary to selection in the latter cases, by the provision "that any officers so selected shall prior to promotion, be subject in all respects to the examinations prescribed by law for officers promoted by seniority." (31 Op. Atty. Gen., 87, concurring in opinion of the Judge Advocate General, Nov. 28, 1916, file 26521-169, which overruled the opinion of the Acting Judge Advocate General of Nov. 14, 1916, file 26521-169).

**Counsel for examining board.**—A letter having been received by an examining board signed as counsel for a candidate for promotion the board requested that some person conversant with the law be detailed to attend the sittings of the board and act as their adviser in matters of law and procedure. The department accordingly designated to advise the board in matters of law and procedure an officer attached to the Judge Advocate General's office who had

been assigned when occasion required to the duty of conducting courts of inquiry and courts-martial. This action was taken in accordance with the precedent established some 12 years before when the same candidate was examined for promotion to his present grade (pay inspector). On that occasion grave matters affecting his fitness were upon record and the first naval examining board which examined him found him neither morally nor professionally qualified for promotion. Col. Robert G. Ingersoll appeared as his counsel before that board and Assistant Attorney General Simons was assigned to the duty of assisting the board during the examination. (Memo. Sec. Navy, Mar. 7, 1893, in relation to the examination of Pay Insp. John H. Stevenson for promotion to pay director.)

**Sec. 1500. [Officer may be present and make statement.]** Any officer whose case is to be acted upon by such examining board shall have the right to be present, if he so desires, and to submit a statement of his case on oath.—(21 April, 1864, c. 63, s. 3, v. 13, p. 53.)

**Provisions of this section held mandatory.**—Every officer of the Navy whose eligibility to promotion is to be acted upon by an examining board under the provisions of sections 1496, 1498-1505, Revised Statutes, has the right to be present at his examination. He must be duly notified of the time and place of his examination, and unless he waives his right or expresses a lack of desire to be present, he must be given leave of absence or permission to attend. No finding of the board adverse to his qualifications for promotion can be made without a personal examination of such officer unless he fails to appear after having been duly notified to do so (sec. 1503, R. S.). *Held*, that the proceedings and findings of the naval examining board in this case are fatally irregular and defective in that (1) said officer, being at the time in the discharge of his duty on shipboard, and under orders of his superior officer, was not notified of the time and place of his examination for promotion, and was not given and did not have an opportunity or permission to exercise his right to appear and be heard at such examination; and (2) said board of examiners rejected said officer and his application for promotion without any examination of himself, although he had not failed, "after having been duly notified, to appear before said board." (27 Op. Atty. Gen., 251.)

**Waiver of right to appear must be affirmative.**—From the provisions of sections 1500 et seq., it is apparent that in every case the officer whose case is to be acted upon has the right to appear and to be heard. The declaration of this right to be present carries with it a command to those having control of his person to relieve him from restraint and permit him to exercise the right thus conferred. An officer on duty can not leave without orders or permission; it is therefore the manifest duty of the proper officers to give to the candidate timely notice of the time when and place where the board will meet to consider his case, and to give him also leave of absence and permission to attend;

or to ascertain from him that he did not desire to be present. Without this the officer is effectually deprived of the right secured to him by the statute. The right to be present may be waived; but in order to do this some affirmative act of waiver is necessary and it is not inferred from the fact that the officer continues in the performance of the duty to which he has been ordered nor is this any expression of a lack of desire to be present at his examination. (27 Op. Atty. Gen., 251.)

**Correction of action taken where officer not accorded the right to be present.**—In this case the officer appeared before the board, but the examination was temporarily suspended and he was granted permission to go home and to be absent until notified by the board to appear. He failed to receive this notice until after the examination, which was resumed during his absence, had been completed. The proceedings and findings of the board were approved by the President and his orders in the case duly executed by the retirement of the officer under section 1447, Revised Statutes, but the vacancy created by such retirement remains unfilled: *Held*, that the action of the President can be revoked and the officer allowed a rehearing, the vacancy created by his retirement not having been filled and no rights of any other person having therefore intervened. (16 Op. Atty. Gen., 20.)

Certain officers in the grade of lieutenant, by reason of vacancies in the next higher grade and their seniority became eligible for promotion to the vacancies upon passing the examinations required by section 1496. They were examined and found disqualified professionally for promotion. They were suspended from promotion (sec. 1505, R. S.) and other officers next in order of seniority were examined, found qualified, and appointed to said vacancies. Lieut. Barnes was one of the officers first examined and the Attorney General (27 Op. Atty. Gen., 251, 258) held that said examinations were fatally irregular and defective. In consequence of the

Attorney General's conclusion the four officers who had been suspended from promotion were again examined, found qualified, and commissioned to fill the vacancies in the grade of lieutenant commander to which they were originally entitled. This necessitated the changing of the dates of promotion to the grade of lieutenant commander of those officers who in the meantime had qualified and been commissioned. The Secretary of the Navy properly, in accordance with the Attorney General's opinion, treated the examination as void and gave the officers other examinations. *Held*, that the promotions first made were contrary to law (section 1458, R. S.) as the officers so promoted were not the senior officers entitled to such promotion, in view of the fact that the examinations first held were irregular; accordingly *held* that the commissions issued to such officers were ineffective to give them the offices, but that such officers were de facto lieutenant commanders from the date they received notice of their commissions and entered upon duty thereunder, although such promotions were subsequently set aside as illegal; and that pay received as such de facto lieutenant commanders can not be recovered back. (17 Comp. Dec., 611). Under similar circumstances, an officer who did not receive notice of his promotion until after the date from which he took rank when subsequently promoted in accordance with law to another vacancy, was neither a de jure nor de facto officer during the interim and therefore is not entitled to pay as lieutenant commander for that period. (18 Comp. Dec., 340.)

**Examination by supervisory board.**—Where the written professional examination of an officer is conducted under the supervision of a board of officers where he is stationed, before which supervisory board the officer was ordered to and did appear for examination, but the record of proceedings of said supervisory board and all the evidence before it were transmitted to the Naval Examining Board at Washington, D. C., to be finally passed upon by the latter board subject to the approval or disapproval of the President, *held* that the officers who supervised such examination as was had at the officer's station were not the naval examining board referred to in the statutes; their office was

merely to collect and put into proper written form certain data and evidence bearing upon the qualifications of the candidate and to transmit the same properly certified to the examining board at Washington and it is the latter board to which the statutes refer, before which the candidate has the right to be present. (27 Op. Atty. Gen., 251.)

Where an officer appearing before a supervisory board formally waived his right to appear before the statutory board, which latter board found him not professionally qualified for promotion, it was decided by the Secretary of the Navy, in accordance with the Attorney General's opinion (27 Op. Atty. Gen., 251, noted above), that it would be legal to suspend the officer from promotion in accordance with section 1505, Revised Statutes, as amended, but that as a matter of expediency, he would be permitted to appear before a statutory board for personal examination. (File 26260-2744, May 22, 1916.)

**Candidate should be formally notified of charges against him.**—While it has been held by the Navy Department that the candidate having been present during the examination and known the testimony introduced, and having announced that he would not avail himself of the opportunity given by the board to offer further testimony, had no ground for complaint on account of the fact that he had not been formally notified that the evidence tended to show that he was addicted to habits of intemperance, the department deems it proper that in a case of this character the candidate should be formally notified of the charges against him and heard upon them as indicated in the published instructions for naval courts and board. (File 2136-98, Apr. 12, 1898.)

**Statement by candidate not under oath.**—The candidate has the right to submit a statement of his case on oath, if he chooses so to do; however, where he did not express any desire to make his statement under oath, but submitted a statement not under oath, it must be taken that he waived the right to make said statement under oath. The proceedings of the board in such case were accordingly approved by the President. (File 26260-1678, Feb. 28, 1912; see also file 26260-1360:1, Jan. 30 and Feb. 12, 1912.)

**Sec. 1501. [Record.]** The statement of such officer, if made, and the testimony of the witnesses and his examination shall be recorded.—(21 April, 1864, c. 63, s. 3, v. 13, p. 53.)

The Judge Advocate General shall, under the direction of the Secretary of the Navy, receive, revise, and have recorded the proceedings of all boards for the examination of officers for promotion in the naval

service. (Act June 8, 1880, 21 Stat., 164, amended June 5, 1896, 29 Stat., 251.)

**Instructions for the keeping of records** of examining boards and the form of such records, are contained in Naval Courts and Boards, 1917.

**Sec. 1502. [Revision by the President.]** Any matter on the files and records of the Navy Department, touching each case, which may, in the opinion of the board, be necessary to assist them in making up their judgment, shall, together with the whole record and finding, be presented to the President for his approval or disapproval of the finding.—(21 April, 1864, c. 63, s. 3, v. 13, p. 53.)



Amendment to this section was made by act of June 18, 1878 (20 Stat., 165), which provided "that hereafter in the examination of officers in the Navy for promotion no fact which occurred prior to the last examination of the candidate whereby he was promoted, which has been enquired into and decided upon, shall be again enquired into, but such previous examination, if approved, shall be conclusive, unless such fact continuing shows the unfitness of the officer to perform all his duties at sea." Also by act of May 22, 1917, section 20 (40 Stat., 90), which provided that "the President be, and he is hereby, authorized to direct the Secretary of the Navy to take such action on the records of proceedings of naval examining boards and boards of naval surgeons for the promotion of officers of the Navy as is now required by law to be taken by the President."

**Supervisory power of President over physical examination.**—Section 3 of the act of April 21, 1864 (sec. 1502, R. S.), refers to action by the President upon the finding of the board of examining officers provided for in section 1 of that act, which passes upon the "mental, moral, and professional fitness" of the candidate. There is nothing in said act constituting the board of naval surgeons, as to who shall appoint them, or as to the number of which the board shall consist, nor any express provision for approval or disapproval by the President. However, by the fourth section of the act of July 16, 1862 (12 Stat., 584), provision was made for an advisory board to report upon the "moral, mental, physical, and professional qualifications" of line officers for promotion; and section 5 of the act of April 21, 1864, provides that all officers not recommended for promotion under the said provision in the act of 1862 "shall have the right to present themselves for examination, according to the provisions of this act; and if found duly qualified, and such finding be approved by the President of the United States, they shall be promoted," etc. Although this provision of the act of 1864 provides only for such officers who have been before the board established by the act of 1862, and were not recommended by that board, it affords safe ground for holding that the same approval exists as to all other officers examined by both boards in accordance with the act of 1864. Accordingly, *held*, that the President has a supervisory power over the action of the board of naval surgeons provided for in section 4 of the act of April 21, 1864 (sec. 1493, R. S.), and may approve or disapprove the same. (12 Op. Atty. Gen., 347.)

No officer can be promoted until his physical fitness to discharge all his duties at sea has been favorably passed upon by a board and the board's action has the approval of the President. (*Hooper v. U. S.*, 53 Ct. Cls., 90, 102.)

The conclusions of any military court, board, or commission must, before being carried into execution, have the approval of the Commander in Chief or of some one representing him. Accordingly, even where the law does not expressly provide for approval of boards in the Army, such boards must receive the approval of the Secretary of War, whose action is conclusively presumed to be that of the President,

in order to be valid and effective. It is not, however, essential that this approval should be express or indicated in any formal language; it might be indicated by merely giving effect, through appropriate orders, to the findings of the board. (27 Op. Atty. Gen., 193; file 26266—627:1, Jan. 30, 1919.)

See also act of May 22, 1917, section 20 (40 Stat., 90), quoted above as amendment to section 1502.

**Approval or disapproval of President required to give effect to findings.**—Under the law a candidate's status could not become that of an officer qualified for promotion until his physical fitness for the promotion had been found by a board of naval surgeons, as required by sections 1493 and 1494, Revised Statutes, and his mental, moral, and professional fitness therefor had been found by a board of examining officers appointed under section 1496, and the findings of both of these boards to that effect had been approved by the President as required by section 1502 (22 Comp. Dec., 153, citing 12 Op. Atty. Gen., 347, 18 Comp. Dec., 466, *Jouett v. U. S.*, 28 Ct. Cls., 257, 266). On the other hand, his status could not become that of an officer disqualified for promotion or to whom the presumption of disqualification attaches by the mere finding of the board alone, without its approval by the President, as section 1502 requires equally all findings of a board, whether of fitness or unfitness, to be presented to the President for his approval or disapproval, and an officer is entitled to the benefit of the President's action on an adverse finding before being classed as disqualified or being presumed to be disqualified. (22 Comp. Dec., 153; compare *Hooper v. U. S.*, 53 Ct. Cls., 90.)

The promotion of an officer can not take place (under secs. 1493, 1494, 1496, and 1502) until his fitness for the promotion has been established to the satisfaction of both the board of naval surgeons and the board of examining officers, and the recommendation of both boards to this effect has been rendered operative by the approval of the President. (18 Comp. Dec., 466, citing 12 Op. Atty. Gen., 347; *Jouett v. U. S.*, 28 Ct. Cls., 257, 266—267; *Adamson v. U. S.*, 19 Ct. Cls., 623, 628; *Crygier, Admx. v. U. S.*, 25 Ct. Cls., 268; 17 Comp. Dec., 167, etc.)

**Suspension of action by the President.**—An officer absent from the United States on duty on a foreign station became due for promotion by seniority; he was nominated for the promotion, "subject to the required examination before being commissioned"; the Senate advised and consented to the appointment of said officer and others similarly nominated, "agreeably to their nominations, respectively"; the same day the President signed a commission appointing the officer to the higher grade for which nominated and confirmed, which commission was given to the Secretary of the Navy, who held it to be delivered to the officer upon his passing the examination required by law; after his return to the United States some years later, the officer was duly examined, and reported qualified by the board in conformity with section 1504, Revised Statutes; the President took the following action upon the board's report: "After examination of the record I have concluded to suspend final action upon the

finding of the board until an opportunity shall have been afforded Lieut. Jouett to further establish his fitness for promotion, which, considering the evidence of record indicating a tendency on his part to intemperate habits, I regard as open to question. He will therefore be ordered for duty at sea, for such period as the Secretary of the Navy may deem proper, and his conduct while on such service will be reported for my information." The President's order was obeyed, and more than a year later he disapproved the findings and recommendations of the board and directed the officer to be reexamined. The following year the officer was reexamined and found not morally qualified, which finding was approved by the President and the officer discharged from the service in accordance with the act of August 5, 1882 (22 Stat., 286), (which was enacted after he had become due for promotion and had been nominated, confirmed, and his commission made out subject to examination). *Held*, That the President's approval or disapproval of the findings is, by section 1502, Revised Statutes, distinctly required, and it is contemplated that he shall examine the whole record and findings; having the duty imposed upon him to approve or disapprove, the President had the power to suspend action or to seek further information; these are necessary incidents of the executive reviewing power; to become operative the board's decision must be acted upon by the President, and the nomination and confirmation of a naval officer for promotion, "subject to the required examination before being commissioned," do not take the case out of the operation of the Revised Statutes, section 1502, which makes examinations subject to the approval of the President. (*Jouett v. U. S.*, 28 Ct. Cls., 257.)

An officer was examined for promotion in course to fill a vacancy existing on August 23, 1912; the board of naval surgeons which examined him on December 9, 1912, found him physically qualified for promotion and said finding was approved by the President July 1, 1913; the examining board, which examined him on February 4, 1913, found him mentally and professionally, but not morally, qualified; this finding was not presented to the President and no action was taken by him thereon. He was again examined, May 8, 1913, and found mentally, morally, and professionally qualified; the President on July 1, 1913, directed that action upon this report be suspended for one year; he was again examined, August 19, 1914, and found mentally, morally, and professionally qualified; the President on September 16, 1914, directed that action upon this report be withheld for a period of six months, "when such action will be taken as the nature of a special report which will be required from his commanding officer will warrant." At the end of six months the required findings and special report were submitted to the President and on March 25, 1915, he approved the findings of the examining boards of May 8, 1913, and August 19, 1914, to the effect that the officer was mentally, morally, and professionally qualified. The President having previously approved the findings of the medical board as to the physical fitness of the candidate, upon his approval of the findings as

to his mental, moral, and professional qualifications on March 24, 1915, the candidate's status became that of an officer qualified for promotion in course to fill a vacancy, who had not previously been disqualified for the promotion and to whom no presumption of disqualification attached prior to his actual qualification, and who therefore is presumed to have been qualified from the date of the vacancy. (22 Comp. Dec., 153; compare *Hooper v. U. S.*, 53 Ct. Cls., 90.)

Section 1502 contemplates an examination by the President of the whole record and findings and no limitation is placed upon the time which he may take in approving or disapproving a finding. Having the duty imposed upon him under the statute to approve or disapprove a finding, he had the power to suspend doing so and to seek further information, and his suspension of July 1, 1913, of such action in this case for one year on the findings of the mental, moral, and professional fitness of the board of May 8, 1913, and his further withholding, February 16, 1914, of such action for six months subsequent to the finding to the same effect of the board of August 19, 1914, were necessary incidents of his exercise of the reviewing power conferred on him by section 1502. (22 Comp. Dec., 153, citing *Jouett v. U. S.*, 28 Ct. Cls., 257, 262.)

An officer became due for promotion by length of service on December 27, 1912; was examined by a board of medical examiners on February 15, 1913, and by a naval examining board on February 19, 1913, and found qualified by both boards. In view, however, of unfavorable reports of fitness in his case, the Secretary of the Navy recommended and the President directed on April 9, 1913, that final action on the findings and recommendations of the boards be suspended for a period of one year, at the expiration of which time he would be again examined. On October 31, 1914, he was reexamined by a board of medical examiners and found not physically qualified for promotion. This finding was approved by the President on November 21, 1914. He was examined by a naval retiring board on December 21, 1914, and found temporarily incapacitated for active service, and on June 12, 1915, was reported by another naval retiring board not incapacitated for active service; both reports were approved by the President. On September 15, 1915, he was examined by a board of medical examiners and found physically qualified for promotion, but under date of November 17, 1915, was found by a naval examining board to be not professionally qualified; both reports were approved by the President and the officer was suspended from promotion for six months in accordance with section 1505, as amended. On July 7, 1916, he was examined by a board of medical examiners which found him not physically qualified for promotion and recommended that he be reexamined physically in six months; no action was taken by the President upon this report. On January 22, 1917, he was again examined by a board of medical examiners and found physically qualified for promotion and on January 30, 1917, a naval examining board reported him mentally, morally, and profes-



sionally qualified for promotion; both reports were approved by the President on April 5, 1917. He was commissioned in the higher grade for which found qualified with date from June 27, 1913, six months after the date on which he originally became due for promotion. The officer brought suit in the Court of Claims for pay of the higher grade from the date stated in his commission, and the attorney for the United States conceded his right to recover. Nevertheless the Court of Claims decided that the officer was not entitled to pay from the date stated in his commission, June 27, 1913, as authorized by the act of March 4, 1913 (37 Stat., 892). Four opinions were filed by the court in this case, in which the President's course in suspending action upon the favorable reports of the boards which first examined the officer and found him qualified was construed as equivalent to an unfavorable finding by said boards. In the opinion of Hay, J., it was stated with reference to this point: "It does not appear from the record whether the unfavorable reports of fitness referred to professional or physical unfitness; and for a proper determination of the case it makes no difference to which they referred. If he was physically unfit, and the President for that reason suspended for a period of one year the findings and recommendations of the boards, and directed him to be examined again at the end of that period, then the plaintiff could not have been promoted in pursuance of law at the time he was examined, nor until he became physically qualified \* \* \*. It also appears that the plaintiff was physically disqualified down to June 12, 1915. \* \* \* If he failed professionally on his first examination and failed again on his reexamination, he is illegally in the service and certainly can not now ask for the pay of an office to which he is not entitled. So whether he was physically or professionally unfit in his first examination he has no standing in this court." In the opinion of Barney, J., it was said: "As before stated, the plaintiff in this case was deferred from rank as chief machinist for six months, presumably by reason of having failed once professionally on an examination, but was not deferred from rank on advance on account of physical disability. \* \* \* Section 1493, it will be seen, suspends him from promotion automatically during the period that he is not qualified for service at sea, which of course is during the time he is physically disqualified for promotion. Thus, construing section 1493, section 1505, as amended, and the act of March 4, 1913, together the plaintiff was automatically (by sec. 1493) and actually by law (act of Mar. 4, 1913) suspended from promotion during the whole period extending from the completion of his six years' service as machinist (Dec. 29, 1912) to a date six months after his failure on examination professionally, which would bring that time to June 16, 1916, beyond which his rank could not be extended." Campbell, C. J., referring to the qualifications for promotion of the officer at the time he originally became due, stated: "Not only is it thus made to appear that he was not qualified, but the record goes further and affirmatively shows that he was disqualified. To have promoted him in the

face of this record would have been in total disregard of section 1493." It was further stated in the opinion last cited: "Up to September 15, 1915, the plaintiff had been found physically disqualified and therefore could not be promoted because of the provisions of section 1493. \* \* \* He was examined on July 7, 1916, and was reported incapacitated for duty. While no action appears to have been taken by the President on the last report, the officer could not be promoted under section 1493 in face of that report unless inaction upon it be held to be equivalent to no report by the board. It was not until January 22, 1917, that plaintiff qualified under section 1493." (*Hooper v. U. S.*, 53 Ct. Cls., 90.) The Secretary of the Navy submitted to the Department of Justice a memorandum concerning this case with request that if deemed advisable same be placed before the Court of Claims in any further proceedings which might be had: motion for a new trial was made by claimant and was overruled by the Court of Claims before opportunity had presented for the Attorney General to consider the question of submitting said memorandum to the court. The Secretary of the Navy thereupon submitted to the Court of Claims certain questions bearing upon the action to be taken in this case, for a ruling by the court thereupon under section 148 of the Judicial Code, and the court decided that it was without jurisdiction under that section to answer the questions so submitted. It was thereupon decided by the Navy Department that, as the case stood, the appointment which had been issued to this officer was inoperative and ineffectual, and that the necessary steps should be taken to issue him a new appointment; also that as the Court of Claims' decision appeared to have been based principally upon the fact that no final action had ever been taken upon the first examinations in this case, the records thereof should be submitted to the President with recommendation that the finding of the board of medical examiners that this officer was physically qualified when first examined be approved, and that the finding as to his professional qualifications be disapproved; which was accordingly done, and upon such action having been taken by the President the officer was reappointed, reconfirmed, and recommissioned with rank from the same date as stated in his original commission. (File 26266-627:1.) He then brought suit in the Court of Claims for pay from date stated in his new commission (*Hooper v. U. S.*, Ct. Cls., No. 33,975), but this suit was subsequently withdrawn by him prior to decision.

**Approval by President subject to recommendation of Secretary of the Navy.**—An officer was examined for promotion and found not physically qualified therefor. The Bureau of Medicine and Surgery recommended that he "be ordered to naval hospital for operative treatment, and that he be reexamined when he has recovered to determine his physical fitness for promotion." The Secretary of the Navy, reciting the recommendation of the Bureau of Medicine and Surgery, transmitted the record to the President with his advice "that the findings and recommendation of the board of medical examiners in this case be

approved, with a view to effecting the recommendation of the Bureau of Medicine and Surgery in the above-quoted indorsement." The President's action upon the record was as follows: "The finding and recommendation of the board in this case are approved." Thereafter the officer was admitted to the naval hospital for operative treatment, after which he was again examined and found physically qualified for promotion. *Held*, that it would be too strict, if not a strained construction of the President's action to say that he merely approved the finding of the board of medical examiners when as a matter of fact he had before him not only their report but the recommendation of the Bureau of Medicine and Surgery and the advice thereon of the Secretary of the Navy. In view of the course that was subsequently taken it would seem that the construction adopted and acted upon, that the Executive had approved the recommendation of the Bureau of Medicine and Surgery which accompanied the report, indorsed as it was by the Secretary of the Navy, that the officer be reexamined after receiving operative treat-

ment, can not be said under the facts of the case to have been an unreasonable construction. Accordingly the officer did not lose any right to be promoted to the vacancy for which first examined with rank from date of said vacancy. (*Downes v. U. S.*, 52 Ct. Cls., 237; compare 22 Comp. Dec., 565, 591, 646.)

**Revocation of President's action.**—See note to section 1456, Revised Statutes, under "Revocation of President's action." See also examining board record in case of Lieut. (Junior Grade) Harold W. Scofield, United States Navy, and file 26260-6133, April 26, 1919.

**Jurisdiction of Civil Courts.**—The proceedings of an examining board to determine the qualifications of an officer of the Army for promotion can not be reviewed by the civil courts by writ of certiorari. The decision of the board is not final but must be reported with the proceedings to the President, and may be approved or disapproved by him. This is the only relief from the errors or the injustice that may be done by the board which is provided. (*Reaves v. Ainsworth*, 219 U. S., 296, 306.)

**Sec. 1503. [No officer to be rejected without examination.]** No officer shall be rejected until after such public examination of himself and of the records of the Navy Department in his case, unless he fails, after having been duly notified, to appear before said board.—(21 April, 1864, c. 63, s. 3, v. 13, p. 53.)

**Statute held to be mandatory.**—The language of the section, "no officer shall be rejected until after *such* public examination of himself," refers manifestly to the previous sections giving him the right to appear and be examined under oath; and it is this personal examination which must be had in every case before an adverse finding, or which is the same thing, before the officer can be rejected. These provisions make it certain, first, in every case the officer has a right to be present at his examination; second, in every case he must be duly notified of the time and place of his examination and unless he waives his right or expresses a lack of desire to be present, he must be given leave of absence or permission to attend; and third, no finding of the board adverse to his qualifications for promotion can be made without a personal examination of the officer himself unless he fails to appear after having been duly notified to do so. The proceedings of an examining board are fatally irregular and defective where the officer being at the time in the performance of his duty on shipboard under orders of his superior officer, was not notified of the time and place of his examination for promotion and was not given and did not have an opportunity or permission to exercise his right to appear and be heard at such examination, and nevertheless

said board of examiners rejected said officer and his application for promotion without any examination of himself, although he had not failed "to appear, after being duly notified, before said board." (27 Op. Attv. Gen., 251.)

While the expression, "no officer shall be rejected until," etc., is not the most apt to express the idea intended, yet the meaning of the section is both certain and plain. For the only matter or thing which this board can "reject" or allow or pass upon at all is the application, claim, or right of the officer to promotion, involving of course his fitness therefor. The board can do but one of two things, find the officer qualified and recommend his promotion or find him not qualified and fail to recommend his promotion. The latter is the only possible way in which an officer can be "rejected," and when the board thus finds that the officer is not qualified and that they do not recommend him for promotion, the officer is "rejected" within the meaning of this section. And this is what the section says shall not be done without the personal examination of the officer or his failure to appear after being duly notified to do so. (27 Op. Attv. Gen., 251.)

For other cases, see note to section 1500, Revised Statutes.

**Sec. 1504. [Report of recommendation.]** Such examining board shall report their recommendation of any officer for promotion in the following form: "We hereby certify that ———— has the mental, moral, and professional qualifications to perform efficiently all the duties, both at sea and on shore, of the grade to which he is to be promoted, and recommend him for promotion."—(16 July, 1862, c. 183, s. 4, v. 12, p. 584. As amended by 21 April, 1864, c. 63, s. 4, v. 13, p. 53. 28 July, 1866, c. 312, s. 1, v. 14, pp. 344, 345.)



**Form of report by naval examining board.**—By act of May 22, 1917, section 20 (40 Stat., 89), it was provided "that hereafter all laws relating to the examination of officers of the Navy for promotion shall be construed to apply to the regular advancement of staff officers to higher ranks on the active list the same as though such advancements in rank were promotions to higher grades: *Provided*, That examinations for such staff officers shall not be required except for such regular advancements in rank." Naval Courts and Boards, 1917 (p. 439), prescribed the form of report by naval examining boards in the cases of candidates found qualified for promotion, as follows: "We hereby certify that Lieutenant H—— C. E——, U. S. Navy, has the mental,

moral, and professional qualifications to perform efficiently all the duties, both at sea and on shore, of the grade (grades) to which he is to be promoted, to wit: —— (and ——) and recommend him for promotion." By Changes in Naval Courts and Boards, 1917, No. 1, of March 16, 1918, the foregoing form was changed by inserting after the word "(grades)" the words "(or rank)," and by striking out the words "to which he is to be promoted," and inserting in place thereof the words "for promotion to which he is a candidate." By Changes in Naval Courts and Boards, 1917, No. 2, the words, "for promotion to which he is a candidate," were stricken out, and the words used in section 1504, "to which he is to be promoted," were restored.

**Sec. 1505. [Failing in examination.]** Any officer of the Navy on the active list below the rank of commander who, upon examination for promotion, is found not professionally qualified, shall be suspended from promotion for a period of six months from the date of approval of said examination, and shall suffer a loss of numbers equal to the average six months' rate of promotion to the grade for which said officer is undergoing examination during the five fiscal years next preceding the date of approval of said examination, and upon the termination of said suspension from promotion he shall be reexamined, and in case of his failure upon such reexamination he shall be dropped from the service with not more than one year's pay: *Provided*, That the provisions of this Act shall be effective from and after January first, nineteen hundred and eleven.

This section was amended and reenacted to read as above by act of March 11, 1912 (37 Stat., 73). As originally enacted it read as follows:

"Sec. 1505. Any officer of the Navy on the active list below the grade of commander, who, upon examination for promotion, is not found professionally qualified, shall be suspended from promotion for one year, with corresponding loss of date when he shall be re-examined, and in case of his failure upon such re-examination he shall be dropped from the service." (15 July, 1870, c. 295, s. 8, v. 16, p. 333.)

Further amendment to this section was made by act of August 29, 1916 (39 Stat., 579), providing for promotion by selection of line officers in the grades of lieutenant commander, commander, and captain, which act provided that should officers so selected fail in their professional examination they "shall thereafter be ineligible for selection and promotion." This law was extended to staff officers of the Navy by act of July 1, 1918 (40 Stat., 718).

**Construction of section 1505 prior to amendment.**—The words in section 1505, "shall be suspended from promotion for one year, with corresponding loss of date," do not mean that the loss of date is to be contemporaneous with the term of suspension but only that it shall agree therewith in point of duration. Accordingly, where a lieutenant in the Navy, being the senior officer of his grade, became entitled to examination for promotion to fill a vacancy in the next higher grade (lieutenant commander) which occurred January

22, 1880, and afterwards upon examination failed to pass and the findings of the examining board were approved, February 6, 1880, by the President, who directed that the officer "be suspended from promotion for one year, with corresponding loss of date," held that the loss of date of the officer is one year, to be reckoned from the occurrence of the vacancy, January 22, 1880, the date from which he would have taken rank as lieutenant commander had he been found qualified for promotion, and that his year of suspension is to be reckoned from the approval by the President of the findings of the examining boards, February 6, 1880. In this case, as the officer, by reason of his suspension, is ineligible for promotion during the whole of the year commencing February 6, 1880, no vacancy should be kept open for him until February 6, 1881. Such vacancies as happen to exist during that period the officers who are then eligible for promotion are entitled to fill. But as his loss of date is only to be one year from January 22, 1880, if on his second examination he shall be found qualified to fill a vacancy in the next higher grade which occurred after the period of his suspension, he will be entitled upon promotion thereto to take rank in such grade as of the date of January 22, 1881; he will not, however, be entitled to the pay of the higher grade from the ranking date in his commission, as his case is not one covered by section 1562, Revised Statutes. (16 Op. Atty. Gen., 587; pay of officers on promotion from date stated in their commissions is now provided for by act of Mar. 4, 1913, 37 Stat., 892.)

If it were held that the loss of date is to commence from the time when the President ap-

proved the findings of the examining boards, the officer might practically lose much more than a year in date, as under some circumstances there may be considerable delay in the adjudication of his case. On the other hand, if the suspension is to date from the time of the occurrence of the original vacancy, it is easy to conceive of cases in which the officer suspended would not have the time which it was the intention of the statute to allow him in order to repair the deficiencies in his professional qualifications. If upon his second examination he fails, the officer is to be dropped from the rolls of the Navy; and in making provision for suspension and for reexamination it was clearly intended that a considerable time should elapse between the commencement of the suspension and the time when he could be ordered for reexamination. For the period of the year of suspension the officer is out of the service so far as promotion is concerned. As he is ineligible for promotion during the whole year, no vacancy should be kept open for him until expiration of that period. Such vacancies as occur the officers who are then eligible are entitled to fill; and it is the obvious intention of Congress that such positions shall be filled, as they are created not for the benefit of officers but for the needs of the public service. (16 Op. Att'y. Gen., 587.)

Section 1505, prior to its amendment, required that professional failure of an officer below the grade of commander be followed by suspension "from promotion" for one year with corresponding "loss of date," or a one-year loss of date and a subsequent reexamination. Under the construction which was placed upon it, the year of suspension "from promotion" began to run from the date of the President's approval of the finding by a naval examining board of professional disqualification of an officer for promotion; on the other hand, the year of "loss of date" began to run from the retroactive date of the vacancy for which the officer was examined and found disqualified to fill (citing 16 Op. Att'y. Gen., 587; 25 Op. Att'y. Gen., 568; 20 Comp. Dec., 199, etc.). The year of suspension "from promotion" and the year of "loss of date" were different years and covered different periods of time, the former running from one date, the latter from another, and the two periods being separate and distinct. The period of suspension "from promotion" was the period which affected the right of the officer to the pay of the higher office for which he had failed to qualify, in that it postponed for a year his reexamination to that office, which in turn affected the particular vacancy in said higher office to which upon eventually passing the examinations as required by law he would become entitled to be appointed or promoted. During said year of suspension from promotion no vacancy in the higher office could be kept open for him, and upon his subsequently passing the examination he could only be appointed to a vacancy that was in existence during the year in the event there remained one to which the right of no other officer had attached. On his appointment to such a vacancy or a subsequent one he became entitled to the rank of the higher office for pay purposes for the retroactive period from the date of appointment back to the date

of the vacancy he was entitled to fill or in other words to the pay of the higher office from the date of such vacancy if an officer covered by the act of June 22, 1874 (18 Stat., 191). His "loss of date" on the other hand operated to reduce him in number on the list which in turn operated to delay his right to promotion to the grade above the one from which he had been suspended from promotion because of his being relegated by said loss of numbers to a lower place in the list than he otherwise would have occupied. It had no effect on his rank for pay purposes to the office from which he had been suspended (22 Comp. Dec., 623, citing 16 Op. Att'y. Gen., 587, 592).

Where a vacancy occurring February 2, 1895, was held open for an officer during his year of suspension, after which he was again examined and was promoted to fill said vacancy with rank from February 2, 1896, one year after the vacancy occurred, held that he was not entitled to be promoted to said vacancy but should have been promoted to the first vacancy occurring after the expiration of his year of suspension; and that he can not be allowed pay in the higher grade until the date that the latter vacancy occurred. (6 Com. Dec., 17.)

**Method of executing loss of numbers.**—Under section 1505, as it originally read, an officer suspended from promotion by reason of failure on examination, although subjected to a loss of numbers greater than at present, did not lose his position as the senior officer in his grade during his period of suspension. In other words, the officer while under suspension was nevertheless carried at the top of his grade, his loss of numbers being accomplished by the advancement over him of his juniors in grade who successfully qualified for promotion during the period of one year from the date of the vacancy to which he would have been advanced had he qualified therefor (citing file 26521-40, June 11, 1912); the amendment of March 11, 1912, was intended to reduce the period of suspension from one year to six months, and to mitigate the loss of numbers; also it provided that if the officer failed upon reexamination he should be dropped from the service with not more than one year's pay, instead of being discharged without any additional pay as was formerly the case. Accordingly, the whole purpose of the amendment was to mitigate the penalties previously prescribed by law for failure of an officer to qualify for promotion and not to add new penalties or to increase those already required. The administrative practice of the Navy Department, adopted upon the amendment, was to reduce the officer in his grade while under suspension according to the loss of numbers suffered, thereby imposing upon him a loss of seniority in grade while under suspension which he did not suffer under the former laws, thus adding a new penalty to that formerly provided. This practice, in the case of officers promoted by seniority, created an inconsistency between the period of suspension and the loss of numbers, which in many instances would operate to increase the period of suspension beyond the six months provided for by Congress; also in the case of officers promoted by length of service it necessitated, first, reducing the officer below those who were



eventually to rank him, secondly, advancing him over the heads of such officers as had not been promoted when his term of suspension expired, and third, holding him at the foot of the higher grade when so advanced until the officers whom he had jumped should be advanced over him. These objections would be obviated by reverting to the practice which was in force under section 1505 as it originally read, viz, letting the officer retain his position at the top of his grade during his period of suspension and advancing his juniors over him until his total loss of numbers had been consummated; should his period of suspension expire in the meantime, under this practice he would be promoted if qualified and then mark time at the foot of the next higher grade until the other officers entitled to rank him in consequence of his loss of numbers had been advanced over him. (File 26260-3091:1, Nov. 3, 1915.)

While legal and fully in accordance with the spirit and purpose of the law to execute the total loss of numbers by having the officer mark time during his period of suspension while his juniors are advanced over him until the total loss of numbers has been consummated, the former practice of reducing the officer in grade during the period of suspension, which was adopted after the amendment of March 11, 1912, was not illegal; the law permits of either practice, and it was well within the discretion of the Navy Department to execute the total loss of numbers immediately upon commencement of the period of suspension, as it has done. It follows that, notwithstanding a change in this practice, the action taken in past cases, not being illegal, should not be disturbed where the officers concerned have already been promoted and commissioned. (File 26260-3091:1, Nov. 3, 1915.)

The fact that the loss of numbers which an officer is required to suffer under section 1505, as amended, is to "equal the average six months' rate of promotion to the grade for which said officer is undergoing examination" would seem to indicate that the loss of numbers is to be suffered in the higher grade, while a loss of numbers in his present grade and an immediate promotion to a higher grade would be of no practical effect so far as loss of numbers is concerned. It would seem, therefore, that an assistant surgeon advanced under such circumstances to the lowest number in the grade to which he is thus promoted must be held stationary at that number until the officers below him, corresponding to the numbers he has lost, have been advanced over him in said higher grade. (*Toulon v. U. S.*, 51 Ct. Cls., 87, 96; see also file 26280-68, Mar. 18, 1916.)

The loss of numbers is determined by the condition of the Navy Register at the date the suspension becomes effective; thus, where an officer is required to lose nine numbers in consequence of his failure, these numbers are represented by the nine officers who were next below him in grade on the date that his suspension went into effect, and if any casualties occur within these nine numbers he would benefit thereby. (File 26260-3091:1, Nov. 3, 1915.)

Under the amendment of March 11, 1912, only promotions actually made during the five

calendar years in question should be taken as a basis for determining the "average six months' rate of promotion" during said years. It would be contrary to the letter and spirit of the law to take as a basis "the rate of duly slated promotions, which would include both actual promotions made and promotions that were due to be made but were not owing to failure of officers to qualify therefor," resignations, retirements, etc. The latter method would not furnish a correct basis for determining the average "rate of promotion," which necessarily implies the consummated advancement of officers to higher grades. (File 26521-40, June 11, 1912.)

Ensign A became due for promotion, was examined and suspended in the latter part of the fiscal year 1911; Ensign B, his junior, became due for promotion, was examined, and suspended in the early part of the fiscal year 1912. In consequence it was necessary to count different periods of five years in computing the loss of numbers which these officers were to sustain. As a result, Ensign A lost 34 numbers, while Ensign B, his junior, lost only 33. This produced the apparent injustice of making Ensign B rank Ensign A in the higher grade when promoted, thereby becoming senior to the officer who originally ranked him. However, this result necessarily follows from the wording of the law, and can be remedied only by Congress. (File 26521-40, June 11, 1912.)

**Date of rank on promotion after suspension.**—An officer due for promotion after a specified period of service, who is suspended from promotion for a period of six months should, if afterwards promoted, be given rank from a date six months later than that on which he first became due for promotion. (File 26260-2605:2, Aug. 17, 1915.)

An officer due for promotion by reason of seniority who is suspended from promotion for a period of six months should, if afterwards promoted, be given rank from the date on which the vacancy occurred which he is promoted to fill, provided such vacancy did not occur during the six months' period of suspension. (File 26260-2605:2, Aug. 17, 1915.)

An officer due for promotion by reason of seniority who is suspended from promotion for a period of six months should, if afterwards promoted, be given rank from the date that the period of suspension expired, where the vacancy which he is promoted to fill occurred during the six months' period of suspension. (File 26260-2605:2, Aug. 17, 1915.)

In the case of ensigns who are promoted in due course after three years' service from date of commission as such, it is proper in routine cases that the date from which they are to take rank on promotion to lieutenant (junior grade) should be three years later than the date from which they took rank in the grade of ensign. Where, however, an ensign fails on examination for promotion it is expressly stipulated by law that he "shall be suspended from promotion for a period of six months from the date of approval of said examination." The effect of this is to postpone the officer's right to promotion for a period of six months, and consequently to fix a later date from which he is to take rank if finally promoted than would have been the case had he

qualified in due course when first examined. If the first examination of such officer has been delayed without fault on his part, in justice and fair dealing the date from which he should take rank when ultimately promoted may be fixed as six months later than the date from which he would have been promoted had he been found qualified when first examined, or as three years and six months later than the date from which he took rank in the grade of ensign. But in no case could an officer who has been suspended from promotion on account of failing in his professional examination be entitled to take rank from the same date when promoted to the higher grade as though he had not been suspended. (File 26268-475, May 14, 1915.)

Two classes of cases arise under this section, viz, first, those in which promotions depend upon length of service, and, secondly, those in which promotions depend upon seniority. In file 26266-475, of May 14, 1915, it was held that the effect of section 1505 as applied to the case of an ensign who failed on examination for promotion to lieutenant (junior grade) was to delay the right of such ensign to promotion for a period of six months, and that when ultimately promoted he is entitled to take rank only from the date he completed three years and six months service in the grade of ensign. On reconsideration this conclusion affirmed as the only interpretation of the law which would give effect to its purpose and letter as applied to these cases in which promotions depend upon length of service and not upon the officer's position in the Navy list. As to the second class, where promotions are made by seniority, if the loss of numbers is executed by reducing the officer in the lower grade [see above, "Method of executing loss of numbers"] his right to promotion depends upon the occurrence of a vacancy after he has again reached the top of the list, and he should be promoted to fill said vacancy, if found qualified, and should take rank from the date of its occurrence. (File 26260-2605:2, Aug. 17, 1915.)

Should an officer due for promotion by seniority to a grade limited in number by law, be suspended from promotion and the loss of numbers in his case executed by reducing him in the lower grade [see above, "Method of executing loss of numbers"], he might again reach the top of his grade prior to the expiration of his six months' period of suspension; in such event, the next vacancy occurring after he reaches the top of the list should be held open for him until the expiration of his period of suspension; but should he be promoted at the end of that period he should take rank from the date that his six months' period of suspension expired. In other words, the officer's promotion in such case depends upon his position in his grade; when he reaches the top of the list he is entitled to the next vacancy, whether or not his six months' period of suspension has expired; however, under the express terms of the law his promotion can not actually be accomplished during the period of six months and inasmuch as the delay in his examination is due to fault on his part and therefore is not a case covered by section 1562, Revised Statutes, when he is in fact promoted the earliest date which he may be given in his commission is that on which

he became eligible for reexamination. (File 26260-2605:2, Aug. 17, 1915.)

When an officer due for promotion by seniority to a grade limited in number by law is suspended and subsequently is promoted to fill a vacancy occurring after the expiration of his period of suspension, there is no warrant of law for giving him a date of rank prior to the occurrence of such vacancy. An officer may be given any date subsequent to the occurrence of the vacancy which he is promoted to fill but can not be given a date prior thereto. Accordingly in such cases, where the vacancy occurs during the six months' period of suspension, and the officer's loss of numbers has been executed by reducing him in the lower grade [see above, "Method of executing loss of numbers"], his date of promotion may legally be fixed to correspond with the date that the period of suspension expired, but where the vacancy occurred after the expiration of the six months' period of suspension, the officer when promoted can not legally be given a date prior to the occurrence of the vacancy. (File 26260-2605:2, Aug. 17, 1915.)

An officer became due for promotion after three years' service in grade. At that time he was absent on distant duty, by reason of which his examination for promotion was delayed for a period of about ten months. He then failed professionally and was suspended from promotion for six months, after which he was examined, found qualified, and promoted: *Held* that under section 1505, Revised Statutes, as amended, the officer when promoted was entitled to take rank in the higher grade from a date six months later than that on which he originally became due for promotion. "We should not impose a greater penalty than the statute fixes, as would be done if he is charged with the long delay for which he was not at fault." (Toulon v. U. S., 51 Ct. Cls., 87, 96.)

The Court of Claims can not accept the view of the Comptroller of the Treasury that because of an officer's failure to qualify professionally in his first examination, and because of the suspension for six months demanded by section 1505, as amended, he became ineligible for promotion until after he had successfully passed a second examination and that therefore he was not and could not be advanced in grade or rank pursuant to law prior to that date. This construction of the statute would not only suspend the officer's right to promotion for the six months stated in the act but also would defeat or wipe out the fact that he had been eligible to promotion for some ten or more months extending from the termination of his three years' service to the beginning of the six months' period of suspension, though the delay in his first examination was owing to an enforced absence and was wholly without his fault. On the contrary we think that the officer became eligible for promotion to the higher grade and rank when he had served three years in the grade of assistant surgeon and there was added to that term a period of six months, covering the time of his suspension under the statute. In other words on account of his failure to qualify when first examined the length of service in his grade required of him before he was eligible for promotion to the



next higher grade was the equivalent of three years and six months instead of the three years which would otherwise have sufficed and in fixing the date of his eligibility to promotion in rank these three years and six months are properly taken as a continuous period of time. (*Toulon v. U. S.*, 51 Ct. Cls., 87, 90; see in this connection 22 Comp. Dec., 623, disallowing claim of S. R. Canine for pay as lieutenant (junior grade) from date stated in his commission, and 52 Ct. Cls., 532, allowing said claim without opinion.)

The requirement of the statute that the suspension shall be for a period of six months "from the date of approval of said examination" is evidently intended to remove any uncertainty which would otherwise arise if the question were whether the suspension dated from the time of examination or the approval by the President of the examining board's report. A considerable time could arise between these two events, and the statute makes certain the date. Manifestly such suspension should operate equally upon the officer's actual appointment and any advancement in grade or rank. But it would operate unequally if he should be suspended from appointment for six months and suspended from advancement in grade or rank for the sixteen months between the date when he first became eligible and the time of his reexamination. The six months' period of suspension can operate equally on the two features of promotion by withholding in one instance any appointment during the said period, and in the other instance by moving forward the date of eligibility to promotion for six months, or, what amounts to the same thing, by adding six months to the three years of service. The officer was eligible to promotion when he took his first examination, and he was still eligible to promotion because of his original three years' service when the time for his reexamination arrived; but he had been required to serve six months longer, and the length of service exacted in his case was three years and six months. (*Toulon v. U. S.*, 51 Ct. Cls., 87, 94, 95, 96.)

In the *Toulon* case (51 Ct. Cls., 87), the court decided against the claim of the officer for pay from the date stated in his commission for the reason that the date so stated was not three years and six months after the date he originally became due for promotion, but was approximately three years and four months after said date. Subsequently a new commission was issued to the officer with date of rank three years and six months after the date that he originally became due for promotion, and the Court of Claims thereupon allowed his claim for pay from the date stated in said commission. (*Toulon v. U. S.*, 52 Ct. Cls., 333; see file 26280-68, Mar. 18, 1916.)

An officer was commissioned as ensign to rank from June 6, 1910, and was commissioned as lieutenant (junior grade) to rank from June 6, 1913, although in the meantime he had been suspended from promotion for six months pursuant to section 1505 as amended. Upon the facts stated he was not legally entitled to rank from June 6, 1913, in the grade of lieutenant (junior grade), but his right to promotion under the law did not accrue until December 6,

1913. (File 26268-475, May 14, 1915.) Where an officer is promoted after six months' suspension, there is no legal obstacle to assigning him a date later than that from which officers below him take rank; under such circumstances section 1505, as amended, fixes the position to which the officer is entitled in the higher grade regardless of the date stated in his commission; but in such case a reference note in the Navy Register to section 1505, as amended, would be desirable as explaining his status in this respect. (File 26260-2605:2, Aug. 17, 1915; 26268-475, May 14, 1915.)

**One year's pay when dropped from the service.**—Section 1454, Revised Statutes, providing for one year's pay to officers wholly retired from service, has no application to the case of an officer of the Navy who is dropped from the service under section 1505, Revised Statutes, because of his professional disqualifications to perform the duties of the position for promotion to which he has been examined. There is no provision of law authorizing the payment of one year's pay in such case. (12 Comp. Dec., 97; *Elmer v. U. S.*, 45 Ct. Cls., 90. NOTE.—These decisions were rendered prior to the amendment of sec. 1505, R. S.)

Section 1505, as amended, providing that where an officer of the Navy fails in an examination for promotion in the way specified therein he shall be dropped from the service with not more than one year's pay, is indefinite, and authority is not given to the accounting officers to determine how much pay, if any, shall be received by said officer; but the discretion in determining the amount is left to the Executive through the administrative department. In this case the President's approval of the examining board merely directs that the officer "be dropped from the service, in accordance with the provisions of section 1505 of the Revised Statutes," without directing that any pay be given him. Therefore, no specific direction as to pay having been given, none can be allowed by the accounting officers. (18 Comp. Dec., 922.)

**Special act of Congress restoring rank.**—When a lieutenant (junior grade) has been suspended from promotion under section 1505, and subsequently passes a reexamination and is promoted to fill a vacancy, a later act of Congress directing the Secretary of the Navy to restore him to his original number to receive rank from the time when his loss of date began does not entitle such officer to the pay of the higher grade during the period of suspension from promotion. (16 Comp. Dec., 557.)

**Suspension of action by President distinguished from suspension from promotion.**—The suspension of an officer from promotion for one year under section 1505, or for four months under that section as amended by the act of March 11, 1912 (37 Stat., 73), because of not having been found professionally qualified for promotion, is a suspension occurring after action by the President approving such finding of disqualification, and is therefore clearly differentiated from the President's suspension of action approving or disapproving the findings of the board for the periods of one year and six months, respectively, prior to his

approval thereof. (22 Comp. Dec., 153; compare *Hooper v. U. S.*, 53 Ct. Cls., 90.)

**Delay in holding examination.**—It is important that in all cases where it is not absolutely impossible to do so examinations for promotion be held prior to the occurrence of the vacancy, as is required by express provisions of law with reference to promotions in the Army and Marine Corps. (File 26260-2605:2, Aug. 17, 1915.)

**Revocation of President's action.**—See note to section 1456, Revised Statutes, under "Revocation of President's action."

Section 1505, as amended, provides that any officer to whom that section applies, if found not professionally qualified, "shall be suspended from promotion for a period of six months from the date of approval of said examination, and shall suffer a loss of numbers equal to the average six months' rate of promotion to the grade for which said officer is undergoing examination during the five fiscal years next preceding the date of approval of said examination, and upon the termination of said suspen-

sion from promotion he shall be reexamined, and in case of his failure upon such reexamination he shall be dropped from the service with not more than one year's pay." This legislation is construed by the Judge Advocate General as vesting no discretion in the Executive with reference to the suspension of an officer who has been found not professionally qualified for promotion, but as mandatory that under such circumstances the officer shall be suspended for the period stated; after approval of the finding of the board, no power exists in the Secretary of the Navy to review same and to revoke his approval. (File 26260-6133, Apr. 26, 1919; for contrary precedents, see record of examining board in case of Lieut. (junior grade) Harold W. Scofield, and note to sec. 1456, R. S., under "Revocation of President's action.")

For other cases, see note to section 1500, Revised Statutes, under "Correction of action taken where officer not accorded the right to be present."

**Sec. 1506. [Advancement in number.]** Any officer of the Navy may, by and with the advice and consent of the Senate, be advanced, not exceeding thirty numbers in rank, for eminent and conspicuous conduct in battle or extraordinary heroism; and the rank of officers shall not be changed except in accordance with the provisions of existing law, and by and with the advice and consent of the Senate.—(21 April, 1864, c. 63, s. 6, v. 13, p. 54. 24 Jan., 1865, c. 19, s. 1, v. 13, p. 424.)

This section was expressly amended and reenacted by act of June 17, 1878 (20 Stat., 144), the amendment consisting in the addition of the words following the semicolon as reproduced above.

By sections 1605 and 1606, Revised Statutes, provision is made for the Marine Corps similar to sections 1506 and 1507, relating to the Navy; by acts of March 3, 1901 (31 Stat., 1108), and June 16, 1906 (34 Stat., 296), officers so advanced are to be carried as additional to the numbers of each grade in which they serve. Other provisions for advancement of officers are contained in sections 1508-1510, Revised Statutes. Retired officers detailed for the command of squadrons or single ships in time of war may be restored to the active list if they receive a vote of thanks of Congress for their services and gallantry in action against the enemy (sec. 1465, R. S.).

**Advancement of officer not subject to revision by subsequent administration.**—A rational interpretation of this section is that Congress has left to the discretion of the President the determination of what acts of heroism should be recommended to the Senate for reward, and in providing that the Senate must advise and consent to the advancement has indicated the only forum which may inquire into the wisdom with which that discretion has been exercised. The nomination for the advancement being in regular form, as also the resolution of the Senate and the commission, and the advancement being an accomplished fact and within the terms of section 1506, it is not in the

power of the President to inquire what was the act of heroism, or when and where it was committed, which induced his predecessor and the Senate to advance the officer in numbers; their action in that matter is conclusive upon the executive department and therefore is not subject to reexamination or revision by the President. (17 Op. Atty. Gen., 76. In this case an officer of the Pay Corps was twice advanced 15 numbers and it was afterwards insisted that both advancements were for the same act of heroism and that the eminent and conspicuous conduct in battle occurred at such a time as would not entitle the officer to the benefits of the law.)

**Date of vacancy created by advancement to higher grade.**—The advancement of a commander to the grade of captain under section 1506, to rank from August 10, 1898, did not create a vacancy in the grade of commander until December 14, 1898, when such advancement was confirmed by the Senate. A lieutenant commander was promoted to be a commander in the place of the aforesaid officer, also with rank from August 10, 1898. As there were no vacancies on August 10, 1898, when these officers took rank according to their commissions, the act of June 22, 1874 (18 Stat., 191; see sec. 1561, R. S.), did not apply so as to entitle them to pay in the higher grades from the time they took rank, respectively. (23 Op. Atty. Gen., 30.)

**Date increased pay commences in higher grade.**—The advancement of an officer to a higher grade pursuant to section 1506, Revised Statutes, is not a promotion in course to fill a



vacancy, within the meaning of section 1561, Revised Statutes, allowing increased pay on promotion from date of rank; and accordingly the increased pay in such cases commences, not at the date from which he takes rank in the higher grade but at the date of his appointment as an officer of that grade. (17 Op. Atty. Gen., 319; see also 23 Op. Atty. Gen., 30, noted above, and *Young v. U. S.*, 19 Ct. Cls., 145. As to pay from date of rank in all cases of officers advanced pursuant to law, see act of Mar. 4, 1913, 37 Stat., 892.)

**Advancement under ad interim commission.**—The advancement and promotion of officers pursuant to section 1506, Revised Statutes, can not be accomplished by the President alone, and ad interim commissions issued to such officers did not create vacancies in their offices, as such advancement and promotion can be only with the advice and consent of the Senate. (23 Op. Atty. Gen., 30, approving 6 Comp. Dec., 7; see also *Peck v. U. S.*, 39 Ct. Cls., 125.)

The last clause of section 1506 forbids that the rank of any officer be changed except with the advice and consent of the Senate. Therefore as the advancement of certain officers under section 1506 would change their respective grades and ranks, it could not be made by the President alone. The Constitution, Article II, section 2, authorizing the President to fill up all vacancies that may happen during the recess of the Senate, does not confer upon the President the power to create such vacancies. (23 Op. Atty. Gen., 30.)

Rear Admiral William T. Sampson was advanced eight numbers and appointed a rear-admiral in the Navy under the provisions of section 1506, Revised Statutes, from the 10th day of August, 1898, and an ad interim commission was issued to him from that date. This advancement the Senate failed to confirm prior to adjournment. Advancement in numbers under this section does not create a vacancy within the meaning of the Constitution from the time when the President decides to recommend such advancement, nor is any vacancy created prior to the date when the Senate concurs in the President's recommendation. Accordingly *held* that no authority exists for paying him as rear admiral from the date when he was commissioned as such, the Senate not having consented to the advancement. (6 Comp. Dec., 7.)

**Consent of the Senate indirectly given.**—A commander in the Navy, Bowman H. McCalla, was nominated by the President for advancement five numbers and appointed as a captain; at the same time a lieutenant commander, John E. Pillsbury, was nominated "to be a commander from the 10th day of August, 1898, vice Commander Bowman H. McCalla, advanced and promoted;" the Senate confirmed the nomination of Pillsbury without acting upon the nomination of McCalla. *Held*, that the confirmation of Pillsbury operated as the advice and consent of the Senate to the advancement and promotion of McCalla. No particular form, set phrase, or language is required by which the Senate shows its assent to a presidential appointment; the President had already nominated McCalla to be a captain and all that was necessary to make him such and to cause a vacancy in his office of com-

mander was that the Senate consent thereto; and when the Senate confirmed another officer, expressly asserting that it was to fill the place of McCalla, promoted, and which promotion could not be without its consent, it necessarily and thereby asserted its consent to his promotion; as the Senate could not increase the number of commanders, its confirmation of Pillsbury to be a commander necessarily either removed McCalla or promoted him, and the Senate said that it was in the place of McCalla advanced and promoted. (23 Op. Atty. Gen., 30.)

Capt. Francis J. Higginson was nominated by the President for advancement in numbers pursuant to section 1506, so as to place him at the head of the list of captains; he was then nominated for promotion to commodore "vice Commodore Winfield S. Schley, advanced and promoted," to rank from August 10, 1898. On December 14, 1898, the Senate confirmed Capt. Higginson's promotion to the grade of commodore, but took no action upon the proposed advancement in numbers, either in his case or that of Commodore Schley. The confirmation of Capt. Higginson's promotion not only made him a commodore from the date of the Senate's action, but in effect advanced Commodore Schley so as to make a vacancy which the promotion operated to fill. (8 Comp. Dec., 7; see also 8 Comp. Dec., 302.)

Capt. Francis J. Higginson was nominated by the President for advancement in numbers pursuant to section 1506, so as to place him at the head of the list of captains; he was then nominated for promotion to commodore to fill a vacancy. On December 14, 1898, the Senate confirmed Capt. Higginson's promotion to the grade of commodore, but took no independent action upon the nomination for his advancement in numbers in the grade of captain. Under the law as construed by the Navy Department Capt. Higginson was not entitled to and there was no authority for his promotion to be a commodore at the time he was so promoted except according to seniority; and as he would not be at the head of the captain's grade, entitled by seniority to promotion to commodore, unless the Senate concurred in his advancement in numbers in the grade of captain, the Navy Department was of opinion that when the Senate confirmed the promotion of Higginson to fill a vacancy to which he could only be entitled upon its confirmation of his advancement in numbers, it necessarily and thereby asserted its consent to his advancement in numbers: *Held*, that "it must be assumed that the Senate in confirming the nomination of Capt. Higginson to be a commodore intended to do everything necessary to that confirmation, and that it intended to act strictly in accordance with law;" accordingly, when the Senate confirmed Capt. Higginson's nomination to be a commodore it thereby consented to and confirmed his nomination for advancement in numbers in the grade of captain, which was necessary to legally accomplish his promotion to the grade of commodore. (8 Comp. Dec., 302, modifying 8 Comp. Dec., 7.)

**Loss of pay as result of advancement.**—Commander Bowman H. McCalla, advanced in numbers under section 1506 so as to be a captain,

was not entitled to the pay of captain from August 10, 1898, the date stated in his commission, but only from December 14, 1898, when the Senate indirectly consented to his advancement, this notwithstanding the fact that in the meantime a vacancy occurred in the grade of captain by reason of retirement for which Commander McCalla would have been eligible by seniority had he not been advanced under section 1506, and which would have entitled him to increased pay as captain from a date prior to December 14, 1898; and in fact an officer junior to Commander McCalla was promoted to said vacancy with pay from a date prior to that on which Commander McCalla was held entitled. It thus happened that the officer intended to be rewarded was in effect punished by the postponement of his pay as captain to a later date than the date from which he would have been promoted in due course; while there is much equity in this consideration, it can not affect the results of the transaction

which actually occurred. (7 Comp. Dec., 865.)

**Precedence of officer advanced in numbers.**—Where an officer is advanced above 30 officers, who were his seniors, it is convenient to insert in his commission a date between that of the commission of the highest of the 30 officers whom he is to outrank and that of the lowest next above him, in order to indicate his position and rank with reference to the other officers of his grade. This might be otherwise expressed, to wit, by inserting the names of the two officers between whom he is to take his new rank. However, while the commission may thus be given a retroactive effect for purposes of precedence, the "date of commission" in such cases for purposes of computing longevity pay under the statute which says "five years after date of commission," is the true date of the instrument, which is the day of its execution. (*Young v. U. S.*, 19 Ct. Cls., 145, 152; see in this connection note to sec. 1467, R. S.)

**Sec. 1507. [Promotion when grade is full.]** Any officer who is nominated to a higher grade by the provisions of the preceding section, shall be promoted, notwithstanding the number of said grade may be full; but no further promotions shall take place in that grade, except for like cause, until the number is reduced to that provided by law.—(24 Jan., 1865, c. 19, s. 2, v. 13, p. 424. 22 June, 1874, c. 392, v. 18, p. 191.)

See note to section 1506, Revised Statutes.

**Additional number officers in grade of rear admiral.**—On February 26, 1901, Capts. Robley D. Evans and Henry G. Taylor were confirmed by the Senate for advancement in numbers and promotion to rear admiral pursuant to section 1506, Revised Statutes. Under the law these officers are not to be treated as occupying numbers among the 18 rear admirals allowed for the grade, but are carried as additional to the numbers of that grade. The addition to the grade of rear admiral by reason of advancement under section 1506 does not advance the officers already in the lower half of that grade to the upper half, so as to affect their pay. The act of March 3, 1899, section 7 (30 Stat., 1005), fixing the pay of the lower half of the grade of rear admiral at the same rate as that received by brigadier generals of the Army, had particular reference to the 9 lower numbers of the 18 rear admirals provided for in that act.

Accordingly held that a rear admiral of the 9 lower numbers was not advanced in numbers by the addition to the grade of rear admiral of Evans and Taylor but is still in the 9 lower numbers of that grade as constituted by the act of March 3, 1899, notwithstanding that as a result of these appointments there are more than 9 rear admirals lower in number than he. (8 Comp. Dec., 7.)

The advancement of an officer in the grade of rear admiral from the lower half of that grade to the upper half is a promotion within the meaning of the act of March 3, 1901 (31 Stat., 1108). Rear Admiral Evans, being carried as an additional number pursuant to the act of March 3, 1901, is advanced contemporaneously with the officer next above him in rank and should be paid as a rear admiral of the upper half from the date when the officer next above him is so advanced in regular course. (8 Comp. Dec., 689.)

**Sec. 1508. [Officers receiving thanks of Congress.]** Any line officer, whether of volunteers or of the regular Navy, may be advanced one grade, if, upon recommendation of the President by name, he receives the thanks of Congress for highly distinguished conduct in conflict with the enemy or for extraordinary heroism in the line of his profession.—(16 July, 1862, c. 183, s. 9, v. 12, p. 584. 24 Jan., 1865, c. 19, s. 2, v. 13, p. 424. 25 July, 1866, c. 231, s. 1, v. 14, p. 222.)

Thanks of Congress, effect of: See sections 1365, 1446, 1465, 1509, 1510, Revised Statutes.

**Sec. 1509. [Effect of vote of thanks.]** A vote of thanks by Congress to any officer of the Navy shall be held to affect such officer only; and whenever, as an incident thereof, an officer who would otherwise be retired is retained on the active list, such retention shall not interfere with the regular promotion of others



who would otherwise have been entitled by law to promotion.—(1 July, 1870, Res. 96, s. 1, v. 16, p. 384.)

See note to preceding section, and section 1446, Revised Statutes.

**Sec. 1510. [Vacancies occasioned by death, &c., of officers thanked.]** No promotion shall be made to fill a vacancy occasioned by the final retirement, death, resignation, or dismissal of an officer who has received a vote of thanks, unless the number of officers left in the grade where the vacancy occurs shall be less than the number authorized by law.—(1 July, 1870, Res. 96, s. 1, v. 16, p. 384.)

See note to section 1508, Revised Statutes.

## CHAPTER FIVE.

### THE NAVAL ACADEMY.

Sec.

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Sec.

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**Sec. 1511. [Where established.]** The Naval Academy shall be established at Annapolis, in the State of Maryland.—(21 May, 1864, c. 93, s. 4, v. 13, p. 85.)

**Historical note.**—The first statutory provision for a naval academy was made by act of Congress, August 10, 1846 (9 Stat., 100, 101), when the modest sum of \$28,200 was appropriated "for repairs, improvement, and instruction at Fort Severn, Annapolis, Maryland." Prior to that time instruction had been given to midshipmen in the naval service in a desultory manner—sometimes on shipboard and sometimes at various places on shore when they were not on sea duty, and this seems to have been done without direct authority of Congress, but by what a writer has termed "wise departmental legislation." During the first few years of the Naval Academy its students were taken directly from midshipmen in the Navy, some of whom had been several years in the service. The act of January 2, 1813 (2 Stat., 789), authorizing the construction of four 74-gun ships, provided that each of them should carry a schoolmaster, and each ship had 20 midshipmen who were presumably under the instruction of this schoolmaster. Our Naval Academy is a growth and an evolution, and in that respect somewhat different from the Military Academy. Its first pupils were officers already in the naval service, holding their warrants from the President. They have gradually ceased to be midshipmen in the active service belonging to the line, and are now naval students the same as cadets at the Military Academy are military students. (Weller v. U. S., 41 Ct. Cls., 324.)

**Regulations of the Naval Academy.**—The Naval Academy, whose existence is due to a wise act of mere departmental administration on the part of Secretary Bancroft in 1845, owes its organization substantially to regulations adopted from time to time by him and his successors. The act of July 16, 1862, chapter 183, is the earliest legislation that concerns the interior management of the Academy, and what has been since enacted touches that management only here and there incidentally. Inasmuch, therefore, as Congress has authorized the successive heads of the

Navy Department to govern the academy by regulations, and has interfered therewith only, so to say, desultorily, the rule of statutory construction, which forbids any disturbance of previously existing statutory or common law by a new statute further than is necessary to its reasonable operation, must be applied here so as to prevent any unnecessary disturbance of previously existing regulations by statutory enactment. (15 Op. Atty. Gen., 637.)

Where regulations are issued by the Secretary of the Navy relating to examinations at the Naval Academy, it can not for a moment be doubted that the existence of such regulations was known to Congress when enacting legislation referring to the "final graduating examination" of midshipmen, and they afford a clear explanation of the use by Congress in such legislation of the words "final graduating examination." (Benjamin v. U. S., 10 Ct. Cls., 474.)

The Secretary of the Navy has plenary authority over the regulations of the Naval Academy. He makes the regulations and can modify or change them at will, providing no statute is thereby trenching upon. The regulations of the Naval Academy do not, strictly speaking, form a part of the regulations for the government of the Navy; they are not embodied therein and do not come under section 1547, Revised Statutes, giving to Navy regulations the force of law. The regulations of the academy are not directly approved by the President, as are the Navy Regulations. (36 J. A. G. letter book, 195, Mar. 19, 1907.)

The Naval Academy regulations are not issued under any explicit statute. The Academy being under naval control is administered by the Secretary of the Navy, and it is assumed that he makes the regulations of the Academy under his general powers as Secretary; but there are certain clauses in the statutes touching more or less directly upon the matter, such as sections 1515 and 1526, Revised Statutes, etc. Duly formulated regulations being essential to the proper administration of such



an establishment as the Naval Academy, the effect of the statutes on the subject is to place the power of making such regulations in the hands of the Secretary of the Navy, subject to the general direction of the President. Such regulations must, of course, be made in furtherance and not in violation or disregard of statutory provisions. (36 J. A. G. letter book, 195, Mar. 19, 1907; see also sec. 161, R. S., and notes thereto.)

Under section 1547, Revised Statutes, the Secretary of the Navy, with the approval of the President, may issue regulations and instructions for the Navy, and the regulations of the Naval Academy providing for the dismissal of midshipmen were presumably made pursuant to such power. (*Weller v. U. S.*, 41 Ct. Cls., 324.)

**Board of Visitors**, to visit the Naval Academy, the date of the annual visit to be fixed by the Secretary of the Navy, is provided for by act of August 29, 1916 (39 Stat., 608). Said

board is to consist of 7 persons appointed by the President; 4 Senators and 5 Members of the House of Representatives, appointed respectively by the Vice President and Speaker; and of the chairmen of the Committees on Naval Affairs of the Senate and House.

**Naval Academy Band**, composed of enlisted men of the Navy, was authorized by acts of April 12, 1910 (36 Stat., 297), and July 11, 1919 (41 Stat., 152); see also act of May 13, 1908 (35 Stat., 153), as to competition of the band as then organized with local civilian musicians, and act of May 18, 1920 (41 Stat., 602, sec. 6), as to temporary increase in pay.

**Naval Academy Chapel**.—Restrictions upon use of crypt and window spaces for memorials are contained in act of March 3, 1909 (35 Stat., 773).

**Superintendent of Naval Academy**.—See note to section 1556, Revised Statutes, under "Additional pay for special duty."

**Sec. 1512. [Title of students.]** The students at the Naval Academy shall be styled cadet midshipmen.—(15 July, 1870, c. 295, s. 12, v. 16, p. 334.)

A separate class of students at the Naval Academy, to be styled "cadet engineers," was provided for by sections 1522-1524, Revised Statutes. By act of August 5, 1882 (22 Stat., 285), the title of all undergraduates at the academy was changed to "naval cadets," and by act of July 1, 1902 (32 Stat., 686), the title "naval cadet" was changed to "midshipman."

**Midshipmen were first provided for** in the act of Congress providing a naval armament, March 27, 1794 (1 Stat., 350), and they were therein denominated "warrant officers." By the act of July 16, 1862 (12 Stat., 583), midshipmen were made ninth in grade in the active list of line officers of the Navy. (*Weller v. U. S.*, 41 Ct. Cls., 324, *U. S. v. Cook*, 128 U. S., 254.)

The first pupils of the Naval Academy were officers already in the naval service, holding their warrants from the President. They have gradually ceased to be midshipmen in the active service belonging to the line, and are now naval students the same as cadets at the Military Academy are military students. (*Weller v. U. S.*, 41 Ct. Cls., 324.)

Section 1 of the act of July 16, 1862 (12 Stat., 583), created the grade of midshipman as one of the nine grades of the active list of line officers of the Navy, and section 11 of the same act declared that students at the Naval Academy shall be styled midshipmen. (*U. S. v. Baker*, 125 U. S., 646.)

**Acting midshipmen**.—By act of July 14, 1862, section 8 (12 Stat., 565), the President was authorized "to annually appoint ten acting midshipmen for education at the Naval Academy," who shall be selected from the sons of officers or enlisted men in the Army, Navy, or Marine Corps; by act of July 28, 1866, section 8 (14 Stat., 322), it was provided that "midshipmen and acting midshipmen in the Navy of the United States shall be entitled to one ration, or commutation therefor." (See sec. 1577, R. S.) It had previously been provided, by act of

August 31, 1852, section 1 (10 Stat., 100), that "no appointment of midshipmen, acting midshipmen, or pupil, at any naval school in the Navy, shall be made, unless recommended by the member of Congress representing the district in which the applicant resides," etc.

**Cadet-midshipmen**.—Section 12 of the act of July 15, 1870 (16 Stat., 321), later embodied in section 1512 of the Revised Statutes, changed the title of students at the Naval Academy to "cadet-midshipmen." That act divided the grade of midshipman on a marked and convenient line, and styled all below that line as cadet-midshipmen, but relative to their new status it was entirely silent. This might with much reason be regarded, nothing to the contrary appearing, as the creation of a new grade in the line of the Navy for cadet midshipmen. A failure, however, to enumerate it as such in the list of grades in that act, and also in the subsequent list of the Revised Statutes, precludes that construction. It left them, however, with the same duties, the same pay, the same mode of appointment, and subject to the same naval discipline and control as before. Whatever doubt might arise as to the particular status of students under the new title, it is quite certain that they still constituted, in some capacity, a part of the Navy. (*Baker v. U. S.*, 23 Ct. Cls., 181; affirmed, 125 U. S., 646.)

After the 12th section of the act of July 15, 1870 (16 Stat., 334), students at the Naval Academy were to be styled "cadet-midshipmen," and after graduation were to be appointed midshipmen and promoted to the grade of ensign as vacancies might occur. Prior to that act students at the Naval Academy were styled midshipmen. The form of appointment was the same before and after the act; in both cases it was signed by the Secretary of the Navy, by direction of the President, and the positions and duties were precisely the same. Calling the student a cadet midshipman instead of a midshipman, without changing his

position or his duties, did not make his status different from what it was before. (*U. S. v. Cook*, 128 U. S., 254.)

If the law designates a cadet as a midshipman, the designation is an official one. The qualification of cadet-midshipman was used for the sake of distinction, to distinguish one kind of midshipman from another, a midshipman at school from a midshipman aboard ship. (*U. S. v. Cook*, 128 U. S., 254.)

Prior to section 12 of the act of July 15, 1870, (16 Stat., 334), the form of appointment issued to a midshipman at the Naval Academy stated that he was "appointed to the grade of midshipman in the United States Navy." After the passage of that act the form of appointment was changed by striking out the words, "appointed to the grade of midshipman," and inserting the words, "appointed a cadet-midshipman." (*U. S. v. Baker*, 125 U. S., 646.)

**Naval cadets.**—The act of August 5, 1882 (22 Stat., 284), provided "that hereafter there shall be no appointments of cadet-midshipmen or cadet-engineers at the Naval Academy, but in lieu thereof naval cadets shall be appointed from each Congressional district and at large, as now provided by law for cadet-midshipmen, and all the undergraduates at the Naval Academy shall hereafter be designated and called 'naval cadets.'" One main object of this act was to abolish the distinctions previously made by law between cadet-engineers and cadet-midshipmen, and for the future to merge both classes in the new designation of naval cadets. The previous differences between them grew out of the separate provisions as to their number, their manner of appointment, their course and term of study, and their pay after their four years' course at the Academy. (*U. S. v. Redgrave*, 116 U. S., 474.)

The purpose of the act of 1882 was to abolish the distinction in name between cadet-engineers and cadet-midshipmen, and to provide for the two but one classification, known to the law as "naval cadets." (*Harmon v. U. S.*, 23 Ct. Cls., 132.)

The act of August 5, 1882 (22 Stat., 284), effected a change in the name of students at the Naval Academy, but did not alter their legal status, which remained the same as before. (8 Comp. Dec., 410.)

Congress has the power to change the name of students at the Naval Academy and to modify the scope of their duties, as it did by the act of 1882; by so doing it did not undertake to name the incumbent of any office and assume the power of appointment thereto, which belonged to the Executive. (*Crenshaw v. U. S.*, 134 U. S., 99.)

**Title of midshipman revived.**—Section 1362 of the Revised Statutes of 1878 named the active list of officers of the Navy, and made midshipmen the eleventh of the list of the different grades therein provided for. The naval appropriation act of March 3, 1883 (22 Stat., 472), changed the title of "midshipman" to "ensign," the effect of which was to discontinue the grade of midshipman in the Navy. The act of June 26, 1884 (23 Stat., 60), provided that all graduates of the Naval Academy on the completion of the six years'

course should be commissioned as ensigns in the Navy, and the grade of junior ensign was therein abolished. Section 7 of the act of March 3, 1899 (30 Stat., 1004), known as the Navy personnel act, named the list of line officers of the Navy, including ensigns, and the name of midshipman is not found therein. The act of July 1, 1902 (32 Stat., 686), changed the title of "naval cadet" to "midshipman." It thus appears that since the act of March 3, 1883, there has been no such rank as midshipman in the United States Navy, except as that title has been given to students at the Naval Academy. (*Weller v. U. S.*, 41 Ct. Cls., 324.)

**Status of students at the Naval Academy.**—A cadet student at the Naval Academy is an officer of the Navy within the meaning of the provision in the act of March 3, 1883 (22 Stat., 473), respecting the longevity pay of officers and enlisted men in the Army or Navy. (*U. S. v. Cook*, 128 U. S., 254, following *U. S. v. Baker*, 125 U. S., 646, and *U. S. v. Hendee*, 124 U. S., 309. But see act of Mar. 4, 1913, 37 Stat., 891, providing that "hereafter the service of a midshipman at the United States Naval Academy, or that of a cadet at the United States Military Academy, who may hereafter be appointed to the United States Naval Academy, or to the United States Military Academy, shall not be counted in computing for any purpose the length of service of any officer in the Navy or in the Marine Corps.")

That a midshipman is an officer has been understood ever since there was a Navy. He is not one of the common seamen. His name indicates a middle position, between that of a superior officer and that of the common seaman. (*U. S. v. Cook*, 128 U. S., 254.)

It is not to be doubted that a midshipman is an officer, and this has been authoritatively decided respecting undergraduates at the Naval Academy under various laws for the benefit of "officers of the Navy." (25 Op. Atty. Gen., 579.)

It is true that a student is at the Naval Academy only for education, but the education is at the request and for the benefit of the Government rather than of himself. A raw recruit is not sent to the front until he has had a course of instruction, discipline, and drill in camp. That the time thus spent would constitute service in the Army no one would doubt. Education at the Academy, though of a higher order, is required and justified by the same principle. (*Baker v. U. S.*, 23 Ct. Cls., 181; affirmed, 125 U. S., 646.)

Both cadets in the Army and cadets in the Navy are appointed in pursuance of the Constitution, Article II, section 2, providing that Congress may vest the appointment of inferior officers in the President alone or in the heads of departments; those in the Army by reason of express authority conferred on the President (sec. 1315, R. S.), those in the Navy by reason of authority conferred on the Secretary of the Navy (sec. 1514 R. S.). The status of military cadets the same as that of naval cadets is that of "officers" in the Constitutional sense of the word as distinguished from employees. (10 Comp. Dec., 795. See also note to sec. 1514, R. S.)



They are not merely students being educated at the expense of the Government, but are officers in the naval service, and as such their salary, fixed by law, can no more be increased or diminished than can the salary of any other officer in the naval service which is fixed by law. Accordingly, where granted leave of absence by the Secretary of the Navy for sickness or other cause, they are still entitled to pay during the period of such leave at the same rate they were receiving at the academy. (8 Comp. Dec., 410.)

It is impossible not to conclude that the claimant continued to be, after the passage of the act of 1870, as he was prior to its passage, an officer of the Navy, on the active list, and serving as such an officer by virtue of his having been appointed a midshipman and continuing to be a student in the Naval Academy, even though he might have been properly styled, after the passage of the act of 1870, a cadet-midshipman. (*U. S. v. Baker*, 125 U. S., 646.)

Whatever doubt may arise as to the particular status of students under the new title, it is quite certain that they still constitute, in some capacity, a part of the Navy. (*Baker v. U. S.*, 23 Ct. Cls., 181; affirmed, 125 U. S., 646.)

In the computation of their longevity pay, officers of the Naval Reserve Force are entitled to credit for previous service in the Navy as cadet-engineer. (24 Comp. Dec., 629.)

A naval cadet traveling under orders is entitled to mileage under the laws providing mileage for officers of the Navy traveling under orders. (*Fitzpatrick v. U. S.*, 37 Ct. Cls., 332.)

Midshipmen at the Naval Academy are not enlisted in the service, but are appointed as midshipmen at the Naval Academy for training. Not being enlisted, they can not therefore be classified as "soldiers, sailors, or marines" within the meaning of laws granting preference in appointment to the civil service of honorably discharged soldiers, sailors, or marines. (File 5252-131, Oct. 11, 1919. Compare file 28762-649: 2, Apr. 9, 1920, holding that the act of July 11, 1919, 41 Stat., 37, respecting preference in civil service appointments, is broad enough to include all members of the military forces of the United States who serve on active duty as such.)

Midshipmen at the Naval Academy are officers on the active list of the Navy within the

meaning of the proviso in the act of May 13, 1908 (35 Stat., 127), which allows a gratuity of six months' pay to be paid to the widow or other designated beneficiary upon the death of an officer on the active list of the Navy. (15 Comp. Dec., 39.)

The Naval Academy is part of the machinery of the Navy. The midshipmen are appointed by the Secretary of the Navy by direction of the President. They are required to engage to serve for eight years unless sooner discharged by competent authority (but see note to sec. 1514, R. S.). They must take an oath and bind themselves to bear true faith and allegiance to the United States, and that they will serve them honestly and faithfully against all their enemies, and that they will obey the orders of the President of the United States and the orders of the officers appointed over them according to the rules and articles for the government of the United States Navy. They are required to wear the uniform prescribed by the naval authorities. They are subject to naval discipline. They are borne upon the Navy Register as a part of the active list of the line of the Navy. They are upon the pay roll; their salary is fixed by law, and they are paid from the appropriation, "Pay of the Navy." That they are in the naval service is not thought questionable. They are by law officers in a qualified sense. They are not now and never were commissioned officers. While they are not officers within the meaning of article 36, section 1624, Revised Statutes, as was decided in the case of *Weller v. U. S.* (see note to sec. 1519, R. S.), yet, following the reasoning of the Supreme Court in the case of *United States v. Cook* (above noted), *held*, that they are officers on the active list of the Navy within the meaning of the act of May 13, 1908 (35 Stat., 127), providing for payment of death gratuity. (20 Comp. Dec., 39.)

Students at the Naval Academy, designated as midshipmen by the act of July 1, 1902, are officers of the Navy within the meaning of section 1586, Revised Statutes, which prohibits the allowance of expenses incurred by any officer of the Navy for medical attendance, unless the attendance of a naval medical officer could not have been had. (9 Comp. Dec., 375.)

For other cases, see notes to sections 1514, 1519, and 1520, Revised Statutes.

### Sec. 1513. [Number of midshipmen.

#### This section provided as follows:

"SEC. 1513. There shall be allowed at said Academy one cadet midshipman for every Member or Delegate of the House of Representatives, one for the District of Columbia, and ten appointed annually at large."—(2 Mar., 1867, c. 174, s. 8, v. 14, p. 517. 15 July, 1870, c. 295, s. 12, v. 16, p. 334.)

It was expressly amended by act of June 17, 1878 (20 Stat., 143), to read as follows:

"Sec. 1513. There shall be allowed in said Academy one cadet-midshipman for every Member or Delegate of the House of Representatives, one for the District of Columbia, and ten appointed at large: *Provided, however*, That there shall not be at any time more in said Academy appointed at large than ten: but the

### Repealed.]

provisions of this section shall not be construed to apply to cadet-midshipmen appointed at large now in said Academy."

Subsequent amendments were made by the following laws:

Act of July 1, 1902 (32 Stat., 686): "That until the year nineteen hundred and fourteen, in addition to the naval cadets now authorized by law (the title having been changed by this act to midshipmen), the President shall appoint five midshipmen, and there shall be appointed from the States at large, upon the recommendation of Senators, two midshipmen for each State."

Act of March 3, 1903 (32 Stat., 1197): "There shall be allowed at the Naval Academy two midshipmen for each Senator, Representative,

and Delegate in Congress, two for the District of Columbia, and five each year at large \* \* \*. That the provisions of this Act for the increase of appointments of midshipmen to the Naval Academy shall continue in force until the thirtieth day of June, nineteen hundred and thirteen; and thereafter one midshipman, as now provided by law, shall be appointed for each Senator, Representative, and Delegate in Congress."

Act of July 9, 1913 (38 Stat., 103); "That after June thirtieth, nineteen hundred and thirteen, and until June thirtieth, nineteen hundred and nineteen, there shall be allowed at the Naval Academy, two midshipmen for each Senator, Representative, and Delegate in Congress, one for Porto Rico, two for the District of Columbia, and ten appointed each year at large."

Act of June 30, 1914 (38 Stat., 410): "Hereafter in addition to the appointments of midshipmen to the United States Naval Academy as now prescribed by law, the Secretary of the Navy is allowed fifteen appointments annually from the enlisted men of the Navy who are citizens of the United States and not more than twenty years of age on the date of entrance to the Naval Academy, and who shall have served not less than one year as enlisted men on the date of entrance: *Provided*, That such appointments shall be made in the order of merit from candidates who have in competition with each other passed the mental examination now or hereafter required by law for entrance to the Naval Academy, and who passed the physical examination required before entrance under existing law."

All the above laws were repealed and superseded by the act of February 15, 1916 (39 Stat., 9), which provided as follows:

"That hereafter there shall be allowed at the United States Naval Academy three midshipmen for each Senator, Representative, and Delegate in Congress, one for Porto Rico, two for the District of Columbia, ten appointed each year at large, and fifteen appointed annually from enlisted men of the Navy as now authorized by law.

"Sec. 2. That all acts or parts of acts inconsistent with the provisions of this act are hereby repealed."

Amendments to the act of February 15, 1916, were contained in the following laws:

Act of August 29, 1916 (39 Stat., 576): "Hereafter in addition to the appointment of midshipmen to the United States Naval Academy, as now prescribed by law, the President is hereby allowed fifteen appointments annually instead of ten as now prescribed by law, and the Secretary of the Navy is allowed twenty-five appointments annually, instead of fifteen as now prescribed by law, the latter to be appointed from the enlisted men of the Navy who are citizens of the United States, and not more than twenty years of age on the date of entrance to the Naval Academy, and who shall have served not less than one year as enlisted men on the date of entrance: *Provided*, That such appointments shall be made in the order of merit from candidates who have in competition with each other passed the mental examination now or hereafter required

by law for entrance to the Naval Academy, and who passed the physical examinations required before entrance under existing laws."

Act of March 4, 1917 (39 Stat., 1182): "Hereafter, in addition to the appointment of midshipmen to the United States Naval Academy, as now prescribed by law, the Secretary of the Navy is allowed one hundred appointments annually, instead of twenty-five as now prescribed by law, to be appointed from the enlisted men of the Navy who are citizens of the United States, and not more than twenty years of age on the date of entrance to the Naval Academy, and who shall have served not less than one year as enlisted men on the date of entrance: *Provided*, That such appointments shall be made in the order of merit from candidates who have, in competition with each other, passed the mental examination now or hereafter required by law for entrance to the Naval Academy, and who passed the physical examination before entrance under existing laws."

Act of April 25, 1917 (40 Stat., 38).

"That, in addition to the number of midshipmen now authorized by law, there shall be appointed during the period from the date of passage of this act until September first, nineteen hundred and eighteen, one additional midshipman for each Senator, Representative, and Delegate in Congress. Nominations shall be made for these vacancies by the Senators, Representatives, and Delegates concerned for any regular or special examination that may be ordered before that date."

The act of February 15, 1916, and amendments thereto (except the act of March 4, 1917) were repealed and superseded by the act of December 20, 1917 (40 Stat., 430), which provided as follows:

"That hereafter there shall be allowed at the United States Naval Academy five midshipmen for each Senator, Representative, and Delegate in Congress, one for Porto Rico, two for the District of Columbia, fifteen appointed each year at large, and one hundred appointed annually from enlisted men of the Navy, as now authorized by law.

"Sec. 2. That all acts or parts of acts inconsistent with the provisions of this act are hereby repealed."

The act of December 20, 1917, was expressly amended by the act of July 11, 1919 (41 Stat., 140), which provided as follows:

"Section 1 of the act entitled 'An Act to increase the number of midshipmen at the United States Naval Academy,' approved December 20, 1917, is hereby amended so as to read as follows: That hereafter there shall be allowed at the United States Naval Academy five midshipmen for each Senator, Representative, Delegate in Congress, and Resident Commissioner from Porto Rico, and five for the District of Columbia, fifteen appointed each year at large, and one hundred appointed annually from enlisted men of the Navy, and members of the Naval Reserve Force on active duty, as now authorized by law."

**Midshipmen appointed from Porto Rico.**—The act of March 3, 1903 (32 Stat., 1198), provided as follows: "That hereafter there shall be at the Naval Academy one



midshipman from Porto Rico, who shall be a native of said island, and whose appointment shall be made by the President on the recommendation of the Governor of Porto Rico."

The act of March 3, 1903, was not repealed by the act of February 15, 1916 (39 Stat., 9), which increased the number of midshipmen and provided for the appointment of "one for Porto Rico," but did not provide that the appointee should be a native of the island or that he should be nominated by the Governor of Porto Rico as provided by the act of 1903. The two provisions are not inconsistent and should be construed as authorizing the appointment of one midshipman from Porto Rico in addition to the native of the island who must be recommended by the Governor. The language of the act of February 15, 1916, "one for Porto Rico," was repeated in the act of December 20, 1917, which latter act also did not repeal the act of March 3, 1903, relating to the appointment of a midshipman from Porto Rico. As a consequence, from March 3, 1903, until February 15, 1916, only one midshipman from Porto Rico was authorized by law; he could be appointed only upon recommendation of the Governor and was required to be a native of the island. From February 15, 1916, until July 11, 1919, two midshipmen were authorized, one required to be a native of the island and to be appointed only on the recommendation of the Governor. On the last mentioned date Congress amended the act of December 20, 1917, so as to provide for the appointment of five midshipmen on the recommendation of the Resident Commissioner from Porto Rico. The result of this amendment is to authorize a total of six midshipmen from Porto Rico, five of whom are to be appointed on the nomination of the Resident Commissioner from Porto Rico and need not be natives of the island, the other to be a native of Porto Rico appointed under the act of March 3, 1903, on the recommendation of the Governor. (File 5252-126, Aug. 1, 1919.)

**Students from the Philippine Islands.**—The act of August 29, 1916 (39 Stat., 576), contained the following provision: "That hereafter the Secretary of the Navy is authorized to permit not exceeding four Filipinos, to be designated, one for each class, by the Governor General of the Philippine Islands, to receive instruction at the United States Naval Academy at Annapolis, Maryland: *Provided*, That the Filipinos undergoing instruction, as herein authorized, shall receive the same pay, allowances, and emoluments, to be paid out of the same appropriations, and shall be subject to the same rules and regulations governing admission, attendance, discipline, resignation, discharge, dismissal, and graduation as are authorized by law and regulation for midshipmen appointed from the United States, but the Filipino midshipmen herein authorized shall not be entitled to appointment to any commissioned office in the United States Navy by reason of their graduation from the Naval Academy."

The above-quoted provision of the act of August 29, 1916, relating to Filipino students, is not repealed by the act of July 11, 1919 (41 Stat., 140), or any other law, relating to the number of midshipmen to be allowed at the

United States Naval Academy. (File 5252-126, Aug. 1, 1919.)

**Students from foreign countries.**—The act of June 29, 1906 (34 Stat., 577), contained the following: "No person shall be admitted for instruction at the Naval Academy at Annapolis from any foreign country except upon authority of law hereafter enacted."

A public resolution approved February 15, 1916, authorized the Secretary of the Navy to permit a designated "citizen of Cuba" to "receive instruction at the United States Naval Academy at Annapolis," provided he first passed the examinations prescribed for candidates from the United States: Held, that said resolution did not authorize the admission of the party named therein as a midshipman or authorize his admission into the naval service in any status whatever; he is not while at the Naval Academy subject to the laws and regulations for the government of the Navy, and is not liable to trial by court-martial and dismissal for misconduct. He is not to be regarded as a member of the naval forces but simply as a student at the Naval Academy, whose presence there is authorized by law. He is ineligible for a commission in the Navy under section 1428 of the Revised Statutes. However, he may be graduated from the Naval Academy and given a diploma as evidence of such graduation. (File 5252-120, May 13, 1919; C. M. O. 186, 1919.)

The act of June 29, 1906, above quoted, is a legislative declaration that unless Congress itself makes an exception to the rule the privileges of the Naval Academy are restricted to citizens of the United States. (File 313-26, Dec. 20, 1906. Overruled by subsequent decisions noted under section 1428, R. S., which hold that aliens may legally be appointed to the Naval Academy as midshipmen, but can not be commissioned upon graduation as officers of the Navy unless naturalized.)

**Midshipmen appointed from enlisted men of the Navy, Marine Corps, Coast Guard, and Naval Reserve Force.**—The appointment of midshipmen from "boys enlisted in the Navy" was authorized by acts of July 16, 1862 (12 Stat., 585, sec. 11), and March 2, 1867 (14 Stat., 517, sec. 8). By act of July 15, 1870 (16 Stat., 334, sec. 12), which changed the title of students at the Naval Academy to "cadet-midshipmen," it was provided that the said act "shall not be construed to authorize the appointment of cadet-midshipmen from among boys enlisted in the Navy." (File 5252-59, Feb. 6, 1914.) The act of June 30, 1914, and later laws above noted, authorized the appointment of midshipmen from enlisted men of the Navy.

Enlisted men of the Marine Corps may be appointed to the Naval Academy in the discretion of the Secretary of the Navy under the authority conferred by the act of June 30, 1914 (38 Stat., 410), which authorizes such appointments from "enlisted men of the Navy." (File 5252-66, May 13, 1915; C. M. O. 20, 1915.)

Even when the Coast Guard is operating "as a part of the Navy" in time of war, as provided by the act of January 28, 1916 (38 Stat., 800), enlisted men of the Coast Guard are not

eligible for appointment to the Naval Academy under the act of June 30, 1914 (38 Stat., 410), which authorizes such appointments from "enlisted men of the Navy." (C. M. O. 141, 1918, citing file 28762-457, Oct. 10, 1918. Compare later decisions noted under sec. 1492, R. S., holding that enlisted men of the Coast Guard when operating "as a part of the Navy" are "enlisted men of the Navy.")

Members of the Naval Reserve Force in enlisted ratings are not eligible, even when on active duty, for appointment to the Naval Academy under the act of June 30, 1914 (38 Stat., 410), as amended by act of December 20, 1917 (39 Stat., 9), which authorizes such appointments to be made from "enlisted men of the Navy." (C. M. O. 174, 1918, citing file 5252-92:1. But see act of July 11, 1919 (41 Stat., 140), above quoted, which authorizes such appointments from "members of the Naval Reserve Force on active duty, as now authorized by law.")

**Miscellaneous decisions.**—The act of July 14, 1862, section 8 (12 Stat., 565), which authorized the President to appoint annually ten acting midshipmen for education at the Naval Academy, to be selected from the sons of officers or men in the Army, Navy, or Marine Corps who distinguished themselves in the service of the United States, was not repealed by the act of July 16, 1862, section 11 (12 Stat., 585), which provided for the number to be allowed at the Naval Academy and the method of appointment thereto. The number to be appointed "at large" by the President under the latter act were in addition to the number to be appointed under the former act, whose appointments were not to be "at large" but confined to a comparatively small class. (10 Op. Atty. Gen., 315.)

Under the 11th section of the act of July 16, 1862, which provided that the nomination of candidates for admission into the Naval Academy should be made upon recommendation of Members and Delegates from actual residents of their districts, it was held that the Secretary of the Navy had the power and it was his duty to fill vacancies in the Naval Academy that might exist from any district when it was clearly impracticable to obtain the recommendation of the Member or Delegate in Con-

gress from that district, as when the district was not represented in Congress; that the words, "two for every Member and Delegate of the House of Representatives," meant to establish as the standard for appointment, not the actual number of Members and Delegates who happened to be entitled to seats in the House, but the number of districts which were entitled to representation by Members and Delegates, and not to make the number of students to be allowed at the Naval Academy an uncertain quantity varying with the accidents of non-election or death of Members or the like; that the provision in said act that if a Member or Delegate neglects to recommend a candidate by the first of July, it shall be the duty of the Secretary to fill the vacancy, clearly showed the intent of Congress that the school should be kept full up to the standard before stated. (10 Op. Atty. Gen., 494, modifying 10 Op. Atty. Gen., 315, which in part held that "midshipmen can not lawfully be appointed for a district which is not represented in Congress." By act of Mar. 2, 1865, 13 Stat., 466, sec. 2, it was provided "that no midshipman shall be appointed for any district not represented in Congress.")

The act of March 3, 1903 (32 Stat., 1177, 1197), providing that "there shall be allowed at the Naval Academy two midshipmen for each Senator, Representative, and Delegate in Congress," did not entitle a representative to have at the academy two midshipmen of his own nomination when there was already one there upon the nomination of his predecessor; under that enactment, no congressional district was entitled to have at the Naval Academy at any one time more than two midshipmen. (25 Op. Atty. Gen., 333.)

The act of July 9, 1913 (38 Stat., 103), quoted above, was construed to mean that two midshipmen were allowed for the office of Senator, Representative, and Delegate in Congress, and not allowed to the individual holding such office; that, accordingly, if a Senator or Representative had two appointments to the Naval Academy made on his recommendation, his successor could not, while such appointees were at the Academy, be allowed to have two additional appointments made to the Academy on his recommendation. (File 5252-67:1, July 12, 1915; C. M. O. 27, 1915.)

### Sec. 1514. [Nomination of candidates. Superseded.]

This section provided as follows:

"Sec. 1514. The Secretary of the Navy shall, as soon after the 5th of March in each year as possible, notify, in writing, each Member and Delegate of the House of Representatives of any vacancy that may exist in his district. The nomination of a candidate to fill said vacancy shall be made upon the recommendation of the Member or Delegate, if such recommendation is made by the first day of July of that year; but if it is not made by that time, the Secretary of the Navy shall fill the vacancy. The candidate allowed for the District of Columbia and all the candidates appointed at large shall be selected by the President."—(16 July, 1862, c. 183, s. 11, v. 12, p. 585. Benjamin's Case, 10 C. Cls., 474.)

It was expressly amended by act of July 26, 1894 (28 Stat., 136), to read as follows:

"The Secretary of the Navy shall, as soon after the fifth of March in each year as possible, notify in writing each Member and Delegate of the House of Representatives of any vacancy that may exist in his district. The nomination of a candidate to fill said vacancy shall be made upon the recommendation of the Member or Delegate, if such recommendation is made by the first day of July of that year; but if it is not made by that time, the Secretary of the Navy shall fill the vacancy by appointment of an actual resident of the district in which the vacancy exists, who shall have been for at least two years immediately preceding the date of his appointment an actual and bona fide resi-



dent of the district in which the vacancy exists and of the legal qualification under the law as now provided. The candidate allowed for the District of Columbia, and all the candidates appointed at large, shall be selected by the President."

It was superseded by the following provision in the act of March 3, 1903 (32 Stat., 1197):

"The Secretary of the Navy shall as soon as practicable after the fifth day of March in each year notify in writing each Senator, Representative, and Delegate in Congress of any vacancy which may be regarded as existing in the State, District, or Territory which he represents, and the nomination of a candidate to fill such vacancy shall be made upon the recommendation of the Senator, Representative, or Delegate. Such recommendation shall be made by the first day of June of that year, and if not so made the Secretary of the Navy shall fill the vacancy by the appointment of an actual resident of the State, District, or Territory in which the vacancy exists, who shall have been for at least two years immediately preceding his appointment an actual bona fide resident of the State, District, or Territory in which the vacancy exists and shall have the qualifications otherwise prescribed by law."

The act of March 3, 1903, was superseded by the following provision in the act of June 29, 1906 (34 Stat., 578):

"Hereafter the Secretary of the Navy shall, as soon as possible after the first day of June of each year preceding the graduation of midshipmen in the succeeding year, notify in writing each Senator, Representative, and Delegate in Congress of any vacancy that will exist at the Naval Academy because of such graduation, or that may occur for other reasons and which he shall be entitled to fill by nomination of a candidate and one or more alternates therefor. The nomination of a candidate and alternate or alternates to fill said vacancy shall be made upon the recommendation of the Senator, Representative, or Delegate, if such recommendation is made by the fourth day of March of the year following that in which said notice in writing is given, but if it is not made by that time the Secretary of the Navy shall fill the vacancy by appointment of an actual resident of the State, Congressional district, or Territory, as the case may be, in which the vacancy will exist, who shall have been for at least two years immediately preceding the date of his appointment an actual and bona fide resident of the State, Congressional district, or Territory in which the vacancy will exist and of the legal qualification under the law as now provided. In cases where by reason of a vacancy in the membership of the Senate or House of Representatives, or by the death or declination of a candidate for admission to the academy there occurs or is about to occur at the academy a vacancy from any State, district, or Territory that can not be filled by nomination as herein provided, the same may be filled as soon thereafter and before the final entrance examination for the year as the Secretary of the Navy may determine. The candidates allowed for the District of Columbia and all the candidates ap-

pointed at large, together with alternates therefor, shall be selected by the President within the period herein prescribed for nomination of other candidates: *Provided*, That the President may select a candidate for the District of Columbia for the year nineteen hundred and eight."

**Recommendation of Senator, Representative, or Delegate advisory only.**—The notification from the Secretary and the recommendation from the Member are parts of the machinery of appointment, but they are only, under the statute, means to an end and not so essential as to defeat the purpose of the statute in cases where their observance may be impossible. Where observance is possible, the statutory direction should be obeyed; but the act of the Member or Delegate is simply advisory; it implies no power to compel the appointment of the person recommended, and the Secretary may refuse to accept the recommendation and require another. If the right to recommend involved the right of absolute control over the appointment, it would be equivalent to the power of appointment itself, which Congress could not vest in Members or Delegates, but which under the Constitution is vested in the President with the advice and consent of the Senate, and may be conferred by law only upon the President alone, the courts of law, or the heads of departments. Any statute which in terms or effect vested the power of appointment of pupils at the Naval Academy in the Members and Delegates of Congress would be in contravention of the Constitution and void. (10 Op. Atty. Gen., 494; see also 19 Op. Atty. Gen., 350.)

**Appointments made by Secretary of the Navy.**—Under the act of August 31, 1852 (10 Stat., 658), which provided that "no appointment of midshipman, acting midshipman, or pupil at any naval school in the Navy shall be made unless recommended by the Member of Congress representing the district in which the applicant resides, in the same manner that cadets at West Point are now appointed," *held*, that a Member of Congress has no power to "appoint" a midshipman, nor even to "nominate" one, according to the common acceptance of that word; the word used in the statute is "recommended," not "nominated," by the Member; the statute only makes the recommendation of a Member of Congress a prerequisite to appointment; the Secretary of the Navy has power to appoint as a midshipman anyone who stands recommended by a Member of Congress who was, at the time he recommended, representing the district in which the applicant resides; and if more than one be so recommended, the Secretary has a right to choose among them. The Member of Congress may, if he will, decline to choose among his young constituents, and recommend them all, thus leaving the appointing power to choose among them. Accordingly, where a Member of Congress recommends for appointment a person resident in his district, and his predecessor while representing the same district had recommended for appointment another person residing within the district, *held*, that the present Member is not precluded from his right to recommend because his

predecessor had exercised the same right before; and that the Secretary of the Navy has a perfect right to choose between them. (10 Op. Atty. Gen., 46; modified by 16 Op. Atty. Gen., 621, holding that a Member of Congress had not the right in January, 1879, to recommend a candidate for examination in June, 1879, but that such recommendation could not lawfully be made until after the 5th day of March, 1879. See also 21 Op. Atty. Gen., 342, noted below under "Recommendation of Member of Congress later unseated.")

Admission or appointment to the Naval Academy is the act of the Secretary of the Navy, both as to candidates "recommended" by Members of Congress and those "selected" by the President. In the one case the Member or Delegate recommends, and the President in the other selects, but neither appoints the naval cadet; the "nomination" based on the "recommendation" or the "selection" is made to the Naval Academy or to the examining committee selected from the academic board of the academy by the superintendent of the academy under paragraph 37 of the Regulations. (19 Op. Atty. Gen., 350.)

According to sections 1513-1515, Revised Statutes, the following steps are necessary to the appointment of naval cadets—that is to say, each one, according as he resides in a State or Territory, must, except as to 11 of them, be recommended by a Member or Delegate of the House of Representatives from the congressional district or Territory of which the proposed candidate is a resident, and upon such recommendation he must be nominated to fill a vacancy in the academy, or in case of a failure by a Member or Delegate to make such recommendation the Secretary of the Navy shall fill the vacancy; and in the 11 excepted cases the persons to fill vacancies shall be "selected by the President." (19 Op. Atty. Gen., 350.)

The power of appointing midshipmen is vested in the Secretary of the Navy. Under sections 1513-1515, Revised Statutes, and the act of July 26, 1894, section 1 (28 Stat., 136), the Member or Delegate to Congress "recommends" or the President "selects," but the Secretary of the Navy "appoints," in pursuance of the power of Congress to vest the appointment of inferior officers in the heads of departments. (25 Op. Atty. Gen., 579, affirming 19 Op. Atty. Gen., 351.)

The power to accept a resignation, like the power to remove from office, is deduced from the power to appoint, and is as firmly established as the power of removal. In the case of cadets at the Naval Academy the power of appointment is vested in the Secretary of the Navy, and therefore the acceptance by him of the resignation of a cadet creates a vacancy in the academy. (19 Op. Atty. Gen., 350.)

Both cadets in the Army and cadets in the Navy are appointed in pursuance of the Constitution, Article II, section 2, providing that Congress may vest the appointment of inferior officers in the President alone, or in the heads of departments; those in the Army by reason of express authority conferred on the President (sec. 1315, R. S.), those in the Navy by reason of authority conferred on the Secretary of the Navy (sec. 1514, R. S.). (10 Comp. Dec., 795.)

#### Appointments made by the President.—

The statutes are silent as to who shall make the appointments of midshipmen in the Naval Academy, except that if Members of Congress fail to nominate to fill vacancies such vacancies shall be filled by the Secretary of the Navy (sec. 1514, R. S.). It has been the universal practice for the Secretary of the Navy to make the appointments of midshipmen "by direction of the President" with the exception above stated. (Weller v. U. S., 41 Ct. Cls., 324.)

The first act providing for midshipmen in the Navy gave their selection, like other naval officers, to the President (1 Stat., 350), and it was not until by act of Congress, August 31, 1852 (10 Stat., 102), that provision was made for their recommendation by Members of Congress. This fact doubtless accounts for the present silence of the Revised Statutes with reference to their appointments, in contrast with the provisions relating to cadets at the Military Academy (sec. 1315, R. S.). (Weller v. U. S., 41 Ct. Cls., 324.)

Neither a midshipman at the Naval Academy nor a cadet at the Military Academy holds either a commission or a warrant; both are appointed by the President. (Weller v. U. S., 41 Ct. Cls., 324, 342.)

The form used by the Secretary of the Navy in the appointment of a midshipman is as follows: "By direction of the President of the United States you are hereby appointed a midshipman in the United States Navy from —." (15 Comp. Dec., 39.)

The midshipmen are appointed by the Secretary of the Navy by direction of the President. (15 Comp. Dec., 39, 44.)

**When appointment takes effect.**—Cadets admitted to the Naval Academy on 10 May and 4 September, 1886, respectively, became naval cadets in the full sense of the term upon the dates named; they had on those dates, respectively, been duly nominated to the place, accepted the nomination, passed successfully the examination required by law, taken the oath prescribed for naval cadets, been assigned to and entered upon the discharge of the duties pertaining to the position, and from those dates their salaries commenced. Their appointments, although not issued until the 11th of October, 1886, related back by express recitals to these dates respectively, and are conclusive evidence of the appointments at the dates aforesaid. The appointments accordingly took effect on 10 May and 4 September, 1886, so as to render them liable to trial by court-martial. (18 Op. Atty. Gen., 507.)

**Obligation assumed by midshipmen to serve in the Navy.**—Formerly midshipmen, at the time of executing their oath of office and as part of the same paper, signed an agreement by which they engaged to "serve in the Navy of the United States for eight years, unless sooner discharged by competent authority" (see 15 Comp. Dec., 43). This agreement was neither required nor expressly authorized by law, but was the creature of administrative action and may be wholly omitted or changed in any manner, not conflicting with law, as may be desired. Thus it would be legal to require that candidates in acknowledging receipt of the Department's permission to re-



port for examination embody in their letter of acknowledgment an engagement that, should they receive an appointment as a midshipman, they "will serve in the Navy of the United States during the pleasure of the President of the United States, unless sooner discharged by competent authority," said letter and agreement to be expressly approved thereon by their parents or guardians. (File 5252-77, July 20, 1915.) In accordance with the above, it was directed by the Secretary of the Navy, April 12, 1916, that form letters be prepared, to be signed by candidates for the Naval Academy and their parents or guardians, obligating such candidates, if appointed, to serve during the pleasure of the President of the United States, instead of for a specified period of eight years. (File 5252-77, Apr. 12 1916.)

**Reinstatement of midshipman.**—The Secretary of the Navy can not revoke his action in accepting the resignation of a naval cadet after the resignation has taken effect. The cadet having declared his purpose to resign, and the Secretary of the Navy having signified his acquiescence in that purpose, the result was a complete severance of the cadet's connection with the Academy, and as much a vacancy there as if the cadet had died. The consent of the parties to the act of resignation could not be recalled except by the reappointment of the same person as cadet in conformity to sections 1514 and 1515, Revised Statutes. It follows that the attempted consent of the Secretary of the Navy to the withdrawal of the cadet's resignation after acceptance thereof did not reinstate and restore such cadet to the Academy, but had no legal effect whatever. (19 Op. Att'y. Gen., 350.)

The appointment of a midshipman was revoked because of accumulated demerits, and the revocation duly promulgated. An officer who has resigned or been dismissed can not be restored to the office formerly held by him except by reappointment. Accordingly, *held* that the Secretary of the Navy has no authority to reinstate to the Naval Academy a midshipman whose appointment has been revoked because of accumulated demerits and the revocation thereof duly promulgated. (25 Op. Att'y. Gen., 579.)

For other cases see notes to sections 1515, 1517, and 1519, Revised Statutes.

**Recommendation of Member of Congress later unseated.**—The notice provided for by section 1514, Revised Statutes, as amended, was intended to be given to the Member of Congress actually sitting, and the recommendation provided for by said section was intended to be made by such member, and action duly taken thereon should not be affected by any subsequent event except the failure of the nominee to pass his examination. Accordingly, *held* that a cadet nominated to the Naval Academy upon the recommendation of a Member of the House of Representatives who, since the recommendation and nomination, has been unseated by contest of election can not be lawfully deprived of his place if he passes his examination. The Secretary of the Navy is not authorized to revoke such a nomination and notify the newly seated Member that a vacancy exists. He has no right to call for a new recommenda-

tion except under section 1516, Revised Statutes, when the candidate fails to pass his examination. Until a decision is made which unseats them, Members of Congress whose seats are contested are considered to be in all respects endowed with the same rights, powers, and privileges as other members. Even if the Secretary had not acted upon the recommendation until after the Member who made it was unseated, his nomination thereon would be perfectly legal and valid. This was held in 10 Op. Att'y. Gen., 46, in which it was said that the Secretary has power to appoint any one who stands recommended by a Member of Congress who was, at the time he recommended, representing the district in which the applicant resides. (21 Op. Att'y. Gen., 342.)

**Date of notice and recommendation.**—Section 1514, Revised Statutes, was amended by act of July 26, 1894, providing that notice shall be given by the Secretary of the Navy "as soon after the fifth of March in each year as possible." The date named in the statute was undoubtedly chosen with reference to the meeting of Congress. The requirement of prompt notice was due to manifest reasons of public policy. The object was not so much to confer a privilege on the Members of Congress as to insure full classes of cadets. (21 Op. Att'y. Gen., 342.)

Beginning with the foundation of the Government, never departed from and now having the force of law, the life of each Congress comes to an end at noon on the 4th day of March. An act approved March 2, 1895, authorized Members of Congress to recommend cadets to fill vacancies existing at the Naval Academy, such nominations to be made on or before March 4, 1895. This act was intended to apply to Members of the then existing Fifty-third Congress. To be valid it was essential that a recommendation should be made before 12 o'clock noon of March 4, 1895. Accordingly, *held* that three recommendations, dated March 4, 1895, but not received at the Navy Department until March 5, 1895, were ineffective, notwithstanding that one of said recommendations was signed at 11.30 a. m. and handed to the Assistant Secretary of the Navy about 9 o'clock in the evening of March 4, 1895; therefore said recommendations did not deprive the successors in office of the signers of the general privileges granted to them by Revised Statutes, sections 1513 and 1514. (21 Op. Att'y. Gen., 164.)

March 6, 1878, a Member of Congress was informed, as required by section 1514, Revised Statutes, of a vacancy at the Naval Academy for the appointment of a cadet midshipman from his district and was requested to recommend a candidate to fill the vacancy; he did so and the candidate failed in June, 1878, to pass the required examination. On June 29, 1878, the Member of Congress was, as required by section 1516, Revised Statutes, informed of the failure of said candidate to pass the required examination and was requested to recommend another to be examined in September following; he did so recommend and the candidate failed on examination in September, 1878. The times for the examination of candidates as fixed by the Regulations are

June 11 and September 22 of each year. *Held*, that the next recommendation of a cadet-midshipman for the vacancy in question should be made after March 5, 1879. Section 1515, Revised Statutes, is to be read as if the dates fixed by the Regulations of the Academy had been expressly inserted therein; accordingly, the season for recommendations and nominations of cadet-midshipmen begins after March 5 and expires on September 22 of each year; although a casual perusal of section 1514 might suggest that the date, "fifth day of March," therein contained applies only to the notice spoken of and does not prevent the recommendation from being made sooner, in case the member has otherwise been informed of the vacancy. While it may be conceded that a previous notification is not essential to the validity of a recommendation, it seems that the date is so. The effect of the law was to postpone the operation of the enactment until the coming-in of a new Congress, and to establish a process by which the Members of that Congress, and of all others, might control the appointment of cadet-midshipmen made during their respective terms of office. Accordingly, *held* that in this case the Member of Congress has not the right, prior to March 5, 1879, to recommend another candidate for examination in June, 1879, or for examination at once. (16 Op. Atty. Gen., 621, modifying 10 Op. Atty. Gen., 46.)

The naval appropriation act of June 29, 1906 (34 Stat., 578), relating to appointments to the Naval Academy, provided that "the candidates allowed for the District of Columbia and all the candidates appointed at large, together with alternates therefor, shall be selected by the President within the period herein prescribed for nomination of other candidates," that is, by the 4th day of March of the year following that in which written notice is given, etc. This clause was followed by a proviso that "the President may select a candidate for the District of Columbia for the year nineteen hundred and eight." This additional authority granted by the proviso was exercised by the President by selecting a candidate for the District of Columbia for the

year 1908. *Held* that the power of the President, granted by this proviso, was thereby exhausted, and the candidate having failed on his examination the President is not authorized, by virtue of that clause, to reappoint him or to otherwise exercise the power conferred upon him by that proviso. (27 Op. Atty. Gen., 420.)

**Recommendation of alternates.**—Under the system followed by the Navy Department the nomination of alternates by a Representative in Congress is limited to vacancies for which designated by the Representative. Accordingly, where the principal and all alternates nominated for one vacancy failed upon examination, new nominations are required and the vacancy can not be filled by the appointment of a successful alternate designated by the same Representative for another vacancy, where such alternate was not also designated as alternate for the vacancy first mentioned. Where two vacancies exist at the same time the same alternates can be designated for each principal candidate, but unless this is done the alternates have no claim to consideration for any vacancy other than that for which designated. In this case the candidate and his three alternates having failed, and in the meantime the Representative who made the nomination having gone out of office, the vacancy was properly filled upon nomination of his successor, and the candidate finally appointed should be entered in the records as having been appointed upon the recommendation of the latter, notwithstanding it so happened that the successful candidate was one of the alternates designated by the former Representative to fill a different vacancy. (File 5252-128, Oct. 17, 1919.)

**Oath of office.**—The form of oath to be taken by midshipmen is that prescribed by section 1757, Revised Statutes, and not that prescribed by article 2 of the Articles of War (sec. 1342, R. S.) for enlisted men of the Army, which is made applicable to enlisted men of the Navy by section 25 of the Navy personnel act of March 3, 1899 (30 Stat., 1004). (File 5252-28: 1, Aug. 25, 1909.)

**Sec. 1515. [Examination of candidates.]** All candidates for admission into the Academy shall be examined according to such regulations and at such stated times as the Secretary of the Navy may prescribe. Candidates rejected at such examination shall not have the privilege of another examination for admission to the same class, unless recommended by the board of examiners.—(16 July, 1862, c. 183, s. 11, v. 12, p. 585. 17 April, 1866, c. 45, s. 5, v. 14, p. 38.)

**Time of examination.**—Section 1515, Revised Statutes, is to be read as if the dates fixed by the regulations of the Academy had been expressly inserted therein. Where the dates fixed by the regulations were June 11 and September 22 of each year, and under section 1514, Revised Statutes, as amended, the date for notifying Representatives of vacancies to be filled was "as soon after the fifth of March in each year as possible," the result was that the season for recommendations and nominations began after March 5 and

expired on September 22, of each year; accordingly *held* that a Member of Congress whose candidate had failed on examination in September, 1878, did not have the right in January, 1879, to recommend another candidate for special examination at once, or for the regular examination in June, 1879, but that such recommendation could not be made until after March 5, 1879. (16 Op. Atty. Gen., 621, modifying 10 Op. Atty. Gen., 46.)

Where the regulations of the Academy provided for mental examinations to be held in



April and June of each year, and a physical examination for those who qualified mentally, *held* that a special examination in February would be in advance of the time provided under the statute; accordingly a number of midshipmen who were dropped as a result of the semiannual examination at the Academy could not be, although renominated, reappointed in February upon passing a successful physical examination and granted leave of absence with pay until the summer course at the Academy beginning the 1st of July. (File 313-20, Feb. 14, 1907.)

**Power of Secretary of the Navy with respect to examinations.**—By section 1515 of the Revised Statutes full power is given the Secretary of the Navy over examinations for admission. So far as the details of the examinations are concerned, the Secretary may, if he chooses, fix them. (36 J. A. G. letter book, 195, Mar. 19, 1907.)

Conformably to the authority granted the Secretary of the Navy by section 1515, Revised Statutes, it has been made a requirement that candidates for appointment must "be of good moral character." In the case of a midshipman who had been dismissed from the Naval Academy for "intoxication and inaptitude," and who had other reports on record against him, the question of his eligibility for reappointment upon a new nomination is not one of law but of fact, *viz*, whether or not his dismissal from the Naval Academy and the

cause thereof, together with his record while at the institution, indicates that he is not of sufficiently "good moral character" to be readmitted as a midshipman. (File 5252-43, Oct. 5, 1911.)

**Reinstatement of midshipmen.**—An appointee is none the less a "candidate for admission" subject to examination under sections 1515 and 1516, Revised Statutes, and the regulations, because he has already been a member or inmate of the Academy. (25 Op. Atty. Gen., 585.)

Where the resignation of a naval cadet has taken effect, he can not be reinstated except by reappointment as cadet in conformity to sections 1514 and 1515, Revised Statutes. (19 Op. Atty. Gen., 350.)

In the matter of reappointment, midshipmen who were dropped as a result of the semiannual examination at the Academy, and are renominated, stand on the same footing as candidates for first appointment to the Academy. (File 313-20, Feb. 14, 1907.)

Whether a midshipman dismissed from the Naval Academy is eligible for reappointment so far as his moral character is concerned is a question of fact to be ascertained upon examination pursuant to the requirements prescribed by the Secretary of the Navy under section 1515, Revised Statutes. (File 5252-43, Oct. 5, 1911.)

For other cases see notes to sections 1514, 1517, and 1519, Revised Statutes.

**Sec. 1516. [Second recommendation.]** When any candidate who has been nominated upon the recommendation of a Member or Delegate of the House of Representatives is found, upon examination, to be physically or mentally disqualified for admission, the Member or Delegate shall be notified to recommend another candidate, who shall be examined according to the provisions of the preceding section.—(16 July, 1862, c. 183, s. 11, v. 12, p. 585. 17 July, 1866, c. 45, s. 5, v. 14, p. 38.)

**Second recommendation authorized only in cases specified.**—Where a cadet was nominated to the Naval Academy upon the recommendation of a Member who was later unseated by contest of election, the Secretary of the Navy can not revoke such nomination and notify the newly seated Member that a vacancy occurs; he has no right to call for a new recommendation, except under section 1516, Revised Statutes, when the candidate fails to pass his examination. (21 Op. Atty. Gen., 342.)

Where a midshipman was appointed upon the recommendation of a Member, and the success-

or of such Member contended that the appointment was null and void for the reason that the appointee did not possess the statutory qualifications, *held* that if this contention could be sustained and the midshipman removed, the vacancy thus existing could be filled, under the statute, only by the selective appointment of the Secretary; there would happen no case for nomination or recommendation by the Representative from the district to which such midshipman had been credited. (28 Op. Atty. Gen., 180.)

**Sec. 1517. [Qualifications.]** Candidates allowed for congressional districts, for Territories, and for the District of Columbia must be actual residents of the districts or Territories, respectively, from which they are nominated. And all candidates must, at the time of their examination for admission, be between the ages of fourteen and eighteen years, and physically sound, well formed, and of robust constitution.—(14 July, 1862, c. 164, s. 9, v. 12, p. 565. 16 July, 1862, c. 183, s. 11, v. 12, p. 585. 1 April, 1864, c. 47, s. 2, v. 13, p. 39.)

Amendments to this section were made by act of March 2, 1889, section 2 (25 Stat., 879), which provided that "after the fourth day of March, eighteen hundred and eighty-nine, the minimum age of admission of cadets to the academy shall be fifteen years and the maximum age twenty years;" by act of March 3, 1903 (32 Stat., 1198), which provided that "after January first, nineteen hundred and four, all candidates for admission to the Naval Academy at the time of their examination must be between the ages of sixteen and twenty years;" and by act of May 14, 1918 (40 Stat., 550), which provided that "hereafter all candidates for admission to the Naval Academy must be not less than sixteen years of age nor more than twenty years of age on April first of the calendar year in which they enter the academy: *Provided*, That the foregoing shall not apply to candidates for midshipmen designated for entrance to the academy in nineteen hundred and eighteen."

Qualifications for appointments from enlisted men of the Navy: See laws noted under section 1513, Revised Statutes.

**Not mandatory that candidate possessing required qualifications be appointed.**—While the law says that a candidate must have undergone a successful examination and possess certain other qualifications before he can be admitted to the academy, it does not say that a candidate possessing those qualifications must be admitted. It is by the act and permission of the Secretary alone that a candidate having all the qualifications is admitted to the academy. (19 Op. Atty. Gen., 350. See also note to sec. 1514, R. S.)

**Reinstatement of midshipman.**—The ages prescribed by law for admission to the Naval Academy apply as well to one who has already been a member of the Naval Academy as to a new appointee. (File 5252-43:1, May 7, 1913.)

A midshipman at the Naval Academy who, being found deficient in studies, presented his resignation, which was accepted, can not be reappointed to fill the vacancy thus created if he is above the statutory age limit for original appointment. (25 Op. Atty. Gen., 585.)

For other cases, see notes to sections 1514, 1515, and 1519, Revised Statutes.

**Qualifications can not be reexamined after appointment.**—A nominee for the office of midshipman in the Navy, whose qualifications have been regularly certified to by a Representative in Congress, who has passed the necessary mental and physical examinations and received and accepted the appointment, can not, in the absence of fraud, be deprived of that office on the ground that he was not an actual resident of the congressional district whence he was appointed, although it should afterwards appear that he was not such an actual resident. (28 Op. Atty. Gen., 180.)

The eligibility of a nominee having been determined by a former Secretary of the Navy, that action, in the absence of fraud, must be regarded as final and not subject to reexamination under a subsequent administration. (28

Op. Atty. Gen., 180; see also note to sec. 417, R. S.)

A statute which empowers an officer or tribunal to appoint a person having certain qualifications confers upon that officer or tribunal the power to determine the qualifications and eligibility of the appointee. In this case the law gives the Secretary of the Navy sole jurisdiction to hear, determine, and adjudge all questions of qualifications, and his decision is final in the absence of some provision for appeal or review. When the decision of the Secretary of the Navy is made and promulgated, his determination becomes final and is *res judicata* of all that is involved. (28 Op. Atty. Gen., 180.)

**Age requirements can not be waived.**—As the age qualifications are fixed by law, the executive is without authority to waive the statutory provisions on the subject. If it could be shown that action had been taken in any case contrary to law, such action could not be regarded as a precedent. (File 5252-43:1, May 7, 1913.)

**Determination of qualifications by Representative making recommendation.**—The statutory requirements as to residence and age are as much directed to and obligatory upon the Representative making the nomination as they are with respect to the Secretary of the Navy in making the appointment. His infinitely better means and greater facilities for ascertaining whether the nominee is a resident of his district recommends this practice; and his interest in his constituents, many of whom would desire this place for their young sons, should insure due care that no mere squatter or sojourner by his recommendation should step into the place to which one of them is entitled. Accordingly, the Secretary of the Navy is not derelict in duty when he assumes that such Representative has performed his duty and reported correctly upon the qualifications and eligibility of the nominee; and it is not an unreasonable practice for the Navy Department to devolve upon the Representative in Congress the duty of ascertaining and reporting with his nomination that the nominee has the required qualifications, including that of residence; and to act upon his statement unless something to the contrary appears. (28 Op. Atty. Gen., 180.)

**Requirements as to residence.**—The words, "an actual and bona fide resident of the State, Congressional district, or Territory in which the vacancy will exist," employed in the act of June 29, 1906 (34 Stat., 578—noted under sec. 1514, R. S.), providing for the nomination of midshipmen for admission to the Naval Academy, require the appointee to be "actually domiciled" in the State where he is appointed; this, however, does not necessarily mean actual physical presence. A naval officer whose home is at Athens, N. Y., but who has for some time past been stationed in Portsmouth, N. H., is a legal resident and voter in Athens, N. Y., which is also the actual bona fide residence of his minor son, notwithstanding the latter has for several years been living with his father and physically present at Portsmouth, N. H. The son is therefore eligible for nomination upon recommendation of the Senator



from New York, by whom this question was raised. (28 Op. Atty. Gen., 41.)

Section 1517, Revised Statutes, requires that candidates must be "actual residents" of the districts or territories from which they are nominated. The act of June 29, 1906 (34 Stat., 578), provides that candidates shall be "actual and bona fide" residents of the State, congressional district, or Territory in which the vacancy will exist. It is manifest that the main purpose of this requirement of residence is the fair distribution of these appointments among the several States, Territories, congressional districts, and the District of Columbia, and to that end to prohibit the filling of a vacancy in one by a resident of another. But the statutes require that candidates must be between specified ages, so that the question is confined to the residence of an infant. It is well settled that the residence of a minor son is that of his father, and that this continues even after the death of the father until the minor acquires in some way another legal residence. Therefore, if the father of a nominee is a resident of the locality in which the vacancy is about to occur, that residence is also the residence of his minor son. (28 Op. Atty. Gen., 41.)

The minor son of an Army officer stationed for the last two years at Governor's Island, N. Y., who has been physically present and attending school in New York City, is not an actual and bona fide resident of the State of New York, but of Virginia, which is the legal residence of his parent, unless he has become entitled to or attempted to establish an actual residence separate and apart from his father; and is not, therefore, eligible for nomination upon recommendation of the Senator from New York, by whom this question was raised. (28 Op. Atty. Gen., 41.)

**Requirements as to age.**—The words "between the ages of fourteen and seventeen," in the act of July 16, 1862, section 11, regulating appointments to the Naval Academy, are unambiguous and too plain for construction. A boy who happens to be below 14 years of age or above 17 is certainly not between those ages; there is no "rigor" in the case, but only a fixing of a qualification of age, as the Constitution does in regard to the President and the members of both houses of Congress; accordingly all who have "attained to seventeen years of age" are excluded from appointment. (10 Op. Atty. Gen., 315; see also note to sec. 1370, R. S., concerning age of candidates for appointment as naval officers.)

**Sec. 1518. [Appropriations, how applied.]** No money appropriated for the support of the Naval Academy shall be applied to the support of any midshipman appointed otherwise than in strict conformance with the provisions of this chapter.—(21 May, 1864, c. 93, s. 1, v. 13, p. 84.)

**Sec. 1519. [Midshipmen found deficient.]** Cadet midshipmen found deficient at any examination shall not be continued at the Academy or in the service unless upon the recommendation of the academic board.—(16 July, 1862, c. 183, s. 11, v. 12, p. 585. 23 June, 1874, c. 453, v. 18, p. 203.)

Amendment to this section was made by act of June 5, 1920 (41 Stat., 1028), which provided "that until otherwise provided by law no midshipman found deficient at the close of the last and succeeding academic terms shall be involuntarily discontinued at the Naval Academy or in the service unless he shall fail upon reexamination in the subjects in which found deficient at an examination to be held at the beginning of the next and succeeding academic terms, and the Secretary of the Navy shall provide for the special instruction of such midshipmen in the subjects in which found deficient during the period between academic terms."

"Cadet-midshipmen," title changed to "naval cadets" and later changed to "midshipmen" by laws noted under section 1512, Revised Statutes.

**Court-martial of midshipmen.**—By act of June 23, 1874 (18 Stat., 203), it was provided that "in all cases where it shall come to the knowledge of the Superintendent of the Naval Academy, at Annapolis, that any cadet-midshipman or cadet-engineer has been guilty of the offense commonly known as hazing, it shall be the duty of said Superintendent to order a court-mar-

tial, composed of not less than three commissioned officers, who shall minutely examine into all the facts and circumstances of the case and make a finding thereon; and any cadet-midshipman or cadet-engineer found guilty of said offense by said court shall, upon recommendation of said court be dismissed; and such finding, when approved by said Superintendent, shall be final; and the cadet so dismissed from said Naval Academy shall be forever ineligible to reappointment to said Naval Academy."

**Court-martial of midshipmen.**—By act of March 2, 1895 (28 Stat., 838), it was provided "that the Secretary of the Navy shall have power to convene general courts-martial for the trial of naval cadets, subject to the same limitations and conditions now existing as to other general courts-martial, and to approve the proceedings and execute the sentences of such courts, except the sentences of suspension and dismissal, which, after having been approved by the Superintendent, shall not be carried into effect until confirmed by the President."

**Court-martial of midshipmen.**—By act of March 3, 1903 (32 Stat., 1198), it was provided "that the superintendent of the Naval Academy shall make such rules, to be ap-

proved by the Secretary of the Navy, as will effectually prevent the practice of hazing; and any cadet found guilty of participating in or encouraging or countenancing such practice shall be summarily expelled from the Academy, and shall not thereafter be reappointed to the corps of cadets or be eligible for appointment as a commissioned officer in the Army or Navy or Marine Corps until two years after the graduation of the class of which he was a member." (See 25 Op. Atty. Gen., 543, noted below.)

**Dismissal without court-martial.**—By act of April 9, 1906, section 1 (34 Stat., 104), it was provided "that it shall be the duty of the Superintendent of the United States Naval Academy, whenever he shall believe the continued presence of any midshipman at the said academy to be contrary to the best interests of the service, to report in writing such fact, with a full statement of the facts upon which are based his reasons for such belief, to the Secretary of the Navy, who, if after due consideration of the said report he shall deem the superintendent's said belief reasonable and well founded, shall cause a copy of the said report to be served upon the said midshipman and require the said midshipman to show cause, in writing and within such time as the said Secretary shall deem reasonable, why he should not be dismissed from the said academy; and after due consideration of any cause so shown the said Secretary may, in his discretion, but with the written approval of the President, dismiss such midshipman from the said academy. And the truth of any issue of fact so raised, except upon the record of demerit, shall be determined by a board of inquiry convened by the Secretary of the Navy under the rules and regulations for the government of the Navy."

**Hazing, punishment for.**—The act of April 9, 1906 (34 Stat., 104, 105), contains the following provisions: "Sec. 2. That so much of the Acts approved June twenty-third, eighteen hundred and seventy-four, and March third, nineteen hundred and three, as requires the Superintendent of the United States Naval Academy to convene a court-martial in all cases when it shall come to the knowledge of the said superintendent that any midshipman has been guilty of the offense commonly known as 'hazing,' and declares the finding of a court-martial so convened, when approved by the said superintendent, final, and directs that any midshipman found guilty by such court-martial shall be summarily dismissed from the said academy, and also all other Acts or parts of Acts inconsistent with the present Act are hereby repealed, and that the offense known as 'hazing' may hereafter be proceeded against, dealt with, and punished as offenses against good order and discipline and for violation and breaches of the rules of said academy. But no midshipman shall be dismissed for a single act of hazing except

under the provisions of section three of this Act.

"Sec. 3. That the Superintendent of the United States Naval Academy may, in his discretion and with the approval of the Secretary of the Navy, cause any midshipman in the said academy to be tried by court-martial for the offense of hazing, as provided by the Act approved June twenty-third, eighteen hundred and seventy-four, and such court-martial, upon conviction, may sentence such midshipman to any punishment authorized by the said Act or by the Act approved March third, nineteen hundred and three, or authorized for any violation or breach of the rules of the said academy by the said rules, or, in cases of brutal or cruel hazing may, in addition to dismissal, sentence such midshipman to imprisonment for a period not exceeding one year: *Provided*, That such midshipman shall not be confined in a military or naval prison or elsewhere with men who have been convicted of crimes or misdemeanors; and such finding and sentence shall be subject to review by the convening authority and by the Secretary of the Navy, as in the cases of other courts-martial.

"Sec. 4. That the offense of 'hazing,' as mentioned in this Act, shall consist of any unauthorized assumption of authority by one midshipman over another midshipman whereby the last-mentioned midshipman shall or may suffer or be exposed to suffer any cruelty, indignity, humiliation, hardship, or oppression, or the deprivation or abridgment of any right, privilege, or advantage to which he shall be legally entitled.

"Sec. 5. That it shall be the duty of every professor, assistant professor, academic officer, or any cadet officer or cadet petty officer, or instructor, as well as every other officer stationed at the United States Naval Academy, to promptly report to the superintendent thereof any fact which comes to his attention tending to indicate any violation by a midshipman or midshipmen of any of the provisions of this Act or any violation of the regulations of the said academy. Any naval officer attached to the academy who shall fail to make such report as provided in this section shall be tried by court-martial for neglect of duty and if convicted he shall be dismissed from the service. Any civilian instructor attached to the academy who shall fail to make such report as provided in this section shall be dismissed by the superintendent of the academy upon the approval of the Secretary of the Navy."

**Act of June 5, 1920, construed.**—The act of June 5, 1920 (above quoted), in so far as it is not retroactive, is amendatory of section 1519, Revised Statutes, and provides for a second examination of the midshipmen found deficient at the examination at the close of the term, before the Academic Board shall pass upon the question of whether they shall be continued at the academy. It applies equally to the annual and semiannual examinations for the expression



"term" and not "year" is used in the act. (32 Op. Atty. Gen., 294.)

Under the Naval Academy Regulations the period intervening between the first term and second term of the academic year amounts to one day, which is Sunday, so that the amount of special instruction which could be imparted to midshipmen found deficient at the semiannual examination would be practically negligible, but an interpretation of the act requires that they be allowed to take a second examination. (32 Op. Atty. Gen., 294.)

Midshipmen found deficient at the annual examinations at the close of the academic term, held May 24-29, 1920, whose retention at the academy or in the service had not been recommended by the Academic Board and whose resignations had been duly submitted and accepted by the Secretary of the Navy on June 1, 1920, are not entitled to the benefits of the act of June 5, 1920. The reinstatement of such midshipmen could not take place otherwise than by appointment by the Secretary of the Navy, and in so far as it is intended to affect such midshipmen the said act is contrary to the Constitution relating to appointment of officers of the United States (32 Op. Atty. Gen., 294, citing 19 Op. Atty. Gen., 350, *U. S. v. Germaine*, 99 U. S., 508, *U. S. v. Mouat*, 124 U. S., 303, 307).

**Academic Board.**—The Academic Board was not of statutory creation. Like many other things connected with the Naval Academy it was a piece of "departmental legislation," but it has since been recognized by law. The "Regulations of the United States Naval Academy, 1867," page 10, chapter 2, under the heading, "Academic Board," declared that "the Academic Board shall be composed of the following officers: The superintendent; the commandant of midshipmen; four senior assistants to the commandant of midshipmen; and the heads of the departments of mathematics; steam engineering; astronomy, navigation, and survey; natural and experimental philosophy; ethics, and English studies; French language; Spanish language; drawing." It further provided that the Academic Board should be convened for the transaction of business at the call of the superintendent; that a majority of the voting members should constitute a quorum. Its duties were defined and appertained generally to the internal management of the Academy and the prosecution of studies. Among the statutes recognizing the Academic Board is section 1519, Revised Statutes, which is based upon an act passed July 16, 1862. (File 5146, June 23, 1906.)

**Jurisdiction of Academic Board and Secretary of the Navy.**—Sections 1519 and 1525, Revised Statutes, leave no right in the Secretary of the Navy to continue at the Academy cadets who have been found, at any examination, deficient in their studies, without the recommendation of the Academic Board. These sections appear to be wise and according to the reason of the thing; and in their absence it would only be in very rare and hardly conceivable instances that the "care and supervision" intrusted by article one (Regs. 1876) to the Secretary of the Navy could authorize an unrecommended revision of a sentence for deficiency. Pro re nata intervention by the Secre-

tary would lead to insubordination on the part of students, and would become a fruitful parent of discord amongst the authorities of the Academy. (15 Op. Atty. Gen., 634.)

Sections 1519 and 1525, Revised Statutes, expressly provide that cadet midshipmen and cadet engineers, or naval cadets as they are now all designated, "found deficient at any examination," shall not be continued at the Academy or in the service "except" or "unless" upon the recommendation of the Academic Board. A regulation of the Naval Academy to the same effect had been in force for some years when the legislation now embodied in those sections was enacted, and the reason for this interference of Congress was, no doubt, to prevent the bad effect on the discipline of the institution produced by the occasional, and perhaps not always well considered, interferences of the Navy Department with the operation of that executive regulation. (19 Op. Atty. Gen., 302.)

Where certain naval cadets were found deficient at the semiannual examinations held at the Naval Academy in January 1889, and without the recommendation of the Academic Board were granted leave of absence by the Secretary of the Navy with permission to report to the Superintendent of the Academy to join the next fourth class: *Held*, that the Secretary had no power to continue these cadets in the Academy without the recommendation of the Academic Board. (19 Op. Atty. Gen., 302.)

Whenever a midshipman is found deficient in his studies as the result of any examination, the determination of the Academic Board is final and conclusive. (File 5146-1, July 13, 1906.)

By section 1515, Revised Statutes, full power is given the Secretary of the Navy over examinations for admission: *Held*, that he also has power of final control over all other examinations. In the first instance the details of the examinations are naturally under the supervision of the Academic Board, which is a body recognized by the statutes. Clearly the Secretary has not the power to order the Academic Board to recommend the retention of a midshipman found deficient at any examination; but it would seem that, so far as the details of the examinations are concerned, the Secretary may, if he choose, fix them. (36 J. A. G. letter book, 195, Mar. 19, 1907.)

**Deficiency in conduct.**—It has been customary for the Academic Board to recommend the dropping, turning back, or retention of midshipmen by reason of conduct, simultaneously with similar recommendations founded upon proficiency or the reverse in their studies; but, while in the latter case the midshipmen are subjected to an examination and the results of this examination are highly material in determining the recommendations of the board, in the former case these recommendations are founded entirely upon the records of the midshipmen and no one is in fact "found deficient" in conduct "at any examination." *Held*, therefore, to be doubtful whether section 1519 ever applied to midshipmen found deficient in conduct; further *held* that, if applicable to such case, the act of April 9, 1906, section 1 (34 Stat., 104, quoted above), must be

considered as repealing, pro tanto, section 1519. (File 5146-1, July 13, 1906.)

Whenever a midshipman is found deficient in his studies as the result of any examination, the determination of the Academic Board is final; when found deficient in conduct, the procedure prescribed by the act of April 9, 1906, must be followed. (File 5146-2, Feb. 13, 1907.)

It seems quite clear from the act of April 9, 1906, that among the grounds on which Congress expected midshipmen to be dismissed was an excess of demerits, since in the words of that act provision is evidently made for that very contingency. Nothing is said in this law as to the dismissal of midshipmen through the action of the Academic Board, but unless provision for such dismissal had been made in express and unequivocal terms in some law existing at the time of the enactment of said act, it would seem clear that, upon established principles of statutory construction, this method of dismissal for misconduct and the procedure incident thereto were intended by Congress to be exclusive of any others. (File 5146-1, July 13, 1906.)

Dismissal for accumulated demerits has always been treated by the Navy Department as dismissal for misconduct. (25 Op. Atty. Gen., 579.)

**Physical deficiency.**—Under Revised Statutes, section 1519, providing that cadet midshipmen found deficient at any examination shall not be continued at the Academy unless upon the recommendation of the Academic Board, a cadet found physically ineligible for appointment in the Navy or Marine Corps has no right to remain at the Academy unless upon recommendation of the Academic Board. Where, under such circumstances, the Academic Board found the cadet proficient for the six years' course and complimented him with a certificate of graduation, he having served nearly the required six years, and the Secretary of the Navy discharged him from the service on the same date on account of physical disability, he is technically a graduate but not entitled to one year's pay under the act of August 5, 1882 (22 Stat., 284, quoted under sec. 1522, R. S.), notwithstanding there was at the time of his discharge a surplus of graduates for whom no vacancies existed in the lower grades. (*Potter v. U. S.*, 34 Ct. Cls., 13.)

A midshipman found deficient in any examination and not having the recommendation of the Academic Board has no right to remain at the Academy. One who graduated from the Academy after the act of March 7, 1912 (37 Stat., 73, reducing the course to four years), but "on leave of absence awaiting physical reexamination to determine fitness for commission as ensign," is in the pay status of a midshipman at the Academy and entitled to pay at \$600 per annum, provided he is continued in the service upon the recommendation of the Academic Board. (20 Comp. Dec., 141.)

A midshipman completed the six years' course and was found proficient by the Academic Board on examination for final graduation, but deficient by the medical examining board, and was continued in the service until it could be determined whether his disability was of a

permanent or temporary nature. He finally passed his physical examination and was appointed ensign. Paragraph 169 of the Regulations of the United States Naval Academy, 1909, enumerates the subjects which the examination for final graduation shall embrace, but such enumeration does not include a physical examination. Paragraph 167 provides that "no midshipman shall pass from a lower to a higher class, perform the two years' service afloat, or be appointed in the lower grades of any branch of the service until he shall have been examined by a board of not less than three medical officers of the Navy and pronounced physically qualified to perform all his duties." *Held*, that the successful passing of a physical examination is not a prerequisite to the final graduation of a midshipman, but is merely a condition precedent to his promotion or appointment in the lowest grades of the line of the Navy and Marine Corps, and therefore in this case the midshipman finally graduated with his class at the termination of his six years' course, and that the date of his final graduation was the same date as the final graduation of his class. (16 Comp. Dec., 734.)

Naval cadets who were found mentally and professionally qualified upon the graduating examination of their class are entitled to a certificate of graduation notwithstanding that they were reported as physically disqualified for the naval service. There is no authority in the law for stating their physical disqualification in the certificates to be given them, for the reason that physical condition does not enter into the idea of graduation except in so far as graduation presupposes a sound physical condition at the time of admission to the Academy. Such a statement would be objectionable as out of place, which is alone a good reason for omitting it. (19 Op. Atty. Gen., 358.)

See below, "Deficiency upon examination for commission."

**Deficiency upon examination for commission.**—The recommendation of the Academic Board, that a midshipman found deficient upon examination for appointment as ensign be dropped from the service, is not final. The laws providing for the appointment of ensigns do not confer exclusive powers upon the Academic Board; section 1519, Revised Statutes, is properly limited to "academic examinations," and does not extend to the final examination which is to determine the midshipman's fitness for a commission in the Navy. That section was passed in the interest of efficient administration and internal discipline of the Naval Academy, and should not be read into the laws providing for the appointment of ensigns. A contrary conclusion would deprive the constitutional appointing power of all jurisdiction over the qualifications of candidates for appointment as ensigns. *Held*, therefore, that the recommendation of the Academic Board in this case may be disapproved and the midshipman continued in the service until further reports on fitness in his case may be received and considered by the department. (File 5252-36, May 5, 1910.)



A midshipman who develops a physical defect, which it is anticipated might in the future incapacitate him for duty in the Navy, may legally tender his resignation, undated, and place same in the hands of the department with request that same be dated and accepted if he should be subsequently found incapacitated for service or for promotion by reason of said physical defect or the sequelæ thereof; and upon so tendering his undated resignation said physical defect may be waived and a commission issued to him as ensign. The dating and accepting of said resignation upon the occurrence of the condition stated would be entirely legal. (File 5252-50, May 14, 1912, citing Mimmack's Case, 12 Op. Atty. Gen., 555, 10 Ct. Cls., 584, 97 U. S., 426. See also file Nos. 13261-163-170 concerning waivers of rights to pensions, retirement, etc., by candidates for appointment as second lieutenants in the Marine Corps.)

The final graduation of midshipmen occurs two years from the date of their formal graduation from the four years' course, and a midshipman who, when the date of final graduation arrived, was qualified for final graduation aside from a failure to pass in some subjects of professional examination, and who subsequently qualified in those subjects and was given a certificate of final graduation became a graduated midshipman from said date of final graduation. (17 Comp. Dec., 298.)

See above, "Physical deficiency."

**Suspension of midshipman without pay.**—Where it is within the power of the Secretary of the Navy, with the approval of the President, to dismiss a midshipman, he may, with the approval of the President, suspend such midshipman for one year without pay for due cause. Since the power to suspend is derived from the power to dismiss absolutely, only such midshipmen as may be subject to dismissal can be so suspended. (C. M. O. 31-1915, citing file 5252-72, Sept. 20, 1915.)

A midshipman suspended for one year under an order of the Secretary of the Navy, with the written approval of the President, which order stated that said suspension was "without pay," is debarred from all the privileges and benefits of his office during said period, including commutation of rations; during the year of suspension the midshipman is practically in the status of one dismissed. (Comp. Dec., Nov. 13, 1915, 177 S. and A. Memo., 3830.)

The Secretary of the Navy, with the approval in writing of the President, may suspend a midshipman for one year without pay for due cause, but only such midshipmen as are subject to dismissal can be so suspended. A midshipman can not be suspended for one year without pay except in mitigation of a legally authorized punishment involving dismissal. The law expressly provides that a midshipman can be dismissed for a single act of hazing only pursuant to the sentence of a court-martial. Since the Secretary of the Navy, acting for the President, can not directly dismiss a midshipman for one act of hazing without sentence of court-martial, it follows that he can not accomplish such dismissal by any indirect means; and if it were legal to suspend a midshipman without pay for

one year in such case, it would be legal to suspend him without pay indefinitely, which would amount in effect to a dismissal. (File 5252-72 : 1, Sept. 21, 1915, affirming file 5252-72, Sept. 20, 1915.)

Where a cadet at the Military Academy had been recommended by the Academic Board to be discharged on account of deficiency in studies, the Secretary of War had power to grant such cadet leave of absence without pay; under the circumstances he might lawfully have discharged the cadet absolutely, and the placing of him on leave of absence was a minor exercise of the power of dismissal. The cadet's status thereby became that of an officer continued on the rolls without pay, instead of that of an officer dismissed absolutely and drawing no pay. (10 Comp. Dec., 795.)

See note to section 416, Revised Statutes, under "Suspension of employees."

**Dismissal without court-martial.**—Section 1624, Revised Statutes, article 36, restricting dismissal of officers of the Navy, does not extend to cadets at the Naval Academy, who may accordingly be dismissed from the Academy and from the naval service for misconduct without trial by court-martial. There are three sorts of officers known to the Navy, viz, commissioned, warrant, and petty (sec. 1410, R. S.); and inasmuch as petty officers may be discharged from the service with bad conduct discharge by sentence of a summary court-martial (sec. 1624, R. S., art. 30), it seems that by "officers" in article 36 is meant at most only warrant and commissioned officers. Cadets at the Naval Academy have neither warrants nor commissions; the object of the studies and discipline to which they are subjected during the whole of the course at the Academy is to fit them for appointment as midshipmen (sec. 1521, R. S.), the lowest commissioned grade of officers of the line (sec. 1362, R. S.), or as second assistant engineers (sec. 1394, R. S.), the lowest grade of officers of the Engineer Corps (sec. 1476, R. S.). They are themselves, by statutory definition, not to be included in general in legislation confined to "officers" of the Navy. In the early days of the Academy, when the students were merely a collection of midshipmen, this was different. The meaning of the word "cadet" is to the same effect. As a cadet-midshipman is, *ex vi termini*, not a midshipman, and a cadet-engineer not an engineer, so a cadet officer or a cadet, simply, is not an officer. Cadets at Annapolis are not liable to court-martial except under the act of 1874 for hazing (citing 1 Op. Atty. Gen., 276, holding that cadets at West Point are subject to court-martial only where expressly authorized by law), and therefore are not entitled to a privilege which, under article 36, is evidently given only to such as are liable in general to the jurisdiction of courts-martial. Accordingly, *held* that a regulation of 1876, providing that cadets are to be dismissed by the Secretary of the Navy for offenses other than hazing, is valid. (15 Op. Atty. Gen., 634.)

The President has power to dismiss a delinquent midshipman from the Naval Academy for violation of the regulations, and that power is not restricted by sections 1229 and 1624 of the Revised Statutes. (*Weller v. U. S.*, 41 Ct.

(Cls., 324.) The Secretary of the Navy's action on February 7, 1905, in dismissing a midshipman from the Naval Academy for continued violation of the regulations regarding the use of tobacco, is presumed to have been the action of the President; particularly as the President appointed another to fill the vacancy, which appointment was signed by the Secretary of the Navy by direction of the President. (*Weller v. U. S.*, 41 Ct. Cls., 324.)

Under the act of March 2, 1895, the Secretary is given power to convene courts-martial for the trial of naval cadets, but it is not mandatory, and the President has the power and authority to dismiss naval cadets, or "midshipmen," as they are now styled, without the intervention of trial by court-martial. (*Weller v. U. S.*, 41 Ct. Cls., 324.)

The act of March 2, 1895, and the other laws relating to the Naval Academy have for many years been construed by the Navy Department to authorize the dismissal of students without trial by court-martial, which has often been done. Where the meaning of a statute is doubtful, the uniform and long-continued construction placed upon it by the department officers charged with its execution is entitled to much weight. (*Weller v. U. S.*, 41 Ct. Cls., 324.)

It will not be contended that a midshipman at the Naval Academy can not be dismissed, or "not continued therein," which is the same thing, for deficiency at an examination without a trial by court-martial; and if the Academic Board can do this, the President can dismiss a midshipman because of a deficiency in conduct, as insubordination or disobedience of orders, particularly when the regulations so provide. (*Weller v. U. S.*, 41 Ct. Cls., 324.)

That students at the Naval Academy are and always have been in the naval service in some capacity has never been doubted, and it was decided in *Cook v. United States* (128 U. S., 254) that they were "officers" of the United States within the meaning of the provisions of the act of March 3, 1883 (22 Stat., 473), respecting longevity pay of officers of the Navy. In the case of *Morton v. United States* (112 U. S., 1), under a similar statute providing longevity pay, it was held that the time of service of a military cadet at West Point is to be regarded as "actual service in the Army." In *Hartigan v. United States* (196 U. S., 169, 38 Ct. Cls., 346) the claimant was summarily dismissed from the West Point Military Academy for misconduct, and it was held, both in the Court of Claims and in the Supreme Court that he was not an officer within the meaning of section 1229, Revised Statutes, and hence could be dismissed without trial and conviction by court-martial. It is not believed that the law, properly construed, makes any distinction in this respect between midshipmen at the Naval Academy and cadets at the Military Academy. Neither of them holds either a commission or a warrant; both are appointed by the President; those at the Military Academy are called cadets, and those at the Naval Academy are now called midshipmen. There may have been a time in the history of the Government when a midshipman should have been regarded as an officer within the meaning of section 1229, Revised Statutes, and when the students at the Naval

Academy were on a different footing in that regard than the students at the Military Academy; but now there are no midshipmen except those appointed to the Naval Academy and undergoing instruction therein or in connection therewith. Under section 1519 midshipmen found deficient at any examination may be dropped from the service. Under section 1547 the Secretary of the Navy, with the approval of the President, may issue regulations and instructions for the Navy, and the regulations of the Naval Academy providing for the dismissal of midshipmen were presumably made pursuant to such power. (*Weller v. U. S.*, 41 Ct. Cls., 324.)

In the case of *Hartigan v. United States* (196 U. S., 169, 38 Ct. Cls., 346), which held that a cadet at the Military Academy was not an officer within the meaning of section 1229, both courts in their opinions point out a clear distinction between service at the Academy and in the Army, and that while the military cadets are a part of the Army they are not officers of the Army, but rather are undergoing instruction to become such; and in the opinion of the Court of Claims this significant expression occurs: "These appointments (to the Academy) are made by the President without the advice and consent of the Senate, and it seems plain that Congress did not intend by any legislation that had been enacted to withhold from him the power of summary dismissal for the good of the academy, for such a power can wisely be left to his discretion." (*Weller v. U. S.*, 41 Ct. Cls., 324.)

The case of *Perkins v. United States* (116 U. S., 483, 20 Ct. Cls., 438), where the claimant entered the academy as a cadet-engineer and after graduation therefrom was held by both courts to be an officer within the meaning of section 1229, Revised Statutes, differs from that of an undergraduate midshipman at the Naval Academy, in that the former was appointed pursuant to sections 1522-1525, Revised Statutes, then in force, which required some technical knowledge before admission; that he had graduated from the Naval Academy and had served in the Navy two years under orders; that the course then prescribed for cadet-engineers was four years (sec. 1524, R. S.), so that he was no longer a cadet and necessarily must have been an officer of some grade, and by his pay had been so recognized. It should also be remarked that it was conceded in the Perkins case that the claimant might have been dismissed for misconduct, under the provisions of section 1525, Revised Statutes, entirely independent of section 1229. (*Weller v. U. S.*, 41 Ct. Cls., 324.)

In the case of *Baker v. United States* (125 U. S., 646), which held that the service of a midshipman at the Naval Academy was service as an "officer in the Navy," within the meaning of the statute providing for longevity pay, the Supreme Court in its opinion lays great stress upon the fact that the claimant at the time of his appointment to the Naval Academy was named as a "midshipman" pursuant to law then in force, and that according to law then in force midshipmen were ninth in grade in the active list of the officers of the Navy. (*Weller v. U. S.*, 41 Ct. Cls., 324.)



The controlling statutes on the subject relative to the Military Academy are not practically the same as those affecting the Naval Academy, but are essentially analogous and equivalent. As to both appointees it may, therefore, be said that the laws relating to courts-martial do not prevent dismissal for deficiency in studies or for misconduct. (25 Op. Atty. Gen., 579.)

Prior to the act of April 9, 1906, a right to summarily dismiss midshipmen had been asserted and even exercised by successive Secretaries of the Navy, although it had recently been disputed. Almost simultaneously, however, with this enactment, the Court of Claims, in the case of *Weller v. United States*, decided April 2, 1906, sustained this right. It seems to the Navy Department quite clear that Congress intended by this law to limit the discretionary power of the Secretary of the Navy to summarily dismiss midshipmen, and to provide one uniform method of procedure by which midshipmen should be dismissed from the academy for misconduct. (File 5146-1, July 13, 1906.)

The Secretary of the Navy, with the written approval of the President, has the power to dismiss midshipmen for due cause in any case except that in which the cause consists in a "single act of hazing." A midshipman who is recommended for punishment for a "single act of hazing" is thus in the unique position, as compared with other offenses against Naval Academy regulations, of being protected by statute against dismissal except by sentence of a court-martial. (File 5252-72, Sept. 20, 1915; C. M. O. 31-1915.)

The Secretary of the Navy, acting for the President, has the power to dismiss a midshipman for insubordination. This power, as sustained by the Court of Claims in the case of *Weller v. United States*, was not taken from him by the act of April 9, 1906 (34 Stat., 104), providing for the trial of midshipmen by court-martial for hazing. Furthermore, said act relates only to midshipmen "at the Naval Academy," and in this case the midshipman had completed his four years' course at the academy and was undergoing the two years' course at sea prior to final graduation. The dismissal of the midshipman in this case being legal, the records can not be changed so as to show that his resignation was accepted. (File 5252-60, Feb. 14, 1914.)

Section 1229 and article 36 of section 1624 of the Revised Statutes did not deprive Congress of power to make any provision for the removal of an officer, even by the Executive who appointed him. It is not within the power of a legislature to deprive its successor of the power of repealing an act creating a public office. (*Crenshaw v. U. S.*, 134 U. S., 99.)

See above, under "Deficiency in conduct."

**Court-martial of midshipmen for hazing, etc.**—Cadets at Annapolis are not liable to court-martial except under the act of 1874, for hazing. (15 Op. Atty. Gen., 634, citing 1 Op. Atty. Gen., 276, holding that cadets at West Point are subject to court-martial only as expressly authorized by law.)

The commands of the law of 1874 (June

23, 18 Stat., 203), are imperative and require that in all cases where it shall come to the knowledge of the superintendent of the Naval Academy that any midshipman is guilty of the offense commonly known as hazing, "it shall be the duty of said superintendent to order a court-martial." Under these circumstances, the superintendent has not the right to exercise a discretion as to whether he shall order a court-martial for the trial of certain midshipmen in whose case it has come to his knowledge, as the result of a preliminary examination through a board of officers, that they are guilty of the offense of hazing. It therefore only remains for him to order a court-martial for the purpose of trying them, and should they be either convicted or acquitted by such court-martial the responsibility resting upon the superintendent under the law will have been fully discharged. A determination of the question whether or not such conviction or acquittal could be successfully pleaded in bar of a criminal prosecution, instituted in the civil courts for an assault or other crime involved in the offense of hazing, could not in any possible manner aid the superintendent in the execution of the law. The superintendent or the Secretary might, without the least impropriety, after such trials are had, bring all the facts to the attention of the United States attorney for the district of Maryland, in which event the question of jurisdiction of the civil authorities would become a question for the consideration of the Department of Justice. (25 Op. Atty. Gen., 543.)

The act of March 3, 1903 (32 Stat., 1198), does not confer upon the superintendent of the Naval Academy or the Secretary of the Navy, or upon both conjointly, the power summarily to dismiss from the Academy without trial by court-martial a midshipman found guilty of the offense of hazing. That act is to be read in connection with the act of June 23, 1874 (18 Stat., 203), requiring the superintendent of the Naval Academy to order a court-martial in all cases of hazing which may come to his attention, and there is nothing in the later act showing a purpose upon the part of Congress to dispense with the formality of requiring a court-martial for the trial of a midshipman upon the charge of hazing. The phrase, "found guilty," appearing in the act of 1903, when read in connection with the act of 1874, refers to the finding of a court-martial and not of the superintendent or a board of officers other than a court-martial. This opinion should not be applied to cases other than hazing; it is unnecessary to decide that a midshipman may not, under certain circumstances, be summarily dismissed from the Naval Academy without first being tried by court-martial. (25 Op. Atty. Gen., 543.)

The act of June 23, 1874 (18 Stat., 203), was in terms mandatory that a "court-martial" be ordered by the superintendent of the Naval Academy in any case of hazing which came to his knowledge; that the finding of such court, when approved by the superintendent, should be final; and that the accused, if found guilty, "shall, upon the recommendation of said court, be dismissed." The act of March 3, 1903 (32 Stat., 1198), required the superin-

tendent of the Naval Academy to "make such rules, to be approved by the Secretary of the Navy, as will effectually prevent the practice of hazing;" and provided that any cadet "found guilty" of participating in, or encouraging or countenancing such practice, "shall be summarily expelled from the academy and shall not thereafter be appointed to the corps of cadets or be eligible for appointment as a commissioned officer in the Army or Navy or Marine Corps until two years after the graduation of the class of which he was a member." The effect of these statutes was to deprive the proper administrative officer of discretion in dealing with the offense of hazing at the Naval Academy; and to require that midshipmen charged with hazing be brought to trial by court-martial, to be followed upon conviction by summary dismissal. (File 26283-925, Sept. 4, 1915.)

By act of April 9, 1906 (34 Stat., 104), Congress repealed "so much of the acts approved June twenty-third, eighteen hundred and seventy-four and March third, nineteen hundred and three, as requires the superintendent of the United States Naval Academy to convene a court-martial in *all cases* when it shall come to the knowledge of the said superintendent that any midshipman has been guilty of the offense commonly known as 'hazing,' and declares the finding of a court-martial so convened, when approved by the said superintendent, *final*, and *directs* that any midshipman found guilty by such court-martial *shall be summarily dismissed* from the said Academy." By said act of 1906 it was further provided that "the offense known as 'hazing' may hereafter be proceeded against, dealt with, and punished as offenses against good order and discipline and for violation and breaches of the rules of said Academy." Thus Congress has removed the distinction previously made between hazing and other offenses committed by midshipmen. But one restriction is placed upon the discretion of the administrative officers in dealing with the offense of hazing, as distinguished from other offenses committed by midshipmen, and that is that "no midshipman shall be dismissed for a single act of hazing except under the provisions of section three of this act," viz, pursuant to the sentence of a court-martial as provided by the act of June 23, 1874. (File 26283-925, Sept. 4, 1915.)

Trial by court-martial is not now required in any case of hazing, it being left entirely to the discretion of the superintendent whether such trial shall be had. If the superintendent, in the exercise of the discretion thus expressly vested in him by the act of 1906, decides that a midshipman should be tried by court-martial for hazing, then the superintendent's decision must be approved by the Secretary of the Navy before the superintendent would be authorized to proceed under the act of 1874 to order a court-martial and cause the accused midshipman to be brought to trial. If the Secretary of the Navy approves the superintendent's decision that a trial be had, then the court-martial is not required, under the act of 1906, to impose a sentence of dismissal, but may sentence the accused, if convicted, to any punishment authorized by the act of June 23, 1874 or by the

act of March 3, 1903, or by the rules of the Naval Academy. (File 26283-925, Sept. 4, 1915.)

If the accused is charged with only "a single act of hazing," and the superintendent decides not to bring him to trial by court-martial, or the Secretary of the Navy does not approve the superintendent's recommendation that such trial be had, then the law of 1906 says explicitly that he shall not be dismissed. He may, however, be punished by the superintendent in accordance with the rules of the academy, otherwise than by dismissal. (File 26283-925, Sept. 4, 1915.)

If the accused is guilty of more than "a single act of hazing," he may be dismissed without trial by court-martial; but in that event he must be proceeded against in accordance with section one of the act of 1906, which details the procedure to be followed in any case in which the superintendent "shall believe the continued presence of any midshipman at the said Academy to be contrary to the best interests of the service;" that is, there must be a written report by the superintendent, a reference of the report to the accused by the Secretary of the Navy, with opportunity for the accused to make written reply thereto, and the written approval of the President before the dismissal may be executed. In addition, if any issue of fact is raised by these proceedings, there must be a "board of inquiry" convened by the Secretary of the Navy to pass thereupon. (File 26283-925, Sept. 4, 1915.)

The words, "a single act of hazing," are to be taken in their literal sense. If an accused was guilty of but one "act" of hazing he can not be dismissed without trial, notwithstanding that several different persons may have been victims of the "single act." Thus, one order obeyed by several midshipmen would be only a "single act" of hazing, although it might legally be more than one offense. On the other hand, if one midshipman in hazing another gives several orders which are obeyed, this would constitute several "acts" although there was only one victim and the several distinct transactions occurred at the same place and very near each other in one continuing attempt to defy the law. (File 26283-925, Sept. 4, 1915.)

A midshipman who, while absent in a distant and foreign station, was nominated and confirmed to be an ensign, "subject to examination," but who was never examined, never became an ensign; and having in the meantime been brought to trial by court-martial, was properly tried as a midshipman. (16 Op. Atty. Gen., 550.)

Cadets admitted to the Naval Academy on 10 May and 4 September, 1886, respectively, became naval cadets in the full sense of the term upon the dates named; they had, on those dates respectively, been duly nominated to the place, accepted the nomination, passed successfully the examination required by law, taken the oath prescribed for naval cadets, been assigned to and entered upon the discharge of the duty pertaining to the position and from those dates their salaries commenced. Their appointments, although not issued until the 11th of October, 1886, relate back by express recitals to these dates respectively, and are conclusive



evidence of the appointments at the date aforesaid. The appointments accordingly took effect on 10 May and 4 September, 1886, so as to render them liable to trial by court-martial. (13 Op. Atty. Gen., 507.)

The minority of some of the members of a court-martial which tried a midshipman and sentenced him to dismissal from the Navy does not invalidate the proceedings of the court-martial, notwithstanding that at common law minority might have been such an objection as would invalidate the verdict of a jury or a judgment thereon. Whatever effect this fact would have in a common law court, it has nothing to do with the action of a court-martial which exists by virtue of statute and regulations conformable thereto. (16 Op. Atty. Gen., 550.)

To constitute the offense of hazing at the Naval Academy, under the act of June 23, 1874, chapter 453, it is essential that the victim should be a new cadet of the fourth class. The act does not define the offense against which the penalty is denounced. This is not unusual. Congress frequently affixes a penalty to a common law offense by name, without defining it. In such cases resort must be had to the common law to ascertain the ingredients of the offense. In this case the statute is local to the Naval Academy, and the offense named is unknown, either to the common or statutory law of the land. Naval cadets could not be guilty of an "offense" unless there was some rule or regulation prescribed by competent authority to be offended. Reference must therefore be had to the rules and regulations in force at the Naval Academy for a definition of the "offense commonly known as hazing." An exhaustive examination of the rules, regulations, and orders on the subject shows that to constitute the offense of hazing as understood at the time of this enactment it was essential that the victim of the maltreatment should be a new cadet of the fourth class. Accordingly, *held* that, unless the charge on which the cadet is arraigned alleges that the victim of the maltreatment or hazing was a new cadet of the fourth class, a court-martial organized under the statute would not have jurisdiction to try it. If the charge makes the allegation and the proof fails to maintain it, the court-martial should acquit the accused. A charge alleging that the victim of a cadet's maltreatment was a candidate for admission would not come within the jurisdiction of a court-martial organized under this statute, nor would proof that the victim was a candidate authorize conviction on a charge properly drawn. (18 Op. Atty. Gen., 292.)

The act of 3 March, 1903 (32 Stat., 1198), provides that the superintendent of the Naval Academy shall make such rules "as will effectually prevent the practice of hazing," and that a "cadet found guilty of participating in or encouraging or countenancing such practice shall be expelled from the Academy." Hazing has such a well-known meaning that it need not be defined by rules under this statute; accordingly, the dismissal of a midshipman pursuant to a sentence of court-martial upon the charge of hazing was legal, the particular acts set forth as constituting such offense being enumerated

in the specifications under said charge. (*Melvin v. U. S.*, 45 Ct. Cls., 213.)

The regulations of the Naval Academy of 1876 described hazing as "molesting, annoying, ridiculing, maltreating, or assuming unauthorized authority over the new cadets of the fourth class" by the older cadets. A charge preferred against a midshipman for violation of the act of June 23, 1874, to prevent hazing at the Naval Academy was within the jurisdiction of the court-martial convened pursuant thereto, the specifications of the charge setting forth that the offense was committed upon "a cadet of the fourth class," named therein, and consisted of "pulling the nose" and "otherwise maltreating" and "striking at" and "otherwise annoying" the said cadet; it elsewhere appearing in the record that the person charged with the offense was then a cadet of the second class. Conceding that the case was one of "personal rencounter or fight" between the parties, and that the facts in evidence make out a case of that sort, this would go only to show that the decision of the court was wrong in convicting the accused, not that it acted without jurisdiction; but it was the duty of the court to determine the truth or falsity of the charge upon the testimony adduced, and its decision when regularly approved by the proper authority has the effect of a final judgment which can not be collaterally brought into question. Whether the decision was correct or erroneous could not affect the validity of the court's finding when regularly approved. (18 Op. Atty. Gen., 376.)

A member of the fourth class at the Naval Academy who failed to pass his examinations and who was reappointed to the same class the following year was, during said year, as much an "older cadet" within the definition of the offense of "hazing" as a cadet who originally entered at the same time and had been advanced to a higher class. All who are not "new cadets of the fourth class" and therefore liable to be victims of "hazing," should be held to be "old cadets" and capable of being the perpetrators of the offense. The length of service at the Academy which takes a cadet out of the one category and into the other can not be determined by any general rule but must be governed by the local customs and traditions and the popular meaning of the terms. (18 Op. Atty. Gen., 507.)

**President's approval of sentence of dismissal or suspension.**—The act of 23 June 1874 (18 Stat., 203), providing for the court-martial of cadet-midshipmen at the Naval Academy is not repealed by the act of 2 March 1895 (28 Stat., 838), which provides that sentences of suspension and dismissal approved by the superintendent "shall not be carried into effect until confirmed by the President." Accordingly, *held* that the dismissal of a midshipman upon sentence of a court-martial convened under the act of 1874, approved by the superintendent, was legal. (*Melvin v. U. S.*, 45 Ct. Cls., 213.)

As a midshipman is neither a commissioned nor a warrant officer, a sentence of dismissal imposed by court-martial convened by the commander-in-chief of the Atlantic Fleet need

not be submitted to the President for confirmation, but may be carried into execution upon confirmation of the officer ordering the court, as provided by article 53, Articles for the Government of the Navy (sec. 1624, R. S.); neither the President nor the Secretary of the Navy has lawful authority to approve or disapprove the sentence in such a case (citing 11 Op. Atty. Gen., 251). (File 26262-198, Nov. 13, 1908.)

As a midshipman is neither a commissioned nor warrant officer, it seems that he may be dismissed pursuant to a sentence of a court-martial without the express approval thereof by the President, unless there be some explicit statutory provision requiring such executive approval. (16 Op. J. A. G., 70, Nov. 2, 1911.)

In the case of a midshipman tried by general court-martial by order of the commander-in-chief of the Atlantic Fleet and sentenced to dismissal, the commander-in-chief having approved the proceedings, findings, and sentence, and stated that, "in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record is respectfully referred to the Secretary of the Navy for transmittal to the President," the action of the convening authority was approved by the Secretary of the Navy, October 6, 1909, with the statement that reference to the President is "unnecessary in the case of midshipmen." (G. C. M. Order No. 36, Oct. 13, 1909.)

It is to be noted that the act of March 2, 1895 (28 Stat., 838), which authorized the trial of midshipmen by "general courts-martial" (convened by the Secretary of the Navy) for any offense, provided that sentences of suspension and dismissal must be confirmed by the President before being executed. It may be contended that approval of the President is necessary before such sentences may be executed in hazing cases, where the court-martial is convened by the superintendent under the act of 1874. It would be advisable to have such sentences so confirmed, thus avoiding any question on this ground, although this is not believed to be necessary. (File 26283-925, Sept. 4, 1915; C. M. O. 31-1915.)

The notice to a midshipman by the Secretary of the Navy that the President had approved the sentence of a court-martial in 1868 dismissing him from the Navy is evidence both of approval and promulgation. The President acts through the Secretaries of War and of the Navy in such matters; a promulgation is not necessarily a publication in a newspaper. (16 Op. Atty. Gen., 550.)

In the case of a midshipman tried by general court-martial by order of the commander in chief of the North Atlantic Fleet and sentenced to be dismissed from the United States naval service, the proceedings, findings, and sentence were approved by the convening authority and the record was submitted by the department to the President "in conformity with article 53 of the Articles for the Government of the Navy (sec. 1624, R. S.), with the recommendation that the sentence be confirmed, but that, in view of the fact that the court unanimously recommended clemency it be commuted to the punishment set forth

below," viz, that he "be turned back into and become a member of the next lower class of midshipmen, the present first class at the United States Naval Academy; to continue in the meantime on probationary sea duty; to take temporary rank at the head of the class to which he is reduced; and, finally, to take rank as a member of that class upon its graduation at the end of the prescribed six years' course, in accordance with the requirements for determining the same as applied to members of that class"; which action was accordingly taken by the President as recommended. (G. C. M. Order No. 77, Sept. 1, 1905. Note: On March 1, 1909, the sentence of dismissal imposed by a general court-martial convened by the commander in chief of the Pacific Fleet for the trial of a midshipman was mitigated by the Secretary of the Navy in the same manner as set forth above, without submission to the President; see G. C. M. Order No. 10, Mar. 1, 1909. In another case, on the same date, the Secretary of the Navy, without reference to the President, mitigated a sentence of dismissal imposed by a general court-martial convened by the commander in chief of the Pacific Fleet, so that the accused midshipman, if commissioned at the completion of his final examination, "will be commissioned as next to the lowest number in his class"; see G. C. M. Order No. 9, Mar. 1, 1909.)

**When sentence of dismissal is executed.**—Where the commander in chief who convened a court-martial approved a sentence of dismissal imposed by said court upon a midshipman, but concluded with the statement that "the record is respectfully referred to the Secretary of the Navy," held that this action did not show an intention on the part of the convening authority to execute the sentence at the time, but implied that the record was forwarded to the Secretary of the Navy in order that the midshipman might be dismissed and the sentence executed by the department; accordingly, mere publication by the commander in chief of his action did not operate to dismiss the midshipman from the service, but the sentence remained unexecuted and subject to mitigation by the President in the exercise of his pardoning power. (File 26262-198, Nov. 13, 1908. Note: In this case the President issued a formal pardon to the midshipman in question, on condition that he take rank at the foot of his class and if commissioned be commissioned as the lowest number therein.)

**Arrest of midshipman pending investigation and action.**—A midshipman may properly be placed under arrest pending action on a recommendation by the superintendent of the Naval Academy for his dismissal. The fact that a court of inquiry may be ordered to investigate the allegations against him does not of itself require his being released from arrest. (C. M. O. 22-1915, citing file 28028-203:1, June 8, 1915.)

**Minor punishments imposed without court-martial.**—The act of March 2, 1895 (28 Stat., 838), did not deprive the proper administrative officers of the power to impose punishment other than dismissal for violation of Naval Academy regulations, where the officers of the academy consider that the best inter-



ests of the institution will be promoted by the imposition of minor punishments by themselves, without the intervention of a court-martial or without resorting to the power of dismissal. (File 26283-925, Sept. 4, 1915.)

**Effect of dismissal.**—There is no law prohibiting the appointment of a former midshipman as an officer of the Navy because of his dismissal from the Naval Academy on September 30, 1915, such dismissal not having been for hazing nor pursuant to sentence of a court-martial, but in accordance with section 1 of the act approved April 9, 1906 (34 Stat., 104), upon investigation of charges consisting principally of false swearing. Accordingly, the question whether such appointment should be made is one of policy and not of law. (File 26283-925:4, Aug. 7, 1916.)

The only offense, if any, which creates a statutory disqualification for reappointment of a midshipman is that of hazing. The spirit of the laws is, however, against the reappointment of any person who has been dismissed from the Navy, as will be seen by reference to section 1441, Revised Statutes. (File 5252-43, Oct. 5, 1911.)

The act of June 23, 1874 (18 Stat., 203), provided for the trial by court-martial and dismissal of any midshipman guilty of hazing, and concluded, "and the cadet so dismissed from said Naval Academy shall be forever ineligible to reappointment to said Naval Academy." The act of March 3, 1903 (32 Stat., 1198), provided that any midshipman found guilty of participating in or encouraging the practice of hazing should be summarily expelled from the Academy and should not thereafter be reappointed to the Academy or be eligible for appointment as a commissioned officer in the Army, Navy, or Marine Corps "until two years after the graduation of the class of which he was a member." The act of April 9, 1906 (34 Stat., 104), provides that no midshipman shall be dismissed for a single act of hazing except after trial and conviction by court-martial and expressly repeals portions of the two laws above cited, but says nothing about ineligibility for reappointment of midshipmen dismissed for hazing, which appears, therefore, to continue in effect. (File 5252-43, Oct. 5, 1911.)

The act of August 29, 1916 (39 Stat., 589), provides that "all former officers of the United States naval service, including midshipmen, who have left that service under honorable conditions \* \* \* and who shall have enrolled in the Naval Reserve Force, shall be eligible for membership in the Fleet Naval Reserve." *Held*, that a midshipman who was dismissed by sentence of court-martial is not eligible for membership in the Fleet Naval Reserve, although he has been pardoned for the offense for which dismissed. (File 26282-287:4, Mar. 16, 1918; C. M. O. 30-1918; 31 Op. Atty. Gen., 225.)

A midshipman having been legally dismissed, the records can not be changed to show that his resignation was accepted. (File 5252-60, Feb. 14, 1914.)

The act of June 23, 1874 (chapter 453), to prevent hazing at the Naval Academy and providing that a cadet-midshipman dismissed pursuant thereto "shall be forever ineligible to

reappointment to said Naval Academy" was designed to cut off all chance of reinstatement or reappointment from such cadet; accordingly, without considering very carefully what the effect of a pardon by the President might be, or whether after an unconditional pardon a reappointment is strictly legal or not, *held* that the President would not be justified in abrogating the clear intent and plain meaning of the statute, and the Attorney General wishes strongly to advise against any such course as will tend, by indirection, to nullify the statute; the parties who consider themselves aggrieved should apply to Congress for a change of the law; while the statute remains in force the President should not interfere to relieve the party found guilty. (15 Op. Atty. Gen., 80. See 31 Op. Atty. Gen., 225, noted under sec. 1441, R. S.)

The question whether a dismissed midshipman is eligible to vote depends upon the laws of the State in which he claims the right, and is not one under the jurisdiction of the Navy Department. The question whether a dismissed midshipman is eligible to hold a State office is similarly not under the cognizance of the Navy Department. With reference to his eligibility to hold a Federal position, under the civil service rules and regulations any person who has been dismissed from the military or naval service is, it is understood, barred from examination for the United States civil service within one year from the date of such dismissal. Likewise it is provided by the Federal statutes that any officer who has been dismissed from the Navy by sentence of court-martial shall never again become an officer of the Navy. Also, with specific reference to midshipmen it is provided by law that any midshipman summarily expelled from the Academy for hazing shall not thereafter be reappointed or be eligible for appointment as a commissioned officer in the Army, Navy, or Marine Corps until two years after the graduation of the class of which he was a member. (File 5252-79, June 19, 1916.)

**Reinstatement of midshipmen.**—A midshipman who has been dismissed for misconduct by order of the President pursuant to law can not be legally reinstated in his former position by revocation of the order of dismissal. The only way in which such a former midshipman can legally obtain readmission to the Naval Academy would be by new appointment in the manner provided for any other candidate. The President's action can not, upon the submission of additional evidence, be reconsidered and revoked, and the midshipman thereby reinstated in his former position. (File 5252-72, Sept. 27, 1915; affirmed, 5252-73, Oct. 1, 1915; sustained by Attorney General, Oct. 15, 1915, 30 Op. Atty. Gen., 457.)

The President is not authorized to reopen the case of a midshipman who has been dismissed from the Naval Academy with a view to revoking the order of dismissal and reinstating him. (30 Op. Atty. Gen., 457, following 25 Op. Atty. Gen., 579.)

A midshipman who has satisfactorily completed the course for the first year at the Naval Academy but who in the following year is found deficient and allowed to resign need not be re-

quired, when given a new appointment, to go over the course for the first year a second time, but may legally recommence the course for the second year, provided that such action is rec-

ommended by the Academic Board. (C. M. O. 12—1915, citing file 5252-65, Mar. 12, 1915.)

For other cases see notes to sections 1514, 1515, and 1517, Revised Statutes.

**Sec. 1520. [Academic course.]** The academic course of cadet midshipmen shall be six years.—(3 Mar., 1873, c. 230, s. 1, v. 17, p. 555.)

Amendments to this section were made by the laws noted under section 1512, Revised Statutes, which changed the title of students at the Naval Academy to "midshipmen;" and by act of March 7, 1912 (37 Stat., 73), which provided "that the course at the Naval Academy shall be four years."

By act of March 4, 1917 (39 Stat., 1182), it was provided that "the President, in his discretion, is authorized to reduce the course of instruction at the Naval Academy from four to three years for a period of two years from the date of the approval of this act, and may during said two years graduate classes which have completed a three-year course."

By act of April 2, 1918 (40 Stat., 501), it was provided "that the President be, and he is hereby, authorized, until August first, nineteen hundred and twenty-one, to reduce, in his discretion, the course of instruction at the United States Naval Academy from four to three years and to graduate classes which have completed such reduced courses of instruction."

By act of August 5, 1882 (22 Stat., 285), it was provided "that the Secretary of the Navy may prescribe a special course of study and training at home or abroad for any naval cadet;" as to change of title from "naval cadet" to "midshipman" see note to Section 1512, Revised Statutes.

By act of March 4, 1913 (37 Stat., 891), it was provided that "hereafter the service of a midshipman at the United States Naval Academy, or that of a cadet at the United States Military Academy, who may hereafter be appointed to the United States Naval Academy, or to the United States Military Academy, shall not be counted in computing for any purpose the length of service of any officer in the Navy or in the Marine Corps."

By act of May 20, 1886 (24 Stat., 69), provision was made for instruction at the Naval Academy as to the effect of alcoholic drinks and narcotics, and for the removal of any officer, superintendent or teacher who shall refuse or neglect to comply with this provision.

**Sea service as part of six-year course.**—As shown by the regulations governing the Naval Academy, sea service for several years, and "other than in practice ships," has uniformly been a part of the academic course at the Naval Academy since its establishment until now. Naval education before the establishment of the academy was, of course, obtained in great measure whilst the student (midshipman) was undergoing sea service. The earliest appointees to the academy (excluding the midshipmen who were at first

collected from service and sent thither), which appointees were designated acting midshipmen, after a partial course on shore were sent to sea for several years, and then returned to Annapolis and finished their studies there. These appointees at the close of the earlier course on shore received a certificate which testified to their fitness to go to sea; and before the end of their sea service they became midshipmen, continuing, however, to be students of the academy. Subsequently (1851) the two previous courses on shore pursued by appointees to the academy, one before and the other after sea service, were consolidated into a single term of four years preliminary to sea service. This system has continued in existence ever since; the act of July 16, 1862 (ch. 183), in the meantime requiring students to be styled midshipmen throughout the whole course, and this style having been again changed to that of cadet-midshipmen by the act of 1870. (15 Op. Atty. Gen., 637; see sec. 1512, R. S., and note thereto.)

The regulation issued by the Secretary of the Navy requiring the students or midshipmen at the Naval Academy, after the completion of their purely academic studies, to perform a term of duty on shipboard in order to acquaint themselves with practical navigation and seamanship, is a perfectly valid regulation; and the act of July 11, 1862, section 11 (12 Stat., 585), providing that students at the Naval Academy shall be commissioned ensigns if successful upon their final graduating examination, should be construed as giving distinct legislative sanction to the regulation of the department, then in force, by which that examination was required to be taken after completion of this period of instruction on shipboard. It must be assumed that Congress, when it made the law of 1862, had in mind the regulations which had been prescribed and enforced under its own authority, and which, so long as they were in operation and remained unchanged by competent authority, had, as Congress well knew, the efficiency of a statute. (11 Op. Atty. Gen., 158.)

The last two years of the academic course of cadet-midshipmen were spent at sea in other than practice ships. After four years at the academy they were temporarily detached from that institution, by orders of the Navy Department, and were sent to sea singly or in squads. On shipboard they performed such active duties as were assigned to them. At the end of the two years they were required to return and did return to the Naval Academy, where they were subjected to a "final graduating examination" before the Academic Board. If successful at such examination they received appointments as midshipmen, and were thereafter classified in the Navy Register as having "graduated" at that date; and they were never



so designated, either in the Navy Register or elsewhere, until after they had passed such examination at the end of the six years' course. (*U. S. v. Redgrave*, 116 U. S., 474, 475.)

The words "final graduating examination" in section 11 of the act of July 16, 1862, chapter 183, and "graduating examination" in section 12 of the act of July 15, 1870, chapter 295, signify that examination which under the regulations of the Naval Academy takes place after the prescribed term of sea service has been performed. (15 Op. Atty. Gen., 637; reconsidered and affirmed, 16 Op. Atty. Gen., 296.)

The "final graduating examination" referred to by the act of July 16, 1862 (12 Stat., 583), which provided that midshipmen passing such examination shall be commissioned ensigns, was not the final academic examination of the Naval Academy, but the last examination referred to in the regulations existing at the time when the act was passed, and which required a final examination after certain sea service. (*Benjamin v. U. S.*, 10 Ct. Cls., 474.)

The statute in express terms provides that "the academic course of cadet-midshipmen shall be six years." If the Navy Department had assumed to make any regulations by which the final graduation should take place in less time, such regulations would have been void. But it did not so assume. It arranged for a two-year course afloat as a part of the academic course, and exacted a preliminary examination to test the cadet's qualifications therefor. But the cadet afloat was a member of the academy. He still was subject to a final examination at that institution, and without such examination successfully sustained never became a graduate. He was not so denominated until then, either in the Navy Register or elsewhere; and it was not until that final test had been sustained that, either by the practice of the academy or by the provision of the statute, he did or could receive his certificate of graduation. There is a very plain distinction between his case and that of a cadet-engineer, fully explained in *United States v. Redgrave* (116 U. S., 474, noted below). (*Crenshaw v. U. S.*, 134 U. S., 99.)

The regulations prescribing the qualifications for appointment of cadet-engineers fixed a higher average age by two years for cadet-engineers entering the academy than was required by law for cadet-midshipmen so entering. After completing the four-year course, cadet-engineers were permanently detached from the academy, and were never required to return to that institution. They remained in active service at sea, or upon other duty, two or three years or longer, until vacancies occurred in the grade of assistant engineer, when they were ordered, singly or in groups, for examination for promotion, under the provisions of section 1392 of the Revised Statutes, before a board of engineer officers which held its sessions at Philadelphia. (*U. S. v. Redgrave*, 116 U. S., 474, 475.)

The certificate given to the midshipman at the end of four years spent in the academy differed in its terms from the certificate issued to the cadet-engineer in the words "preparatory

to the two years' course afloat." Cadet-engineers were not undergraduates when they were performing the service incident to the two years following their study at the academy, but were then in the discharge of the duties incident to a period between graduation and promotion. The cadet-midshipman at the end of the two years' course afloat was required to return to the academy, subjecting himself again to some extent to the jurisdiction of the institution in order that an academic board might determine whether his acquirement afloat was sufficient, in connection with his scholarship at the institution, to justify his certificate of graduation. His education was theoretical and practical; the one he acquired in the immediate institution, the other on the high seas; but each acquirement came within the course of study covered by a period of six years. According to the decision of the Supreme Court the term of service of a cadet-engineer was but four years. (*Harmon v. U. S.*, 23 Ct. Cls., 132.)

**Sea service eliminated by reduction of course to four years.**—Prior to the act of March 7, 1912 (37 Stat., 73), the course at the Naval Academy was six years (sec. 1520, R. S.), the first four of which were spent in pursuing the academic studies at the academy, and the remaining two years at sea, upon the successful termination of which, as determined by a final examination, the midshipmen were commissioned ensigns. The four years at the academy constituted an undergraduate course, and the two years' service at sea was in the nature of a postgraduate course. The act of May 13, 1908 (35 Stat., 128), made two pay grades for midshipmen by providing that those at the academy, that is, those in the undergraduate course, should receive pay at the rate of \$600 per annum, and that after graduation from the academy, that is, after completing the four years' undergraduate course and while performing the two years' service at sea—the postgraduate course—they should receive pay at the rate of \$1,400 per annum. The effect of the act of March 7, 1912, was to eliminate the two years' service at sea—the postgraduate course—and also the pay grade provided for those thus previously serving. It follows, therefore, that the only grade of midshipmen now authorized by law is that for those pursuing the four years' course at the academy. (20 Comp. Dec., 141. Note: The act of May 13, 1908, 35 Stat., 128, contained the following provision, which is that referred to in this decision: "The pay of midshipmen shall hereafter be six hundred dollars per annum while at the Naval Academy, and one thousand four hundred dollars per annum after graduation from the Naval Academy.")

The effect of the act of March 7, 1912 (37 Stat., 73), was to eliminate the two years at sea and also the pay grade provided for those previously serving at sea. It follows, therefore, that the only pay for midshipmen now authorized by law is that for those pursuing the four years' course at the Naval Academy, viz, \$600 per annum, and this is the base pay of midshipmen within the meaning of the act of August 29, 1916 (39 Stat., 587), establishing the Naval Reserve Force and providing that "the annual retainer pay of officers of the Fleet Naval Reserve shall be two months' base pay

of the corresponding rank in the Navy." (23 Comp. Dec., 279.)

For laws governing pay of midshipmen, see note to Section 1556, Revised Statutes.

**Sea service may be made part of four-year course.**—Under existing laws the curriculum at the Naval Academy may be so changed by the Secretary of the Navy as to permit of the following: "To send one undergraduate class of midshipmen to sea for one year and have them pursue a course on board ship—at the end of the year return them to the Naval Academy for examination in the studies pursued; the Academic Board to lay out a course to be pursued and the subjects in which to be examined. The course to be entirely practical in its nature and include navigation, ordnance and gunnery, seamanship, and engineering." (File 5252-76, Apr. 1, 1916.)

The course of instruction for midshipmen, whether pursued at the Naval Academy or elsewhere, is a matter of regulation in the discretion of the Secretary of the Navy; there is nothing contained in the laws relating to midshipmen which would preclude the Secretary of the Navy from sending one class of midshipmen to sea for a year. (File 5252-76:1, May 1, 1916; affirmed, file 5252-76:2, May 3, 1916.)

**Former midshipmen not required to repeat course on reappointment.**—A midshipman who has satisfactorily completed the course for the first year at the Naval Academy but who, in the following year, is found deficient and allowed to resign, need not be required, when given a new appointment, to go over the course for the first year a second time, but may legally recommence the course for the second year provided that such action is recommended by the Academic Board. (C. M. O. 12—1915, citing file 5252-65, Mar. 12, 1915.)

**Leave of absence during course.**—A midshipman granted a temporary leave of absence while attached to and serving on a vessel at sea in other than practice ships was not thereby detached from duty at sea on board said vessel and continued entitled to the higher rate of pay provided by law for such duty. (14 Comp. Dec., 208.)

Midshipmen are not merely students being educated at the expense of the Government, but are officers in the naval service and as such their salary, fixed by law, can no more be increased or diminished than can the salary of any other officer in the naval service which is fixed by law. Accordingly, where granted leave of absence by the Secretary of the Navy for sickness or other cause, they are still entitled to pay during the period of such leave at the same rate they were receiving at the academy. (8 Comp. Dec., 410.)

For other cases see note to section 1519, Revised Statutes, under "Suspension of midshipman without pay."

**Whether service of midshipmen during course at academy is "service" in Navy.**—The question involved is whether plaintiff, while he was a midshipman, was serving as an officer or enlisted man in the Navy, within the meaning of the act of March 3, 1883 (22 Stat., 473), providing for crediting officers with the actual time that they may have "served" as officers or enlisted men in the Regular or Volun-

teer Army or Navy, or both. The Government contended that it was immaterial whether as a student he is or is not to be regarded as an officer of the Navy, because he did not, whilst a student at the Naval Academy, "serve" either as an officer or an enlisted man in the sense of the act of 1883. It was denied by the United States that the entry of a pupil into the academy is his entry into the naval service, or that the period of his pupilage is actual service within the meaning of the act of 1883; and it was argued that he does not enter into actual service until he is appointed either in the line of the Navy, the Marine Corps, or the Engineer Corps; that as a student he does not serve but is preparing to serve; that he does not render service to the Government but is receiving favors from it; that he can only commence serving after his graduation, such service depending upon his graduating merit; and that compensation is given him not as a payment for service rendered but as a gratuity and an allowance made to him for his support in his preparation for service to be rendered: *Held*, that claimant is entitled to be credited, under the act of March 3, 1883, with the time he so served as a midshipman, on the ground that service as a midshipman at the Naval Academy was service as an officer in the Navy. (U. S. v. Baker, 125 U. S., 646. Note: In this case the claimant was appointed a midshipman on Sept. 30, 1867, and continued to serve as such after the act of July 15, 1870, sec. 12, 16 Stat., 334, which changed the designation of students to "cadet-midshipmen." The decision in this case was followed in U. S. v. Cook, 128 U. S., 254, in the case of a cadet-midshipman appointed after the act of July 15, 1870. See *Morton v. U. S.*, 112 U. S., 1, holding that the time of service of a military cadet at West Point is to be regarded as "actual service in the Army," under a statute providing longevity pay. See also note to sec. 1512, R. S.)

It is true that a student is at the Naval Academy only for education, but the education is at the request and for the benefit of the Government rather than of himself. A raw recruit is not sent to the front until he has had a course of instruction, discipline, and drill in camp. That the time thus spent would constitute service in the Army no one would doubt. Education at the academy, though of a higher order, is required and justified by the same principle. (*Baker v. U. S.*, 23 Ct. Cls., 181; affirmed, 125 U. S., 646.)

In the computation of their longevity pay, officers of the Naval Reserve Force are entitled to credit for previous service in the Navy as cadet-engineers. (24 Comp. Dec., 629.)

In the case of *Moser v. United States* (42 Ct. Cls., 86), it was decided that a student at the Naval Academy under instruction during the Civil War "served" during the Civil War within the meaning of the act of March 3, 1899, section 11 (30 Stat., 1007), relating to the rank and pay of retired officers who served during the Civil War. This decision followed the doctrine laid down in *Baker v. United States* (125 U. S., 646). In the case of *Jasper v. United States* (43 Ct. Cls., 368), it was decided that, under identical conditions, the claimant did not "serve" during the Civil War while



a student at the Naval Academy, and that the decision in the Moser case had been erroneously made, in ignorance of the act of June 29, 1906 (34 Stat., 554), which limited the benefits of Civil War service to any officer who served during the Civil War "otherwise than as a cadet." Held, that no appeal having been taken from the decision in the Moser case that decision, notwithstanding that it may have been in error, is final and binding upon the Government and entitles the claimant, so long as he may be on the retired list of the Navy, to the pay benefits provided by law for retired officers who "served" during the Civil War; that the law of a case may sometimes be settled wrong, but when it is once settled it is none the less final; that the court could not have been right in both the Moser and the Jasper cases, but that its conflicting decisions "made the law" in each of the two cases; and accordingly that Moser is entitled to increased pay on the retired list in accordance with the former decision in his case for periods subsequent to that covered in the former suit and for which the accounting officers of the Treasury had refused to allow such increased pay. (*Moser v. U. S.*, 49 Ct. Cls., 285.)

The decision of the Court of Claims that a retired officer who was a student at the Naval Academy during the Civil War is entitled to the increased pay provided for retired officers who "served" during the Civil War by the act of March 3, 1899 (30 Stat., 1007), does not estop the Secretary of the Navy from denying such officer the increased rank on the retired list provided by the same law; the Navy Department being of opinion that time spent by students at the Naval Academy under instruction was not service in the Navy within the meaning of the law. (28 Op. Atty. Gen., 352.) The Secretary of the Navy can not be compelled by mandamus proceedings to place the name of the officer in question upon the retired list with the rank of rear admiral. (*U. S. ex rel. Moser v. Meyer*, 38 App. D. C., 13.)

A cadet serving in the Coast Guard Academy when the Coast Guard is operating as a part of the Navy in time of war is a person "serving in the naval forces of the United States" within the meaning of the act of February 24, 1919 (40 Stat., 1151, sec. 1406), providing for payment of \$60 on resignation or discharge. (26 Comp. Dec., 419. Compare, 26 Comp. Dec., 236, holding that "a cadet of the United Military Academy while in training there as a student is not a person 'serving in the military or naval forces of the United States' within the

meaning of section 1406 of the act of Feb. 24, 1919, 40 Stat., 1151, and therefore is not entitled to the \$60 war service payment provided by said act when honorably discharged.")

A midshipman at the Naval Academy is a "person serving in the naval forces of the United States," and one resigning from the naval service under honorable conditions is entitled to the allowance of \$60 authorized by the act of February 24, 1919. (File 26543-224:11, May 9, 1919; 26543-224:34, Aug. 25, 1919.)

The act of July 1, 1918 (40 Stat., 717), provided "that hereafter, during the existence of war or of a national emergency declared by the President to exist, any commissioned or warrant officer of the Navy, Marine Corps, or Coast Guard of the United States on the retired list may, in the discretion of the Secretary of the Navy, be ordered to active duty at sea or on shore; and any retired officer performing such active duty in time of war or national emergency, declared as aforesaid, shall be entitled to promotion on the retired list to the grade or rank, not above that of lieutenant commander in the Navy or major in the Marine Corps or captain in the Coast Guard, and shall thereafter receive the pay and allowances thereof, which his total active service as an officer both prior and subsequent to retirement, in the manner rendered by him, would have enabled him to attain in due course of promotion had such service been rendered continuously on the active list during the period of time last past." Held that the words "total active service as an officer" mean active service as an officer of the kind previously defined in the same provision, viz, a "commissioned or warrant officer of the Navy, Marine Corps, or Coast Guard," and that service as a midshipman at the Naval Academy, or service as a midshipman at sea after graduation from the academy, should not be considered in determining the amount of "total active service as an officer." (File 26509-225:11, July 12, 1918; affirmed, file 26509-225:16, Nov. 6, 1918, and 26509-225:17, Jan. 21, 1919.)

By act of March 4, 1913, (37 Stat., 891), it was provided that "hereafter the service of a midshipman at the United States Naval Academy, or that of a cadet at the United States Military Academy, who may hereafter be appointed to the United States Naval Academy, or to the United States Military Academy, shall not be counted in computing for any purpose the length of service of any officer in the Navy or in the Marine Corps."

**Sec. 1521. [Appointments on graduation.]** When cadet midshipmen shall have passed successfully the graduating examination at the Academy, they shall receive appointments as midshipmen and shall take rank according to their proficiency as shown by the order of their merit at date of graduation.— (15 July, 1870, c. 295, s. 12, v. 16, p. 334.)

Amendments to this section were made by act of August 5, 1882 (22 Stat., 285), which changed the title of all undergraduates at the Naval Academy to "naval cadets," provided for appointment of naval cadets,

on completion of the six years' course, "to fill vacancies in the lower grades of the line and Engineer Corps of the Navy and of the Marine Corps," and provided that "so much of section fifteen hundred and

twenty-one of the Revised Statutes as is inconsistent herewith is hereby repealed;" by act of March 3, 1883 (22 Stat., 472), which changed the title of "midshipmen" to "ensigns (junior grade);" by act of June 26, 1884 (23 Stat., 60), which provided "that from and after the passage of this act all graduates of the Naval Academy who are assigned to the line of the Navy, on the successful completion of the six years' course, shall be commissioned ensigns in the Navy," and that "the grade of junior ensign in the Navy is hereby abolished"; by act of March 2, 1889 (25 Stat., 878), which provided for a division of the first class, commencing their fourth year at the Naval Academy, into two divisions, who were to pursue, respectively, separate courses to fit them for the line of the Navy and of the Marine Corps, and for the Engineer Corps of the Navy, and provided that from the final graduates of the line and Marine Corps division at the end of their six years' course, "appointments shall be made hereafter as it shall be necessary to fill vacancies in the lowest grades of commissioned officers of the line of the Navy and Marine Corps," and that "vacancies in the lowest grades of the commissioned officers of the Engineer Corps of the Navy shall be filled in like manner by appointments from the final graduates of the Engineer division at the end of their six years' course," and that "not less than two shall be appointed annually to the Engineer Corps of the Navy, nor less than one annually to the Marine Corps;" by act of July 26, 1894 (28 Stat., 124), which provided that when necessary the Secretary of the Navy should select final graduates in the engineer division or in the line division, as the case might require, "and such final graduates shall be appointed to fill vacancies in the grade of ensign in the Navy or in the grade of assistant engineer in the Navy, respectively;" by act of March 3, 1899 (30 Stat., 1004), which abolished the Engineer Corps of the Navy; by act of July 1, 1902 (32 Stat., 686), which changed the title "naval cadet," to "midshipman;" by act of March 7, 1912 (37 Stat., 73), which provided that "midshipmen on graduation shall be commissioned ensigns;" by act of July 9, 1913 (38 Stat., 103), which provided "that midshipmen on graduation shall be commissioned ensigns in the Navy, or may be assigned by the Secretary of the Navy to fill vacancies in the lowest commissioned grades of the Marine Corps or Staff Corps of the Navy;" and by act of May 22, 1917, section 5 (40 Stat., 86), reenacted by act of July 1, 1918 (40 Stat., 716), which provided that "the class of midshipmen graduated from the Naval Academy on March twenty-ninth, nineteen hundred and seventeen, and the classes to be graduated hereafter, may be commissioned effective from date of graduation."

The act of August 5, 1882, above cited, provided that the appointments therein provided for were to be made "from the graduates of the

year, at the conclusion of their six years' course, in the order of merit as determined by the Academic Board of the Naval Academy; the assignment to the various corps to be made by the Secretary of the Navy upon the recommendation of the Academic Board;" the act of March 2, 1889, above cited, provided that the appointments therein provided for were to be made "from the final graduates of the year, in the order of merit as determined by the Academic Board of the Naval Academy, the assignment to be made by the Secretary of the Navy upon the recommendation of the Academic Board at the conclusion of the fiscal year then current;" the act of July 26, 1894, above cited, provided that the appointments therein authorized were to be made from final graduates "who shall be reported as proficient and be recommended thereto by the Academic Board," and that such appointees should take rank "among themselves according to merit as determined by the Academic Board."

The act of March 3, 1899, section 19 (30 Stat., 1008), relating to the Marine Corps, provided "that the vacancies existing in said corps after the promotions and appointments herein provided for shall be filled by the President from time to time, whenever the actual needs of the naval service require it, first, from the graduates of the Naval Academy in the manner now provided by law," etc.; the act of March 3, 1903 (32 Stat., 1198), authorized an increase in the number of officers in the Marine Corps, and provided that "vacancies in the grade of second lieutenant shall be filled, first, as far as practicable, from graduates of the Naval Academy each year on completing the prescribed course at the Naval Academy, exclusive of the probationary tour of sea service before final graduation," etc.

The act of August 29, 1916 (39 Stat., 611) provided "that no midshipman at the United States Naval Academy or cadet at the United States Military Academy who fails to graduate therefrom shall be eligible for appointment as a commissioned officer in the Marine Corps until after the graduation of the class of which he was a member."

With reference to rank and precedence of graduates of the Naval Academy, see section 1483, Revised Statutes, and note thereto; as to pay of midshipmen commissioned within six months after graduation, see act of March 3, 1893 (27 Stat., 716), which allows the pay of the grade in which commissioned from the date of rank stated in the commission to the date of qualification and acceptance of commission.

**Prior laws superseded.**—The act of August 5, 1882 (22 Stat., 285), providing for appointments from the graduates of the Naval Academy to fill vacancies in the lower grades of the line and engineer corps of the Navy and of the Marine Corps, was superseded by the act of March 2, 1889 (25 Stat., 878). Next came the act of July 26, 1894 (28 Stat., 124), which was a provision intended to meet exceptional conditions



which can not now arise in view of the act of March 3, 1899 (30 Stat., 1004), transferring the engineer corps to the line; it may therefore be regarded as repealed by the act last cited. (File 5252-36, May 5, 1910.)

**Vacancies must remain unfilled where insufficient graduates.**—Under the act of March 2, 1889 (ch. 396), the vacancies in the lowest grades of commissioned officers in the line and Marine Corps must be filled from the final graduates of the line and Marine Corps divisions at Annapolis; so also as to vacancies in the engineer corps. Vacancies in the line and Marine Corps can not be filled from the engineer corps division or vice versa. If in any year there are more vacancies in the line and Marine Corps than there are final graduates of the six years' course in the line and marine division, the vacancies must remain unfilled until the following year; and the same rule applies to vacancies in the engineer corps. (20 Op. Atty. Gen., 615; by act of July 26, 1894, above noted, provision was made for filling vacancies in the line from the engineer division, and vacancies in the engineer corps from the line division. See also later laws above noted.)

**Law does not require that graduates be commissioned.**—The act of July 9, 1913 (38 Stat., 103), providing that "midshipmen on graduation shall be commissioned ensigns in the Navy, or may be assigned by the Secretary of the Navy to fill vacancies in the lowest commissioned grades of the Marine Corps or staff corps of the Navy," could not be held to require the appointment of any midshipman upon graduation as an ensign in the Navy. No act of Congress can compel the President to appoint a midshipman to the office of ensign in the Navy unless he chooses to make such an appointment. (File 5252-120, May 13, 1919; C. M. O. 186-1919.)

If a midshipman were entitled to be commissioned ensign and the President should refuse to issue his commission, no action would lie for the salary of the office which he does not possess. His becoming an ensign depended not upon the operation of law but upon his being nominated by the President and confirmed by the Senate for that office; neither of which things might ever be done. For reasons deemed sufficient, the President might not nominate or the Senate might not confirm him for the position; or after nomination and confirmation the President might, on grounds considered adequate, decline to commission him. In either case he would not be an ensign. The issue of the commission is that which confers the office and the right to its pay. However clear and strong his legal right might have been to be commissioned as such when he passed the academic examination, the fact remains that he was not so commissioned, and the law gave him no right to the salary until he got the commission. (Benjamin v. U. S., 10 Ct. Cls., 474.)

The term of office of a naval cadet expires with the completion of his six years' course. If not appointed to another office he ceases to be an officer of the Navy and goes out of office by the expiration of the tenure as limited by law. Where a naval cadet was erroneously discharged upon expiration of his six years, due to an error of law, he can not be regarded as

still in the service and entitled to recover pay, either as a naval cadet or as the incumbent of a commissioned office to which he might and should have been appointed; a person can not recover the salary of an office which he does not hold. The case of a naval cadet is to be distinguished from that of a cadet engineer, as the latter could under the law, after graduation, continue in the service in the status of a cadet engineer and, where erroneously discharged, could recover the pay of a cadet engineer as though such discharge had not been issued. (Grambs v. U. S., 23 Ct. Cls., 420.)

**Graduates can not be commissioned unless vacancies exist.**—Under the act of August 5, 1882 (22 Stat., 285), a naval cadet who completed his six years' course subsequent to that year was legally discharged, there being no vacancy to which he could be appointed, notwithstanding the obligation assumed by him upon entering the Academy to "serve in the Navy of the United States for eight years, unless sooner discharged by competent authority." The discharge in this case was in strict pursuance of law, by an executive officer of the Government, authorized by statute to perform that function. Obligations are not always mutual in the liability of the parties to perform. They are often unilateral, giving a right to one to declare the obligation at an end, while the other party is bound to a full performance. The number of men in the Army and Navy is dependent upon the will of Congress. A naval cadet has no vested right to the office, and Congress may prescribe new terms and conditions upon which he may remain in the service after graduation. (Harmon v. U. S., 23 Ct. Cls., 132.)

The provision in the naval appropriation act of August 5, 1882, section 1 (22 Stat., 284, 285), which directs in certain cases the honorable discharge of naval cadets from the Navy with one year's sea pay, is not in conflict with the contract clause of the Constitution of the United States. An officer in the Army or Navy does not hold his office by contract but at the will of the sovereign power. Even if it were true as to other officers of the Navy that their term of office is for life, this would not be true as to a naval cadet appointed under a statute fixing the academic course at six years and who when he entered the service executed a bond to serve for eight years unless discharged by competent authority, thus recognizing his liability to be discharged. (Crenshaw v. U. S., 134 U. S., 99.)

The act of August 5, 1882 (22 Stat., 285), providing for the discharge of surplus graduates of the Naval Academy, is constitutional. (Harmon v. U. S., 23 Ct. Cls., 406.)

Midshipmen graduated from the Naval Academy and assigned to the Marine Corps can not be appointed as second lieutenants in the Marine Corps if the grade of second lieutenant is filled to the number fixed by law, notwithstanding that the total number of officers allowed by law in the Marine Corps would not be exceeded by their appointment owing to certain vacancies existing in upper grades. There being five vacancies in the Marine Corps on the date of graduation which would result in the promotion of five second

lieutenants from the date said vacancies occurred, and six midshipmen having been assigned to the Marine Corps, *held* that five of said midshipmen may be appointed to the grade of second lieutenant upon the occurrence of the five vacancies in said grade, and if commissioned therein within six months from the date of their graduation may be given rank from said date of graduation pursuant to the act of March 3, 1893 (27 Stat., 716). The appointment of the sixth midshipman as a second lieutenant should not be made until a vacancy exists for him in the grade of second lieutenant, and there does not appear to be any authority of law for dating his rank prior to the date that a sixth vacancy occurs in the Marine Corps. (File 3261-486, June 8, 1916.)

**Status of graduates pending occurrence of vacancies.**—The act of March 4, 1917 (39 Stat., 1182), authorizes the graduation of midshipmen, during a limited period, who have completed a three-year course at the Naval Academy; the number of officers in the grades

of lieutenant (junior grade) and ensign is limited by act approved August 29, 1916 (39 Stat., 576, 577); a sufficient number of vacancies will not exist in the line of the Navy to permit of commissioning all graduates of the Naval Academy prior to July 1, 1917: *Held*, that in the meantime such graduates may be appointed as acting ensigns; or may be commissioned as ensigns in the Naval Reserve Force; or may be ordered to duty as "midshipmen after graduation." (File 5252-83, Mar. 20, 1917.)

See acts of May 22, 1917, section 5, and July 1, 1918, noted above.

**Appointment made subject to examination.**—A midshipman who, while absent in a distant and foreign station, was nominated and confirmed to be ensign "subject to examination" but who was never examined, never became an ensign and having in the meantime been brought to trial by court-martial was properly tried as a midshipman. (16 Op. Atty. Gen., 550.)

### Sec. 1522. [Cadet engineers. Repealed.]

**This section provided as follows:**

"Sec. 1522. The Secretary of the Navy is authorized to make provision, by regulations issued by him, for educating at the Naval Academy, as naval constructors or steam engineers, such midshipmen and others as may show a peculiar aptitude therefor. He may, for this purpose, form a separate class at the Academy, to be styled cadet engineers, or otherwise afford to such persons all proper facilities for such a scientific mechanical education as will fit them for said professions."—(4 July, 1864, c 252, s. 1, v. 13, p. 393.)

It was repealed by the act of August 5, 1882 (22 Stat., 285), which provided "that hereafter there shall be no appointments of cadet-midshipmen or cadet-engineers at the Naval Academy, but in lieu thereof naval cadets shall be appointed from each congressional district and at large, as now provided by law for cadet-midshipmen, and all the undergraduates at the Naval Academy shall hereafter be designated and called 'naval cadets,' and from those who successfully complete the six years' course appointments shall hereafter be made as it is necessary to fill vacancies in the lower grades of the line and Engineer Corps of the Navy and of the Marine Corps: *And provided further*, That no greater number of appointments into these grades shall be made each year than shall equal the number of vacancies which has occurred in the same grades during the preceding year; such appointments to be made from the graduates of the year, at the conclusion of their six years' course, in the order of merit, as determined by the academic board of the Naval Academy; the assignment to the various corps to be made by the Secretary of the Navy upon the recommendation of the academic board. But nothing herein contained shall reduce the number of appointments from such graduates below ten in each year, nor deprive of such appointment any graduate who may complete the six years' course during the year eighteen hundred and eighty-two. And if there be a surplus of graduates, those

who do not receive such appointment shall be given a certificate of graduation, an honorable discharge, and one year's sea-pay, as now provided by law for cadet-midshipmen; and so much of section fifteen hundred and twenty-one of the Revised Statutes as is inconsistent herewith is hereby repealed. \* \* \* That the Secretary of the Navy may prescribe a special course of study and training at home or abroad for any naval cadet."

**Later laws relating to this subject are as follows:**

Act of March 2, 1889 (25 Stat., 878): "That the Academic Board of the Naval Academy shall on or before the thirtieth day of September in each year separate the first class of naval cadets then commencing their fourth year into two divisions, as they may have shown special aptitude for the duties of the respective corps, in the proportion which the aggregate number of vacancies occurring in the preceding fiscal year ending on the thirtieth day of June in the lowest grades of commissioned officers of the line of the Navy and Marine Corps of the Navy shall bear to the number of vacancies to be supplied from the Academy occurring during the same period in the lowest grade of commissioned officers of the engineer corps of the Navy; and the cadets so assigned to the line and Marine Corps division of the first class shall thereafter pursue a course of study arranged to fit them for service in the line of the Navy, and the cadets so assigned to the Engineer Corps division of the first class shall thereafter pursue a separate course of study arranged to fit them for service in the Engineer Corps of the Navy, and the cadets shall thereafter, and until final graduation, at the end of their six years' course, take rank by merit with those in the same division, according to the merit marks; and from the final graduates of the line and Marine Corps division, at the end of their six years' course, appointments shall be made hereafter as it shall be necessary to fill vacancies in the lowest grades of commissioned officers of the line of the Navy and Marine Corps; and the vacancies in



the lowest grades of the commissioned officers of the Engineer Corps of the Navy shall be filled in like manner by appointments from the final graduates of the Engineer division at the end of their six years' course: *Provided*, That no greater number of appointments into the said lowest grades of commissioned officers shall be made each year than shall equal the number of vacancies which shall have occurred in the same grades during the fiscal year then current; such appointments to be made from the final graduates of the year, in the order of merit as determined by the Academic Board of the Naval Academy, the assignment to be made by the Secretary of the Navy upon the recommendation of the Academic Board at the conclusion of the fiscal year then current; but nothing contained herein or in the naval appropriation act of August fifth, eighteen hundred and eighty-two, shall reduce the number of appointments of final graduates at the end of their six years course below twelve in each year to the line of the Navy, and not less than two shall be appointed annually to the Engineer Corps of the Navy, nor less than one annually to the Marine Corps; and if the number of vacancies in the lowest grades aforesaid, occurring in any year shall be greater than the number of final graduates of that year, the surplus vacancies shall be filled from the final graduates of following years, as they shall become available \* \* \*.

Act of July 26, 1894 (28 Stat., 124): Provided for appointments to the line of the Navy from the engineer division, and to the Engineer Corps of the Navy from the line division, when necessary.

Act of March 3, 1899 (30 Stat., 1004): Abolished the Engineer Corps of the Navy and pro-

vided for transfer of engineer officers to the line.

Act of August 29, 1916 (39 Stat., 580): Provided for appointment to the line of the Navy, as "acting ensigns for the performance of engineering duties only," of persons who "have received a degree of mechanical or electrical engineer from a college or university of high standing," or who are "graduates of technical schools approved by the Secretary of the Navy \* \* \*."

Act of March 3, 1915 (38 Stat., 945): Provided that appointments to the grade of assistant naval constructor may be made by transfer from officers of the line of the Navy who have had not less than three years' service in the grade of ensign and have taken, or are taking, satisfactorily, a post-graduate course in naval architecture under orders from the Secretary of the Navy. By act of August 29, 1916 (39 Stat., 577), it was provided that "vacancies in the Construction Corps shall be filled in the manner now prescribed by law," and that "hereafter ensigns of not less than one year's service as such shall be eligible for transfer to the Construction Corps." It had previously been provided by section 1403, Revised Statutes, that "cadet engineers who are graduated with credit in the scientific and mechanical class of the Naval Academy may, upon the recommendation of the academic board, be immediately appointed as assistant naval constructors;" and by act of July 9, 1913 (38 Stat., 103), that "midshipmen on graduation \* \* \* may be assigned by the Secretary of the Navy to fill vacancies in the lowest commissioned grades of the \* \* \* staff corps of the Navy."

### Sec. 1523. [Number and appointment of. Repealed.]

**This section provided as follows:**

"SEC. 1523. Cadet engineers shall be appointed by the Secretary of the Navy. They shall not at any time exceed fifty in number, and no persons, other than midshipmen, shall be eligible for appointment unless they shall first produce satisfactory evidence of mechanical skill and proficiency, and shall have passed an examination as to their mental and physical qualifications."—(4 July, 1864, c. 252, ss. 3, 4, v. 13, p. 393. 2 Mar., 1867, c. 174, s. 2, v. 14, p. 516. 22 June, 1874, c. 392, s. 3, v. 18, p. 192.)

It was amended by act of June 22, 1874, section 3 (18 Stat., 192), which provided that "so much of the act entitled 'An act to authorize the Secretary of the Navy to provide for the education of naval constructors and steam-engineers, and for other purposes,' approved

July 4, 1864, as provides that cadet-engineers, not to exceed fifty in number, shall be appointed by the Secretary of the Navy, is hereby repealed; and cadet-engineers shall hereafter be appointed annually by the Secretary of the Navy, and the number appointed each year shall not exceed twenty-five; and that all acts or parts of acts inconsistent with the provisions of this act be, and the same are hereby repealed." (See *United States v. Redgrave*, 116 U. S., 474, 478.)

It was repealed by act of August 5, 1882 (22 Stat., 285), quoted under section 1522, Revised Statutes, which expressly prohibited any further appointments of cadet-engineers. See also later laws noted under section 1522, Revised Statutes.

### Sec. 1524. [Academic course of. Repealed.]

**This section provided as follows:**

"SEC. 1524. The course for cadet engineers shall be four years, including two years of service on naval steamers."—(4 July, 1864, c. 252, s. 5, v. 13, p. 393. 3 Mar., 1873, c. 230, s. 1, v. 17, p. 555. 24 Feb., 1874, c. 35, v. 18, p. 17.)

It was amended to read as above by act of February 24, 1874, section 2 (18 Stat., 17), which

provided that "from and after the thirtieth day of June, eighteen hundred and seventy-four, the course of instruction at the Naval Academy for cadet-engineers shall be four years, instead of two as now provided by law; and this provision shall first apply to the class of cadet-engineers entering the academy in the year eighteen hundred and seventy-four, and to all subsequent classes; and that all acts or parts of acts incon-

sistent herewith be, and are hereby, repealed." This amendment had the effect of requiring four years of instruction at the Naval Academy in addition to the two years' service on naval steamers. (See *United States v. Redgrave*, 116 U. S., 474, 478.)

It was repealed by act of August 5, 1882 (22 Stat., 285), quoted under section 1522, Revised Statutes, which expressly prohibited any further appointments of cadet-engineers. See also later laws noted under sections 1522 and 1520, Revised Statutes.

#### Sec. 1525. [Examinations of. Repealed.]

This section provided as follows:

"SEC. 1525. Cadet engineers shall be examined from time to time, according to regulations prescribed by the Secretary of the Navy, and if found deficient at any examination, or if dismissed for misconduct, they shall not be continued in the Academy or in the service except upon the recommendation of

the academic board."—(4 July, 1864, c. 252, s. 4, v. 13, p. 393.)

It was repealed by act of August 5, 1882 (22 Stat., 285), quoted under section 1522, Revised Statutes, which expressly prohibited any further appointments of cadet-engineers. See also later laws noted under section 1522, Revised Statutes.

Sec. 1526. [Studies not to be pursued on Sunday.] The Secretary of the Navy shall arrange the course of studies and the order of recitations at the Naval Academy so that the students in said institution shall not be required to pursue their studies on Sunday.—(15 July, 1870, c. 294, s. 21, v. 16, p. 319.)

Sec. 1527. [Store-keeper at the Academy.] The store-keeper at the Naval Academy shall be detailed from the Paymaster's Corps, and shall have authority, with the approval of the Secretary of the Navy, to procure clothing and other necessities for the midshipmen and cadet engineers in the same manner as supplies are furnished to the Navy, to be issued under such regulations as may be prescribed by the Secretary of the Navy.—(2 Mar., 1867, c. 174, s. 4, v. 14, p. 516.)

Amendments to this section were made by the act of July 11, 1919 (41 Stat., 147), which provided that "hereafter the Pay Corps shall be called the Supply Corps;" by act of August 5, 1882 (22 Stat., 285), quoted under section 1522, Revised Statutes, which expressly prohibited any further appointments of cadet-engineers; and by act of May 13, 1908 (35 Stat., 153), which provided that "the Secretary of the Treasury is hereby authorized and directed to close and balance as expended the sum of twenty-four thousand five hundred dollars now standing on the books of the Treasury under the appropriation 'Pay of the Navy,' which was advanced by direction of the Secretary of the Navy in eighteen hundred and sixty-seven and eighteen hundred and sixty-eight, and has heretofore been used as a midshipmen's store fund at the Naval Academy: *Provided*, That hereafter the storekeeper at the Naval Academy, authorized by section fifteen hundred and twenty-seven of the Revised Statutes, shall render quarterly returns of property to the Chief of the Bureau of Supplies and Accounts, under such regulations as the Secretary of the Navy may prescribe. A full report shall be made annually of receipts and expenditures by the Chief of the Bureau of Supplies and Accounts to the Secretary of the Navy: *And provided further*, That an inspection of the storekeeper's accounts shall be made quarterly by the general inspector of the Pay Corps [now Supply Corps], with such recommendation as he may deem necessary, to the

Chief of the Bureau of Supplies and Accounts."

**Midshipmen's store fund.**—Prior to 1867 a civilian storekeeper provided for the needs of the midshipmen under an arrangement made between himself and the officials of the Academy. This arrangement was not satisfactory, and in 1867 and 1868, by direction of the Secretary of the Navy, the sum of \$24,500 was advanced for the purpose of taking over the said store and of carrying it on. This was done from the appropriation, "Pay of the Navy." *Held*, that the sum of \$24,500 aforesaid is public money and that said sum and the accumulated profits, if any, should be covered into the Treasury; that the establishment of said fund and the present manner of conducting the store at the Naval Academy are without authority of law, it being provided by the act of June 19, 1878 (20 Stat., 167), section 2, that "Pay of the Navy" shall hereafter be used only for its legitimate purpose, as provided by law," and by act of July 26, 1886, section 2 (24 Stat., 157), that "all balances of money appropriated for pay of the Navy or pay of the Marine Corps for any year existing after the accounts for said year shall have been settled shall be carried into the Treasury." *Held*, further, that by section 1527 of the Revised Statutes it was clearly the intention of Congress that the supplies for the Naval Academy store should be procured in the same manner as other naval stores. (14 Comp. Dec., 680. But see act of May 13, 1908, quoted above.)

**Naval Academy dairy.**—Provisions for purchase of land and establishment of dairy thereon were contained in act of March 4, 1913



(37 Stat., 904), which provided that appropriation therein made for the purpose should be treated as an advance to the midshipmen's store fund, to be ultimately repaid to the United States, and that expenditures therefrom should be reported by the Chief of the Bureau of Supplies and Accounts to the Secretary of the Navy.

**Midshipmen's commissary fund.**—Such additional payments from this fund as the Superintendent may deem necessary may be made to servants authorized in the commissary department. (Act Mar. 4, 1913, 37 Stat., 907. See also note to sec. 236, R. S., under "II. Jurisdiction of Accounting Officers," subheading "Public Money.")

**Sec. 1528. [Professors of ethics, Spanish, and drawing.]** Three professors of mathematics shall be assigned to duty at the Naval Academy, one as professor of ethics and English studies, one as professor of the Spanish language, and one as professor of drawing.—(21 May, 1864, c. 93, s. 3, v. 13, p. 85.)

By act of August 29, 1916 (39 Stat., 577), it was provided that "hereafter no further appointments shall be made to the corps of professors of mathematics, and that corps shall cease to exist upon the death, resignation, or dismissal of the officers now carried in that corps on the active and retired lists of the Navy." (See secs. 1399-1401, and notes thereto, with reference to the number of professors of mathematics, their appointment, duties, etc.)

By act of August 29, 1916 (39 Stat., 607), it was provided that "the Secretary of the Navy is authorized to employ at the Naval Academy such number of professors and instructors, including one professor as librarian, as, in his opinion, may be necessary for the proper instruction of the midshipmen; and that professors and instructors so employed shall receive such compensation for their services as may be prescribed by the Secretary of the Navy: *Provided further*, That the total amount so paid shall not exceed \$175,000 annually: *And provided further*, That the Secretary of the Navy shall report to Congress each year the number of professors and instructors so employed and the amount of compensation prescribed for each." (It had previously been provided by act Mar. 2, 1895, 28 Stat., 837, that "any assistant professor at the Naval Academy who served as such for five years shall have the title and pay of a professor," and by act Mar. 3, 1897, 29 Stat., 661, that "the proper pay officer of the Navy be, and is hereby, authorized to pay the professors at the Naval Academy, whose compensation was affected by the Act making appropriations for the naval service for the fiscal year ending June thirtieth, eighteen hundred and ninety-six, approved March second, eighteen hundred and ninety-five, at the

rate of compensation fixed by that Act from July first, eighteen hundred and ninety-six.")

By act of May 18, 1920, section 7 (41 Stat., 603), the Secretary of the Navy was authorized in his discretion to readjust the prevailing rates of pay of civilian professors and instructors at the Naval Academy, said readjustment to be effective from January 1, 1920, and not to involve an additional expenditure in excess of \$55,000 for the remainder of the current fiscal year.

**Commissioned as professors of mathematics.**—Although the title conferred by law is a misnomer, *held* that the heads of the departments of ethics and English studies, of Spanish and other modern languages, and of drawing, should be commissioned as professors of mathematics under section 1528, Revised Statutes, after passing the examinations required by the act of January 20, 1881 (21 Stat., 317). The purpose that persons known to the law and the Navy Register as "professors of mathematics" should be engaged in teaching other branches of learning is too obvious for construction. That the name did not indicate the sole duties of the office is further apparent from the express declaration of the act of August 3, 1846, section 12 (now secs. 1399-1401, R. S.), "that the number of professors of mathematics in the Navy shall not exceed twelve; that they shall be appointed and commissioned by the President of the United States, by and with the advice and consent of the Senate, and shall perform such duties as may be assigned them by order of the Secretary of the Navy at the Naval School, the Observatory, and on board ships of war in instructing the midshipmen of the Navy, or otherwise." Section 1528 shows that, certainly as to three of these professors, the duties to be assigned were not to be mathematical in their nature. (17 Op. Atty. Gen., 103.)

## CHAPTER SIX.

### VESSELS AND NAVY YARDS.

Sec.

- 1529. Classification and command of vessels.
- 1530. Rating of vessels.
- 1531. Rule for naming vessels.
- 1532. Two vessels not to bear the same name.
- 1533. Names of purchased vessels.
- 1534. Vessels kept in service in time of peace.
- 1535. Vessels, how officered and manned.
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Sec.

- 1539. Repairs on sails and rigging.
- 1540. Sale of vessels unfit to be repaired.
- 1541. Sale of unserviceable vessels and materials.
- 1542. Commandants of navy yards.
- 1543. Master workmen.
- 1544. Laborers, how selected.
- 1545. Salaries; per diem compensation.
- 1546. Requiring contributions for political purposes.

#### Sec. 1529. [Classification and command of vessels. Superseded.]

This section provided as follows:

"SEC. 1529. The vessels of the Navy of the United States shall be divided into four classes, and shall be commanded as nearly as may be as follows:

"First rates, by commodores; second rates, by captains; third rates, by commanders; fourth rates, by lieutenant-commanders."—(16 July, 1862, c. 183, s. 3, v. 12, p. 583.)

It was superseded by act of March 3, 1901 (31 Stat., 1133), which provided as follows:

"That the President of the United States be, and he is hereby, authorized to establish, and from time to time to modify, as the needs of the service may require, a classification of vessels of the Navy, and to formulate appropriate rules governing assignments to command of vessels and squadrons."

A classification of vessels of the Navy was established by General Order No. 541 of July 17, 1920.

"Vessels" defined.—See section 3, Revised Statutes.

Lost vessels.—How date of loss to be determined: See section 286, Revised Statutes.

Authority of officers over crew after loss of vessel: See section 1624, Revised Statutes, article 21.

Accounts of seamen on lost vessels, compensation for personal effects lost, etc. See sections 287–290, Revised Statutes.

Collisions.—Claims for damages occasioned by collisions for which vessels of the Navy are responsible, to be adjusted by the Secretary of the Navy, where amount does not exceed \$500. (Act June 24, 1910, 36 Stat., 607.)

Ocean mail vessels.—To be constructed with particular reference to their prompt conversion into auxiliary cruisers. (Act Mar. 3, 1891, sec. 4, 26 Stat., 831.)

Suits by or against commanding officers of naval vessels.—See note to section 189, Revised Statutes, and note to Constitution, Article I, section 8, clause 13.

Officers of vessels.—To be citizens of the United States. (Sec. 1428, R. S.)

Retired officers may be assigned to command vessels and squadrons in time of war. (Secs. 1463–1465, R. S.)

Officers and men not to be shipped for service on United States auxiliary vessels unless members of the Naval Reserve Force. (Act Aug. 29, 1916, 39 Stat., 589.)

Employment of naval vessels.—Secretary of the Navy to execute the orders of the President relating to employment of vessels of war. (Sec. 417, R. S.)

Vessels of the United States and their commanders may be directed by the President to examine vessels registered under the laws of the United States which are believed to be engaged in the coolie trade, and in proper cases to cause any vessel so examined to be delivered with her officers and crew to a United States marshal. (Sec. 2163, R. S.)

Officers of the Navy may be detailed to make arrests and seize vessels and sponges in enforcement of law regulating sponge trade in Gulf of Mexico or Straits of Florida. (Act Aug. 15, 1914, sec. 5, 38 Stat., 692.)

Vessels of the Navy may be used to protect merchant vessels against piratical vessels. (Sec. 4294, R. S.)

May be used to patrol waters frequented by seal herds and sea otter, and search and seize vessels violating law relating thereto. (Act Aug. 24, 1912, sec. 9, 37 Stat., 501.)

Not to receive goods or merchandise for freight, except gold, silver, or jewels, without authority from President or Secretary of the Navy. (Sec. 1624, R. S., art. 13.)

Secretary of the Navy may, in his discretion, at the request of the National Board of Health, place gratuitously at the disposal of the Commissioners of Quarantine or the proper authorities at any of the ports of the United States, to be used by them temporarily for quarantine purposes, such vessels belonging to the United



States as are not required for other uses of the National Government, subject to such restrictions and regulations as he may deem necessary to impose for the preservation thereof. (Act June 14, 1879, 21 Stat., 50.)

Vessels may be loaned, upon written application of the governor of the State, to nautical schools at Boston, Philadelphia, New York, Seattle, San Francisco, Baltimore, Detroit, Saginaw, Mich., Norfolk, and Corpus Christi. (Act Mar. 4, 1911, 36 Stat., 1353.)

The President was authorized to employ public vessels in surveying the coast of the United States, by section 4686, Revised Statutes. (See note to sec. 264 R. S.)

The Secretary of the Navy is authorized to place the vessels of the United States Fish Commission on the same footing with the Navy Department as those of the United States Coast and Geodetic Survey, by act of May 31, 1880. (21 Stat., 151, see note to sec. 264, R. S.)

One fully equipped man-of-war's cutter may be loaned, upon application of the governor, to one well-established military school in any State having seacoast line or bordering on one or more of the Great Lakes. (Act Mar. 3, 1901, 31 Stat., 1440, amended by acts June 29, 1906, 34 Stat., 620, and June 24, 1910, 36 Stat., 613.)

For other laws, see section 1536, Revised Statutes, and note thereto.

**Expenses incurred by vessels rendering services for other departments.**—See note to section 1437, Revised Statutes.

**Jurisdiction over vessels of the Navy.**—Freedom from State interference. (See notes to Constitution, Art. I, sec. 8, clauses 13 and 14; and note to sec. 355, R. S.)

**Command of hospital ships by medical officers.**—See note to section 1488, Revised Statutes.

**Power of President as Commander in Chief.**—The act of March 3, 1901 (quoted above), is plainly intended to amend the previous statutes on the subject, and is designed to allow the President to reclassify the vessels of the Navy that had theretofore been fixed by section 1529, Revised Statutes, and to authorize him to assign the command of vessels, omitting all restrictions. He is by that act given the full power contemplated in that provision of the Constitution which makes him Commander in Chief of the Army and Navy. The act of March 3, 1901, is a complete substitute for prior laws or customs. The language of that act is clear and unambiguous, and was enacted with a full knowledge of the conditions brought about by prior laws and of the necessity of a new and elastic system by which the President could from time to time make such regulations as the necessities of the changing conditions in the service should require. (27 Op. Atty. Gen., 571.)

Under previous laws it was held that, when the rate of a ship of war has been fixed by statute, it can not be changed by an order of the Navy Department in so far as to affect the compensation of an officer of the Navy; that it is the established course of the legislation of the United States to designate the rate of ships of war when authorizing their construction; that of all this, Congress has jurisdiction, which it

exercises in its constitutional discretion; that it may affix to certain ships of the Navy, by express names, a specified rate, and to others a different rate, which rates bind the Secretary of the Navy in so far as they are employed by the statutes for any statutory object, such as to measure of pay, although they may not for other objects, which the statute leaves to the discretion of the executive; that in general, and as the apparently settled legislative policy of the Government, Congress reserves itself the power of designating the character as well as the number of vessels of the Navy; that if the legislative nomenclature be an anomaly Congress may change same, if it will, but that to do so exceeds the power of the executive. (8 Op. Atty. Gen., 503, Mar. 3, 1857; compare 10 Comp. Dec., 516; see also 10 Comp. Dec., 122, and 12 Comp. Dec., 373.)

For other cases, as to the power of Congress and of the President as Commander in Chief, see note to Constitution, Article II, section 2, clause 1.

**Ownership of vessel not accepted by the Government but in possession of the builders.**—Where a vessel is on her trial trip prior to acceptance, and still within the possession and control of the builders, the United States, however, having, by the payment of installments, acquired 49 out of 50 parts of the vessel, she must be regarded as practically the property of the Government. (*Williams v. U. S.*, 47 Ct. Cls., 186.)

The Attorney General defers answering the question as to the right of the Secretary of the Navy, under the direction of the President, to employ the military forces of the Government to obtain possession of the cruiser *Galveston*, in course of construction under contract with the Wm. R. Trigg Co., of Richmond, Va., which company has gone into the hands of a receiver appointed by the chancery court of Virginia, for the reason that a method of procedure in such cases is provided for by section 3753, Revised Statutes, and occasion for the exercise of this power is not likely to arise if the stipulation authorized by that section is filed. (24 Op. Atty. Gen., 679.)

It is not to be doubted for a moment that the United States is entitled to the undisturbed possession and control of its property and of property in which it is interested to the extent of that interest, and that this possession and control are exempt from the process of every court. Yet, in order to avoid unseemly clashing and hostile demonstration upon the part of creditors or claimants, Congress has by the law embodied in sections 3753 and 3754, Revised Statutes, provided an orderly and peaceful solution of controversies that may arise between parties claiming adversely to the United States, under the terms of which the utmost rights of all claimants are preserved without the functions of the Government being in the slightest disturbed. However, this law is not mandatory in its provisions, and in a palpable case of improper interference with the Government's rights the strong Executive arm may be relied upon for the protection of its sovereignty. (24 Op. Atty. Gen., 679, 683.)

Quite apart from the statute, and because of the nature of the case, it is impossible, on primary grounds, to yield assent at all to the idea that any instrumentality of the Government—in this case an instrumentality of prime importance—may be taken into custody and held under any adverse authority whatever. This view applies whether the adverse custody

should assume to attach upon the instrumentality as a completed thing or upon one in process of creation. (24 Op. Atty. Gen., 679, 682.)

For other cases as to the freedom of Federal instrumentalities from State interference, see note to Constitution, Article I, section 8, clause 13.

### Sec. 1530. [Rating of vessels. Superseded.]

This section provided as follows:

"SEC. 1530. Steamships of forty guns or more shall be classed as first rates, those of twenty guns and under forty as second rates, and all those of less than twenty guns as third

rates."—(12 June, 1858, c. 153, s. 5, v. 11, p. 319.)

It was superseded by act of March 3, 1901 (31 Stat., 1133), quoted above under section 1529, Revised Statutes.

### Sec. 1531. [Rule for naming vessels. Superseded.]

This section provided as follows:

"SEC. 1531. The vessels of the Navy shall be named by the Secretary of the Navy, under the direction of the President, according to the following rule:

"Sailing-vessels of the first class shall be named after the States of the Union, those of the second class after the rivers, those of the third class after the principal cities and towns, and those of the fourth class as the President may direct.

"Steamships of the first class shall be named after the States of the Union, those of the second class after the rivers and principal cities and towns, and those of the third class as the President may direct."—(3 Mar., 1819, c. 7, s. 1, v. 3, p. 538. 12 June, 1858, c. 153, s. 5, v. 11, p. 319.)

It was superseded by the act of March 3, 1901 (31 Stat., 1133), quoted above, under section 1529, Revised Statutes, which expressly authorized the President to establish a classification of vessels of the Navy, and from time to time to modify such classification, thereby superseding the provisions of this section which established rules for naming vessels according to the classification prescribed by sections 1529 and 1530, Revised Statutes. (See file 26255-614, Aug. 9, 1920, and 26255-614:10, Jan. 21, 1921.)

Other provisions for naming vessels were embodied in the act of May 4, 1898 (30 Stat., 390), as follows: "Hereafter all first-class battle ships and monitors owned by the United States shall be named for the States, and shall not be named for any city, place, or person until the names of the States, shall have been exhausted: *Provided*, That nothing herein contained shall be so construed as to interfere with the names of States already assigned to any such battle ship or monitor."

The act of May 4, 1898, was modified by act of May 13, 1908 (35 Stat., 159), which provided that so much of said act of May 4, 1898, "as provides that monitors owned by the United States shall be named for the States, and shall not be named for any city, place, or person until the names of the States shall have been exhausted, is hereby repealed, and monitors now owned by the United States or hereafter built may be named as the President may direct." (See file 26255-614, Aug. 9, 1920, and 26255-614:10, Jan. 21, 1921.)

Gifts to vessels from States, municipalities, or others, presented in accordance with custom, may be accepted by the Secretary of the Navy. (Act May 20, 1908, 35 Stat., 171.)

Sec. 1532. [Two vessels not to bear the same name.] Care shall be taken that not more than one vessel in the Navy shall bear the same name.—(3 Mar., 1819, c. 7, s. 1, v. 3, p. 538. 12 June, 1858, c. 153, s. 5, v. 11, p. 319.)

Sec. 1533. [Names of purchased vessels.] The Secretary of the Navy may change the names of any vessels purchased for the Navy by authority of law.—(5 Aug., 1861, c. 51, s. 2, v. 12, p. 316.)

When in the opinion of the President the prices asked for the charter of vessels for the transportation of fuel for the Navy are excessive, he is authorized to purchase vessels suitable

for the purpose, and if money is not otherwise available to pay for them from the appropriation "Fuel and transportation." (Act July 1, 1918, 40 Stat., 730.)

Sec. 1534. [Vessels kept in service in time of peace.] The President is authorized to keep in actual service in time of peace, such of the public armed vessels as, in his opinion, may be required by the nature of the service, and to cause the residue thereof to be laid up in ordinary in convenient ports.—(21 April, 1806, c. 35, s. 2, v. 2, p. 390.)



**Sec. 1535. [Vessels, how officered and manned.]** Vessels in actual service, in time of peace, shall be officered and manned as the President may direct, subject to the provisions of section fifteen hundred and twenty-nine.—(21 April, 1806, c. 35, s. 3, v. 2, p. 390.)

Amendment to this section was made by act of March 3, 1901, quoted above, under section 1529, Revised Statutes, which act superseded section 1529 and thereby superseded the words, "subject to the provisions

of section fifteen hundred and twenty-nine," appearing in this section.

In time of war retired officers may be assigned to the command of vessels and squadrons. (Secs. 1463–1465, R.S.)

**Sec. 1536. [Vessels to assist distressed navigators.]** The President may, when the necessities of the service permit it, cause any suitable number of public vessels adapted to the purpose to cruise upon the coast in the season of severe weather and to afford such aid to distressed navigators as their circumstances may require; and such public vessels shall go to sea fully prepared to render such assistance.—(22 Dec., 1837, c. 1, v. 5, p. 208.)

By act of March 3, 1905 (33 Stat., 1164), it was provided that "the President in his discretion may temporarily detail any vessel or vessels of the Navy to remove or destroy derelicts in the course of vessels at sea," etc.

By act of May 12, 1906 (34 Stat., 190), the Secretary of the Treasury was authorized to have constructed a vessel "for the purpose of blowing up or otherwise destroying or towing into port wrecks, derelicts, and other floating dangers to navigation."

Section 2759, Revised Statutes, provided that "the revenue cutters on the northern and northwestern lakes, when put in commission, shall be specially charged with aiding vessels in distress on the lakes."

By act of April 19, 1906 (sec. 2, 34 Stat., 123), the construction was authorized, under the supervision of the Revenue-Cutter Service, of a first-class ocean-going tug for service in saving life and property in the vicinity of the north Pacific coast of the United States, to be equipped with modern life and property saving appliances useful in assisting vessels and rescuing persons and property from the perils of the sea.

By resolution of October 31, 1893 (28 Stat., 13), it was provided that "the President of the United States be, and he is hereby, authorized to make, with the several Governments interested in the navigation of the North Atlantic Ocean, an international agreement providing for the reporting, marking, and removal of dangerous wrecks, derelicts, and other menaces to navigation in the North Atlantic Ocean outside the coast waters of the respective countries bordering thereon."

By act of July 1, 1918 (40 Stat., 705), it was provided "that hereafter the Secretary of the Navy is authorized to cause vessels under his control adapted to the purpose, to afford salvage service to public or private vessels in distress: *Provided*, That when such salvage service is rendered by a vessel specially equipped for the purpose or by a tug, the Secretary of the Navy may determine and collect reasonable compensation therefor."

By section 4642, Revised Statutes, it is provided that all salvage accruing or awarded to any vessel of the Navy shall be distributed and paid to the officers and men entitled thereto in the same manner as prize money, under the direction of the Secretary of the Navy. The laws relating to prize were contained in sections 4613–4652, Revised Statutes. By act of March 3, 1899, section 13 (30 Stat., 1007), it was provided that "all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed."

By act of April 28, 1908 (35 Stat., 69), it was provided that the authority therein conferred upon the Secretary of Commerce to make and enforce regulations to promote the safety of life on navigable waters during regattas or marine parades may be transferred for any special occasion to the head of another department by the President whenever in his judgment such transfer is desirable.

By act of March 3, 1883 (22 Stat., 475), the Secretary of the Navy was authorized to constitute and introduce, as a portion of the equipment of the Navy, the life-saving dress adopted and approved by the Life-Saving Service of the United States. (By act of Jan. 28, 1915, 38 Stat., 800, the Life-Saving Service and the Revenue-Cutter Service were amalgamated under the name of the "Coast Guard.")

**Salvage.**—Under section 1536, Revised Statutes, it is a part of the duty of the Navy to assist vessels in distress. In an opinion rendered as early as July 8, 1856 (7 Op. Atty. Gen., 756), the Attorney General remarked that "officers and crews of the public ships of the United States are not entitled to salvage, civil or military, as of complete legal right," and that "the allowance of salvage, civil or military, in such cases, like the allowance of prize money on captures, is against public policy, and ought to be abolished in the sea service as

it was long ago in the land service." The distribution of prize money has since been abolished by statute (see note above), but there has been no late legislation respecting salvage. (Naval Dig. 1916, p. 557, citing file 4496-79, Oct. 17, 1907. But see act July 1, 1918, noted above.)

In the recent history of the Navy no claim has been allowed for salvage, the Navy Department having taken the ground, in a number of cases, that such claims should not be made. In one or two instances, where a bonus was

voluntarily tendered for distribution among the officers and men of a naval vessel, such gift has been informally accepted. (Naval Dig. 1916, p. 557, citing file Nos. 4496-79, Oct. 17, 1907; 7173; 27601-116; 2, May 17, 1915; 27673-342, Dec. 23, 1915.)

In a recent salvage case the actual cost of certain salvage services rendered a merchant vessel by a naval vessel was collected and deposited to the credit of the United States. (Naval Dig. 1916, p. 557, citing file 27601-116.)

**Sec. 1537. [Patented articles connected with marine engines.]** No patented article connected with marine engines shall hereafter be purchased or used in connection with any steam-vessels of war until the same shall have been submitted to a competent board of naval engineers, and recommended by such board, in writing, for purchase and use.—(18 July, 1861, c. 8, s. 3, v. 12, p. 268.)

No application for patent shall be regarded as abandoned which has become the property of the Government of the United States and which is important to the armament or defense of the United States. (Sec. 4894, R. S., amended by act July 6, 1916, 39 Stat., 348.)

Patent may be granted to public officers without payment of any fee where the invention is used or to be used in the public service without payment of royalty. (Act Mar. 3, 1883, 22 Stat., 625.)

Suit for compensation may be brought against the United States in Court of Claims for use of patented inventions without lawful authority, except where patentee is in the service of the United States, and except where the invention was made by an employee of the United States during the

time of his employment or service. (Act July 1, 1918, 40 Stat., 705, amending act June 25, 1910, 36 Stat., 851. See also note to Constitution, Art. I, sec. 8, clause 8.)

Suit may also be brought for use of invention by the United States prior to issuance of patent, where the grant of a patent was withheld by order of the President in the interest of the public safety or defense. (Act Oct. 6, 1917, sec. 10, 40 Stat., 422.)

The Secretary of the Navy was authorized, by act of August 29, 1916 (39 Stat., 570), to construct, equip, and operate a laboratory for experimental and research work on the subject, among others, of "improvement and development in submarine engines," and such other necessary work for the benefit of the Government service.

**Sec. 1538. [Repairs on hull and spars.]** Not more than three thousand dollars shall be expended at any navy-yard in repairing the hull and spars of any vessel, until the necessity and expediency of such repairs and the probable cost thereof are ascertained and reported to the Navy Department by an examining board, which shall be composed of one captain or commander in the Navy, designated by the Secretary of the Navy, the naval constructor of the yard where such vessel may be ordered for repairs, and two master workmen of said yard, or one master workman and an engineer of the Navy, according to the nature of the repairs to be made. Said master workmen and engineer shall be designated by the head of the Bureau of Construction and Repair.—(21 Feb., 1861, c. 49, s. 1, v. 12, p. 147.)

The naval appropriation act of March 4, 1917 (39 Stat., 1184), and the appropriation acts in previous years, under the title, "construction and repair of vessels," contained the following provisions which have since been omitted: "*Provided*, That no part of this sum shall be applied to the repair of any wooden ship when the estimated cost of such repairs, to be appraised by a competent board of naval officers, shall exceed ten per centum of the estimated cost, appraised in like manner, of a new ship of the same size and like material: *Provided further*, That no part of this sum shall be applied to the repair of any other ship when the estimated

cost of such repairs, to be appraised by a competent board of naval officers, shall exceed twenty per centum of the estimated cost, appraised in like manner, of a new ship of the same size and like material: *Provided further*, That nothing herein contained shall deprive the Secretary of the Navy of the authority to order repairs of ships damaged in foreign waters or on the high seas, so far as may be necessary to bring them home."

The urgent deficiency act of June 15, 1917 (40 Stat., 212), and the naval appropriation acts of July 1, 1918 (40 Stat., 730), and July 11, 1919 (41 Stat., 149), contained the



following provision, which has since been omitted: "That the limitations imposed by existing law relative to repairs to vessels of the Navy shall not apply to the expenditure of funds made available in this act."

The act of March 2, 1907 (34 Stat., 1195), required the Secretary of the Navy to report to Congress, at the commencement of each regular session, the number of vessels and their names upon which any repairs or changes are proposed which in any case shall amount to more than \$200,000, expenditures for such repairs or changes to be made only after appropriations in detail are provided by Congress. By act

of March 3, 1909 (35 Stat., 769), the Secretary was required to report to Congress, at the beginning of each regular session, in addition to the report required by the act of March 2, 1907, a detailed statement showing the amount expended from each of the appropriations for the repair of every ship, where such repairs exceed for any one ship the sum of \$200,000 in any one fiscal year. By act of August 29, 1916 (39 Stat., 605), the statutory limit of \$200,000 for repairs and changes to capital ships, as provided in the act of March 2, 1907, was changed to \$300,000.

**Sec. 1539. [Repairs on sails and rigging.]** Not more than one thousand dollars shall be expended in repairs on the sails and rigging of any vessel, until the necessity and expediency of such repairs and the estimated cost thereof have been ascertained and reported to the Navy Department by an examining board, which shall be composed of one naval officer, designated by the Secretary of the Navy, and the master rigger and the master sail-maker of the yard where such vessel may be ordered.—(21 Feb., 1861, c. 49, s. 1, v. 12, p. 147.)

See note to section 1538, Revised Statutes.

**Sec. 1540. [Sale of vessels unfit to be repaired.]** The President may direct any armed vessel of the United States to be sold when, in his opinion, such vessel is so much out of repair that it will not be for the interest of the United States to repair her.—(21 April, 1806, c. 47, s. 3, v. 2, p. 402.)

By act of September 7, 1916, section 6 (39 Stat., 730), it was provided that the President may transfer to the Shipping Board such vessels belonging to the Navy Department

as are suitable for commercial uses and not required for naval use in time of peace.  
See notes to sections 418 and 1541, Revised Statutes.

**Sec. 1541. [Sale of unserviceable vessels and materials.]** The Secretary of the Navy is authorized and directed to sell, at public sale, such vessels and materials of the United States Navy as, in his judgment, can not be advantageously used, repaired, or fitted out; and he shall, at the opening of each session of Congress, make a full report to Congress of all vessels and materials sold, the parties buying the same, and the amount realized therefrom, together with such other facts as may be necessary to a full understanding of his acts.—(23 Mar., 1872, c. 195, s. 2, v. 17, p. 154.)

By act of June 30, 1890 (26 Stat., 194), the Secretary of the Navy was authorized to sell, after advertisement, condemned naval supplies, stores, and materials, either by public auction or by advertising for sealed proposals.

By act of August 5, 1882, section 2 (22 Stat., 296), the sale or exchange was prohibited of old material of the Navy "which can be profitably used by reworking or otherwise in the construction or repair of vessels, their machinery, armor, armament, or equipment"; it was required that such old material which can not be profitably used as aforesaid "be appraised and sold at public auction after public notice and advertisement shall have been given according to law under such rules and regulations and in such manner as the Secre-

tary may direct"; and it was further required that the Secretary of the Navy annually report in detail to Congress the proceeds of all such sales. The same act and section required that the Secretary of the Navy cause to be examined by competent boards of officers all vessels on their return from foreign stations, and all vessels in the United States as often as once in three years, if practicable, and strike from the Navy Register and report to Congress the name of such vessels as said board, with his concurrence, shall ascertain to be unfit for further service, or, if unfinished in any navy yard, which can not be finished without disproportionate expense. By act of March 3, 1883, section 5 (22 Stat., 599), the Secretary was required to have appraised all vessels stricken from the Navy

Register pursuant to the act of August 5, 1882, and in his discretion to sell any such vessel for not less than its appraised value, after advertising in newspapers for sealed proposals and complying with other detailed provisions of said act; the same act prohibited the sale of any vessel in the future in any manner other than as therein provided, "unless the President of the United States shall otherwise direct in writing."

By act of August 29, 1916 (39 Stat., 605), the Secretary of the Navy was authorized to sell any or all of the auxiliary ships of the Navy, classified as colliers, transports, tenders, supply ships, special types, and hospital ships which are 18 years and over in age, which he deems unsuited to present needs of the Navy, and which can be disposed of at an advantageous price, not less than 50 per cent of their original cost.

Exchange of worn-out motor-propelled vehicles of the Naval Establishment as part of purchase price of new ones, was authorized by act of August 29, 1916. (39 Stat., 565.)

President authorized to make regulations for purchase, preservation, and disposition of all articles, stores, and supplies for persons in the Navy. (Sec. 1549, R. S.)

Sale of useless papers in the Navy Department, on naval vessels, and at navy yards is authorized by acts of February 16, 1889 (25 Stat., 672); March 2, 1895 (28 Stat., 933); February 16, 1909, section 14 (35 Stat., 622); August 22, 1912 (37 Stat., 329); and March 3, 1915 (38 Stat., 929).

Transfer of naval ordnance and ordnance material to the War Department was authorized by act of July 8, 1918 (40 Stat., 817).

For reference to other laws relating to the sale, exchange, and loan of vessels or other property belonging to the naval service, see note to section 418, Revised Statutes.

**Mandamus proceedings to compel delivery of vessel to highest bidder.**—The United States, as the owner in possession of a naval vessel, can not be interfered with behind its back; nor can the courts compel the Secretary of the Navy, who has the custody of such vessel, to surrender it in a mandamus proceeding to which the United States is not and can not be made a party. (*Goldberg v. Daniels*, 231 U. S., 218.)

Mandamus will not lie at the instance of one who, in response to advertisement, has made the highest bid for a vessel, to compel the Secretary of the Navy to deliver the vessel. (*Goldberg v. Daniels*, 231 U. S., 218.)

The discretion of the Secretary of the Navy is not ended by receipt and opening of bids for a condemned naval vessel, even though they satisfy the conditions prescribed. Mandamus will not lie to compel him to accept the highest bid. (*Goldberg v. Daniels*, 231 U. S., 218, affirming *U. S. v. Meyer*, 37 App. D. C., 282.)

**Delivery of public property to contractor as part payment on contract.**—Sections 1541 and 3618, Revised Statutes, confer upon the Secretary of the Navy the only authority by which he can dispose of the materials of the United States Navy. When in the judgment of the Secretary they can be advan-

tageously used they must be used; when they can not be so used they must be sold at public sale and the proceeds covered into the Treasury. No officer of the Navy Department had any authority, therefore, to deliver to a contractor the materials of the Navy to be sold by him and to allow him to put the proceeds into his own pocket. (*Steele v. U. S.*, 113 U. S., 128, 133.)

A private sale of old material arising from the breaking up of a vessel of war, made by an officer of the Navy Department to a contractor for repairs of a war vessel and machinery, is in violation of the provisions of section 1541, Revised Statutes. (*Steele v. U. S.*, 113 U. S., 128.)

The allowance of the estimated value of such material in the settlement of the contractor's accounts is a violation of the provisions of section 3618, Revised Statutes. (*Steele v. U. S.*, 113 U. S., 128.)

A settlement of such accounts at the Navy Department and at the Treasury, in which the contractor was debited with the material at the estimated value, does not preclude the United States from showing that the estimates were far below the real value, and from recovering the difference between the amount allowed and the real value. (*Steele v. U. S.*, 113 U. S., 128.)

Delay in enforcing a claim arising out of an illegal sale of the property of the United States at a value far below its real worth can not be set up as a bar to the recovery of its value. (*Steele v. U. S.*, 113 U. S., 128.)

An officer of the Government can not trade off to a contractor, in payment of the money due him on his contract, old materials belonging to the United States, when in the judgment of the officer they can not be advantageously used. The delivery of such old material to a contractor, with or without the authority of the Navy Department, if it was intended to vest in the contractor any title to the material, was without authority of law. Where the property so delivered was charged to the contractor at about one-fourth its actual value, the United States is entitled to recover the difference between the amount charged and its real value. The whole transaction was illegal, and the contractor is chargeable with knowledge of the fact. It was in effect a private sale of the property of the United States at a grossly inadequate price. The fact that the account had been settled by the officers of the Navy Department did not cure the unauthorized acts. Both the disposition of the property and the settlement of the account were without authority of law and not binding on the Government. (*Steele v. U. S.*, 113 U. S., 128, 133.)

**Exchange of vessels.**—The Secretary of the Navy can not exchange a vessel belonging to the Navy, which has been condemned as unfit for naval purposes, for another vessel, notwithstanding the exchange might be of advantage to the public service. The disposition of such vessel is controlled by the act of May 23, 1872, section 2 [now sec. 1541, R. S.]. The Secretary of the Navy can only dispose of vessels and materials belonging to the United States and under the control of his department



in manner as prescribed in said section. (14 Op. Atty. Gen., 369.)

For other cases, see notes to sections 161, 355, and 418, Revised Statutes.

**Loan of public property.**—The head of a department has no power to turn over Government property to States or individuals, to be used for any purpose not authorized by some act of Congress, any more than he has power to give such property away absolutely. The property, real and personal, of the United States is dedicated by law to the uses and purposes of the United States, and nothing short of an act of Congress can authorize its application to any other uses and purposes. The question is one of power, and that must come from Congress and is not to be inferred from the fact that what is recommended would be highly beneficial to the United States. Whether the proposed application of Government property to State purposes is advisable or not is a question for the legislative and not the executive department of the Government. (20 Op. Atty. Gen., 93, 96, citing *Steele v. U. S.*, 113 U. S., 128.)

For other cases, see notes to sections 161, 355, and 418, Revised Statutes.

**Disposition of vessel where bids are less than appraised value.**—The act of March 3, 1883 (22 Stat., 599), provides for the advertisement and sale of condemned vessels of the Navy and that no such vessel shall be sold for less than the appraised value. Where the Secretary of the Navy has endeavored to comply with that statute, but no one is willing to pay the appraised value, the case is one not specifically covered by any statute. In the absence of any such statute, the Secretary, by virtue of his office and because of his general duty to care for and preserve the property of the Government under his control, has the right to

reject all bids submitted and to dispose of such condemned vessel in such way as may seem to him to be most advantageous to the Government. He may, therefore, very properly utilize such portion of the vessel as is of value, and destroy that which remains and which is valueless. (28 Op. Atty. Gen., 470.)

It is customary to remove from condemned naval vessels before sale such articles of outfit and equipment as may still be serviceable to the Government. This custom does not depend upon any statute authorizing it, but is based upon the exercise of the general official power which the Secretary of the Navy has, in virtue of his office, to properly care for and protect the public property committed to his control and to prevent unnecessary waste of Government property. (28 Op. Atty. Gen., 470.)

The Secretary of the Navy may legally remove the engine and boiler from a naval barge for future use by the Government, since the vessel has been found unfit for further service, and the highest bid received for the vessel was much less than the value of the engine and boiler. The hull, being valueless, may be sunk or destroyed. (28 Op. Atty. Gen., 470.)

**Status of vessel stricken from the Navy Register.**—Although a board to examine vessels of the Navy, under the act of August 5, 1882 (22 Stat., 296, sec. 2), finds a vessel "unfit for further service as a cruiser," and her name is stricken from the list of ships in the Navy Register, that does not necessarily muster her out of the service. A vessel condemned by a board as unfit for a cruiser, but subject to the usual naval routine and put to kindred uses, her officers being subject to the same rules as before she was condemned, remains, as to those serving on her, as much a vessel of the Navy as before. (*Pierce v. U. S.*, 33 Ct. Cls., 294.)

**Sec. 1542. [Commandants of navy-yards.]** The President may select the commandants of the several navy-yards from officers not below the grade of commander.—(2 Aug., 1861, c. 36, v. 12, p. 285. 5 July, 1862, c. 134, s. 2, v. 12, p. 510.)

Military command by staff officers: See section 1488, Revised Statutes.

Marine officers not to command navy yards. See section 1617, Revised Statutes.

**Commandant must be line officer.**—The grade of commander exists only in the line of the Navy, therefore the words, "officers not below the grade of commander," used in this section, require that the commandants of the several navy yards be officers of the line. (File 5038-20.1, Jan. 18, 1915. See note to secs. 1404 and 1390, R. S.)

**"Navy yard" defined.**—Where the Commonwealth of Virginia ceded to the United States jurisdiction over certain public lands for the purpose of a navy yard, by "navy yard" was meant not merely the land on which the

Government does work connected with ships of the Navy, but the waters contiguous necessary to float the vessels of the Navy while at the navy yard. (Ex parte Tatem, 23 Fed. Cas., No. 13759; see art. 5354, Naval Institutions, 1913.)

**Transfer of property between navy yards.**—When specifically appropriated for to be used at a designated navy yard, can not be transferred to another without legislative authority. (28 Op. Atty. Gen., 511, as to floating dry dock; 31 Op. Atty. Gen., 594, as to machinery and tools.)

**Abolishing navy yards.**—Whether this may be done without legislative authority, quare. (31 Op. Atty. Gen., 594, 596.)

**Sec. 1543. [Master workmen.]** The persons employed at these several navy-yards to superintend the mechanical departments, and heretofore known as master mechanics, master carpenters, master joiners, master blacksmiths, master boiler-makers, master sail-makers, master plumbers, master painters, master calkers, master masons, master boat-builders, master spar-makers,

master block-makers, master laborers, and the superintendents of rope-walks shall be men skilled in their several duties and appointed from civil life, and shall not be appointed from the officers of the Navy.—(17 June, 1868, c. 61, s. 1, v. 15, p. 69.)

**Sec. 1544. [Laborers, how selected.]** Laborers shall be employed in the several navy-yards by the proper officers in charge with reference to skill and efficiency, and without regard to other considerations.—(23 May, 1872, c. 195, s. 1, v. 17, p. 146.)

No enlisted men or seamen, not including commissioned and warrant officers, on battle-ships of the Navy, when such battleships are docked or laid up at any navy yard for repairs, shall be ordered or required to perform any duties except such as are or may be performed by the crew while at sea or in a foreign port. (Act Aug. 22, 1912, 37 Stat., 355.)

**Moral character considered.**—Taken literally, section 1544 might require a disregard for good character or personal morals on the part of an applicant for employment if his skill in his trade and efficiency as a mechanic were notable and undoubted. Such was not the intention of Congress, and this section should be read as though the word “primarily” or the words “first of all” were interpolated between the words “reference” and “to”; or as though the words “suggesting the choice of those less efficient and skillful” had been appended after the word “considerations.” (27 Op. Atty. Gen., 184, 189.)

**Political considerations.**—There can be no doubt that the “considerations” which Congress had in mind refer to general complaints which had been made by reason of the alleged employment of workmen at navy yards for political considerations and through the influence of politicians in order to secure expected partisans or personal advantage. This section intended to lay down, as a rule for the guidance of officers at the several navy yards, the principle that workmen should be employed for the benefit of the Government and not for any other reason. (27 Op. Atty. Gen., 184, 189.)

**Nature of tests to determine fitness.**—The Secretary of the Navy may direct by what reasonable and appropriate tests fitness or comparative fitness may be ascertained, and in the absence of any law, rule, or order on the subject, that matter would be left to the discretion of the appointing power. (27 Op. Atty. Gen., 184.)

**Persons discharged from military service.**—Section 1544, Revised Statutes, must be construed in connection with 1754, Revised Statutes, which provides that persons honorably discharged from the military or naval service by reason of disability, etc., incurred in the line of duty, shall be preferred for appointments to civil offices where they are found to possess the necessary business capacity to properly discharge the duties of such office. (27 Op. Atty. Gen., 184.)

Regulations promulgated to give effect to sections 1544 and 1754, Revised Statutes,

should provide that persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty, if fitted physically, mentally, and morally to discharge with reasonable skill and efficiency the duties of the position to be filled, are entitled to be selected in preference to others, although the latter may possess greater skill and efficiency. As between persons within this privileged class relative skill and efficiency should be decisive as to the right of employment, and all other considerations should be subordinated thereto. With respect to all other persons, including those honorably discharged on account of expiration of enlistment or reasons other than disability incurred in the line of duty, superior fitness for the employment should be the decisive consideration; but where there is no appreciable difference in this respect between two applicants, then an honorably discharged soldier, sailor, or marine would be entitled to preference in conformity with the intentment of section 1755, Revised Statutes. (27 Op. Atty. Gen., 184.)

**Preference for employment.**—“Persons employed in the clerical, drafting, and inspection force at navy yards and stations discharged for lack of work or insufficiency of funds shall for one year thereafter be preferred for employment in such navy yards and stations in the clerical, drafting, inspection, and messenger forces.” (Act Mar. 3, 1909, 35 Stat., 755.)

**Classified service.**—Civilian employees at navy yards, other than laborers or workmen, are included within the classified service and are not exempted from competitive examination by the terms of section A of the Civil Service Rules, but in so far as they come within the provisions of section 3 of Rule III are subjected to special tests of fitness to be prescribed in accordance with the terms of the latter rule. (27 Op. Atty. Gen., 184.)

**Mandamus will lie to compel the members of the Board of Labor Employment at the United States Navy Yard, Washington, D. C., to register an applicant for examination for employment as mechanic or laborer, where the refusal of the board is based solely upon the citizenship of the applicant and in this respect he is eligible under Rule 5 of the Civil Service Commission, promulgated by the President on April 15, 1903, which modified previous regulations of the Navy Department. (U. S. v. Bowyer, 25 App. D. C., 121. See note to sec. 417, R. S.)**



### Sec. 1545. [Salaries; per diem compensation. Repealed.]

This section provided as follows:

"SEC. 1545. Salaries shall not be paid to any employes in any of the navy-yards, except those who are designated in the estimates. All other persons shall receive a per diem compensation for the time during which they may be actually employed."—(14 July, 1862, c. 16 4, s. 1, 12, p. 564.)

It was expressly repealed by act of March 3, 1909 (35 Stat., 755), which act made the following new provision on the same subject (35 Stat., 754, 755): "That hereafter the rates of pay of the clerical, drafting, inspection, and messenger force at navy-yards and naval stations and other stations and offices under the Navy Department shall be paid from lump appropriations and shall be fixed by the Secretary of the Navy on a per annum or per diem basis as he may elect; that the number may be increased or decreased at his option and shall be distributed at the various navy-yards and naval stations by the Secretary of the Navy to meet the needs of the naval service \* \* \*; that the total amount expended annually for pay for such clerical, drafting, inspection, and messenger force shall not exceed the amounts specifically allowed by Congress under the several lump appropriations, and that the Secretary of the Navy shall each year, in the annual estimates, report to Congress the number of persons so employed, their duties, and the amount paid to each."

(See act of Aug. 29, 1916, 39 Stat., 558, as to lump-sum employees.)

**Leaves of absence.**—By act of August 29, 1916 (39 Stat., 617), it was provided "that each and every employee of the navy yards, gun factories, naval stations, and arsenals of the United States Government is hereby granted thirty days' leave of absence each year, without forfeiture of pay during such leave: *Provided further*, That it shall be lawful to allow pro rata leave only to those serving twelve consecutive months or more: *And provided further*, That in all cases the heads of divisions shall have discretion as to the time when the leave can best be allowed: *And provided further*, That not more than thirty days' leave with pay shall be allowed any such employee in one year: *Provided further*, That this provision shall not be construed to deprive employees of any sick leave or legal holidays to which they may now be entitled under existing law."

The act of March 3, 1909 (35 Stat., 755), which was modified by the above-quoted provisions in the act of August 29, 1916, contained the following with reference to per diem employees at navy yards and naval stations and other stations and offices under the Navy Department: "That such per diem employees may hereafter, in the discretion of the Secretary of the Navy, be granted leave of absence not to exceed fifteen days in any one year, which leave may, in exceptional and meritorious cases, where such an employee is ill, be extended, in the discretion of the Secretary of the Navy, not to exceed fifteen days additional in any one year."

"All officers and employees of the United States and of the District of Columbia who shall be members of the National Guard shall be en-

titled to leave of absence from their respective duties, without loss of pay, time or efficiency rating, on all days during which they shall be engaged in field or coast-defense training ordered or authorized under the provisions of this Act." (Act June 3, 1916, sec. 80, 39 Stat., 203.)

The naval appropriation act of March 4, 1913 (37 Stat., 893), provided that "employees while taking their leaves of absence shall not receive compensation for services rendered during the period of such leave of absence in addition to leave pay."

The act of August 29, 1916 (39 Stat., 557), provided that "hereafter any civilian employee of the Navy Department who is a citizen of the United States and employed at any station outside the continental limits of the United States may, in the discretion of the Secretary of the Navy, after at least two years' continuous, faithful, and satisfactory service abroad, and subject to the interests of the public service, be granted accrued leave of absence, with pay, for each year of service, and if an employee should elect to postpone the taking of any or all of the leave to which he may be entitled in pursuance hereof such leave may be allowed to accumulate for a period of not exceeding four years, the rate of pay for accrued leave to be the rate obtaining at the time the leave is granted."

**Holidays.**—"The employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to-wit: The first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days." (Res. Jan. 6, 1885, 23 Stat., 516. See 21 Comp. Dec., 337, noted below under "Pay at navy yards for work on holidays.")

"All per diem employees of the Government, on duty at Washington or elsewhere in the United States, shall be allowed the day of each year, which is celebrated as 'Memorial' or 'Decoration Day' and the fourth of July of each year, as holiday, and shall receive the same pay as on other days." (Res. Feb. 23, 1887, 24 Stat., 644.)

"The first Monday of September in each year, being the day celebrated and known as Labor's Holiday, is hereby made a legal public holiday, to all intents and purposes, in the same manner as Christmas, the first day of January, the twenty-second day of February, the thirtieth day of May, and the fourth day of July are now made by law public holidays." (Act June 28, 1894, 28 Stat., 96.)

Every Saturday after 12 o'clock noon is a holiday in the District of Columbia under the following provision of the District of Columbia Code, section 1389 (act Mar. 3, 1901, 31 Stat., 1404), as amended by act of June 30, 1902 (32 Stat., 520): "The following days in each year, namely, the first day of January, commonly

called New Year's Day; the twenty-second day of February, known as Washington's Birthday; the Fourth of July; the thirtieth day of May, commonly called Decoration Day; the first Monday in September, known as Labor's Holiday; the twenty-fifth day of December, commonly called Christmas Day; every Saturday, after twelve o'clock noon; any day appointed or recommended by the President of the United States as a day of public fasting or Thanksgiving, and the day of the inauguration of the President, in every fourth year, shall be holidays in the District for all purposes."

Holidays falling on Sunday are observed on the following day in the District of Columbia under section 1389 of the Code (cited above), which contains the following clause: "Whenever any day set apart as a legal holiday shall fall on Sunday, then and in such case the next succeeding day shall be a holiday \* \* \*." The Navy Regulations, article 1289, after providing that January 1, February 22, May 30, July 4, the first Monday in September, December 25, "and such other days as may be designated by the President (including the day for National Thanksgiving) shall be regarded as holidays on board ships of the Navy and at naval stations," further provides that "whenever any of the above-designated dates falls on Sunday, the following Monday shall be observed as a holiday." General provision to the same effect with reference to employees of the Federal Government was made by Executive order of May 22, 1909.

**Civilian employees traveling from United States to duty in insular possessions and return.**—"The Secretary of the Navy, in his discretion, is authorized to pay all civilian employees appointed for duty in the Philippine, Hawaiian, and Samoan islands, the island of Guam, and the island of Porto Rico, from the date of their sailing from the United States until they report for duty to the officer under whom they are to serve, and while returning to the United States by the most direct route and with due expedition, a per diem compensation corresponding to their pay while actually employed; and in cases where the appointee is not to fill an existing vacancy his pay while traveling may be charged to the annual appropriation of the bureau concerned." (Act July 1, 1902, 32 Stat., 663.)

**Pay at navy yards for work on holidays.**—Where employees of the Navy Department are required to perform labor in the District of Columbia on Saturday afternoon, which is a legal holiday in the District of Columbia for all purposes, they are entitled to be paid therefor at the ordinary rate of pay under Revised Statutes, section 1545. (Adams v. U. S., 42 Ct. Cls., 192.)

The work in a navy yard is under the control of the Secretary of the Navy, and where he directs work to be performed by per diem employees on holidays, a regulation fixing pay operates as a contract if it does not contravene some law. (Adams v. U. S., 42 Ct. Cls., 192.)

An order issued by the Secretary of the Navy, requiring employees to render service on Saturday afternoons with no other compensation than such as shall be due by reason of the extension

of hours, is presumed to be issued with the approval of the President under section 1547, Revised Statutes. (Adams v. U. S., 42 Ct. Cls., 192.)

Where a statute gives to certain employees pay without work on holidays, and they are required by the head of the department to render service on holidays, he may make provision by regulation or contract for extra pay for services so performed. (Adams v. U. S., 42 Ct. Cls., 192.)

Exemption from work on holidays does not carry with it the right to pay. If Congress makes no provision for payment to per diem employees on holidays, their compensation is limited to the time they are actually employed. (Adams v. U. S., 42 Ct. Cls., 192.)

Actual service is the basis for pay, and where there is no law giving pay without work, the per diem employee is not entitled to be paid. (Adams v. U. S., 42 Ct. Cls., 192.)

Per diem employees of the Government at navy yards and stations which are not in the United States are entitled to be paid on holidays as provided in article 382, Naval Instructions, as amended July 6, 1914. By section 1545, Revised Statutes, per diem employees in navy yards were allowed compensation only for time actually employed, but this statute was repealed by the act of March 3, 1909 (35 Stat., 753, 755), and there is no existing law which said article of the Naval Instructions contravenes (21 Comp. Dec., 337).

Hawaii is in the United States within the meaning of the joint resolution of January 6, 1885 (23 Stat. 516), and its provisions as to pay for certain holidays are applicable to per diem employees at navy yards within that territory (21 Comp. Dec., 337).

**Suspension of work for part of day under Executive order.**—On April 6, 1899, the Washington navy yard being closed at noon pursuant to an Executive order, in connection with ceremonies attending the interment of the bodies of soldiers and sailors whose lives were lost in the War with Spain, the per diem employees of the yard should receive compensation for the entire day. Section 1545, Revised Statutes, does not restrict the employees under such circumstances to compensation for the time they were actually engaged in doing work. The employees did not cease work on their own motion, nor were they discharged from the Government service for the remaining part of the day. They had severally begun a day's work under a contract with the Government, and had continued to work until the authorities of the shop closed the navy yard, shut up its workshops, and arbitrarily required them to stop. They were still actually in the employment of the Government, though instead of laboring in the navy yard they were engaged, by direction of the President, in doing honor to the heroes who gave their lives for the country in a foreign war. While the statute of the United States provides that eight hours shall constitute a day's work for all laborers, workmen, and mechanics who may be employed by or on behalf of the Government of the United States, there is no rule of law which exempts the Government from the same



obligation to its employees as that which rests upon a private individual. (22 Op. Atty. Gen., 472).

**Employee suspended by order of commandant.**—One who is employed at a navy yard at a per diem compensation is not entitled to compensation except for the time during which he actually renders services; and the fact that, after being suspended by the commandant, he holds himself ready to perform such services, gives him no claim against the

Government. The suspension of such an employee by the commandant is in effect his discharge; and the fact that, after his suspension, a board is appointed to investigate charges against him is no recognition of his status as an employee, and gives him no right to compensation, nor to a recovery of sums expended in traveling to attend before the board. (*Murphy v. U. S.*, 79 Fed. Rep., 255. For other cases, see note to sec. 416, R. S.).

**Sec. 1546. [Requiring contributions for political purposes.]** No officer or employé of the Government shall require or request any working man in any navy-yard to contribute or pay any money for political purposes, nor shall any working man be removed or discharged for political opinion; and any officer or employé of the Government who shall offend against the provisions of this section shall be dismissed from the service of the United States.—(2 Mar., 1867, c. 172, s. 3, v. 14, p. 492.)

By act of June 30, 1876 (19 Stat., 69), it was provided that "no increase of the force at any navy yard shall be made at any time within sixty days next before any election to take place for President of the United States, or members of Congress, except when the Secretary of the Navy shall certify that the needs of the public service make such increase necessary at that time which certificate shall be immediately published when made."

Civil Service Commission is to prepare rules on the subject of political contributions and services by persons in the public service, and preventing the coercion of any person's political action by persons in the public service. (Act Jan. 16, 1883, sec. 2, 22 Stat., 403.)

Detailed records of political contributions required to be kept and filed, etc., by political committees. (Act June 25, 1910, 36 Stat., 822, as amended by act Aug. 19, 1911, 37 Stat., 25.)

Punishment of persons in the United States service for directly or indirectly soliciting or receiving political contributions from officers or employees of the United States is provided for by United States criminal code, act of March 4, 1909, sections 118, 122 (35 Stat., 1110).

Punishment of any person for soliciting in any manner whatever or receiving any political contribution in any room or building occupied in the discharge of official duties by any employee of the United States, or in any navy yard, fort, or arsenal, is provided for by United States criminal code, act of March 4, 1909, sections 119, 122 (35 Stat., 1110).

Punishment of any officer or employee of the United States for discharging, promoting, or degrading, or changing the official rank or compensation of any other officer or employee, or promising or threatening to do so, for giving or withholding any political contribution, is provided for by United States criminal code, act of March 4, 1909, sections 120, 122 (35 Stat., 1110).

Punishment of any person in the service of the United States for directly or indirectly giv-

ing any political contribution to any other person in the United States service, is provided for by United States criminal code, act of March 4, 1909, sections 121, 122 (35 Stat., 1110).

**Purpose of section.**—The evident purpose of Congress in all this class of enactment has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the just scope of legislative power. If contributions from those in public employment may be solicited by others in official authority, it is easy to see that what begins as a request may end as a demand, and that a failure to meet the demand may be treated by those having the power of removal as a breach of some supposed duty growing out of the political relations of the party. The law contemplates no restrictions upon either giving or receiving, except in so far as may be necessary to protect in some degree those in the public service against exactions through fear of personal loss. This purpose of the restriction and the principle on which it rests are most distinctly manifested in section 1546, Revised Statutes. If there were no other reasons for legislation of this character than such as relate to the protection of those in the public service against unjust exactions, its constitutionality would be clear. But there are other reasons equally good. If persons in public employ may be called on by those in authority to contribute from their personal income to the expenses of political campaigns, and a refusal may lead to putting good men out of the service, liberal payments may be made the ground for keeping poor ones in. Also, if part of the compensation received for public services must be contributed for political purposes, it is easy to see that an increase of compensation may be required to provide the means to make the contribution, and that in this way the Government itself may be made to furnish indirectly the money to defray the expenses of keeping the political party in power that happens to have for the time being the control of the public patronage. (*Ex parte Curtis*, 106 U. S., 371.)

## CHAPTER SEVEN.

### GENERAL PROVISIONS RELATING TO THE NAVY.

Sec.  
1547. Regulations.  
1548. Copy to be furnished to officers.  
1549. Regulations of supplies.  
1550. Appointment of persons to disburse money on foreign stations.

Sec.  
1551. Insane of the Navy.  
1552. Coal depots.  
1553. Enticing persons to desert.  
1554. Captured flags.  
1555. Preservation of, in some public place.

**Sec. 1547. [Regulations.]** The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner.—(14 July, 1862, c. 164, s. 5, v. 12, p. 565.)

See note to section 161, Revised Statutes, for collection of decisions on the subject of executive regulations.

**Valid regulations have the force of law.**—It is a well-settled rule of judicial construction that the regulations issued by the Secretary of the Navy, in conformity with section 1547 of the Revised Statutes, are valid and have the force of law when they are not inconsistent with the statute under which they are issued by the Secretary. (25 Op. Atty. Gen., 270, 274. (See below, "Proceedings of courts-martial.")

**Must be consistent with law.**—"The authority of the Secretary to issue orders, regulations and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the Navy. He may, with the approval of the President, establish regulations in execution of, or supplemental to, but not in conflict with, the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court." (U. S. v. Symonds, 120 U. S., 46, 49; Glavey v. U. S., 182 U. S., 595, 605.)

The orders, regulations, and instructions issued by the Secretary of the Navy under Revised Statutes, section 1547, must be in accordance with law and upon a subject which the law has not determined, adjusted, or defined. A regulation of an executive department must conform to the law, if a law exists upon the subject of the regulation. The Secretary of the Navy can not change the character of an officer's service from sea service to shore service by simply ordering that it be so regarded; sea service is defined by section 1571, Revised Statutes, and the final construction of the statute is vested in the judiciary. (Symonds v. U. S., 21 Ct. Cls., 148; affirmed, 120 U. S., 46.)

For other cases, see specific rulings noted below.

**Detachment of officers from Marine Headquarters.**—Article 4141 of the Navy Regulations, approved May 14, 1913, is in contravention of existing statutes and therefore invalid, in that it permits officers of the staff departments of the Marine Corps to be detached permanently from the headquarters of the commandant, and gives the power to the commandant of the corps to impose duties upon these staff officers inconsistent with their staff functions. (30 Op. Atty. Gen., 234.)

**Regulations of a legislative character.**—Prior to the act of July 14, 1862 (now section 1547, R. S.), it was held by the Attorney General that a code of regulations issued by the President, February 15, 1853, for the government of the naval service, entitled "System of Orders and Instructions," was without legal validity; that said system was neither more nor less than rules for the government and regulation of the naval forces, "that precise thing which the Constitution empowers Congress to make;" and that, even if it be conceded, "what might well be questioned," that Congress can delegate to others the power to make a law, said system could not lay claim to legality by virtue of any power delegated to the President by Congress, as there was no act of Congress authorizing same to be issued or thereafter adopting same. (6 Op. Atty. Gen., 10, reviewing history of Navy Regulations.)

It is not intended to say that the President, as Commander in Chief of the land and naval forces, has not some power to issue directions and orders; so also has a commodore in command of a squadron, or a general in the field. But such orders and directions, when issued by the President, must be within the range of purely executive or administrative action. Cases may be supposed in which it is not easy to draw the line between what is legislative and what is executive or administrative; and so it is in regard to every such question of the distinction of powers. (6 Op. Atty. Gen., 10.)



The Army Regulations derive their force from the power of the President as Commander in Chief, and are binding upon all within the sphere of his legal and constitutional authority. (*Kurtz v. Moffitt*, 115 U. S., 487, 503.)

The act of 1862 (now sec. 1547, R. S.), was only intended to recognize the power of the President to alter regulations which he was originally competent to adopt and promulgate without express authority of Congress; no just rule of construction would authorize giving to this provision the force and effect of a general delegation of legislative authority to the executive at his pleasure to pass upon and regulate subjects which were in their own nature exclusively subjects of legislative action and cognizance, or which Congress had previously fixed by law and which the regulations thereby recognized had not undertaken to modify or alter. (13 Op. Atty. Gen., 10.)

**Regulations specifically adopted by Congress can not be altered by President.**—Congress, by acts of August 5, 1854, chapter 268, section 4, and March 3, 1859, chapter 76, section 2, specifically adopted certain orders of the Secretary of the Navy, dated August 31, 1846, May 27, 1847, and January 13, 1857, upon relative rank; this fact gave to such orders the character of legislative acts; they thereby ceased to be orders or regulations of the executive and were incorporated into the statute law as laws of Congress. Accordingly, the act of July 14, 1862, section 5 (now sec. 1547, R. S.), which authorized the Secretary of the Navy, with the approval of the President, to adopt alterations in "orders, regulations, and instructions" theretofore issued by the Secretary of the Navy, can not properly be treated as comprehending or embracing the above-mentioned orders, which had been previously recognized and established by legislation as regulations of Congress on the subject of the relative rank of staff officers of the Navy. (13 Op. Atty. Gen., 10, overruling 10 Op. Atty. Gen., 413, noted below.)

The executive has no power, without express authority of law, to fix the relative rank of the line and staff officers of the Navy. However, the fifth section of the act of July 14, 1862, recognizing the orders of the Secretary of the Navy theretofore issued as regulations of the Navy Department and authorizing alterations thereof, confers on the Secretary of the Navy, with the approbation of the President, power to alter any orders issued by him before the passage of the act fixing the relative rank of the line and staff officers of the Navy. If, therefore, the head of the Navy Department, as the Minister of the President, has at any former period, by any order or regulation, fixed the relative rank of the line and staff officers of the Navy, it is competent for him, with the approbation of the President, under authority of the provision cited, to make such alterations in such order or regulation as in his judgment the good of the service may require. (10 Op. Atty. Gen., 413; overruled by 13 Op. Atty. Gen., 10, noted above.)

Certain regulations issued by the Secretary of the Navy, with the approbation of the President, on 13 March, 1863, establishing and in-

creasing the relative rank of the staff officers of the Navy, and modifying previous orders which had been specifically adopted by Congress, *held* not founded upon valid authority of law. (13 Op. Atty. Gen., 10.)

**Precedence of line and staff officers.**—Article 21 of the Navy Regulations, 1893 (art. 1009, Navy Regs., 1913), fixing the order in which officers of the line and different staff corps shall take precedence when of the same date, is within the authority conferred upon the Secretary of the Navy, by Revised Statutes, section 1547. (21 Op. Atty. Gen., 46.)

**Rank of aids to rear admirals.**—Section 1547, Revised Statutes, provides that the Secretary of the Navy, with the approval of the President, can make necessary regulations for the Navy, and when the law provides for additional pay of aids to admirals it would seem both proper and necessary for the regulations to provide under what circumstances such aids should be appointed and what should be their rank. There is no other branch of the Government service interested in the rank of officers to be detailed for such service, and there is no law prohibiting the Secretary of the Navy, with the approval of the President, from determining that matter. When such regulations are promulgated, they have the force of law. (*Jones v. U. S.*, 49 Ct. Cls., 16; compare *Knox v. U. S.*, 52 Ct. Cls., 22, 28.)

**Command of hospital ships.**—The Navy Regulations, edition of 1909, article 37, paragraph 2, approved by the President, provide for the command of hospital ships by a medical officer not below the grade of surgeon. The law provides that such regulations, when so approved, shall be the regulations of the Navy, and they have the force of law when not inconsistent therewith. The orders preceding this regulation and the regulation itself were issued and adopted in accordance with law. The regulation referred to may at any time be changed or modified by the President or by the Secretary of the Navy with the approval of the President. (27 Op. Atty. Gen., 571.)

**Proceedings of courts-martial.**—The Orders, Regulations, and Instructions for the Administration of Law and Justice in the United States Navy, issued by the Secretary of the Navy under authority of the President in 1870, were recognized and given the sanction of law by section 1547 of the Revised Statutes, passed since the adoption of such regulations. Accordingly, section 127 of the said regulations, providing that "when the offense is a disorder or neglect not specially provided for, it should be charged as 'scandalous conduct tending to the destruction of good morals,'" is a valid regulation conferring upon a court-martial jurisdiction over a charge of scandalous conduct tending to the destruction of good morals, and it is not important to inquire in a specific case whether such charge should be considered as made under the concluding words of the first clause of article 8, section 1624, Revised Statutes, punishing "profane swearing, falsehood, drunkenness, gambling, theft, or any other scandalous conduct tending to the destruction of good morals," or under article 22, section 1624, Revised Statutes,

punishing "all offenses committed by persons belonging to the Navy which are not specified in the foregoing articles," for in either view it should, under the regulations of 1870, recognized and sanctioned by Congress, be charged as "scandalous conduct tending to the destruction of good morals." (*Smith v. Whitney*, 116 U. S., 167.)

"Regulations for the administration of law and justice," issued April 15, 1870, which provided for revision by naval courts-martial of their proceedings and sentence when directed by the convening authority, were authorized by section 1547, Revised Statutes, and have the force of law. (*Ex parte Reed*, 100 U. S., 13.)

Congress in establishing courts-martial provided that the Secretary of the Navy is authorized to establish "regulations of the Navy," with the approval of the President (12 Stat., 565; R. S., sec. 1547). Pursuant to this authority, "Regulations for the Administration of Law and Justice" were issued on the 15th of April, 1870. It has been held that such regulations have the force of law. (*Gratiot v. U. S.*, 4 How., 80; *Ex parte Reed*, 100 U. S., 22.) Thus the legislative power is not exercised in detail, but a court is established in pursuance of the power conferred upon Congress and the Secretary of the Navy is clothed with the power of making regulations to control the court. This is one of the many instances in which it is essential for the operations of a great government that matters of detail be intrusted by the legislative department to executive officers for the purpose of giving effect to legislative acts. (21 Op. Att'y. Gen., 430, 441.)

**Manual for the Government of Naval Prisons.**—Articles 81 of the Manual for the government of Naval Prisons, issued by the Judge Advocate General of the Navy with the approval of the Secretary of the Navy, pursuant to authority contained in article 901, Navy Regulations, 1913, and article 604, Naval Instructions, 1913, is a regulation authorized by section 1547, Revised Statutes. (24 Comp. Dec., 740, 757. Compare 25 Op. Att'y. Gen., 270, 275, noted below.)

**Checkages of pay for lost property.**—See note to section 1549, Revised Statutes.

**Refund of enlistment bounty on discharge.**—Where an act of Congress "authorized" the Secretary of the Navy to furnish as a bounty to apprentices enlisting in the Navy when first received on board of a training ship an outfit of clothing not to exceed in value the sum of \$45 (act Mar. 1, 1889, 25 Stat., 781), the language, although permissive in form, is to be construed as imposing upon the Secretary of the Navy an imperative obligation and not merely discretionary power. Congress undoubtedly did not intend that the Secretary of the Navy should have such discretionary power with respect to furnishing the bounty authorized by the act as would enable him to furnish it in one case and in another case decline to furnish it. Neither does the law contain any language from which the inference could be drawn that apprentices discharged within one year after date of enlistment shall refund any part of the clothing outfit previously furnished them as a bounty.

Accordingly, held that regulations issued by the Secretary of the Navy, July 1, 1901, are inconsistent with law and void in so far as they require a refund of the bounty or any portion of it in case an apprentice is discharged within one year after his enlistment for disability not incurred in the line of duty. (25 Op. Att'y. Gen., 270; see also 11 Comp. Dec., 193. **NOTE.**—Refund of enlistment bounty in case of discharge was afterwards specifically provided for by statute; see act June 29, 1906, 34 Stat., 556; and Mar. 2, 1907, 34 Stat., 1176.)

**Duties of disbursing officers.**—Regulations made by the Commissioners of the Navy in 1817, with the consent of the Secretary of the Navy and approved by the President of the United States, were binding upon pursers in the Navy, who were thereby required to make disbursements in accordance therewith, without other compensation than their regular pay as purser, unless when the disbursements were made there was an agreement or understanding between them and the Secretary of the Navy or other officer competent to make such an agreement that they should receive compensation therefor in addition to their regular and fixed pay as purser. (*U. S. v. Fitzgerald*, 25 Fed. Cas. No. 15107; see also notes to secs. 161, 285, and 419, R. S.)

**Disposition of effects of deceased persons.**—The Navy Regulations on the subject of payments to administrators and under wills are to be construed as binding only upon the officers and seamen of the Navy; they are not applicable to nor binding upon the accounting officers of the Treasury Department in the settlement of naval accounts, and it was not intended that they should control those officers. (16 Op. Att'y. Gen., 494, 498.)

The character of all the regulations in question indicates that they were not intended to affect any persons except those subject to the orders of the Secretary of the Navy. Unless they are thus construed, it would seem that a power to legislate was assumed independently of the Federal and State law. For the purpose of protecting the rights of heirs and relatives of deceased seamen, the regulations of the Navy may well require that if the disbursing officer pays the money to an administrator he shall establish facts additional to those which he would ordinarily be required to do. (16 Op. Att'y. Gen., 494, 496.)

See below, "Whether regulations are binding upon accounting officers of the Treasury."

**Whether regulations are binding upon accounting officers of the Treasury.**—The Navy Regulations are published by the Secretary of the Navy "for the government of all persons attached to the naval service." This statement accurately indicates the objects and the limits of the naval regulations, which are for the government of persons attached to the naval service in the conduct of their several duties, and the violation of which would subject such persons to official rebuke. It would be going too far to hold that because the Secretary of the Navy, with the approval of the President, has a quasi legislative power in prescribing the mode in which the subordinates of the naval department should perform their



duties, and the rules by which they should be governed, he could also prescribe a rule which would control the action of the accounting officers upon the same subject. (16 Op. Atty. Gen., 494, 495.)

While in general terms it is often said that the Army and Navy regulations have the force and effect of law, this can only be properly so where we are dealing with a person or subject matter over which the Secretary has official control (citing *Gratiot v. U. S.*, 4 How., 117). Nor can it be said that the fact that Congress has adopted the regulations gives them the force of law in the general sense. It gives them the force of law only so far as they assume to control those to whom the regulations were applicable. Were it otherwise, it would be necessary to hold that, inasmuch as the Secretary with the authority of the President has a right to alter these regulations, Congress has parted with its legislative power so far as the Navy is concerned, and has conferred it upon the Secretary of the Navy. That which it has conferred upon the Secretary of the Navy is not any portion of its general power of legislation, but only the right to make appropriate regulations for the performance of their duties by those whom Congress has placed under his official control. (16 Op. Atty. Gen., 494, 497.)

The decisions of the Comptroller of the Treasury, declaring invalid article 3991, Navy Regulations 1913, limiting the responsibility of pay officers of shore stations for errors in pay rolls, are not conclusive upon the Navy Department; said regulation is valid, at least to the extent of protecting a pay officer who, in good faith, pays items that on the face of the roll are apparently legal expenditures. The regulation in question, as a valid order of the head of an executive department, has binding force upon the accounting officers of the Government. (30 Op. Atty. Gen., 376.)

See above, "Disposition of effects of deceased persons."

**Regulations not approved by the President.**—Regulations issued by the Secretary of the Navy may safely be held invalid where it does not appear that they ever received the approval of the President, as required by section 1547, Revised Statutes, for all regulations issued since July 14, 1862. Such approval, in terms prescribed by the law, is manifestly essential to give validity to regulations as having the force of law. (25 Op. Atty. Gen., 270, 275; but see sec. 161, R. S., and note thereto; and compare 24 Comp. Dec., 740, 757, noted above.)

Under Revised Statutes, section 1547, the orders, regulations, and instructions issued by the Secretary of the Navy are presumed to be issued with the approval of the President, and

this presumption extends to an order requiring employees to render service on Saturday afternoons with no other compensation than such as shall be due by reason of the extension of the hours of service. (*Adams v. U. S.*, 42 Ct. Cls., 192.)

**Regulations enter into contract of navy-yard employees.**—The work in navy yards and naval stations is under the control and direction of the head of the Navy Department, and the employment and pay of per diem employees at such yards and stations, paid from lump-sum appropriations, are also under the direction and control of the head of the department. Under these circumstances regulations are important and necessary instruments in the administration of the duties involved in these cases, and the regulation often operates as a contract or enters into the contracts of employment. This is the effect of such regulations where they do not contravene some law. (21 Comp. Dec., 337, holding that per diem employees of the Government at navy yards and stations which are not in the United States are entitled to be paid on holidays as provided by Navy Regulations.)

**Effect of regulations upon interpretation of later statutes.**—The naval regulations are recognized by Congress in section 1547, Revised Statutes, and those in force when a particular statute was passed may properly be considered in construing it, because the presumption is that Congress enacted the law with the knowledge of and in the light of such regulations. (19 Op. Atty. Gen., 589, 591.)

**Regulations superseded by subsequent statutes.**—The Navy Regulations of 1818, prescribing the official duties of pursers and Navy agents, were repealed by the act of August 26, 1842 (5 Stat., 535), requiring purchases of supplies for the use of the Navy to be made with the public moneys appropriated for the purpose, under such directions and regulations as the executive may prescribe, the effect of which law was to require new "directions and regulations" in the place of the old regulations. (*Strong v. U. S.*, 6 Wall., 788.)

Inasmuch as Congress has authorized the successive heads of the Navy Department to govern the Naval Academy by regulations, and has interfered therewith only, so to say, desultorily, the rule of statutory construction, which forbids any disturbance of previously existing statutory or common law by a new statute further than is necessary to its reasonable operation, must be applied so as to prevent any unnecessary disturbance of previously existing regulations by a subsequent statute. (15 Op. Atty. Gen., 637.)

**Sec. 1548. [Copy to be furnished to officers.]** The Secretary of the Navy shall cause each commissioned or warrant officer of the Navy, on his entry into the service, to be furnished with a copy of the regulations and general orders of the Navy Department then in force, and thereafter with a copy of all such as may be issued.—(17 July, 1862, c. 204, s. 19, v. 12, p. 610.)

**Sec. 1549. [Regulations of supplies.]** It shall be the duty of the President to make, subject to the provisions of law concerning supplies, such regulations for

the purchase, preservation, and disposition of all articles, stores, and supplies for persons in the Navy, as may be necessary for the safe and economical administration of that branch of the public service.—(26 Aug., 1842, c. 206, s. 2, v. 5, p. 535; 3 Mar., 1847, c. 48, s. 1, v. 9, p. 171.)

Exchange of worn-out typewriting and computing machines for the naval establishment as part of the purchase price of new ones, was authorized by act of August 22, 1912 (37 Stat., 346).

Loan of medical and other equipment to the American Red Cross for instruction and practice, for the purpose of rendering aid to the Army and Navy in war, was authorized by resolution of May 8, 1914 (38 Stat., 771), amended by resolution of May 18, 1916 (39 Stat., 164).

Settlement of property accounts is provided for by act of March 29, 1894 (28 Stat., 47); with reference to jurisdiction of Comptroller of the Treasury over property accounts, see note to section 236, Revised Statutes, under "III. Limitations upon jurisdiction."

Ship's stores in the Navy may charge profit on sales, such profit to be expended for the amusement, comfort, and contentment of the enlisted force. (Act June 24, 1910, 36 Stat., 619.)

See note to sections 161, 355, 418, 1540, and 1541, Revised Statutes, concerning purchase, sale, exchange, etc., of property belonging to the Navy.

**Checkages of pay for lost property.**—If a regulation shall be made providing that the willful or negligent damage or destruction of public property by persons in the Navy be charged against the pay of the individual responsible for such damage or destruction, ascertained by a board of survey or other fair method, then such amount or amounts may lawfully be so charged. (15 Comp. Dec., 491.)

In an opinion of the Judge Advocate General, December 8, 1909 (file 3980-452:2), it was concluded that, in the absence of statutory authority, there is no warrant of law for checking the pay of an officer or enlisted man for loss or

damage to Government property, notwithstanding the contrary decision of the Comptroller of the Treasury, above noted. Pursuant to said opinion, article 1260 (5), published in Changes in Navy Regulations Circular No. 4 of June 25, 1909, was revoked by the President upon recommendation of the Secretary of the Navy. (Naval Dig., 1916, p. 447, citing S. & A. ind., May 10, 1916, No. 186-362 and file 26834-594; see also *Smith v. Jackson*, 241 Fed. Rep., 747, 246 U. S., 388 as to jurisdiction of accounting officers.)

There is no authority of law under which an officer of the Navy, who is not required to render return for property in his possession, can be checked for the value of missing property. In this connection attention is invited to the fact that there is no legal obstacle in the way of such officer's depositing to the credit of the United States, if he is willing to do so, a sum sufficient to cover the cost of missing property for which he has been held responsible. (Naval Dig., 1916, p. 447, citing file 18140-35, July 25, 1916.)

There is no authority of law to check the pay of an officer or enlisted man for the loss of a library book (file 2657-04, Apr. 5, 1904; 3980-452:2, Dec. 8, 1909); or for loss or damage to public property (14 J. A. G., 230); or for a boat taken without permission and lost (file 170-04, Jan. 21, 1904); or for careless enlistments by recruiting officers of the Navy (file 5942-34); or for windows broken through carelessness (file 18140-16, Feb. 27, 1912). (Naval Dig., 1916 p. 448.)

The practice of having enlisted men attached to a receiving ship checked in their pay accounts for the loss or destruction of Government property, upon their request, in lieu of being punished for the offense involved therein, is wholly unauthorized by law. (Naval Dig., 1916, p. 448, citing file 3773-149, Dec. 26, 1912.)

#### Sec. 1550. [Appointment of persons to disburse money on foreign stations.]

No person shall be employed or continued abroad, to receive and pay money for the use of the naval service on foreign stations, whether under contract or otherwise, who has not been, or shall not be, appointed by and with the advice and consent of the Senate.—(17 June, 1844, c. 107, s. 4, v. 5, p. 703.)

The senior officer present may make an acting appointment of any fit person to perform the duties of paymaster or assistant paymaster on foreign stations when such office

becomes vacant by death or otherwise, until another paymaster or assistant paymaster shall report for duty. (Secs. 1381 and 1564, R. S.)

**Sec. 1551. [Insane of the Navy.]** The Secretary of the Navy may cause persons in the naval service or Marine Corps, who become insane while in the service, to be placed in such hospital for the insane as, in his opinion, will be most convenient and best calculated to promise a restoration of reason. And he may pay to any such hospital, other than the Government Hospital for the Insane in the District of Columbia, the pay which may from time to time be due to such insane person, and he may, in addition thereto, pay to such



institution, from the annual appropriation for the naval service, under the head of contingent enumerated, any deficiency of a reasonable expense, not exceeding one hundred dollars per annum.—(3 Aug., 1848, c. 121, s. 13, v. 9, p. 272. 2 July, 1864, c. 210, s. 2, v. 13, p. 348.)

Amendment to this section was made by act of July 1, 1916, section 1 (39 Stat., 309), which provided that “after the passage of this act the Government Hospital for the Insane shall be known and designated as Saint Elizabeths Hospital.”

For general provisions relating to the Government Hospital for the Insane, see sections 4838–4858, Revised Statutes.

With reference to habeas corpus proceedings in cases of persons in the naval service committed to the Government Hospital for the Insane, see note to section 761, Revised Statutes, under “Appeal from decision of court or judge granting writ,” and “Arrest of petitioner after discharge.”

**Allotments of pay.**—A warrant officer of the Navy confined in the Government Hospital for the Insane is not authorized by law or regulations to register an allotment, even though mentally competent to take such action, for the reason that he is ashore within the United States (Navy Regs., 1909, art. 1094); the wife of such an officer desiring to secure a portion of his pay should have a guardian or committee appointed to take charge of his affairs. (File 8528–327.1; see also 8528–111; compare Navy Regs., 1913, art. 4472.)

The Secretary of the Navy has no power to increase a naval officer's allotment of pay in favor of his wife without his consent, and if the Secretary makes such increase without his consent, he may recover the illegal excess. (*Melville v. U. S.*, 23 Ct. Cls., 74.)

Where an enlisted man of the naval service is a patient at the Government Hospital for the Insane, and it has been certified by the naval medical officer at, and the superintendent of, said hospital that he is mentally competent to receive and dispose of his pay, he is legally competent to make an allotment or assignment of wages in accordance with Navy Regulations, 1913, articles 4471 and 4472. (File 10060–67, Aug. 18, 1915; see also 8528–340; 1802–04; 8528–399, Oct. 29, 1913; C. M. O. 29, 1915.)

See also section 1430, Revised Statutes, and note thereto.

**Comfort and welfare of patients.**—Where certain articles are essential for the comfort and welfare of general court-martial prisoners confined in the Government Hospital for the In-

sane, the naval medical officer is authorized to forward a certificate, setting forth the articles desired, to the commandant of the navy yard, Washington, D. C.; the commandant has authority to approve the purchase of such articles, not to exceed \$3 per month, the amount excepted by the court-martial sentence for “necessary prison expenses”; if there is no money due such prisoners, these articles will be charged to “Pay, Miscellaneous,” in accordance with the act of February 16, 1909, section 3 (35 Stat., 622). Naval patients not undergoing punishment, when competent to sign pay receipts for such articles, will be allowed to draw the same from pay due, and the commandant is authorized to approve such purchases upon certification of the naval medical officer that such patients are competent to sign pay receipts for nominal amounts necessary to the comfort and welfare of such patients. There is no authority whereby patients not undergoing sentence, and who are legally incompetent to sign such pay receipts, can draw such sums unless a guardian or committee has been appointed. (C. M. O. 22–1915, citing file 10060–61, June 3, 1915; see also 8528–410, June 4, 1914; 10060–14, Jan. 30; 1911; 10060–46, June 12, 1914.)

**Payment of service pensions due inmates.**—Allowances under sections 4756 and 4757, Revised Statutes, which accrue to inmates of Saint Elizabeths Hospital, should be paid to the superintendent of the hospital, notwithstanding such inmates are represented by a legal guardian or committee. (31 Op. Atty. Gen., 354.)

**Jurisdiction of civil authorities.**—The only provision for a judicial inquiry into the mental status of any persons, previous to their admission to Saint Elizabeths Hospital, is in the case of indigent persons residing in the District of Columbia. An enlisted man who was discharged from the Army because of insanity was properly admitted to said hospital upon the order of the Secretary of the Treasury as an insane patient of the Bureau of War Risk Insurance, and as he does not come within the class of indigent persons residing in the District of Columbia, no judicial inquiry prior to his admission is necessary. (31 Op. Atty. Gen., 431.)

## Sec. 1552. [Coal depots. Repealed.]

This section provided as follows:

“Sec. 1552. The Secretary of the Navy may establish, at such places as he may deem necessary, suitable depots of coal, and other fuel, for

the supply of steamships of war.”—(31 Aug., 1842, c. 279, s. 7, v. 5, p. 577.)

It was repealed by act of March 4, 1913 (37 Stat., 898).

## Sec. 1553. [Enticing persons to desert. Repealed.]

This section provided as follows:

“SEC. 1553. Any person who shall entice or procure, or attempt to entice or procure, any seaman or other person in the naval service of the United States, or who has been recruited for such service, to desert therefrom, or who shall

in anywise aid or assist any such seaman or other person in deserting, or in attempting to desert from such service, or who shall harbor, conceal, protect, or in anywise assist any such seaman or other person who may have deserted from said service, knowing him to have deserted

therefrom, or who shall refuse to give up and deliver such person on the demand of an officer authorized to receive him, shall be punished by imprisonment for not less than six months nor more than three years, and by fine of not more than two thousand dollars, to be enforced in any court of the United States having jurisdiction."—(1 July, 1864, c. 204, v. 13, p. 343.)

It was repealed by the Criminal Code, act of March 4, 1909, section 341 (35 Stat., 1153), and was reenacted, with amendments, by section 42 of the same act (35 Stat., 1097), which also reenacted, with amendments, section 5455, Revised Statutes.

**Punishment by court-martial of persons in the naval service who receive or entertain deserters** is provided for by section 1624, Revised Statutes, article 8, paragraph 22.

**Attorney not guilty because of advice given client.**—An attorney employed by the father of a soldier, 16 years old, who had enlisted without the father's consent, to obtain his release on the ground of nonage, by advising the soldier, who was then a deserter, to remain away from the authorities until notified, *held*, not to have "harbored, concealed or assisted" the deserter within Criminal Code, section 42, which requires, to constitute the offense, some positive, physical act, done with knowledge and intent to aid in the wrongful purpose of the deserter. (*Firpo v. U. S.*, 261 Fed. Rep., 850.)

To "conceal," as used in Criminal Code, section 42, providing for punishment of anyone who shall harbor, conceal, protect, or assist any soldier who has deserted from service, means to hide, secrete, or keep out of sight. (*Firpo v. U. S.*, 261 Fed. Rep., 850.)

To "harbor," as used in Criminal Code, section 42, providing for punishment of anyone who shall harbor, conceal, protect, or assist any soldier who has deserted from service, means to lodge, to care for, after secreting the deserter. (*Firpo v. U. S.*, 261 Fed. Rep., 850.)

**Where enlistment not completed.**—Under the act of Congress of March 2, 1855, section 11 (10 Stat., 628), making it an offense to entice a seaman who has enlisted in the naval service of the United States to desert therefrom, *held*, that one who had previously been in the Navy, and whose term of service had expired, and who came to the United States naval rendezvous in Boston to reenlist, and passed through all the necessary steps there,

was examined and passed by the surgeon and his descriptive and transcript lists made out and given to the commanding officer of the rendezvous, and who took the oath required by act of Congress, signed the Navy shipping articles which stated, among other things, his "term of enlistment" and "date of enlistment," and received orders to go on board the receiving ship and for advance pay and bounty, and everything necessary to his enlistment, so far as the officer in charge of recruiting at the naval rendezvous was concerned, was completely performed according to the instructions of the Navy Department; and who went to the receiving ship, but when he reached it was so intoxicated that the commanding officer, in pursuance of instructions issued by the Navy Department, declined to receive him until he became sober; and who then left the ship, saying that he would report in the morning; and before the morning was induced by the defendant not to return to the vessel but to enlist in the Army, was not enlisted within the meaning of the aforesaid act, he not having been examined by the surgeon on the receiving ship or accepted there, and not having his name entered on the books of the ship, and it appearing that no recruit coming from any naval rendezvous and who had passed through all the forms there was ever allowed an advance or any pay, or had his name recorded on the paymaster's books, until he had passed the surgeon on board the receiving ship. (*U. S. v. Thompson*, 28 Fed. Cas. No. 16491; see also *Tyler v. Pomeroy*, 8 Allen (Mass.) 480; and see note to sec. 1418, R. S., under "When enlistment complete.")

**Desertion in consequence of inducements made prior to enlistment.**—Where the prisoner, in order to induce one H. to enlist, made representations to him as to the means and facilities of deserting, and after he had enlisted received the whole of his bounty money, and at the times when he made such representations and received the money he believed they would be likely to cause H. to desert, and they did cause him to desert, the prisoner may be deemed to have procured or enticed H. to desert within the meaning of the statute of 1812, chapter 14, section 17 (2 Stat., 673). It is not necessary, in order to warrant a conviction, that the prisoner should have wished or intended that H. should desert. (*U. S. v. Clark*, 25 Fed. Cas. No. 14808.)

**Sec. 1554. [Captured flags.]** The Secretary of the Navy shall cause to be collected and transmitted to him, at the seat of Government of the United States, all such flags, standards, and colors as shall have been or may hereafter be taken by the Navy from enemies.—(18 April, 1814, c. 78, s. 1, v. 3, p. 133.)

Substantially this same provision is contained | upon the same original enactment as this section.

**Sec. 1555. [Preservation of, in some public place.]** All flags, standards, and colors of the description mentioned in the foregoing section, which are now in the possession of the Navy Department, or may hereafter be transmitted to it, shall be delivered to the President, for the purpose of being, under his direction, preserved and displayed in such public place as he may deem proper.—(18 April, 1814, c. 78, s. 1, v. 3, p. 133.)



## CHAPTER EIGHT.

### PAY, EMOLUMENTS, AND ALLOWANCES.

Sec.	Sec.
1556. Pay of commissioned and warrant officers, midshipmen, mates, secretaries and clerks, nurses, and Naval Reserve Force.	1574. Crews of wrecked or lost vessels.
1557. Furlough pay.	1575. Crews of vessels taken by an enemy.
1558. Allowances.	1576. Assignment of wages.
1559. Volunteer service.	1577. Rations of midshipmen.
1560. Commencement of pay; original entry.	1578. Rations of other officers.
1561. Commencement of pay of promoted officers.	1579. When rations not allowed.
1562. In cases of delayed examination.	1580. Navy ration, constituents of.
1563. Advances to persons on distant stations.	1581. Substitutions in rations, and extra allowance for night watches.
1564. Persons acting as paymaster.	1582. Short allowance.
1565. Chiefs of bureau.	1583. Rations stopped for the sick.
1566. Mileage and traveling expenses.	1584. Additional ration.
1567. Officers serving as storekeepers on foreign stations.	1585. Ration commutation.
1568. Civilians, storekeepers on foreign stations.	1586. Medicines and medical attendance.
1569. Pay of enlisted men.	1587. Funeral expenses.
1570. Additional pay for serving as firemen.	1588. Pay of retired officers.
1571. Sea service.	1589. Retired rear admirals.
1572. Detention beyond term of enlistment.	1590. Third assistant engineers.
1573. Honorable discharge gratuity and continuous service pay.	1591. Pay not increased by promotion.
	1592. Pay on active duty.
	1593. Officers retired on furlough pay.
	1594. Transfer from furlough to retired pay list.
	1595. Rations.

[SEE NOTES AT END OF SECTION 1556 FOR LAWS AMENDATORY OF THAT SECTION, IN FORCE MARCH 4, 1921, RELATING TO THE PAY OF COMMISSIONED AND WARRANT OFFICERS, MIDSHIPMEN, MATES, SECRETARIES AND CLERKS, NURSES, AND NAVAL RESERVE FORCE; ADDITIONAL PAY FOR SPECIAL DUTY, ETC.]

Sec. 1556. [Pay of commissioned and warrant officers, midshipmen, mates, secretaries and clerks, nurses, and Naval Reserve Force.] The commissioned officers and warrant officers on the active list of the Navy of the United States, and the petty officers, seamen, ordinary seamen, firemen, coal-heavers, and employés in the Navy, shall be entitled to receive annual pay at the rates herein stated after their respective designations:—(20 Feb., 1874, c. 35, v. 18, p. 17.)

[2] The Admiral, thirteen thousand dollars.—(15 July, 1870, c. 295, s. 3, v. 16, p. 330.)

[3] The Vice-Admiral, when at sea, nine thousand dollars; on shore duty, eight thousand dollars; on leave, or waiting orders, six thousand dollars.

[4] Rear-admirals, when at sea, six thousand dollars; on shore duty, five thousand dollars; on leave, or waiting orders, four thousand dollars.

[5] Commodores, when at sea, five thousand dollars; on shore duty, four thousand dollars; on leave, or waiting orders, three thousand dollars.

[6] Captains, when at sea, four thousand five hundred dollars; on shore duty, three thousand five hundred dollars; on leave, or waiting orders, two thousand eight hundred dollars.

[7] Commanders, when at sea, three thousand five hundred dollars; on shore duty, three thousand dollars; on leave, or waiting orders, two thousand three hundred dollars.

[8] Lieutenant-commanders, during the first four years after date of commission, when at sea, two thousand eight hundred dollars; on shore duty, two thousand four hundred dollars; on leave, or waiting orders, two thousand dollars; after four years from such date, when at sea, three thousand dollars; on shore duty, two thousand six hundred dollars; on leave, or waiting orders, two thousand two hundred dollars.

[9] Lieutenants, during the first five years after date of commission, when at sea, two thousand four hundred dollars; on shore duty, two thousand dollars; on leave, or waiting orders, one thousand six hundred dollars; after five years from such date, when at sea, two thousand six hundred dollars; on shore duty, two thousand two hundred dollars; on leave, or waiting orders, one thousand eight hundred dollars.

[10] Masters, during the first five years after date of commission, when at sea, one thousand eight hundred dollars; on shore duty, one thousand five hundred dollars; on leave, or waiting orders, one thousand two hundred dollars; after five years from such date, when at sea, two thousand dollars; on shore duty, one thousand seven hundred dollars; on leave, or waiting orders, one thousand four hundred dollars.

[11] Ensigns, during the first five years after date of commission, when at sea, one thousand two hundred dollars; on shore duty, one thousand dollars; on leave, or waiting orders, eight hundred dollars; after five years from such date, when at sea, one thousand four hundred dollars; on shore duty, one thousand two hundred dollars; on leave, or waiting orders, one thousand dollars.

[12] Midshipmen, after graduation, when at sea, one thousand dollars; on shore duty, eight hundred dollars; on leave, or waiting orders, six hundred dollars.

[13] Cadet midshipmen, five hundred dollars.—(16 July, 1862, c. 183, s. 15, v. 12, p. 586. 15 July, 1870, c. 295, s. 12, v. 16, p. 334.)

[14] Mates, when at sea, nine hundred dollars; on shore duty, seven hundred dollars; on leave, or waiting orders, five hundred dollars.—(15 July, 1870, c. 295, s. 3, v. 16, p. 330.)

[15] Fleet-surgeons, fleet-paymasters, and fleet-engineers, four thousand four hundred dollars.—(15 July, 1870, c. 295, s. 3, v. 16, p. 330.)

[16] Medical directors, medical inspectors, pay directors, and pay inspectors, and chief engineer having the same rank as pay director and pay inspector, when on duty at sea, four thousand four hundred dollars.

When not at sea, the same as surgeons and paymasters, respectively.—(15 July, 1870, c. 295, s. 3, v. 16, p. 331. 3 Mar., 1871, c. 117, ss. 5, 6, v. 16, pp. 535, 536. 3 Mar., 1873, c. 230, s. 1, v. 17, p. 555.)

[17] Surgeons, paymasters, and chief engineers who have the same rank with paymasters, during the first five years after date of commission, when at sea, two thousand eight hundred dollars; on shore duty, two thousand four hundred dollars; on leave, or waiting orders, two thousand dollars; during the second five years after such date, when at sea, three thousand two hundred dollars; on shore duty, two thousand eight hundred dollars; on leave, or waiting orders, two thousand four hundred dollars; during the third five years after such date, when at sea, three thousand five hundred



dollars; on shore duty, three thousand two hundred dollars; on leave, or waiting orders, two thousand six hundred dollars; during the fourth five years after such date, when at sea, three thousand seven hundred dollars; on shore duty, three thousand six hundred dollars; on leave, or waiting orders, two thousand eight hundred dollars; after twenty years from such date, when at sea, four thousand two hundred dollars; on shore duty, four thousand dollars; on leave, or waiting orders, three thousand dollars.—(15 July, 1870, c. 295, s. 3, v. 16, p. 330.)

[18] Passed assistant surgeons, passed assistant paymasters, and first assistant engineers, during the first five years after date of appointment, when at sea, two thousand dollars; on shore duty, one thousand eight hundred dollars; on leave, or waiting orders, one thousand five hundred dollars; after five years from such date, when at sea, two thousand two hundred dollars; on shore duty, two thousand dollars; on leave, or waiting orders, one thousand seven hundred dollars.

[19] Assistant surgeons, assistant paymasters, and second assistant engineers, during the first five years after date of appointment, when at sea, one thousand seven hundred dollars; on shore duty, one thousand four hundred dollars; on leave, or waiting orders, one thousand dollars; after five years from such date, when at sea, one thousand nine hundred dollars; on shore duty, one thousand six hundred dollars; on leave, or waiting orders, one thousand two hundred dollars.

[20] Assistant surgeons of three years' service, who have been found qualified for promotion by a medical board of examiners, the pay of passed assistant surgeons.—(3 Mar., 1871, c. 117, s. 5, v. 16, p. 535.)

[21] Naval constructors, during the first five years after date of appointment, when on duty, three thousand two hundred dollars; on leave, or waiting orders, two thousand two hundred dollars; during the second five years after such date, when on duty, three thousand four hundred dollars; on leave, or waiting orders, two thousand four hundred dollars; during the third five years after such date, when on duty, three thousand seven hundred dollars; on leave, or waiting orders, two thousand seven hundred dollars; during the fourth five years after such date, when on duty, four thousand dollars; on leave, or waiting orders, three thousand dollars; after twenty years from such date, when on duty, four thousand two hundred dollars; on leave, or waiting orders, three thousand two hundred dollars.—(15 July, 1870, c. 295, s. 3, v. 16, p. 331.)

[22] Assistant naval constructors, during the first four years after date of appointment, when on duty, two thousand dollars; on leave, or waiting orders, one thousand five hundred dollars; during the second four years after such date, when on duty, two thousand two hundred dollars; on leave, or waiting orders, one thousand seven hundred dollars; after eight years from such date, when on duty, two thousand six hundred dollars; on leave, or waiting orders, one thousand nine hundred dollars.

[23] Chaplains, during the first five years after date of commission, when at sea, two thousand five hundred dollars; on shore duty, two thousand dollars; on leave, or waiting orders, one thousand six hundred dollars; after five years from such date, when at sea, two thousand eight hundred dollars; on shore duty,

two thousand three hundred dollars; on leave, or waiting orders, one thousand nine hundred dollars.

[24] Professors of mathematics and civil engineers, during the first five years after date of appointment, when on duty, two thousand four hundred dollars; on leave, or waiting orders, one thousand five hundred dollars; during the second five years after such date, when on duty, two thousand seven hundred dollars; on leave, or waiting orders, one thousand eight hundred dollars; during the third five years after such date, when on duty, three thousand dollars; on leave, or waiting orders, two thousand one hundred dollars; after fifteen years from such date, when on duty, three thousand five hundred dollars; on leave, or waiting orders, two thousand six hundred dollars.

[25] Boatswains, gunners, carpenters, and sail-makers, during the first three years after date of appointment, when at sea, one thousand two hundred dollars; on shore duty, nine hundred dollars; on leave, or waiting orders, seven hundred dollars; during the second three years after such date, when at sea, one thousand three hundred dollars; on shore duty, one thousand dollars; on leave, or waiting orders, eight hundred dollars; during the third three years after such date, when at sea, one thousand four hundred dollars; on shore duty, one thousand three hundred dollars; on leave, or waiting orders, nine hundred dollars; during the fourth three years after such date, when at sea, one thousand six hundred dollars; on shore duty, one thousand three hundred dollars; on leave, or waiting orders, one thousand dollars; after twelve years from such date, when at sea, one thousand eight hundred dollars; on shore duty, one thousand six hundred dollars; on leave, or waiting orders, one thousand two hundred dollars.—(15 July, 1870, c. 295, s. 3, v. 16, p. 332.)

[26] Secretaries to the Admiral and the Vice-Admiral, each two thousand five hundred dollars.

Secretaries to commanders of squadrons, two thousand dollars.

Secretary of the Naval Academy, one thousand eight hundred dollars.—(15 July, 1870, c. 295, s. 3, v. 16, p. 332.)

[27] Clerks to commanders of squadrons and commanders of vessels, seven hundred and fifty dollars.—(15 July, 1870, c. 295, s. 3, v. 16, p. 332.)

[28] First clerks to commandants of navy-yards, one thousand five hundred dollars.

Second clerks to commandants of navy-yards, one thousand two hundred dollars.

Clerk to commandant at navy-yard at Mare Island, one thousand eight hundred dollars.

Clerks to commandants of naval stations, one thousand five hundred dollars.—(15 July, 1870, c. 295, s. 3, v. 16, p. 332.)

[29] Clerks to paymasters at navy-yards, Boston, New York, Philadelphia, and Washington, one thousand six hundred dollars; Kittery, Norfolk, and Pensacola, one thousand four hundred dollars; Mare Island, one thousand eight hundred dollars.

Clerks to paymasters, at other stations, one thousand three hundred dollars.—(15 July, 1870, c. 295, s. 3, v. 16, p. 332.)

[30] Clerks to paymasters of receiving ships at Boston, New York, and Philadelphia, one thousand six hundred dollars; at Mare Island, one thousand



eight hundred dollars; of other receiving ships, one thousand three hundred dollars.—(15 July, 1870, c. 295, v. 16, p. 332.)

[31] Clerks to paymasters on vessels of the first rate, one thousand three hundred dollars; on vessels of the second rate, one thousand one hundred dollars; on vessels of the third rate, and supply-vessels and store-ships, one thousand dollars.—(15 July, 1870, c. 295, s. 3, v. 16, p. 332.)

[32] Clerks to fleet paymasters, one thousand one hundred dollars.—(15 July, 1870, c. 295, v. 16, p. 332.)

[33] Clerks to paymasters at the Naval Academy and Naval Asylum, one thousand three hundred dollars.—(15 July, 1870, c. 295, v. 16, p. 332.)

[34] Clerks to inspectors in charge of provisions and clothing, at navy-yards, Boston, New York, Philadelphia, and Washington, one thousand six hundred dollars; to inspectors in like charge at other inspections, one thousand three hundred dollars.—(16 July, 1862, c. 183, s. 15, v. 12, p. 586.)

[35] Cadet engineers: before final academic examination, five hundred dollars;

After final academic examination, and until warranted as assistant engineers, when on duty at sea, one thousand dollars; on shore duty, eight hundred dollars; on leave, or waiting orders, six hundred dollars.—(4 July, 1864, c. 252, s. 5, v. 13, p. 393. 3 Mar., 1865, c. 124, s. 1, v. 13, p. 539. 15 July, 1870, c. 295, v. 16, p. 332. 15 July, 1870, c. 295, s. 3, v. 16, p. 330.)

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| <ol style="list-style-type: none"> <li>1. General rule; amendatory statutes.</li> <li>2. Admirals.</li> <li>3. Vice admirals.</li> <li>4. Rear admirals.</li> <li>5. Commodores.</li> <li>6. Captains.</li> <li>7. Commanders.</li> <li>8. Lieutenant commanders.</li> <li>9. Lieutenants.</li> <li>10. Masters (lieutenants, junior grade) and acting lieutenants, junior grade.</li> <li>11. Ensigns and acting ensigns.</li> <li>12. Midshipmen.</li> <li>13. Cadet midshipmen.</li> <li>14. Mates.</li> <li>15. Fleet officers.</li> <li>16. Medical directors and inspectors; pay directors and inspectors.</li> <li>17. Surgeons, paymasters, and chief engineers.</li> <li>18. Passed assistant surgeons, passed assistant paymasters, and first assistant engineers.</li> <li>19. Assistant surgeons, acting assistant surgeons, assistant paymasters, second assistant engineers.</li> <li>20. Assistant surgeons qualified for promotion.</li> <li>21. Naval constructors.</li> <li>22. Assistant naval constructors.</li> <li>23. Chaplains and acting chaplains.</li> </ol> | <ol style="list-style-type: none"> <li>24. Professors of mathematics, civil engineers, and assistant civil engineers.</li> <li>25. Warrant officers, acting warrant officers, and commissioned warrant officers.</li> <li>26. Secretaries.</li> <li>27. Clerks to commanders of squadrons, etc.</li> <li>28. Clerks to commandants of yards and stations.</li> <li>29. Clerks to paymasters of yards and stations.</li> <li>30. Clerks to paymasters of receiving ships, etc.</li> <li>31. Clerks to paymasters of vessels.</li> <li>32. Clerks to fleet paymasters.</li> <li>33. Clerks to paymasters at asylum and academy.</li> <li>34. Clerks to inspectors.</li> <li>35. Cadet engineers.</li> <li>36. Dental Corps; and Nurse Corps (Female).</li> <li>37. Naval Reserve Force.</li> <li>38. Additional pay for special duty.</li> <li>39. Longevity pay.</li> <li>40. Absence from duty.</li> <li>41. Deductions for Naval Hospital Fund.</li> <li>42. Stoppage of pay, service with contractors.</li> <li>43. Waiver of pay.</li> <li>44. Allotments of pay.</li> <li>45. Reduction of pay.</li> <li>46. Termination of pay.</li> <li>47. Pay computed on monthly basis.</li> </ol> |
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**1. General rule; amendatory statutes.**—As to definition of pay, allowance, pay proper, and emoluments, see notes to sections 1558 and 1569, Revised Statutes.

The Navy personnel act of March 3, 1899, section 13 (30 Stat., 1007), provided that "after June thirtieth, eighteen hundred and ninety-

nine, commissioned officers of the line of the Navy and of the Medical and Pay Corps [now designated as "Supply Corps," act of July 11, 1919, 41 Stat., 147] shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army:

*Provided*, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty; but this provision shall not apply to warrant officers commissioned under section twelve of this act: *Provided further*, That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places: *Provided further*, \* \* \* that all officers, including warrant officers, who have been or may be appointed to the Navy from civil life shall, on the date of appointment, be credited, for computing their pay, with five years' service \* \* \* : *And provided further*, That no provision of this act shall operate to reduce the present pay of any commissioned officer now in the Navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay according to existing law: *And provided further*, That nothing in this act shall operate to increase or reduce the pay of any officer now on the retired list of the Navy." (See notes to said act of Mar. 3, 1899, sec. 13, 30 Stat., 1007.)

In the enactment of the Navy personnel act the intention of Congress was evidently to put officers of the Army and Navy on the same footing with respect to their general pay, and to make the act prospective in its application to future legislation, so that if Congress should thereafter raise the general pay of Army officers as fixed by Revised Statutes, section 1261, a like increase should apply to Navy officers. But Congress might thereafter increase the pay of Army officers for services in particular places and under special circumstances without thereby intending such increase to apply to naval officers. (*U. S. v. Thomas*, 195 U. S., 418.)

The naval personnel act undertook to equalize the pay of naval officers with that of Army officers of equal rank, as to duties properly required of a naval officer, but had no operation to provide pay for services peculiar to the Army. (*U. S. v. Crosley*, 196 U. S., 327.)

It was the intention of Congress, as shown by the fourth proviso of section 13 of the personnel act, to leave undisturbed the "present pay" of certain Navy officers who were already receiving higher pay than Army officers of the same rank. (*U. S. v. Thomas*, 195 U. S., 418, 420.) However, this proviso applied only to officers in the Navy at the time the act was passed, and to the pay they were then receiving. (*Taylor v. U. S.*, 38 Ct. Cls., 155, 160.)

By act of June 7, 1900 (31 Stat., 697), section 13 of the personnel act was amended so as to provide "that nothing therein contained shall operate to reduce the pay which, but for the passage of said act, would have been received by any commissioned officer at the time of its passage or thereafter." With reference to this amendment, it was judicially stated: "The original proviso to section 13 excepted from the purview thereof 'the commissioned officers now in the Navy' whose 'present pay' was thereby reduced; while the amendment thereto extends the exception so as to apply to the pay such officers may receive thereafter in case of promotion to higher grades, and as to such officers it is provided that they shall continue to receive

pay 'according to existing law.' The evident purpose of section 13, act of March 3, 1899, was to assimilate the pay of officers of the line of the Navy and of the Medical and Pay Corps to the pay and allowances of officers of corresponding rank in the Army, reserving, however, to such officers then in the Navy the right to continue to receive Navy pay in case the assimilated pay under the act was less. \* \* \* The amendment was clearly intended to apply only to commissioned officers in the Navy when the original act was passed and to the pay they might receive thereafter in case of promotion." (*Taylor v. U. S.*, 38 Ct. Cls., 155.) "That officers in the Navy at the time the personnel act was passed should not be reduced in pay was an obvious and just exception; and to have such an exception preserved in all grades is very obvious and just, which thereby prevents the promotion in grade from working a diminution of pay." (*Richardson v. U. S.*, 38 Ct. Cls., 182, 191; *Jones v. U. S.*, 50 Ct. Cls., 344, 354. See also *Cromwell v. U. S.*, 42 Ct. Cls., 432; *Terry v. U. S.*, 39 Ct. Cls., 353; *Denig v. U. S.*, 37 Ct. Cls., 383; *Littell v. U. S.*, 36 Ct. Cls., 22.)

By act of May 13, 1908 (35 Stat., 127), it was provided that "hereafter all commissioned officers of the active list of the Navy shall receive the same pay and allowances according to rank and length of service," with the limitation (35 Stat., 128), that "the pay and allowances of chaplains in the Navy shall in no case exceed that provided for lieutenant commanders," and the saving clause that "nothing herein shall be construed so as to reduce the pay or allowances now authorized by law for any commissioned, warrant, or appointed officer \* \* \* of the active or retired lists of the Navy \* \* \*." The said act fixed designated rates of pay for chiefs of bureaus in the Navy Department and for the various ranks in the Navy, including midshipmen, warrant officers, and mates, as set forth below; and contained general provisions for increases in pay on account of longevity, sea duty, and foreign service, or shore duty beyond seas, as set forth below.

The said act of May 13, 1908, was construed by the Comptroller of the Treasury as preserving to officers then in the Navy the right to receive pay at the rates they were actually receiving at the date of said act, and also to receive subsequent increases in pay as authorized by prior laws where their pay under former laws would be higher than the rates of pay provided by the act of May 13, 1908. (15 Comp. Dec., 174.) In the specific case presented, the comptroller held that a civil engineer who was in the Navy on May 13, 1908, and who thereafter, on August 29, 1908, completed 15 years' service "after date of appointment," was entitled on and after the date last mentioned to receive the rate of pay provided by section 1556, Revised Statutes, for civil engineers after 15 years from date of appointment, such pay being greater in his case than the new rate of pay provided by the act of May 13, 1908, for a civil engineer of his rank and longevity. In support of this conclusion the comptroller cited the saving clause in the act of May 13, 1908, that nothing therein contained should be construed so as to reduce the pay or allowances "now authorized by law" for any commissioned, warrant, or appointed



officer of the active or retired lists of the Navy, and stated that said expression ("now authorized by law") "means something more than the pay the officer or man was actually receiving at the passage of the act."

In the case of *Jones v. United States* (50 Ct. Cls., 344), it was judicially determined that the saving clause in the act of May 13, 1908, did not entitle a paymaster's clerk to the rate of pay provided by section 1556, Revised Statutes, although higher than that provided by the act of May 13, 1908, where said paymaster's clerk was appointed subsequent to said act; and that said clause applied only to persons who were officers of the Navy on the date of the act, the court remarking in its opinion (50 Ct. Cls., 355): "The reason for the provision against reduction in the act of 1908 is as manifest as was the provision against reduction in the act of 1899 as amended in 1900. Somewhat different language is used, but the reason is the same."

The said act of May 13, 1908, was subsequently construed by the Comptroller of the Treasury as not entitling an officer of the Navy to the rates of pay provided by section 1556, Revised Statutes, for an office which was not held by him on the date of said act but to which he was thereafter promoted, notwithstanding that he was an officer of the Navy when the act of 1908 was enacted, and that the old rate of pay was greater than that provided by said act for the same office. (Comp. Dec., Mar. 8, 1917, 193 S. and A. Memo., 4172, file 26254-2160.) In this case the comptroller specifically decided that the saving clause in the act of 1908 applies to the "reduction of the pay of an officer as distinguished from that of an office," and is "limited in its effect on pay to the pay of the office which the officer held on May 13, 1908, date of its enactment \* \* \* . For such office the old pay, if higher, remains the pay thereof during the period of its occupancy by the then incumbent of it, the taking effect of the new rate of pay in such exceptional cases being, by means of the proviso, postponed until that time."

By act of August 29, 1916 (39 Stat., 581), it was provided that "hereafter all commissioned officers of the active list of the Navy shall receive the same pay and allowances according to rank and length of service," omitting the limitation contained in the act of May 13, 1908, with reference to the pay of chaplains. (As to effect of this provision upon pay of chaplains, see below, under "23. Chaplains.") This clause was followed by a proviso that it "shall not be construed to reduce the pay and allowances of commissioned warrant officers as herein authorized." Also in the same act (39 Stat., 579), it was provided that "nothing contained in this act shall be construed to reduce the rank, pay, or allowances of any officer of the Navy or Marine Corps as now provided by law."

By act of May 18, 1920 (41 Stat., 601), temporary increases in pay were authorized, as set forth below, for officers of the Navy with the rank of captain and below, including warrant officers, such increases to remain effective until the close of the fiscal year ending June 30, 1922, with the proviso that "the increases provided in this act shall not enter into the computation

of the retired pay of officers or enlisted men who may be retired prior to July 1, 1922"; and with the further provision (sec. 14) "that nothing contained in this act shall operate to reduce the pay or allowances of any officer or enlisted man on the active or retired list: *Provided*, That the allowances and gratuities now authorized by existing law are not changed hereby, except as otherwise specified in this act."

By said act of May 18, 1920, it was further provided (sec. 13) "that a special committee, to be composed of five Members of the Senate, to be appointed by the Vice President, and five Members of the House of Representatives, to be appointed by the Speaker of the House of Representatives, shall make an investigation and report recommendations to their respective Houses not later than the first Monday in January, 1922, relative to the readjustment of the pay and allowances of the commissioned and enlisted personnel of the several services herein mentioned."

**2-3. Admirals; Vice admirals.**—See note to section 1362, Revised Statutes.

By act of May 13, 1908 (35 Stat., 127), the pay of Admiral was fixed at \$13,500 per annum. The grade of "Admiral of the Navy" ceased to exist upon the death of Admiral George Dewey on January 16, 1917. By act of August 29, 1916 (39 Stat., 558), the Chief of Naval Operations, while so serving, is given the rank and title of Admiral, with pay at the rate of \$10,000 per annum. By act of May 22, 1917, section 18 (40 Stat., 89), the President is authorized to designate six officers of the Navy for the command of fleets or subdivisions thereof, not more than three of whom shall have the rank and pay of Admiral, and the others the rank and pay of Vice Admiral, "from the date of assuming such command until relinquishing thereof," and by the same act it was provided that "the pay of an Admiral shall be \$10,000 and the pay of a Vice Admiral \$9,000 per annum." This act superseded provisions on the same subject contained in the naval appropriation act of March 3, 1915. (38 Stat., 941, 942.) The latter act was construed as not investing the officers concerned with the *offices* of Admiral and Vice Admiral, but merely as conferring upon them, temporarily, the rank and pay of those offices, while they continued at the same time to be officers of the grade permanently held by them in the Navy. (21 Comp. Dec., 840.)

An officer serving as commander in chief of a fleet with the rank of Admiral, in accordance with the act of March 3, 1915, was held not entitled, in addition to the pay provided in said act for rear admirals so serving, to 10 per centum increase thereof for sea duty under the act of May 13, 1908. (22 Comp. Dec., 522.)

As to allowances see notes to sections 1487, 1558, and 1578, Revised Statutes.

Increased pay for longevity is authorized by the act of May 13, 1908 (35 Stat., 128), only for officers "below the rank of rear admiral."

**4. Rear admirals.**—See notes to sections 1362 and 1466, Revised Statutes.

By act of May 13, 1908 (35 Stat., 127), the pay of "rear admiral, first nine," was fixed at \$8,000 per annum, and "rear admiral, second nine," at

\$6,000 per annum. By act of August 29, 1916 (39 Stat., 577, 578), it was provided that "hereafter pay and allowances of officers in the upper half of the grade or rank of rear admiral, including the staff corps and including staff officers heretofore permanently commissioned with the rank of rear admiral, shall be that now allowed by law for the first nine rear admirals, and the pay and allowances of officers in the lower half of the grade or rank of rear admiral, including the staff corps, shall be that now allowed by law for the second nine rear admirals."

Increased pay for longevity is authorized by the act of May 13, 1908 (35 Stat., 128), only for officers "below the rank of rear admiral."

As to increased pay for special service, see notes below under "38. Additional pay for special duty," and note to section 1571, Revised Statutes.

As to allowances of rear admirals, see notes to sections 1487, 1558, and 1578, Revised Statutes.

A commodore in the Navy who was commissioned as a rear admiral on March 3, 1899, was entitled to the sea pay of a rear admiral as fixed by section 1556, Revised Statutes, this being higher than the pay of a rear admiral of the lower half as fixed by the Navy personnel act of March 3, 1899, and the act of June 7, 1900, having allowed this officer to receive the old rate of pay where higher than that provided by the act of March 3, 1899. The pay of officers in service at the date of the act of March 3, 1899, and the amendatory act of June 7, 1900, might be increased by the terms of those statutes, but was not to be diminished. (*Cromwell v. U. S.*, 42 Ct. Cls., 432. See above, under "1. General rule.")

Section 7 of the Navy personnel act of March 3, 1899 (30 Stat., 1004), provided that each rear admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowances as then allowed a brigadier general in the Army. Section 13 of the same act provided that officers of the line of the Navy when on shore shall receive the allowances, but 15 per centum less pay than when on sea duty. *Held*, that this provision as to pay on shore duty applied to rear admirals of the lower nine. (*Rodgers v. U. S.*, 185 U. S., 83.)

Section 1466, Revised Statutes, provides that all rear admirals shall rank with major generals in the Army. Section 13 of the Navy personnel act provided that officers of the line shall receive the same pay as officers of corresponding rank in the Army; but section 7 of the same act provided that rear admirals of the lower nine shall receive the same pay as brigadier generals in the Army. *Held*, that the provision of section 7 was to be read as an exception to the provision in section 13, and accordingly that rear admirals of the lower nine were not entitled to the pay of major generals, the corresponding rank in the Army, but only to the pay allowed brigadier generals. (*Rodgers v. U. S.*, 185 U. S., 83.)

**5. Commodores.**—See note to section 1362, Revised Statutes.

The naval appropriation act of May 13, 1908 (35 Stat., 127), provided that "hereafter all commissioned officers of the *active list* of the Navy shall receive the same pay and allowances, according to rank and length of service,

and the annual pay of each grade shall be as follows: \* \* \* rear admiral, second nine, or *commodore*, six thousand dollars." However, there were no commodores on the active list at the time of that enactment, and none have since been appointed, the grade of commodore having been omitted from the active list by the Navy personnel act of March 3, 1899, section 7. (30 Stat., 1005.) In certain cases officers have since been retired with the rank of commodore. (See note to sec. 1362, R. S.)

As to pay of retired officers, see section 1588, Revised Statutes, and note thereto.

**6. Captains.**—By act of May 13, 1908 (35 Stat., 127), the pay of captain was fixed at \$4,000 per annum, plus 10 per cent increase thereon for each term of five years' service in the Army, Navy, and Marine Corps, with the limitation that "the total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law," and that "the annual pay of captain shall not exceed five thousand dollars per annum." As to increased pay over and above the amount of this limitation for special service, see note below under "38. Additional pay for special duty," and note to section 1571, Revised Statutes.

By act of May 18, 1920 (41 Stat., 601), the pay of captains in the Navy was increased \$600 per annum "in addition to all pay and allowances now allowed by law," such increase to commence January 1, 1920, and to remain effective "until the close of the fiscal year ending June 30, 1922."

As to allowances of captains, see notes to sections 1487, 1558, and 1578, Revised Statutes.

**7. Commanders.**—By act of May 13, 1908 (35 Stat., 127), the pay of commander was fixed at \$3,500 per annum, plus 10 per cent increase thereon for each term of five years' service in the Army, Navy, and Marine Corps, with the limitation that "the total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law," and that the "annual pay" of commander shall not exceed \$4,500 per annum. As to increased pay over and above the amount of this limitation for special service, see note below under "38. Additional pay for special duty," and note to section 1571, Revised Statutes.

By act of May 18, 1920 (41 Stat., 601), the pay of commanders in the Navy was increased \$600 per annum, "in addition to all pay and allowances now allowed by law," such increase to commence January 1, 1920, and to remain effective "until the close of the fiscal year ending June 30, 1922."

As to allowances of commanders, see notes to sections 1487, 1558, and 1578, Revised Statutes.

**8. Lieutenant commanders.**—By act of May 13, 1908 (35 Stat., 127), the pay of lieutenant commanders was fixed at \$3,000 per annum, plus 10 per cent increase thereon for each term of five years' service in the Army, Navy, and Marine Corps, with the limitation that "the total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law," and that the "annual pay" of lieutenant commander shall not exceed



\$4,000 per annum. As to increased pay over and above the amount of this limitation for special service, see note below under "38. Additional pay for special duty," and note to section 1571, Revised Statutes.

By act of May 18, 1920 (41 Stat., 601, 602), the pay of lieutenant commanders in the Navy was increased \$840 per annum "in addition to all pay and allowances now allowed by law," such increase to commence January 1, 1920, and to remain effective "until the close of the fiscal year ending June 30, 1922."

As to allowances of lieutenant commanders, see notes to sections 1487, 1558, and 1578, Revised Statutes.

**9. Lieutenants.**—By act of May 13, 1908 (35 Stat., 127), the pay of lieutenants was fixed at \$2,400 per annum, plus 10 per cent increase thereon for each term of five years' service in the Army, Navy, and Marine Corps, with the limitation that "the total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law." As to increased pay for special service, see note below under "38. Additional pay for special duty," and note to section 1571, Revised Statutes.

By act of May 18, 1920 (41 Stat., 602), the pay of lieutenants in the Navy was increased \$720 per annum, "in addition to all pay and allowances now allowed by law," such increase to commence January 1, 1920, and to remain effective "until the close of the fiscal year ending June 30, 1922."

As to allowances of lieutenants, see notes to sections 1487, 1558, and 1578, Revised Statutes.

**10. Masters [lieutenants (junior grade)] and acting lieutenants (junior grade).** The grade of master as part of the active list of the line was abolished, and the grade of lieutenant (junior grade) created, by act of March 3, 1883 (22 Stat., 472), which provided that "the masters now on the list shall constitute a junior grade of, and be commissioned as, lieutenants, having the same rank and pay as now provided by law for masters." This had the effect of changing the title "master" to "lieutenant (junior grade)." (See note to sec. 1362, R. S.)

By act of May 13, 1908 (35 Stat., 127), the pay of lieutenants (junior grade) was fixed at \$2,000 per annum, plus 10 per cent increase thereon for each term of five years' service in the Army, Navy, and Marine Corps, with the limitation that "the total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law." As to increased pay for special service, see note below under "38. Additional pay for special duty," and note to section 1571, Revised Statutes.

By act of May 18, 1920 (41 Stat., 602), the pay of lieutenants (junior grade) in the Navy was increased \$600 per annum, "in addition to all pay and allowances now allowed by law," such increase to commence January 1, 1920, and to remain effective "until the close of the fiscal year ending June 30, 1922."

By act of August 29, 1916 (39 Stat., 583), provision was made for appointment of acting lieutenants (junior grade) for aeronautic duties only, and by the same act special provision

was made for the pay of officers detailed to duty with aircraft involving actual flying. (See below, under "38. Additional pay for special duty.")

As to allowances of lieutenants (junior grade), see notes to sections 1487, 1558, and 1578, Revised Statutes.

**11. Ensigns and acting ensigns.**—By act of May 13, 1908 (35 Stat., 127, 128), the pay of ensigns was fixed at \$1,700 per annum, plus 10 per cent increase thereon for each term of five years' service in the Army, Navy, and Marine Corps, with the limitation that "the total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law." As to increased pay for special service, see note below under "38. Additional pay for special duty," and note to section 1571, Revised Statutes.

By act of May 18, 1920 (41 Stat., 602), the pay of ensigns in the Navy was increased \$420 per annum, "in addition to all pay and allowances now allowed by law," such increase to commence January 1, 1920, and to remain effective "until the close of the fiscal year ending June 30, 1922."

As to allowances of ensigns, see notes to sections 1487, 1558, and 1578, Revised Statutes.

By act of August 29, 1916 (39 Stat., 580, 583, 585), provision was made for the appointment of acting ensigns for engineering duties only and for aeronautic duties only. The same act (39 Stat., 581) provided that all commissioned officers of the active list shall receive the same pay and allowances according to rank and length of service and made special provision for the pay of officers detailed to duty with aircraft involving actual flying. (See below under "38. Additional pay for special duty.")

**12. Midshipmen.**—The grade of midshipman as part of the active list of the line was abolished, and the grade of junior ensign created, by act of March 3, 1883 (22 Stat., 472), which provided that "the midshipmen now on the list shall constitute a junior grade of, and be commissioned as, ensigns, having the same rank and pay as now provided by law for midshipmen." The grade of junior ensign thus created was abolished by act of June 26, 1884, section 2 (23 Stat., 60), which provided that "the junior ensigns now on the list shall be commissioned ensigns in the Navy," and that graduates of the Naval Academy who are assigned to the line of the Navy on the successful completion of their course shall be commissioned ensigns in the Navy. (See notes to secs. 1362 and 1521, R. S.; and see below, under "13. Cadet midshipmen.")

As to pay of ensigns, see above, under "11. Ensigns."

**13. Cadet midshipmen.**—By section 1512, Revised Statutes, it was provided that "the students at the Naval Academy shall be styled cadet midshipmen." The title of all undergraduates at the Naval Academy was changed to "naval cadets" by act of August 5, 1882 (22 Stat., 285), and the title "naval cadet" was changed to "midshipman" by act of July 1, 1902 (32 Stat., 686).

By act of May 13, 1908 (35 Stat., 128), the pay of midshipmen was fixed at \$600 per an-

num while at the Naval Academy, and \$1,400 per annum after graduation from the Naval Academy.

Prior to the act of March 7, 1912 (37 Stat., 73), the course at the Naval Academy was six years, the first four of which were spent in pursuing the academic studies at the Academy and the remaining two years at sea. The act of May 13, 1908, made two pay grades for midshipmen. The effect of the act of 1912, which reduced the course at the Naval Academy to four years was to eliminate the two years' service at sea and also the pay grade provided for those thus previously serving. It follows that the only pay for midshipmen now authorized by law is that for those pursuing the four years, course at the Naval Academy, viz, \$600 per annum. (20 Comp. Dec., 141; 23 Comp. Dec., 279. Compare note to sec. 1520, R. S.)

By act of July 11, 1919 (41 Stat., 146), it was provided that "the pay of midshipmen shall hereafter be \$780 per annum."

By act of August 29, 1916 (39 Stat., 585), it was provided that "student flyers shall, after receiving a certificate of qualification as an aviator for actual flying in aircraft, rank with midshipmen and shall receive the same pay and allowances as midshipmen, plus fifty per centum thereof."

As to ratings of midshipmen, see note to section 1577, Revised Statutes.

**14. Mates.**—On the general subject of mates, their status, pay and allowances, etc., see notes to sections 1408 and 1409, Revised Statutes. See also sections 1558, 1569, and 1579, Revised Statutes.

By act of August 1, 1894 (28 Stat., 212), the annual pay of "the twenty-eight officers now serving as mates in the Navy" was fixed at the following rates: "When at sea, twelve hundred dollars; on shore duty, nine hundred dollars; on leave or waiting orders, seven hundred dollars."

By act of May 13, 1908 (35 Stat., 128), the pay of "all" mates was increased 25 per cent. The pay of mates under section 1556, Revised Statutes, clause 14, as amended by said acts of August 1, 1894, and May 13, 1908, is as follows: Mates who were serving as such on August 1, 1894—when at sea, \$1,500; on shore duty, \$1,125; on leave or waiting orders, \$875. Mates who were rated as such since August 1, 1894—when at sea, \$1,125; on shore duty, \$875; on leave or waiting orders, \$625.

By act of May 13, 1920, section 6 (41 Stat., 602), it was provided that, "commencing January 1, 1920, the following shall be the rate of base pay for each enlisted rating: \* \* \* chief petty officers with permanent appointments *and mates*, \$126 per month"; and by section 13 of the same act this rate of pay was to remain effective "until the close of the fiscal year ending June 30, 1922." It was further provided by section 6 of this act "that the rates of base pay herein fixed shall not be further increased ten per centum as authorized by an act approved May 13, 1908, nor by the temporary war increases as authorized by section 15 of the act approved May 22, 1917, as amended by the act approved July 11, 1919."

The act of May 13, 1908 (35 Stat., 128), to which reference is here made, authorized an

increase of 10 per cent in the pay of "all active and retired enlisted men of the Navy," but this did not include mates, whose pay, as above stated, was increased 25 per cent by the same act. No provision is contained in the act of May 18, 1920, with reference to the inclusion or exclusion of this 25 per cent increase in the computation of the pay of mates as therein fixed. (But see Comp. Dec., noted below.)

The act of May 22, 1917, section 15 (40 Stat., 87), to which reference is also made in the provision last quoted from the act of May 18, 1920, provided that "commencing June first, nineteen hundred and seventeen, and continuing until not later than six months after the termination of the present war, all enlisted men of the Navy of the United States in active service," should receive certain increase in pay, including the following: "Those whose base pay is \$45 or more per month, an increase of \$6 per month." The act of July 11, 1919 (41 Stat., 140), also referred to in the provision last quoted from the act of May 18, 1920, provided that the rates of pay prescribed in section 15 of the act approved May 22, 1917, "are hereby made the permanent rates of pay of enlisted men of the Navy during their present current enlistment and for those who enlist or reenlist prior to July 1, 1920, for the term of such enlistment or reenlistment."

Prior to May 18, 1920, the "base pay" of mates (rated as such since Aug. 1, 1894) had been held to be at the rate of \$875 per annum, consisting of their shore duty rate under section 1556, Revised Statutes (\$700 per annum), with the 25 per cent increase allowed thereon under the act of May 13, 1908. The act of May 18, 1920, supersedes or substitutes for said former existing base pay rate that of \$126 per month, or \$1,512 per annum, a yearly increase of \$637 per annum. As the old base rate of \$875 per annum, which the \$126 per month supersedes, included the 25 per cent additional, the act of May 18, 1920, operates to repeal the provision for the 25 per cent increase to mates in the act of May 13, 1908. Accordingly, *held*, that the base pay of mates fixed by section 6 of the act of May 18, 1920, at \$126 per month, is not to be increased 25 per cent thereof. (27 Comp. Dec., 175, citing 23 Comp. Dec., 279.)

The act of May 18, 1920, section 14 (41 Stat., 604), provided that "nothing contained in this act shall operate to reduce the pay or allowances of any officer or enlisted man on the active or retired list: *Provided*, That the allowances and gratuities now authorized by existing law are not changed hereby, except as otherwise specified in this act."

Mates who are honorably discharged from the Navy at the expiration of their enlistment and reenlist in the rating of mate within four months from such discharge are entitled to the four months' gratuity pay provided by section 1573 of the Revised Statutes as amended by the act of March 3, 1899, section 16 (30 Stat., 1008), such honorable-discharge gratuity to be computed on the pay they were receiving at the time of their discharge (14 Comp. Dec., 457). By act of May 18, 1920, section 10 (41 Stat., 603), it was provided that "any enlisted man or apprentice seaman who shall reenlist in the Navy within one year from the date of his dis-



charge therefrom shall, upon such reenlistment, be entitled to and shall receive the same benefits as are now authorized by law for reenlistment within four months from date of last discharge from the service: *Provided*, That this section shall become inoperative six months after the date of the approval of this act."

Because of the prohibition contained in section 1558, Revised Statutes, mates are not entitled, upon reenlistment in accordance with section 1573, Revised Statutes, as amended by the act of March 3, 1899, section 16 (30 Stat., 1008), to continuous-service pay as provided therein for enlisted men who reenlist pursuant to said statutes (14 Comp. Dec., 457); and for the same reason, the pay fixed for mates by the act of May 18, 1920, is not to be increased for continuous service (27 Comp. Dec., 175).

Mates being specifically excepted from the provisions of section 1569, Revised Statutes, under authority of which extra compensation for good-conduct medals and bars, seaman gunner's certificates, and petty officer's certificates, is provided, they are not entitled to such extra compensation (14 Comp. Dec., 457). Nor does the act of May 18, 1920, operate to grant to mates in the Navy the right to permanent additions to their base pay that are authorized for enlisted men of the Navy generally under General Order No. 34 for continuous service and for good-conduct medals. Inasmuch as mates possessed no right to said permanent additions to their pay previously to May 18, 1920, differing in this respect from enlisted men generally, they could not become invested by the act of May 18, 1920, with a right to said permanent additions without express legislation to that effect. The mere change of their base pay rating, along with that of changes in the base pay of other enlisted ratings, did not in itself confer on mates the independent right to said permanent additions to base pay which the other enlisted ratings already possessed. (27 Comp. Dec., 175.)

For other decisions, see note to section 1408, Revised Statutes.

As to allowances of mates, see notes to sections 1558 and 1578, Revised Statutes.

**15. Fleet officers.**—See notes to sections 1373, 1382, and 1393, Revised Statutes, on the general subject of fleet officers.

An officer commissioned after July 1, 1899, is not entitled to the pay provided by section 1556, Revised Statutes, for fleet engineers. The pay provided by that section, including the pay of fleet engineers, is the old Navy pay, and this old Navy pay is reserved to officers who were in the Navy on June 30, 1899. As to other commissioned officers of the line and of the Medical and Pay Corps, the act of March 3, 1899, section 13, provided that they shall receive the "same" pay and allowances, except forage, as officers of the corresponding rank in the Army. The word "same" in this provision means "identical, not different or other." (Comp. Dec., Aug. 14, 1914, 150 S. and A. Memo., 2761; see above, under "1. General Rule." Compare, *U. S. v. Thomas*, 195 U. S., 418, 421, holding that the act of March 3, 1899, extended to naval officers only the general pay authorized for the Army, and not the pay of Army officers "for services in particular places

or under special circumstances"; and see 12 Comp. Dec., 185, 188, holding that "an engineer of the fleet is a member of the fleet staff of a flag officer, and as such has special duties to perform, in consideration of which he receives increased pay. The position is somewhat analogous in this respect to that of aid, who is a member of the personal staff of the flag officer, and who receives additional pay for the additional services performed as such.")

The act of June 7, 1900 (31 Stat., 697), which provides that the naval personnel act of March 3, 1899, section 13, shall not operate so as to reduce the pay which but for the passage of that act would have been received by any commissioned officer at the time of its passage or thereafter, extends to pay which officers may subsequently become entitled to receive and to the pay of a fleet engineer as prescribed by section 1556, Revised Statutes. (*Denig v. U. S.*, 37 Ct. Cls., 383.)

As to increased pay for special service as aid, see note below under this section.

**16. Medical directors and inspectors; pay directors and inspectors.**—See notes to sections 1368, 1376, 1474, and 1475, Revised Statutes.

Under the acts of May 13, 1908, and August 29, 1916, all officers of the Navy receive the same pay and allowances according to rank and length of service, except in certain cases where the old Navy pay is higher than that provided for officers of the same rank and longevity. (See above, under "1. General Rule.")

Medical directors and pay directors have the rank of rear admiral and captain in each grade, and medical inspectors and pay inspectors have the rank of commander. (See notes to sections 1474 and 1475, R. S.) As to the pay of rear admirals, captains, and commanders, see notes above, under this section.

**17. Surgeons, paymasters, and chief engineers.**—See notes to sections 1368, 1376, 1390, 1474–1476, Revised Statutes.

Under the acts of May 13, 1908, and August 29, 1916, all officers of the Navy receive the same pay and allowances, according to rank and length of service, except in certain cases where the old Navy pay is higher than that provided for officers of the same rank and longevity. (See above, under "1. General Rule.")

Officers of the Medical Corps below the grade of medical inspector, viz, surgeons, passed assistant surgeons, and assistant surgeons, have the rank of lieutenant commander, lieutenant, and lieutenant (junior grade), depending upon their length of service, original appointments being made with the rank of lieutenant (junior grade), and thereafter advancements in rank up to and including the rank of lieutenant commander being made "with the officers of the line with whom or next after whom they take precedence under existing law." (See note to sec. 1474, R. S.)

Officers of the Supply Corps below the grade of pay inspector, viz, paymasters, passed assistant paymasters, and assistant paymasters, have the rank of lieutenant commander, lieutenant, lieutenant (junior grade), and ensign, depending upon their length of service, original appointments being made with the rank of ensign, and thereafter advancements in rank up to and

including the rank of lieutenant commander being made "with the officers of the line with whom or next after whom they take precedence under existing law." (See note to sec. 1475, R. S.)

The Engineer Corps was abolished by the Navy personnel act of March 3, 1899 (30 Stat., 1004). (See note to sec. 1390, R. S.)

As to the pay of the various ranks, see notes above, under this section.

"Mounted pay" is not an allowance but pay proper; the officer to whom it is assigned by statute receives it whether he is actually mounted or not; where a surgeon in the Army is entitled to it, a surgeon in the Navy receiving Army pay under the act of March 3, 1899, is entitled to it also. (*Richardson v. U. S.*, 38 Ct. Cls., 182.)

**18. Passed assistant surgeons, passed assistant paymasters, and first assistant engineers.**—See note above, under "17. Surgeons, paymasters, and chief engineers." See also note to sections 1368 and 1371, Revised Statutes, concerning the status and pay of passed assistant surgeons.

**19. Assistant surgeons, acting assistant surgeons, assistant paymasters, second engineers.**—See note above, under "17. Surgeons, paymasters, and chief engineers."

Under section 13 of the Navy personnel act of March 3, 1899 (30 Stat., 1007), and the acts of June 7, 1900 (31 Stat., 697), March 2, 1907 (34 Stat., 1167), and May 13, 1908 (35 Stat., 127), the pay of acting assistant surgeons was enhanced and assimilated to that of assistant surgeons and did not remain fixed as regulated by section 1556, Revised Statutes. The rank of assistant surgeons having been raised from ensign to lieutenant (junior grade), an acting assistant surgeon was entitled to pay and allowances provided by law for assistant surgeons at the time his services as acting assistant surgeon were rendered, and where he was allowed pay and allowances only at the rate fixed for assistant surgeons at the time the act of May 4, 1898 (30 Stat., 369, 380), was passed, he was entitled to recover the difference. (*Plummer v. U. S.*, 224 U. S. 137, overruling *Taylor v. U. S.*, 38 Ct. Cls., 155, and *Nelson v. U. S.*, 41 Ct. Cls., 157. See note to sec. 1411, R. S.)

By act of May 18, 1920 (41 Stat., 602), the pay of acting assistant surgeons was increased \$600 per annum, "in addition to all pay and allowances now allowed by law," such increase to commence January 1, 1920, and to remain effective "until the close of the fiscal year ending June 30, 1922."

**20. Assistant surgeons qualified for promotion.**—See note above, under "17. Surgeons, paymasters, and chief engineers." See also notes to sections 1368 and 1371, Revised Statutes, concerning the status of passed assistant surgeons, and the promotion of assistant surgeons.

**21-22. Naval constructors; assistant naval constructors.**—Under the acts of May 13, 1908, and August 29, 1916, all officers of the Navy receive the same pay and allowances, according to rank and length of service, except in certain cases where the old Navy pay is higher than that provided for officers of the same rank

and longevity. (See above, under "1. General Rule.")

As to the rank of naval constructors and assistant naval constructors, see note to section 1477, Revised Statutes; as to the organization of the Construction Corps, see notes to sections 1402 and 1403, Revised Statutes; as to the pay of the various ranks, see notes above, under this section.

**23. Chaplains and acting chaplains.**—See notes to sections 1395-1398 and 1479, Revised Statutes.

By act of June 29, 1906 (34 Stat., 554), it was provided that "all chaplains now in the Navy above the grade of lieutenant shall receive the pay and allowances of lieutenant commander in the Navy according to length of service under the provisions of law for that rank, and all chaplains now in the Navy in the grade of lieutenant shall receive their present sea pay when on shore duty." The same act further provided that "naval chaplains hereafter appointed shall have the rank, pay, and allowances of lieutenant (junior grade) in the Navy until they shall have completed seven years of service, when they shall have the rank, pay, and allowances of lieutenant in the Navy; and lieutenants shall be promoted, whenever vacancies occur, to the grade of lieutenant commander, which shall consist of five numbers, and when so promoted shall receive the rank, pay, and allowances of lieutenant commander in the Navy: *Provided further*, That nothing herein contained shall be held or construed to increase the number of chaplains as now authorized by law or to reduce the rank or pay of any now serving."

By act of May 13, 1908 (see above, under "1. General rule"), all officers of the Navy were given the same pay and allowances, according to rank and length of service, with the limitation that "the pay and allowances of chaplains in the Navy shall in no case exceed that provided for lieutenant commanders," and the saving clause that "nothing herein shall be construed so as to reduce the pay or allowances now authorized by law for any commissioned, warrant, or appointed officer \* \* \* of the active or retired lists of the Navy."

By act of June 30, 1914 (38 Stat., 404), the grade of acting chaplain was created with the rank, pay, and allowances of lieutenant (junior grade), and provision was made for promotion of acting chaplains to the grade of chaplain with the rank of lieutenant (junior grade), and for the advancement of chaplains to higher ranks to and including the rank of captain, with the proviso "that no provision of this section shall operate to reduce the rank, pay, or allowances that would have been received by any person in the Navy except for the passage of this section." (See note to sec. 1479, R. S.)

By act of August 29, 1916 (39 Stat., 581), it was provided that "hereafter all commissioned officers of the active list of the Navy shall receive the same pay and allowances according to rank and length of service," omitting the limitation contained in the act of May 13, 1908, with reference to the pay of chaplains. Also in the same act it was provided that "nothing contained in this act shall be construed to reduce the rank, pay, or allowances of any officer



of the Navy or Marine Corps as now provided by law." (See above, under "1. General rule.") The effect of the act of August 29, 1916, was to repeal the limitation in the act of May 13, 1908, respecting the pay and allowances of chaplains, and to give to chaplains above the rank of lieutenant commander the pay and allowances of their rank. (Comp. Dec., May 23, 1917, 195 S. and A. Memo., 4251.)

As to rank of chaplains, see note to section 1479, Revised Statutes.

As to the pay of the various ranks, see notes above, under this section.

**24. Professors of mathematics, civil engineers, and assistant civil engineers.**—See notes to sections 1399–1401 and 1480, Revised Statutes, respecting professors of mathematics; and notes to sections 1413 and 1478, Revised Statutes, respecting civil engineers and assistant civil engineers.

Under the acts of May 13, 1908, and August 29, 1916, all officers of the Navy receive the same pay and allowances according to rank and length of service, except in certain cases where the old Navy pay is higher than that provided for officers of the same rank and longevity. (See above, under "1. General rule.")

As to rank of professors of mathematics, see section 1480, Revised Statutes, and note thereto; as to rank of civil engineers and assistant civil engineers, see note to section 1478, Revised Statutes.

As to the pay of the various ranks, see notes above, under this section.

Further appointments to the corps of professors of mathematics were prohibited by act of August 29, 1916 (39 Stat., 577), which act provided that "that corps shall cease to exist upon the death, resignation, or dismissal of the officers now carried in that corps on the active and retired lists of the Navy."

**25. Warrant officers, acting warrant officers, and commissioned warrant officers.**—See notes to sections 1405–1409, Revised Statutes. As to allowances of warrant officers, see note to section 1558, Revised Statutes.

By act of June 17, 1898 (30 Stat., 474, 475), the grade of pharmacist was created in the Hospital Corps of the Navy, "with the rank, pay, and privileges of warrant officers."

By act of March 3, 1899, section 12 (30 Stat., 1007), it was provided that "the pay of boatswains, gunners, carpenters, and sailmakers shall be the same as that now allowed by law."

By the same act of March 3, 1899, sections 14 and 15 (30 Stat., 1007, 1008), the grade of warrant machinist was authorized with the provision that the pay of that grade "shall be the same as that of warrant officers"; and that "warrant machinists shall receive at first an acting appointment, which may be made permanent under regulations established by the Navy Department for other warrant officers." By act of March 3, 1909 (35 Stat., 771), the title of "warrant machinist" was changed to "machinist."

By act of May 13, 1908 (35 Stat., 128), it was provided that "the pay of all warrant officers \* \* \* is hereby increased twenty-five per cent."

By act of March 3, 1915 (38 Stat., 942), the grade of pay clerk was established as a grade of warrant officers in the Navy, appointments thereto being regularly made by promotion from the grade of acting pay clerk, also created by that act, and it was provided that "pay clerks and acting pay clerks shall have the same pay, allowances, and other benefits as are now or may hereafter be allowed other warrant officers and acting warrant officers, respectively."

By act of August 29, 1916 (39 Stat., 572), it was provided that "the pharmacists now in the Hospital Corps of the United States Navy or hereafter appointed therein in accordance with the provisions of this act shall have the same rank, pay, and allowances as are now or may hereafter be allowed other warrant officers."

By the same act of August 29, 1916 (39 Stat., 578), it was provided that "warrant officers shall be allowed such leave of absence, with full pay, as is now or may hereafter be allowed other officers of the United States Navy." Under this provision, a warrant officer granted leave of absence from duty at sea is entitled to full pay at the rate received by him while on sea duty; the words "full pay," as used in this provision, "undoubtedly mean that warrant officers are to be granted leave without any reduction in the pay they are receiving at the time leave is granted." (23 Comp. Dec., 200; but note that the "other officers of the United States Navy," referred to in this enactment, do not, while on leave of absence from sea duty, receive full pay at the rate received by them while on sea duty: see 18 Comp. Dec., 340, and see note below as to leave of absence pay.)

By act of March 4, 1917 (39 Stat., 1181), it was provided that "hereafter the pay of warrant officers while on shore duty during the fourth three years' service shall be \$1,750 per annum."

By act of July 11, 1919 (41 Stat., 140), warrant officers on shore duty beyond the continental limits of the United States shall, while so serving and from the time of departure from and until the time of return to said limits under orders to or from such foreign-shore duty, receive the same pay as is now or may be authorized by law for warrant officers on sea duty. Prior to this enactment warrant officers were not entitled to increased pay for shore duty beyond seas. (Ollif v. U. S., 46 Ct. Cls., 349; 14 Comp. Dec., 882.)

The grade of sailmaker has become obsolete, no appointment thereto having been made since May 4, 1888. (See note to sec. 1405, R. S.)

Under section 1556, Revised Statutes (clause 25), as amended by the foregoing statutes, the pay of warrant officers, that is, boatswains, gunners, carpenters, machinists, pharmacists, and pay clerks, is as follows: During the first three years after date of appointment, when at sea or on foreign-shore duty, \$1,500; on shore duty, \$1,125; on waiting orders, \$875; during the second three years after such date, when at sea or on foreign-shore duty, \$1,625; on shore duty, \$1,250; on waiting orders, \$1,000; during the third three years after such date, when at sea or on foreign shore duty, \$1,750; on shore

duty, \$1,625; on waiting orders, \$1,125; during the fourth three years after such date, when at sea or on foreign-shore duty, \$2,000; on shore duty, \$1,750; on waiting orders, \$1,250; after 12 years from such date, when at sea or on foreign-shore duty, \$2,250; on shore duty, \$2,000; on waiting orders, \$1,500. (The "waiting orders" pay as given in this paragraph is also the leave pay which warrant officers are in practice allowed while on leave of absence in excess of the time authorized by law with full pay.) Acting pay clerks, and machinists holding acting appointments as such, as authorized by statute, and boatswains, gunners, and carpenters holding acting appointments as authorized by Navy Regulations, receive the same rates of pay as above set forth for warrant officers. (See note to sec. 1410, R. S., as to acting officers.)

By act of May 18, 1920 (41 Stat., 602), the pay of warrant officers of the Navy was increased \$240 per annum, "in addition to all pay and allowances now authorized by law," such increase to commence January 1, 1920, and to remain effective "until the close of the fiscal year ending June 30, 1922."

Special provisions as to pay of retired warrant officers while employed on active duty are contained in act of April 10, 1918 (40 Stat., 516).

By act of March 3, 1899, section 12 (30 Stat., 1007), chief boatswains, chief gunners, chief carpenters, and chief sailmakers were to "rank with, but after, ensign," and to receive "the same pay and allowances as are now allowed a second lieutenant in the Marine Corps."

By act of May 13, 1908 (see above, under "1. General rule"), it was provided that "hereafter all commissioned officers of the active list of the Navy shall receive the same pay and allowances according to rank and length of service," with the saving clause that "nothing herein shall be construed so as to reduce the pay or allowances now authorized by law for any commissioned, warrant, or appointed officer \* \* \* of the active or retired lists of the Navy." Under this act chief boatswains, chief gunners, chief carpenters, and chief sailmakers, being commissioned officers and having the rank of ensign, became entitled to the same pay and allowances as ensigns in the Navy. (14 Comp. Dec., 883.) As to the pay of ensigns, see notes above, under this section.

By act of March 3, 1909 (35 Stat., 771), it was provided that "no warrant officer, heretofore or hereafter promoted six years from date of warrant, shall suffer a reduction in pay which, but for such promotion, would have been received by him." Under this act the pay which is not to be reduced is the pay attaching to the warrant officer in the lower grade at the time the officer vacates it upon promotion to a higher grade, and does not include any additional pay that may thereafter be made a part of the warrant office thus vacated by subsequent legislation. (26 Comp. Dec., 935.)

By the same act of March 3, 1909 (35 Stat., 771), it was provided that chief machinists shall "have the same pay and allowances as are allowed chief boatswains, chief gunners, chief carpenters, and chief sailmakers."

By act of August 22, 1912 (37 Stat., 345), it was provided that chief pharmacists shall "have the rank, pay, and allowances of chief boat-

swains." By act of August 29, 1916 (39 Stat., 572, 573), it was provided that chief pharmacists shall "have the same rank, pay, and allowances as now or may hereafter be allowed other commissioned warrant officers."

By act of March 3, 1915 (38 Stat., 942), it was provided that chief pay clerks shall "have the rank, pay, and allowances of chief boatswains."

By act of August 29, 1916 (39 Stat., 578), it was provided that "hereafter chief boatswains, chief gunners, chief machinists, chief carpenters, chief sailmakers, chief pharmacists, and chief pay clerks, on the active list with creditable records, shall, after six years from date of commission, receive the pay and allowances that are now or may hereafter be allowed a lieutenant (junior grade), United States Navy: *Provided*, That chief boatswains, chief gunners, chief machinists, chief carpenters, chief sailmakers, chief pharmacists, and chief pay clerks, on the active list with creditable records, shall, after 12 years from date of commission, receive the pay and allowances that are now or may hereafter be allowed a lieutenant, United States Navy." Similar provisions as to pay of retired chief warrant officers while employed on active duty are contained in act of April 10, 1918 (40 Stat., 516.)

"Creditable records" within the meaning of the act of August 29, 1916, relating to the pay of commission warrant officers, does not import distinguished records, but requires only that a record be such that upon examination for promotion it would be found satisfactory. In passing upon the creditability of an officer's record in these cases consideration should be given to all matters therein disclosed, whether pertaining to his mental, moral, or professional qualifications, and it is necessary that an officer be satisfactory in all these respects if his record is to be deemed creditable. (C. M. O. 33, 1916, p. 6, citing file 17789-27, Sept. 21, 1916.)

In determining whether the record of a commissioned warrant officer is creditable, the investigation should ordinarily be limited to a scrutiny of his record in his present grade, and his prior record in the service should not be taken into consideration except in the cases where under existing law this would be done in determining his fitness for promotion. (C. M. O. 33, 1916, p. 6, citing file 17789-27, Sept. 21, 1916.)

When a commissioned warrant officer has the necessary length of service, and it has been decided by the Navy Department that his record is creditable, this definitely fixes the rate of pay and allowances to which he is entitled, and, in the event of his record ceasing to be creditable, his pay and allowances can not be affected except by means of disciplinary action as in the cases of all officers. (C. M. O. 33, 1916, p. 6, citing file 17789-27, Sept. 21, 1916.)

The purpose of the law of August 29, 1916, was clearly to give additional pay to commissioned warrant officers in the nature of the longevity increase to which officers of the Navy are generally entitled. Congress did not intend that, the right to increased pay and allowances once having accrued, the benefit thereof should be lost upon an extra judicial



determination by the Navy Department that the officer's record had ceased to be creditable, but rather Congress contemplated that anything of a discreditable nature thereafter occurring should be disposed of by means of the disciplinary instrumentalities which it has placed under the control of the Secretary of the Navy, and which may and should be resorted to for the purpose of reducing the pay and allowances of any officer, or dismissing him from the Navy, or otherwise punishing him as may be appropriate. (File 17789-27, Sept. 21, 1916.)

When the record of a commissioned warrant officer has been held by the Navy Department to be creditable, and a certificate to that effect issued, but subsequently it is established by additional evidence, unknown to the department at the time the certificate was issued, that said certificate was clearly erroneous and that in fact his record was not creditable on the date thereof, because of serious offenses committed by him prior thereto of which he was convicted by general court-martial subsequent to the issuance of the certificate, *held*, that the cancellation of the certificate was authorized, and that the officer's request that it be returned must accordingly be denied; that the certificate was not cancelled because of matters occurring subsequent to its issuance, and the case therefore is not one covered by the decision of September 21, 1916 (above cited). (File 17789-27: 21, Feb. 28, 1919.)

The question whether an officer's record is creditable within the meaning of the statute must be determined in each specific case as it arises, and such determination must be that of the Secretary of the Navy. The law does not prescribe what method shall be pursued by the Secretary in ascertaining the fact of creditability, and this matter is accordingly left to the Secretary's discretion, in the exercise of which he may avail himself of any appropriate administrative instrumentality. *Suggested*, that when a commissioned warrant officer has the necessary length of service, his entire record in his existing grade be referred to an examining board for report as to whether or not in the opinion of the board his record is creditable, the board being governed, in arriving at its conclusion, by the same considerations as would influence it in determining whether or not the officer in question would be qualified on his record if undergoing examination for promotion. The personal appearance of the officer before the board would not be required by law, and as an administrative matter might be undesirable as well as expensive and inconvenient. The board might, however, if deemed advisable, call upon the officer to submit evidence, or afford him an opportunity to submit a statement for its consideration. The Secretary would be empowered to approve or disapprove the board's report, or to make an independent decision based upon the evidence adduced. (File 17789-27, Sept. 21, 1916; see also Gen. Order No. 247, Nov. 4, 1916.)

Whether or not a commissioned warrant officer's record is creditable is a question of fact to be determined by the examining board in any case referred to it for report. The period of "twelve years from date of commission," is

indivisible and, if his record is not creditable considering the entire period, he is not entitled, on a finding that his record was creditable for the last six years of the period, to the pay and allowances of a lieutenant (junior grade). (File 17789-27:15, Apr. 22, 1918.)

It is not essential that a commissioned warrant officer should have had a creditable record at all times for a period of six years from the date of his commission to entitle him to the pay and allowances of a lieutenant (junior grade), or that he should have had a creditable record at all times for a period of 12 years from the date of his commission to entitle him to the pay and allowances of a lieutenant. The question as to whether his record is creditable is to be determined as of the date his record is examined by the board, either at the end of six years from the date of his commission, or at the end of 12 years from the date of commission. The question whether, considered as a whole, his record is creditable is one for the board to determine; the law does not require that he should have had six years' creditable service, or 12 years' creditable service, as the case may be, but that, at the end of six years, or of 12 years, his record must be creditable before he can receive the pay and allowances of a lieutenant (junior grade) or a lieutenant, as the case may be. (File 17789-27:15, Apr. 22, 1918.)

As to rates of pay received by lieutenants (junior grade), and lieutenants, see notes above under this section.

As to allowances of warrant officers and commissioned warrant officers, see notes to sections 1487 and 1558, Revised Statutes.

**26. Secretaries.**—See section 1367, Revised Statutes, and note thereto.

By act of May 4, 1878 (20 Stat., 50), it was provided that "on and after the first day of July, eighteen hundred and seventy-eight, there shall be no appointments made from civil life of secretaries or clerks to the Admiral, or Vice Admiral, when on sea service, commanders of squadrons, or of clerks to commanders of vessels; and an officer not above the grade of lieutenant shall be detailed to perform the duties of secretary to the Admiral or Vice Admiral, when on sea service, and one not above the grade of master [now lieutenant (junior grade)]: see notes above under this section] to perform the duties of clerk to a rear admiral or commander, and one not above the grade of ensign to perform the duties of clerk to a captain, commander, or lieutenant commander when afloat."

The pay of secretary of the Naval Academy has been increased from time to time by appropriations contained in the annual naval appropriation acts. See, for example, naval appropriation act approved June 4, 1920 (41 Stat., 828), which contains, under the caption, "Pay, Naval Academy," the following item: "Secretary of the Naval Academy, \$2,750."

The position of secretary to the Admiral was necessarily in abeyance until the grade of Admiral was revived. However, when the grade of Admiral was revived, the provisions of law relating to the secretary to the Admiral became again operative. Not being a commissioned officer, his pay was not affected by the Navy personnel act of March 3, 1899. Accordingly, he is entitled to a salary of \$2,500 per annum

under section 1556, Revised Statutes, and to the allowances of a lieutenant in the Navy, under section 1367. (6 Comp. Dec., 828.)

See note to section 1362, Revised Statutes, and notes above, under this section, as to Admirals and Vice Admirals in the Navy.

**27. Clerks to commanders of squadrons, etc.**—See act of May 4, 1878 (20 Stat., 50), quoted above, under "Secretaries."

**28. Clerks to commandants of yards and stations.**—See section 1416, Revised Statutes, and note thereto.

By naval appropriation act of March 3, 1909 (35 Stat., 754), the Secretary of the Navy was authorized to fix the pay of the "clerical, drafting, inspection, and messenger force at navy yards and naval stations," on a per annum or per diem basis, as he may elect; the same act repealed "so much of section fifteen hundred and fifty-six of the Revised Statutes as relates to pay of clerks to commandants of navy yards and naval stations," and omitted the specific provision theretofore made in the annual naval appropriation act, under "Pay of the Navy," for such clerks.

**29-34. Clerks to paymasters, etc.**—The provisions of section 1556, Revised Statutes, fixing the pay of clerks to paymasters, was repealed by the act of May 13, 1908 (35 Stat., 127), which act substituted for the pay specified in said section a provision that "all paymasters' clerks shall, while on duty, receive the same pay and allowances as warrant officers of like length of service in the Navy"; which said provision in the act of May 13, 1908, was amended by act of June 24, 1910 (36 Stat., 606), so as to read that "all paymasters' clerks shall, while holding appointment in accordance with law, receive the same pay and allowances and have the same rights of retirement as warrant officers of like length of service in the Navy." The saving clause in said act of May 13, 1908, that "nothing herein shall be construed so as to reduce the pay or allowances now authorized by law for any commissioned, warrant, or appointed officer or enlisted man of the active or retired lists of the Navy," did not apply to a paymaster's clerk appointed after the enactment of that act; accordingly, a clerk to the paymaster at the navy yard, Mare Island, who was appointed after May 13, 1908, was held not entitled to the pay provided by section 1556, Revised Statutes, for that position, but was correctly allowed pay at the lower rate provided by law for a warrant officer of like length of service in the Navy. (*Jones v. U. S.*, 50 Ct. Cls., 344.)

By act of March 3, 1915, the grades of acting pay clerk, pay clerk, and chief pay clerk were established, and provision was made for the appointment of all paymasters' clerks then in the service to one of said grades. As to the pay and allowances of acting pay clerks, pay clerks, and chief pay clerks, see notes above, under "warrant officers, acting warrant officers, and commissioned warrant officers."

**35. Cadet engineers.**—The appointment of cadet engineers was prohibited by act of August 5, 1882 (22 Stat., 285). See note to section 1522, Revised Statutes.

**36. Dental Corps; and Nurse Corps (Female).**—By act of August 29, 1916 (39

Stat., 573, 574), as amended and reenacted by act of July 1, 1918 (40 Stat., 708-710), it was provided that officers of the Dental Corps (assistant dental surgeons, passed assistant dental surgeons, and dental surgeons) shall have the rank of lieutenant (junior grade), lieutenant, and lieutenant commander, "and shall receive the same pay and allowances as officers of corresponding rank and length of service in the Naval Medical Corps up to and including the rank of lieutenant commander" and that "dental surgeons shall be eligible for advancement in pay and allowances, but not in rank, up to and including the pay and allowances of commander and captain, subject to such examinations as the Secretary of the Navy may prescribe, except that the number of dental surgeons with the pay and allowances of captain shall not exceed four and one-half per centum and the number of dental surgeons with the pay and allowances of commander shall not exceed eight per centum of the total authorized number of dental officers: *Provided further*, That dental surgeons shall be eligible for advancement to the pay and allowances of commander and captain when their total active service as dental officers in the Navy is such that if rendered as officers of the Naval Medical Corps, it would place them in the list of medical officers with the pay and allowances of commander or captain, as the case may be."

By the same act of August 29, 1916, it was provided that "the senior dental officer now at the United States Naval Academy" shall have "the grade of dental surgeon and the rank, pay, and allowances of lieutenant commander."

By the same it was further provided that "nothing herein contained shall be construed to legislate out of the service any officer now in the medical department of the Navy or to reduce the rank, pay, or allowances now authorized by law for any officer of the Navy."

By act of May 18, 1920 (41 Stat., 602), the pay of "acting assistant dental surgeons in the Navy" was increased \$600 per annum, "in addition to all pay and allowances now allowed by law," such increase to commence January 1, 1920, and to remain effective "until the close of the fiscal year ending June 30, 1922." (The Navy Register of January 1, 1920, shows only one "acting assistant dental surgeon," being an officer appointed under the provisions of an act of Congress approved August 22, 1912 (37 Stat., 344), which act was superseded by the act of August 29, 1916, above cited, containing a saving clause with reference to officers then in the medical department not being thereby legislated out of the service.)

The advancement of dental officers to the pay and allowances of commander and captain should be by the same method that medical officers are promoted; i. e., by selection by the same board of officers as selects medical officers for advancement to the ranks of commander and captain. No other board is qualified to determine whether the service of dental officers "is such that if rendered as officers of the Naval Medical Corps, it would place them in the list of medical officers with the pay and allowances of commander or captain, as the case may be." (File 26509-315:2, Aug. 29, 1919.)



*Nurse Corps, Female.*—The superintendent, chief nurses, and nurses of the Nurse Corps (Female), U. S. Navy, shall respectively receive the same pay, allowances, emoluments, and privileges as now or hereafter provided by or in pursuance of law for the Nurse Corps (Female) of the Army. (Act May 13, 1903, 35 Stat., 146.) The designation of the "Nurse Corps (Female)" of the Army was changed to "the Army Nurse Corps" by act of July 9, 1918, Chapter V, section 1 (40 Stat., 879), which said act also made provision as to the pay and allowances of the Army Nurse Corps. (See note below.)

Reserve nurses of the Nurse Corps (Female), U. S. Navy, may be assigned to active duty when the necessities of the service demand and when on such duty shall receive the pay and allowances of nurses; but shall receive no compensation except when on active duty. (Act May 13, 1903, 35 Stat., 146.)

Members of the Nurse Corps (Female), U. S. Navy, shall hereafter be paid the same commutation of quarters as is or may be allowed members of the Nurse Corps of the Army. (Act June 15, 1917, 40 Stat., 209.) It had previously been provided by act of June 24, 1910 (36 Stat., 606), that the Secretary of the Navy, in his discretion, is authorized to allow members of the Nurse Corps (Female) of the Navy \$15 per month in lieu of quarters when Government quarters are not available.

The annual pay of members of the Army Nurse Corps was fixed by act of July 9, 1918, Chapter V, section 4 (40 Stat., 879), as amended by act of February 28, 1919 (40 Stat., 1211), as follows: Superintendent, \$2,400; assistant superintendents and directors, \$1,800; assistant directors, \$1,500; chief nurses, \$360 in addition to the pay of nurses; nurses, \$720 for first three years' service, \$780 for second three years' service, \$840 for third three years' service, \$900 for fourth three years' service, \$960 after 12 years' service in said corps (including time of service as contract nurses); reserve nurses, when on active duty will receive the same pay as nurses who have served in the corps for periods corresponding to the full period of their active service; all members of said corps, in addition to the foregoing, \$10 per month when serving beyond the continental limits of the United States (excepting Porto Rico and Hawaii).

By act of May 18, 1920, section 4 (41 Stat., 602), it was provided that "Commerce January 1, 1920, the pay \* \* \* of members of the Female Nurse Corps of the Army and Navy is hereby increased 20 per centum;" and by section 13 of the same act (41 Stat., 604) it was provided that such increase "shall remain effective until the close of the fiscal year ending June 30, 1922, unless sooner amended or repealed."

Members of the Army Nurse Corps shall be entitled to cumulative leave of absence with pay at the rate of 30 days for each calendar year of service in said corps, not exceeding, however, 120 days at one time; and in addition thereto sick leave not exceeding 30 days in any one calendar year in cases of illness or injury incurred in the line of duty. (Act July 9, 1918, Chapter V, section 5, 40 Stat., 879.)

Where a member of the Nurse Corps (Female) was upon her own request discharged, but the commanding officer erroneously issued a discharge stating that same was to take effect from date thereof, contrary to the authorization from the Bureau of Medicine and Surgery as approved by the Secretary of the Navy for her discharge to take effect upon the expiration of 74 days' accrued leave of absence, *held*, that the words "from this date" in the discharge must be disregarded as unauthorized and ineffective; that the discharge was otherwise legal and should be regarded as becoming effective on the date specified in her application therefor as approved by the Surgeon General, the Bureau of Navigation, and the Secretary of the Navy; that if said nurse was absent from duty in the meantime, such absence was by leave of the head of the department and she is accordingly entitled to pay for such period of authorized absence. (File 26477-87, Feb. 6, 1919, citing Reinhard's Case, 10 Ct. Cls., 282.)

The act of July 9, 1918, relating to cumulative leaves of absence, entitles members of the Nurse Corps (Female) to final leave, to the amount accumulated and unused, not to exceed 120 days, prior to honorable discharge. (File 26477-87, Feb. 6, 1919, citing 23 Comp. Dec., 192, 197; 9 Comp. Dec., 606; *Hurlburt v. U. S.*, 30 Ct. Cls., 16; and *U. S. v. Barringer*, 188 U. S., 577, reversing *Barringer v. U. S.*, 37 Ct. Cls., 1.)

It would seem that if cumulative leave of absence were refused prior to final discharge, the nurse concerned would be entitled to receive pay for such leave due but not granted; however, this question not decided, but should be presented to the accounting officers if such a case should occur. (File 26477-87, Feb. 6, 1919.)

The question of granting leave to members of the Nurse Corps (Female) presents a matter coming under the jurisdiction of the Navy Department and not under the jurisdiction of the Comptroller of the Treasury. (File 26477-102, Feb. 19, 1921.)

Members of the Army Nurse Corps shall receive transportation and necessary expenses when traveling under order and such allowances of quarters and subsistence and, during illness, such medical care as may be prescribed in regulations by the Secretary of War; and when at places where no public quarters are available, commutation in lieu thereof, and of heat and light therefor, at such rates and upon such conditions as are now or shall hereafter be provided by law. (Act July 9, 1918, Chap. V, sec. 6, 40 Stat., 879.) It had previously been provided by act of August 29, 1916 (39 Stat., 626), that the superintendent of the Nurse Corps (Female) of the Army should receive such allowances of quarters, subsistence, and medical care during illness as may be prescribed in regulations by the Secretary of War.

By Army appropriation act of May 22, 1917 (40 Stat., 50), provision was made for commutation of rations for members of the Nurse Corps (Female) while on duty in hospital at 40 cents per ration for the ensuing fiscal

year; by Army appropriation act of June 5, 1920 (41 Stat., 956), appropriation was made for commutation in lieu of rations for members of the Army Nurse Corps while on duty in hospital, without specifying the amount of such commutation.

By act of June 4, 1920, section 10 (41 Stat., 767), it was provided that "hereafter the members of the Army Nurse Corps shall have relative rank as follows: The superintendent shall have the relative rank of major; the assistant superintendents, director, and assistant directors, the relative rank of captain; chief nurses, the relative rank of first lieutenant; head nurses and nurses, the relative rank of second lieutenant; and as regards medical and sanitary matters and all other work within the line of their professional duties shall have authority in and about military hospitals next after the officers of the Medical Department. The Secretary of War shall make the necessary regulations prescribing the rights and privileges conferred by such relative rank."

The regulations made by the Secretary of War prescribing the "rights and privileges" conferred upon nurses by the relative rank given them by the act of June 4, 1920, were contained in War Department General Orders, No. 49, of August 14, 1920, which provided, among other things, the following: "8. Nurses are entitled to the same allowances and privileges, except mileage, as are prescribed for commissioned officers of grades corresponding to their relative rank, viz: Commutation of quarters when quarters in kind are not available; commutation of heat and light; purchase privileges; insurance privileges; gratuities; and in general all such personal privileges and perquisites, not specifically denied them, as go with commissioned rank and are customarily enjoyed by commissioned officers. 9. Pay and allowances of nurses are set forth in Chapter V of the act of Congress approved July 8, 1918. (40 Stat., 845, 879, Bul. No. 43, W. D., 1918.)"

Payment of compensation to beneficiaries of nurses who die while on the active list of the Regular Navy from wounds or disease not the result of their own misconduct, is provided for by act of June 4, 1920. (41 Stat., 824.)

**37. Naval Reserve Force.**—*Pay for active duty.*—By act of August 29, 1916 (39 Stat., 588), which created the Naval Reserve Force, it was provided that "all members of the Naval Reserve Force shall, when actively employed as set forth in this act, be entitled to the same pay, allowances, gratuities, and other emoluments as officers and enlisted men of the naval service on active duty of corresponding rank or rating and of the same length of service." This provision was superseded by the following clause in the act of July 1, 1918 (40 Stat., 712): "Members of the Naval Reserve Force when employed in active service, ashore or afloat, under the Navy Department shall receive the same pay and allowances as received by the officers and enlisted men of the regular Navy of the same rank, grades, or ratings and of the same length of service, which shall include service in the Navy Marine Corps, Naval Reserve Force,

Naval Militia, National Naval Volunteers, or Marine Corps Reserve."

An officer of the Naval Reserve Force, assigned to active duty, who is thereafter detached from such duty with direction to await further orders, is not thereby returned to a reserve status, but is entitled to the same pay that an officer of similar rank and length of service in the Regular Navy would be entitled to while awaiting orders as directed by the Navy Department. The words "actively employed," and "active service," as used in the statute, refer to service in the Navy under the call of the President in time of war or national emergency, as distinguished from service in reserve. In this case the officer was not discharged from active duty in the sense of being returned to a reserve status. The order of detachment shows conclusively that he was to hold himself in readiness for new duty. (24 Comp. Dec., 626.)

The act of August 29, 1916, providing that members of the Naval Reserve Force when actively employed shall receive the same pay and allowances as officers and enlisted men of the Regular Navy of corresponding rank or rating and of the same length of service, does not limit the pay and allowances of naval reservists when in active service to the pay and allowances provided for members of the Regular Navy at the time said act of August 29, 1916, was approved; but entitles them to the same pay and allowances as are provided by law for members of the Regular Navy at the time their active service with the Navy is rendered; accordingly enlisted personnel of the Naval Reserve Force are entitled while in active service to the increase of pay provided in the act of May 22, 1917, for members of the Regular Navy. (23 Comp. Dec., 773.)

Members of the Naval Reserve Force given provisional rank as officers of the Supply Corps, but who have not been required to execute a bond as required of supply officers in the Navy by sections 1383 and 1560, Revised Statutes, are nevertheless entitled to receive the pay and allowances of their rank on the active list during the period they may be assigned to duty for training with their consent, when not required to make disbursements of public money nor charged with accountability or responsibility for any Government property. (27 Comp. Dec., 228.)

An officer of the Fleet Naval Reserve, when on active duty in time of war or national emergency, placed in a hospital for treatment, is entitled to active duty pay while in hospital under the same circumstances and subject to the same limitations under which officers of the Regular Navy would be entitled. (23 Comp. Dec., 651; see also, 24 Comp. Dec., 626.)

Members of the Fleet Naval Reserve detached from active duty (to which they had been assigned for training on board ship), and transferred to a naval hospital for treatment, are not entitled to active service pay thereafter, except for time necessary to travel to their homes. (Comp. Dec., Feb. 23, 1917, 192 S. and A. Memo., 4157, distinguishing Comp. Dec., Aug. 3, 1916, 186 S. and A. Memo., 4031, in which it was held that a member of the former Naval Reserve, created by the act of



March 3, 1915, 38 Stat., 941, was entitled to active duty pay during a period when he was under treatment in a hospital, in that the enlisted man in the latter case was not detached from his ship and sent to a hospital for temporary treatment.)

A member of the Naval Reserve Force in an enlisted rating who, after undergoing treatment in a naval hospital, is ordered on sick leave of absence is in a duty status and entitled to the per diem allowance for subsistence for such period. (26 Comp. Dec., 47.)

"An officer in the Naval Reserve Force serving at sea, who is granted leave of absence, is entitled to full active duty pay for the period of absence." (24 Comp. Dec., 626, 627. See also 21 Comp. Dec., 628, holding that an officer of the former Medical Reserve Corps of the Navy, on authorized leave granted while on active duty, was entitled to pay for the period of such leave, provided the leave granted was not in excess of the leave to the credit of the officer at the time he availed himself of it.)

An officer of the Naval Reserve Force on active duty, who formerly served in the Navy, is entitled to be credited for pay purposes with the five years' constructive service which was credited to him, under the act of March 3, 1899 (30 Stat., 1007), upon his original appointment to the Navy from civil life. (Comp. Dec., Feb. 21, 1918, 204 S. and A. Memo., 4505; see also, 24 Comp. Dec., 168; 24 Comp. Dec., 629.)

Officers of the Naval Auxiliary Reserve of the Naval Reserve Force are not entitled to longevity increase for service rendered in the Naval Auxiliary Service, even though they were entitled to such increase while members of said Auxiliary service. (Comp. Dec., June 27, 1917, 196 S. and A. Memo., 4292.)

In determining the amount of continuous-service pay to which members of the Naval Reserve Force in enlisted ratings are entitled, under the act of July 1, 1918, by reason of naval militia service, all legal active service in enlistments which contain the elements of continuous service prescribed for men in the regular Navy should be counted. (25 Comp. Dec., 154.)

Members of the Naval Reserve Force who are citizens of the United States are entitled to the benefits of General Order No. 34, Navy Department, issued under Executive order of November 27, 1906 (later embodied in art. 4427, par. 25, Navy Regs., 1913), including in the computation thereunder service in the naval militia under reenlistments since November 27, 1906. (25 Comp. Dec., 154.)

The National Guard not being one of the organizations enumerated in the act of July 1, 1918, for the service in which a member of the Naval Reserve Force in active service is entitled to credit, and not being comprehended in the term, "Naval Militia," which is included, an officer of the Naval Reserve Force who has had legal active service in the National Guard to his credit is not entitled to longevity pay therefor. (25 Comp. Dec., 735.)

Enlisted men of the Regular Navy who, upon the expiration of enlistment, are transferred to the Fleet Naval Reserve at their request, are entitled as members of the Naval Reserve Force, while on active duty, to continuous-

service pay and pay under General Order No. 34 (art. 4427, par. 25, Navy Regs., 1913), the same as if they had accepted discharge from the Navy at the expiration of enlistment and had thereafter enrolled in the Fleet Naval Reserve; but said enlisted men are not entitled upon such transfer to the honorable discharge gratuity. (25 Comp. Dec., 186.)

*Retainer pay.*—Retainer pay for members of the Naval Reserve Force is based solely on consideration of an obligation assumed by them "to serve in the Navy in time of war or during the existence of a national emergency declared by the President." It is not compensation for services rendered. (26 Comp. Dec., 884.)

"When not actively employed in the Navy, members of the Naval Reserve Force shall not be entitled to any pay, bounty, gratuity, or pension except as expressly provided for members of the Naval Reserve Force by the provisions of this act." (Act Aug. 29, 1916, 39 Stat., 588.)

An enrolled member of the Naval Reserve Force is not entitled to retainer pay for any period subsequent to the expiration of his term of enrollment and prior to reenrollment, although he may be continued on active duty during such period. (26 Comp. Dec., 900.)

"Retainer pay shall be in addition to any pay to which a member may be entitled by reason of active service." (Act Aug. 29, 1916, 39 Stat., 588.)

"In time of peace no member of any class of the Naval Reserve Force shall be entitled to retainer pay when assigned to active duty for purposes other than training." (Act July 1, 1918, 40 Stat., 711.)

"Retainer pay provided by existing law shall not be paid to any member of the Naval Reserve Force who fails to train as provided by law during the year in which he fails to train." (Act June 4, 1920, sec. 1, 41 Stat., 824.)

"Hereafter the Secretary of the Navy may, in his discretion, withhold any part or all of the retainer pay which may be due to a member of the Naval Reserve Force where such members fail to perform such duty as may be prescribed by law for the maintenance of the efficiency of the Naval Reserve Force: *Provided*, That any money so withheld shall be credited to the appropriation for organizing and administering the Naval Reserve Force to be used for any purpose that the Secretary of the Navy may consider proper to increase the efficiency of the Naval Reserve Force." (Act June 4, 1920, sec. 9, 41 Stat., 837.)

"Retainer pay shall only be paid to members of the Naval Reserve Force upon their making such reports concerning their movements and occupations as may be required by the Secretary of the Navy." (Act Aug. 29, 1916, 39 Stat., 588.)

"Any pay which may be due any member of the Fleet Naval Reserve shall be forfeited when so ordered by the Secretary of the Navy upon the failure, under such conditions as may be prescribed by the Secretary of the Navy, of such man to report for inspection." (Act Aug. 29, 1916, 39 Stat., 590.)

"Retainer pay shall be paid annually or at shorter intervals, as the Secretary of the Navy,

in his discretion, may direct." (Act Aug. 29, 1916, 39 Stat., 588.)

"The retainer pay of all members of the Naval Reserve Force, except the Volunteer Naval Reserve, while enrolled in a provisional rank or rating, and until such time as they shall have been confirmed in such rank or rating, shall be \$12 per annum. Thereafter, the retainer pay shall be that prescribed for members in the various classes." (Act Aug. 29, 1916, 39 Stat., 588.)

"The Volunteer Naval Reserve shall be composed of those members of the Naval Reserve Force who are eligible for membership in any one of the other classes of the Naval Reserve Force, and who obligate themselves to serve in the Navy in any one of said classes without retainer pay and uniform gratuity in time of peace." (Act Aug. 29, 1916, 39 Stat., 592.)

"The retainer pay of the enrolled men of the Fleet Naval Reserve shall be the same as for the enrolled men of the Naval Reserve and shall be computed in like manner: *Provided*, That nothing herein shall operate to reduce the retainer pay allowed by existing law to enlisted men who, after sixteen years or more of naval service, are transferred to the Fleet Naval Reserve." (Act July 1, 1918, 40 Stat., 710.)

"The annual retainer pay of members of the Naval Reserve Force, except officers in the Naval Auxiliary Reserve and transferred members of the Fleet Naval Reserve, after confirmation in rank; grade, or rating, shall be the equivalent of two months' base pay of the corresponding rank, grade, or rating in the Navy, but the highest base pay upon which the retainer pay of officers of the Naval Reserve Force shall be computed shall not be greater than the base pay of a lieutenant commander." (Act July 1, 1918, 40 Stat., 710.)

"The annual retainer pay of members in this class [Naval Auxiliary Reserve] after confirmation in rank or rating shall be for officers, one month's base pay of the corresponding rank in the Navy." (Act Aug. 29, 1916, 39 Stat., 592.)

"Members of the Fleet Naval Reserve who have, when transferred to the Fleet Naval Reserve, completed naval service of sixteen or twenty or more years shall be paid a retainer at the rate of one-third and one-half, respectively, of the base pay they were receiving at the close of their last naval service plus all permanent additions thereto: *Provided*, That the pay authorized in this paragraph as a retainer shall be increased ten per centum for all men who may be credited with extraordinary heroism in the line of duty or whose average marks in conduct for twenty years or more shall not be less than ninety-five per centum of the maximum." (Act Aug. 29, 1916, 39 Stat., 590.)

Upon original enrollment members of the Fleet Naval Reserve enrolled in enlisted ratings are entitled to retainer pay computed on the rating given them at the date of such original enrollment. The law specifically exempts members of the Fleet Naval Reserve from the requirement that they be given a provisional rating upon first enrollment, and in actual operation such members are, by direction of the Navy Department, presumed to be given a confirmed rating. As enrolled members of the Fleet Naval Reserve are given a confirmed

rating upon enrollment, the law authorizing "after confirmation" a retainer pay to be computed on a basis of "the equivalent of two months' base pay" grants to said members the right to have retainer pay computed on the basis of two months' base pay of the rating in which enrolled. (25 Comp. Dec., 350.)

A former ensign in the Navy enrolled in the Fleet Naval Reserve on May 29, 1918, with the provisional rank of ensign, and thereafter, on November 26, 1919, issued a commissioned and confirmed rank of ensign from May 29, 1918, date of enrollment, is entitled to retainer pay based upon such confirmed rank from the date of his enrollment, and not merely from the date that he established his qualifications for such confirmed rank. (26 Comp. Dec., 758.)

A former midshipman in the Regular Navy who was enrolled in the Fleet Naval Reserve with the provisional rank of ensign on January 15, 1918, and thereafter, on November 26, 1919, was issued a commission in the confirmed rank of ensign from January 15, 1918 (date of enrollment), is entitled to retainer pay based upon such confirmed rank only from the date that the board, duly appointed for that purpose, passed and reported upon his qualifications for confirmation, which in this case was October 1, 1919. (26 Comp. Dec., 668.)

A member of the Naval Reserve Force holding a confirmed rank or rating, who is promoted to a provisional rank, continues to be entitled to the retainer pay based on the confirmed rating until the termination of the enrollment period in which received, but upon reenrollment in the provisional rank which he held at the termination of his last enrollment period he loses the right to receive retainer pay based on the former confirmed rating unless again appointed thereto, and is entitled only to retainer pay based on the provisional rank in which reenrolled. If subsequent to his reenrollment he is again given his former confirmed rating, to date from his reenrollment, he will be entitled to retainer pay based on such confirmed rating from said date. (27 Comp. Dec., 82.)

Upon promotion to a provisional rating, members of the Fleet Naval Reserve enrolled in enlisted ratings are entitled, under the act of July 1, 1918, to retainer pay computed on the confirmed rating given them at date of enrollment. If promotion be to a confirmed rating, retainer pay should be computed on the basis of the confirmed rating thereby acquired. (25 Comp. Dec., 350.)

Members of the Fleet Naval Reserve, upon advancement from one provisional or confirmed rank to a higher confirmed rank, are entitled to retainer pay at the higher rate from the date of confirmation in the higher rank or rating. (25 Comp. Dec., 350.)

Officers of the Naval Reserve Force who, while holding a confirmed rank, are transferred to another class of the Reserve and given a higher provisional rank therein, are entitled to continue in receipt of retainer pay which they were receiving in the confirmed rank held by them. (25 Comp. Dec., 421.)

Transferred members of the Fleet Naval Reserve are entitled, as retainer pay, to one-third or one-half, respectively, of the base pay they were receiving at the close of their last naval



service, and to the full amount of all permanent additions thereto. Thus, where the current rate of pay of a man at the time of his transfer to the Fleet Naval Reserve in September, 1916, after 20 years' service, was \$94.53 per month, composed of \$70 base pay, plus \$24.53 permanent additions, he was entitled as retainer pay to \$59.53 per month, being one-half of his base pay, or \$35, plus all permanent additions, amounting to \$24.53, such permanent additions being composed of \$6.44 continuous-service pay, \$8 pay under Executive order of November 27, 1906 (art. 4427, par. 25, Navy Regs., 1913), \$1.50 for good-conduct medal, and \$8.59 as 10 per cent increase of pay under the act of May 13, 1908, said 10 per cent increase being treated as a permanent addition to his base pay and therefore being allowed in full. (See 23 Comp. Dec., 190.)

In computing the retainer pay of members of the Fleet Naval Reserve who have been transferred thereto at the expiration of enlistment after completing 16 years of service in the Regular Navy, the increased rates of pay provided in section 15 of the act of May 22, 1917 (40 Stat., 87), which are made permanent in certain enlistments by the act of July 11, 1919 (41 Stat., 140), are considered as establishing new base rates of pay for each rating; while the 10 per cent increase of pay authorized by the act of May 13, 1908 (35 Stat., 128), is to be treated as permanent addition to pay and not as an increase in the base rates thereof. Accordingly, said man will be allowed, in computing his retainer pay, only one-third of the increase provided by the acts of May 22, 1917, and July 11, 1919, while he will be allowed the full amount of increase provided by the act of May 13, 1908. (26 Comp. Dec., 219, explaining 23 Comp. Dec., 190.)

The retainer pay of officers of the Naval Reserve Force is not increased by the temporary increase granted officers of the Navy by the act of May 18, 1920 (41 Stat., 601); such temporary increase was not an increase in the base pay of the various ranks in the Navy, and as the retainer pay of an officer of the Naval Reserve Force is computed only upon base pay of the confirmed rank held by him, the computation of his retainer pay is not affected by said act of May 18, 1920. However, confirmed members of the Naval Reserve Force holding enlisted ratings, and transferred members of the Fleet Naval Reserve, are entitled to retainer pay computed on the increased rates of pay provided in section 6 of said act of May 18, 1920 (41 Stat., 602), for enlisted men of the Navy; but if such members were not on active duty during any of the period from January 1, 1920, from which said increase in the pay of the Regular Navy took effect, until May 18, 1920, when said act was approved, they are not entitled to such increase prior to the date of said act. (27 Comp. Dec., 274, modifying 27 Comp. Dec., 126.)

A transferred member of the Fleet Naval Reserve of over 20 years' service is entitled to but one 10 per cent increase of his retainer pay, as provided by the act of August 29, 1916, even though he may possess the two qualifications of extraordinary heroism and conduct marks.

The statute authorizes but one 10 per cent increase for the possession by a man of either of two alternative qualifications, and makes his possession of one or other of the qualifications sufficient to entitle him to it. The fact that he may possess both of the qualifications does not operate to entitle him to two 10 per cent increases, only one having been provided for. (Comp. Dec., June 2, 1917, 196 S. and A. Memo., 4266.)

"That the retainer pay of those members of the Fleet Naval Reserve who, pursuant to call, shall return to active duty within one month after the approval of this act and shall continue on active duty until the Navy shall have been recruited up to its permanent authorized strength, or until the number in the grade to which they may be assigned is filled, but not beyond June 30, 1922, shall be computed upon the base pay they are receiving when retransferred to inactive duty, plus the additions or increases prescribed in the naval appropriation act approved August 29, 1916, for members of the Fleet Naval Reserve." (Act May 18, 1920, sec. 5, 41 Stat., 603. By sec. 13 of the same act it was provided that the provisions of sec. 5 thereof "shall remain effective until the close of the fiscal year ending June 30, 1922, unless sooner amended or repealed.")

"Any member [of the Fleet Naval Reserve] who has failed to perform three months' active service with the Navy in any term of enrollment shall, on the next reenrollment, receive retainer pay at the rate of \$12 per annum until such time as he shall have completed three months' active service. The three months' active service with the Navy may be taken in one or more periods, at the election of the member." (Act Aug. 29, 1916, 39 Stat., 590.)

"Members of the Naval Reserve Force who reenroll for a term of four years within four months from the date of the termination of their last term of enrollment, and who shall have performed the minimum amount of active service required during the preceding term of enrollment, shall, for each such reenrollment, receive an increase of twenty-five per centum of their base retainer pay." (Act Aug. 29, 1916, 39 Stat., 588.)

"Officers and men enrolling in the Fleet Naval Reserve within four months of the date of the termination of their last naval service or reenrolling within four months of the date of the termination of their last term of enrollment shall receive an increase of twenty-five per centum of their retainer pay for each such enrollment." (Act Aug. 29, 1916, 39 Stat., 590.)

"Service in the Navy, Marine Corps, National Naval Volunteers, and Naval Militia shall be counted as continuous service in the Naval Reserve Force, both for the purpose of retirement and of computing retainer pay \* \* \* : *Provided further*, That no retainer pay of any member of the Naval Reserve Force, except those enlisted men transferred to the Fleet Naval Reserve after sixteen or twenty or more years' naval service, shall be in excess of the amount authorized to members having had sixteen years' continuous service therein." (Act July 1, 1918, 40 Stat., 710.)

"For all purposes of this act a complete enlistment during minority and any enlistment terminated within three months prior to the expiration of the term of enlistment by special order of the Secretary of the Navy shall be considered as four years' service." (Act Aug. 29, 1916, 39 Stat., 590.)

Any former member of class one of the United States Naval Reserve, established by act of March 3, 1915 (38 Stat., 940), who was serving therein on August 29, 1916, and who upon his own application prior to July 1, 1917, was enrolled in the Naval Reserve Force, shall, for all purposes, be considered as having served continuously in such Naval Reserve Force since August 29, 1916, with due credit for previous and continuous service in the Naval Reserve in the same manner and to the same effect as for equal length of service in the Naval Reserve Force. (Act Mar. 4, 1917, 39 Stat., 1174.)

Under the act of March 4, 1917, an enlisted man of the Navy who enrolled in the former Naval Reserve within four months from the date of his discharge from the Navy was serving in said Naval Reserve on August 29, 1916, and was enrolled in the Fleet Naval Reserve prior to July 1, 1917, upon his own application, is regarded as having served constructively in the Naval Reserve Force from the date of his enrollment in the former Naval Reserve, and therefore as having enrolled in said Naval Reserve Force within four months from the date of termination of his last naval service; he is therefore entitled to 25 per cent increase of retainer pay, as provided by the act of August 29, 1916, for persons enrolling in the Naval Reserve Force within four months of the date of termination of their last naval service. (Comp. Dec., Sept. 29, 1917, 199 S. and A. Memo., 4386.)

Under the act of July 1, 1918, members of the Naval Reserve Force are entitled, for previous service in the Navy, Marine Corps, National Naval Volunteers, and Naval Militia, to credit for such service as provided in the act of August 29, 1916, i. e., for each four years a credit of 25 per cent, within the limitation of 16 years; allowing for members with four, but less than eight years' previous services, a credit of 25 per cent; for eight but less than 12 years, 50 per cent; for 12 but less than 16 years, 75 per cent; and for 16 or more years' service, 100 per cent. (25 Comp. Dec., 504, modifying 25 Comp. Dec., 308.)

Members of the Naval Reserve Force transferred thereto from the National Naval Volunteers, under the provisions of the act of July 1, 1918 (40 Stat., 708), are entitled to increase of 25 per cent of their base retainer pay upon reenrollment in the Naval Reserve Force within four months from termination of their three-year enrollment in which serving when so transferred. (27 Comp. Dec., 221.)

Members of the Naval Reserve Force appointed to commissioned or warrant grades "shall not be deprived of the retainer pay, allowances, or gratuities to which they would otherwise be entitled." (Act Aug. 29, 1916, 39 Stat., 587.)

Enrolled members of the Fleet Naval Reserve in enlisted ratings, who have been appointed to commissioned, warrant, and chief warrant

grades in other classes of the Naval Reserve Force, are not entitled to continue after June 30, 1918, in receipt of retainer pay of their enlisted ratings, computed on the rates established by the act of August 29, 1916, which rates of pay for enrolled members of the Fleet Naval Reserve were abolished and new rates substituted by the act of July 1, 1918 (40 Stat., 710). However, enrolled members of the Fleet Naval Reserve so appointed to offices in other classes of the Naval Reserve Force may, on and after July 1, 1918, be allowed the rate of retainer pay provided by the act of that date for the enlisted rating which they held in the Fleet Naval Reserve. (25 Comp. Dec., 445.)

*Pay while holding other offices.*—"No existing law shall be construed to prevent any member of the Naval Reserve Force from accepting employment in any branch of the public service, except as an officer or enlisted man in any branch of the military service of the United States or any State thereof, nor from receiving the pay and allowances incident to such employment in addition to his retainer pay." (Act Aug. 29, 1916, 39 Stat., 588.)

"That no part or parts of any existing law shall be construed \* \* \* to prevent members of the Naval Reserve Force from being or becoming members of the Naval Militia of any State, Territory, or the District of Columbia: *Provided*, That such membership in the Naval Militia shall not interfere with the discharge of duties by such members thereof who are in the Naval Reserve Force." (Act July 11, 1919, 41 Stat., 141.)

"That upon their enrollment in the Naval Reserve Force, and not otherwise, until June 30, 1922, the members of said Naval Militia shall have all the benefits, gratuities, privileges, and emoluments provided by law for other members of the Naval Reserve Force; and that with the approval of the Secretary of the Navy, duty performed in the Naval Militia may be counted as active service for the maintenance of efficiency required by law for members of the Naval Reserve Force." (Act June 4, 1920, sec. 1, 41 Stat., 818.)

Officers and employees of the Government who are members of the Naval Reserve Force are not entitled to military leave of absence with pay, in addition to their regular annual and sick leave, for the period they are on active duty with the Naval Reserve Force. (27 Comp. Dec., 214.)

Members of the Naval Reserve Force on active duty are prohibited by the provisions of the act of August 29, 1916 (39 Stat., 582), from receiving salary of any civil position they may be holding, if the combined amount of such salary and active-duty pay as members of the Naval Reserve Force exceeds the sum of \$2,000 per annum, but such limitations do not apply to the retainer pay of members of the Naval Reserve Force. (27 Comp. Dec., 214.)

*Uniform gratuity.*—"Members of the Naval Reserve Force shall, upon first reporting for active service for training during each period of enrollment, be credited with a uniform gratuity of \$50 for officers \* \* \*. Upon reporting for active service in time of war or national emergency the uniform gratuity shall be \$150 for officers \* \* \*, or the difference



between these amounts and any amounts that may have been credited as a uniform gratuity during the current enrollment." (Act Aug. 29, 1916, 39 Stat., 589.)

"The uniform gratuity for the members, other than officers, of each class of the Naval Reserve Force shall be the same as that prescribed for enlisted men of the Navy, but in time of peace the Secretary of the Navy shall prescribe the portion of the clothing gratuity to be issued to such members, other than officers, of the Naval Reserve Force." (Act July 1, 1918, 40 Stat., 711.)

Enlisted men of the Navy are not entitled to a credit for uniform gratuity but to clothing outfit, or, in other words, to a gratuitous issue of uniform and clothing. Therefore, what the enrolled members of the Naval Reserve Force who first reported for active service on or subsequent to July 1, 1918, became entitled to was not a credit for uniform gratuity but to a gratuitous issue of uniform, not to exceed \$100. (25 Comp. Dec., 281.)

Under the act of August 29, 1916, uniform gratuity is payable only to those members of the Naval Reserve Force whose membership is contingent upon a period of enrollment; accordingly, transferred members of the Fleet Naval Reserve who are not "enrolled" and whose service is not measured by "periods of enrollment" are not entitled to uniform gratuity either under that act or subsequent legislation. (25 Comp. Dec., 318.)

Officers of the Volunteer Naval Reserve of the Naval Reserve Force are entitled when on active duty in time of war to the uniform gratuity of \$150 provided by the act of August 29, 1916, for a full term of enrollment, notwithstanding that under said act members of the Volunteer Naval Reserve are not entitled to retainer pay or uniform gratuity in time of peace. (Comp. Dec., Aug. 7, 1917, 198 S. and A. Memo., 4332.)

During the period of any "time of war or national emergency" officers of the Naval Reserve Force who reenroll and report for active service are entitled to be credited with uniform gratuity of not to exceed \$150, provided they have the required outfit of uniforms and equipment, and the other members of the Naval Reserve Force so reporting, following a reenrollment, are entitled to uniform gratuity of \$100. While the act of July 1, 1918, increases the amount of uniform gratuity over that provided by the act of August 29, 1916, so as to entitle enrolled members other than officers to a uniform gratuity of \$100, the latter act does not in any way repeal the provision of the act of August 29, 1916, providing under what conditions the gratuity is payable. The provision of the act of July 1, 1918, "shall be the same as prescribed for enlisted men of the Navy," relates only to the amount of the gratuity. (26 Comp. Dec., 1010.)

A member of the Naval Reserve Force holding an enlisted rating who is promoted, during the term of his enrollment and in time of war, to a commissioned rank is entitled only to the difference between the amount already credited to him as uniform gratuity and the maximum allowed for active service in time of war. (24 Comp. Dec., 433.)

The provision for the crediting of the uniform gratuity is a mandatory one. It is that officers "shall" be credited with it "upon first reporting for active service for training during his period of enrollment," and that said credit "shall" be \$150 for said officers "upon reporting for active service in time of war or national emergency." (25 Comp. Dec., 130, 131.)

Should any member of the Naval Reserve Force sever his connection with the service without compulsion on the part of the Government before the expiration of his term of enrollment, the amount so credited [for uniform gratuity] shall be deducted from any money that may be or may become due him." (Act Aug. 29, 1916, 39 Stat., 589.)

Members of the Naval Reserve Force "shall in time of peace, when no national emergency exists, be discharged upon their own request upon reimbursing the Government for any clothing gratuity that may have been furnished them during their current enrollment." (Act Aug. 29, 1916, 39 Stat., 587.)

"That no part of the clothing gratuity credited to members of the Naval Reserve Force shall be deducted from their accounts where said members accept or have accepted temporary appointments in the Navy in time of war or other national emergency." (Act July 1, 1918, 40 Stat., 711.)

Where an ensign in the Naval Reserve Force receives an order from the Navy Department stating, "You are this day discharged from the U. S. Naval Reserve Force for the convenience of the Government," and the next day accepts a commission as temporary ensign in the Regular Navy, his connection with the service was not severed, within the meaning of the provisions of the act of August 29, 1916 (39 Stat., 589), directing the deduction of uniform gratuities of officers who have voluntarily severed their connection with said force. (*Price v. U. S.*, 55 Ct. Cls., 499.)

The act of July 1, 1918 (40 Stat., 711), providing that clothing gratuity credited to members of the Naval Reserve Force shall not be deducted from their accounts where such members accept temporary appointment in the Regular Navy in time of war, would protect a member's account against checkage if such checkage had not already been made; the mere fact that his account had been checked does not deprive him of a right which would be accorded him if the account had not been checked. (*Price v. U. S.*, 55 Ct. Cls., 499.)

*Travel allowance.*—"The Secretary of the Navy is authorized to assign any member of the Fleet Naval Reserve to active duty for training on board ship upon the application of such member \* \* \* : *Provided*, That no member shall be entitled to travel allowance unless the period of such active service is for not less than one month, or unless specifically provided for by such regulations as may be prescribed by the Secretary of the Navy." (Act Aug. 29, 1916, 39 Stat., 590.)

By act of February 28, 1919 (40 Stat., 1203), it was provided that naval reservists duly enrolled who have been honorably released from active service since November 11, 1918, or who may hereafter be honorably released from active service, shall be entitled to receive

travel pay at the rate of five cents per mile from the place where they are released from active duty to their actual bona fide home or residence, or original muster into the service, at their option; but for sea travel, transportation and subsistence only shall be furnished to enlisted men. By act of June 4, 1920 (41 Stat., 836), it was provided that any enrolled man who, since November 11, 1918, has been or shall hereafter be discharged from any branch or class of the naval service for the purpose of re-enlisting in the Navy or Marine Corps, shall be entitled to travel pay as authorized in said act of February 28, 1919.

Enlisted men of the Regular Navy, transferred to the Fleet Naval Reserve after 16 or 20 or more years of service, whose rating at the time of transfer entitled them to honorable discharge and who, as reservists, are not retained on active duty, are entitled at the time of transfer to travel allowance at 5 cents per mile from the place of transfer to their actual bona fide home or residence or place of original muster into the service, at their option, as provided by the act of February 28, 1919 (40 Stat., 1203). (26 Comp. Dec., 636.)

An officer of the Naval Reserve Force detached from active duty and ordered to his home who, in proceeding to his home, delays beyond the period authorized by the Navy Regulations, is not entitled to mileage in subsequently performing the travel, his active duty status having terminated as of the date of detachment. (26 Comp. Dec., 639, overruled, 27 Comp. Dec., 478, noted below; see also 26 Comp. Dec., 245.)

An officer of the Naval Reserve Force relieved from active duty and ordered to his home occupies a situation analogous to a retired naval officer released from active duty and is accordingly entitled to mileage to his home, provided the journey is performed in obedience to orders within a reasonable time after date of release from active duty. (27 Comp. Dec., 478, overruling 26 Comp. Dec., 639.)

Under the act of February 28, 1919, (40 Stat., 1203), a member of the Naval Reserve Force released from active duty in the interior of a foreign country is entitled to travel allowance at the rate of 5 cents per mile from place of release to port of embarkation, transportation and subsistence for the sea travel involved, and 5 cents per mile in the United States from the port of landing to his bona fide home or residence or place of original muster into the service, at his option. (26 Comp. Dec., 888.)

Transferred members of the Naval Reserve Force, as well as those duly enrolled from civil life, are entitled to travel allowance upon honorable release from active duty under the act of February 28, 1919 (40 Stat., 1203). (26 Comp. Dec., 878.)

*Courts-martial.*—Transferred members of the Fleet Naval Reserve, when released from active duty, are entitled to be credited, under article 4893, Naval Instructions, 1913, with the amounts deducted from their pay on account of court-martial sentences, in the same manner as though such release from active duty were a discharge from the service. (26 Comp. Dec., 91.) But enrolled members of the Naval Reserve Force are entitled to such credit only

upon disenrollment or discharge, their release from active duty not being equivalent to a discharge. (26 Comp. Dec., 818.)

The appropriation, "Pay, miscellaneous," is available for the payment of the cost of subsistence of officers of the Naval Reserve Force on inactive duty, while in confinement awaiting action of the Navy Department or awaiting trial by court-martial. (26 Comp. Dec., 884.)

*Deduction of pay.*—Deduction of 20 cents per month for the naval hospital fund should be made from the active-duty pay of all members of the Naval Reserve Force during such time as they are on active duty, and also such deduction should be made from the retainer pay of transferred members of the Fleet Naval Reserve when not on active duty. Under the act of August 29, 1916, enrolled members of the Naval Reserve Force are "subject to the laws, regulations, and orders for the government of the Regular Navy only during such time as they may by law be required to serve in the Navy, in accordance with their obligations, and when on active service at their own request as herein provided, and when employed in authorized travel to and from such active service in the Navy." Under the same act, "men transferred to the Fleet Naval Reserve shall be governed by the laws and regulations for the government of the Navy" at all times, and not merely while employed on active duty. One of the laws for the government of the Navy thus made applicable to members of the Naval Reserve Force is that providing for deduction on account of the naval hospital fund. (Comp. Dec., Dec. 27, 1916, 190 S. and A. Memo., 4121; secs. 1614 and 4808, R. S.)

An enrolled member of the Naval Reserve Force holding an enlisted rating and in an active-duty status is not entitled to active-duty pay or allowance for subsistence during unauthorized absence, such case being governed by article 4425, Navy Regulations 1913 (C. N. R. 7), made applicable by act of August 29, 1916 (39 Stat., 588), to enrolled members of the Naval Reserve Force while on active duty. (Comp. Dec., June 20, 1918, 208 S. and A. Memo., 4581.)

*Retired pay.*—Enrolled members of the Naval Reserve Force "who shall have completed twenty years of service in the Naval Reserve Force, and who shall have performed the minimum amount of active service required in their class for maintaining efficiency during each term of enrollment, shall, upon their own application, be retired with the rank or rating held by them at the time, and shall receive in lieu of any pay, a cash gratuity equal to the total amount of their retainer pay during the last term of their enrollment." (Act August 29, 1916, 39 Stat., 588.)

Transferred members of the Fleet Naval Reserve "may, upon their own request, upon completing thirty years' service, including naval and Fleet Naval Reserve service, be placed on the retired list of the Navy with the pay they were then receiving plus the allowances to which enlisted men of the same rating are entitled on retirement after thirty years' naval service." (Act August 29, 1916, 39 Stat., 591.)



"Service in the Navy, Marine Corps, National Naval Volunteers, and Naval Militia shall be counted as continuous service in the Naval Reserve Force, both for the purpose of retirement and of computing retainer pay: *Provided*, That no member of the Naval Reserve Force shall be eligible for retirement other than for physical disability incurred in line of duty." (Act July 1, 1918, 40 Stat., 710.)

Nothing contained in this act shall operate to deny to enlisted men transferred to the Naval Reserve Force after 16 years or more of naval service, their privilege of retirement upon completing 30 years' naval service as now provided by law. (Act July 1, 1918, 40 Stat., 710.)

**38. Additional pay for special duty—*Superintendent of Naval Academy.***—"The pay of the Superintendent of the Naval School at Annapolis shall be at the rate allowed to an officer of his rank, when in service at sea." (Act Sept. 28, 1850, 9 Stat., 515.)

The Superintendent of the Naval Academy, while discharging the duties of that position, is entitled to the sea pay of an officer of his rank, notwithstanding section 13 of the Navy personnel act of March 3, 1899 (30 Stat., 1007), which provides that officers of the Navy "when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty." The rule is applicable that a general law will not repeal an earlier special act by mere implication; and in this case the Navy personnel act is general in its provisions and does not by implication repeal special acts applicable to particular cases. (6 Comp. Dec., 885; see also 12 Op. Atty. Gen., 81; 18 Comp. Dec., 17.)

***Commandant of navy yard, Mare Island.***—"The pay of the officer of the Navy assigned to the command of the navy yard at Mare Island, California, shall be the sea pay of his grade." (Joint Res. Mar. 3, 1863, 12 Stat., 825.)

The joint resolution of March 3, 1863, providing that the pay of the officer of the Navy assigned to the command of the Mare Island Navy Yard shall be the sea pay of his grade, is not in conflict with the act of May 13, 1908, and such officer while in that command is entitled to the pay of his grade, fixed by said act of May 13, 1908, with 10 per cent additional allowed for sea duty. The requirement in said act of May 13, 1908, that estimates for "Pay of the Navy" shall hereafter show the amount allowed "for pay at sea rates to officers employed on shore," evidently contemplates that there may be cases under the act where the additional pay for service on sea duty may lawfully be paid to officers employed on shore. (15 Comp. Dec., 36; 18 Comp. Dec., 17.)

***Chief of Naval Operations, and commanding officers of fleets and squadrons.***—See note above, under "Admirals; Vice Admirals."

***Chiefs of bureaus, assistant chiefs of bureaus, and Judge Advocate General.***—See note to section 421, Revised Statutes.

***Aids to rear admirals.***—By act of May 13, 1908, it was provided that "aids to rear admirals embraced in the nine lower numbers of that grade shall each receive one hundred and fifty dollars additional per annum, and aids to all other rear admirals two hundred dollars addi-

tional per annum each." (35 Stat., 128.) By act of August 29, 1916 (39 Stat., 577, 578), the number of rear admirals was increased and the designation of those in the nine lower numbers was changed to rear admirals of the lower half, and the designation of rear admirals of the first nine was changed to rear admirals of the upper half.

A naval officer assigned to duty on the personal staff of a rear admiral, as flag lieutenant, without any other designation, is an aid to such rear admiral and entitled to the additional pay of \$200 per annum allowed to an aid of a major general in the Army. (U. S. v. Miller, 208 U. S., 32, construing the law as it existed prior to May 13, 1908, viz, Act of Mar. 3, 1899, sec. 13, 30 Stat., 1004, and secs. 1098 and 1261, R. S.)

A determination of who are aids should be arrived at by a consideration of the nature and character of the duties of the officers constituting the personal staff of a flag officer, and not made to depend upon whether they are technically designated as aids. (U. S. v. Miller, 208 U. S., 32.)

An aid in the Navy is an officer legally ordered to duty with an admiral, vice admiral, or rear admiral, to perform for him strictly personal, confidential, and routine duties. These duties can not be combined with the duties of a fleet ordnance officer or any other officer who has other duties to perform separate and distinct from the duties of an aid. (Knox v. U. S., 52 Ct. Cls., 22, holding that an officers' appointment as fleet ordnance officer did not constitute him an aid of the commander in chief.)

No officer above the rank of lieutenant in the Navy is entitled to pay as an aid to a rear admiral under the act of May 13, 1908, fixing the pay of aids. (Knox v. U. S., 52 Ct. Cls., 22.)

Under Revised Statutes, section 1098, no officer above the rank of captain in the Army could legally become an aid to a major general. It follows (no statute or regulation having changed the qualifications of aids in the Navy) that no officer above the rank of lieutenant in the Navy can be entitled to pay as aid to a rear admiral. Congress, in fixing the pay of aids in the Navy by the act of May 13, 1908, must have had in mind the qualifications which at that time were prescribed for aids in the Army and which up to that time had been the qualifications for aids in the Navy. (Knox v. U. S., 52 Ct. Cls., 22. See also, Tompkins v. U. S., 52 Ct. Cls., 30; Helm v. U. S., 52 Ct. Cls., 32.)

The provision of the Navy pay act of May 13, 1908 (35 Stat., 198), considered in connection with provisions of the Navy Regulations relating to the rank of "aids," is unambiguous, and entitles a naval officer with the rank of lieutenant commander serving at sea as aid to a rear admiral of the senior nine to the additional compensation provided by the act of May 13, 1908. The Navy Regulations may designate the rank of "aids" when the statute has made appropriations for their pay. In this case the regulations then in force allowed an officer with the rank of lieutenant commander to be detailed as aid, and as he complied with the regulations he was entitled to the additional pay notwithstanding that at the time officers of corre-

sponding rank in the Army were not qualified to act as aids to majors general. (*Jones v. U. S.*, 49 Ct. Cls., 16; affirmed, *Holmes v. U. S.*, 49 Ct. Cls., 70.)

Appointments as aids are, under the Navy Regulations, to be made by the Secretary of the Navy. A lieutenant in the Navy ordered by the Secretary to report to a rear admiral, commandant of a navy yard, to perform such duty as the commandant might assign him, and who was assigned by the commandant pursuant to this order of the Secretary to duty as his aid, is entitled to additional pay provided for aids to rear admirals, the order of the Secretary being sufficient authority to the commandant to make such assignment; but the appointment of an aid by the commander in chief of a fleet is void *ab initio*. The regulations require that in all cases aids must be nominated to the Secretary by the officer under whom they are to serve. He could not become entitled to the additional pay of aid merely by being called an aid by his commanding officer or by having the word "aid" affixed to his name in the Navy Register. (*Knox v. U. S.*, 52 Ct. Cls., 22, distinguishing *Frucht v. U. S.*, 49 Ct. Cls., 570.)

Where a lieutenant of the Navy serves as aid to the commandant of a navy yard under section 1469, Revised Statutes, and such commandant was a rear admiral, *held*, that the aid is entitled to the additional pay provided for by the act of May 13, 1908. In this case the Secretary of the Navy ordered the lieutenant to report to the commandant of the navy yard for such duty as the latter might assign, and the commandant, a rear admiral, detailed him to duty as his aid. (*Frucht v. U. S.*, 49 Ct. Cls., 570.)

If the commandant happens to be a rear admiral, the aid will be entitled to the additional pay provided by the act of May 13, 1908, and if the commandant happens to be an officer of inferior rank, the aid will not be entitled to such additional pay, the same incongruity appears in regard to aids for officers afloat; a rear admiral in command of a squadron is entitled to an aid who would receive the extra pay provided by the act of May 13, 1908, while a captain exercising the same command would not be so entitled. (*Frucht v. U. S.*, 49 Ct. Cls., 570.)

The commanding officer of a fleet has no power to appoint an aid for a rear admiral commanding a division; while the officer might have to obey an order of his superior officer, he is not thereby entitled to the additional pay provided for those legally detailed as aids. (*Knox v. U. S.*, 52 Ct. Cls., 22; *Palmer v. U. S.*, 52 Ct. Cls., 31.)

A lieutenant in the Navy is entitled to additional pay as aid to a rear admiral during a period that he served as such aid, notwithstanding that upon subsequent promotion to the grade of lieutenant commander he became entitled to the rank and pay of the latter grade retroactively, covering the same period for which he had received aid's pay; while he became constructively a lieutenant commander during that period, he was not such in fact. (*Downes v. U. S.*, 52 Ct. Cls., 237, 243, 327.)

The Secretary of the Navy's assignment of a captain of the Navy to duty with the rank and title of rear admiral, by authority of section 1434, Revised Statutes, does not make such officer a rear admiral within the meaning of the law providing additional pay for aids to rear admirals. (17 Comp. Dec., 54.)

A lieutenant in the Navy serving as flag secretary and aid to a rear admiral designated as commander in chief of a fleet, under the act of March 3, 1915 (38 Stat., 941, 942), is not entitled to pay as an aid to an admiral. The designation of said rear admiral as commander in chief conferred upon him the rank of admiral, but did not invest him with the office of admiral. (21 Comp. Dec., 840.) However, an officer serving as aid to a rear admiral holding the rank of admiral as commander in chief of a fleet is entitled to the additional pay allowed by law for aids to rear admirals. (Comp. Dec., Oct. 13, 1915, 176 S. and A. Memo., 3810.)

An officer of the Navy serving as aid to the Admiral of the Navy is not entitled, under the assimilating provisions of section 13 of the Navy personnel act of March 3, 1899 (30 Stat., 1007), to higher rank and pay as provided by section 1096, Revised Statutes, for aids to the General of the Army. That section had ceased to exist as the result of the nonexistence of the grade of General of the Army years before the re-creation of the office of Admiral in 1899. Furthermore, Congress in the Navy pay act of May 13, 1908 (35 Stat., 127), in terms specifically provided for the pay of every officer in the Navy, including the Admiral and embracing extra compensation to aids to rear admirals, making no provisions whatever for compensation for services which might be rendered by an officer acting as aid to the Admiral. The incongruity, if any, which might result from providing for extra compensation for an aid to a rear admiral, and not for aids to the higher officer, the Admiral, would be but the consequence of legislative omission, and would not justify to exertion of judicial power for the purpose of re-creating a provision of law concerning aids to the General of the Army which has long since ceased to exist, in order to afford a subject upon which the assimilating provision of the Navy personnel act of 1899 might operate. (*Wood v. U. S.*, 224 U. S., 132. See also *Caldwell v. U. S.*, 44 Ct. Cls., 604; *Wood v. U. S.*, 44 Ct. Cls., 611.)

An officer of the Navy detailed to duty as aid to the Chief of Naval Operations is not entitled, while so serving, to the additional pay provided in the act of May 13, 1908, for aids to rear admirals, although the Chief of Naval Operations holds the office of rear admiral in the Navy and has the rank but not the office of Admiral while so serving. This case differs from one in which an officer is expressly ordered to duty as aid to a rear admiral, in that here the officer's orders were to duty as aid to the Chief of Naval Operations and not as aid to a rear admiral. (24 Comp. Dec., 190.)

Under section 1262, Revised Statutes, and the act of June 30, 1882 (22 Stat., 118), an aid to a rear admiral is not entitled to have his longevity pay calculated upon the additional pay which he receives as aid, that being, under section 1261, Revised Statutes, an allowance



in addition to and not a part of the pay of his rank. (U. S. v. Miller, 208 U. S., 32.)

A lieutenant in the Navy serving as aid to a rear admiral was entitled, under the Navy personnel act of March 3, 1899, to the additional \$200 allowed to a lieutenant serving as aid to a major general, under section 1261, Revised Statutes, but not to the mounted pay allowed to the Army lieutenant serving as such aid under section 1301, Army Regulations. (U. S. v. Crosley, 196 U. S., 327.)

An officer of the Navy is entitled to the additional pay allowed an aid when said officer enters upon duty under proper designation as aid to a rear admiral, and is entitled to such pay while on authorized allowance of leave if, during such leave, his designation as aid remains unchanged. (17 Comp. Dec., 104.)

For other cases, see note to section 1469, Revised Statutes.

*Aviation duty.*—By act of March 3, 1915 (38 Stat., 939), it was provided that "hereafter officers of the Navy and Marine Corps appointed student naval aviators, while lawfully detailed for duty involving actual flying in air craft, including balloons, dirigibles, and aeroplanes, shall receive the pay and allowances of their rank and service plus thirty-five per centum increase thereof; and those officers who have heretofore qualified, or may hereafter qualify, as naval aviators, under such rules and regulations as have been or may be prescribed by the Secretary of the Navy, shall, while lawfully detailed for duty involving actual flying in air craft, receive the pay and allowances of their rank and service plus fifty per centum increase thereof \* \* \*: *Provided*, That not more than a yearly average of forty-eight officers \* \* \* of the Navy, and twelve officers \* \* \* of the Marine Corps, detailed for duty involving actual flying in air craft, shall receive any increase in pay while on duty involving actual flying in air craft, nor shall any officer in the Navy senior in rank to commander, nor any officer in the Marine Corps senior in rank to major, receive any increase in pay or allowances by reason of such detail or duty."

By act of August 29, 1916 (39 Stat., 582, 586), it was provided that "the officers detailed and the enlisted men of the Naval Flying Corps shall receive the same pay and allowances that are now provided by law for officers and enlisted men of the same grade or rank and rating in the Navy and Marine Corps detailed to duty with aircraft involving actual flying"; that "officers and enlisted men, while detailed as student aviators and student airmen involving actually flying in aircraft, shall receive the same pay and allowances that are now provided by law for officers and enlisted men of the same grade or rank and rating in the Navy detailed for duty with aircraft"; that student flyers appointed by the Secretary of the Navy, during a period of four years following said act, for instruction and training in aeronautics "shall receive the same pay and allowances as midshipmen at the United States Naval Academy"; and that "student flyers shall, after receiving a certificate of qualification as an aviator for actual flying in aircraft, rank with midshipmen

and shall receive the same pay and allowances as midshipmen, plus fifty per centum thereof."

By act of July 1, 1918 (40 Stat., 718), it was provided that thereafter the "allowances" of "officers, enlisted men, and student flyers of the naval service shall in no case be increased by reason of the performance of aviation duty."

Flights performed by an officer of the Navy prior to receipt of orders to duty involving actual flying in aircraft do not constitute duty performed under a lawful detail, and therefore do not entitle the officer to the increased pay and allowances authorized by the act of March 3, 1915. (26 Comp. Dec., 93.)

An officer designated as naval aviator on the date that he qualified as such is entitled to the increased pay authorized by the act of March 3, 1915, from the date of such designation, and not merely from the date that the designation was received by him. (Comp. Dec., Jan. 30, 1917, 191 S. and A. Memo., 4149.)

If in point of fact an officer was engaged under proper orders in actual flying at the time an order was issued by the Secretary of the Navy detailing him to duty involving actual flying in heavier-than-air craft, and prior to receipt by him of said detail, he is entitled to the additional pay provided for such duty from the date the detail was issued. (Comp. Dec., Apr. 14, 1913, 146 S. and A. Memo., 2483.)

Officers and enlisted men of the Navy who are properly detailed, under the act of March 3, 1915 (38 Stat., 928, 939), for duty involving actual flying in aircraft, are entitled to the additional pay provided in that act while on authorized leave of absence within the period of such detail. (22 Comp. Dec., 292; see also, 23 Comp. Dec., 589; 24 Comp. Dec., 232.)

An officer of the Army detailed for duty requiring him to make regular and frequent aerial flights is entitled to the increased pay authorized for such duty during the period he is disabled by reason of injuries received in the line of duty as aviator. (25 Comp. Dec., 50.)

The detachment from duty involving actual flying of a student naval aviator because of injuries received in line of duty implies a cessation of such duty for an indefinite period and terminates the right to the additional pay provided therefor while the officer is undergoing treatment. (25 Comp. Dec., 872.)

An officer of the Navy detailed to duty involving actual flying in aircraft is not entitled to the additional pay provided for that duty during a period in which such duty was not performed by him, notwithstanding that he was prevented from performing such duty during said period because of his being interned in a neutral country or held prisoner by the enemy. (25 Comp. Dec., 169; but see decision of Court of Claims, noted below.)

An officer of the Navy detailed as a student aviator is not entitled to the additional pay provided for aviation duty during a period that he was not performing duty involving actual flying, notwithstanding that he was prevented from performing such duty during said period because of conditions directly resulting from a hurricane and over which he had no control. (Comp. Dec., Aug. 8, 1917, 198 S. and A. Memo.,

4334; but see decision of Court of Claims, noted below.)

In any case where an officer or enlisted man detailed to duty involving actual flying in aircraft is not engaged in actual flying for an unreasonable period after his order of detail, payment of the additional pay provided in the act of March 3, 1915, is not authorized. As to what would be considered by the Comptroller of the Treasury as such an "unreasonable time" would depend upon the facts in each particular case. (23 Comp. Dec., 589; but see decision of Court of Claims, noted below.)

An officer detailed by the Secretary of the Navy to duty involving actual flying in aircraft, as shown by said detail, is not entitled to the additional pay provided by law for officers so detailed, unless in the opinion of the Comptroller of the Treasury "the duty which the order was for in fact included actual flying." The Comptroller of the Treasury holds that it is the duty of his office to determine in any case whether or not the duty to which an officer of the Navy is detailed by the Secretary of the Navy involves actual flying in aircraft, and that the question of jurisdiction raised by the Secretary of the Navy is one which can be decided only by the comptroller. The Comptroller of the Treasury regards loss of life in the performance of duty for which the additional pay is given as evidence which would certainly pass through his office the accounts of an officer for additional pay for any period within reason prior to his death. (24 Comp. Dec., 11; but see decision of Court of Claims, noted below.)

Under the act of March 3, 1915 (38 Stat., 939, 940), an enlisted man of the Navy is entitled to the additional pay allowed by law "while detailed for duty involving actual flying in aircraft." The pay is not made dependent upon the number of flights while on such duty, but is made dependent on the detail to such duty. Congress did not fix the pay on the number of times an enlisted man actually flew, nor on the number of days he was engaged in actual flying. When, therefore, he was lawfully detailed to duty involving actual flying in aircraft he must be regarded and treated as entitled to the consequences of such detail and to the pay provided for such duty. (*Luskey v. U. S.*, Ct. Cls. No. 34241, decided Nov. 7, 1921, overruling contrary decisions of the Comptroller of the Treasury, noted above.)

An officer of the Navy ordered to perform duty as student naval aviator in addition to his regular sea duty is entitled, if he performs actual flights under said detail, to the 35 per cent increase in shore pay only from the time he reported for such duty until he left the station to return to his ship, such increase not to be computed on his increase for sea duty nor on his allowances. Where the orders do not expressly impose the continued discharge of sea duty, but state that the flying duty is not to interfere with duties already assigned, the presumption is that the shore duty is temporary and additional to the regular duty, and therefore the officer is entitled to sea duty pay while performing said temporary duty. (26 Comp. Dec., 93.)

*Shore duty beyond seas.*—"All officers on sea duty and all officers on shore duty beyond

the continental limits of the United States shall while so serving receive ten per centum additional of their salaries and increase as above provided, and such increase shall commence from the date of reporting for duty on board ship or the date of sailing from the United States for shore duty beyond the seas or to join a ship in foreign waters." (Act May 13, 1908, 35 Stat., 128. The words "as above provided" refer to the rates of pay for the various ranks as prescribed by the act of May 13, 1908, and which are set forth above in the notes under this section.)

The additional pay provided by the act of May 13, 1908, for shore duty beyond seas, applies to commissioned officers only; midshipmen and warrant officers are not entitled to such increase. (14 Comp. Dec., 882; see also *Olliff v. U. S.*, 46 Ct. Cls., 349; compare *Prindle v. U. S.*, 41 Ct. Cls., 8.) As to additional pay allowed warrant officers for foreign shore duty, see act of July 11, 1919 (41 Stat., 140), noted above under "Warrant officers, acting warrant officers, and commissioned warrant officers."

The act of March 2, 1901 (31 Stat., 903), relating to the Army, provided that "hereafter the pay proper of all officers and enlisted men serving beyond the limits comprising the Union and Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto." (See also act of June 30, 1902, 32 Stat., 512, to same effect.) The act of March 3, 1901 (31 Stat., 1108), relating to the naval service, provided that "officers of the Navy and officers and enlisted men of the Marine Corps who have been detailed or may hereafter be detailed for shore duty in Alaska, the Philippine Islands, Guam, or elsewhere beyond the continental limits of the United States shall be considered as having been detailed for 'shore duty beyond seas' and shall receive pay accordingly, with such additional pay as may be provided by law for service in island possessions of the United States." The act of March 3, 1899 (30 Stat., 1007), provided that "when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army for duty in similar places." Under these laws it was held, in *McCully v. U. S.* (42 Ct. Cls., 275), that an officer of the Navy detached from shore duty beyond seas and ordered home continues to be entitled to his ten per cent increase until his return to the United States. The act of May 13, 1908, does not change the law as it previously existed so as to deprive naval officers of the right to increased pay while returning home upon orders from foreign stations. Said act expressly provides that "nothing herein shall be so construed as to reduce the pay or allowances now authorized by law for any commissioned, warrant, or appointed officers, or any enlisted man of



the active or retired lists of the Navy, and all laws inconsistent with this provision are hereby repealed." Taking into consideration the clause last quoted, and the legislative proceedings, which show that it was the intention of Congress in the act of May 13, 1908, to place officers of the Army, Navy, and Marine Corps exactly on the same basis as to pay, and not to make an unjust discrimination between such officers, *held*, that officers of the Navy are still entitled to the benefit of the act of March 2, 1901, so far as relates to the length of time during which they are entitled to the increased 10 per cent of pay for shore duty beyond seas. (*Gearing v. U. S.*, 46 Ct. Cls., 187.)

The decision of the Court of Claims in the *Gearing* case related to an officer who entered the Navy prior to the passage of the act of May 13, 1908, and is not, therefore, decisive of the question presented in the case of an officer who entered the service after that date. Nevertheless, *held*, that officers of the Navy appointed after said act, and who are detailed for shore duty beyond seas, are entitled to retain the 10 per cent additional pay until their arrival in the United States. There is nothing in the act of May 13, 1908, which requires that said additional pay shall cease upon their detachment from foreign duty, and the reasonable inference from the language used is that Congress intended, when it said that this increased pay should commence from the date of sailing from the United States, that the point of departure from the United States, indicated as the beginning point for the increased pay, should be the terminating point for increased pay upon return. (Comp. Dec., Jan. 24, 1914, 155 S. and A. Memo., 2962.)

Prior to the act of March 2, 1901 (31 Stat., 903), Army officers were not allowed the extra pay provided for foreign service from the date of departure from the United States to the date of return thereto; and the same was true as to naval officers receiving Army pay under the act of March 3, 1899. (*McGowan v. U. S.*, 49 Ct. Cls., 454, citing 6 Comp. Dec., 947, and 7 Comp. Dec., 670.)

Where an officer of the Navy was detailed to sea duty which necessitated a journey by sea on a merchant vessel to reach the place appointed for such duty, he is not an officer "detailed to shore duty beyond seas" within the meaning of section 13 of the Navy personnel act of March 3, 1899 (30 Stat., 1007). Although his duty during such voyage on a merchant vessel was not sea duty and did not entitle him to sea pay, neither was it shore duty beyond seas, first, because he was not ordered to perform the latter duty, and second, because he never actually performed any such duty regardless of his detail. The statutes made it ordinary shore duty. (*McGowan v. U. S.*, 49 Ct. Cls., 454.)

The claim of an officer detached from sea duty abroad for additional pay for performance of shore duty beyond seas while in Manila waiting for the Army transport in which he was to take passage back to the United States, and his claim for sea-duty pay while aboard said vessel en route to the United States, is governed

by the decision in *Farenholt v. U. S.* (42 Ct. Cls., 114, noted below). (*McDonald v. U. S.*, 48 Ct. Cls., 123; see also note to sec. 1571, R. S.)

The act of May 13, 1908 (35 Stat., 128), provides that all officers on sea duty and all officers on shore duty beyond the continental limits of the United States shall receive 10 per cent additional pay from the date of reporting for duty on board ship or of sailing from the United States; but it also provides that nothing shall be construed so as to reduce the pay or allowances then authorized by law for officers and enlisted men. The first provision of the said act was intended to assimilate the pay of all officers of the Army and Navy performing similar duty in similar circumstances, but the second provision saves to all officers any legislative discrimination theretofore existing and preserves intact the pay and allowances existing at the time of the passage of the act of 1908. (*McDonald v. U. S.*, 48 Ct. Cls., 123.)

The act of March 2, 1901 (31 Stat., 903), followed by the act of March 3, 1901 (31 Stat., 1108), provided in terms for extra pay for shore duty beyond the limits of the United States and expressly applied to the accounting thereof "from the date of departure from said States to the date of return thereto." In *McCully v. United States* (42 Ct. Cls., 275) these statutes were applied to naval officers on shore duty beyond seas, under the assimilating clause of the act of March 3, 1899, section 13 (30 Stat., 1007). It follows that the act of May 13, 1908, saves to officers of the Navy for shore duty beyond seas the pay fixed by the foregoing enactments. In *Gearing v. United States* (46 Ct. Cls., 187) it was held that the act of May 13, 1908, did not repeal the statutes upon which the *McCully* case was based. (*McDonald v. U. S.*, 48 Ct. Cls., 123.)

Officers of the Navy are entitled to the 10 per cent increase authorized for shore duty beyond the continental limits of the United States while on duty at the naval station Hawaii, and while returning to the United States from such duty. The Army act of August 24, 1912 (37 Stat., 576), providing that "hereafter the laws allowing increase of pay to officers and enlisted men for foreign service shall not apply to service in the Canal Zone, Panama, Hawaii, or Porto Rico," does not apply to officers of the Navy who derive their right to additional pay for shore duty beyond seas from the act of May 13, 1908. (22 Comp. Dec., 35.)

Shore duty beyond seas is exceptional duty, both as to officers of the Army and Navy, and a naval officer must be "detailed for shore duty beyond seas" before he can "receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places," as prescribed by the Navy personnel act of March 3, 1899, section 13. (*Ackley v. U. S.*, 40 Ct. Cls., 216.)

An officer of the Navy assigned by proper authority to sea duty on a vessel at Guam can not be considered as "detailed for shore duty beyond seas" within the intent of the Navy personnel act of March 3, 1899, section 13 (30 Stat., 1007), and the act of March 3, 1901 (31

Stat., 1108), because the governor of Guam, by a verbal order, directed him to do duty on shore. (*Furlong v. U. S.*, 45 Ct. Cls., 493.)

Duty performed on shore by a naval officer without having been detailed for shore duty must be regarded as temporary service performed while he officially remains on board the vessel to which he is attached. The service of a naval officer on shore duty beyond seas is exceptional service; to entitle him to the extra pay therefor he must show that he was detailed for such service. (*Furlong v. U. S.*, 45 Ct. Cls., 493.)

The naval personnel act of March 3, 1899, section 13, allowing certain officers of the Navy the same pay and allowances as officers of corresponding rank in the Army, did not entitle officers of the Navy, for services on naval vessels in Philippine and Chinese waters, or beyond the limits of the States comprising the Union, to the 10 per cent additional pay given to Army officers under the acts of May 26, 1900 (31 Stat., 211), and March 2, 1901 (31 Stat., 903). While the intention of Congress in the personnel act was to put officers of corresponding rank in the Army and Navy on the same general footing with respect to their general pay and to make the act prospective in its application to any future legislation by which the general pay of Army officers might be increased. Congress may increase the pay of Army officers for services in particular places and under special circumstances without thereby intending such increase to apply to naval officers. (*U. S. v. Thomas*, 195 U. S., 418.)

A naval officer performing sea service in foreign waters was not entitled by the Navy personnel act to the increased 10 per cent of pay given Army officers for like duty. Only shore duty beyond seas entitled Navy officers to such increased pay. (*U. S. v. Thomas*, 195 U. S., 418, reversing *Thomas v. U. S.*, 38 Ct. Cls., 719; see also *Thomas v. U. S.*, 38 Ct. Cls., 113.)

Under the Navy personnel act, section 13 (30 Stat., 1007), and the act of May 26, 1900 (31 Stat., 211), and the act of March 3, 1901 (31 Stat., 1108), an officer of the Navy on shore duty in the Philippine Islands was entitled to the increased pay allowed for shore duty "beyond seas." The Philippine Islands is "beyond seas" within the meaning of these statutes. (*Irwin v. U. S.*, 38 Ct. Cls., 87.)

The words "pay proper" in the act of May 26, 1900 (31 Stat., 211), includes longevity pay, and the increased pay allowed for shore duty in the Philippine Islands should be computed accordingly. (*Irwin v. U. S.*, 38 Ct. Cls., 87; *McCully v. U. S.*, 42 Ct. Cls., 275.)

The term "beyond seas" generally means out of the Kingdom of England; out of the United States; out of a State. The term must receive the legal interpretation usually given to it in this country and in England, unless there is an indication to the contrary. When the act of May 26, 1900 (31 Stat., 211), was passed the Philippine Islands were unequivocally "beyond seas" within the meaning of the act of March 3, 1899 (30 Stat., 1007),

as the treaty under which it became a possession of the United States had not then been ratified. (*Irwin v. U. S.*, 38 Ct. Cls., 87.)

Service in Alaska is "shore duty beyond the continental limits of the United States," and an officer performing service there is entitled to the increased pay provided for such service under the act of May 13, 1908 (37 Stat., 128), and the act of March 3, 1901 (31 Stat., 1108). (*Downey v. U. S.*, 50 Ct. Cls., 273.)

Where an assistant surgeon in the Navy performed shore duty beyond seas, at a naval hospital in the Philippine Islands, pursuant to an order detailing him for such duty, he was entitled to 10 per cent additional compensation calculated on the basis of his maximum pay. The Philippine Islands constitute a "foreign station" for the purpose of extra pay under the act of May 26, 1900 (31 Stat., 211), which was in force when he performed such duty. (*Thompson v. U. S.*, 49 Ct. Cls., 459.)

The duty status of an officer serving beyond seas remains the same for all purposes until his return home. His detachment from service beyond seas does not take effect until his return; and his duty status continues during delay in returning, if such delay was allowed as leave of absence and he was entitled to such leave by law. The permission given to the officer in this case, to delay two months in returning to the United States, in effect and as a matter of fact gave him a leave of absence for sixty days. (*Izard v. U. S.*, 48 Ct. Cls., 367. Under prior laws it had been held that officers were entitled to the increased pay only while performing shore duty beyond seas, and not while in transitu or sick in hospital abroad. See *Farenholt v. U. S.*, 42 Ct. Cls., 114; *Thompson v. U. S.*, 49 Ct. Cls., 459.)

A naval officer ordered to a hospital for treatment while waiting the arrival of a vessel to which he was to be attached will not be entitled while in hospital to shore duty pay "beyond seas," under the Navy personnel act, section 13. (*Ackley v. U. S.*, 40 Ct. Cls., 216.)

An officer of the Navy while on shore duty beyond seas is entitled when on leave of absence taken abroad to the increased pay provided for such duty by the act of May 13, 1908. (19 Comp. Dec., 608.)

A naval officer granted leave of absence from shore duty beyond seas is entitled to the additional pay provided for such duty while en route to the United States and during the period of his return therefrom to his post of duty, but is not entitled to such pay while in the United States. (21 Comp. Dec., 604.)

The Comptroller of the Treasury has repeatedly held that an officer is not entitled to additional pay for service beyond seas while in the United States, whether on temporary duty or on leave. (Comp. Dec., Jan. 17, 1916, 179 S. and A. Memo., 3870.)

When a naval officer on sea duty is ordered to certain duty on shore beyond seas, which duty is described in his orders as being additional but which, in fact, requires his attention to the exclusion of all other duty, he is to be regarded, for purposes of pay and allowances, as being on shore duty beyond seas during the period of



such duty. (21 Comp. Dec., 604); but his sea-duty status continues, and he does not become an officer serving on shore duty beyond seas unless he can establish as a matter of fact that the duties performed by him on shore were paramount to his assignment to sea service. (*Leach v. U. S.*, 44 Ct. Cls., 132; see also *Furlong v. U. S.*, 45 Ct. Cls., 493.)

An officer of the Navy detached from a ship in foreign waters and ordered to duty at a foreign station is not entitled to traveling expenses while awaiting transportation to his station nor to the 10 per cent additional for sea duty while en route to his station on board a Government vessel. (Comp. Dec., June 30, 1916, 184, S. and A. Memo., 4007.)

The law makes no provision for 10 per cent increase of naval officers' pay while traveling from shore duty beyond seas to join a vessel in foreign waters, or vice versa. (Comp. Dec., June 24, 1913, 148 S. and A. Memo., 2662.)

An officer of the Navy who is ordered from foreign shore duty to duty on board a vessel in a United States port is entitled to the 10 per cent additional pay for shore duty beyond seas to the date of his return to the United States. (Comp. Dec., Nov. 20, 1916, 189 S. and A. Memo., 4094.)

*Sea duty.*—See note to section 1571, Revised Statutes.

*Acting as pay officer.*—See sections 1381 and 1564, Revised Statutes.

**39. Longevity pay.**—"There shall be allowed and paid to each commissioned officer below the rank of rear admiral ten per centum of his current yearly pay for each term of five years service in the Army, Navy, and Marine Corps. The total amount of such increase for length of service shall in no case exceed forty per centum of the yearly pay of the grade as provided by law: *Provided*, That the annual pay of captain shall not exceed five thousand dollars per annum; of commander, four thousand five hundred dollars per annum, and of lieutenant commander, four thousand dollars per annum." (Act May 13, 1908, 35 Stat., 128. As to temporary increases in pay of the grades specified, see notes above, under this section.)

As to longevity increases in pay of commissioned warrant officers, warrant officers, mates, Dental Corps, and Naval Reserve Force, see notes above with reference to those specific classes.

"For the purposes of computing longevity pay, and retirement privileges of officers and enlisted men of the Navy, all creditable service in the Coast Guard and former Revenue-Cutter Service shall be counted." (Act June 4, 1920, 41 Stat., 835.)

"Hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services." (Act May 18, 1920, sec. 11, 41 Stat., 604.)

"All officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the Regular or Volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the Regular Navy

in the lowest grade having graduated pay held by such officer since last entering the service." (Act Mar. 3, 1883, 22 Stat., 473.)

"All officers who have been or may be appointed to any corps of the Navy or to the Marine Corps after service in a different corps of the Navy or of the Marine Corps shall have all the benefits of their previous service in the same manner as if said appointments were a reentry into the Navy or into the Marine Corps." (Act June 10, 1896, 29 Stat., 361.)

"Officers who have been, or may be, transferred from the volunteer service to the Regular Navy shall be credited with the sea service performed by them as volunteer officers, and shall receive all the benefits of such duty in the same manner as if they had been, during such service, in the Regular Navy." (Sec. 1412, R. S.)

By act of March 3, 1899 (30 Stat., 1007), it was provided that "all officers, including warrant officers, who have been or may be appointed to the Navy from civil life shall, on the date of appointment, be credited for computing their pay, with five years' service." By act of March 4, 1913 (37 Stat., 891), it was provided that this provision "shall not apply to any person entering the Navy from and after the passage of this act."

"Hereafter the service of a midshipman at the United States Naval Academy, or that of a cadet at the United States Military Academy, who may hereafter be appointed to the United States Naval Academy, or to the United States Military Academy, shall not be counted in computing for any purpose the length of service of any officer in the Navy or in the Marine Corps." (Act Mar. 4, 1913, 37 Stat., 891.)

The act of March 3, 1883 (22 Stat., 473), entitles an officer to be credited with actual service only, and does not include constructive service credited to an officer under a special act of Congress. (*Laws v. U. S.*, 27 Ct. Cls., 69.)

Longevity pay is to be computed, except where the statutes otherwise provide, from the date the officer's commission was signed by the President, and not from an antecedent date mentioned in the body of the commission. Under section 1556, Revised Statutes, the right of naval officers to the longevity pay provided therein depends upon the words "date of commission" as used in that section; and the legal construction to be given to those words is the date when the instrument was executed; the President for other purposes may insert an antecedent date in the body of a commission; but antecedent date can affect an officer's pay only in the cases authorized by statute. (*Young v. U. S.*, 19 Ct. Cls., 145.)

The words "current yearly pay," as employed in Revised Statutes, section 1262, were construed in *United States v. Tyler* (105 U. S., 244) to require that the calculation of longevity pay should be made, not upon the sum of the base pay but on the base pay and previous longevity increases thereof. Subsequently, by the act of June 30, 1882 (22 Stat., 118), Congress expressly directed that the longevity increases provided in section 1262 should be computed "on the yearly pay of the grade." This act was passed for the purpose of commanding a method of computation which would render

inapplicable the construction adopted in the Tyler case (citing *U. S. v. Miller*, 208 U. S., 32, 38). Thereafter the longevity pay of Army officers was computed by the method directed in the act of 1882. In view of the purpose of Congress to equalize, as far as possible, the pay of Army and Navy officers, manifested by the adoption of the Navy personnel act of 1899 and in all subsequent legislation as to such pay, *held*, that the act of May 13, 1908 (35 Stat., 127, 128), providing longevity increases for Navy officers based upon their "current yearly pay," was intended to provide that the longevity increase therein prescribed should be computed according to the method then prevailing; that is, upon the "yearly pay of the grade," and not upon the "current yearly pay" as construed in the Tyler case. (*Plummer v. U. S.*, 224 U. S., 137.)

The words "officers or enlisted men in the Regular or Volunteer Army or Navy, or both," as used in the law relating to longevity of officers of the Navy (see act of Mar. 3, 1883, above quoted), were intended to include all men regularly in the service in the Army or Navy; the expression "officers or enlisted men," is not to be construed distributively, as requiring that a person should be an enlisted man, or an officer nominated and appointed by the President, or by the head of a department, but was meant to include all men in service, either by enlistment or regular appointment in the Army or Navy; the word "officer" is used in the statute in a more general sense. (*U. S. v. Hendee*, 124 U. S., 309, 313, followed in *U. S. v. Cook*, 128 U. S., 254, 257.)

An officer of the Navy is entitled under the act of March 3, 1883, to credit for service rendered by him as a paymaster's clerk in computing his longevity pay, although such paymaster's clerk, under the law as it then existed, was neither an enlisted man nor an "officer" in the constitutional sense. (*U. S. v. Hendee*, 124 U. S., 309, distinguishing *U. S. v. Mouat*, 124 U. S., 303.)

Service as a midshipman at the Naval Academy was service as an officer of the Navy, and should be credited to an officer of the Navy in computing his longevity pay under the act of March 3, 1883. (*U. S. v. Baker*, 125 U. S., 646; see also *U. S. v. Cook*, 128 U. S., 254; *U. S. v. Morton*, 112 U. S., 1; *U. S. v. Watson*, 130 U. S., 80; but see act Mar. 4, 1913, quoted above, with reference to midshipman service.)

An officer who was not in the Navy on the date of the act (Mar. 4, 1913) abolishing, under certain conditions, credit for constructive service, but who was appointed to the Navy after that date, is entitled to credit for prior service, both actual and constructive, based upon a former appointment to the Navy. The said act did not deprive officers then in the Navy, or thereafter reappointed, of credit for such service previously earned. (22 Comp. Dec., 542; see also, 24 Comp. Dec., 168, 24 Comp. Dec., 629, and 204 S. and A. Memo., 4505.)

Service by an officer of the Navy as an enlisted man in the Marine Corps is to be credited to him in calculating his longevity pay under the act of March 3, 1883. (*U. S. v. Dunn*, 120 U. S., 249.)

The word "service" in section 1262, Revised Statutes, providing increased pay for officers of the Army "for each term of five years of service," evidently means "military service." (*U. S. v. La Tourrette*, 151 U. S., 572.)

An aid to a rear admiral is not entitled to have his longevity pay calculated upon the additional pay which he receives as aid, that being an allowance in addition to and not a part of the pay of his rank. (*U. S. v. Miller*, 208 U. S., 32.)

A retired officer of the Navy is not entitled, in computing his longevity pay, to credit for service rendered after his retirement. (*Roget v. U. S.*, 148 U. S., 167; see also, *Thornley v. U. S.*, 113 U. S., 310; *Faust v. U. S.*, 42 Ct. Cls., 94; 15 Comp. Dec., 767; compare, *U. S. v. Tyler*, 105 U. S., 244; 5 Comp. Dec., 809; and see notes to secs. 1588 and 1592, R. S., as to longevity increases of retired officers under later laws.)

An officer of the Regular Navy who was credited, under the act of March 3, 1883, with prior service rendered by him in the Volunteer Navy is not entitled to receive the pay of higher grades in the Navy from the dates that he might have been promoted to such grades had he entered the Regular Navy when he entered the Volunteer Navy, and had he been promoted from time to time under the rule of promotion provided by law for the Regular Navy; the court can not concur in the contention of such officer that under the act of 1883, officers in his situation, while denied rank and commissions under the statute, have the right to the pay of the several grades they might have reached if their appointments in the Regular Navy are treated as having been made at the date of their entry into the volunteer service. (*Barton v. U. S.*, 129 U. S., 249.)

As to the method of computing longevity increases under the act of March 3, 1883, in the cases of officers receiving graduated pay under section 1556, Revised Statutes, see *United States v. Mullan* (123 U. S., 186), *United States v. Green* (138 U. S., 293), *United States v. Alger* (151 U. S., 362), *United States v. Alger* and *United States v. Stahl* (152 U. S., 384), *United States v. Rockwell* (120 U. S., 69), *White v. United States* (191 U. S., 545), *United States v. Foster* (128 U. S., 435).

For other cases, as to what time counts as service in the Navy, see note to section 1443, Revised Statutes, and see *Byrnes v. United States* (26 Ct. Cls., 302), and *Davis v. United States* (28 Ct. Cls., 21).

The act of March 3, 1883 (22 Stat., 473), is not limited to officers who had entered the Navy more than once, but applies also to officers who have served continuously; when such an officer enters the service only once, his first entry is also his last entry within the meaning of the statute. (*Mullan v. U. S.*, 123 U. S., 186.)

Where an officer resigns one office the day before his appointment to a higher one, in substance and in law his actual service was for a continuous period and not for two different periods. (*U. S. v. Alger*, 151 U. S., 362; *U. S. v. Stahl*, 151 U. S., 366; *U. S. v. Alger*, 152 U. S., 384.)



Where at the time of resigning from the Navy it is the intention and purpose of an officer to reenter the service, and as soon as he can do so thereafter he does reenter the service, such last appointment is not "from civil life" as contemplated by section 13 of the Navy personnel act of March 3, 1899. (*Barber v. U. S.*, 50 Ct. Cls., 250. See also *U. S. v. U. S. Fidelity and Guaranty Co.*, 244 Fed. Rep., 310.)

The reinstatement of an officer, pursuant to a special act of Congress, is not an appointment from civil life entitling him to credit for constructive service under the act of March 3, 1899, section 13. (*Stirling v. U. S.*, 48 Ct. Cls., 386.)

The credit of five years' constructive service under the act of March 3, 1899, section 13, is in addition to actual service rendered under a previous appointment. (*Guilmette v. U. S.*, 49 Ct. Cls., 188; 52 Ct. Cls., 219.)

Where the resignation of an officer of the Navy is in good faith, and he is thereafter appointed to serve in the Navy, such latter appointment is from civil life and he is entitled to credit for five years' constructive service. (*Guilmette v. U. S.*, 49 Ct. Cls., 188, 52 Ct. Cls., 219.)

Where an officer was rated as an appointee from civil life and for a number of years paid accordingly, he is entitled to retain the pay so allowed until the date his rating was corrected, although under the correct interpretation of the law he was not appointed from civil life. (*U. S. v. U. S. Fidelity and Guaranty Co.*, 244 Fed. Rep., 310.)

**40. Absence from duty.** See notes above, under "Mates"; "Warrant officers, acting warrant officers, and commissioned warrant officers"; "Dental Corps and Nurse Corps (Female)"; "Naval Reserve Force (pay for active duty)"; "Additional pay for special duty (Aids to rear admirals, Aviation duty, and Shore duty beyond seas)."

*Leave and waiting orders.*—In *Hunt v. United States* (38 Ct. Cls., 704) the Court of Claims said: "Neither the Secretary of War nor any officer of the Government can force a leave of absence or furlough upon an officer or soldier." But as to furlough, see section 1442, Revised Statutes, and note thereto.

"A leave of absence is not forced upon an officer, but is granted to him for his sole accommodation." (16 Comp. Dec., 617; see also note to sec. 1442, R. S.)

Prior to July 1, 1899, when the thirteenth section of the Navy personnel act took effect, the duty pay and leave pay of all commissioned officers on the active list of the Navy were fixed by section 1556, Revised Statutes. That section fixed the pay of each officer of different grades, whether on duty or leave, or on waiting orders, including the Construction Corps, professors of mathematics, and civil engineers. Section 13 of the personnel act assimilating the pay of commissioned officers of the Navy with that of Army officers of corresponding rank, was confined to "commissioned officers of the line of the Navy and of the Medical and Pay Corps." This left the Construction Corps, professors of mathematics, and civil engineers where they were before. The leave pay and waiting-orders pay of officers of the Army to which the pay of certain naval officers was thus assimilated is regulated by section 1265, Re-

vised Statutes, which provides: "Officers when absent on account of sickness or wounds, or lawfully absent from duty and waiting orders, shall receive full pay; when absent with leave, for other causes, full pay during such absence not exceeding in the aggregate thirty days in one year, and half pay during such absence exceeding thirty days in one year. When absent without leave, they shall forfeit all pay during such absence, unless the absence is excused as unavoidable." This section was amended by the act of July 29, 1876 (19 Stat., 102), so as to provide that "all officers on duty shall be allowed, in the discretion of the Secretary of War, sixty days leave of absence without deduction of pay or allowances: *Provided*, That the same be taken once in two years: *And provided further*, That the leave of absence may be extended to three months, if taken only once in three years, or four months if taken only once in four years." The act of May 13, 1908 (35 Stat., 127), provided that "hereafter all commissioned officers of the active list of the Navy shall receive the same pay and allowances according to rank and length of service \* \* \*." One of the purposes of this act was to correct the discrimination in respect of leave pay between commissioned officers of the Navy whose pay was assimilated with that of the Army by section 13 of the personnel act and officers of the Construction Corps, professors of mathematics, and civil engineers, who continued to receive pay at the rates provided by section 1556, Revised Statutes. By said act of May 13, 1908, all commissioned officers of the Navy were placed upon the same footing as to pay and allowances, "according to rank and length of service," whether on active duty or not, and officers of the Construction Corps, professors of mathematics, and civil engineers accordingly are entitled to the same benefits of the law relating to the pay of Army officers when on leave of absence or on waiting orders that are conferred upon officers of the line of the Navy and of the Medical and Pay Corps (now Supply Corps). (27 Op. Atty. Gen., 261; followed, *Comp. Dec.*, Apr. 16, 1909, 98 S. and A. Memo., 1036.)

"The leave year is reckoned from July 1 to the following June 30, both inclusive." (*Army Regs.*, 1913, par. 1276.)

A retired naval officer assigned to active duty is not entitled to cumulative leave of absence that had accrued prior to his retirement, notwithstanding the fact that his assignment to active duty occurred immediately after his retirement. (23 Comp. Dec., 307.)

The leave of absence of an officer of the Navy who was ordered to his home and granted a leave of absence began when he was relieved from duty on board his vessel, and he is not entitled to duty pay while traveling to his home, as said travel was performed for his own benefit and not on public business. (*Comp. Dec.*, Apr. 13, 1910, 110 S. and A. Memo., 1375.)

An officer of the Navy ordered to proceed to his home and granted a leave of absence, and at the expiration of such leave to return to his station, is traveling for his own pleasure and benefit and not on public business, and is not entitled to mileage. (16 Comp. Dec., 611;

see also Comp. Dec., June 23, 1910, 112 S. and A. Memo., 1504.)

Section 1265, Revised Statutes, provides that officers shall be entitled to 30 days' leave of absence in one year; and the act of July 29, 1876 (19 Stat., 102), provides that leave of absence may be extended in the discretion of the Secretary of War "to four months if taken only once in four years." An officer of the Navy detached from duty beyond seas and ordered to return home, and who is afterwards authorized to delay two months en route to the United States, is in effect and as a matter of fact given a leave of absence of 60 days, and he is entitled during such leave to continue in receipt of pay allowed him for shore duty beyond seas, provided such leave of absence was not in excess of that to which he was entitled by law. (*Izard v. U. S.*, 48 Ct. Cls., 367.)

An officer ordered away from his station to appear before an examining board preliminary to promotion, and who after completing his examination is, upon his own request, authorized to delay his return to his station, is during such delay in the status of leave of absence granted upon his own request, being in fact relieved from duty and from responsibility during such period, notwithstanding the provisions of the Navy Regulations that "a temporary leave of absence does not detach an officer from duty nor affect his rate of pay." (*Roberts v. U. S.*, 44 Ct. Cls., 411.)

A commissioned officer of the Navy is not entitled to the 10 per cent additional for sea duty while on leave of absence, even though the leave be of only one day's duration. (Comp. Dec., June 8, 1915, 172 S. and A. Memo., 3703.)

The act of May 13, 1908, did not repeal prior statutes regulating the pay of naval officers of the Line and Pay Corps [now Supply Corps] while on leave of absence, and such officers while temporarily absent from their ship on leave properly granted to them for periods not in excess of that authorized with full pay by section 1265 of the Revised Statutes and the act of July 29, 1876, are entitled to the present pay of their grades, increased by their length of service pay, in accordance with the act of May 13, 1908; otherwise, to half of such amount for leave so granted in excess of that authorized by such statutes with full pay: but such officers are not entitled to receive while on leave of absence from sea duty the 10 per cent increase in pay which they were receiving "while so serving," notwithstanding the provision in the act of July 29, 1876, that the authorized leave of absence shall be "without deduction of pay or allowances." (15 Comp. Dec., 656.)

A warrant officer of the Navy granted leave of absence from duty at sea is entitled under the act of August 29, 1916 (39 Stat., 578), to full pay at the rate received by him while on sea duty. (23 Comp. Dec., 200. Note: The act of August 29, 1916, provides that "warrant officers shall be allowed such leave of absence, with full pay, as is now or may hereafter be allowed other officers of the United States Navy.")

A commissioned officer of the Navy is entitled only to half pay while on leave of absence in excess of the amount authorized by statute

with full pay. (Comp. Dec., June 25, 1913, 148 S. and A. Memo., 2670.)

An officer of the Army granted, and accepting, leave without pay is not estopped from demanding the half pay allowed by statute, even though he did not protest at the affixing of such a condition to the order granting the leave. Public policy prohibits any attempt by unauthorized agreement with an officer of the United States, under the guise of a condition or otherwise, to deprive him of the right to pay given by statute. (*U. S. v. Andrews*, 240 U. S., 90, approving *Glavey v. U. S.*, 182, U. S., 595.)

An officer of the Army who is ordered, even on his own request, to proceed to a particular place, including his home, and "there await orders," reporting thence by letter to the Adjutant General of the Army and to the headquarters of the department to which he then belongs, is not an officer "absent from duty with leave" within the meaning of an act of Congress which enacted that "any officer absent from duty with leave, except from sickness or wounds, shall during his absence receive half of the pay and allowances prescribed by law, and no more." Such an officer is waiting orders in pursuance of law, but not absent from duty on leave. (*U. S. v. Williamson*, 23 Wall., 411.)

The distinction between the case of an officer "absent from duty with leave," and that of an officer ordered to proceed to a particular place and there "to await orders, reporting thence by letter to the Adjutant General of the Army and to these headquarters," is too plain to require much comment. While absent from duty "with leave," the officer is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses. If he reports himself at the expiration of his leave, it is all that can be asked of him. The obligations of an officer directed to proceed to a place specified, there to await orders, are quite different. It is his duty to go to that place and to remain at that place. He can not go elsewhere; he can not return until ordered. He is as much under orders, and can no more question the duty of obedience than if ordered to an ambush to lie in wait for the enemy, to march to the front by a particular direction, or to the rear by a specified time. That the assignment was made at the request of the officer can make no difference. The pay is regulated by the position, and not by the manner or influence by which the position is acquired. (*U. S. v. Williamson*, 23 Wall., 411, 415.)

An officer of the Army ordered from a military post at which he is doing duty to his home, to await orders, even at his own request, is entitled to mileage for travel by him in pursuance of his orders. The status of the officer while awaiting orders is different from that of an officer absent from duty with leave. The officer in this case was not absent on leave but was awaiting orders at his home. It results that in thus proceeding to his home he was traveling under orders. The fact that he changed his residence while awaiting orders is unimportant. Whether he resided in New York or New Jersey could make no difference in his position in the Army or his liability or readiness to respond to any orders



given to him. It was, indeed, important that he should keep the department advised of his residence, that he could be called upon when it was desired. This he did. (*U. S. v. Phisterer*, 94 U. S., 219, approving *U. S. v. Williamson*, 23 Wall., 411.)

The theory of leave or waiting orders pay is that an officer while at home on leave or waiting orders is at less expense than when at sea or on shore duty. (*Selfridge v. U. S.*, 28 Ct. Cls., 40.)

Where a naval constructor, entitled to pay under section 1556, Revised Statutes, became sick while on duty and was placed in a naval hospital, and upon his discharge from the hospital, upon the recommendation of a board of medical survey, was granted sick leave for two months, *held*, that during the time he is absent from his station on such sick leave doing no duty whatever, although not formally detached from duty by express order, he was in fact detached and was entitled to leave pay only. (*Williams v. U. S.*, 47 Ct. Cls., 56.)

*Awaiting trial.*—While under arrest and suspended from duty awaiting trial by court-martial, an officer is in the status of "waiting orders" and is entitled to pay and allowances; forfeiture of pay and allowances can only be imposed by the sentence of a lawful court-martial. (*Walsh v. U. S.*, 43 Ct. Cls., 225, citing *Smith v. U. S.*, 2 Ct. Cls., 206; *Winters v. U. S.*, 3 Ct. Cls., 136; *Collins v. U. S.*, 15 Ct. Cls., 22; *Sullivan v. U. S.*, 32 Ct. Cls., 402; 4 Comp. Dec., 605; 6 Comp. Dec., 970.)

Where an officer is awaiting trial before either a civil or military tribunal under waiting orders issued by authority of the War Department he is entitled to the emoluments of his office, including commutation of quarters. (*Carrington v. U. S.*, 46 Ct. Cls., 279, overruling 11 Comp. Dec., 755, which held that the officer in such case was in the status of "absent without leave," and not entitled to pay while on bail pending an appeal to a higher civil court.)

*Serving sentence.*—A person in the military service is not entitled to pay while serving sentence of imprisonment imposed by a civil court, even though during the term of imprisonment he was in the custody of the commanding officer of a military station as a prisoner of the civil authorities. (Comp. Dec., Dec. 20, 1910, 118 S. and A. Memo., 1642.)

An officer suspended from rank and duty pursuant to sentence of court-martial is not entitled to emoluments or allowances. (*Swain v. U. S.*, 165 U. S., 553.)

*Absence without leave.*—A commissioned officer of the Navy granted a leave of absence for a specified period, who does not report his address on date of termination of such leave, is absent without leave from such date and is not entitled to any pay for the period of such unauthorized absence, unless excused as unavoidable. (Comp. Dec., July 25, 1910, 113 S. and A. Memo., 1521. See also note to sec. 1569, R. S.)

*Furlough.*—Pay of officers while on furlough under section 1442, Revised Statutes, is fixed by section 1557, Revised Statutes. (See notes to those sections.)

*Absence due to misconduct.*—"Hereafter no officer or enlisted man in the Navy or Marine Corps in active service who shall be absent

from duty on account of injury, sickness, or disease resulting from his own intemperate use of drugs or alcoholic liquors, or other misconduct, shall receive pay for the period of such absence, the time so absent and the cause thereof to be ascertained under such procedure and regulations as may be prescribed by the Secretary of the Navy: *Provided*, That an enlistment shall not be regarded as complete until the enlisted man shall have made good any time in excess of one day lost on account of injury, sickness, or disease resulting from his own intemperate use of drugs or alcoholic liquors, or other misconduct." (Act Aug. 29, 1916, 39 Stat., 580, as amended by act July 1, 1918, 40 Stat., 717.)

**41. Deductions for naval hospital fund.**—"The Secretary of the Navy shall deduct from the pay of each officer, seaman, and marine, in the Navy, at the rate of twenty cents per month for each person, to be applied to the fund for Navy hospitals." (Sec. 4808, R. S.; see also sec. 1614, R. S.)

**42. Stoppage of pay, service with contractors.**—"That hereafter no payment shall be made from appropriations made by Congress to any officer in the Navy or Marine Corps on the active or retired list while such officer is employed, after June thirtieth, eighteen hundred and ninety-seven, by any person or company furnishing naval supplies or war material to the Government; and such employment is hereby made unlawful after said date." (Act June 10, 1896, 29 Stat., 361.)

**43. Waiver of pay.**—Public policy prohibits any attempt by unauthorized agreement with an officer of the United States, under the guise of a condition or otherwise, to deprive him of the right to pay given by statute. (*U. S. v. Andrews*, 240 U. S., 90, approving *Glavey v. U. S.*, 182 U. S., 595; see also *Katzer v. U. S.*, 52 Ct. Cls., 32, and *Kozlowski v. U. S.*, 54 Ct. Cls., 206.)

**44. Allotments of pay.**—See section 1430, Revised Statutes, and note thereto.

The Secretary of the Navy has no power to increase a naval officer's allotment without his consent; where he attempts to do so, the officer may recover the illegal excess paid under the allotment, without his knowledge or consent. (*Melville v. U. S.*, 23 Ct. Cls., 74.)

Section 3477, Revised Statutes, prohibits assignment of any claim against the United States. The naval appropriation act of June 10, 1896 (29 Stat., 361), authorizes the Secretary of the Navy to permit "officers" of the Navy and Marine Corps to make allotments under certain conditions. Under this authority the Secretary issued a regulation (art. 1094, Navy Regs., 1909) authorizing allotments to be made, under certain conditions, by "each person in the Navy and Marine Corps." (Assignment of wages by enlisted men of the Navy was authorized by sec. 1576, R. S.) (17 Comp. Dec., 666.)

The act of June 10, 1896, is a beneficial one and provides with little expense to the Government for a worthy object; it is not, therefore, an act that calls for a technical construction. Paymasters' clerks in the Navy were recognized as entitled to make allotments of their pay under said act. *Held*, that clerks to assistant paymasters of the Marine Corps, in

1911, were likewise entitled to make such allotments under said act of 1896 relating to officers. (17 Comp. Dec., 666.)

**45. Reduction of pay.**—It is not in the power of the executive department, or any branch of it, to reduce the pay of an officer of the Army. The regulation of the compensation of the officers of the Army belongs to the legislative department of the Government. (*U. S. v. Williamson*, 23 Wall., 411, 416; see also cases cited above, under “43. Waiver of pay.”)

Reduction by the President of the sentence of an officer of the Navy from dismissal from the service to reduction to one-half sea pay for five years is a mitigation of the sentence within the meaning of article 54, section 1624, Revised Statutes. The officer whose pay has been so reduced is not entitled to recover from the United States the difference between one-half sea pay and waiting-orders pay for the period covered by the sentence. (*Mullan v. U. S.*, 212 U. S., 516.)

The report and recommendation of a naval board, although approved by the Secretary of the Navy, did not work a forfeiture of the pay of the disbursing officer involved, as the board only recommended that he be held responsible and that the amount of the loss be deducted from any money that might be due him. Such declaration of the investigating board might have been made the basis of a court-martial, but it is well settled that the pay due to an officer can only be forfeited by the sentence of a court-martial. (*Worz v. U. S.*, 48 Ct. Cls., 80, 93.)

It was competent for the proper marine superiors and the accounting officers of the Treasury to withhold payment of the money due to an officer until he, or his representative after his death, shall establish that the money committed to his care was not lost by or through his fault or negligence. (*Worz v. U. S.*, 48 Ct. Cls., 80, 93.)

**46. Termination of pay.**—Where a contract officer (civilian captain of a naval collier) abandoned his place of service without orders, it is conclusive that such contract officer considered his contract with the Government at an end, and he is entitled to no further remuneration from the Government. (*Gove v. U. S.*, 49 Ct. Cls., 251.)

An appointed officer (paymaster's clerk) ordered, while abroad, to proceed to his home in

the United States, and that upon his arrival home his appointment “is revoked,” was entitled to compensation until he arrived at his home. (*Calongne v. U. S.*, 49 Ct. Cls., 240, citing *Davis v. U. S.*, 47 Ct. Cls., 195; see also *Katzer v. U. S.*, 49 Ct. Cls., 294.)

An officer dismissed in time of peace without sentence of court-martial can not recover pay thereafter if he acquiesces in the unlawful dismissal for such a long period that he may be held to have abandoned his office. (*Ide v. U. S.*, 25 Ct. Cls., 401; 29 Ct. Cls., 558; *Newton v. U. S.*, 18 Ct. Cls., 435.)

The discharge of an officer does not take effect, so as to relieve the Government from its obligations, until he is notified of the fact and actually discharged from the service. (*Gould v. U. S.*, 19 Ct. Cls., 593.)

An officer who continues in the performance of his duty after tendering his resignation is entitled to pay up to the time that he is notified of the acceptance of his resignation. (*Barger v. U. S.*, 6 Ct. Cls., 35.)

**47. Pay computed on monthly basis.**—Annual compensation of any person in the service of the United States shall be divided into 12 equal installments, one of which shall be the pay for each calendar month; one-thirtieth of one installment shall be the daily rate of pay, in making payments for a fractional part of a month; the 31st of any calendar month shall be excluded from computation, and February shall be treated as having 30 days. Persons entering the service in a 31-day month shall be entitled to pay from date of entry to the 30th of said month, and persons entering in February shall be entitled to one month's pay less as many thirtieths as days elapsed prior to entry. For unauthorized absence on the 31st of any month, one day's pay shall be forfeited. (Act June 30, 1906, sec. 6, 34 Stat., 763.)

The Revised Statutes, section 1556, provided that the officers and men of the Navy “shall be entitled to receive annual pay at the rates herein stated”; but the officers of the Army and Navy have never been paid annually, and in the case of death, resignation, or dismissal, pay runs to the date when the officer leaves the service; therefore, the statute of limitations excludes pay anterior to a period of six years prior to the bringing of suit therefor. (*Brook v. U. S.*, 31 Ct. Cls., 272.)

**Sec. 1557. [Furlough pay.]** Officers on furlough shall receive only one-half of the pay to which they would have been entitled if on leave of absence.—(3 Mar., 1835, c. 27, s. 1, v. 4, p. 756. 3 Mar., 1845, c. 77, s. 6, v. 5, p. 794. 1 June, 1860, c. 67, s. 4, v. 12, p. 27.)

As to leave of absence pay, see note to section 1556, Revised Statutes, under “Absence from duty.”

This section has not been repealed by subsequent enactments. (15 Comp. Dec., 73. See also notes to sections 1454, 1593, and 1594, Revised Statutes.)

**Officers furloughed as measure of economy.**—In the appropriations for the naval service for the fiscal year ending June 30, 1877, Congress reduced the amount for “Pay of the

Navy” considerably below that required for the pay of officers on active duty, this action being based upon the express grounds “that by a very rigid enforcement of a somewhat disused power on the part of the Secretary of the Navy to furlough officers, instead of having them under the heads of ‘other duty’ or ‘waiting orders,’ a very considerable reduction could be made,” and that they therefore “give the Secretary of the Navy the disagreeable duty of putting officers upon furlough, when they can



be spared from the actual needs of the service.” Under these circumstances, the Secretary of the Navy felt bound to reduce the number of officers employed to that absolutely needed to meet the requirements of the service, and to put those unemployed upon furlough pay. (Navy Dept. Gen. Order No. 216, Aug. 12, 1876, citing Cong. Rec., June 30, 1876, p. 16.)

The Secretary of the Navy found it a disagreeable duty to be obliged to put so many well-deserving officers in a position which had been reserved of late years solely for the useless

and undeserving, but had no other alternative except that of refusing to carry out the expressed will of the representatives of the people. In placing these officers on furlough, the Secretary stated that it would be understood that his action “neither imputes any wrong to, nor involves the disgrace of, any such officer; but that it is simply an effort to meet, as nearly as may be, the requirements of public law, binding alike upon the department and the service.” (Navy Dept. Gen. Order No. 216, Aug. 12, 1876.)

**Sec. 1558. [Allowances.]** The pay prescribed in the two preceding sections shall be the full and entire compensation of the several officers therein named, and no additional allowance shall be made in favor of any of said officers on any account whatever, except as hereinafter provided.—(15 July, 1870, c. 295, s. 4, v. 16, p. 332.)

Allowances for officers of the Army, except forage, are made applicable to all commissioned officers of the Navy by act of March 3, 1899, section 13 (30 Stat., 1007), as amended by acts of May 13, 1908 (31 Stat., 128), and August 29, 1916 (39 Stat., 581), noted under section 1487, Revised Statutes.

Chief of Naval Operations shall receive the allowances prescribed by or in pursuance of law for the grade of general in the Army. (Act July 1, 1918, 40 Stat., 716.)

Chiefs of bureaus and the Judge Advocate General of the Navy shall receive the same allowances as prescribed by or in pursuance of law for chiefs of bureaus of the War Department and the Judge Advocate General of the Army. (Act July 1, 1918, 40 Stat., 717.)

Officers of the Navy holding the rank and title of Admiral and Vice Admiral in the Navy, while holding such rank and title, shall receive the allowances of a General and Lieutenant General of the Army, respectively. (Act July 1, 1918, 40 Stat., 717.)

See note to section 1556, Revised Statutes, as to pay and allowances of warrant officers, commissioned warrant officers, Naval Reserve Force, Nurse Corps (Female), etc.

See note to section 1487, Revised Statutes, as to quarters, heat, and light, and as to allowances in general.

See notes to sections 1578 and 1579, Revised Statutes, as to rations of officers.

Transportation of household effects: See act of May 18, 1920, section 12 (41 Stat., 604).

Warrant officers and mates “shall hereafter receive the same commutation for quarters as second lieutenants of the Marine Corps” (act Mar. 3, 1901, 31 Stat., 1107); and “shall receive the same allowances of heat and light as are now or may hereafter be allowed an ensign, United States Navy.” (Act Aug. 29, 1916, 39 Stat., 578.) As to rations of warrant officers and mates, see notes to sections 1578 and 1579, Revised Statutes.

**Historical note.**—By act of March 3, 1835 (4 Stat., 757), it was provided that “the yearly allowance provided in this act is all the pay, compensation, and allowance which shall be received under any circumstances whatever by any such officer,” etc. Before said act it was lawful for the Secretary of the Navy to

make allowances out of appropriations in gross to officers of the Navy, beyond their regular pay, for quarters, furniture, light, fuel, and so forth. By act of April 17, 1866 (14 Stat., 33), said act of March 3, 1835, was repealed. The effect of said repeal was to restore the right to make such allowances, as the act of February 25, 1871, now embodied in section 12 of the Revised Statutes, was not then in force. (*U. S. v. Philbrick*, 120 U. S., 52.)

Provision as to allowances which are fixed for naval officers in the naval personnel act of March 3, 1899, section 13 (30 Stat., 1007), noted above, superseded the statutory provisions as to the same allowances which were contained in earlier statutes. (*Gibson v. U. S.*, 194 U. S., 182.)

The proviso in the naval personnel act declaring that “no provision of this act shall operate to reduce the present pay of any commissioned officer,” and the act of June 7, 1900 (31 Stat., 684, 697), that nothing contained in the personnel act shall operate to reduce the pay which, but for the passage of said act, would have been received by any commissioned officer at its passage or thereafter, do not extend to allowances. (*Thomas v. U. S.*, 38 Ct. Cls., 113.)

Allowances provided by law for officers of the Army are applicable to officers of the Navy by reason of section 13 of the Navy personnel act approved March 3, 1899 (30 Stat., 1007), and the acts of May 13, 1908 (35 Stat., 127, 128), and August 29, 1916 (39 Stat., 581). (24 Comp. Dec., 610, citing 15 Comp. Dec., 809; 66 MS. Comp. Dec., 663; Aug. 14, 1913; 27 Op. Atty. Gen., 261; Op. J. A. G. Navy, Apr. 13, 1918.)

**Allowances, pay, emoluments, etc., defined and distinguished.**—See note to section 1556, Revised Statutes, under “longevity pay,” for definition of current yearly pay and yearly pay of the grade; and note to section 1487, Revised Statutes.

Under the term “allowances” everything is embraced which would be recovered from the Government by the soldier in consideration of his enlistment and services, except the stipulated monthly compensation designated as pay. Therefore, the term allowances includes the bounty allowed to a soldier upon his honorable discharge at the expiration of his service. (*U.*

*S. v. Landers*, 92 U. S., 77, 80, citing 13 Op. Atty. Gen., 198, 199.)

"Mounted pay" is not an allowance, but pay proper; the officer to whom it is assigned by statute receives it, whether he is actually mounted or not; where a surgeon in the Army is entitled to it, a surgeon in the Navy receiving Army pay and allowances under the Navy personnel act of March 3, 1899, is also entitled to it. (*Richardson v. U. S.*, 38 Ct. Cls., 182.)

By reference to the statutes it appears that the words "pay and allowances" may be understood in a general sense as including all emoluments paid or allowed to a soldier. (13 Op. Atty. Gen., 199.)

A general order of the Navy Department allowing officers, in lieu of all allowances, except mileage or traveling expenses, a sum equal to 33½ per cent of their "pay," is to be construed as requiring that said percentage be based upon the amount of the officer's stated statutory pay at the time said order was in force, without taking into consideration the additional amount allowed the officer as longevity pay under the act of March 3, 1883 (22 Stat., 473). (*U. S. v. Allen*, 123 U. S., 345.)

Under a statute providing that officers serving as chiefs of bureaus shall have certain "rank, title, and emoluments," the word "emoluments" includes salary, pay, and every kind of pecuniary compensation for service rendered. (28 Op. Atty. Gen., 429, citing *Hoyt v. U. S.*, 10 How., 108, 135.)

The basis of increased pay for shore duty beyond seas is the officer's "pay proper as fixed by law in time of peace." The term "pay proper" is not to be construed differently from the term "pay," which includes the increase granted for longevity service. The total amount is the "pay proper" upon which the percentage is to be computed. (*McCully v. U. S.*, 42 Ct. Cls., 275.)

Under the act of May 26, 1900, increasing the pay of officers 10 per cent and of enlisted men 20 per cent "above the rates of pay proper as fixed by law in times of peace" (for shore duty beyond seas), "pay proper" means the fixed amount given by law to officers as distinguished from pay and emoluments or pay and allowances. The increase of an officer's pay is to be computed on his longevity pay, if any. (*Irwin v. U. S.*, 38 Ct. Cls., 87.)

The words "pay proper" as used in the acts of May 26, 1900 (31 Stat., 205, 211), and March 2, 1901 (31 Stat., 895, 903), allowing additional pay to officers and enlisted men of the Army serving beyond the limits of the States comprising the Union and the territories contiguous thereto, include increase for longevity pay. The total of the minimum pay of the office prescribed by statute and the increased pay for length of service should be taken as the basis of the computation for the increase under the acts cited. (*U. S. v. Mills*, 197 U. S., 223.)

"Pay proper" means the regular, ordinary pay which an officer may be entitled to under the facts in his case, and if by virtue of length of service he is entitled to receive the additional compensation provided therefor, that

compensation is his "pay" or his "pay proper" as distinguished from possible other compensation by way of allowances, or commutation, or otherwise. (*U. S. v. Mills*, 197 U. S., 223.)

The words "pay proper" are not to be construed differently from the word "pay." The term means compensation which may properly be described or designated as "pay" as distinguished from allowances, commutation for rations, or other methods of compensation not specifically described as pay. (*U. S. v. Mills*, 197 U. S., 223.)

The words "all back pay and emoluments," in a special act of Congress (granting the compensation to which an officer would have been entitled had he remained in the Army for a period that he was out after an enforced resignation until his reinstatement), are all comprehensive; they embrace all the compensation, perquisites, and dues to which the beneficiary was entitled as an officer. The word "all" excludes the idea of limitation, and the word "emoluments" is the most adequate that could have been used. It especially expresses the perquisites of an office, and its use in connection with the word "pay" makes the restitution of the statute complete. (*McLean v. U. S.*, 226 U. S., 374.)

The word "pay" does not include allowances. (*Thomas v. U. S.*, 38 Ct. Cls., 113.)

Where an officer is sentenced by court-martial to suspension from rank and duty for 12 years, and to forfeit one-half his monthly pay every month for the same period, he is not entitled to recover allowances. (*Swain v. U. S.*, 28 Ct. Cls., 173, 237; affirmed, 165 U. S., 553.)

The word "pay" in the laws providing for the pay and allowances of officers and enlisted men of the Army has a distinct and technical signification, and when used alone in the sentence of a court-martial does not affect the right to of the accused to his pecuniary allowances. (2 Comp. Dec., 300.)

A midshipman suspended from the Naval Academy for one year "without pay" is not entitled to allowances during the period of his suspension. (Comp. Dec., Nov. 13, 1915, 177 S. and A. Memo., 3830, citing 17 Comp. Dec., 834; 11 Comp. Dec., 560; 13 Comp. Dec., 626.)

See also *United States v. Jones* (18 How., 92), noted under section 1586, Revised Statutes.

**Maintenances, attachés.**—The money appropriated by Congress for "maintenance of students and attachés and information from abroad" is in the nature of a contingent fund, to be disbursed by the Secretary of the Navy in his discretion. The only question that can arise is how much did the Secretary intend to allow to an officer. Neither can the form of the Secretary's allowance be a matter of judicial review, nor the time when the maintenance was to begin. Accordingly, *held*, that where a naval officer was ordered by the Secretary of the Navy to report for duty to our minister to Spain, and to accompany him to Madrid, and it was further ordered by the Secretary that the officer be allowed \$285 per month for "maintenance," to begin at the time he reports for duty, and that such allowance be "addi-



tional to the ordinary traveling and other expenses that may be allowed," the accounting officers were in error in refusing to allow the maintenance prior to the time said officer arrived in Madrid. (*Dyer v. U. S.*, 37 Ct. Cls., 337, citing *U. S. v. Jones*, 18 How., 92, noted under section 1586, R. S.; see also note to sec. 285, R. S.)

**Medical expenses of officers.**—See note to section 1586, Revised Statutes.

**Servants.**—The Navy Regulations which allow the detail of enlisted men to prepare and serve food for officers' messes extend only to messes on board ship; officers' messes on shore are voluntary, and there is no law or regulation which recognizes them. Where enlisted men on shipboard were detailed to serve an officer's mess on shore, and were subsisted by the mess, and their rations were commuted and paid to the mess, the accounting officers could disallow the payment and compel the officers to refund the money. (*Williams v. U. S.*, 44 Ct. Cls., 175.)

The act of July 1, 1902 (32 Stat., 662, 680), authorizing the payment of money accruing from the rations of enlisted men "commuted for the benefit of any mess," does not extend to an officer's mess on shore. (*Williams v. U. S.*, 44 Ct. Cls., 175.)

Section 1232, Revised Statutes, providing that "no officer shall use an enlisted man as a servant in any case whatever," which related to officers of the Army, is equally applicable to officers of the Navy, at least on shore; the Navy Regulations respecting enlisted men in the Marine Corps are equally as explicit, so that, whatever authority there may be for the enlistment of messmen of the servant class on board ship can have no application to a private mess formed by officers on shore. (*Williams v. U. S.*, 44 Ct. Cls., 175.)

See also 12 Comp. Dec., 697, noted under section 1487, Revised Statutes, "Services of laborer in caring for quarters," and see 6 Comp. Dec., 756.

**Sec. 1559. [Volunteer service.]** When a volunteer naval service is authorized by law, the officers therein shall be entitled to receive the same pay as officers of the same grades, respectively, in the Regular Navy.—(16 July, 1862, c. 183, s. 20, v. 12, p. 587.)

Naval Reserve Force, pay and allowances: See note to section 1556, Revised Statutes.  
Pay, defined: See note to section 1558, Revised Statutes.

**Sec. 1560. [Commencement of pay; original entry.]** The pay of an officer of the Navy, upon his original entry into the service, except where he is required to give an official bond, shall commence upon the date of his acceptance of his appointment; but where he is required to give such bond his pay shall commence upon the date of the approval of his bond by the proper authority.—(15 July, 1870, c. 295, s. 7, v. 16, p. 333.)

As to commencement of pay in the cases of officers of the Navy required to give bonds, see note to section 1383, Revised Statutes, under "II. Necessity of furnishing bond before entering upon duty"; see also note

**Mileage, traveling expenses, and transportation of dependents.**—See note to section 1566, Revised Statutes.

**Allowances of officer under suspension.**—See note above, under "Allowances, pay, emoluments, etc., defined and distinguished"; see also note to section 1556, Revised Statutes.

**Sale of stores, etc., to persons in the Navy.**—Sale of naval stores to persons in the Navy and Marine Corps, and civilian employees at certain naval stations is authorized by act of March 3, 1909 (35 Stat., 768), act of June 24, 1910 (36 Stat., 619), and act of March 4, 1913 (37 Stat., 909). Sale of Navy and Marine Corps subsistence stores to officers and enlisted men of the Army is authorized by act of August 29, 1916 (39 Stat., 630), which also authorizes officers and enlisted men of the Navy and Marine Corps to purchase subsistence supplies from the Army. (See also sec. 1135, R. S., and note thereto.)

The Secretary of the Navy is not authorized, in the absence of a provision of law therefor, to purchase for sale to officers and enlisted men of the Navy articles not included in the regular naval stores. (6 Comp. Dec., 321; see also note to sec. 1414, R. S.)

Uniforms, accoutrements, and equipment shall be sold at cost to officers of the Navy, Marine Corps, midshipmen, cadets at the Coast Guard Academy, and officers of the Coast Guard while operating with the Navy, subject to such restrictions and regulations as the Secretary of the Navy may prescribe. (Act Jan. 12, 1919, 40 Stat., 1054.)

Honorably discharged officers and enlisted men of the Army, Navy, and Marine Corps receiving medical treatment from the Public Health Service shall be permitted to purchase subsistence stores from the Army, Navy, and Marine Corps. (Act June 5, 1920, 41 Stat., 976.)

Transfer of officers from the volunteer service to the Regular Navy: See note to section 1412, Revised Statutes.

to same section, under "I. Who are required to give bonds."

As to pay of midshipmen commissioned within six months after graduation, see act of March 3, 1893 (27 Stat., 715), which allows

the pay of the grade in which commissioned from the date of rank stated in the commission to the date of qualification and acceptance of commission; and act of May 22, 1917, section 5 (40 Stat., 86), reenacted by act of July 1, 1918 (40 Stat., 716), which provides that midshipmen thereafter graduating "may be commissioned effective from date of graduation."

**Appointment of officer to higher office in another branch of the service.**—It has been the rule of the accounting officers to hold that the appointment of an officer in one branch of the service to another office in another branch is an "original entry into the service" within the meaning of section 1560, Revised Statutes. (Comp. Dec., May 31, 1907, 76 S. and A. Memo., 372.)

For other cases, see note to section 1458, Revised Statutes, under "Promotion" and "appointment" compared." See also note to section 1556, Revised Statutes, under "Longevity pay," citing *United States v. Alger* (151 U. S., 362, 152 U. S., 384), *United States v. Stahl* (151 U. S., 366), *Barber v. United States* (50 Ct. Cls., 250), *United States v. U. S. Fidelity and Guaranty Co.* (244 Fed. Rep., 310), *Stirling v. United States* (48 Ct. Cls., 386), which cases hold that the reappointment of an officer, whether under the general law or special act of Congress, is not an original entry into the service, for purposes of longevity pay, where the officer had not left the service with the bona fide intention of not returning, but his services under the two appointments had in effect been continuous. See also notes to sections 1561 and 1562, Revised Statutes.

**Reappointment under special act of Congress.**—A former officer of the Navy reappointed by authority of a special act of Congress, providing that such reappointment shall be made "as of" a prior specified date, would, if the act stopped there, be entitled to back pay from such prior date; but where the act contained a proviso "that he shall receive no pay or emoluments except from the date of such reappointment," its effect was to forbid the allowance of pay or emoluments prior to the date of such reappointment, which must be regarded as the date when such reappointment was actually made under the act, and not the retroactive date as of which such reappointment was made, and which served merely to fix his rank and precedence. Further held, that this legislation, being remedial in its character, should be construed as ratifying payments which had been made to the officer prior to the passage of the act and which the Government in a counterclaim had sought to recover back. (*Quackenbush v. U. S.*, 177 U. S., 20.)

See also *Stirling v. United States* (48 Ct. Cls., 386), noted under section 1556, Revised Statutes, "Longevity pay."

**Appointment of officer to higher office in a new corps.**—The act of March 3, 1915 (38 Stat., 942), created in the Navy the grades

of acting pay clerk, pay clerk, and chief pay clerk, and rendered eligible for commissions as chief pay clerks, paymasters' clerks then in the Navy and former paymasters' clerks whose appointments had been revoked prior to the act and who had not less than six years' actual service as such. The said act also changed the titles of paymasters' clerks to "pay clerk." Held, that a paymaster's clerk whose title was changed to pay clerk by the act, and who was commissioned in accordance with said act as a chief pay clerk, was not "advanced in grade or rank pursuant to law" within the meaning of the act of March 4, 1913 (noted under sec. 1562, R. S.); that the said act of March 3, 1915, created a new corps in the Navy; and that paymasters' clerks then in the service, notwithstanding their change of title, were not members of said new corps any more than those whose appointments had theretofore been revoked; that the appointment of the officer in this case as a chief pay clerk was no more an advancement in grade or rank than the appointment of a former paymaster's clerk with the requisite qualifications would have been an advancement in grade or rank; that in either case the appointment would have been that of one outside of the newly created corps, and of one who had no grade or rank as a warrant or commissioned officer; accordingly, the officer in this case, having been commissioned as a chief pay clerk on August 3, 1915, pursuant to the act of March 3, 1915, was not entitled to pay as chief pay clerk from the date of rank stated in his commission, which was July 1, 1915. (*Seifert v. U. S.*, 52 Ct. Cls., 40.)

**Promotion of enlisted man.**—The appointment of an enlisted man to the position of pharmacist in the Navy is not a promotion "in course," within the meaning of section 1561, Revised Statutes, and the appointee is not entitled to the pay of the higher grade from the date he is to take rank, as provided therein, but from the date of his acceptance of the office. (5 Comp. Dec., 141.)

An officer's original entry into the service, within the meaning of section 1560, Revised Statutes, has reference to his entry into the service as an officer and not as an enlisted man, and when an officer is appointed from among the enlisted men of the Navy his pay as an officer begins as provided in said section. (5 Comp. Dec., 141.)

**Midshipman commissioned as an officer.**—The appointment of a midshipman to the position of assistant civil engineer in the Navy, when not made until over six months from the date of his graduation, is "an original entry into the service" within the meaning of section 1560, Revised Statutes, rather than a "promotion in course to fill a vacancy in the next higher grade," within the meaning of the act of June 22, 1874 (noted under section 1561, R. S.). (13 Comp. Dec., 606; but see act of July 1, 1918, noted above.)

### Sec. 1561. [Commencement of pay of promoted officers. Superseded.]

This section provided as follows:

"Sec. 1561. When an officer is promoted in course to fill a vacancy, and is in the perform-

ance of the duties of the higher grade from the date he is to take rank, he may be allowed the increased pay from such date."—(15 July, 1870,



c. 295, s. 7, v. 16, p. 333. 5 June, 1872, c. 306, s. 1, v. 17, p. 226.)

It was superseded by the following clause contained in the act of June 22, 1874 (18 Stat., 191):

"On and after the passage of this act, any officer of the Navy who may be promoted in course to fill a vacancy in the next higher grade shall be entitled to the pay of the grade to which promoted from the date he takes rank therein, if it be subsequent to the vacancy he is appointed to fill."

By act of March 4, 1913 (37 Stat., 892), it was provided that "all officers of the Navy who, since the third day of March, eighteen hundred and ninety-nine, have been advanced or may hereafter be advanced in grade or rank pursuant to law shall be allowed the pay and allowances of the higher grade or rank from the dates stated in their commissions."

**Historical note.**—The provision of the act of July 15, 1870, section 7, chapter 295 (16 Stat., 333), that "the increased pay of a promoted officer shall commence from the date he is to take rank as stated in his commission," was repealed by the act of June 5, 1872, chapter 306 (17 Stat., 226). The pertinent provision of the latter act is substantially reenacted in section 1561, Revised Statutes. (17 Op. Atty. Gen., 495.)

By the settled practice of the service, promotion to a higher grade includes the right to the rank of that grade from the date of the vacancy filled by the promotion. This practice has the distinct recognition of Congress. Before the legislation referred to, several of the Attorneys General had decided that it was competent for the appointing power to give rank by relation in making promotions. (18 Op. Atty. Gen., 393.)

Prior to the act of July 15, 1870, chapter 295, the general rule was that the increased pay of all promoted officers in the Navy commenced from the date of the signature of an appointment to perform the duty of the higher grade if an appointment was given before the issue of a commission; or from the date of the commission if no appointment was previously given. This rule was changed by the said act, which provided that "the increased pay of a promoted officer shall commence from the date he is to take rank as stated in his commission." The provision of that act, which was general and applied to any promoted officer, was repealed by the act of June 5, 1872, chapter 306. By the latter act only those officers who are "promoted in course to fill a vacancy" and have been in the performance of the duties of the higher grade from their ranking date become entitled to the increased pay from that date. Officers otherwise promoted are impliedly excluded; with them it must be deemed that their increased pay was contemplated to commence at the date of appointment. The provision of the act of 1872, is substantially embodied in section 1561, Revised Statutes. (17 Op. Atty. Gen., 319. But see sec. 1562, R. S., and note thereto.)

The act of June 22, 1874, chapter 392, supercedes section 1561, Revised Statutes, as to officers promoted thereafter. (17 Op. Atty. Gen., 329.)

The sole purpose and intent of the first section of the act of June 22, 1874, was to modify the rule prescribed by section 1561, fixing the period at which the increased pay of an officer on the active list who is "promoted in course to fill a vacancy," shall begin. It in no way affected section 1591, which thereafter, as before, remained in full force. (17 Op. Atty. Gen., 495.)

The language of the act of June 22, 1874 (18 Stat., 191), is too plain to require construction. The only question presented is whether there was a vacancy in the office on the date from which the officer took rank therein on promotion. (Williams v. U. S., 47 Ct. Cls., 316, 319.)

The first section of the act of June 22, 1874, chapter 392, is in pari materia with the provision touching the pay of promoted officers contained in section 7 of the act of July 15, 1870, chapter 295, and the act of June 5, 1872, chapter 296, and section 1561, Revised Statutes, and must be considered in connection therewith to determine its scope. (17 Op. Atty. Gen., 495.)

The act of June 22, 1874 (18 Stat., 191), supercedes section 1561, Revised Statutes, on the same subject. (7 Comp. Dec., 865, 867; 13 Comp. Dec., 606, 608; but see 5 Comp. Dec., 141, 142.)

The President for other purposes may insert an antecedent date in the body of a commission; but antecedent date can affect an officer's pay only in the cases authorized by statute. (Young v. U. S., 19 Ct. Cls., 145.)

As a general principle, it has been repeatedly decided by the Attorneys General that constructive rank retroactively assigned to an officer does not draw after it retroactive pay. Even though a statute expressly provide that rank shall be dated back, the pay is not thereby dated back in the absence of a provision in the statute to that effect. (6 Op. Atty. Gen., 68. But see Quackenbush v. U. S., 177 U. S., 20, noted under sec. 1560, R. S.)

The President, by and with the advice and consent of the Senate, has authority to confer brevet rank in the Army from a period antecedent to the actual appointment and commission; if the words in the commission, "to take rank from" a specified date confer on the officer rank from that time, then they confer on him also the pay and emoluments of that rank, when he is on duty and has a command according to that rank from and after that time. It seems that pay and emoluments are necessarily attached to the rank, and that if the rank existed from the date stated in the commission, and the duty and command existed, then the pay and emoluments followed of course. (U. S. v. Vinton, 2 Sumn., 299, 28 Fed. Cas. No. 16, 624.)

There is no provision of law authorizing payment to an officer of the Army of the pay of the higher grade from the date on which the vacancy occurred which he is promoted to fill; but by immemorial custom and practice the pay is allowed from the date of the vacancy, in the same manner that officers of the Navy are authorized to be paid. Accordingly, officers of the Revenue Cutter Service (now Coast Guard), who were given by law the same pay as the Army, are likewise entitled to pay on promotion from date of vacancy. (9 Comp. Dec., 1.)

By special legislation the right to compensation may be so conferred as to give an officer the same right thereto that he would have had had he been appointed at a prior date. The act of June 22, 1874 (18 Stat., 191), is an instance of this kind. Similar provisions were made in prior acts; namely, section 16, act of July 16, 1862 (12 Stat., 586); section 5, act of July 15, 1870 (16 Stat., 333); and section 1, act of June 5, 1872 (17 Stat., 226). (9 Comp. Dec., 1, 2.)

**Officers advanced for heroism.**—Revised Statutes, sections 1561 and 1562, provide for certain cases where the pay of an officer shall run from a date anterior to the date of his commission—which is the date when the instrument was executed—but advancement in rank “for eminent or conspicuous conduct in battle or extraordinary heroism” under section 1506, Revised Statutes, is not one of such cases. (Young v. U. S., 19 Ct. Cls., 145; see also 17 Op. Atty. Gen., 319, in same case.)

**Cadet engineers.**—The words “any officer of the Navy” as employed in the first section of the act of June 22, 1874, chapter 392, comprehend cadet engineers, and that section fixes the commencement of their pay in the grade of assistant engineer when promoted thereto. (17 Op. Atty. Gen., 329. See note to sec. 1522, R. S., as to cadet engineers.)

**Retired officers.**—The act of June 22, 1874, chapter 392, was manifestly designed to fix the commencement of the increased pay of promoted officers in active service only. (17 Op. Atty. Gen., 495.)

**Officer retired after nomination for promotion.**—An officer who qualified and was nominated by the President for promotion to the grade of rear admiral, to fill a vacancy occurring February 18, 1886, but who was retired on account of age prior to his confirmation by the Senate, may, if subsequently confirmed, be commissioned as a rear admiral with rank from the date of said vacancy and with the retired pay of that grade. (18 Op. Atty. Gen., 393; compare note to sec. 1588, R. S.)

**“Vacancy” defined.**—An office which has just been created and has never been filled is “vacant” within the meaning of the act of June 22, 1874 (18 Stat., 191), which provides that “any officer of the Navy who may be promoted in course to fill a vacancy,” etc. An office created by law and never filled constitutes a vacancy. (Williams v. U. S., 47 Ct. Cls., 316.)

Where a statute enacts that there shall be 26 additional passed assistant and assistant paymasters on the active list of the Navy, the President, in his discretion, may direct that

this whole number so added to the active list shall be of the grade of passed assistant paymaster. The President having directed that the whole number be added to the higher grade the effect of the law in conjunction with the President's order was to create vacancies in the grade of passed assistant paymaster, within the meaning of the act of June 22, 1874. (Williams v. U. S., 47 Ct. Cls., 316.)

Where the law authorizes additional offices in the Navy, and the President has discretion to add the increase to the higher of two grades, the vacancies are created by the law itself, and not by the President's order; when the President issues his order, it relates back to the date of the law authorizing the additional appointments. An officer promoted with date of rank subsequent to the date of the law, but prior to the date of the President's order, is entitled to the increased pay of the higher grade from the date of rank. (Crapo v. U. S., 50 Ct. Cls., 337, construing the act of March 4, 1913, above quoted, and explaining Williams v. U. S., 47 Ct. Cls., 316.)

There is no reason in justice why an officer who has completed the service necessary to make him eligible to an office of higher grade, which office is vacant by reason of the fact that it has never been filled since it was created by law, should not be entitled to the same consideration as an officer who has become eligible to an office made vacant by death or resignation. (Williams v. U. S., 47 Ct. Cls., 316.)

For other cases, as to definition of “vacancy” see note to section 1458, Revised Statutes.

**Date of vacancy.**—The advancement in numbers and promotion by the President alone of certain officers under section 1506, Revised Statutes, as amended by the act of June 17, 1878 (20 Stat., 144), did not create vacancies in their offices, as such advancement and promotion can be made only with the advice and consent of the Senate; accordingly, junior officers nominated and commissioned to fill the vacancies resulting from such advancement of their seniors were not entitled, under the act of June 22, 1874 (18 Stat., 191), to pay in the higher grades from the dates of rank stated in their commissions, which were prior to the date that the Senate confirmed the promotions of their seniors and the date of such confirmation was the date of the resulting vacancies. (23 Op. Atty. Gen., 30 citing 6 Comp. Dec., 7.)

For other cases as to date of vacancies, see note to section 1458, Revised Statutes; see also cases noted above under “‘Vacancy’ defined.”

**Promotion of an enlisted man.**—See note to section 1560, Revised Statutes.

**Sec. 1562. [In cases of delayed examination.]** If an officer of a class subject to examination before promotion shall be absent on duty, and by reason of such absence, or of other cause not involving fault on his part, shall not be examined at the time required by law or regulation, and shall afterward be examined and found qualified, the increased rate of pay to which his promotion would entitle him shall commence from the date when he would have been entitled to it had he been examined and found qualified at the time so required by law or regulation; and this rule shall apply to any cases of this description



which may have heretofore occurred. And in every such case the period of service of the party, in the grade to which he was promoted, shall, in reference to the rate of his pay, be considered to have commenced from the date when he was so entitled to take rank.—(15 July, 1870, c. 295, s. 7, v. 16, p. 333.)

By act of June 22, 1874 (18 Stat., 191), it was provided that "on and after the passage of this act, any officer of the Navy who may be promoted in course to fill a vacancy in the next higher grade shall be entitled to the pay of the grade to which promoted from the date he takes rank therein, if it be subsequent to the vacancy he is appointed to fill."

By act of March 4, 1913 (37 Stat., 892), it was provided that "all officers of the Navy who, since the third day of March, eighteen hundred and ninety-nine, have been advanced or may hereafter be advanced in grade or rank pursuant to law shall be allowed the pay and allowances of the higher grade or rank from the dates stated in their commissions."

See note to section 1495, Revised Statutes, as to when examinations are required; and see act of March 4, 1917 (39 Stat., 1171), empowering commanding officers on foreign stations to convene examining boards when authorized by the Secretary of the Navy.

**Section 1562 not repealed by act of 1874.**—There is no conflict between section 1562, Revised Statutes, which applies to officers promoted after a prescribed period of service without the necessity of any vacancy, and the act of June 22, 1874, which applies to officers promoted in course to fill vacancies. Accordingly, an officer promoted to the grade of chief boatswain after a specified period of service and not to fill a vacancy—there being no vacancy for a chief boatswain other than that created by his own service and examination as boatswain—is entitled, under section 1562, Revised Statutes, to the pay of chief boatswain from the date he took rank as stated in his commission, that being the date on which he was entitled to examination for promotion. (*Doyle v. U. S.*, 47 Ct. Cls., 356.)

The act of July 16, 1862, section 16 (12 Stat., 586), provided "that whenever any officer of the Navy, of a class subject by law or regulation to examination before promotion to a higher grade, shall have been absent on duty at the time when he should have been examined, and shall have been found qualified at a subsequent examination, the increased rate of pay to which he may be entitled shall be allowed to him from the date when he would have received it had he been found qualified at the time when his examination should have taken place." *Held*, that any right an officer may have had to claim back pay, under any construction of the act of July 16, 1862, from a date prior to the occurrence of the vacancy to which he was promoted, was cut off by the act of June 22, 1874 (18 Stat., 191), which latter act authorizes payment only from the time the promoted officer takes rank in the higher grade and subsequent to the date of the vacancy to which in course he is promoted. (*Adamson v. U. S.*, 19 Ct. Cls., 623, 628.)

**Whether section 1562 repealed by act of 1913.**—In so far as section 1562, Revised Statutes, would restrict an officer's right to the pay of a higher grade to the date that he became entitled to examination for promotion, which in the case of an officer who had been suspended under section 1505, Revised Statutes, would be one year from the date of the examination upon which he had failed, the said section of the Revised Statutes is absolutely inconsistent with the act of March 4, 1913, allowing the pay of the higher grade from the date stated in the commission; and the later law must govern in a case where the date stated in the commission is prior to the date that the officer became entitled to reexamination. (*Smith v. U. S.*, 50 Ct. Cls., 244.)

The act of March 4, 1913, deals with the question of pay, and the act of 1874 and section 1562, Revised Statutes, also deals with questions of pay. It is not necessary to determine whether the last act supersedes the other two, or merely extends similar benefits to other officers not included within the provisions of the former acts. It is sufficient to say that the term "all officers of the Navy" as used in the last act is comprehensive enough to include passed assistant surgeons. (*Toulon v. U. S.*, 51 Ct. Cls., 87, 97.)

**Purpose of section 1562.**—The evident and sole purpose of the law is to prevent an officer from being deprived by absence on duty of the increased pay which promotion would have given him. The meaning of the law is that if an officer is delayed in his promotion because he has not been examined, and his examination has been delayed by his absence on duty, he shall, when promoted, have the increased pay of the new grade to begin from the time when his examination should have taken place. (*Hunt v. U. S.*, 116 U. S., 394.)

The provisions of section 1562, taken from the act of July 15, 1870 (16 Stat., 333), were enacted to relieve officers, absent on duty when the time arrived for their promotion and examination, from the manifest injustice of keeping them out of the pecuniary and other benefits of promotion until such time as the exigencies or convenience of the service admitted of their examination. The period of delay is often long, and during the delay other officers who entered the Navy at a later date more favorably stationed, are examined and but for the provisions of section 1562 would take rank above and receive higher pay than their less fortunate fellow officers of longer service. (*Howell v. U. S.*, 25 Ct. Cls., 288, 292.)

The theory of the statute is that when the officer became due for promotion he was competent to perform the duties of the higher office, was then entitled to examination, and, being without fault, his examination was postponed; but the benefits of the statute are fundamentally based upon capacity and competency, and to hold otherwise would be to declare that, with-

out the capacity to perform the duties of the position, the officer was entitled to pay. (*Austin v. U. S.*, 20 Ct. Cls., 269.)

**When entitled to examination.**—Under a misconception of the law a practice grew up in the Navy Department by which promoted officers were allowed the pay of their new grade from the time when they became eligible for examination; but this was corrected by the Secretary of the Navy in 1877, who recommended that the increased pay of a promoted officer should be allowed only from the time when a vacancy occurred to which he could have been promoted if an opportunity for examination had been given him. This recommendation was based on a correct construction of the statute. (*Hunt v. U. S.*, 116 U. S., 394.)

Under the provisions of the act of July 16, 1862 (12 Stat., 586, sec. 16), an officer of the Navy of a class subject by law or regulation to examination before promotion to a higher grade was not entitled to be examined until his turn for promotion had arrived or was near at hand. (*Hunt v. U. S.*, 116 U. S., 394.)

Under a regulation which provided that "candidates for promotion to the grade of chief engineer must have served at least two years at sea as first assistant engineers on board a naval steamer" a first assistant engineer became eligible to examination for promotion when he had served two years at sea upon a naval steamer; but he was merely eligible. He was not entitled to be examined until his turn for promotion had arrived or was near at hand. In no event, therefore, could he demand that the increased pay of his new grade should begin until he had a right to be examined for promotion. It would be an unwarranted construction of the statute and regulation to hold that as soon as a first assistant engineer had served two years at sea on board a naval steamer he was entitled, as a matter of right, to an immediate examination whether there was a vacancy in the next higher grade to which he could be promoted or not; and that if his examination was delayed by his absence on duty he could, when examined and promoted, demand the pay of a chief engineer from the time when he had completed his two years' service at sea. (*Hunt v. U. S.*, 116 U. S., 394.)

For other cases, see note to section 1495, Revised Statutes.

**Officer promoted subject to examination.**—An officer nominated and confirmed for promotion, subject to the condition that his commission be withheld until he pass an examination required by law, will not be entitled to the salary of the office until he comply. Unless there be a holding of an office, *de facto* or *de jure*, there is no right to its salary. (*Crygier v. U. S.*, 25 Ct. Cls., 268.)

**Officer failing upon examination for promotion.**—If a naval officer's examination for promotion be postponed through no fault of his, and he afterwards be examined and found qualified, the increased rate of pay to which his promotion would entitle him shall commence from the date when he would have been entitled to it had he been examined and found qualified at the time so required by law or regulation; but this does not extend to officers who upon examination, being found not quali-

fied, must be suspended under section 1505, Revised Statutes, from promotion for one year. (*Austin v. U. S.*, 20 Ct. Cls., 269.)

For other cases, see note to section 1505, Revised Statutes; and see specific cases noted below.

**Section 1562 applicable to warrant officers.**—An officer in the Navy whose promotion depends not upon vacancies occurring but upon length of service as a boatswain and examination for promotion is entitled to the increased pay of the office of chief boatswain from the date on which he became entitled to examination. In such case he is entitled to the increased pay, not under the act of June 22, 1874 (18 Stat., 191), which relates only to promotions in course to fill vacancies, but under section 1562, Revised Statutes. In this case the officer was promoted on April 14, 1905, to take rank as chief boatswain from March 6, 1905, the date he became entitled to examination. *Held*, that he is entitled to increased pay from said date of rank. (*Doyle v. U. S.*, 47 Ct. Cls., 356.)

**Act of March 4, 1913, construed literally.**—If the act of March 4, 1913, quoted above, means anything, it was intended by Congress thereby to confer upon the appointing power the right to name the date upon which an officer advanced in grade or rank should take such grade or rank and receive pay and allowances accordingly. This is the plain language of the law. (*Smith v. U. S.*, 50 Ct. Cls., 244.)

The act of March 4, 1913 (37 Stat., 892), would seem to be too plain for construction. The said act, in language which can not be misunderstood, provides that officers "shall be allowed the pay and allowances of the higher grade or rank from the date stated in their commissions." (*Smith v. U. S.*, 50 Ct. Cls., 244.)

The act of March 4, 1913, is especially free from ambiguity, and was intended to fix a date from which officers, coming within its terms should be paid. It is designed to establish uniformity, and set at rest disputations with respect to its subject matter, by bringing the whole subject of pay within fixed, definite, and certain limitations. (*Crapo v. U. S.*, 50 Ct. Cls., 337.)

An officer's commission determines the date it was intended he should take rank, and he is entitled under the act of March 4, 1913, to the pay and allowances fixed thereby by law from said date. (*Crapo v. U. S.*, 50 Ct. Cls., 337.)

The single question presented in a case arising under the statute of March 4, 1913, is, Was the officer's status such as to entitle him to pay from the date stated in his commission? (*Crapo v. U. S.*, 50 Ct. Cls., 337.)

If an officer promoted to a higher office was eligible to the office on the date stated in his commission, he is entitled under the act of March 4, 1913, to the pay and allowances of the higher office from said date; if he was not, neither the court nor any administrative officer of the Government has a right to alter the date of his commission or to change the essential proceedings followed by the President in doing what it may be presumed he thought he had a right to do. (*Crapo v. U. S.*, 50 Ct. Cls., 337.)

**Erroneous date in commission can not be changed by the courts.**—When the Presi-



dent, acting in pursuance of law, nominates and appoints an officer, and the Senate confirms the appointment, his commission thereupon issued is his warrant of authority, and the date thereof can not be changed, eliminated, or substituted by an administrative officer of the Government nor by the court. (*Crapo v. U. S.*, 50 Ct. Cls., 337.)

The administrative officers can not change the date of rank, neither can the court change the commission. The right to change it rests with the appointing power. (*Toulon v. U. S.*, 51 Ct. Cls., 87.)

**Erroneous date of commission not controlling under act of March 4, 1913.**—Under the act of March 4, 1913, the date stated in the commission is not controlling; the court can not change the date, where it appears to be erroneous, but it can refuse relief where the date is erroneous. (*Downes v. U. S.*, 52 Ct. Cls., 237, 240.)

The statute of March 4, 1913, does not authorize pay and allowances where the date stated in the commission is a date prior in point of time to that on which the officer was eligible to promotion to the grade to which he is promoted. (*Toulon v. U. S.*, 51 Ct. Cls., 87.)

The language of the Court of Claims in *Smith v. United States* (50 Ct. Cls., 244, 249, above noted) implies, as a matter of course, that in naming the date upon which an officer promoted should take rank and receive pay positive law is not ignored. (*Toulon v. U. S.*, 51 Ct. Cls., 87.)

Where the commission issued to a naval officer shows that the date of rank is incorrect he can not, by virtue of the act of March 4, 1913, recover pay from the date so stated. As he can not recover pay from the date stated in his commission in such case, he can not recover at all. (*Toulon v. U. S.*, 51 Ct. Cls., 87.)

Where an erroneous date is stated in the commission, and the increased pay of the higher grade denied by the Court of Claims for that reason, and the President, with the advice and consent of the Senate, issues a new commission to correct the date of rank previously stated, the increased pay will be allowed from the date stated in the new commission. (*Toulon v. U. S.*, 52 Ct. Cls., 333.)

**Act March 4, 1913, requires that advancement be pursuant to law.**—The statute of March 4, 1913, does not provide that when an officer is advanced in grade or rank he shall have the pay and allowances of the higher grade or rank from the date stated in his commission, but it does provide that when the advancement is "pursuant to law" he shall have them. When he is advanced or promoted contrary to law, if such a case is supposable, or when the period of suspension required by section 1505, Revised Statutes, for instance, is overlooked or disregarded, he can not be said to have been advanced pursuant to law; and in such case he can not be entitled to the pay and allowances of the higher grade from the date stated in his commission. (*Downes v. U. S.*, 52 Ct. Cls., 237.)

The Court of Claims did not hold in the cases of *Smith*, *Crapo*, or *Toulon* (50 Ct. Cls., 244, 342, and 51 Ct. Cls., 87, noted above), and does not now hold, that the act of March 4, 1913,

authorizes the fixing of a date in the commission from which the rank begins, which is controlling on the court regardless of whether the promotion was made pursuant to law or not. (*Downes v. U. S.*, 52 Ct. Cls., 237.)

The act of March 4, 1913, contemplates that the officer will be advanced under and in accordance with law, and that the date from which the higher rank begins will be stated in pursuance of law. Conversely, it does not contemplate that an arbitrary date will be chosen, nor that an officer will be advanced in contravention of the positive requirement that he shall not be promoted or advanced while under suspension for a failure to professionally qualify when examined. (*Downes v. U. S.*, 52 Ct. Cls., 237.)

Under the act of March 4, 1913, the court has the right to inquire as to whether there was a vacancy, and also the right to inquire whether the date of commission was prior to any vacancy, or whether any positive law had been ignored in fixing the date of rank in the commission; but ordinarily the court can not look into a matter relating purely to administrative action. (*Downes v. U. S.*, 52 Ct. Cls., 237, 243.)

Where a machinist was advanced to the grade of chief machinist, and given a date of rank in the higher grade which, in the opinion of the Court of Claims, was prior to the date on which he became eligible for promotion, *held*, that he was not promoted in grade or rank pursuant to law, and is illegally in the service; his claim for difference in pay must therefore be denied. (*Hooper v. U. S.*, 53 Ct. Cls., 90.)

An officer was actually commissioned as passed assistant surgeon on July 25, 1912, by promotion from the grade of assistant surgeon. On that date he was eligible to promotion, and his appointment was therefore pursuant to law. His commission, however, purported to give him rank in the higher grade from April 11, 1911, on which date he was not eligible to promotion. It would be a too literal view of the act of March 4, 1913, to hold that his promotion was pursuant to law, because at the time of his actual promotion such promotion could legally be made. The date which the statute contemplates would be stated in the commission is that upon which the officer becomes eligible to promotion, because the statute regulates the pay during the period of constructive service, and therefore the court must take notice of the date when such constructive service can begin, pursuant to law. The ascertainment of that date is confined in the first instance to the appointing power. (*Toulon v. U. S.*, 51 Ct. Cls., 87.)

The promotion of an assistant surgeon before completing three years' service would not be pursuant to law, and likewise his promotion during a period of six months' suspension under section 1505, Revised Statutes, as amended, would not be pursuant to law. Accordingly, *held*, that he was not advanced pursuant to law, because he was given a date of rank prior to the expiration of his period of suspension. (*Toulon v. U. S.*, 51 Ct. Cls., 87.)

**Specific cases involving retroactive rank.**—See cases noted above, under this section; see also notes to sections 1560 and 1561,

Revised Statutes; and see note to section 1458, Revised Statutes, under "Antedating rank on promotion."

A lieutenant (junior grade) became due for promotion to fill a vacancy which existed in the grade of lieutenant on February 1, 1898; by reason of absence on duty on board the U. S. S. *Maine* he could not be examined; on February 15, 1898, he was injured in the destruction of the *Maine*, from which injuries he died in June 1898; in the meantime, after his injuries and prior to his death therefrom, he was commissioned a full lieutenant to rank from February 1, 1898. He was allowed in his lifetime the pay of a full lieutenant from the date he took rank, to which he was clearly entitled in the application of section 1562 and the act of June 22, 1874, chapter 392. *Held*, that at the time of his death he was a full lieutenant, and that his widow, under the act of March 30, 1898 (30 Stat., 346, sec. 2), was entitled to a sum equal to 12 months' sea pay of the grade of lieutenant, which is the amount that the officer would have been entitled to under section 1562, Revised Statutes, and the act of June 22, 1874 (18 Stat., 191), had he survived. (*Blandin v. U. S.*, 35 Ct. Cls., 568, distinguishing *Swan v. U. S.*, 113 U. S., 747.)

An assistant surgeon in the Navy became due for promotion to passed assistant surgeon to fill a vacancy which occurred on July 1, 1897; he was not promoted until February 13, 1899, when he was commissioned as passed assistant surgeon to rank from July 9, 1897. *Held*, that in consequence of section 1562, Revised Statutes, and the act of June 22, 1874 (18 Stat., 191), his rate of pay on May 1, 1898, was that of passed assistant surgeon, and should be so computed for the purpose of determining his share in the distribution of bounty under section 4631, Revised Statutes. (*Engagement at Manila Bay*, 36 Ct. Cls., 206, 209, citing *Blandin v. U. S.*, 35 Ct. Cls., 568.)

Where an officer was entitled to his first examination for promotion on March 3, 1909, and through no fault of his own such examination was delayed until May 17, 1909; and he failed on such examination and was suspended from promotion, under section 1505, Revised Statutes, for one year from May 17, 1909; and he was again examined on June 10, 1910, and promoted with date of rank in his commission as March 3, 1910, being one year from the date he originally became due for promotion. *Held*, that under the act of March 4, 1913, he was entitled to pay from the date so stated in his commission, and that it was but doing him justice to date his rank one year later than the date when he was entitled to his first examination. (*Smith v. U. S.*, 50 Ct. Cls., 244.)

An assistant surgeon becoming eligible for promotion to passed assistant surgeon after three years' service and who failed professionally upon examination for promotion, was again eligible for promotion, under section 1505, Revised Statutes, as amended, after the expiration of six months from the date he originally became due. Where he was commissioned in the higher grade, upon qualifying by reexamination, with a date of rank earlier than six months from the date he originally became due for promotion, he was not enti-

tled to pay from the date of rank so stated in his commission. (*Toulon v. U. S.*, 51 Ct. Cls., 87; see also note to sec. 1505, R. S.)

The act of March 3, 1915 (38 Stat., 942), created in the Navy the grades of acting pay clerk, pay clerk, and chief pay clerk, and rendered eligible for commission as chief pay clerks, paymasters' clerks then in the Navy and former paymasters' clerks whose appointments had been revoked prior to the act and who had not less than six years actual service as paymasters' clerks. *Held*, that a paymaster's clerk who was commissioned in accordance with said act as chief pay clerk was not "advanced in grade or rank pursuant to law" within the meaning of the act of March 4, 1913; that said paymaster's clerk was not a member of the new corps created by the act of 1915 until he was commissioned therein; and that his appointment as chief pay clerk was no more an advancement in grade or rank than would have been the appointment of a former paymaster's clerk having the requisite qualifications; that in either case the appointment would be that of an outsider, who had no grade or rank as a warrant or commissioned officer at the time of such appointment. The question is not the same as that in the case of *Smith v. United States* (noted above), in which a machinist was promoted to the grade of chief machinist pursuant to the law which in terms referred to such advancement as a promotion. Accordingly, in this case, where the officer was commissioned as chief pay clerk on August 3, 1915, but was given date of rank as July 1, 1915, he was not entitled to pay as chief pay clerk from the date of rank so stated in his commission. (*Seifert v. U. S.*, 52 Ct. Cls., 40.)

An officer became due for promotion by seniority to fill an existing vacancy in the next higher grade; he was found upon examination incapacitated for service by reason of hernia contracted in the line of duty, and therefore not recommended by the board for promotion; the Bureau of Medicine and Surgery recommended that he be ordered to a naval hospital for operative treatment, and that he be reexamined when he had recovered to determine his physical fitness for promotion; the Secretary of the Navy, reciting the recommendation of the Bureau of Medicine and Surgery, transmitted the record to the President advising that the findings and recommendations of the board of medical examiners be approved, with a view to effecting the recommendation of the Bureau of Medicine and Surgery. The President's indorsement was as follows: "The findings and recommendation of the board in this case are approved." Thereafter the officer was admitted to the naval hospital for operative treatment, and having subsequently passed the required examinations was promoted from the date of the vacancy which had been held open for him in the meantime. *Held*, that the officer was advanced in grade or rank pursuant to law under the act of March 4, 1913, and is entitled to the pay of the higher grade for constructive service from the date of the vacancy, as stated in his commission; further *held*, that it would be too strict, if not strained, a construction of the President's



action to say that he merely approved the finding of the board of medical examiners, when as a matter of fact he had before him not only their report but the recommendation of the Bureau of Medicine and Surgery and the advice thereon of the Secretary of the Navy. It was not an unreasonable construction that the President's approval of the board's findings and recommendation included an approval of the recommendation of the Bureau of Medicine and Surgery. Further, *held*, that section 1505, Revised Statutes, as amended, relating to suspension from promotion applies to officers not professionally qualified, and is not applicable in a case where the examination develops merely a physical disqualification. (*Downes v. U. S.*, 52 Ct. Cls., 237; see also note to sec. 1505, R. S.)

An assistant surgeon who, on original appointment as such, executed his oath of office on December 4, 1907, but whose commission, in accordance with administrative custom, fixed his date of rank as November 29, 1907, may be regarded as becoming eligible for promotion after three years from the date of rank so stated in his original commission, instead of requiring three years' actual service; and the said officer having failed on examination for promotion and been suspended for six months, in accordance with section 1505, Revised Statutes as amended, he again became eligible for promotion after the expiration of three years and six months from the date he took rank as stated in his original commission, that is, on May 29, 1911; and having been promoted to the grade of passed assistant surgeon to rank from the last-named date, he was entitled under the act of March 4, 1913, to be paid from the date of rank so stated in his commission. (*Toulon v. U. S.*, 52 Ct. Cls., 333.)

A machinist in the Navy become eligible for promotion to chief machinist in December, 1912; in February, 1913, a naval examining board reported the said machinist qualified for promotion; however, owing to unfavorable reports as to fitness, the department recommended and the President directed in April, 1913, that final action on the recommendation be suspended for one year; in October, 1914, he was reexamined and found suffering from neurasthenia contracted in line of duty and thereby incapacitated for service, and was not recommended for promotion; the President approved this report of the board of medical examiners on November 21, 1914; subsequently he was examined by a naval retiring board and found temporarily incapacitated for active service by reason of neurasthenia, and recommendation was made that he be granted three months' sick leave; this recommendation was approved by the President on January 2, 1915; in June, 1915, he was again examined by a naval retiring board and found not incapacitated for active duty, and the President approved this report; in September, 1915, he was again examined for promotion and found physically qualified, but in November following the naval examining board reported him as mentally and morally but not professionally qualified, and did

not recommend him for promotion; in December, 1915, the President approved this report and directed that he be suspended from promotion for period of six months; in July, 1916, he was examined by a board of medical examiners and found physically incapacitated for duty and it was recommended by the board that he be reexamined physically in six months; no action was taken by the President on this report; in January, 1917, he was reexamined by a board of medical examiners and a naval examining board, found qualified by both boards, and recommended for promotion. These reports were approved by the President and on April 30, 1917, the officer was appointed a chief machinist in the Navy to rank from June 27, 1913, being six months after the date that he originally became due for promotion; he was paid as machinist to January 29, 1917, and claimed the difference in pay between that of machinist and that of chief machinist from June 27, 1913, the date of rank stated in his commission. *Held*, that under sections 1493, Revised Statutes, and section 1505, Revised Statutes, as amended by the act of March 11, 1912 (37 Stat., 73), the act of June 18, 1878 (20 Stat., 165), and the act of March 4, 1913 (37 Stat., 892), he was not promoted in grade or rank pursuant to law, because he was not eligible for promotion on the date of rank stated in his commission, and he is therefore illegally in the service and not entitled to difference of pay as claimed. (*Hooper v. U. S.*, 53 Ct. Cls., 90; see also note to sec. 1505, R. S.)

An ensign in the Navy became eligible for promotion by length of service to the grade of lieutenant (junior grade) on January 31, 1910; he successfully passed his examination, as required by section 1496 of the Revised Statutes, but was found not physically qualified by the medical board acting under section 1493, Revised Statutes, and it was recommended by said board that he be further examined physically in three months, in order to ascertain the extent of his incapacity. The findings and recommendations of both boards were approved by the President on December 12, 1910. Being subsequently examined and found physically qualified, he was commissioned as a lieutenant (junior grade) on May 2, 1911, to rank from January 31, 1910. *Held*, that he was entitled to the pay of lieutenant (junior grade) from the date stated in his commission; that this case is more analogous to that of *Downes v. United States* (above noted) than that of *Hooper v. United States* (above noted). (*Wadsworth v. U. S.*, 55 Ct. Cls., 383.)

**Distinction between rank and office.**—The distinction between rank and office is not without importance when considering the right of the officer to take rank prior to the time when he is actually commissioned in office. To be an officer he must pass an examination, be nominated to and confirmed by the Senate, and receive a commission; but he takes rank as from the date he became eligible to promotion to such office. His right to the rank becomes absolute when he is actually commissioned, and before that time he was merely eligible to it. (*Toulon v. U. S.*, 51 Ct. Cls., 87, 94.)

The rule and custom of promotion in rank from the date the officer becomes eligible to promotion finds recognition in many statutes, of which the act of June 22, 1874, and section 1562, Revised Statutes, referring to pay between the date of commission and date of rank, are examples. The date of an officer's rank on promotion is, therefore, that on which he becomes eligible to promotion, and though his actual appointment in the higher grade be at a later time, his date of rank relates back to the period stated. (*Toulon v. U. S.*, 51 Ct. Cls., 87, 93.)

An officer takes rank in his grade from the time when the law entitles him to do so, and not necessarily from the time when he is commissioned. (*Howell v. U. S.*, 25 Ct. Cls., 288; *Toulon v. U. S.*, 51 Ct. Cls., 87, 93.)

Section 1562, Revised Statutes, the act of June 22, 1874, and the act of March 4, 1913, each has in contemplation the custom of advancement according to number in grade, and that there is one date when the officer is actually commissioned in the higher grade, and a preceding date upon which he is eligible to promotion thereto. Referring, as it does, to the matter of pay, the purpose of the act of March 4, 1913, may be rendered in the language of section 1562, providing that "the period of service of the party in the grade to which he was promoted shall, in reference to the rate of his pay, be considered to have commenced from the date when he was so entitled to take rank." (*Toulon v. U. S.*, 51 Ct. Cls., 87, 97.)

The officer's service in the grade to which promoted actually begins on the date that he is actually commissioned, but the date upon which he became eligible to promotion may be

denominated the date of his constructive service in such grade. The act of March 4, 1913, refers to this latter date, from which he constructively enters the higher grade and takes rank upon being actually commissioned at a subsequent date. By observing the distinction which is to be taken under the act of 1913 between actual and constructive service, and the fact that the pay and allowances therein provided for relate to the period of such constructive service and have no relation to the period of actual service following the date of commission, we find the proper application for the words "advanced in grade or rank, pursuant to law," as used in said act. (*Toulon v. U. S.*, 51 Ct. Cls., 87, 97.)

A lieutenant in the Navy received additional pay for duty as aid to a rear admiral from July 1, 1914, to August 20, 1914; thereafter he was commissioned as a lieutenant commander, with rank as such from July 1, 1914. As a lieutenant commander he would not be entitled to the additional pay allowed aids to rear admirals. *Held*, that the Government is not entitled to recover the sum allowed him for additional pay as aid during the period in question; that he was in fact a lieutenant and not a lieutenant commander during said period; that he did not become a lieutenant commander until a subsequent date, and the fact that his commission retroactively gave him rank as a lieutenant commander during the period when he was in fact serving as a lieutenant, and that he was entitled to pay as a lieutenant commander from date of rank pursuant to the act of March 4, 1913, can not serve to make him a lieutenant and a lieutenant commander in fact at the same time. (*Downes v. U. S.*, 52 Ct. Cls., 327.)

**Sec. 1563. [Advances to persons on distant stations.]** The President of the United States may direct such advances, as he may deem necessary and proper, to such persons in the naval service as may be employed on distant stations where the discharge of the pay and emoluments to which they are entitled cannot be regularly effected.—(31 Jan., 1823, c. 9, s. 1, v. 3, p. 723.)

Amendment to this section was made by act of March 4, 1917 (39 Stat., 1181), which provided that "hereafter advances of pay not to exceed three months' pay in any one case may be made to officers ordered to and from sea duty and to and from shore duty beyond the seas, under such regulations as the Secretary of the Navy may prescribe."

By section 3648, Revised Statutes, advances of public money were prohibited, with a saving clause with respect to persons employed in the military and naval service similar to the provisions of section 1563, Revised Statutes. Other exceptions have been made by specific statutes, as, for example, act of August 22, 1912 (37 Stat., 32), relating to partial payments to contractors doing work for the Navy Department; act of October 6, 1917, section 5 (40 Stat., 333), relating to contractors for supplies for the War and Navy Departments "during the period of the existing emergency"; act of April 27, 1904 (33 Stat., 403), relating to purchase of mileage

books and transportation tickets for officers and other persons in advance of travel performed under the Navy Department; and various laws relating to payment for subscriptions to newspapers and periodicals, which are noted under section 192, Revised Statutes.

**Validity of Navy Regulations relating to advances.**—Prior to the amendment of March 4, 1917, noted above, it was held by the Comptroller of the Treasury that Navy Regulations (art. R 4458, Navy Regs., 1913) which authorized advances in pay to officers ordered to duty at sea or on shore beyond the continental limits of the United States were invalid under modern conditions as applied to officers ordered to duty where disbursing officers are stationed who could regularly make payments to them of amounts due for pay and emoluments, and that such regulations should be amended to meet the requirements of sections 1563 and 3648, Revised Statutes. (21 Comp. Dec., 733.) After said decision of the Comptroller was rendered, it was held by the Judge Advocate General of the Navy, December 21, 1916 (file



3980-1275), that the Navy Regulations in question, which had been in effect for many years with the full knowledge and acquiescence of the accounting officers and with the implied sanction of Congress, should be obeyed by disbursing officers, citing the Attorney General's opinion of May 19, 1915 (noted under sec. 285, R. S.), and other opinions of the Attorney General (see 2 Op. Att. Gen., 204, and 1 Op. Att. Gen., 620, relating to advances to diplomatic

officers going abroad). Certain minor modifications were, however, made in article 4458 (Navy Regs., 1913), by C. N. R. 7 of September 15, 1916, and C. N. R. 10 February 25, 1918. (See art. 1803, Navy Regs., 1920; see also note to sec. 236, R. S., respecting jurisdiction of the accounting officers and the Secretary of the Navy; and note to sec. 161, R. S., respecting validity of Navy Regulations.)

**Sec. 1564. [Persons acting as paymaster.]** Any person performing the duties of paymaster, acting assistant paymaster, or assistant paymaster, in a ship at sea, or on a foreign station, or on the Pacific coast of the United States, by appointment of the senior officer present, in case of vacancy of such office, in accordance with the provisions of section thirteen hundred and eighty-one, and not otherwise, shall be entitled to receive the pay of such grade while so acting.—(17 July, 1861, c. 4, s. 4, v. 12, p. 258.)

See section 1381, Revised Statutes, and note thereto.

**Not entitled to dual compensation.**—Under sections 1381 and 1564, Revised Statutes, a person who holds no office under the Government may be given an acting appointment as paymaster, and in that case the sections may operate literally to entitle the appointee to the pay of the grade while so acting; but if the appointee holds another office under the Government, he can not escape from the prohibitions of the Revised Statutes, sections 1763 and 1765, prohibiting dual compensation. In such case it is the liberal custom of the Treasury Department to allow a person holding more than one office the compensation of that one which is larger. (*Webster v. U. S.*, 28 Ct. Cls., 25.)

**Status of acting appointee.**—A person appointed to act as paymaster in a ship at sea or on a foreign station, under the Revised Statutes, sections 1381 and 1564, does not thereby become an officer. A naval officer

acting as paymaster is appointed to discharge the duties of an office which he does not hold. (*Webster v. U. S.*, 28 Ct. Cls., 25.)

**Pay of acting appointee.**—A person appointed paymaster to fill the vacancy of a deceased officer on a ship at sea or in a foreign port is entitled to the pay of the office but not to the longevity pay of the officer in whose stead he is acting. (*Webster v. U. S.*, 28 Ct. Cls., 25.)

The offices of engineer and paymaster in the Navy are incompatible, and he who holds them is not entitled to the compensation of both, but is entitled to the larger of the two. (*Webster v. U. S.*, 28 Ct. Cls., 25.)

**Termination of acting appointment.**—The continuance of an appointment as "acting" paymaster, under Revised Statutes 1381 and 1564, does not depend upon a discharge or revocation; it terminates when another paymaster reports for duty; and the pay continues at farthest only to the time when the acting officer's accounts are made up. (*Ostrander v. U. S.*, 22 Ct. Cls., 218.)

### Sec. 1565. [Chiefs of Bureau. Superseded.]

#### This section provided as follows:

"SEC. 1565. The pay of chiefs of Bureau in the Navy Department shall be the highest pay of the grade to which they belong, but not below that of commodore."—(3 Mar., 1871, c. 117, s. 12, v. 16, p. 537.)

It was superseded by act of March 3, 1899, section 7 (30 Stat., 1005), which provided that the pay of chiefs of bureaus shall be the highest pay of the grade to which they belong, not below that of commodore.

**Other modifications of the law as to pay of chiefs of bureaus** were made by act of May 13, 1908 (35 Stat., 128), which provided that their pay and allowances "shall be the highest pay of the grade to which they belong, and not below that of rear admiral of the lower nine"; by act of June 24, 1910 (36 Stat., 607), which provided that their pay and allowances should be the highest shore duty pay and allowances of rear admirals of the lower nine; by act of August 22, 1912 (37 Stat., 328), which repealed the provisions of the act of June 24, 1910, without making any further provision on the subject—the effect of which was to revive the act

of May 13, 1908 (Comp. Dec., June 22, 1916 file 26254-2045); and by act of July 1, 1918 (40 Stat., 717), which provided that chiefs of bureaus in the Navy Department shall receive the same pay and allowances as chiefs of bureaus in the War Department.

**Chief of bureau dismissed by sentence of court-martial.**—The chief of a bureau in the Navy Department tried by court-martial and sentenced to be dismissed from the position of chief of bureau and to be suspended from rank and duty in his permanent grade, on furlough pay, for one year, which sentence was duly confirmed by the President, is not entitled to recover the emoluments of a chief of bureau for the remainder of the four-year term for which he was appointed. A naval court-martial has jurisdiction to sentence chiefs of bureaus to be dismissed from their office as such. (*Smith v. U. S.*, 26 Ct. Cls., 143.)

**For other cases relating to the pay and allowances of chiefs of bureaus**, see note to section 421, Revised Statutes; see also note to section 1556, Revised Statutes.

**Sec. 1566. [Mileage and traveling expenses. Superseded.]**

This section provided as follows:

"Sec. 1566. An allowance of ten cents a mile may be made to officers in the naval service, and store-keepers on foreign stations for traveling expenses when under orders. And an allowance may be made to officers traveling in foreign countries under orders, for expenses of transportation of baggage necessarily incurred. And no officer shall be paid mileage, except for travel actually performed at his own expense and in obedience to orders."—(3 Mar., 1835, c. 27, s. 2, v. 4, p. 757. 17 July, 1862, c. 200, s. 7, v. 12, p. 595. 15 July, 1870, c. 295, s. 4, v. 16, p. 332. 16 June, 1874, c. 285, v. 18, p. 72. 3 Mar., 1875, c. 133, v. 18, p. 452.)

Is was superseded by later enactments set forth below.

By act of June 16, 1874 (18 Stat., 72), it was provided "that only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, and all allowances for mileage and transportation in excess of the amount actually paid are hereby declared illegal; and no credit shall be allowed to any of the disbursing officers of the United States for payment or allowances in violation of this provision."

By act of January 18, 1875 (18 Stat., 297), it was provided "that no allowance shall be made in the settlement of any account for traveling expenses unless the same be incurred on the order of the Secretary of the Navy, or the allowance be approved by him."

By act of March 3, 1875 (18 Stat., 452), it was provided "that hereafter only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, except marshals, district attorneys, and clerks of the courts of the United States and their deputies; and all allowances for mileages and transportation in excess of the amount actually paid, except as above excepted, are hereby declared illegal; and no credit shall be allowed to any of the disbursing officers of the United States for payment or allowances in violation of this provision."

By act of June 30, 1876 (19 Stat., 65), it was provided that so much of the act of June 16, 1874, above quoted, "as provides that only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States while engaged on public business, as is applicable to officers of the Navy so engaged, is hereby repealed; and the sum of eight cents per mile shall be allowed such officers while so engaged, in lieu of their actual expenses."

By act of August 5, 1882 (22 Stat., 286), it was provided that "officers of the Navy traveling abroad under orders hereafter issued shall travel by the most direct route, the occasion and necessity for such order to be certified by the officer issuing the same; and shall receive, in lieu of the mileage now allowed by law, only their actual and reasonable expenses, certified under their own signatures and approved by the Secretary of the Navy."

By act of July 7, 1893 (30 Stat., 708), it was provided "that hereafter the accounting officers of the Treasury shall not receive, examine, con-

sider, or allow any claim against the United States for difference between mileage and actual expenses which has been or may be presented by officers of the Navy, their heirs or legal representatives, under the decisions of the Supreme Court which have heretofore been adopted as a basis for the allowance of such claims, which accrued prior to July first, eighteen hundred and seventy-four." (See decisions of Supreme Court noted below, under "Act of 1876 allowed mileage for all travel by officers of the Navy.")

By act of March 3, 1899, section 13 (30 Stat., 1007), officers of the line of the Navy, and of the Medical and Pay Corps, were given the same allowances, except forage, as officers of the corresponding rank in the Army.

By act of June 7, 1900 (31 Stat., 685), it was provided "that in lieu of traveling expenses and all allowances whatsoever connected therewith, including transportation of baggage, officers of the Navy traveling from point to point within the United States under orders shall hereafter receive mileage at the rate of eight cents per mile, distance to be computed by the shortest usually traveled route; but in cases where orders are given for travel to be performed repeatedly between two or more places in the same vicinity the Secretary of the Navy may, in his discretion, direct that actual and necessary expenses only be allowed. Actual expenses only shall be paid for travel under orders outside the limits of the United States in North America."

By act of March 3, 1901 (31 Stat., 1029), the foregoing provisions of the act of June 7, 1900, were repeated in identical language.

By act of July 1, 1902 (32 Stat., 663), it was provided "that hereafter in cases where orders are given to officers of the Navy or Marine Corps for travel to be performed repeatedly between two or more places in such vicinity as in the discretion of the Secretary of the Navy is appropriate, he may direct that actual and necessary expenses only be allowed."

By act of April 27, 1904 (33 Stat., 403), it was provided that "the Secretary of the Navy is hereby authorized to continue to purchase such mileage books, commutation tickets, and other similar transportation tickets as may in his discretion seem necessary, and to furnish same to officers and others ordered to perform travel on official business; and payment for such transportation tickets upon their receipt, in accordance with commercial usage, or prior to the actual performance of the travel involved, shall not be regarded as an advance of public money within the meaning of section thirty-six hundred and forty-eight of the Revised Statutes."

By act of February 26, 1907, section 6 (34 Stat., 997), provision was made for travel of officers detailed to the Light-House establishment.

By act of March 3, 1909 (35 Stat., 774), it was provided "that hereafter the settlement of all traveling expense claims, where the payment of such is authorized by existing law, and the determination of distances and of what constitutes the shortest usually traveled route in the meaning of laws relating to traveling allowances,



shall accord to such rules as the Secretary of the Navy may prescribe."

By act of June 30, 1914 (38 Stat., 393), it was provided "that hereafter no mileage shall be paid to any officer where Government transportation is furnished such officer."

By act of May 18, 1920, section 12 (41 Stat., 604), provision was made for transportation being furnished by the Government to the wife and dependent child or children of officers and certain enlisted men of the Navy and Marine Corps upon permanent change of station by the latter. The same act and section further provided that "the personnel of the Navy shall have the benefit of all existing laws applying to the Army and the Marine Corps for the transportation of household effects." (See also statutes noted under sec. 1135, R. S., as to transportation in Army transports.)

By clauses in the annual naval appropriation acts, under "Bureau of Navigation," officers of the Navy on duty with traveling recruiting parties are entitled to "actual and necessary expenses in lieu of mileage." (See, e. g., act June 4, 1920, 41 Stat., 815.)

By clauses in the annual naval appropriation acts, under "Pay, miscellaneous," provision is made "for mileage, at 5 cents per mile, to midshipmen entering the Naval Academy while proceeding from their homes to the Naval Academy for examination and appointment as midshipmen"; for "actual traveling expenses of female nurses"; and for "mileage to officers of the Navy and Naval Reserve Force while traveling under orders in the United States, and for actual personal expenses of officers of the Navy and Naval Reserve Force while traveling abroad under orders." (See, e. g., act June 4, 1920, 41 Stat., 812.)

As to travel allowance, Naval Reserve Force, see note to section 1556, Revised Statutes, under "Naval Reserve Force."

As to transportation and necessary expenses of members of the Nurse Corps (Female), when traveling under orders, see note to section 1556, Revised Statutes, under "Dental Corps and Nurse Corps (Female)."

**Section 1566 repealed and later revived with modifications.**—The provisions of section 1566, Revised Statutes, allowing ten cents a mile to naval officers "for traveling expenses when under orders," were repealed by the act of June 16, 1874 (18 Stat., 372), but became in force, though modified, by reason of the act of June 30, 1876 (19 Stat., 65), which repeals so much of the act of June 16, 1874, "as is applicable to officers of the Navy," and allows to them eight cents per mile in lieu of their actual expenses. (*Steele v. U. S.*, 30 Ct. Cls., 8.)

Section 1566 never actually went into effect, so far as the question of mileage is concerned, as by the act of June 16, 1874, it was provided that "only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States," etc. This act took effect in such a way as to operate to repeal the section referred to, so far as this subject was concerned, before the same actually had effect. (15 Op. Atty. Gen., 309, citing sec. 5601, R. S., as to the effect of laws passed after Dec. 1, 1873.)

The act of June 16, 1874, making appropriations for the support of the Army was in its terms applicable to every person holding employment or appointment under the United States, and its obvious purpose was to abolish all payments for traveling expenses in which a specific allowance per mile was made by law, and to establish the more equitable principle of paying the actual expenses of persons traveling in the service of the Government. (*U. S. v. Mouat*, 124 U. S., 303.)

**Act of 1874 repealed only in part by act of 1876.**—The act of June 16, 1874, which provided that only actual traveling expenses shall be allowed to any person "holding employment or appointment under the United States," applied to all persons holding "employment or appointment" under the Government of the United States, including officers of the Navy. The later act of June 30, 1876, which excepted "officers of the Navy" from the application of the former act, did not repeal the whole of that statute, even as applicable to the entire Navy, but selected a certain class of persons in the Navy to whom it should no longer apply. This class of persons is designated as "officers of the Navy." No other person holding an employment or appointment under the United States, although in the Navy, was thus relieved from the effect of the act of 1874. The words "officers of the Navy," in the act of 1876, must be confined to those who are, properly speaking, officers of the Navy, that is, to those who are appointed by the President, or by a court of law, or by the head of a department, that is, by a member of the President's cabinet. (*U. S. v. Mouat*, 124 U. S., 303. See below, as to persons held not officers of the Navy under mileage laws.)

**Act of March 3, 1899, extended Army mileage laws to Navy.**—Mileage is an allowance, and officers of the Navy coming within the operation of section 13 of the Navy personnel act of March 3, 1899 (30 Stat., 1007), became entitled only to the same rates of mileage as provided by law or regulations for officers of the Army; i. e., to a maximum of 7 cents a mile. (7 Comp. Dec., 117. See later laws noted above.)

**Section 1566 repealed only in part by act of March 3, 1901.**—The act of March 3, 1901 (31 Stat., 1029), repeals section 1566, Revised Statutes, only as to the amount per mile allowed to officers for mileage, but does not repeal the provision in section 1566 that "no officer shall be paid mileage except for travel actually performed at his own expenses and in obedience to orders." (*Katzer v. U. S.*, 52 Ct. Cls., 32.)

**Act of 1876 allowed mileage for all travel by officers of the Navy.**—The act of June 30, 1876 (19 Stat., 65), establishes one rule, mileage for all travel by officers of the Navy, whether on land or sea. The Government can not by buying for a naval officer traveling under orders a railroad or steamship ticket, reinstate the "actual expense" rule repealed by the said act. (*Temple v. U. S.*, 14 Ct. Cls., 377.)

An officer of the Navy who while engaged in public business in 1878, traveled under orders, partly by land and partly by sea, the travel by

sea not being in a public vessel, was, under the act of June 30, 1876 (19 Stat., 65), entitled to mileage for the whole distance traveled. The accounting officers of the Treasury, in holding that for one class of travel he should have mileage, and for the other his actual expenses, were attempting to make the law and not to construe it. (*U. S. v. Temple*, 105 U. S., 97. In this case the accounting officers allowed the officer mileage for the travel by land, and actual expenses for his travel by sea. The court said: "When this travel was performed there was not a line on the statute books of the United States which made any provision whatever, under any circumstances, for allowing officers of the Navy, when engaged on the public business, their actual expenses of travel. The only law ever enacted which made such provision had been expressly repealed by the act on which the appellee based his claim for mileage.")

The act of March 3, 1835 (4 Stat., 755), which provided that 10 cents a mile should be allowed to naval officers for traveling expenses while traveling under orders, made no distinction between travel in and travel out of the country. The construction put upon it by the Treasury Department to the effect that mileage should be paid for traveling expenses within the United States, but that the usual and necessary passage money actually paid by officers returning from foreign service under orders or on sick leave, when they could not return in a public vessel, would be paid as theretofore, as well as the like expenses of officers going out, which construction was accepted by the Navy Department and embodied in the Navy Regulations, can not affect the plain provisions of the act. Under both the act of 1835 and the act of June 30, 1876, all traveling expenses were to be paid by mileage, and in neither act is there any indication of an intention of Congress to make a distinction between travel by sea or on land in foreign countries or in the United States. (*U. S. v. Graham*, 110 U. S., 219.)

Prior to the decisions of the Supreme Court noted above, the Attorney General had rendered an opinion to the following effect: It was known when the act of June 30, 1876, was passed that the construction which for years had been given by the Navy Department to the law of March 3, 1835, providing that mileage should be paid to officers of the Navy, limited the allowance of the same to those traveling within the limits of the United States. When, therefore, Congress reenacted the law substantially in the same terms, and made no clear provision that the mileage should be paid to those officers who travel by sea and out of the limits of the United States, it must be deemed that in thus reenacting it has accepted the construction theretofore put upon a similar act by the Navy Department. Accordingly, *held*, that under the act of 1876, mileage is to be allowed and paid to naval officers only when traveling within the United States, in lieu of their actual expenses, and that when traveling without the United States they are to receive their actual expenses alone. (15 Op. Atty. Gen., 309; the Supreme Court decisions noted above overruled this opinion of the Attorney General.)

See act of July 7, 1898, noted above, which prohibited the accounting officers from allowing claims for differences between mileage and actual expenses, under decisions of the Supreme Court, where such claims accrued prior to July 1, 1874.

**Actual expenses for travel abroad under act of 1882.**—An officer of the Navy authorized to appear before a court of inquiry on a foreign station, and ordered "on the conclusion of the investigation to return to Yokohama and there to remain until you receive further orders from the department," is "traveling abroad under orders" within the meaning of the act of August 5, 1882 (22 Stat., 286), allowing actual expenses for such travel. (*Selfridge v. U. S.*, 28 Ct. Cls., 440.)

Traveling does not intend endless movement. A traveler is one who journeys to foreign lands; one who visits strange countries and people; an officer, although not in movement while attending a court of inquiry in a foreign country, or during a few days' detention waiting for a connecting steamer, or during a few days spent in a foreign city on his way out, nevertheless was properly entitled to his expenses at such places. During his stops at these places his status was that of "traveling abroad under orders." He was in the condition of a traveler from the time he left the United States until he returned home. (*Selfridge v. U. S.*, 28 Ct. Cls., 440; see also 10 Comp. Dec., 589; 12 Comp. Dec., 358; 25 Comp. Dec., 555; compare 25 Comp. Dec., 485.)

The question whether travel is abroad or within the United States should be determined by the termini of the journey, rather than by the route actually taken. A naval officer traveling under orders from San Francisco to New York, by way of the Isthmus of Panama, is to be considered, under the statutes applicable to the case, as traveling under orders in the United States and as entitled to eight cents per mile, measured by the nearest traveled route. (*U. S. v. Hutchins*, 151 U. S., 542.)

An officer is to be understood as traveling abroad when he goes to a foreign port or place under orders to proceed to that place, or from one foreign port to another. (*U. S. v. Hutchins*, 151 U. S., 542.)

Why officers are allowed by Congress mileage in one case and not in the other is not altogether clear, but probably the reason is that travel at home is ordinarily for such short distances and the disbursements therefor are generally for such petty amounts that to save the necessity of the officer keeping a minute account of each outlay, and the accounting officers passing upon the reasonableness of every small item, it was thought better to allow the officer a fixed mileage by the shortest traveled route, leaving him at liberty under certain circumstances, and where his orders are not to proceed by a particular route, to choose his own. (*U. S. v. Hutchins*, 151 U. S., 542.)

**Actual expenses for repeated travel.**—The act of June 7, 1900 (31 Stat., 685), authorizing actual expenses for repeated travel between places in the same vicinity, invests the Secretary of the Navy with discretion to determine what places are "in the same vicinity;"



but the Secretary can exercise this discretion only where the travel must be performed "repeatedly between two or more places." Where the travel between two places was not repeated, the officer is entitled to mileage and not actual expenses. (*Willits v. U. S.*, 38 Ct. Cls., 534.)

The word "vicinity" in the statute has no fixed and definite meaning, and to determine what is or is not a vicinity in these days of express trains and trolley cars must be a matter of discretion, and this discretion is lodged in the Secretary, whose decision is not subject to review by the courts. (*Willits v. U. S.*, 38 Ct. Cls., 534.)

An order of the Secretary of the Navy which does not relieve an officer from duty at a navy yard, but imposes upon him additional duty at another, and requires his personal attention at both, entitles him to mileage for travel between the two and invests him with discretion to determine when his presence is necessary at either; such travel is travel "under orders." (*Steele v. U. S.*, 30 Ct. Cls., 8.)

**Mileage not allowed when Government transportation furnished.**—By "Government transportation," as used in the act of June 30, 1914 (38 Stat., 393), is understood transportation on vessels owned or employed by the Government or by conveyances on land so owned or employed, but not transportation furnished on transportation request. Accordingly, *held*, that an officer of the Navy, traveling under proper orders in the United States, and furnished transportation on Government requests, is entitled to be paid mileage less cost of transportation furnished and any other expense incurred by the Government. (21 Comp. Dec., 690.)

Where, under proper orders, a naval officer proceeded from his regular station to a certain point, took charge of a motor launch, and returned thereon to such regular station, said launch not being provided with sleeping quarters or mess arrangements, he is not entitled, for the return journey, either to reimbursement of actual expenses incurred for meals and lodging en route, or to mileage allowance, since he was not performing repeated travel, and was furnished with Government transportation within the meaning of the act of June 30, 1914. (23 Comp. Dec., 368.)

The act of June 30, 1914, was passed after the decision of the comptroller (20 Comp. Dec., 741), which held that a right to mileage was not lost because an officer traveled on a Government conveyance. (23 Comp. Dec., 368, 370.)

**Officer performing travel while under suspension.**—An officer of the Navy ordered to travel to his home in the United States during his suspension from duty by sentence of a general court-martial is entitled to reimbursement for his actual necessary expenses incurred in traveling from Manila to San Francisco under said orders. (14 Comp. Dec., 684.)

**Officer performing travel in answer to a subpoena.**—An officer of the Navy is entitled only to actual and necessary expenses for travel performed in attending as a witness before a United States grand jury, in response to a subpoena, notwithstanding that he may have been ordered by his superior officer to perform the

travel in answer to said subpoena. (4 Comp. Dec., 146.)

**Officer ordered to attend funeral of another officer.**—See 11 Comp. Dec., 181, noted under section 1587, Revised Statutes.

**Officer traveling to and from leave of absence.**—An officer of the Navy ordered to proceed to his home and granted a leave of absence, and at the expiration of such leave to return to his station, is traveling for his own pleasure and benefit and not on public business and he is not entitled to mileage. (16 Comp. Dec., 611.)

It matters not that the officer's leave was not to commence until he arrived at his home, and that the travel to his home was performed before the leave began; such travel was in no sense upon public business, and did not entitle the officer to mileage. (17 Comp. Dec., 252.)

By act of March 4, 1911 (36 Stat., 1303), it was provided that "the Auditor of the Navy Department is directed to allow mileage to officers of the Navy who have heretofore been disallowed same by reason of a decision of the Assistant Comptroller of the Treasury dated March seventeenth, nineteen hundred and ten; and to pay said allowances out of any balances of the appropriations for pay, miscellaneous, of the Navy." (The decision referred to was published in 16 Comp. Dec., 611, noted above.)

If an officer in making a journey to his home does so for his own pleasure or on private business, he is not entitled to mileage (citing *Perrimon v. U. S.*, 19 Ct. Cls., 509; *Barker v. U. S.*, 19 Ct. Cls., 291); but where an officer is discharged from treatment in a hospital, after a serious illness, and ordered by the proper authorities to proceed to his home and upon his arrival there granted three months' sick leave for the purpose of allowing him to regain his health, the travel is on public business within the meaning of the law and he is entitled to mileage for travel in the United States and actual expenses for travel out of the United States, in accordance with the act of March 3, 1901 (31 Stat., 1029). (*McCauley v. U. S.*, 50 Ct. Cls., 105.)

In *Henderson's* case, decided by the Comptroller of the Treasury October 18, 1910 (noted in *McCauley v. U. S.*, 50 Ct. Cls., 105, 112), it was said: "Whether a leave of absence is granted on account of sickness or for other cause, the officer's status is the same so far as the matter under consideration is concerned [mileage to his home]. While on 'sick leave' or 'ordinary leave' he is not on duty, nor is he subject to the orders of superior authority. His time is placed at his own disposal, as he may see fit, and he can go and come as he chooses." (But see *McCauley v. U. S.*, noted above.)

The acts of March 3, 1835 (4 Stat., 755), June 16, 1874 (18 Stat., 72), and June 30, 1876 (19 Stat., 65), provide that naval officers shall be allowed mileage "for traveling expenses when under orders." Where an officer at his home on leave of absence is ordered to a new station for special service, and then back to his home before the expiration of his leave, it is travel "when under orders" within the intent of the law and he is entitled to mileage therefor. (*Fitzpatrick v. U. S.*, 37 Ct. Cls., 332.)

It is a principle long recognized and established that the expiration of a leave of absence finds the officer, in legal contemplation, at his post; i. e., the officer must actually or constructively travel from and return to his post at his own expense. But travel for special service within the period of his leave of absence, under orders which leave the officer no discretion as to route, and require him to return to his home, does not come within the reasonable application of the principle. (*Fitzpatrick v. U. S.*, 37 Ct. Cls., 332.)

The ruling of the accounting officers that where an officer absent on leave is ordered to a new station he is entitled to mileage from the place where he happens to be to the new station, "provided the distance is not greater than that from the old station to the new station," but, conversely, if it be greater that he is entitled to mileage only from the old station to the new station, is one which in legal effect prescribes two rules of law where Congress has enacted one, viz, that naval officers shall be allowed mileage "for traveling expenses when under orders" within the United States. The application of the statute must be uniform in all cases. (*Fitzpatrick v. U. S.*, 37 Ct. Cls., 332.)

An officer ordered at the expiration of his leave of absence, to a new station for temporary service, is entitled to mileage from his home to the station; but he is not entitled to mileage for travel from the station to his regiment, if the distance be less than from his home there. (*Foster v. U. S.*, 43 Ct. Cls., 170.)

Where an officer was detached from his ship and granted leave of absence, without any direction for any further duty, the expiration of his leave left him at his home until further orders might be received; it was not his duty to return to the ship or station from which he had been detached. Orders sent him at his home, directing him upon expiration of his leave to proceed to the vessel and station from which he had been detached, for duty on such vessel, entitled him to mileage for travel performed thereon, notwithstanding that he was thereby ordered back to the same station. (17 Comp. Dec., 252.)

**Officer traveling on vessel during trial trip.**—An officer assisting the superintending naval constructor at the contractor's works was ordered to take passage on a vessel on her trial trip, and was put to no expense whatever in the performance of this duty. *Held*, that he is not entitled to mileage under the act of June 7, 1900 (31 Stat., 685). (*Williams v. U. S.*, 47 Ct. Cls., 186.)

The theory of the law in allowing mileage is to provide expenses necessarily incurred in the performance of travel (citing *Smith v. U. S.*, 26 Ct. Cls., 568; *Galm v. U. S.*, 39 Ct. Cls., 67): 8 cents per mile of travel under the statute is supposed to include very liberal expenses. In this case it does not appear that the officer was charged for any transportation, or for that matter anything else that was necessary for his comfort and convenience. (*Williams v. U. S.*, 47 Ct. Cls., 186.)

**Officer traveling home upon resigning from the Navy.**—It has been the policy of the Government to restore an officer to his residence before discharging him from its service;

and a journey for that purpose, by authority of the Secretary of the Navy, is a matter of public obligation "and on public business," within the meaning of the act of June 30, 1876 (19 Stat., 65). Where the manifest intent of an order is that a resignation shall take effect when the officer, traveling from a foreign station, arrives in the port of New York, that effect should be given it. (*Allerdice v. U. S.*, 19 Ct. Cls., 511.)

**Officers exchanging stations at their own request.**—An Army regulation, providing that "when officers are permitted to exchange stations, or are transferred at their own request from one regiment or company to another, the public will not be put to the expense of their transportation. They must bear it themselves," is just and reasonable. If A, at one station, and B, at another, desire to exchange stations or regiments or companies with each other, and prefer a request to that effect, the regulation assumes that the commanding officer may in his discretion grant it; but as no public interest is advanced by it, and it is consented to for the advantage or pleasure of the two officers, they must bear their own expense of transportation in making the exchange. (*U. S. v. Phisterer*, 94 U. S., 219, 221.)

It would be too narrow a construction of the regulation to hold that it required that two officers should be concerned in the exchange. An exchange from one station to another station by the same officer, at his own request, if found compatible with the public service, would be within the words of the regulation and apparently as much within its spirit as when the exchange was made by and between two officers. (*U. S. v. Phisterer*, 94 U. S., 219.)

Said regulation, however, does not apply to the case of an officer who, at his own request, is ordered to his home to await orders; his home is not a "station" and therefore there is no exchange of stations within the meaning of the regulation. (*U. S. v. Phisterer*, 94 U. S., 219.)

See *Kozlowski v. United States* (54 Ct. Cls., 206), decided January 13, 1919, without an opinion, in which judgment was rendered against the United States for mileage in favor of a paymaster's clerk in the Navy who was permitted to exchange stations with another paymaster's clerk. (See also file 26266-664.)

**Officer traveling by permission.**—Under the act of June 30, 1876 (19 Stat., 159), an officer was entitled to mileage if the cause of his travel was "public business." When the commander of a squadron on the high seas decides that there are no habitable quarters for certain warrant officers on the ship, and that he has no alternative save that of detaching them "with permission" to return home, he not feeling at liberty "to order" them home, because their quarters had been assigned by the department, the cause of the travel was public business. Request on the part of the inferior and permission on the part of the superior officer do not necessarily change public business into private business. (*Barker v. U. S.*, 19 Ct. Cls., 288.)

See also *Katz v. United States* (52 Ct. Cls., 32), noted below.

**Officer can not be deprived of mileage allowed by law.**—An officer, prior to appointment as paymaster's clerk in the Navy, was



"authorized," by telegram from the Secretary of the Navy, to report at Mare Island, Calif., for necessary physical examination; and "if qualified, authorized proceed at own expense to Newport, R. I., and report *Minnesota* as paymaster's clerk." On the same date the Secretary addressed a letter to the candidate, authorizing him to report to the commandant, navy yard, Mare Island, for examination, and stating that, if found qualified, "you will execute the inclosed acceptance, oath of office, and beneficiary slip, and will proceed at your own expense to Newport, R. I., reporting to the commanding officer of the *Minnesota* for the above-mentioned duty"; and directing him to forward a true copy "of this order" to the Bureau of Navigation. The candidate was found qualified, and executed the oath and acceptance at Mare Island, Calif.; and then performed travel to Newport and reported for duty on the *Minnesota*. *Held*, that he became a paymaster's clerk in the Navy at Mare Island, upon executing the oath of office, and that the travel performed by him to Newport was travel "under orders." Further *held*, that the right of an officer of the Navy, including a paymaster's clerk (in 1913), to the emoluments and allowances pertaining to his office and prescribed by statute is fixed, and the appointing power can not attach conditions to the appointment which have the effect of depriving the officer of what the law authorizes him to receive. The Secretary would have no more right to require the officer to waive his statutory travel pay than he would have had to require a waiver of part of his salary as a condition precedent to his acceptance or enjoyment of his office. (*Katzer v. U. S.*, 52 Ct. Cls., 32, citing *Glavey v. U. S.*, 182 U. S., 595, and *Andrews v. U. S.*, 240 U. S., 90. See also *Comp. Dec.*, Mar. 10, 1917, appeal No. 26679, in case of Chief Pay Clerk T. M. Schnotala, and 23 *Comp. Dec.*, 420, 421; compare *Hunt v. U. S.*, 38 Ct. Cls., 135; 5 *Comp. Dec.*, 514; and 9 *Comp. Dec.*, 5, noted under sec. 1422, R. S., "Transportation may be waived.")

In the *Katzer* case, above noted, it was further held that the Secretary's direction to the officer to proceed at his own expense did not necessarily mean that his acceptance of the office would be upon the condition that the Government would not be expected or required to bear his mileage; that under section 1566, Revised Statutes, as amended, an officer must travel at his own expense to be entitled to the statutory allowance of mileage when traveling from point to point within the United States; that in charging the officer to travel to Newport at his own expense the Secretary did what the law required as a condition to receiving any travel allowance, and it is more reasonable to ascribe that purpose to the Secretary's order than it is to adopt the view that the Secretary's direction constituted an illegal condition.

**Travel must be performed under orders.**—There is no act of Congress or Navy regulation authorizing the payment of traveling expenses of an officer while traveling in the interests of the service unless by order of an officer having the authority to make such order. (*Gove v. U. S.*, 49 Ct. Cls., 251.)

**Travel required by officer's delinquency.**—A boatswain in the Navy was absent from his vessel when she sailed; he was ordered by the commander of the fleet to take passage on a steamer at his own expense and rejoin his ship; he claimed mileage for such travel. *Held*, that claim must be denied. Mileage is a form of reimbursement, and "public business" is the foundation on which it rests. If private delinquency and not public business was the cause of the travel, the officer disbursed nothing for the Government. In such case the commanding officer could not make the Government liable for mileage by ordering the officer to rejoin his ship. (*Perrimond v. U. S.*, 19 Ct. Cls., 509.)

The right of an officer to mileage depends upon his having traveled upon public business. Ordinarily it is for his commanding officer to determine whether public business required it. If he be delinquent and ordered to travel at his own expense, he can not recover mileage. (*Hannum v. U. S.*, 19 Ct. Cls., 516.)

**Wording of order not controlling as to character of travel.**—The question being presented whether travel performed by an officer of the Navy, under orders, was on public business, *held*, that the rule is well settled that the terms of an order given for any purpose can not determine the character of the travel or the service performed, but that the question must be determined from the particular facts in each case. (*McCauley v. U. S.*, 52 Ct. Cls., 105, citing *Curry v. U. S.*, 47 Ct. Cls., 393, 398; *McGovern v. U. S.*, 36 Ct. Cls., 63; *Leach v. U. S.*, 44 Ct. Cls., 132; and *Doyle v. U. S.*, 46 Ct. Cls., 181.)

**Mileage allowed for shortest usually traveled route.**—An officer is ordinarily bound to travel by the shortest usually traveled route, but not by an extraordinary and unusual route because it is the shortest. (*Hannum v. U. S.*, 19 Ct. Cls., 516.)

Mileage should not be computed by tracing a direct route upon a chart, but by ascertaining the distance of the shortest route of ordinary travel. (*DuBose v. U. S.*, 19 Ct. Cls., 514.)

If public business was an element in an officer's circuitry of route, he should recover mileage therefor, under the act of June 30, 1876 (19 Stat., 65); if it was not, the Government is not answerable for the needless distance. (*DuBose v. U. S.*, 19 Ct. Cls., 514.)

An order requiring an officer to leave for his station before a designated date does not authorize him to travel by a circuitous route if other means offer prior to the appointed date. (*Crosby v. U. S.*, 22 Ct. Cls., 131.)

By the Revised Statutes, section 1566, as modified by the act of June 30, 1876 (19 Stat., 65), mileage is allowed to naval officers. When the choice of the route is left to the discretion of the officer, his mileage should be calculated by the shortest usually traveled route, regardless of the distance actually traveled, unless some good reason be shown for the deviation. (*Crosby v. U. S.*, 22 Ct. Cls., 131.)

**Travel performed not in conformity with orders.**—When an officer does not travel by the most direct route, or being ordered to travel by one, is compelled to travel by another,

he must bring to the accounting officers the authority or ratification of the Navy Department; neglecting to do so, he must establish his rights judicially. (*Hannum v. U. S.*, 19 Ct. Cls., 516.)

An officer at a foreign station receives an order stating that his resignation is accepted to take effect on his "arrival in the United States," and directing him to proceed to New York and report by letter the date of his arrival. The officer travels by another route, entering the United States at San Francisco; he reports the reasons for so doing, and the Secretary approves his action and orders that his resignation take effect the date of his arrival in New York. *Held*, that where a naval officer satisfies the Secretary of the Navy that the route traveled by him was proper, admitting the circumstances, ratification was as effective as antecedent authority. (*Allerdice v. U. S.*, 19 Ct. Cls., 511.)

Permission given by an admiral on a foreign station to an officer to return home by a merchantman at his own cost, instead of by a ship of war as directed by the Navy Department does not constitute the travel as upon public business. (*Pendleton v. U. S.*, 21 Ct. Cls., 5.)

Where a naval officer did not travel home in the manner directed by the department, and his action has not been ratified or approved, an informal permission by his immediate commanding officer to return in another manner does not alter the legal situation of his claim for mileage. (*Pendleton v. U. S.*, 21 Ct. Cls., 5.)

Where a naval officer under orders to return home on a ship of war technically disobeys by returning on a merchantman, he can not receive mileage, though the exercise of his discretion in consequence of the changed position of the ship of war may have been a wise one. (*Pendleton v. U. S.*, 21 Ct. Cls., 5.)

**Effect of change in law while travel being performed.**—The claim of a naval officer for his expenses when traveling under orders rests, not upon contract with the Government, but upon acts of Congress; and when part of such a journey is performed when one statute is in force, and the remainder after another statute takes effect, providing a different rate of compensation, the compensation for each part of the journey is to be at the rate provided by the statute in force when the traveling was done. *U. S. v. McDonald*, 128 U. S., 471.)

**Who are "officers" within meaning of mileage laws.**—See note above, under "act of 1874 repealed only in part by act of 1876."

A paymaster's clerk appointed by a paymaster in the Navy, although his appointment is indorsed with the approval of the Secretary of the Navy, is not an officer of the Navy within the meaning of the statute of June 30, 1876, because there is no statute authorizing the Secretary of the Navy to appoint a paymaster's clerk or requiring his approval of such an appointment;

and the regulations of the Navy in force at the time did not require any such appointment or approval for the holding of the position. Therefore a paymaster's clerk was not an officer, either appointed by the President or under the authority of any law vesting such appointment in the head of a department; and was not entitled to allowance for mileage under the act of 1876, notwithstanding that the word "officer" might be construed in a more popular sense as embracing such clerk in other connections. (*U. S. v. Mouat*, 124 U. S., 303; see also note to sec. 1386, R. S.)

A paymaster's clerk (prior to the act of Mar. 3, 1915, noted under sec. 1386, R. S.), was not an "officer of the Navy" entitled to mileage within the meaning of the act of March 3, 1901 (31 Stat., 1029). A regulation of the Navy Department vesting the appointment of such clerks in the Secretary of the Navy was not sufficient to change their status so as to bring them within the terms of said act. Such regulation was not a law of Congress within the meaning of the Constitution relating to appointment of officers, and heads of departments can not confer upon themselves authority to appoint officers of the United States by mere regulations. (*Ashton v. U. S.*, 51 Ct. Cls., 65; distinguishing *Katzer v. U. S.*, 49 Ct. Cls., 294.)

Under the act of June 24, 1910 (36 Stat., 606), a paymaster's clerk, "while holding appointment in accordance with law," was given the same pay and allowances as warrant officers of like length of service in the Navy. Under this act it is not necessary to determine whether a paymaster's clerk was an officer of the Navy within the meaning of the mileage law of March 3, 1901, as said act of 1910 prescribes what the pay and allowances or emoluments of paymaster's clerks shall be. If an act provided that clerks in the office of the Auditor for the War Department should receive the same pay and allowances as warrant officers in the Navy, it would not be necessary to inquire whether the clerks were officers of the Navy, any more than it would be supposed that because the Navy personnel act of March 3, 1899, assimilated the pay of officers in the Navy to that of officers of corresponding rank in the Army they had to become officers of the Army. It follows that, under the act of 1910, paymasters' clerks became entitled to mileage as allowed warrant officers by the act of March 3, 1901. (*Katzer v. U. S.*, 52 Ct. Cls., 32.)

A mate in the Navy is not an officer of the United States within the meaning of the decision of the Supreme Court in the case of *Mouat v. United States* (124 U. S., 303, 307), and is not entitled to mileage. Money paid such mate for mileage was received by him in violation of law and may be recovered by the United States on a counterclaim. (*Baxter v. U. S.*, 32 Ct. Cls., 75; see also note to sec. 1408, R. S.)

**Sec. 1567. [Officers serving as store-keepers on foreign stations.]**—Officers who are ordered to take charge of naval stores for foreign squadrons, in the place of naval store-keepers, shall be entitled to receive, while so employed, the shore-duty pay of their grades; and when the same is less than fifteen hundred dollars a year, they may be allowed compensation, including such shore-duty



pay, at a rate not exceeding fifteen hundred dollars a year.—(17 June, 1844, c. 107, s. 1, v. 5, pp. 700, 701.

See sections 1413 and 1438, Revised Statutes.

**Sec. 1568. [Civilians, store-keepers on foreign stations.]**—Civilians appointed as store-keepers on foreign stations shall receive compensation for such services, at a rate not exceeding fifteen hundred dollars a year.—(17 June, 1844, c. 107, s. 1, v. 5, pp. 700, 701. 3 Mar., 1847, c. 48, s. 3, v. 9, pp. 172, 173.)

See sections 1414 and 1438, Revised Statutes.

**Sec. 1569. [Pay of enlisted men. Superseded.]**

**This section provided as follows:** "Sec. 1569. The pay to be allowed to petty officers, excepting mates, and the pay and bounty upon enlistment of seamen, ordinary seamen, firemen, and coal-heavers, in the naval service, shall be fixed by the President: *Provided*, That the whole sum to be given for the whole pay aforesaid, and for the pay of officers, and for the said bounties upon enlistments shall not exceed, for any one year, the amount which may, in such year, be appropriated for such purposes."—(18 Apr., 1814, c. 84, s. 1, v. 3, p. 136. 3 Mar., 1847, c. 48, s. 4, v. 9, p. 173. 1 July, 1864, c. 201, s. 4, v. 13, p. 342. 3 Mar., 1865, c. 124, s. 2, v. 13, p. 539.)

**It was amended** by act of March 3, 1899, section 16 (30 Stat., 1008), quoted under section 1573, Revised Statutes, fixing increased pay of enlisted men for continuous service in the Navy. See decisions noted under section 1573 relating to continuous-service pay, and honorable-discharge gratuity.

**It was superseded** by the following provisions of the naval appropriation act, May 13, 1908 (35 Stat., 128):

"The pay of all active and retired enlisted men of the Navy is hereby increased ten per centum: \* \* \* all pay herein provided shall remain in force until changed by act of Congress. Nothing herein shall be construed so as to reduce the pay or allowances now authorized by law for any \* \* \* enlisted man of the active or retired lists of the Navy, and all laws inconsistent with this provision are hereby repealed."

**Other changes were made by the following statutes:**

**Hospital Corps.**—"\* \* \* the Hospital Corps of the United States Navy shall consist of the following grades and ratings: \* \* \* enlisted men classified as chief pharmacists' mates pharmacists' mates, first class; pharmacists' mates, second class; pharmacists' mates, third class; hospital apprentices, first class; and hospital apprentices, second class; such classifications in enlisted ratings to correspond respectively to the enlisted ratings, seamen branch, of chief petty officers; petty officers, first class; petty officers, second class; petty officers, third class; seamen, first class; and seamen, second class." (Act Aug. 29, 1916, 39 Stat., 572, superseding prior laws relating to the Hospital Corps.)

"\* \* \* the pay, allowances, and emoluments of the enlisted men of the Hospital Corps shall be the same as are now, or may hereafter

be, allowed for respective corresponding ratings, except the rating of turret captain of the first class in the seaman branch of the Navy: *Provided*, That the pay of the rating of the chief pharmacist's mate shall be the same as that now allowed for the existing rating of hospital steward." (Act Aug. 29, 1916, 39 Stat., 573.) It had previously been provided by act of May 13, 1908 (35 Stat., 146), that "the pay of enlisted men of the Hospital Corps shall be the same as that provided for the corresponding ratings of the seaman branch and other staff corps of the Navy"; and by act of June 17, 1898 (30 Stat., 474, 475), that "the pay of hospital stewards shall be sixty dollars a month, the pay of hospital apprentices (first class) thirty dollars a month, and the pay of hospital apprentices twenty dollars a month, with the increase on account of length of service as is now or may hereafter be allowed by law to other enlisted men in the Navy."

The effect of the act of May 13, 1908, was to allow enlisted men of the Hospital Corps the same rates of pay as allowed other enlisted men of corresponding ratings under Executive orders issued pursuant to section 1569, Revised Statutes; but this did not entitle hospital stewards to the pay of the rating of chief petty officer from the date of said act, but only from the date that such rating was conferred upon him. (17 Comp. Dec., 452. By a clause in the naval appropriation act of August 22, 1912, the Auditor for the Navy Department was directed to allow payments which had been made to hospital stewards who were granted permanent appointments as of May 13, 1908, and which payments had been disallowed pursuant to the comptroller's decision last cited.)

**Ratings changed.**—"That the designation of the ratings of coal passer be changed to fireman, third class, and that of ordinary seaman to seaman, second class, without change of pay; and that the Bureau of Navigation be authorized under rules established for the advancement of other enlisted men, to advance printers to the ratings of printer, first class, and chief printer, which ratings are hereby authorized with same pay and increases allowed to yeomen, first class, and chief yeomen, respectively: *And provided further*, That the rating of storekeeper is hereby established in the artificer branch with the following rates of pay per month: Chief petty officer, \$50; petty officer, first class, \$40; petty officer, second class, \$35; petty officer, third class, \$30, subject to such increases of pay and allowances as are

or may hereafter be authorized by law for the enlisted men of the Navy." (Act Aug. 29, 1916, 39 Stat., 575.)

*Naval Flying Corps.*—"The enlisted personnel of the Naval Flying Corps shall be distributed by the Secretary of the Navy in the various ratings as now obtain in the Navy in so far as such ratings are applicable to duties connected with aircraft." (Act Aug. 29, 1916, 39 Stat., 585, 586.)

"\* \* \* the enlisted men of the Naval Flying Corps shall receive the same pay and allowances that are now provided by law for \* \* \* enlisted men of the same grade or rank and rating in the Navy and Marine Corps detailed to duty with aircraft involving actual flying." (Act Aug. 29, 1916, 39 Stat., 583.)

"\* \* \* enlisted men, while detailed as student aviators and student airmen involving actually flying in aircraft, shall receive the same pay and allowances that are now provided by law for \* \* \* enlisted men of the same grade or rank and rating in the Navy detailed for duty with aircraft." (Act Aug. 29, 1916, 39 Stat., 584.)

"Hereafter enlisted men of the Navy or Marine Corps, while detailed for duty involving actual flying in aircraft, shall receive the pay, and the permanent additions thereto, including allowances, of their rating and service, or rank and service, as the case may be, plus fifty per centum increase thereof." (Act Mar. 3, 1915, 38 Stat., 939.)

By act of July 1, 1918 (40 Stat., 718), it was provided that the "allowances" of "enlisted men \* \* \* of the naval service shall in no case be increased by reason of the performance of aviation duty."

See note to section 1556, Revised Statutes, under "Additional pay for special duty—Aviation duty."

*Naval Academy Band.*—"The Naval Academy Band shall hereafter consist of one leader, with pay and allowances of first lieutenant in the Marine Corps; one second leader, with a base pay of \$81 per month; forty-five musicians, first class, with a base pay of \$51 per month; twenty-seven musicians, second class, with a base pay of \$44 per month; one drum major, with a base pay of \$57.20 per month; and the said leader of the band, second leader of the band, drum major of the band, and the enlisted musicians of the band shall be entitled to the same benefits in respect to pay, emoluments, and retirement arising from longevity, reenlistment, and length of service as are or may hereafter become applicable to other officers or enlisted men of the Navy." (Act July 11, 1919, 41 Stat., 152; modifying act of April 12, 1910, 36 Stat., 297.)

Under the act of April 12, 1910 (36 Stat., 297), providing for the enlistment of the Naval Academy bandmen and giving them "the same benefits in respect to pay, emoluments, and retirement arising from longevity, reenlistment, and length of service as are or may hereafter become applicable to other enlisted men of the Navy," such bandmen upon enlistment are entitled to be credited with all services as members of said band in computing continuous-service pay, such con

tinuation to be made as if actually enlisted and discharged as provided by law in effect when such service was rendered; and if citizens of the United States they are entitled to the additional pay provided by General Order No. 34 of November 28, 1906 (art. 1134, par. 7, Navy Regs., 1909), and to ten per cent increase on all permanent pay as provided by the act of May 13, 1908 (35 Stat., 128). (17 Comp. Dec., 27.)

*New ratings established.*—"The ratings of engineman, first class, engineman, second class; blacksmith, first class, blacksmith, second class; coppersmith, first class, coppersmith, second class; pattern maker, first class, pattern maker, second class; molder, first class, molder, second class; chief special mechanic and special mechanic, first class, be, and they are hereby, established in the artificer branch of the Navy with the following rates of base pay per month: Engineman, first class, \$45; engineman, second class, \$40; blacksmith, first class, \$65; blacksmith, second class, \$50; coppersmith, first class, \$65; coppersmith, second class, \$50; pattern maker, first class, \$65; pattern maker, second class, \$50; molder, first class, \$65; molder, second class, \$50; chief special mechanic, \$127; special mechanic, first class, \$80: *Provided*, That the base pay of machinists' mates, second class, and water tenders be, and it is hereby, increased from \$40 to \$45 per month: *Provided further*, That all the aforesaid rates of pay shall be subject to such increases of pay and allowances as are, or may hereafter be, authorized by law for enlisted men of the Navy: *And provided further*, That appointments or enlistments in the said ratings may be made from enlisted men in the Navy or from civil life, respectively, and the qualifications of candidates for any of said ratings shall be determined in accordance with such regulations as the Secretary of the Navy may prescribe." (Act Oct. 6, 1917, 40 Stat., 397.)

*Grades and ratings to be established by Secretary.*—"That hereafter the Secretary of the Navy is authorized, in his discretion, to establish such grades and ratings as may be necessary for the proper administration of the enlisted personnel of the Navy and Marine Corps." (Act June 4, 1920, 41 Stat., 836.)

*Increases in pay during war.*—"That commencing June first, nineteen hundred and seventeen, and continuing until not later than six months after the termination of the present war, all enlisted men of the Navy of the United States in active service whose base pay does not exceed \$21 per month shall receive an increase of \$15 per month; those whose base pay is over \$21 and does not exceed \$24 per month, an increase of \$12 per month; those whose base pay is over \$24 and less than \$45 per month, an increase of \$8 per month; and those whose base pay is \$45 or more per month, an increase of \$6 per month: *Provided*, That the increases of pay herein authorized shall not enter into the computation of continuous-service pay." (Act May 22, 1917, sec. 15, 40 Stat., 87.)

"Base pay," as that term is used in the act of May 22, 1917 (40 Stat., 87), relative to increase in pay of enlisted men during the



present war, is the fixed monthly sum to which such enlisted men are respectively entitled, stripped of all increases or additions thereto by percentages or otherwise, and accordingly does not include the ten per cent increase provided in the act of May 13, 1908 (35 Stat., 128). (23 Comp. Dec., 677.)

*War time increases temporarily continued.*—"The rates of pay prescribed in section 15 of an act \* \* \* approved May 22, 1917, are hereby made the permanent rates of pay of the enlisted men of the Navy during their present current enlistment and for those who enlist or reenlist prior to July 1, 1920, for the term of such enlistment or reenlistment." (Act July 11, 1919, 41 Stat., 140.)

The 10 per cent increase provided by the act of May 13, 1908 (35 Stat., 128), for enlisted men of the Navy, does not attach to the increase provided in section 15 of the act of May 22, 1917 (40 Stat., 87), which the act of July 11, 1919 (41 Stat., 140), makes a part of the permanent pay of a rating. (26 Comp. Dec., 143.)

*Temporary increases of 1920.*—By act of May 18, 1920, section 6 (41 Stat., 602), it was provided that "commencing January 1, 1920, the following shall be the rate of base pay for each enlisted rating: Chief petty officers with acting appointments, \$99 per month; chief petty officers with permanent appointments and mates, \$126 per month; petty officers, first class, \$84 per month; petty officers, second class, \$72 per month; petty officers, third class, \$60 per month; nonrated men, first class, \$54 per month; nonrated men, second class, \$48 per month; nonrated men, third class, \$33 per month: *Provided*, That the base pay of firemen, first class, shall be \$60 per month; firemen, second class, \$54 per month; firemen, third class, \$48 per month: *Provided further*, That the rate of base pay for each rating in the Naval Academy Band shall be as follows: Second leader, with acting appointment, \$99 per month with permanent

appointment, \$126 per month; drum major, \$84 per month; musicians, first class, \$72 per month; musicians, second class, \$60 per month: *Provided further*, That the base pay of cabin stewards and cabin cooks shall be \$84 per month; wardroom stewards and wardroom cooks, \$72 per month; steerage stewards and steerage cooks, \$72 per month; warrant officers' stewards and warrant officers' cooks, \$60 per month; mess attendants, first class, \$42 per month; mess attendants, second class, \$36 per month; mess attendants, third class, \$33 per month: \* \* \* *Provided further*, That the rates of base pay herein fixed shall not be further increased 10 per centum as authorized by an act approved May 13, 1908, nor by the temporary war increases as authorized by section 15 of the act approved May 22, 1917, as amended by the act approved July 11, 1919." By section 13 of the same act (41 Stat., 604), it was provided that the rates of bases pay therein established for enlisted men "shall remain effective until the close of the fiscal year ending June 30, 1922, unless sooner amended or repealed," and that said rates of pay "shall be the rates of pay during the current enlistment of all men in active service on the date of the approval of this act, and for those who enlist, reenlist, or extend their enlistments prior to July 1, 1922, for the term of such enlistment, reenlistment, or extended enlistment." It was further provided therein "that the increases provided in this act shall not enter into the computation of the retired pay of \* \* \* enlisted men who may be retired prior to July 1, 1922." By section 14 of the same act (41 Stat., 604), it was provided "that nothing contained in this act shall operate to reduce the pay or allowances of any \* \* \* enlisted man on the active or retired list: *Provided*, That the allowances and gratuities now authorized by existing law are not changed hereby, except as otherwise specified in this act."

1. Historical note.
2. Compilation of orders issued under section 1569.
3. Act of May 13, 1908, construed.
4. Civilians shipped on naval vessels.
5. Insular force.
6. Mates.
7. Mess attendants and cooks.
8. Additional pay for special duty, etc.
9. Longevity pay, General Order No. 34.
10. Changes in rating.
11. Commencement of pay.
12. Leave of absence.
13. Forfeiture of pay.

1. **Historical note.**—"Section 7 of the act of March 27, 1794, first authorized the President to fix the pay which should be allowed to petty officers, ordinary seamen, seamen, and marines. The act of July 1, 1797, contains the same authorization. The act of April 18, 1814, provides that the pay and bounty upon enlistment of seamen, ordinary seamen, and marines shall

14. Men transferred to Fleet Naval Reserve.
15. Men furloughed without pay.
16. Men extending enlistments.
17. Retired enlisted men.
18. Men detained after expiration of enlistment.
19. Fraudulent enlistment.
20. Mileage and transportation on discharge.
21. Clothing bounty on enlistment.
22. Deposit of savings.
23. Waiver of pay or allowances.
24. Sixty dollar bonus on discharge.
25. Attachment of pay by creditors.
26. Allotments of pay.

be fixed by the President of the United States. The act of March 3, 1847, provides that the pay of firemen and coal heavers employed in the naval service shall hereafter be fixed by the President in the same manner as is now provided by law for the pay of other petty officers, seamen, ordinary seamen, and marines." (24 Comp. Dec., 364, 367; hearings before the Com-

mittee on Naval Affairs, House of Representatives, appropriation bill subjects, 1909, 60th Cong., 1st sess., No. 97, p. 907.)

**2. Compilation of orders issued under section 1569.**—Prior to May 13, 1908, the pay of enlisted men of the Navy was provided for under section 1569, Revised Statutes. The following is a compilation of orders issued pursuant to said section, from November 7, 1883, to February 7, 1908, fixing the pay of enlisted men of the United States Navy:

GENERAL ORDER }  
No. 310 } NOVEMBER 7, 1883.

The following Executive order is published for the information and guidance of all concerned.

EDWARD T. NICHOLS,  
*Acting Secretary of the Navy.*

EXECUTIVE MANSION,  
*Washington, D. C., November 5, 1883.*

The pay of the petty officers and enlisted men of the United States Navy on and after the 1st of January, 1884, will be as follows:

Rating.	Monthly pay.
Seamen gunners.....	\$34.00
Chief boatswains' mates.....	35.00
Boatswains' mates.....	30.00
Chief gunners' mates.....	35.00
Gunners' mates.....	30.00
Chief quartermaster.....	35.00
Quartermasters.....	30.00
Cockswains.....	30.00
Captains of forecastle.....	30.00
Captains of tops.....	30.00
Captains of afterguard.....	27.00
Quarter gunners.....	27.00
Carpenters' mates [see G. O. 311].....	40.90
Sailmakers' mates.....	40.00
Machinists, first class.....	70.00
Machinists, second class.....	60.00
Machinists, third class.....	50.00
Blacksmiths.....	60.00
Armors.....	45.00
Captains of hold.....	30.00
Ship's cooks.....	35.00
Ship's corporals.....	28.00
Ship's lamplighters.....	25.00
Jack-of-the-dust.....	22.00
Carpenter and calkers.....	25.00
Baymen.....	18.00
Seamen.....	24.00
Ordinary seamen.....	19.00
Landsmen.....	16.00
Boys.....	10.00
Ordinary seamen, second class (apprentices).....	15.00
Apprentices, first class.....	11.00
Apprentices, second class.....	10.00
Apprentices, third class.....	9.00
Firemen, first class.....	35.00
Firemen, second class.....	30.00
Coal heavers.....	22.00
Apothecaries.....	60.00
Yeomen, paymasters'.....	60.00
Yeomen, equipment.....	60.00
Yeomen, engineers'.....	60.00
Master-at-arms.....	65.00
Schoolmasters.....	45.00
Ship's writers.....	45.00
Ship's printers.....	40.00
Ship's tailors.....	30.00
Ship's barbers.....	30.00
Painters.....	30.00
Cabin stewards.....	37.00
Cabin cooks.....	32.00
Wardroom stewards.....	37.00
Wardroom cooks [see G. O. 311].....	37.00
Steerage stewards.....	25.00
Steerage cooks.....	22.00
Warrant officers' steward.....	24.00

Rating.	Monthly pay.
Warrant officers' cooks.....	\$20.00
Steward to commanders in chief.....	45.00
Cooks to commanders in chief.....	40.00
Cockswains to commanders in chief.....	35.00
Steward to commandants, navy yards.....	45.00
Cooks to commandants, navy yards.....	40.00
Cockswains to commandants, navy yards.....	35.00
Masters of bands.....	52.00
Musicians, first class.....	32.00
Musicians, second class.....	30.00
Buglers.....	33.00
Electricians.....	50.00

CHESTER A. ARTHUR.

GENERAL ORDER }  
No. 311. } NOVEMBER 15, 1883.

The following corrections of typographical errors in the Executive order of November 5, 1883, promulgated in General Order No. 310, of November 7, 1883, are hereby made, viz: The pay of carpenters' mates will read \$40 instead of \$40.90, and the pay of wardroom cooks will read \$32 instead of \$37.

EDWARD T. NICHOLS,  
*Acting Secretary of the Navy.*

GENERAL ORDER }  
No. 312. } NOVEMBER 24, 1883.

On and after January 1, 1884, General Order No. 208, of April 1, 1876, will be superseded, and the pay of the crews of receiving ships will be regulated by General Order No. 310, of the Navy Department, dated November 7, 1883.

WM. E. CHANDLER,  
*Secretary of the Navy.*

GENERAL ORDER }  
No. 313. } NOVEMBER 24, 1883.

The rates of finisher, boiler maker, engineer's blacksmith, armorer's mate, cooper, ship's baker, and second-class painter being abolished by Executive order dated November 5, 1883, and promulgated in General Order No. 310, of the Navy Department, dated November 7, 1883, men holding those ratings in the service on December 31, 1883, will be disposed of as follows, viz: Finishers serving on seagoing or other vessels to be rated first-class machinists; those available on receiving ships and in hospital to be rated second-class machinists. Boiler makers serving on seagoing or other vessels to be rated second-class machinists; those available on receiving ships and in hospitals to be rated third-class machinists. Engineer's blacksmiths and ship's blacksmiths serving on seagoing or other vessels to stand a competitive examination as to their qualifications to perform general blacksmithing work, and those found most capable to be retained as blacksmiths; all others to be discharged from the service, giving such as are entitled thereto the same benefits they would receive had they served out the full term of enlistment. Armorer's mates, coopers, ship's bakers, and second-class painters to be disrated to landsmen,



or discharged from the service should they so elect.

The rates of seamen, E. F., and ordinary seamen, E. F., are also abolished, and on and after January 1, 1884, men for the engineer's force will be enlisted as first and second class firemen and coal heavers. Seamen, E. F., and ordinary seamen, E. F., in the service on that date will be rated first and second class firemen, respectively. [See G. O. 319.]

All men discharged by this order are to be sent to the United States by the first public opportunity, if serving abroad, unless they desire their discharge on the station.

WM. E. CHANDLER,  
*Secretary of the Navy.*

GENERAL ORDER } JANUARY 4, 1884.  
No. 315. }

The rating of electrician, the pay of which was fixed by Executive order of November 5, 1883, promulgated in General Order No. 310, dated November 7, 1883, is hereby abolished.

WM. E. CHANDLER,  
*Secretary of the Navy.*

GENERAL ORDER } MAY 19, 1884.  
No. 319. }

The closing sentence in paragraph 2 of General Order No. 313, of November 24, 1883, should read as follows: Seamen, E. F.; ordinary seamen, E. F.; and landsmen serving in the engineer's force, in the service on that date, will be rated first and second class firemen and coal heavers, respectively.

WM. E. CHANDLER,  
*Secretary of the Navy.*

GENERAL ORDER } NOVEMBER 21, 1884.  
No. 327. }

From and after January 1, 1885, the form of honorable discharge from the naval service, authorized by section 1427, Revised Statutes of the United States, will be the "honorable-discharge and continuous-service certificate."

All men (except officers' cooks, stewards, and servants enlisted for special service) now serving under enlistments for three years, or who may hereafter enlist for that period, shall receive an "honorable-discharge and continuous-service certificate" at the expiration of their terms of enlistment, upon the recommendation of their commanding officers.

Any man holding an "honorable-discharge and continuous-service certificate" who reenlists for three years, within three months from the date of his last discharge, shall receive an increase of \$1 per month to the pay prescribed for the rating in which he serves, for each consecutive reenlistment, in addition to the "honorable-discharge money."

Any man holding an "honorable-discharge and continuous-service certificate" who fails to reenlist within three months from date of last discharge will derive no further advantages therefrom.

The department directs that the records of conduct and professional qualifications on the

"enlistment records" shall be a verification of the recommendations for "honorable-discharge and continuous-service certificate," and hereafter only those shall be recommended who obtain, during their terms of enlistment, a general average of 4.

In order that commanding officers of vessels upon which men complete their terms of enlistment shall be informed as to the previous merit of said men, the original "Enlistment record" (Form 12), which accompanies an enlisted man upon his first transfer, will thereafter be carefully preserved and accompany him upon all subsequent transfers, until his term of enlistment has been completed. This form has been amended so as to show the record of conduct as averaged by the commanding officer of the vessel for the period for which the man has served under his command. The final averages will be made by the officer under whom the man is serving at the time his enlistment expires when about to be discharged. These "enlistment records" must be forwarded to the Bureau of Equipment and Recruiting.

In addition to the above requirements, enlisted men must serve at least two years and nine months of their terms in order to receive an "honorable-discharge and continuous-service certificate," except in extraordinary cases, which will be provided for by the department as they may occur.

When any man holding an "honorable-discharge and continuous-service certificate" shall fail to receive a recommendation for its renewal upon the expiration of his term of enlistment, the words "Not entitled to honorable discharge" shall be written on the line below the last entry. Men so discharged will receive no further pecuniary benefit from their "honorable-discharge and continuous-service certificate," and entries of reenlistment or subsequent service must not be noted thereon.

"Good-conduct badges" are special distinctions for fidelity, zeal, and obedience, and will not be granted for the first term of enlistment under "continuous service." At the expiration of subsequent reenlistments for three years, within three months from date of discharge, men who hold "honorable-discharge and continuous-service certificates," have obtained a general average of 4.5 on their conduct records, and are recommended by their commanding officers, will be entitled to and receive said badges. The first badge will be a medal, as hitherto. Subsequent badges to be clasps, with the name of the vessel from which given engraved thereon, to be worn on ribbon above medal. When any enlisted man shall have received three such badges, under consecutive reenlistments as above, he shall be enlisted as a petty officer in the rating in which he is best qualified to serve, and shall continue to hold a petty officer's rating during subsequent continuous reenlistments, and shall not be reduced to a lower rating except by sentence of court-martial.

Paragraphs 18 and 20, page 100, and paragraph 22, page 101, United States Navy Regulations, are hereby annulled.

WM. E. CHANDLER,  
*Secretary of the Navy.*

U. S. NAVY REGULATION }  
CIRCULAR NO. 41. }

JANUARY 8, 1885.

The following classification of petty officers and enlisted men in the Navy and of noncommissioned officers, musicians, and privates in the Marine Corps is hereby adopted.

WM. E. CHANDLER,  
*Secretary of the Navy.*

*Classification.*

## PETTY OFFICERS, FIRST CLASS.

Seaman class.	Special class.	Artificer class.	Marines.
Chief boatswains' mates. Chief quartermasters. Chief gunners' mates.	Master-at-arms. Equipment yeomen. Apothecaries. Paymaster's yeomen. Engineer's yeomen. Ships' writers. Schoolmasters. Bandmasters.	Machinists.	Sergeants major. First sergeants.

## PETTY OFFICERS, SECOND CLASS.

Boatswains' mates. Quartermasters. Gunners' mates. Coxswains to commander in chief.	Ships' corporals. Ships' cooks. Chief musicians.	Boiler makers. Armors. Carpenters' mates. Blacksmiths. Sailmaker's mates. Water tenders.	Sergeants.
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## PETTY OFFICERS, THIRD CLASS.

Captains of fore-castle. Captains of maintop. Captains of foretop. Captains of mizzen top. Captains of after guard. Coxswains. Quarter gunners. Seamen gunners.	Captains of hold.	Printers. Painters. Oilers.	Corporals.
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## SEAMEN, FIRST CLASS.

Seamen. Seamen, apprentice, first class.	Lamplighters. Jacks-of-the-dust. Buglers. Musicians, first class. Tailors. Barbers.	Firemen, first class. Carpenters. Calkers.	Musicians. Orderlies.
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## SEAMEN, SECOND CLASS.

Ordinary seamen. Seamen, apprentice, second class.	Baymen. Musicians.	Firemen, second class.	Privates.
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## SEAMEN, THIRD CLASS.

Seaman class.	Special class.	Artificer class.	Marines.
Landsmen. Apprentices, first class. Apprentices, second class. Apprentices, third class. Boys.		Coal heavers.	

Messmen, stewards, cooks, and attendants.

GENERAL ORDER }  
No. 330. } DECEMBER 31, 1884.

The following Executive order is published for the information and guidance of all concerned.

WM. E. CHANDLER,  
*Secretary of the Navy.*

EXECUTIVE MANSION,  
December 31, 1884.

The Executive order of November 4, 1883, is hereby modified as follows:

The ratings of first, second, and third class machinists are abolished, and hereafter there will be no rating of machinist in the Navy, with the pay of \$70 a month.

New ratings are hereby established as follows:

Rating.	Monthly pay.
Boiler maker.....	\$60.00
Water tenders.....	38.00
Oilers.....	36.00
Chief musician.....	36.00

CHESTER A. ARTHUR.

GENERAL ORDER }  
No. 341. }

NAVY DEPARTMENT,  
Washington, January 1, 1886.

General Orders Nos. 272 and 281, relating to seamen gunners, are hereby modified as follows:

Hereafter seamen gunners will not be classed with petty officers, but with seamen, first class, and all seamen who pass through the Ordnance School of Instruction at Newport and Washington will be rated seamen gunners, upon the completion of the course, and can not be reduced to a lower rating except by sentence of a court-martial.

The words "qualified as seamen gunner" will be written in red ink across the face of the continuous-service certificate of each person qualified as above, and signed by the inspector of ordnance of the stations at Newport and Washington when the course is completed, with the date of its completion.

The same indorsement will be placed on the continuous-service certificate of any enlisted petty officer who may pass through the course.

All petty officers of the line, armorers, machinists and lamplighters employed in connection with electrical plant will hereafter be selected exclusively from seamen gunners when available.



Men having qualified as seamen gunners can reenlist as such, even if not enlisted under continuous-service certificate, on giving satisfactory evidence that they have so qualified.

The pay of seamen gunners hereafter will be \$26 per month.

WILLIAM C. WHITNEY,  
*Secretary of the Navy.*

GENERAL ORDER }  
No. 346. }

APRIL 20, 1886.

Hereafter enlisted men of the Navy not under instruction at Newport or Washington when employed in submarine diving will receive extra compensation at the rate of \$1 for each hour so employed under water. Breathing time and other time necessary out of water will not be deducted if not exceeding 15 minutes, or one-fifth of the whole time immersed.

Such compensation is to be charged to the bureau for which the service is performed.

WM. C. WHITNEY,  
*Secretary of the Navy.*

GENERAL ORDER }  
No. 409. }

NAVY DEPARTMENT,  
Washington, February 25, 1893.

The following Executive order is published for the information and guidance of all persons concerned.

B. F. TRACY,  
*Secretary of the Navy.*

EXECUTIVE MANSION,  
Washington, D. C., February 25, 1893.

On and after the 1st day of April, 1893, the pay of the petty officers and other enlisted men of the Navy shall be as follows, but this order shall not reduce the pay or rating of any enlisted man during his present enlistment below the rate or pay at which he was enlisted or in which he is now serving, unless he shall be reduced in rating as provided by law or regulations:

Rating.	Monthly pay.
Chief masters-at-arms.....	\$65.00
Chief boatswains' mates.....	50.00
Chief gunners' mates.....	50.00
Chief quartermasters.....	50.00
Masters-at-arms, first class.....	40.00
Boatswains' mates, first class.....	40.00
Gunners' mates, first class.....	40.00
Quartermasters, first class.....	40.00
Schoolmasters.....	40.00
Masters-at-arms, second class.....	35.00
Boatswains' mates, second class.....	35.00
Gunners' mates, second class.....	35.00
Quartermasters, second class.....	35.00
Masters-at-arms, third class.....	30.00
Coxswains <sup>1</sup> .....	30.00
Gunners' mates, third class.....	30.00
Quartermasters, third class.....	30.00
Seamen gunners.....	25.00
Seamen <sup>2</sup> .....	24.00
Apprentices, first class.....	21.00
Ordinary seamen.....	19.00
Apprentices, second class.....	15.00
Landsmen <sup>3</sup> .....	16.00
Apprentices, third class.....	9.00
Machinists.....	70.00
Chief carpenters' mates.....	50.00
Boiler makers.....	60.00
Coppersmiths.....	50.00

Rating.	Monthly pay.
Blacksmiths.....	\$50.00
Carpenters' mates, first class.....	40.00
Plumbers and fitters.....	45.00
Water tenders.....	38.00
Sailmakers' mates.....	40.00
Oilers.....	36.00
Carpenters' mates, second class.....	35.00
Printers.....	35.00
Painters.....	30.00
Carpenters' mates, third class.....	30.00
Firemen, first class.....	35.00
Firemen, second class.....	30.00
Shipwrights.....	25.00
Sailmakers.....	25.00
Coal passers.....	22.00
Bandmasters.....	52.00
Yeomen.....	60.00
Apothecaries.....	60.00
Writers, first class.....	35.00
First musicians.....	36.00
Writers, second class.....	30.00
Writers, third class.....	25.00
Musicians, first class.....	32.00
Musicians, second class.....	30.00
Buglers.....	30.00
Baymen.....	18.00
Ships' cooks, first class.....	35.00
Ships' cooks, second class.....	30.00
Ships' cooks, third class.....	25.00
Ships' cooks, fourth class.....	20.00
Stewards to commanders in chief.....	45.00
Stewards to commanders.....	45.00
Cabin stewards.....	37.00
Wardroom stewards.....	37.00
Steerage stewards.....	25.00
Warrant officers' stewards.....	24.00
Cooks to commanders in chief.....	40.00
Cooks to commanders.....	40.00
Cabin cooks.....	32.00
Wardroom cooks.....	32.00
Steerage cooks.....	22.00
Warrant officers' cooks.....	20.00
Mess attendants.....	16.00

<sup>1</sup> Coxswains detailed as coxswains of steam launches or as coxswains to commanders in chief shall receive \$5 per month in addition to their pay.

<sup>2</sup> Seamen in charge of holds shall receive \$5 per month in addition to their pay.

<sup>3</sup> Landsmen assigned to duty as jacks-of-the-dust or as lamp-lighters shall receive \$5 per month in addition to their pay.

BENJ. HARRISON.

GENERAL ORDER }  
No. 448. }

NAVY DEPARTMENT,  
Washington, D. C., June 17, 1895.

The following Executive order is published for the information and guidance of all persons concerned.

H. A. HERBERT, *Secretary.*

EXECUTIVE MANSION,  
Washington, D. C., June 15, 1895.

On and after July 1, 1895, the pay of machinists, water tenders, oilers, and writers in the Navy shall be as follows, but this order shall not reduce the pay of any enlisted man during his present enlistment below the pay at which he was enlisted, or which he is now receiving:

	Per month.
Chief machinists.....	\$70.00
Machinists, first class.....	55.00
Machinists, second class.....	40.00
Water tenders.....	40.00
Oilers.....	37.00
Writers, first class.....	40.00
Writers, second class.....	35.00
Writers, third class.....	30.00

GROVER CLEVELAND.

GENERAL ORDER }  
No. 467.

NAVY DEPARTMENT,  
Washington, D. C., September 19, 1896.

The following Executive order is published for the information of all persons concerned.

W. McADOO, *Acting Secretary*.

EXECUTIVE MANSION,  
Washington, D. C., September 16, 1896.

On and after October 1, 1896, the pay of yeomen in the Navy shall be as follows, but this order shall not reduce the pay of any enlisted men during his present enlistment below the pay at which he was enlisted, or which he is now receiving:

	Per month.
Chief yeomen.....	\$60.00
Yeomen, first class.....	40.00
Yeomen, second class.....	35.00
Yeomen, third class.....	30.00

GROVER CLEVELAND.

GENERAL ORDER }  
No. 486.

NAVY DEPARTMENT,  
Washington, April 8, 1898.

The following Executive order is published for the information and guidance of all persons concerned.

JOHN D. LONG, *Secretary*.

EXECUTIVE MANSION,  
Washington, April 8, 1898.

On and after this date, the pay of electricians in the Navy shall be as follows, but this order shall not reduce the pay of any enlisted man during his present enlistment below the pay at which he was enlisted, or which he is now receiving:

	Per month.
Chief electricians.....	\$50.00
Electricians, first class.....	40.00
Electricians, second class.....	35.00

WILLIAM MCKINLEY.

GENERAL ORDER }  
No. 520.

NAVY DEPARTMENT,  
Washington, June 30, 1899.

The following instructions are issued governing (1) qualifications for instruction and (2) the detail, (3) the classification and (4) the rating of gun captains, and (5) the award of gunnery prizes to men holding gun-captain's certificates.

1. *Qualification*.—(a) Men who have attained special proficiency as marksmen with great guns or small arms, or whose superior intelligence fits them to acquire such proficiency, and who, by force of character and ability to command, are suitable to fill the ratings of gun captains. (b) No person shall be detailed who is not a citizen of the United States.

2. Details for instruction will be made from the following: (a) Apprentices, first class, in the last year of their enlistments having not less than six months to serve. (b) Seamen. (c) Men and apprentices holding either acting or permanent appointments as coxswains or quartermasters, third class.

3. *Classification*.—Upon the completion of the course of instruction on board the gunnery training ship, the percentage attained by each man shall be reported to the Bureau of Navigation, which will issue gun-captain's certificates in three classes, namely:

"A" certificate, to men who have attained a proficiency of 90 per cent and over.

"B" certificate, to men who have attained a proficiency of 75 to 90 per cent.

"C" certificate, to men who have attained a proficiency of 60 to 75 per cent.

Certificates will not be issued to men whose proficiency is less than 60 per cent.

4. *Rating*.—Apprentices, first class, and seamen holding gun-captain's certificates shall be advanced only through the ratings of coxswain and quartermaster, third class, and must have not less than a 4 in signaling.

No man shall be given an acting appointment as a gun captain, second class, who does not hold a gun-captain's certificate, and petty officers, third class, holding gun-captain's certificates and gun captains, second and first classes, shall not be promoted or transferred into any other than the gun-captain branch.

All appointments and advancements of gun captains and men holding gun-captain's certificates shall be in accordance with the Navy Regulations and the instructions governing appointments and advancements of petty officers.

5. *Award of prizes*.—Commanding officers are directed to award to men holding gun-captain's certificates gunnery prizes as follows:

To men holding "A" certificates, \$3 per month.

To men holding "B" certificates, \$2 per month.

To men holding "C" certificates, \$1 per month.

The holder of a gun-captain's certificate shall be paid the award monthly, or proportionately for a fractional part of any month (computed in the same manner as pay, except that he shall not be credited with this award for time out of service between enlistments), from date of completion of course of instruction; and it shall continue throughout his current enlistment and each succeeding reenlistment under honorable discharge, if within four months, until he shall be promoted to gun captain, second class, on which date the award shall cease. The award shall be paid by the pay officers, on public bills, under the appropriation: "Gunnery exercises—Bureau of Navigation."

6. Gun captains, having been trained as leading men, may be assigned, class for class, to fill any vacancy in the complement of a ship in the seaman branch, excepting vacancies for gunner's mates, but their ratings shall not be changed.

JOHN D. LONG, *Secretary*.



GENERAL ORDER }  
No. 532.NAVY DEPARTMENT,  
Washington, November 24, 1899.

The department publishes for the information of the service the following Executive order.

JOHN D. LONG, *Secretary*.EXECUTIVE MANSION,  
Washington, D. C., November 4, 1899.

On and after November 4, 1899, petty officers of the Navy, performing duty which deprives them of quarters, and their rations or commutation thereof, shall receive \$9 per month in addition to the pay of their rating.

WILLIAM MCKINLEY.

GENERAL ORDER }  
No. 552.NAVY DEPARTMENT,  
Washington, June 28, 1900.

The following Executive order is published for the information and guidance of all persons concerned.

JOHN D. LONG, *Secretary*.EXECUTIVE MANSION,  
Washington, June 27, 1900.

On and after the 1st day of July, 1900, the classification and pay of the rating of electricians shall be as follows, but this order shall not reduce the pay of any enlisted man during his present enlistment below the pay at which he was enlisted, or which he is now receiving:

Per month.

Electrician, third class.....	\$30.00
Electrician, second class.....	40.00
Electrician, first class.....	50.00
Chief electrician.....	60.00

WILLIAM MCKINLEY.

GENERAL ORDER }  
No. 20.NAVY DEPARTMENT,  
Washington, January 1, 1901.

By authority of the President the department publishes the rates and pay of the enlisted men of the Navy as follows, but this order shall not reduce the pay or rating of any enlisted man during his present enlistment below the rate or pay at which he was enlisted or in which he is now serving, unless he shall be reduced in rating as provided by law or regulation.

JOHN D. LONG, *Secretary*.*Executive order, Jan. 1, 1901.*

Rating.	Monthly pay.
Chief master-at-arms.....	\$65.00
Chief boatswains' mates.....	50.00
Chief gunners' mates.....	50.00
Chief gun captains.....	50.00
Chief quartermasters.....	50.00
Master-at-arms, first class.....	40.00
Boatswains' mates, first class.....	40.00
Gunners' mates, first class.....	40.00
Gun captains, first class.....	40.00

Rating.	Monthly pay.
Quartermasters, first class.....	\$40.00
Master-at-arms, second class.....	35.00
Boatswains' mates, second class.....	35.00
Gunners' mates, second class.....	35.00
Gun captains, second class.....	35.00
Quartermasters, second class.....	35.00
Master-at-arms, third class.....	30.00
Coxswains.....	30.00
Gunners' mates, third class.....	30.00
Quartermasters, third class.....	30.00
Seamen gunners.....	26.00
Seamen.....	24.00
Apprentices, first class.....	21.00
Ordinary seamen.....	19.00
Apprentices, second class.....	15.00
Landsmen.....	16.00
Apprentices, third class.....	9.00
Chief machinists.....	70.00
Chief electricians.....	60.00
Chief carpenters' mates.....	50.00
Boilermakers.....	60.00
Machinists, first class.....	55.00
Electricians, first class.....	50.00
Coopersmiths.....	50.00
Blacksmiths.....	50.00
Plumbers and fitters.....	45.00
Sailmakers' mates.....	40.00
Carpenters' mates, first class.....	40.00
Water tenders.....	40.00
Machinists, second class.....	40.00
Electricians, second class.....	40.00
Oilers.....	37.00
Carpenters' mates, second class.....	35.00
Printers.....	35.00
Carpenters' mates, third class.....	30.00
Electricians, third class.....	30.00
Painters.....	30.00
Firemen, first class.....	35.00
Firemen, second class.....	30.00
Shipwrights.....	25.00
Coal passers.....	22.00
Chief yeomen.....	60.00
Hospital stewards.....	60.00
Bandmasters.....	52.00
Yeomen, first class.....	40.00
First musicians.....	36.00
Yeoman, second class.....	35.00
Yeomen, third class.....	30.00
Hospital apprentices, first class.....	30.00
Musicians, first class.....	32.00
Musicians, second class.....	30.00
Buglars.....	30.00
Hospital apprentices.....	20.00
Stewards to commanders in chief.....	45.00
Cooks to commanders in chief.....	40.00
Stewards to commandants.....	45.00
Cooks to commandants.....	40.00
Cabin stewards.....	37.00
Cabin cooks.....	32.00
Wardroom stewards.....	37.00
Wardroom cooks.....	32.00
Steerage stewards.....	25.00
Steerage cooks.....	22.00
Warrant officers' stewards.....	24.00
Warrant officers' cooks.....	20.00
Ships' cooks, first class.....	35.00
Ships' cooks, second class.....	30.00
Ships' cooks, third class.....	25.00
Ships' cooks, fourth class.....	20.00
Mess attendants.....	16.00

1. Petty officers of the Navy performing duty which deprives them of quarters and their rations, or commutation thereof, shall receive \$9 per month in addition to the pay of their rating.

2. All enlisted men of the Navy shall receive \$5 per month, in addition to their pay, while serving on board of submarine vessels of the Navy.

3. Coxswains, detailed as coxswains of boats propelled by machinery, or as coxswains to commanders in chief, shall receive \$5 per month in addition to their pay.

4. Seamen in charge of holds shall receive \$5 per month in addition to their pay.

5. Landsmen assigned to duty as jacks-of-the-dust or as lamplighters shall receive \$5 per month in addition to their pay.

6. Any man who has received an honorable discharge from his last term of enlistment, or who has received a recommendation for reenlistment upon the expiration of his last term of service of not less than three years, who reenlists for a term of four years within four months from the date of his discharge, shall receive an increase of \$1.36 per month to the pay prescribed for the rating in which he serves, for each consecutive reenlistment.

7. Twenty cents per month is deducted from the pay due each officer, seaman, and marine in the Navy, to be applied to the fund for naval hospitals.

8. Mess attendants serving in the Navy who are honorably discharged from service shall receive \$20 as monthly pay of their rating during first reenlistment, and \$24 as monthly pay during second reenlistment, and during each continuous reenlistment thereafter under honorable discharge, provided that service prior to January 1, 1898, shall not be computed in determining increase of pay, and provided further, that the monthly pay of the rating of mess attendants shall not exceed \$24 per month, exclusive of additional compensation for continuous service.

WILLIAM MCKINLEY.

GENERAL ORDER }  
No. 40. }

NAVY DEPARTMENT,  
Washington, April 8, 1901.

The department publishes for the information and guidance of the service the following Executive order, authorizing the insular force, United States Navy, and designating the ratings and rates of pay therein;

EXECUTIVE MANSION, April 5, 1901.

The Secretary of the Navy is authorized to enlist in the insular force, United States Navy, which is hereby established, not to exceed 500 Filipinos in the following ratings and at the rates of pay indicated;

Insular force, United States Navy.

Rates.	Monthly pay.
Native coxswains.....	\$15.00
Native seamen.....	12.00
Native ordinary seamen.....	10.00
Native machinists, first class.....	28.00
Native machinists, second class.....	20.00
Native firemen, first class.....	18.00
Native firemen, second class.....	15.00
Native coal passers.....	11.00
Native stewards.....	15.00
Native cooks.....	13.00
Native mess attendants.....	8.00

WILLIAM MCKINLEY.  
JOHN D. LONG, Secretary.

GENERAL ORDER }  
No. 61. }

NAVY DEPARTMENT,  
Washington, October 17, 1901.

The following Executive order is published for the information and guidance of the service:

On and after January 1, 1902, the following ratings and pay per month are established for the petty officers and other enlisted men of the commissary branch of the United States Navy:

Rating.	Monthly pay.
Chief commissary steward.....	\$70.00
Commissary steward.....	60.00
Ship's cook, first class.....	55.00
Ship's cook, second class.....	40.00
Ship's cook, third class.....	30.00
Ship's cook, fourth class.....	25.00
Baker, first class.....	45.00
Baker, second class.....	35.00

Landsmen detailed as crew messmen shall, while so acting, except when assigned as reliefs during the temporary absence of the regular crew messmen, receive extra compensation at the rate of \$5 per month.

(Signed) THEODORE ROOSEVELT.

JOHN D. LONG, Secretary.

GENERAL ORDER }  
No. 69. }

NAVY DEPARTMENT,  
Washington, December 2, 1901.

The following Executive order is published for the information and guidance of the naval service:

EXECUTIVE ORDER.

WHITE HOUSE, November 26, 1901.

From and after January 1, 1902, all enlisted men of the Navy will be allowed 75 cents per month in addition to the pay of their ratings for each good conduct medal, pin, or bar issued for services terminating after December 31, 1901.

THEODORE ROOSEVELT.

JOHN D. LONG, Secretary.

GENERAL ORDER }  
No. 70. }

NAVY DEPARTMENT,  
Washington, December 5, 1901.

The following Executive order is published for the information and guidance of the naval service:

WHITE HOUSE, December 3, 1901.

From and after January 1, 1902, each enlisted man of the Navy who holds a certificate as a graduate from the Petty Officers' School of Instruction, Naval Training Station, Newport, R. I., shall receive \$2 per month in addition to the pay of his rating.

THEODORE ROOSEVELT.  
JOHN D. LONG, Secretary.



GENERAL ORDER }  
No. 73.

NAVY DEPARTMENT,  
Washington, December 11, 1901.

The department publishes for the information and guidance of the service the following Executive order:

WHITE HOUSE, December 9, 1901.

From and after January 1, 1902, the classification and monthly pay of mess attendants in the U. S. Navy shall be as follows:

Mess attendants, first class. ....\$24.00  
Mess attendants, second class. ....20.00  
Mess attendants, third class. ....16.00

T. ROOSEVELT.

JOHN D. LONG, *Secretary*.

GENERAL ORDER }  
No. 76.

NAVY DEPARTMENT,  
Washington, December 26, 1901.

Paragraph 8 of General Order No. 20, dated January 1, 1901, is hereby rescinded, and pay officers are authorized to check all amounts which have been credited to mess attendants in excess of \$16, in compliance with the provisions of that paragraph. This order does not apply to the \$1.36 per month allowed by law for consecutive reenlistments.

All mess attendants now in the service shall be rated mess attendants, third class, on January 1, 1902.

JOHN D. LONG, *Secretary*.

GENERAL ORDER }  
No. 79.

NAVY DEPARTMENT,  
Washington, January 7, 1902.

The following Executive order, modifying General Order No. 61 of October 17, 1901, is published for the information and guidance of the service:

WHITE HOUSE,  
Washington, January 7, 1902.

Executive order, dated October 15, 1901, establishing ratings and pay for enlisted men of the commissary branch of the U. S. Navy, is so far modified as to change the first word in the footnote from "Landsmen" to "Enlisted men."

THEODORE ROOSEVELT.

JOHN D. LONG, *Secretary*.

GENERAL ORDER }  
No. 91.

NAVY DEPARTMENT,  
Washington, June 25, 1902.

The following Executive order, affecting General Orders Nos. 69 and 70, is published

for the information and guidance of the service:

WHITE HOUSE, June 24, 1902.

Executive order of November 26, 1901, relative to additional compensation for enlisted men of the Navy holding good-conduct medals, pins, or bars, and Executive order of December 3, 1901, relative to additional compensation for enlisted men holding certificates as graduates from the petty officers' School of Instruction, are hereby revoked, to take effect July 1, 1902, from which date the following substitutes shall take effect:

Each enlisted man of the Navy shall receive 75 cents per month, in addition to the pay of his rating, for each good-conduct medal, pin, or bar which he may heretofore have been, or shall hereafter be, awarded.

Each petty officer holding a certificate of graduation from the Petty Officers' School of Instruction, or as gun captain, or both, shall receive \$2 a month in addition to the pay of his rating.

THEODORE ROOSEVELT.

WILLIAM H. MOODY, *Secretary*.

GENERAL ORDER }  
No. 94.

NAVY DEPARTMENT,  
Washington, July 8, 1902.

The Department publishes for the guidance of the service the information that the naval appropriation bill, approved July 1, 1902, for the fiscal year 1903, provides for outfits at \$45 each, for naval apprentices, hospital apprentices, landsmen under training for seamen, and all other enlisted men of the Navy, on first enlistment.

WILLIAM H. MOODY, *Secretary*.

GENERAL ORDER }  
No. 101.

NAVY DEPARTMENT,  
Washington, August 4, 1902.

The following Executive order, supplementing General Order No. 91, dated June 25, 1902, is published for the information and guidance of the service:

WHITE HOUSE, August 1, 1902.

From and after July 1, 1902, each enlisted man that has been rated seaman gunner prior to April 1, 1902, or that holds a certificate of graduation from the petty officers' school, seaman gunner class, shall receive \$2 per month in addition to the pay of his rating during current and subsequent enlistments.

THEODORE ROOSEVELT.

CHAS. H. DARLING,  
*Acting Secretary*.

GENERAL ORDER }  
No. 102. }

NAVY DEPARTMENT,  
Washington, August 6, 1902.

1. The following Executive order is published for the information and guidance of the service:

WHITE HOUSE,  
Washington, D. C., August 4, 1902.

From and after this date the following ratings and rates of pay for same are established in the naval service:

Ship fitter, first class, \$55.

Ship fitter, second class, \$40.

Men enlisted in these ratings to be petty officers, first or second class, respectively.

THEODORE ROOSEVELT.

2. The complements of all vessels of the first and second rate are amended so as to include one ship fitter, first class, and one ship fitter, second class. Vessels of the third rate are allowed one ship fitter, second class.

3. The specialty work on the rating badge for ship fitter shall be the same as that for blacksmiths.

CHAS. H. DARLING,  
Acting Secretary.

GENERAL ORDER }  
No. 103. }

NAVY DEPARTMENT,  
Washington, August 18, 1902.

The following Executive order is published for the information and guidance of the service:

WHITE HOUSE, August, 13, 1902.

From and after this date the following ratings and rates of pay per month are established:

Painters, first class..... \$40.00

Painters, second class..... 35.00

Painters, third class..... 30.00

Stewards, for commander in chief or commandants..... 60.00

Cooks, for commander in chief or commandants..... 50.00

Cabin and wardroom stewards..... 50.00

Cabin and wardroom cooks..... 45.00

Steerage and warrant officers' stewards..... 35.00

Steerage and warrant officers' cooks... 30.00

Coopersmiths..... 55.00

Boiler makers..... 65.00

THEODORE ROOSEVELT.

All painters now in the service will be rated painters, third class. All painters that have served two years satisfactorily in that rating with an average of at least 4 in proficiency in rating, conduct, and sobriety, and establish their qualifications by a practical examination, may be rated painters, second class.

Painters, second class, will be required to serve one year in that rating, with an average of at least 4 in proficiency in rating, conduct, and sobriety, before being rated painters, first class.

CHAS. H. DARLING,  
Acting Secretary.

GENERAL ORDER }  
No. 108. }

NAVY DEPARTMENT,  
Washington, September 11, 1902.

The following Executive order is published for the information and guidance of the service.

WHITE HOUSE, September 4, 1902.

Executive orders of June 25, 1902, and August 4, 1902, are hereby rescinded, and from and after July 1, 1902, every enlisted man and apprentice who has been rated a seaman gunner, or holds a gun-captain's certificate, or a certificate of graduation from one or more classes of the Petty Officers' School of Instruction, shall receive \$2 per month in addition to the pay of his rating for each such certificate, viz:

	Per month.
For certificate as seaman gunner, or from seaman gunner class.....	\$2.00
For certificate as gun captain, or from gun captain class.....	2.00
For certificate from petty officer class...	2.00
For certificate from artificer class.....	2.00
For certificate from machinist class.....	2.00
For certificate from electrical class.....	2.00

Every enlisted man of the Navy shall receive 75 cents per month, in addition to the pay of his rating, for each good-conduct medal, pin, or bar which he may heretofore have been or shall hereafter be awarded.

THEODORE ROOSEVELT.

All men who successfully complete, or have completed, the prescribed course in any of the above-mentioned classes, and have been reported qualified, will, upon the recommendation of their commanding officers to the Bureau of Navigation, receive certificates of graduation. The Bureau of Navigation will be informed as to any men who are entitled to certificates as indicated above and who have not yet received them.

In accordance with the provisions of the above Executive order, General Order Nos. 91 and 101 are hereby revoked.

Respectfully,  
WILLIAM H. MOODY, Secretary.

GENERAL ORDER }  
No. 110. }

NAVY DEPARTMENT,  
Washington, D. C., October 22, 1902.

The following Executive order is published for the information and guidance of the service:

WHITE HOUSE,  
Washington, D. C., October 20, 1902.

Enlisted men of the naval service regularly detailed as signalmen shall receive the following extra compensation in addition to the monthly pay of the rating which they may hold:

Signalmen, first class.....	\$3.00
Signalmen, second class.....	2.00
Signalmen, third class.....	1.00

THEODORE ROOSEVELT.



From and after the date of receipt of this order all seamen, ordinary seamen, landsmen, or apprentices who may be detailed as signalmen will be allowed this extra compensation.

Flagships will be allowed four signalmen, first class; four signalmen, second class; and four signalmen, third class.

Vessels of the first rate will be allowed four signalmen, first class, and four signalmen, second class.

Vessels of the second rate will be allowed four signalmen, first class; two signalmen, second class; and two signalmen, third class.

Vessels of the third rate will be allowed three signalmen, first class; one signalman, second class; and two signalmen, third class.

This, however, does not increase the allowed complement of any vessel as at present established, but is merely an allowance to men detailed as signalmen.

CHAS. H. DARLING,  
*Acting Secretary.*

GENERAL ORDER }  
No. 130. }

NAVY DEPARTMENT,  
*Washington, May 15, 1903.*

Hereafter apprentices appointed as petty officers, third class, of the seamen branch, under article 856, Navy Regulations, shall be eligible for advancement under the same rules that apply to other petty officers.

CHAS. H. DARLING,  
*Acting Secretary.*

GENERAL ORDER }  
No. 134. }

NAVY DEPARTMENT,  
*Washington, June 26, 1903.*

The following Executive order is published for the information and guidance of the service:

WHITE HOUSE,  
*Washington, D. C., June 26, 1903.*

All chief petty officers of the Navy whose pay is not fixed by law, including chief water tenders, which rating is hereby established, who, on or after July 1, 1903, shall receive permanent appointments after qualifying therefor by passing such examination as the Secretary of the Navy may prescribe, shall be paid at the rate of \$70 a month; those who serve under permanent appointments issued prior to said date, or under acting appointments, shall be paid at the rates now in force. The pay of chief water tenders who hold acting appointments shall be \$50 a month. Nothing herein contained, however, shall operate to reduce the present pay of any enlisted man in the Navy.

THEODORE ROOSEVELT.

On and after July 1, 1903, permanent appointments will be issued by the Bureau of Navigation to chief petty officers in the service only after the fitness of the man for promotion shall have been shown before a board consisting of three officers detailed from a ship or ships other than the one on board of

which the candidate is serving. The examination shall show that the applicant is in all respects fitted to fill the rating in which he seeks a permanent appointment. Such appointments will entitle the holder to draw pay at the rate of \$70 per month.

All persons holding permanent appointments as chief petty officers issued prior to July 1, 1903, may qualify by passing examination as above. In the event of their qualifying they will be given new permanent appointments by the Bureau of Navigation from the date they pass their examination.

Chief petty officers who hold permanent appointments issued prior to July 1, 1903, and who do not qualify by examination; those who reenlist under permanent appointments issued prior to July 1, 1903; and those who have acting appointments will draw pay under the present pay table until such time as they qualify by examination and are given permanent appointments.

When these permanent appointments are presented to the pay officer for an increase in pay, he will procure orders from the commanding officer upon S. and A. Form No. 22 (Ratings and Disratings) to make the appropriate changes on his books.

W. H. MOODY, *Secretary.*

GENERAL ORDER }  
No. 137. }

NAVY DEPARTMENT,  
*Washington, July 25, 1903.*

The following Executive order is published for the information and guidance of the naval service:

WHITE HOUSE, *July 25, 1903.*

Enlisted men of the Navy, after having qualified as gun pointers, according to standards of marksmanship and rules that may be prescribed from time to time by the Secretary of the Navy, and who are regularly detailed as gun pointers by the commanding officer of a vessel, shall receive monthly, in addition to the pay of their respective ratings, extra pay as follows:

Heavy gun pointers, first class, \$10; second class, \$6; for the class of guns comprising those of 8-inch caliber or larger.

Intermediate gun pointers, first class, \$8; second class, \$4; for the class of guns comprising those of 4-inch to 7-inch caliber, inclusive.

Secondary gun pointers, first class, \$4; second class, \$2; for the class of guns comprising those of 1-pounder to 3-inch caliber, inclusive.

Extra pay shall be allowed a qualified gun pointer during not less than two years from and after the date of his qualifying, but only while he is regularly detailed as a gun pointer at a gun of the class at which he qualified.

The following ratings and rates of pay per month for the same are hereby established in the naval service:

Chief turret captain, holding acting appointment as such, \$60; holding a permanent appointment as such, \$70.

Turret captain, first class, \$50.

Enlisted men of the Navy regularly detailed by the commanding officer of a vessel as gun captains, except as secondary battery guns, shall receive, in addition to the pay of their respective ratings, \$5 per month, which, in the case of men holding certificates as gun captains or of graduation from the gun-captain class, petty officers' school, shall include the \$2 per month to which such certificates entitle them.

This order shall go into effect October 1, 1903.

THEODORE ROOSEVELT.

In pursuance of the provisions of the foregoing order, the following instructions will be observed:

#### RULES GOVERNING EXTRA PAY TO GUN POINTERS

The standards of marksmanship entitling men to extra pay as gun pointers (first and second classes) of the three classes of guns (heavy, intermediate, and secondary) will be announced by the department as soon as practicable after the completion of the record target practice to be held early in 1904. These standards are subject to change yearly.

A gun pointer's "gunnery record" will be his sole certificate of qualification, and the rate of his extra pay as a qualified gun pointer will be determined by his score at an annual record target practice, signed by the chief umpire detailed for the ship at that practice.

As soon as the official announcement of standards of marksmanship is received, the commanding officer of each vessel shall direct the pay officer (using S. and A. Form No. 236, "Order for extra compensation for enlisted men") to credit the men that have qualified as gun pointers, first or second class, with the extra pay allowed them, respectively, by the foregoing Executive order; and over the men's names on the pay roll shall be entered in red ink the abbreviations "H. G. P., 1st Cl.," "H. G. P., 2d Cl.," "I. G. P., 1st Cl.," "I. G. P., 2d Cl.," "S. G. P., 1st Cl.," "S. G. P., 2d Cl.," as the case may be. Such extra pay shall be allowed from the date that the vessel on which the pointer qualifies completes her record target practice.

A gun pointer shall receive extra pay as such only during the time that he is regularly detailed by the commanding officer of the vessel as a gun pointer at a gun of a class at which he has qualified; if he has qualified at more than one class of gun, he shall receive only the extra pay allowed for a gun of the class at which he is regularly detailed as gun pointer.

Although the standards of marksmanship are subject to change yearly, a pointer that qualifies at any annual record practice is entitled to the corresponding extra pay for all the time during the ensuing period of two years that he is regularly detailed as a gun pointer at a gun of the class at which he qualified at that practice.

A qualified gun pointer reenlisting for four years within four months of his discharge, and regularly stationed as a gun pointer at a gun of a class at which he was qualified at the time of his discharge, shall be entitled to the corresponding extra pay during the unexpired portion of the period of two years from the date

of qualifying—the interval of time between the date of his discharge and reenlistment to be included in the period of two years.

#### QUALIFICATIONS AND APPOINTMENT OF TURRET CAPTAINS.

The qualifications required for the duties of turret captain are sufficient knowledge and ability to drill the turret crews and to control the fire of the guns in action in the absence of the turret officer, and the mechanical knowledge and skill necessary to overhaul all parts of the turret and gun gear and keep them at all times in efficient condition.

For each 10-inch, 12-inch, and 13-inch turret, and for each combination of superimposed turrets, one chief turret captain is allowed; but a turret captain, first class, may be assigned to any such turret for which no chief turret captain is available. For each 8-inch turret (not superimposed) one turret captain, first class, is allowed.

To fill these ratings, wholly or in part, commanding officers will select candidates that appear to possess the necessary qualifications from gunner's mates, seamen gunners, men holding the rate of gun captain or certificate of graduation from the petty officers' school, gun captain class, and other intelligent men—not alone of the seaman branch—of mechanical bent and good promise as leading men. The names of these men shall be sent to the squadron commander, who will order their examination before a board of not less than three officers, the majority to be turret officers if practicable, to be appointed by him, none of whom shall be taken from the ship to which the candidates belong. Commanding officers shall nominate at least two candidates for each vacancy as turret captain, in order that the examination may be competitive.

The candidates that pass the examination will be eligible for acting appointments as turret captains, first class; but no chief petty officer shall be rated a turret captain, first class, against his will. Permanent appointments and advancement will be governed by the same regulations that apply to other petty officer ratings.

#### EXTRA PAY FOR GUN CAPTAINS.

When the commanding officer details a petty officer or other enlisted man as a gun captain he shall direct the pay officer to credit him with the extra pay allowed by the foregoing Executive order (using S. and A. Form No. 236, "Order for extra compensation for enlisted men"), and over the man's name on the pay roll shall be entered in red ink the abbreviation "G. C."

#### DISCONTINUING EXTRA PAY.

When the commanding officer revokes the detail of a man as a gun captain or gun pointer he shall, in writing, direct the pay officer to discontinue the corresponding extra pay.

WILLIAM H. MOODY, *Secretary*.



GENERAL ORDER }  
No. 168. }

NAVY DEPARTMENT,  
*Washington, September 9, 1904.*

The following Executive order, affecting General Order No. 108, is published for the information and guidance of the service:

WHITE HOUSE, *September 5, 1904.*

The Executive order of September 4, 1902, authorizing additional pay to certain enlisted men of the Navy, is hereby so far modified that hereafter the date of the award of a good-conduct medal, pin, or bar shall be the date of the holder's discharge by reason of the expiration of the enlistment for which the medal pin, or bar is given, the allowance of 75 cents per month to be reckoned from said date of award: *Provided*, That nothing in this order shall be construed to authorize any change in the date of award of any good-conduct medal, pin, or bar heretofore awarded, or to grant any arrears of allowances on account thereof.

THEODORE ROOSEVELT.

PAUL MORTON, *Secretary.*

GENERAL ORDER }  
No. 186. }

NAVY DEPARTMENT,  
*Washington, June 5, 1905.*

The following Executive order is published for the information and guidance of the service:

Any enlisted man of the Navy detailed to perform the duties of ship's tailor on board of a vessel having a complement of 600 men or more, exclusive of marines, shall receive \$20 per month in addition to the monthly pay of his rating; on a vessel having a complement of from 300 to 600 men, exclusive of marines, \$15 per month in addition to the monthly pay of his rating; on a vessel having a complement of less than 300 men, exclusive of marines, \$10 per month in addition to the monthly pay of his rating. Any enlisted man of the Navy detailed as tailor's helper on board of a vessel having a complement of 600 men or more, exclusive of marines, shall receive \$10 per month in addition to the monthly pay of his rating: *Provided*, That the total pay of an enlisted man detailed to perform the duties of ship's tailor shall not exceed \$50 per month, and of tailor's helper shall not exceed \$40 per month.

THEODORE ROOSEVELT.

THE WHITE HOUSE,  
*June 2, 1905.*

From and after July 1, 1905, vessels having a complement of 600 men or more, exclusive of marines, will be allowed one ship's tailor and one tailor's helper; vessels having a complement of less than 600 men and more than 100 men will be allowed one ship's tailor.

Men detailed for duty as ship's tailors, or as tailor's helpers, will be assigned to the paymaster's division and perform the duties of their detail without reference to the rating held by

them. It shall be their duty to alter, when necessary, without expense to the enlisted men of the Navy, all uniforms, caps, and clothing issued by the paymaster.

The above does not increase the allowed complement of any vessel as at present established.

PAUL MORTON, *Secretary.*

GENERAL ORDER }  
No. 9. }

NAVY DEPARTMENT,  
*Washington, November 9, 1905.*

The following Executive order is published for the information and guidance of the service:

Besides the \$5 per month extra pay allowed them for submarine service, enlisted men serving with submarine torpedo boats, and having been reported by their commanding officers to the Navy Department as qualified for submarine torpedo-boat work, shall receive \$1 additional pay for each day during any part of which they shall have been submerged in a submarine torpedo boat while under way: *Provided, however*, That such further additional pay shall not exceed \$15 in any one calendar month.

THEODORE ROOSEVELT.

THE WHITE HOUSE, *November 8, 1905*

Men to be eligible for recommendation by their commanding officers as "qualified for submarine torpedo boat work" must fulfill the requirements prescribed from time to time by the Bureau of Navigation.

Service on a submarine torpedo boat shall be counted sea service for all purposes of rating, but in examinations for permanent appointment petty officers who have served their probationary period wholly or in part on vessels of this class will be required to show such proficiency in all the usual duties of their respective ratings as will qualify them to serve in such rating on vessels of any class. The examinations for permanent appointment as chief petty officer, called for in article 852, paragraph 2, of the Navy Regulations, shall be conducted by officers other than those on duty with submarine torpedo boats.

Whenever a submarine torpedo boat is engaged on duty under water, it shall be accompanied by a tender which shall be capable of including comfortable accommodations for the officers and men of the submarine.

Time spent by officers on duty with submarine torpedo boats shall count as part of a cruise.

CHARLES J. BONAPARTE, *Secretary.*

GENERAL ORDER }  
No. 31. }

NAVY DEPARTMENT,  
*Washington, D. C., October 29, 1906.*

In accordance with the act of Congress approved June 29, 1906, "making appropriations for the naval service for the fiscal year ending June 30, 1907, and for other purposes," the

department directs that any man enlisting on or after December 1, 1906, who is discharged during the first six months of a first enlistment for any cause other than disability incurred in the line of duty shall have checked against his accounts prior to discharge the cost of such portion of outfit allowed on first enlistment as he may have drawn.

TRUMAN H. NEWBERRY,  
*Acting Secretary.*

GENERAL ORDER }  
No. 34. }

NAVY DEPARTMENT,  
*Washington, November 28, 1906.*

The following Executive order is published for the information and guidance of the service:

To provide adequate compensation for trained men, the pay now prescribed by Executive order for each rating in the Navy is hereby increased \$5 per month during the second period of service and a further sum of \$3 per month during each and every subsequent period of service: *Provided*, That only enlisted men who are citizens of the United States, and whose second and subsequent periods of service each follow next after service in the Navy that was terminated by reason of expiration of enlistment, shall receive the benefits of the increased pay named herein: *Provided further*, That in the cases of men who are or were finally discharged from the Navy by reason of expiration of enlistment, the first enlistment on or after the date of this order shall be considered the second period of service which shall carry with it the increased pay provided by this order, except that men discharged on recommendations of boards of medical survey shall, if they reenter the service, be given credit for any previous periods of service in the Navy which were terminated by reason of expiration of enlistment.

Chief petty officers detailed as instructors of apprentice seamen at naval stations who qualify as instructors by examination shall receive hereafter, in addition to their pay, the sum of \$10 per month, while so detailed, such pay to be considered extra pay for special duty.

Apprentice seamen detailed as apprentice chief petty officers, apprentice petty officers, first, second, or third class, in connection with the instruction of apprentice seamen at naval stations, shall receive hereafter, in addition to their pay, the sum of \$2.50, \$2, \$1.50, and \$1 each per month, respectively, while so detailed, such pay to be considered extra pay for special duty.

THEODORE ROOSEVELT.

THE WHITE HOUSE,  
*November 27, 1906.*

Chief petty officers must be citizens of the United States and serving under continuous service in order to be eligible for examination for detail as instructors of apprentice seamen at naval stations. They must also qualify in accordance with the requirements prescribed from time to time by the Bureau of Navigation.

The complement of apprentice seamen authorized at each naval station as apprentice petty officers will be four (one of each rating) for each 75 apprentice seamen under training at the station.

G. A. CONVERSE,  
*Acting Secretary.*

GENERAL ORDER }  
No. 43. }

NAVY DEPARTMENT,  
*Washington, D. C., April 6, 1907.*

On and after July 1, 1907, all enlisted men of the Navy shall receive, on first enlistment, outfits amounting in value as follows:

Samoans and such men of the messman branch as are not required to possess complete outfits, not to exceed.....	\$20. 00
Men of the insular force, not to exceed..	30. 00
All other enlisted men, not to exceed..	60. 00

Commanding officers will direct which of the above amounts is to be allowed in each case of first enlistment.

Attention is called to the Uniform Regulations, 1905, pages 53 and 54, regarding the portions of outfits to be issued on enlistment, and on transfer to cruising vessels; also to General Order 31, of October 29, 1906, regarding the checkage against the accounts of men discharged during the first six months of first enlistment for any cause other than disability incurred in the line of duty, of the cost of such portion of the allowed outfit as may have been drawn.

V. H. METCALF, *Secretary.*

GENERAL ORDER }  
No. 57. }

NAVY DEPARTMENT,  
*Washington, December 9, 1907.*

The following Executive order is published for the information and guidance of the naval service:

THE WHITE HOUSE, *November 16, 1907.*

The extra pay allowed gun pointers in accordance with the Executive order of July 25, 1903, shall be allowed a gun pointer regularly detailed as a gun pointer at a gun of the class at which he qualified only as long as he remains qualified: *Provided*, This order shall be construed as affecting only gun pointers who qualify subsequent to the date of this order.

THEODORE ROOSEVELT.

V. H. METCALF, *Secretary.*

GENERAL ORDER }  
No. 62. }

NAVY DEPARTMENT,  
*Washington, February 7, 1908.*

The following Executive order is published for the information and guidance of the service:

On and after March 1, 1908, the classification and pay of mess attendants in the Navy who



are citizens of the United States shall be as follows:

	Per month.
Mess attendants, first class .....	\$30. 00
Mess attendants, second class.....	25. 00
Mess attendants, third class.....	20. 00

On and after March 1, 1908, all stewards and cooks in the messman branch who are citizens of the United States and who hold, or may receive certificates of qualification as stewards or cooks, shall receive \$5 per month additional to the pay of their rating while holding such certificate, such additional pay to be of a permanent character as regular pay.

THEODORE ROOSEVELT.

#### THE WHITE HOUSE,

January 28, 1908.

On and after March 1, 1908, all mess attendants who are citizens of the United States shall be paid in accordance with the above Executive order.

Certificates of qualification heretofore or hereafter issued by the Bureau of Navigation shall remain in force for a period of two years from their date, unless sooner revoked in the discretion of the commanding officer for cause, and shall be renewed by the commanding officer at the expiration of each two years for a similar term, provided the continued good performance of duty of the steward or cook so warrants.

V. H. METCALF, *Secretary*.

**3. Act of May 13, 1908, construed.**—The act of May 13, 1908 (35 Stat., 128), provided that "the pay of all active and retired enlisted men of the Navy is hereby increased ten per centum," and that "all pay herein provided shall remain in force until changed by act of Congress." The 10 per cent increase provided by said act of May 13, 1908, applied only to the pay proper of enlisted men, or their base pay and permanent additional pay, such as additional pay allowed by Executive orders for continuous service, longevity service, good-conduct medals, pins, or bars, and for graduation certificates; and did not apply to their temporary additional pay provided by Executive orders for special service, such as for gun pointers, messmen, coxswains of steam launches, jacks-of-the-dust, etc. (14 Comp. Dec., 829.)

Nevertheless, while the increase of 10 per cent allowed by the act of May 13, 1908, applied only to base pay and permanent additions thereto, the further provision of said act, that all pay therein provided shall continue in force until changed by act of Congress, included not only such base pay and permanent additions thereto, but also temporary additional pay for special service. (24 Comp. Dec., 364.)

The effect of the act of May 13, 1908, was to make the pay of all enlisted men of the Navy, then in force, and as increased by said act, permanent and subject to change only by legislation of Congress; and to prohibit any additional compensation for special services performed by enlisted men under authority of Executive orders issued since May 13, 1908. Accordingly, where Executive orders in force on the last-named date limited the payment of additional compensation to men detailed to

perform special services on board vessels of the Navy, the conditions prescribed by such Executive orders could not, after the date of said act, be changed by Executive order so as to allow such additional compensation for similar services performed at shore stations. (24 Comp. Dec., 364.)

*Held*, however, that additional compensation provided by Executive order prior to May 13, 1908, for enlisted men of the Navy detailed as gun pointers "by the commanding officer of a vessel," may be allowed enlisted men detailed as gun pointers by the officer in command of an enlisted force of the Navy aboard a merchant ship, who may be considered as the commanding officer within the meaning of said order; but that the conditions under which said additional compensation may be allowed are not subject to change. (24 Comp. Dec., 364.)

The act of May 13, 1908, providing that the pay of all enlisted men of the Navy is hereby increased 10 per cent, and that all pay herein provided shall remain in force until changed by act of Congress, took from the President the powers previously conferred upon him, under section 1569, Revised Statutes; and Congress adopted, as the basis of the pay for enlisted men of the Navy, the rates then in force, making such rates permanent. (26 Comp. Dec., 428.)

By the act of May 13, 1908, Congress intended to grant, by direct legislative action, the right to pay previously granted by Executive orders, subject to the limitations which the Comptroller of the Treasury and the courts had by decisions placed thereon. Had Congress intended to extend benefits beyond those which had been held to arise under Executive orders, it is proper to assume that such intent would have been expressed. (26 Comp. Dec., 428.)

**4. Civilians shipped on naval vessels.**—Section 1569, Revised Statutes, authorizing the President to fix the pay of petty officers, seamen, and others, does not apply to seamen on a vessel who were "shipped" and not enlisted, and whose pay was fixed as a matter of agreement with the officer who shipped them. (*Stovel v. U. S.*, 36 Ct. Cls., 392.)

**5. Insular force.**—Pursuant to the authority conferred by section 1569, Revised Statutes, the insular force, United States Navy, was established by Executive order dated April 5, 1901 (incorporated in art. 4429, Navy Regs., 1913), under which the Secretary of the Navy is authorized to enlist in the insular force not to exceed 500 Filipinos in the ratings and at the rates of pay therein specified. (27 Comp. Dec., 357.)

Under the act of May 13, 1908 (35 Stat., 128), the rates of pay of the insular force, as established by the Executive order of April 5, 1901, plus the 10 per cent increase thereof provided by that act, was to remain in force until changed by act of Congress. (27 Comp. Dec., 357.)

Pursuant to section 1569, Revised Statutes, the President issued an order dated April 5, 1901, published in Navy Department General Order No. 40 of April 8, 1901, establishing an "insular force" of Filipinos and providing rates of pay for men enlisted therein. *Held*, that the enlisted men of the said insular force

are enlisted men of the Regular Navy of the United States; that unless said insular force be a part of the Regular Navy there would be no authority for the establishment of such force; and that, being enlisted men of the Regular Navy, they are entitled to the outfits on first enlistment as authorized by act of April 27, 1904 (33 Stat., 326), and the extra pay for detention in the service as provided by section 1422, Revised Statutes. (12 Comp. Dec., 189; see also note to sec. 1422, R. S.)

As General Order No. 40, Navy Department, April 8, 1901, which provided for the organization of the insular force of the Navy, made no provision for the payment of additional pay for medals, pins, and bars, and as said order was not modified or enlarged by the act of May 13, 1908 (35 Stat., 127), *held*, that the members of said insular force acquired no further benefits by reason of the provisions of that act, and accordingly are not entitled to the additional pay provided for enlisted men of the Regular Navy who are awarded good-conduct medals, pins, and bars. (26 Comp. Dec., 428.)

Enlisted men of the insular force are entitled to extra pay conferred upon all enlisted men by statute; but extra pay provided by Executive orders other than that which established the insular force is not payable to members of said force. (26 Comp. Dec., 428.)

The rates of pay prescribed by section 6 of the act of May 18, 1920 (41 Stat., 602), for certain enlisted men of the Navy are applicable to the insular force. Section 13 of the same act provides that same shall be the rates of pay during the current enlistment of "all" men in active service on the date of the approval of the act, etc. The words "all men" as used in that section clearly extend to the enlisted men of the insular force. (27 Comp. Dec., 357.)

The classification in the act of May 18, 1920, section 6, prescribing base pay for certain enlisted ratings, does not include the ratings of steward or cook to commander in chief, stewards and cooks to commandants, or any of the enlisted ratings of the insular force. Apparently no provision is made in the act for discontinuing these ratings, or adapting them to the classified ratings, and therefore they exist as ratings for which no base pay is expressly provided by law. *Held*, that the provision in the act of June 4, 1920 (41 Stat., 836), empowering the Secretary of the Navy to establish such grades and ratings as may be necessary for the proper administration of the enlisted personnel of the Navy and Marine Corps, confers upon the Secretary authority to remodel or change any existing ratings so as to make the designation thereof conform to the classification of the ratings for which a new base rate of pay is provided in the act of May 18, 1920 (41 Stat., 603, 604); and therefore that the Secretary is authorized to determine the proper class in the messmen branch in which native stewards, cooks, and mess attendants of the insular force of the Navy should be placed in order to conform to the classification of ratings for which base pay is prescribed by said act of May 18, 1920. (Comp. Dec., Dec. 17, 1920, file 29199-28:1.)

**6. Mates.**—See notes to sections 1408, 1409, 1556, and 1573, Revised Statutes.

The exception of mates from section 1569, Revised Statutes, merely indicates that Congress, having already fixed their pay by section 1556, such pay need not be fixed by the President. Such exception of mates from other petty officers in section 1569 indicates that they are petty officers. (*U. S. v. Fuller*, 160 U. S., 593; see note to sec. 1579, R. S.)

A mate is eligible for selection and designation as Navy mail clerk under the act of May 27, 1908 (35 Stat., 417), and is entitled to receive the pay provided in said act for a Navy mail clerk in addition to his pay as mate, provided that the provision in said act for the designation and qualification of a Navy mail clerk has been fully complied with. (15 Comp. Dec., 262. See below, "Additional pay for special duty.")

In view of section 1558, Revised Statutes, mates are not entitled to the additional pay provided for by Executive order for good-conduct medals, pins, and bars. (9 Comp. Dec., 600.)

Mates being specifically excepted from section 1569, under authority of which extra compensation for good-conduct medals and bars, seamen gunners' certificates, and petty officers' certificates is provided, they are not entitled to such extra compensation. (14 Comp. Dec., 457.)

**7. Mess attendants and cooks.**—See also above, "Pay of insular force"; and see below, "Longevity pay, General Order No. 34."

The rates of increased pay for continuous service which, before the naval personnel act of March 3, 1899, section 16 (30 Stat., 1008), had been fixed by the President under section 1569, Revised Statutes, became by said act a part of the statutory law; said act fixed the increase of \$1.36 per month to the pay prescribed for the rating of mess attendants for each consecutive reenlistment as the measure of the increase of value to the service of one who so reenlists, and it is not within the power of anyone, until the law is changed, to fix a greater or less rate. Under section 1569, the President could fix the pay to be allowed mess attendants, and could change same from time to time as he deemed just and proper; but when he had fixed the rate, then by section 16 of the personnel act Congress declared what increased amount they should receive for reenlistment. Accordingly, *held*, that Navy Department General Order No. 20, of January 1, 1901, fixing the pay of mess attendants for the second and third enlistments, and adding \$4 to the monthly pay of the rating for a first reenlistment and \$4 more per month for a second reenlistment, in addition to the \$1.36 per month for each consecutive reenlistment allowed by section 16 of the personnel act of March 3, 1899, was contrary to law. (8 Comp. Dec., 227.)

A mess attendant of the Navy, third class, who holds a certificate of identity issued by the Department of Commerce and Labor, or other proper evidence showing that he was born in the Hawaiian Islands, is a citizen of the United States and as such is entitled to be paid at the rate provided for a citizen of the United States. (17 Comp. Dec., 556.)

Extra pay for enlisted men detailed as messmen was authorized by General Order No. 61 of October 17, 1901, as amended by



General Order No. 79 of January 7, 1902. *Held*, that a man enlisted as a mess attendant is not entitled to the extra pay allowed men enlisted in other branches and temporarily detailed to duty as messmen. The pay of such mess attendants is governed by specific orders. (Comp. Dec., Apr. 11, 1908, 86 S. and A. Memo., 631.)

The rates of pay of mess attendants in the Navy who are citizens of the United States were fixed by Executive order dated January 23, 1903, and promulgated to become effective from March 1, 1903, in General Order No. 62, Navy Department, February 7, 1903. The act of May, 13, 1903 (35 Stat., 128), should be construed as specifically fixing, as permanent, rates of pay for each rating then in effect for the Navy. Included in these rates are the rates of pay for mess attendants, citizens of the United States. Accordingly, a mess attendant, second class, is not entitled to the pay thus fixed by law for mess attendants, third class. (25 Comp. Dec., 424, citing Gen. Order 303, June 13, 1917, note B. Compare, Comp. Dec., Apr. 14, 1914, 158 S. and A. Memo., 3038, noted below under "Retired enlisted men.")

The fact that enlisted men of the Navy holding the rating of mess attendants, second class, receive less pay, including the increase granted by the act of May 22, 1917, than mess attendants, third class, does not authorize the crediting of men holding the rating of mess attendant, second class, with the pay fixed for the third class. (25 Comp. Dec., 424.)

A wardroom cook who is a citizen of the United States and who holds a certificate of qualification as cook, issued to him while he was a warrant officer's cook, is entitled under such certificate to \$5 per month additional pay until its expiration, two years from issuance unless it shall sooner lapse or be revoked. (18 Comp. Dec., 724.)

**8. Additional pay for special duty, etc.**—See also, below, "Retired enlisted men," and "Leave of absence"; and see above "Mess attendants and cooks."

The increased pay for aviation duty in the case of enlisted men of the Navy is to be computed upon the pay and permanent additions thereto of their rating and service. (22 Comp. Dec., 11.)

As originally provided by the act of May 22, 1917 (40 Stat., 87), the increase of pay to enlisted men of the Navy, which was to continue until not later than six months after the termination of the then existing war, was not permanent in character, but for service under special circumstances due to the emergency of war. Accordingly, it was held that such increase should not be included in the computation of the per cent additional pay for flying duty, either as pay or as permanent additions to pay (citing 24 Comp. Dec., 139). However, the act of July 11, 1919 (41 Stat., 140), changed the nature of these increases and expressly declared them to be the permanent rates of pay of enlisted men of the Navy, to continue throughout all existing enlistments and all enlistments or reenlistments prior to July 1, 1920. They are, therefore, permanent for all existing and future enlistments within these bounds. Accordingly, it was held that the act

of July 11, 1919, created "a new permanent base rate of pay for each rating, and that this rate is to be determined by adding to the base pay of a particular rating in effect prior to July 11, 1919, the increase applicable thereto granted by the 1917 law." (26 Comp. Dec., 220, citing and affirming 26 Comp. Dec., 139.)

*Distinguished-service cross.*—An enlisted man of the Navy who, while serving under the jurisdiction of the Army, was awarded the distinguished-service cross provided by the act of July 9, 1918 (40 Stat., 871), for persons serving in any capacity with the Army, is entitled upon his return to the Navy to the additional pay at the rate provided by the act of February 4, 1919 (40 Stat., 1056), for the recipients of the Navy cross for distinguished service. (26 Comp. Dec., 304; see also note to sec, 1407, R. S.)

*Navy mail clerks.*—Where an ordinary seaman of the Navy is appointed assistant Navy mail clerk under the act of May 27, 1903 (35 Stat., 406), for duty on board a particular flagship named, the appointment of such assistant mail clerk is not revoked by transfer of the flag to another ship. The proper officer not having directed the termination of his services, and he actually continuing to perform postal services, such seaman is entitled to the additional pay; but he is not entitled to pay for postal services performed on board another vessel, as he earns the pay by services on board the vessel to which he was designated. (18 Comp. Dec., 539.)

Where specific provision for the position of Navy mail clerk for a fleet has been omitted from the classes authorized in Navy regulations, such position can not legally be filled; or, if filled, the incumbent may not receive pay therefor. (24 Comp. Dec., 491; but see, contra, 31 Op. Atty. Gen., 320, July 19, 1918, noted under sec. 236, R. S., "Jurisdiction of accounting officers and heads of executive departments.")

Since the laws relating to the delivery of special delivery mail matter apply only to post offices, payment to Navy mail clerks and assistant Navy mail clerks of fees for making such delivery is not authorized. (25 Comp. Dec., 563.)

For other cases, see above, "Pay of mates"; and see below, "Changes in ratings."

*Service on submarines.*—A submarine boat in the hands of the contractor and not accepted by the Government is not a "submarine vessel of the Navy" within the meaning of Executive order of January 1, 1901, General Order No. 20, and where enlisted men of the Navy are assigned to perform duty in connection with the fitting out of such submarine boat before its acceptance by the Government, such men are not entitled to the additional pay as provided in the said Executive order. (18 Comp. Dec., 545.)

Enlisted men of the Navy attached to the tender of a submarine group, "under instruction," already reported "qualified" but for a different class of submarine torpedo boats, who are performing actual duty on a submarine torpedo boat in commission but of a different class from that for which previously reported qualified, and are performing no duty on board the tender to which attached,

are entitled, in addition to the \$5 per month provided for service on submarines, to \$1 per day for the days on which their vessel is submerged, as provided by Executive order of November 9, 1905. (19 Comp. Dec., 468.)

Enlisted men of the Navy attached to a tender of a submarine group, "under instruction," but not yet reported "qualified," who are performing actual duty on board a submarine torpedo boat in commission, but performing no duty on board the tender to which attached, are entitled to the \$5 additional pay prescribed in Executive order of January 1, 1901. (19 Comp. Dec., 468.)

Enlisted men of the Navy attached to and serving on submarines are entitled to the increased pay provided for duty on such vessels although they are actually quartered and messed on shore. (22 Comp. Dec., 299.)

Enlisted men of the Navy serving on a submarine vessel are entitled to the additional pay provided for such service, although such vessel is merely in commission "in ordinary." (23 Comp. Dec., 89.)

An enlisted man of the Navy detailed as instructor at a submarine school who, in the performance of duty, occasionally submerges in a submarine torpedo boat, while under way or otherwise, is not attached to or serving on board of or with a submarine torpedo boat within the meaning of Navy Department General Order No. 9 of 1905, so as to be entitled to the additional pay of \$1 per day provided therein. (25 Comp. Dec., 533.)

*Gun captains and gun pointers.*—An enlisted man of the Navy who is detailed as a gun captain, and who also holds a certificate of graduation from the seamen gunners' class, is entitled, while so detailed, to additional pay both as a gun captain and under his certificate as a seaman gunner. (22 Comp. Dec., 575.)

General Order No. 137, of July 25, 1903, provides for additional pay, after qualification, to enlisted men detailed, under certain restrictions, as gun pointers. The restrictions are that he be detailed at a gun of the class at which he qualified. The order provides for said detail to be made by the commanding officer of a vessel. *Held*, that the officer in command of an enlisted force of the Navy, aboard a merchant ship, might well be considered as the commanding officer within the meaning of said general order, and, subject to the further conditions of the general order, if an enlisted man be detailed at a gun on board a merchant ship of the class at which he was qualified, he would be entitled to the additional pay as gun pointer of that class. However, the provisions of the act of May 13, 1908, limit the right to the additional compensation to details to guns of the class at which qualified. (24 Comp. Dec., 364.)

*Seamen gunners' certificates.*—See notes above, under "Pay of mates," and 22 Comp. Dec., 575, noted above as to pay of gun captains.

An enlisted man who holds a petty officer's certificate of graduation from electrical class, and also holds a petty officer's certificate of graduation from the seaman gunner class, is entitled to additional monthly pay for each of said certificates in accordance with Execu-

tive order of September 4, 1902, promulgated in General Order No. 108 of September 11, 1902. (Comp. Dec., Apr. 26, 1915, 170 S. and A. Memo., 3597.) But an enlisted man who holds two certificates of graduation from the seaman gunner class of different schools is entitled to additional pay for only one such certificate. (Comp. Dec., Dec. 3, 1914, 166 S. and A. Memo., 3461.)

*Coxswains.*—The "coxswains" who are entitled to additional pay under Executive order of January 1, 1901, published in General Order No. 20 of 1901, are confined to those regularly rated as coxswains, and do not include men of other ratings detailed as coxswains. (20 Comp. Dec., 618.)

The additional pay of coxswains continues during temporary separation of boats from their ship unless their details to such duty are revoked. (Comp. Dec., May 31, 1917, 195 S. and A. Memo., 4260.)

*Ship's tailors and ship's helpers.*—If the total pay of an enlisted man of the Navy, including increase for foreign service, extra pay as heavy-gun pointer, and additional pay as ship's tailor, exceeds \$50 per month, he is only entitled to receive sufficient of the additional pay as ship's tailor to make his total pay amount to \$50 per month, in view of General Order No. 186, June 5, 1905, in which it is stated that a ship's tailor's monthly pay shall not exceed \$50. (15 Comp. Dec., 87.)

General Order No. 186, dated June 5, 1905, limits the payment of additional pay to ship's tailors and ship's helpers to men detailed to perform the duties on board vessels, and fix a sliding scale of monthly compensation based on the complement of the vessel. Accordingly, *held*, that the act of May 13, 1908, does not authorize payment under any other conditions, and the conditions may not after the date of that act, be changed by Executive order. (24 Comp. Dec., 364.)

The increased rates of pay provided for the enlisted personnel of the Navy by the act of May 22, 1917 (40 Stat., 87), which, by the act of July 11, 1919 (41 Stat., 139), became part of the permanent base rates of pay of enlisted men in certain enlistments, should be included in arriving at the total pay of ship's tailors and helpers. (26 Comp. Dec., 258.)

*Petty officer's certificates.*—See note below under "Men furloughed without pay"; and see note above, under "Seamen gunners' certificates."

*Good-conduct medals, pins, and bars.*—See also notes above, under "Pay of mates," and "Pay of insular force"; and see notes below, under "Changes in ratings."

Prior to the passage of the act of May 13, 1908 (35 Stat., 217), the rates of pay for the various ratings for good-conduct medals, and for most of the extra duty and detail pay was provided for by Executive orders, in accordance with section 1569, Revised Statutes. The additional pay allowed to holders of good-conduct medals, pins, or bars was last fixed by Executive order incorporated in General Order No. 108, dated September 11, 1902. By enactment of May 13, 1908, the additional pay for medals, pins, and bars became statutory rates. (26 Comp. Dec., 428.)



Medals, pins, and bars awarded to enlisted men for service in the insular force of the Navy entitle the holders thereof, after transfer to the Regular Navy for general service, to the additional pay authorized by Executive order of September 4, 1902, embodied in General Order No. 108, September 11, 1902, and article 3664, Navy Regulations, 1913; plus 10 per cent increase thereof as authorized by act of May 13, 1908 (35 Stat., 128). (27 Comp. Dec., 468.) Also, an enlisted man of the Navy is entitled to be credited with pay for a good-conduct medal granted to him for service in the Marine Corps. (20 Comp. Dec., 360.)

**9. Longevity pay, General Order No. 34.**—See also note above, under "Mess attendants and cooks"; and see notes below, under "Retired enlisted men," "Men transferred to Fleet Naval Reserve," "Men furloughed without pay," "Naval Academy Band," and "Men extending enlistments." Further, see note to section 1573, Revised Statutes.

The complete control given the President by section 1569, Revised Statutes, over the pay of enlisted men certainly justified the President in establishing more than one amount as the pay of a rating. If he may fix the pay of a fireman, first class, at \$35 per month, he may also fix the amounts to be paid in that rating at \$35, \$40, and \$43, as done by General Order No. 34 of 1906, and allow the amount of \$40 to those of that rating having four years' experience under the conditions stated in the order, and the amount of \$43 to those of that rating having eight years' experience. Neither period of former experience must necessarily be the period immediately preceding the last enlistment, but may have been at any time, continuous reenlistment not being required. In addition to the pay so fixed by the President, the men are entitled to the \$1.36 per month allowed by the act of March 3, 1899, if they come within its terms as to reenlistment within four months, etc. (13 Comp. Dec., 448, distinguishing 8 Comp. Dec., 227, noted above, relating to continuous service pay of mess attendants.)

Navy Department General Order No. 34 of November 28, 1906, publishing Executive order of November 27, 1906, providing \$5 per month and \$8 per month additional pay for trained men who are citizens of the United States, was within the authority of the President under section 1569, Revised Statutes, and not contrary to the act of March 3, 1899, section 16 (30 Stat., 1008), providing continuous-service pay of \$1.36 per month. (13 Comp. Dec., 448.)

Section 1569, Revised Statutes, provided that the pay of enlisted men shall be fixed by the President, and that he might change the same from time to time as he deemed just and proper. Congress, by section 16 of the Navy personnel act of March 3, 1899, provided that to the rates of pay thus established by the President the enlisted men shall in addition receive an increase of \$1.36 per month for each continuous reenlistment. Congress having undertaken to provide for continuous-service pay the general authority of the President to fix the pay of enlisted men of the Navy was modified to that extent, but to that extent only. General Order No. 34 of 1906 does not attempt

to provide for continuous-service pay, but does undertake to provide for pay based on length of service, or longevity pay. The main purpose of the statute providing for continuous-service pay was to encourage immediate reenlistment, while that of General Order No. 34 was to establish higher rates of pay for trained men. (13 Comp. Dec., 448; 17 Comp. Dec., 27, 32.)

By the terms of General Order No. 34 of 1906, no one but a citizen of the United States is entitled to receive the additional pay therein provided, and it follows that a payment of it to one not a citizen would be an illegal payment and credit could not be allowed a paymaster making such payment. The paymaster should, therefore, for his own protection, check all such payments made for periods prior to the date on which the man became a citizen. (14 Comp. Dec., 267.)

An enlisted man of the Navy who was not a citizen of the United States at the time of his reenlistment, but who was naturalized during his second period of service, is entitled to the additional pay provided by Executive order of November 27, 1906 (General Order No. 34), from the date of his naturalization, if he otherwise comes within the scope of said order. (14 Comp. Dec., 284; 18 Comp. Dec., 617.)

A person of Chinese descent, born in the United States of Chinese parents, is a citizen of the United States within the meaning of General Orders Nos. 34 and 62 of the Navy. (18 Comp. Dec., 1026.)

A minor residing in this country became a citizen of the United States upon the naturalization of his stepfather, and being enlisted in the Navy and otherwise qualified is entitled to the additional pay provided by General Order No. 34 of November 28, 1906. (19 Comp. Dec., 641.)

An enlisted man of the Navy who is given a bad-conduct discharge and subsequently reenlists is not entitled during his enlistment next following such discharge to any increase of pay under the provisions of General Order No. 34 of 1906. (19 Comp. Dec., 768; 20 Comp. Dec., 856.)

An enlisted man of the Navy dishonorably discharged pursuant to sentence of court-martial within three months preceding the expiration of his enlistment, and recommended for reenlistment, is not entitled on reenlistment to any additional pay under General Order No. 34 of 1906. (21 Comp. Dec., 871; see also Comp. Dec., Aug. 31, 1914, 70 MS. Comp. Dec., 931.)

Enrolled men transferred from the Naval Reserve Force to the Regular Navy to serve the unexpired term of their enrollment "shall be entitled to and receive the same pay, rights, privileges, and allowances in all respects as now provided by existing law for men regularly discharged and reenlisted immediately upon the expiration of their full four year enlistment in the Regular Navy." (Act July 11, 1919, 41 Stat., 139.) Under this act, *held*, that enrolled men of the Naval Reserve Force so transferred to the Regular Navy are entitled, from the date the transfer is consummated, to increase of pay for continuous service and under General Order No. 34 of 1906, as well as to

honorable-discharge gratuity. (26 Comp. Dec., 33.)

The act of July 11, 1919 (41 Stat., 141), provides that "any enlisted man of the Navy or Marine Corps who has been or may be discharged to enable him to accept appointment as a commissioned or warrant officer in the Naval Reserve Force or Marine Corps Reserve, and who reenlists in the Navy or Marine Corps after the termination of his reserve service, shall be entitled, in computing service for retirement, to credit for all active reserve service; and if he reenlists in the Navy or Marine Corps within four or three months, respectively, from the date of the termination of his service as an officer of the reserve, he shall be restored to the grade or rank held by him before being discharged to accept such commission or warrant, and his service in the Regular Navy or Marine Corps, including his active service in the Naval Reserve Force or Marine Corps Reserve, shall be regarded as continuous for purposes of continuous-service pay." *Held*, that this act preserves the status previously acquired by continuity of service, which, without the provision, would be lost; but it does not create any right to permanent additions to pay other than those already acquired. (26 Comp. Dec., 565.)

Reenlistment pay under General Order No. 34, continuous-service pay under the act of August 22, 1912 (noted under sec. 1573, R. S.), and honorable-discharge gratuity under the act of August 22, 1912 (noted under sec. 1573, R. S.), are three distinct classifications of pay that should be kept separate and apart in any consideration of an enlisted man's respective rights thereto, each being dependent upon conditions peculiar to itself. Accordingly, *held*, that the provision of the act of July 11, 1919 (41 Stat., 141), that service performed by the enlisted men described therein "shall be regarded as continuous for purposes of continuous-service pay," does not entitle such men to an increase in continuous-service pay and additional pay under article 4427, paragraph 25, Navy Regulations, 1913 (Gen. Order No. 34, 1906), immediately upon reenlistment; that it does not entitle such men to increase in continuous-service pay and additional pay under General Order No. 34 of 1906, upon the completion of four years from date of last reenlistment in the Navy; that the pay of such men, upon restoration, including permanent additions previously earned by reason of continuity of service, will remain unchanged for the period of their enlistment, except as it may be affected by changes in law or rating; and that such men will not be entitled to honorable-discharge gratuity immediately upon reenlistment or upon the completion of four years' service from date of last reenlistment in the Navy. (26 Comp. Dec., 565. Compare, 25 Comp. Dec., 440, noted below, under "Retired enlisted men.")

For the purpose of computing payment of honorable-discharge gratuity, continuous-service pay, and pay under General Order No. 34 (1906), enlistments in the Navy for "the period of the present war," authorized by section 3 of the act of May 22, 1917 (40 Stat., 84), may be considered to have expired on date of discharge;

or in case of an extension of enlistment, as provided by the act of July 11, 1919 (41 Stat., 139), on date the extension becomes effective. (26 Comp. Dec., 132.)

As the word "service" as used in article 4427 (25), Navy Regulations, 1913, and General Order No. 34, contemplates the performance of duty or a duty status, and as an enlistment which expires while the enlisted man is in desertion is not a termination of service by expiration of enlistment, an enlisted man of the Navy who deserts, surrenders himself subsequent to the period of enlistment, and is permitted to reenlist, is not entitled to pay under General Order No. 34, during the enlistment following such desertion. (26 Comp. Dec., 250.)

The right of a man to pay under General Order No. 34 of 1906 involves the question of his citizenship, which is one of fact which the Comptroller of the Treasury is not required or authorized to decide. (26 Comp. Dec., 399, 401.)

The basic provisions of all existing laws relating to pay for reenlistment in the Navy are now in General Order No. 34, Navy Department, November 28, 1906, promulgating an Executive order of November 27, 1906, and having the authority of law. General Order No. 34 was carried into the Navy Regulations of 1913 as article 4427, paragraph 25. (26 Comp. Dec., 565.)

By reason of prior service in the Regular Navy, terminated by discharge at expiration of enlistment, an enrolled member of the Naval Reserve Force acquires a right to pay under General Order No. 34 while on active duty, and is entitled to the further increases provided by that order when he transfers to the Regular Navy to serve the unexpired portion of his enrollment, as authorized by the act of July 11, 1919. (26 Comp. Dec., 778.)

Enlisted men of the Navy serving over four years under short-term enlistments or extensions of enlistments are entitled to pay under General Order No. 34 at the expiration of the first four years of service, either continuous or dis severed, and at the expiration of each four years of service thereafter: *Provided*, That no previous service terminated for other than expiration of enlistment (unless on recommendation of boards of medical survey) may be counted. (27 Comp. Dec., 506.)

The period of service from which enlisted men of the Navy were honorably discharged in the course of demobilization under the provisions of the act of July 11, 1919 (41 Stat., 139), should be regarded as a full statutory period of four years, and entitles the man, if otherwise qualified, to pay under General Order No. 34 (1906) in subsequent enlistments. (28 Comp. Dec., 814.)

**10. Changes in rating.**—Under article 798, Navy Regulations, 1896, an enlisted man given an acting appointment by the captain of a ship on a foreign station is entitled to the pay of the rating given by the appointment until notice is received of the disapproval of such appointment by the Navy Department, the disapproval being based upon noncompliance with article 800 of the Regulations requiring that, as far as practicable, each class of petty officers be recruited from the next



lower class, and that they shall be advanced but one class at a time. (4 Comp. Dec., 77.)

The rate of pay of an enlisted man in the naval service depends upon the orders establishing his rating, and is not affected by the fact that notice of a change in rating is not communicated to the proper pay officer pursuant to article 826 of the Navy Regulations of 1896. (4 Comp. Dec., 95.)

An enlisted man of the Navy who, while holding the rating of ship fitter, first class, is appointed acting chief carpenter's mate, is entitled while serving under said appointment only to the pay of an acting chief carpenter's mate, notwithstanding that it is less than the pay of a ship fitter. (12 Comp. Dec., 346.)

Where an acting bandmaster of the Navy, who was not a citizen of the United States, received a permanent appointment as bandmaster under article 852, Navy Regulations, 1905, after the examination provided by said article, and performed the duties of such office, he is entitled to retain the pay he received under said appointment, notwithstanding that said article required that men to whom such appointments were issued be citizens of the United States. (14 Comp. Dec., 267.)

The Navy Regulations, 1900 (art. 948), provided that "apprentices, third class, shall be rated apprentices, second class, immediately before being transferred from the training service to general service, and shall not again be reduced below that rating while continuing in general service, except by sentence of a court-martial." *Held*, that an apprentice of the third class in the Navy, transferred to the general service while said regulation was in force, was entitled to the rating of an apprentice of the second class immediately before such transfer; that the duty enjoined upon the commanding officer was ministerial and a mere formality; and where the commanding officer neglected to perform such duty until more than five months after the transfer, his neglect could not have the effect to deprive the apprentice of the pay to which he was entitled under General Order No. 20 of January 1, 1901; that the regulation and the Executive order fix the man's right to pay, and he should not be made to suffer because the commanding officer neglected to perform a ministerial and formal act. (15 Comp. Dec., 459.)

When enlisted men of the Navy take the required oath and enter upon their duties as Navy mail clerks and assistant Navy mail clerks, as provided in the act of May 27, 1908 (35 Stat., 417), by order of their commanding officer, and are recommended by said officer for designation from the date on which they entered upon their duties, which recommendation is subsequently approved by the Secretary of the Navy and the designation made by the Postmaster General, such enlisted men are entitled to the additional pay provided for in the act of May 27, 1908, from the date on which they took the oath and entered upon their duties. (16 Comp. Dec., 442.)

The pay of a new rating to which an enlisted man of the Navy is reduced by sentence of summary court-martial becomes his proper pay on the date of the approval of the sentence by the senior officer present. (17 Comp. Dec., 489.)

As soon as the new system of ratings provided in the act of August 29, 1916 (39 Stat., 572), for the enlisted force of the Hospital Corps shall have been established, enlisted men thereof then rated as hospital apprentices, second class, shall be paid only \$19 per month, although prior to the passage of that act or the establishment of the ratings therein provided they were serving as hospital apprentices at \$20 per month. (23 Comp. Dec., 231.)

The statement by a commanding officer of the Navy, over his signature, that a rating of an enlisted man was actually changed on a certain date, is sufficient evidence to entitle the man to the increase in pay from that date. (26 Comp. Dec., 393.)

**11. Commencement of pay.**—See note to section 1418, Revised Statutes, under, "When enlistment complete."

**12. Leave of absence.**—A Navy mail clerk absent from his vessel and undergoing treatment at a hospital on shore, when he can not perform his duties as Navy mail clerk, is not entitled to the additional pay. The additional pay of such mail clerks, under the act of May 27, 1908 (35 Stat., 417), is dependent upon the performance of the services prescribed by said act. (15 Comp. Dec., 548.)

An enlisted man of the Navy regularly detailed to perform the duties of "ship's tailor" is entitled while on leave to the additional pay provided by General Order No. 186, June 5, 1905, of the Navy Department, provided that no one has been detailed to perform his duties as ship's tailor during his absence on leave. (15 Comp. Dec., 894.)

Enlisted men of the Navy on authorized leave are not entitled to the \$5 per month additional pay for submarine service authorized by Executive order of January 1, 1901. (19 Comp. Dec., 754.)

Enlisted men of the Navy properly detailed, under the act of March 3, 1915 (38 Stat., 928), for duty involving actual flying in aircraft, are entitled to the additional pay provided in that act while on authorized leave of absence within the period of such detail. (22 Comp. Dec., 292.)

An ordinary seaman detailed as jack-of-the-dust is entitled while on leave of absence to the additional pay allowed for such detail by General Order No. 178 of November 29, 1904. (Comp. Dec., Aug. 17, 1905, 54 S. and A. Memo., 585.) So also a chief petty officer detailed as instructor of apprentice seamen is entitled to additional pay under General Order No. 34 of November 28, 1906, while on leave, if his detail remain unrevoked. (Comp. Dec., Nov. 12, 1910, 117 S. and A. Memo., 1617.)

See act of June 5, 1920 (41 Stat., 975, 976), as to furlough fare certificates for travel of disabled enlisted men.

**13. Forfeiture of pay.**—The forfeiture incurred by a deserter under the Army Regulations is not a fine which the soldier may be compelled to pay out of any property he possesses, by imprisonment if need be; nor is it, strictly speaking, a punishment; but it relates solely to the soldier's rights under his contract of enlistment, and is a forfeiture of moneys that were due and payable under it in consequence of his contract, and still would be if he had not deserted; and for the purpose of de-

termining what the soldier's rights are, to receive money from the United States under or in consequence of his contract, the fact of desertion need not be established by the record of a court-martial. As the entry of desertion on the muster roll may sometimes have been improperly made, and may afterward be canceled by the War Department on proof that the soldier did not desert, it may happen that the soldier by the cancellation of such an entry becomes entitled to bounty previously withheld from him. (13 Op. Atty. Gen., 188, 199.)

Under a law providing that "all forfeitures on account of desertion" should be used for the support of the National Asylum for Disabled Volunteer Soldiers, installments of bounty which are not already due and payable to a soldier at the time he deserts never become due and payable in case he does not return or is not returned to the service, and therefore are not forfeited in the legal sense of that word. Nor, in case the deserter returns or is apprehended and put back into service, are such installments forfeited on account of desertion, because either the soldier on serving out his term is entitled to receive them, or they never become due and payable by reason of his desertion. But the installments and bounty due and payable at the time of desertion are forfeited thereby, in both those cases, and become payable to the board of managers of the National Asylum for Disabled Volunteer Soldiers. (13 Op. Atty. Gen., 188.)

A soldier who had deserted but was restored to duty by order of his department commander without trial, on condition that he make good the time lost (about two months), and who complied with the condition and was honorably discharged at the expiration of his term of service, *held*, entitled to bounty money notwithstanding his desertion. (U. S. v. Kelly, 15 Wall., 34. Note: This decision related to money accruing subsequent to the desertion, and not to money due and payable at the time of desertion; see U. S. v. Landers, 92 U. S., 77.)

The honorable discharge of the deserter was a formal, final judgment, passed by the Government upon the entire military record of the soldier, and an authoritative declaration by it that he had left the service in a status of honor; as such it dispensed altogether with the supposed necessity that the soldier must obtain bounty by removal, by order, of the charge of desertion from the rolls, and amounted of itself to the removal of any charge or impediment in the way of his receiving bounty. (U. S. v. Kelly, 15 Wall., 34; compare U. S. v. Landers, 92 U. S., 77.)

Forfeiture of pay and allowances up to the time of the desertion follows from the conditions of the contract of enlistment, which is for faithful service. The contract is an entirety; and if service for any portion of the time is criminally omitted, the pay and allowances for faithful service are not earned. And for the purpose of determining the rights of the soldier to receive pay and allowances for past services, the fact of desertion need not be established by the findings of a court-

martial; it is sufficient to justify a withholding of the moneys that the fact appears upon the muster rolls of his company. But forfeiture of pay and allowances for future service, as a condition of restoration to duty, can only be imposed by a court-martial. (U. S. v. Landers, 92 U. S., 77, 79, explaining U. S. v. Kelly, 15 Wall., 34.)

An honorable discharge granted to a soldier who has been restored to duty after desertion, and whose conduct subsequent to his restoration to duty entitled him to such honorable discharge, could not relieve him from the consequences of the judgment of a military court and entitled him to pay and allowances which that court had adjudged to be forfeited. The forfeiture must first be removed, either by its remission in terms, or by the reversal of the judgment, or the pardon of the President. (U. S. v. Landers, 92 U. S., 77, 80, explaining U. S. v. Kelly, 15 Wall., 34.)

Where a deserter at large surrenders and is restored to duty without trial, but the facts clearly establish that he had deserted, he is not entitled to payment of the amount due him at the time of his desertion, notwithstanding that the Bureau of Navigation may have removed the mark of desertion on the alleged ground that it was erroneously entered. (27 Comp. Dec., 46, citing 14 Comp. Dec., 412.)

The pay of enlisted men of the Navy being fixed by the President and subject to regulation by him, a regulation providing that enlisted men absent from duty without leave shall forfeit all pay while so absent is valid; and an enlisted man so absent is not entitled to pay for the period of such absence, although his absence was caused by his arrest by the civil authorities. (9 Comp. Dec., 231.)

An enlisted man of the Navy absent from his station and duty without leave is not entitled to pay for the time so absent, but upon his apprehension and delivery to the naval authorities he is thereafter entitled to pay unless it shall be forfeited by sentence of a court-martial. (15 Comp. Dec., 386.)

No deduction is to be made for the naval hospital fund for any period that an enlisted man is absent without leave. (18 Comp. Dec., 724; see sec. 4808, R. S.)

The pay of an enlisted man of the Navy held by the civil authorities for trial on a criminal charge should not be paid unless he is acquitted; and if found guilty his pay is then forfeited to the United States from the date of his arrest. (2 Comp. Dec., 584.)

Where a carpenter's mate of the Navy was arrested by the civil authorities on a criminal charge and admitted on to bail on his own recognizance, and his trial indefinitely postponed, and it was apparently not the intention of the authorities to further prosecute the case, his pay was not thereby forfeited. (10 Comp. Dec., 490.)

When enlisted men of the Navy have been tried and acquitted by court-martial of the charge of desertion, such acquittal is also an acquittal of absence without leave, and the pay department and accounting officers should follow the judgments in such cases and consider such enlisted men as being in a pay



status during the period that they were charged with being in desertion. (16 Comp. Dec., 480.)

An enlisted man of the Navy released from the custody of the civil authorities on bail, who reports at his regular station for duty, is not to be deprived of his pay after so reporting simply because, due solely to the fact that he was on bail, no naval duty was assigned him. (22 Comp. Dec., 374.)

A soldier who was arrested by the civil authorities on a charge of murder, of which he was convicted, is not entitled to pay or allowances after the date of his arrest, although pending his trial he was discharged by reason of the expiration of his term of enlistment. (9 Comp. Dec., 249.)

A soldier who claimed that his enlistment in the Army was illegal, and endeavored to secure his release by habeas corpus proceedings which were decided against him by the Supreme Court, *held*, not entitled to pay and allowances for the time that his litigation was pending in the civil courts and no service was being rendered by him to the United States, he having secured his release by decision of the lower court which was reversed on appeal. (*Grimley v. U. S.*, 32 Ct. Cls., 285.)

The pay and allowances of an enlisted man of the Navy can not be withheld because he may have been engaged in the performance of service prohibited by law, provided that he was not enlisted solely for the performance of such illegal service. (6 Comp. Dec., 756.)

If men are properly enlisted in the naval service, it is not material to the accounting officers whether they are at all times lawfully engaged or not. That is a matter regulated by the Navy Department. The legality of such service can become material to the accounting officers only where the enlistments are made solely for such illegal purpose, and then only in passing upon payments made under said enlistments. (6 Comp. Dec., 756.)

Absence from duty on account of injury, sickness, or disease resulting from misconduct of an enlisted man shall forfeit his pay for the time of such absence. (See act of Aug. 29, 1916, 39 Stat., 580, as amended by act of July 1, 1918, 40 Stat., 717, noted under sec. 1556, R. S., under "Absence from duty.")

For other cases, see note to section 1556, Revised Statutes, relating to pay of officers.

**14. Men transferred to Fleet Naval Reserve.**—Since the transfer of an enlisted man of the Regular Navy to the Fleet Naval Reserve at the expiration of enlistment, after 16 years' service, has the effect of relieving him of all obligation under said contract of enlistment, it is to all intents and purposes a discharge at the expiration of enlistment, so as to entitle him to travel allowance as provided by the act of June 29, 1906 (34 Stat., 555). (25 Comp. Dec., 609.)

A transferred member of the Fleet Naval Reserve, whose transfer was made after 20 years' service in the Regular Navy and not at the expiration of enlistment, and who subsequently was discharged from the Fleet Naval Reserve and reenlisted, next day, in the Regular Navy, is not entitled to credit for continuous-service increase of pay, or for the increase under Gen-

eral Order No. 34 of 1906. The cases of transferred members are not covered by the provision in the act of August 29, 1916 (39 Stat., 590), with respect to enrolled members of the Naval Reserve Force who are discharged therefrom and reenlist in the Regular Navy, nor is it covered by 23 Comp. Dec., 535, which related to enlisted men of the Navy transferred to the Fleet Naval Reserve at expiration of a period of enlistment and subsequently reenlisting in the Regular Navy. (25 Comp. Dec., 884; see also note to sec. 1573, R. S., as to continuous-service pay.)

Enlisted men transferred to the Fleet Naval Reserve after 16 or 20 years' service, whose ratings at the time of transfer entitled them to honorable discharge, and who as reservists are not retained on active duty, are entitled at time of transfer to travel allowance at 5 cents per mile from the place of transfer to their actual bona fide home or residence or place of original muster into the service, at their option, as provided by act of February 28, 1919 (40 Stat., 1203). (26 Comp. Dec., 636.)

For other cases, see note to section 1556, Revised Statutes, under "Naval Reserve Force."

**15. Men furloughed without pay.**—An enlisted man who has been discharged by purchase or by special order, and who upon such discharge has refunded the cost of clothing outfit, is entitled upon reentry into the service on a second enlistment to a new outfit, subject only to the condition that the total net cost of outfits furnished any one man shall not exceed \$60. (Act Mar. 3, 1915, 38 Stat., 932.) An enlisted man furloughed without pay, under the act of August 29, 1916 (39 Stat., 580), under the same conditions and in lieu of discharge by purchase, and who refunded the cost of clothing outfit issued to him, is entitled upon recall to active duty to the same right to clothing outfit as that provided by the act of March 3, 1915, for men reentering the service after discharge by purchase. (24 Comp. Dec., 191.)

The term "unexpired portion of enlistment," as used in the act of August 29, 1916, with respect to the service of an enlisted man after recall from furlough without pay, means the unexpired portion of the enlistment at the date of recall from furlough, and not that remaining when said furlough was granted. (25 Comp. Dec., 231.)

An enlisted man of the Navy furloughed without pay in accordance with the act of August 29, 1916 (39 Stat., 580), resumes in all respects his former status upon being recalled to active service, and upon discharge at the completion of the unexpired portion of his enlistment is entitled to travel allowance, and upon reenlistment to the honorable-discharge gratuity if otherwise authorized. (25 Comp. Dec., 231; see also note to sec. 1573, R. S., as to honorable-discharge gratuity.)

An enlisted man of the Navy whose preceding period of enlistment expired while he was on furlough without pay, as authorized by act of August 29, 1916 (39 Stat., 580), and who, therefore, in accordance with the practice then prevailing, did not receive an honorable discharge upon the expiration of such enlistment, his enlistment having been regarded as terminated by furlough and not by expiration,

held, not entitled to receive the additional pay authorized for holding a petty officer's certificate (art. 4427, par. 8, Navy Regs., 1913, C. N. R. 3), or the longevity pay provided in General Order No. 34 of 1906, or the continuous-service pay authorized by act of August 22, 1912 (37 Stat., 331), amending section 1573, Revised Statutes, all of which payments are conditioned upon reenlistment after the receipt of an honorable discharge. (25 Comp. Dec., 328.)

For other cases, see note to section 1417, Revised Statutes.

**16. Men extending enlistment.**—An enlisted man of the Navy who has a deposit to his credit, under the act of February 9, 1889 (25 Stat., 657), and who elects to extend his enlistment under the act of August 22, 1912 (37 Stat., 331), may not be repaid such deposit until his discharge from his enlistment, as extended. (19 Comp. Dec., 384.)

The first enlistment of a seaman was extended one year, and during extension his rating was changed to gunner's mate, third class; at expiration of enlistment, as extended, he was honorably discharged and reenlisted within four months. *Held*, that on reenlistment he was entitled to four months' honorable-discharge gratuity at the rate of pay he was receiving when discharged, which included his rating pay as a gunner's mate, third class, and that he was entitled to citizenship reenlistment pay (longevity pay under General Order No. 34 of 1906), and continuous-service pay, and 10 per cent increase on said total pay. (20 Comp. Dec., 361; see note to sec. 1573, R. S., as to honorable-discharge gratuity and continuous-service pay.)

Enlisted men of the Navy who extend their enlistments under the provisions of the act of August 22, 1912 (37 Stat., 331), are not entitled to the travel allowance authorized by the act of June 29, 1906 (34 Stat., 555), at the expiration of the four-year period for which they originally enlisted, but are entitled thereto at the time they are discharged at the expiration of the extended period, the reason being that the extension of enlistment is a modification of their original enlistment, the extension thereby becoming a part of their enlistment. (20 Comp. Dec., 805, affirming 20 Comp. Dec., 699; see also, 25 Comp. Dec., 610. But see act of June 4, 1920, sec. 6, noted below, under "Mileage and transportation on discharge.")

The travel for which enlisted men of the Navy are entitled to travel allowance on discharge at the expiration of their enlistments as extended, is travel in the United States from place of discharge to place of original enlistment. (20 Comp. Dec., 805.)

An enlisted man of the Navy who surrendered from desertion and was restored to duty without trial, and who after serving a period of probation was allowed to extend his enlistment, is entitled under such extended enlistment to credit for pay for continuous service and under General Order No. 34, his status being the same as though he had not been absent during his term of enlistment. (25 Comp. Dec., 920; see note to sec. 1573, R. S., as to continuous-service pay.)

The extension of enlistment law granted to enlisted men of the Regular Navy the right to continuous-service increase of pay and to pay under General Order No. 34 of 1906; and also the right to honorable-discharge gratuity if the period for which the extension was made aggregates four years. (26 Comp. Dec., 33, 34, citing 63 MS. Comp. Dec., 136, and 68 MS. Comp. Dec., 1200.)

**17. Retired enlisted men.**—See acts of March 3, 1899, section 17 (30 Stat., 1008); June 22, 1906 (34 Stat., 451); March 2, 1907 (34 Stat., 1217); May 13, 1908 (35 Stat., 128); March 3, 1915 (38 Stat., 941); August 29, 1916 (39 Stat., 591); July 1, 1918 (40 Stat., 719).

The provision in the order of the President of June 24, 1902, that "each enlisted man of the Navy shall receive 75 cents per month, in addition to the pay of his rating, for each good-conduct medal, pin, or bar" which he shall have been awarded, applies to enlisted men on the retired list, who are entitled to the full amount of the additional pay provided for therein. (9 Comp. Dec., 164, Oct. 27, 1902.)

The retired pay of an enlisted man under the acts of March 3, 1899, and March 2, 1907, was 75 per cent of the pay he was in receipt of at the date of his retirement; and 75 cents per month for each good-conduct medal held by him, and an increase of 10 per cent on the total amount thereof. (Comp. Dec., May 14, 1909, S. and A. Memo. No. 99, p. 1077, citing 9 Comp. Dec., 164; 14 Comp. Dec., 176; and 14 Comp. Dec., 830.)

The allowances to which retired enlisted men of the Navy are entitled are separate from and in addition to the pay to which they are entitled. The term "pay" used in a special statute providing for the retirement of an enlisted man with the retired "pay" of his rating does not include allowances. (Comp. Dec., May 14, 1909, 99 S. and A. Memo., 1077.)

The benefits of General Order No. 34, of 1906, are limited by its terms to those men who reenlist on or after its date. An enlisted man who was retired prior to the date of said order is, therefore, not entitled to additional pay thereunder, nor was said order made applicable to him by virtue of the provisions in the act of May 13, 1908 (35 Stat., 128), to the effect that "the pay of all active and retired enlisted men of the Navy is hereby increased ten per centum," and that "the pay of all \* \* \* enlisted men of the Navy now on the retired list shall be based on the pay, as herein provided for, of \* \* \* enlisted men of corresponding rank and service on the active list." (15 Comp. Dec., 517.)

Enlisted men of the Navy, retired under the provisions of the act of March 2, 1907 (34 Stat., 1217), are entitled on retirement to three-fourths of the pay they were in receipt of at the date of retirement, together with the allowances of \$9.50 per month in lieu of rations and clothing, and \$6.25 per month in lieu of quarters, fuel, and light. (18 Comp. Dec., 575.)

The additional pay authorized for a steward or cook holding a certificate of qualification (G. O. 62, Feb. 7, 1908) is no part of the pay of the rating held by him at the time of retirement, and should not be included in computing his



retired pay under the act of March 2, 1907. (Comp. Dec., Apr. 14, 1914, 158 S. and A. Memo., 3038. Compare, 25 Comp. Dec., 424, noted above, under "Mess attendants and cooks.")

An enlisted man of the Navy retired subsequent to the act of March 2, 1907 (34 Stat., 1217), and thereafter naturalized, is not entitled to be credited to three-fourths of the pay authorized by Executive order of November 27, 1906, in the computation of his retired pay. (20 Comp. Dec., 606; but see, contra, Comp. Dec., Nov. 16, 1920, case of James Quinn, G. M. 1c., A. D. No. 5207, Navy Dept. file 26252-146:2.)

A retired enlisted man called into active service under the act of August 29, 1916 (39 Stat., 591), and issued a new permanent appointment as chief petty officer, is not entitled to the present pay and allowances of the rate to which appointed. (24 Comp. Dec., 79.)

A retired enlisted man called into active service pursuant to the provision in the act of August 29, 1916 (39 Stat., 591)—that while so employed on active duty such retired enlisted men shall receive "the same pay and allowances they were receiving when placed on the retired list"—is entitled to the present pay of men on the active list of the same rating and of the same length of service; and is not limited to the identical pay he received previous to his retirement and regardless of subsequent legislation. Where such retired enlisted man was employed in active service on June 1, 1917, he was entitled to the increased pay provided for enlisted men by the act of May 22, 1917 (40 Stat., 87), which went into effect on June 1, 1917, with reference to all enlisted men in active service on the last-named date. (24 Comp. Dec., 79.)

The act of May 22, 1917 (40 Stat., 87), providing for increased pay, commencing June 1, 1917, for enlisted men of the Navy in active service during the present war, is not applicable to enlisted men retired since June 1, 1917. (24 Comp. Dec., 116.)

The rule is well understood that if the pay of the rank or grade on the active list is changed, it effects a change in the pay of enlisted men on the retired list holding that rank or grade. But this does not apply to exceptional pay or increase of pay for special service. (24 Comp. Dec., 116.)

The retired pay of enlisted men should be computed upon their regular ordinary pay, and not include additional pay allowed for exceptional duty or special services. (Comp. Dec., Apr. 14, 1914, 158 S. and A. Memo., 3038.)

Additional pay allowed coxswains by General Order No. 20 of January 1, 1901, should not be included in computing retired pay. (Comp. Dec., May 27, 1914, 159 S. and A. Memo., 3073.)

By act of July 1, 1918 (40 Stat., 719), it was provided that retired enlisted men recalled into active service shall be eligible for promotion and "shall be entitled to the pay and benefits of continuous service of such rank and for such length of time as he is or has been employed in active service, and when relieved of active service shall retain upon the retired list the rank and service held by him at the time of such relief, with the pay and allowances of such rank on the retired list." *Held*, that, broadly speaking, "continuous-service"

pay includes any pay or gratuity which is based upon the element of continuity in the service of enlisted men; so defined, continuous-service pay includes the so-called honorable-discharge gratuity, since the payment of such gratuity is dependent on continuity of service; it also includes additional pay allowed under General Order No. 34 of 1906, as well as continuous-service pay proper allowed by act of August 22, 1912 (noted under sec. 1573, R. S.). Further *held*, that the provision in the act of July 1, 1918, provides in effect for a constructive reenlistment when the enlisted man has served the unexpired portion of the enlistment in which he was serving when retired. Accordingly, retired enlisted men of the Navy who are recalled to active service and who complete a period of service equal to the unexpired term of their enlistment are entitled, when otherwise qualified, to continuous-service pay proper, honorable-discharge gratuity, and pay under General Order No. 34 of 1906, whether the constructive reenlistment be considered as operating for a term of four years or for the duration of the existing war. (25 Comp. Dec., 440. Compare, 26 Comp. Dec., 565, noted above, under "Longevity pay, General Order No. 34.")

Retired enlisted men of the Navy who are recalled to active duty and who, upon release therefrom, are ordered to their homes, are not entitled to travel pay under the act of February 28, 1919 (40 Stat., 1203), but only to transportation in kind from their homes to the place to which called for active duty and from such place to their homes, when released from such duty. (26 Comp. Dec., 21.)

Retired enlisted men of the Navy called to active duty under the act of July 1, 1918 (40 Stat., 719), and relieved therefrom on or subsequent to July 11, 1919, are entitled to credit for the increase of pay authorized by the act of July 11, 1919 (41 Stat., 140), in computing their pay on the retired list. (26 Comp. Dec., 478.)

Enlisted men of the Navy who were not on active duty during the period from July 11, 1919, to June 30, 1920, inclusive, are not entitled to credit for the war increase of pay authorized by the act of July 11, 1919 (41 Stat., 140), in computing their pay on the retired list. (27 Comp. Dec., 481.)

**18. Men detained after expiration of enlistment.**—See notes to sections 1418, 1422, and 1426, Revised Statutes.

An enlisted man in the Navy who was appointed as mate and continued to serve as such after the expiration of his term of enlistment, without receiving a discharge, is still in the service and entitled to his discharge, and may be permitted to reenlist with the benefit of continuous service under article 839 of the Navy Regulations of 1905. (26 Op. Atty. Gen., 319.)

The period of detention beyond the expiration of the term of service of an enlisted man of the Navy undergoing treatment in a hospital is to be considered as for the convenience of the Government, and the man is entitled to pay to and including the date of his actual discharge. (26 Comp. Dec., 447, modifying 26 Comp. Dec., 128.)

An enlisted man remains in the service until receipt of his discharge, or until such action is

taken as will render him legally chargeable with notice thereof, notwithstanding the expiration of his term of enlistment during his absence on a furlough granted at his own request. (2 Comp. Dec., 94; 27 Comp. Dec., 784.)

The right of a soldier to pay for service after the expiration of his term of enlistment is not expressly provided for by any statutory provision. The Government has no authority to hold a soldier to service after the expiration of his term of enlistment, except that arising from an exigency of the service or the delay incident to the muster out of troops; at least in the latter case the soldier is entitled to pay during the period of detention, as an incident to his term of enlistment, and at the rate to which he was entitled at the expiration thereof. 7 Comp. Dec., 391.)

A deserter from the Navy, upon his return to duty and assignment to a hospital for treatment, is entitled to pay computed upon the base pay prescribed by act of May 18, 1920 (41 Stat., 602), from the date of his return, if after January 1, 1920, to date his enlistment was due to expire, and at the same rate thereafter, to and including the date of his actual discharge. (27 Comp. Dec., 541.)

Where an enlisted man of the Marine Corps who deserted therefrom in time of peace, and subsequently returned to his organization, after the expiration of his enlistment but within two years from the latter date, and was restored to duty without trial, his organization then being in France operating under the Army and subject to Army regulations, *held*, that such restoration to and acceptance of duty is a constructive reenlistment or extension of enlistment, and credit for pay should be allowed from the date of return to military control. (25 Comp. Dec., 881.)

A convicted deserter, restored to duty on probation after expiration of his enlistment in the Navy, is entitled to pay for services rendered while on probation. (Comp. Dec., Nov. 20, 1908, 93 S. and A. Memo., 896.)

An enlisted man remaining in the service under an illegal extension of enlistment is entitled to pay under his original enlistment, notwithstanding that it had previously expired. (Comp. Dec., June 6, 1914, 160 S. and A. Memo., 3255.)

An enlisted man of the United States Navy captured and separated from his vessel in consequence of an attack by a British vessel in 1807, and held by the British for a period of five years, when he was released and returned to his vessel, *held*, entitled to be paid his wages by the United States for the total period of five years, although the enlistment in which he was serving at the time of his capture was for a period of only one year. (*Straughan v. U. S.*, 1 Ct. Cls., 324.)

An enlisted man of the Navy whose enlistment expires while he is in confinement serving sentence of a naval court-martial is not entitled to be credited with pay after the expiration of his enlistment; he is thereafter held in obedience to the sentence of the court-martial, but such imprisonment can not be regarded as holding him in the naval service within the meaning of any law entitling him to receive pay for such services, notwithstanding that his

discharge is not delivered to him until expiration of his term of imprisonment. (9 Comp. Dec., 256.)

**19. Fraudulent enlistment.**—See notes to sections 1419 and 1420, Revised Statutes.

It is well established that an enlisted man whose enlistment is procured by fraud, unless the Government waives the objection and allows the enlistment to stand, is not entitled to any arrearages of pay or allowances. (14 Comp. Dec., 267, citing 12 Comp. Dec., 326, 328.)

Whether a man securing his enlistment by fraud shall be discharged for that reason or retained in the service rests in the sound discretion of the executive officer, regardless of his indebtedness to the Government. A paymaster should, for his own protection, upon the discovery of fraud in an enlistment, suspend payments until it is known from the proper authority whether the enlistment shall be terminated and the man discharged on account of the fraud, or whether he shall, notwithstanding, be retained in the service. If he is to be discharged for the fraud, no further payments should be made; if he is to be retained in the service, credit should be given him and payments made as though no fraud had occurred in his enlistment. (14 Comp. Dec., 267.)

Pay and allowances of deserter who fraudulently reenlists: See note to section 1420, Revised Statutes.

Payment of death gratuity in case of deserter who fraudulently enlists and dies without discovery of the fraud: See note to section 1420, Revised Statutes.

Where an enlisted man convicted of fraudulent enlistment and sentenced to imprisonment and dishonorable discharge is restored to duty on probation by order of the Secretary of the Navy, execution of the sentence being suspended during the probationary period with a view to its ultimate remission should his conduct warrant, *held*, that such man is entitled to pay while serving on probation, the same as if said sentence did not exist; but he is not entitled to be paid any balance due him at the time of the sentence unless and until the sentence be unconditionally remitted after the probationary period. (13 Comp. Dec., 723.)

**20. Mileage and transportation on discharge.**—See note to section 1422, Revised Statutes; notes above, under "Retired enlisted men," "Men furloughed without pay," "Men extending enlistments," and "Men transferred to Fleet Naval Reserve"; note below, under "Waiver of pay or allowances"; note to section 1556, Revised Statutes, under "Naval Reserve Force," and act of March 3, 1901 (31 Stat., 1030); see also act of June 3, 1916, section 126 (39 Stat., 217), as amended and reenacted by act of February 28, 1919, section 3 (40 Stat., 1203), which is the general law providing for travel allowance on discharge.

Where, by inadvertence, an enlisted man of the Navy, on his application therefor, was not furnished transportation to his home on discharge on medical survey, for which provision was made by the appropriation act of March 3, 1901 (31 Stat., 1030), and he paid his own fare, he is entitled to reimbursement therefor not to exceed the cost to the general public. (8 Comp. Dec., 377.)



An enlisted man of the Navy whose home is in Porto Rico is a resident of the United States, within the meaning of the provision in the act of March 3, 1903 (32 Stat., 1178), for the transportation to their homes of enlisted men of the Navy on discharge from the service. (11 Comp. Dec., 336.)

An enlisted man of the Navy who reenlisted upon his discharge on account of expiration of enlistment, and did not perform actual travel between the place of his discharge and the place of his enlistment, is entitled under the act of June 29, 1906 (34 Stat., 555), to travel allowance at the rate of four cents per mile for travel in the United States between said points. (13 Comp. Dec., 50.)

An enlisted man who reenlisted immediately on the expiration of a prior enlistment does not become entitled, under the act of June 29, 1906 (34 Stat., 555), on his discharge from such reenlistment, to travel allowance to the place of his preceding enlistment. (13 Comp. Dec., 526.)

The travel allowance for travel in the United States to which enlisted men of the Navy are entitled under the act of June 29, 1906 (34 Stat., 555), when discharged at a foreign port, should be computed from the nearest regular port of arrival in the continental limits of the United States to the place of enlistment. (13 Comp. Dec., 689.)

The act of March 3, 1909 (35 Stat., 755), gives the right to enlisted men of the Navy, when discharged on medical survey, to transportation to their homes at Government expense; but such right must be availed of at the time of discharge or within a reasonable time thereafter. (16 Comp. Dec., 555.)

The place of discharge from which travel allowance of an enlisted man is computed under the act of June 29, 1906 (34 Stat., 555), is the place at which the discharge was delivered and received by him, provided he is on duty at that place, and not necessarily the place of its issuance. (19 Comp. Dec., 565.)

Travel from Alaska to the State of Washington is "travel in the United States," within the meaning of the authorization for the payment of a travel allowance, under the act of June 29, 1906 (34 Stat., 555). (22 Comp. Dec., 183.)

Where a man presented himself at a certain place for enlistment, and there took the initial steps toward entering the service, he is to be regarded, with reference to travel allowance on discharge, as having been enlisted at that place, although for the convenience of the Government he was transported to another place before executing the formal contract of enlistment and taking the oath of allegiance. (23 Comp. Dec., 248.)

The statement or affidavit of an enlisted man as to his actual bona fide home or residence would not be sufficient evidence in all cases upon which to decide the question of the amount of travel pay to which he is entitled under the act of February 28, 1919 (40 Stat., 1203). No general rule may be laid down for the determination of the place to which travel pay should be allowed, but each case should be decided upon its merits. (25 Comp. Dec., 792.)

Whether or not an enlisted man intends to make the travel to the place declared to be his "actual bona fide home or residence," to which he is paid travel pay on discharge, as provided by the act of February 28, 1919 (40 Stat., 1203), is immaterial, so far as payment is concerned. (25 Comp. Dec., 792.)

Enlisted men who have been honorably discharged since November 11, 1918, should be paid by disbursing officers as provided in the act of February 28, 1919 (40 Stat., 1203), travel pay at 5 cents per mile from the place of discharge to the place of original muster into the service, and if the place claimed as actual bona fide home or residence be at a greater distance the enlisted man may present his claim for the difference between that amount and the amount paid to the proper auditor, by whom the evidence as to his home or residence may be considered and the amount found due may be certified for payment. (25 Comp. Dec., 792.)

Under the act of February 28, 1919 (40 Stat., 1203), an enlisted man whose bona fide home or residence is in the interior of a foreign country is entitled, in addition to the allowance for necessary travel in the United States, to be furnished transportation and subsistence for the sea travel involved, and 5 cents per mile from the nearest port in the foreign country to his home or residence therein. (25 Comp. Dec., 950.)

Where enlisted men are discharged under an agreement to reenlist they are not entitled to travel allowance at the rate of 5 cents per mile provided by the act of February 28, 1919 (40 Stat., 1203). (26 Comp. Dec., 21.)

Any enlisted man discharged from any branch of the naval service for the purpose of reenlisting in the Navy or Marine Corps, or who shall extend his enlistment therein, shall be entitled to travel pay as authorized by act of February 28, 1919 (40 Stat., 1203). (Act June 4, 1920, sec. 6, 41 Stat., 836.)

The act of June 4, 1920, section 6 (41 Stat., 836), applies only to men who were in the service on November 11, 1918. (27 Comp. Dec., 305; 27 Comp. Dec., 32.)

The words "honorably discharged" which are used in the act of February 28, 1919 (40 Stat., 1203), as a condition precedent to the allowance of mileage to enlisted men of the Navy, are not used in the technical sense which they have acquired in the Navy, but are used in the same broad sense with reference to the Navy that they have with reference to the Army, thus including all discharges under which the holder may be regarded by the War and Navy Departments and military men of the branch in question as leaving the service in an honorable manner. (File 9209-114, Mar. 11, 1919; C. M. O. 114, 1919, p. 18; file 9209-114:45, Feb. 10, 1920.)

An enlisted man who is not dishonorably discharged or discharged without honor, but who is discharged under honorable conditions, although the word "honorably" is omitted from the discharge paper may be considered to be honorably discharged within the meaning of the act of February 28, 1919, providing for travel pay. (25 Comp. Dec., 792; see also 25 Comp. Dec., 771, and 25 Comp. Dec., 930.)

The act of February 28, 1919 (40 Stat., 1203), provides for furnishing an enlisted man, honorably discharged from the Army, Navy, or Marine Corps, with mileage at the rate of 5 cents per mile from the place of his discharge to his "actual bona fide home or residence, or original muster into the service, at his option," and makes similar provision for furnishing mileage to reservists "honorably released from active service." *Held*, that the word "home" and "residence" are not used synonymously in this statute; that the man's actual bona fide home within the meaning of the statute is what is commonly known as his legal residence or domicile, and may be different from his actual residence, to which he may at his option claim mileage; that at the time of his enlistment in the Navy, a man may have been engaged in business and actually resided at a place other than his home, domicile, or legal residence. In such case, under the statute, he may, at his option, claim mileage to the place of his actual residence or former employment, or to his home or legal residence. However, to constitute his home or legal residence at a place different from that where he actually resided at the time of enlistment, it must appear that the man did actually reside at some time at the place to which he claims mileage, and if he did not actually reside at such place at the time of his enlistment, it must have been his bona fide home at some time in the past and he must have retained ever since the intention of returning thereto for the purpose of making same his permanent abode. (File 9209-114:4, Apr. 5, 1919; C. M. O. 186, 1919, p. 40.)

A man whose bona fide home was in Batesburg, S. C., was employed at Winston-Salem, N. C., and enrolled in the Naval Reserve Force at Columbia, S. C. He was honorably released from active duty at Charleston, S. C. *Held*, that there are three places to which the man in this case is entitled, at his option to claim mileage, viz., first, his actual bona fide home, which is stated to be Batesburg, S. C.; second, his actual, bona fide residence at the time of enrollment, which appears upon the facts stated to have been Winston-Salem, N. C.; and third, his place of "original muster into the service," being in this case place of enrollment which is stated to be Charleston, S. C. (File 9209-114:4, Apr. 5, 1919; C. M. O. 186, 1919, p. 40.)

The words of the statute, allowing mileage to be claimed to place of "original muster into the service," refer to the place shown by the records as the man's place of enlistment or enrollment under his current contract. (File 9209-114:4, Apr. 5, 1919; C. M. O. 186, 1919, p. 40.)

The act of February 28, 1919 (40 Stat., 1203), is permanent legislation, superseding prior laws for payment of travel allowances on discharge from the Army and Navy. (File 9209-114, Mar. 11, 1919; C. M. O. 114, 1919, p. 18; file 9209-114:45, Feb. 10, 1920.)

The act of July 11, 1919 (41 Stat., 139), authorizing the issuance of honorable discharges and the payment of mileage in certain cases of enlisted men who have served in the war with the German Government, did not repeal the prior permanent law of February 28, 1919 (40

Stat., 1203), or restrict the scope of said prior law. (File 9209-114:45, Feb. 10, 1920.)

Travel allowance on discharge should be paid to enlisted men of the Navy, under the act of February 28, 1919 (40 Stat., 1203), irrespective of their indebtedness to the Government at the time of discharge. (File 9209-114:5, Apr. 11, 1919, citing 18 Comp. Dec., 621 and 8 Comp. Dec., 624.)

**21. Clothing bounty on enlistment.**—By act of March 1, 1889 (25 Stat., 781), it was provided that "in order to encourage the enlistment of boys as apprentices in the United States Navy, the Secretary of the Navy is hereby authorized to furnish as a bounty to each of said apprentices after his enlistment, and when first received on board of a training ship, an outfit of clothing not to exceed in value the sum of \$45." The language of this statute, both as to the classes of persons included and the value of the clothing outfit, was broadened from time to time by subsequent appropriations for the naval service, until provision is now annually made for furnishing "outfits for all enlisted men and apprentice seamen of the Navy on first enlistment, at not to exceed \$100 each." (See, e. g., acts of July 11, 1919, 41 Stat., 135, and June 4, 1920, 41 Stat., 815.)

By act of March 3, 1915 (38 Stat., 932), it was provided "that hereafter the Secretary of the Navy is authorized to issue a clothing outfit to all enlisted men serving in their second enlistment who failed to receive an outfit of the value authorized by law on their first enlistment, or who, having received such outfit, were required to refund its value on account of discharge prior to expiration of enlistment: *Provided further*, That the net cost to the Government of clothing outfits furnished any one enlisted man shall not exceed \$60."

By act of June 29, 1906 (34 Stat., 556), it was provided "that hereafter the Secretary of the Navy may, in his discretion, require the whole or a part of the cost of outfits allowed upon enlistment to be refunded in cases where men are discharged during the first six months of enlistment for any cause other than disability incurred in line of duty."

By act of March 2, 1907 (34 Stat., 1176), it was provided "that the Secretary of the Navy may, in his discretion, require the whole or a part of the bounty allowed upon enlistment to be refunded in cases where men are discharged during the first year of enlistment by request for inaptitude, as undesirable, or for disability not incurred in line of duty."

The whole purpose of the act of March 1, 1889 (25 Stat., 781), providing clothing bounty on enlistment, was to encourage the enlistment of boys as apprentices in the United States Navy; the Secretary of the Navy has no discretion to furnish bounty in one case and decline to furnish it in another. (25 Op. Atty. Gen., 270.)

Regulations of the Secretary of the Navy, requiring refund of the clothing bounty, or any portion thereof, in case an apprentice is discharged within a year after his enlistment for disability not incurred in line of duty, are inconsistent with law and void. (25 Op. Atty. Gen., 270. Note: This opinion was rendered



prior to the statutory enactments of 1906 and 1907, above quoted, with respect to refund of clothing outfit.)

An enlistment in the Navy for temporary service is not the first enlistment within the meaning of the act of March 1, 1889 (25 Stat., 781), and the naval appropriation acts providing for the giving of outfits of clothing as a bounty on first enlistment of all enlisted men and apprentice seamen of the Navy. (19 Comp. Dec., 587.)

The promulgation of a Navy regulation to the effect that checkages of cost of clothing outfit furnished to any enlisted man of the Navy on first enlistment shall be made against his account if discharged within the first six months of such enlistment does not preclude the Secretary of the Navy from the exercise of the discretion conferred on him by the act of June 29, 1906 (34 Stat., 556), in each case coming within such statute. (19 Comp. Dec., 741.)

An enlisted man who is given a bad-conduct discharge and subsequently reenlists is not entitled to receive a clothing outfit as of a first enlistment. (20 Comp. Dec., 856. This decision was prior to the act of Mar. 3, 1915, above quoted, authorizing clothing outfits on second enlistment in certain cases.)

For other cases, see notes above, under "Pay of insular force," and "Men furloughed without pay."

**22. Deposit of savings.**—See note above, under "Men extending enlistments."

The act of February 9, 1889 (25 Stat., 657), "to provide for the deposit of the savings of seamen of the United States Navy," does not extend to enlisted men of the Marine Corps. (19 Op. Atty. Gen., 616.)

Paymasters of the Navy may receive from enlisted men or petty officers for deposit, under the act of February 9, 1889 (25 Stat., 657), accumulated savings of any amount, provided they represent the earnings of such a person as an enlisted man or petty officer in the United States Navy, notwithstanding that they may include accumulated savings from previous terms of enlistment. (21 Op. Atty. Gen., 498.)

The act of February 9, 1889 (25 Stat., 657), providing for deposits of savings of enlisted men of the Navy and exempting such deposits from liability for their debts, does not apply to debts due the Government, and such debts should be set-off against said deposits. (16 Comp. Dec., 566.)

When it appears that an enlisted man of the Navy has been dishonorably discharged after serving a term of imprisonment for desertion, that at the time of his discharge the fact that there was due him a sum deposited was inadvertently overlooked, and that upon discharge he was furnished, under authority of the acts of February 16, 1909 (35 Stat., 622), and March 3, 1909 (35 Stat., 756), a cash gratuity and transportation, the amount of such gratuity, transportation, and any other indebtedness due the Government at the time of his discharge should be set-off against the sum deposited to his credit. (16 Comp. Dec., 566.)

Enlisted men of the Navy temporarily warranted or commissioned under the act of May 22, 1917 (40 Stat., 84), being thereby, during the continuance of such appointment, discharged

from service as enlisted men and entitled to receive all pay and allowances due them as such, may legally be paid the moneys which they have on deposit at the time of being warranted or commissioned. (24 Comp. Dec., 179; for other cases, see note to sec. 1409, R. S., under "Deposit accounts of mates and warrant officers," note to sec. 1417, R. S., under "Enlisted men furloughed without pay," and note above, under "Men transferred to Fleet Naval Reserve.")

Members of the Naval Reserve Force when released from active duty should be repaid deposits with interest thereon. (Comp. Dec., July 3, 1917, 197 S. and A. Memo., 4302.)

**23. Waiver of pay or allowances.**—See note to section 1422, Revised Statutes, under "Transportation may be waived," and note to same section under "Additional pay can not be waived;" and see cases noted under section 1556, Revised Statutes, under "Waiver of pay."

An enlisted man of the Navy who, in consideration of his being allowed to remain on his vessel, then about to proceed to Asiatic waters, gives a waiver of all claim to transportation home should he refuse to reenlist and be discharged in a foreign port, can not maintain an action for the value of such transportation. (Hunt v. U. S., 38 Ct. Cls., 135.)

Power to discharge a soldier upon the latter's request is a discretion vested in the President and exercised by him through the Secretary of War. It is essential to the due exercise of this discretion that he have power to exercise it upon conditions prescribed by himself; and this power the judiciary does not desire to question or curtail. Accordingly, *held*, that where the Secretary of War authorized the discharge of an enlisted man who had unsuccessfully instituted proceedings in the civil courts to have his enlistment canceled, and as a condition to such discharge required that the man make good all indebtedness due by him to the United States; and the man accepted the terms of the release offered, paid what the Government claimed of him, and left the service; there was an implied agreement on the part of the soldier that he would assert no claim for compensation against the United States; he waived some supposed rights in order to secure other and substantial advantages himself; and he was not entitled thereafter to pay or allowances from the United States for the time that his litigation was pending in the civil courts and he rendered no service to the Government. (Grimley v. U. S., 32 Ct. Cls., 285.)

An apprentice of the Navy, having been transferred from one vessel to another, upon his request and upon his waiver of his right, on discharge in a foreign port, to transportation to the United States, he is not entitled to reimbursement of the cost of such transportation procured by himself. (9 Comp. Dec., 5.)

**24. Sixty-dollar bonus on discharge.**—Under the act of February 24, 1919, section 1406 (40 Stat., 1151), authorizing payment of \$60 to men discharged under honorable conditions, and who served in the military or naval forces of the United States during the World War, *held*, that the separation from the service of enlisted men by discharge should in all cases be considered as "under honorable conditions,"

except when the certificate or order of discharge recites facts precluding the presumption of honorable conditions. (25 Comp. Dec., 771.)

Under section 1406 of the act of February 24, 1919 (40 Stat., 1151), the discharge contemplated is one which effects a separation from the service, and not a discharge given in the regular course of procedure, solely for the purpose of enabling the person to reenter the service in another branch or subdivision thereof. (25 Comp. Dec., 790.)

The aforesaid bonus can not be paid on the date an enlistment is due to expire, in cases where the enlisted man has agreed to extend his enlistment (25 Comp. Dec., 986); but may be paid on the discharge of such man after the expiration of such extension. (26 Comp. Dec., 138.)

The bonus may be paid to enlisted men who voluntarily reenlist after discharge, but not where the discharge is conditioned upon reenlistment. (25 Comp. Dec., 930.) And it can

not be paid to men transferred from the Naval Reserve Force to the Regular Navy, to serve the unexpired term of their enrollment, pursuant to act of July 11, 1919 (41 Stat., 139). (26 Comp. Dec., 33.)

Any enlisted man discharged from any branch of the naval service for the purpose of reenlisting in the Navy or Marine Corps, or who shall extend his enlistment therein, shall be entitled to the payment of bonus authorized by act of February 24, 1919, section 1406. (Act June 4, 1920, sec. 6, 41 Stat., 836.)

The act of June 4, 1920, section 6, above quoted, applies only to persons who were in the service on November 11, 1918. (27 Comp. Dec., 305; 27 Comp. Dec., 32.)

**25. Attachment of pay by creditors.**—See *Buchanan v. Alexander* (4 How., 19), noted under section 1430, Revised Statutes.

**26. Allotments of pay.**—See sections 1430 and 1576, Revised Statutes, and notes thereto.

**Sec. 1570. [Additional pay for serving as firemen.]** Every seaman, landsman, or marine who performs the duty of a fireman on board any vessel of war shall be entitled to receive, in addition to his compensation as seaman, landsman, or marine, a compensation at the rate of 33 cents a day for the time he is employed as fireman.

This section was expressly amended and reenacted to read as above by act of March 29, 1918 (40 Stat., 499). As originally enacted, it read as follows:

“SEC. 1570. Every seaman, ordinary seaman, or landsman who performs the duty of a fireman or coal-heaver on board of any vessel of war shall be entitled to receive, in addition to his compensation as seaman, ordinary seaman, or landsman, a compensation at the rate of thirty-

three cents a day for the time he is employed as fireman or coal-heaver.”—(1 Mar., 1869, c. 48, s. 2, v. 15, p. 280.)

**Applicable to insular force.**—Members of the insular force are entitled to the extra pay provided by section 1570, Revised Statutes, while performing the duty of a fireman on board a vessel of war of the United States. (Comp. Dec., Aug. 13, 1910, 114 S. and A. Memo., 1546; see note to sec. 1569, R. S.)

**Sec. 1571. [Sea service.]** No service shall be regarded as sea service except such as shall be performed at sea, under the orders of a Department and in vessels employed by authority of law.—(1 June, 1860, c. 67, s. 3, v. 12, p. 27.)

Additional pay for sea duty: See act of May 13, 1908 (35 Stat., 128).

**Section 1571 not repealed.**—The Navy personnel act of March 3, 1899, section 13 (30 Stat., 1007), which provided that officers of the Navy shall receive the same pay and allowances as officers of corresponding rank in the Army, did not repeal or modify Revised Statutes, section 1571, defining sea service. (*Ryan v. U. S.*, 38 Ct. Cls., 143.)

There is nothing in the Navy personnel act inconsistent with or repealing Revised Statutes, section 1571. (*U. S. v. Thomas*, 195 U. S., 418.)

**Orders of Secretary of the Navy as to what constitutes sea service.**—The authority of the head of an executive department to issue orders and regulations under the direction of the President, to have the force of law, is subject to the condition that they conflict with no act of Congress; and an order of the Secretary of the Navy that a service shall not be a sea service which Congress has directed shall be a sea service is invalid. (*U. S. v. Symonds*, 120 U. S., 46.)

Congress certainly did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation as established by law, by declaring that to be shore service which was in fact sea service; or to increase his compensation by declaring that to be sea service which was in fact shore service. (*U. S. v. Symonds*, 120 U. S., 46.)

The statute does not confer upon the Secretary of the Navy, acting alone or by direction of the President, the power to declare a particular service to be shore service if in fact it was performed by the officer “when at sea,” under the orders of the Department, and on a vessel employed with authority of law. (*U. S. v. Symonds*, 120 U. S., 46; *U. S. v. Bishop*, 120 U. S., 51.)

Services are to be deemed services performed at sea, not because the Secretary of the Navy has announced that the Department will so regard them, but because they are in fact services performed at sea and not on shore. (*U. S. v. Symonds*, 120 U. S., 46; *U. S. v. Bishop*, 120 U. S., 51.)

The Navy Department has no power to disregard the provisions of Revised Statutes, sections 1556 and 1571, and either deprive an



officer of sea pay by assigning him to a duty mistakenly qualified as shore duty but which is in law sea duty; or to entitle him to receive sea pay by assigning him to duty which is essentially shore duty and mistakenly qualifying it as sea duty. (*U. S. v. Engard*, 196 U. S., 511.)

The Secretary of the Navy can not arbitrarily change, by an order, the character of the duty to be performed by a naval officer; but the fact that he designates a mixed duty as shore duty is an indication of the construction which he places upon it. (*McGowan v. U. S.*, 36 Ct. Cls., 63.)

The burden of proof rests on an officer seeking sea pay to disclose the character of the service rendered, especially where the order assigning him to duty designates it as shore duty. (*Corwine v. U. S.*, 24 Ct. Cls., 104.)

When a naval officer on sea duty was assigned to shore duty, a modification of the order, after the service was performed, by inserting the words "for temporary duty," and the certificate of the department that the omission of the word "temporary" was a clerical error, does not confer a legal right to sea pay on the officer. The Navy Department has not power to fix the character of the service by the terms of its order. The character of the service is a question of fact. (*Doyle v. U. S.*, 46 Ct. Cls., 181, distinguishing *Mueller v. U. S.*, 41 Ct. Cls., 240, which held that ratification by the Secretary of War of an oral order was valid.)

**Vessels in bays, inlets, or other arms of the sea.**—The sea pay given to officers of the Navy by Revised Statutes, 1556, may be earned by services performed under orders of the Navy Department in a vessel employed by authority of law in active service in bays, inlets, roadsteads, or other arms of the sea, under the general restrictions, regulations, and requirements that are incident or peculiar to service on the high seas. (*U. S. v. Symonds*, 120 U. S., 46.)

Under the third section of the act of June 1, 1860 (now sec. 1571, R. S.), *held*, that the words "at sea" are not to be construed literally, as requiring that the vessel must be actually at sea; but that they may properly include an officer who, upon being ordered to duty at sea, reports himself, in obedience to his orders, at the place designated, even though the vessel be lying in port and not actually out at sea. (10 Op. Atty. Gen., 191.)

Trips made down the river, under orders for a sea voyage, and up the river on the return of a vessel from sea, are sea service. (*McRitchie v. U. S.*, 23 Ct. Cls., 23.)

A naval vessel always afloat on tide water, frequently ordered to sea, at all times ready to obey such orders, the officers and crew messing and sleeping on board and maintaining the regulations and discipline of a man-of-war at sea, is in sea service within the intent of the Revised Statutes, section 1556. (*McRitchie v. U. S.*, 23 Ct. Cls., 23.)

For a naval vessel to come within the phrase "at sea," it is not necessary that she be upon the high seas; it is enough if she be water borne, even at anchor, or tied to a dock. (*Wyckoff v. U. S.*, 34 Ct. Cls., 288.)

Service performed on board a vessel of the United States, by order of the Secretary of the Navy, in which the officer is obliged to occupy a room, pay mess bills, etc., as if actually at sea, entitles him to sea pay. (*Hannum v. U. S.*, 36 Ct. Cls., 99.)

The fact that an officer assigned to duty is to take charge of the machinery of another vessel, and that the vessels were at a navy yard, does not render the service shore duty. (*Hannum v. U. S.*, 36 Ct. Cls., 99.)

**Training ship at anchor and not in commission.**—It is of no consequence that a naval vessel was, during the period for which sea pay is claimed, in such condition that she could not be safely taken out to sea beyond the mainland. She was a training ship, anchored in Narragansett Bay, during the whole time covered by the claim, and was subject to such regulations as would have been enforced had she been put in order and used for purposes of cruising or as a practice ship at sea. Within the meaning of the law an officer performing his duties as executive officer of the vessel was "at sea"; notwithstanding that, by order of the Secretary of the Navy, it was announced that said vessel "will not be considered in commission for sea service." (*U. S. v. Symonds*, 120 U. S., 46.)

**Receiving ship at anchor and not in commission.**—Service, under an order of the Secretary of the Navy, by an officer of the Navy as executive officer of a receiving ship, at anchor in port at a navy yard and not in commission for sea service, entitles him to receive pay for sea service. The facts in this case disclose that the vessel has been stationed and anchored at the same navy yard and in the same place for over 12 years; that it has been used as a naval recruiting station; that there is a roof built over the deck; that the ship is connected and communicates with shore by a rope; that steam is used only for heating purposes and pumps; that all the anchors have never been taken up at the same time; that she was not in a safe condition for cruising; that the duties performed by the executive officer of the vessel were similar to those of executive officers on cruising ships. (*U. S. v. Strong*, 125 U. S., 656.)

**Receiving ship condemned and stricken from Navy Register.**—An officer is entitled to sea pay when ordered to duty on board a vessel used as a receiving ship, notwithstanding that such vessel has been condemned by a board as unfit for a cruiser, and its name stricken from the list of ships in the Navy Register. The fact nevertheless appears that the said vessel is subject to the usual naval routine and put to kindred uses, and that her officers are subject to the same rules as before she was condemned. Where officers are charged with the responsibilities and duties of officers on sea duty, the emoluments follow the responsibilities and duties. (*Pierce v. U. S.*, 33 Ct. Cls., 294.)

**Vessel having no crew but civilian laborers.**—It is sufficient to entitle an officer to sea pay that the vessel on which he is, is employed by authority of law; she need not be in commission or engaged in navigation; her crew

need not be seamen, but may be a small force of civilian laborers from a dockyard. (*Wyckoff v. U. S.*, 34 Ct. Cls., 288.)

**Vessel in reserve with reduced complement.**—It is not the location of a ship, but the condition with reference to the sea, qualified by the further condition of an officer's being "subjected to such restrictions, regulations, and requirements as are incident to service at sea," which determines his right to sea pay. Accordingly, *held*, that a paymaster ordered to a designated station, "for duty on board the *Ajax* and the other monitors off that place," his orders designating the duty as shore duty, is not entitled to sea pay, the said ships not being in any designated service, but lying in port, held in reserve for sea service and reduced in complement. (*Corwine v. U. S.*, 24 Ct. Cls., 104.)

A ship of war afloat, manned, in a serviceable condition, and able to proceed to sea, is in service, though she may need more men and stores to make her sea service effective, and although she may be lying in port, held in reserve for sea service and reduced in complement. An officer on such a vessel is in sea service if he is subjected to the restrictions, regulations, and requirements which are incident to service at sea. (*Aulick v. U. S.*, 27 Ct. Cls., 109, distinguishing *Corwine v. U. S.*, 24 Ct. Cls., 104, in that, in the latter case, the officer failed to show that he was subjected to the restrictions, regulations, and requirements incident to sea service.)

**Vessel loaned to State as school ship.**—A lieutenant in the Navy assigned, by order of the Secretary of the Navy, to duty as executive officer of a vessel of the United States, furnished by the Secretary to the State of New York as a school ship, is entitled to sea pay as well while the vessel is attached to a wharf in the harbor of New York as while she is on a cruise, and although this service is called, in the Secretary's order for the officer's detail, "employment on shore duty," and notwithstanding the officer is receiving pay from the State as instructor in its nautical school upon the vessel. (*U. S. v. Barnette*, 165 U. S., 174.)

**Duty on shore in connection with vessels.**—A naval paymaster on shore duty at a navy yard is not entitled to pay for sea duty, though required by the Secretary of the Navy, in addition to his regular duties, to take charge of the accounts of certain vessels temporarily at anchor off the yard and in commission for sea service. (*Carpenter v. U. S.*, 15 Ct. Cls., 247.)

**Duty as lighthouse inspector.**—An officer of the Navy assigned to duty as a lighthouse inspector, under Revised Statutes, section 4671, and ordered to inspect the light stations in his district, is not entitled to sea pay under section 1571, Revised Statutes, while making his tour of inspection, though it be by water and involve going to sea. To be entitled to sea pay under section 1571, Revised Statutes, an officer must be afloat and under orders to perform sea service. (*Schoonmaker v. U. S.*, 19 Ct. Cls., 170.)

**Officer at sea, suspended from duty.**—A paymaster at sea, but suspended from duty pending an investigation of his accounts, is not rendering sea service within the intent of sec-

tion 1571, Revised Statutes, and is entitled only to waiting-orders pay. While in attendance before the court-martial, he is entitled to shore-duty pay; after his court-martial, awaiting the review of the court's proceedings by the President, he is entitled to waiting-orders pay. (*Sullivan v. U. S.*, 32 Ct. Cls., 402.)

It is not the mere being at sea which entitles an officer to sea pay, but it is his being at sea in such a legal condition as entitles him to the pay incident to that condition. In this case the officer was at sea, in that he was on board a receiving ship under the order of the department, but he was not at sea within the meaning of the law entitling him to sea pay. He was, by his own fault, without duty and in the discharge of no functions; so far as public and efficient services were concerned, he had no participation in them, and would have been guilty of a further offense if he had attempted to exercise any of his powers as an officer. (*Sullivan v. U. S.*, 32 Ct. Cls., 402.)

**Distinction between "rendering service at sea" and being in "sea service."**—There is a distinction between rendering service and being in service; an officer may be in sea service though not rendering service at sea. (*Aulick v. U. S.*, 27 Ct. Cls., 109.)

An officer sleeping in his berth is not rendering service, but is nevertheless in service; an officer on shore leave for a few hours while his vessel is in a foreign port is in sea service, though not rendering service; and sea pay does not stop because the officer chances for the moment to be on dry land. And so it is with a vessel. Ships of war, in time of peace, are for the greater part of the time in a condition of idleness. They sail somewhere and do nothing; they sail somewhere else, and again do nothing; they return home, and await orders. A ship of war may pass her entire life in a condition of readiness to serve, but of never serving. (*Aulick v. U. S.*, 27 Ct. Cls., 109.)

**Vessel on trial trip but not accepted.**—Where a vessel is on her trial trip prior to acceptance, and still within the possession and control of the builders, the United States, however, having, by the payment of installments, acquired an interest equal to 49 out of 50 parts of the vessel, she must be regarded as practically the property of the Government. (*Williams v. U. S.*, 47 Ct. Cls., 186.)

**Officer traveling on vessel as passenger.**—Section 1571 does not admit of the construction that a steamer upon which a naval officer takes passage under orders of the department thereby becomes a "vessel employed by authority of law." A person who takes passage upon a steamer, or a seat in a railway carriage, does not "employ" such steamer or carriage in any just sense. (*U. S. v. Thomas*, 195 U. S., 418.)

Under section 1571, Revised Statutes, the term "vessels employed by authority of law" is restricted to vessels owned or otherwise engaged in the Government service; and travel under orders by naval officers upon a merchant vessel is not service within the meaning of that section. (*McGowan v. U. S.*, 49 Ct. Cls., 454.)

Section 1571 recognizes the fact that a naval officer, like a landsman, may be on shore duty



and yet sailing the seas beyond the 3-mile limit. (*McGowan v. U. S.*, 49 Ct. Cls., 454.)

Where an assistant surgeon in the Navy travels under orders, as a passenger, on a United States naval vessel from China to reach an assignment to duty in the Philippine Islands, he is not performing sea service and is only entitled to shore pay. While he was traveling under orders, his orders were not to perform sea service in the sense required to entitle him to sea pay. (*Thompson v. U. S.*, 49 Ct. Cls., 459.)

Where an assistant surgeon in the Navy was ordered by the commander in chief of the Asiatic station to proceed on the U. S. S. *Iris* and report to the senior squadron commander off Taku, China, for temporary duty with the detachment of marines; and under orders of the senior squadron commander he performed services in China with the United States marines, such services were shore duties and not duties at sea; during the period in question he was not attached to and performed no duty on any ship. (*Thompson v. U. S.*, 49 Ct. Cls., 459.)

**Mixed duty; which is paramount.**—Where the assignment of an officer to duty by the Navy Department expressly imposes upon him the continued discharge of his sea duties, and qualifies the shore duty as merely temporary and ancillary to the regular sea duty, the presumption is that the shore duty is temporary and does not operate to interfere with or discharge the officer from the responsibilities of sea duties to which he is regularly assigned; and he is entitled to sea pay during the time of such temporary shore duty. (*U. S. v. Engard*, 196 U. S., 511.)

Where an officer is assigned to the command of a training ship, and of a vessel at a station used as a training ship, and his most arduous and responsible duties are discharged on shore, it must be held that the ship is the incident and the shore the principal. (*McGowan v. U. S.*, 36 Ct. Cls., 63.)

Where the question is one of shore duty or sea service, the facts in each case must be considered, and where there is a preponderance the service having paramount character must constitute the basis on which to predicate the right of pay. (*McGowan v. U. S.*, 36 Ct. Cls., 63.)

The fact that the Secretary of the Navy designates a mixed duty as shore duty is an indication of the construction which he places upon it. (*McGowan v. U. S.*, 36 Ct. Cls., 63.)

A naval officer on shore duty who was assigned to the temporary command of a vessel in the Coast Survey service, but who continued on shore duty and did not live continuously on board the vessel, and was not subject to the restrictions, requirements, or regulations of sea service, is entitled only to shore-duty pay. (*Taussig v. U. S.*, 38 Ct. Cls., 104.)

Officers of the Navy may perform duty on a receiving ship which will entitle them to sea pay; but only where they wear their uniform when on duty, live and mess on board the vessel, and are subject to all the restrictions and regulations applicable to vessels at sea; but an officer also having shore duty, living and messing on shore in quarters furnished to him by

the Government, and presumably receiving the allowances to which Army officers are entitled, is entitled only to shore-duty pay. (*Mahan v. U. S.*, 40 Ct. Cls., 36.)

It is well settled that where a naval officer attached to a vessel and detailed for shore duty is not called upon to perform services ashore incompatible with the performance of his duty on his ship, and the shore services are temporary and not so different in character as to detach him in fact from his vessel, his paramount duty is sea service. (*Leach v. U. S.*, 44 Ct. Cls., 132.)

The primary question in the case of a naval officer, "detailed for special duty on shore," is one of fact; and the court can not determine the character of the duty on shore or the right of the officer to sea pay or shore-duty pay without knowing what were the services rendered on shore, and how far they detached him in fact from his vessel. (*Leach v. U. S.*, 44 Ct. Cls., 132.)

Where an officer of the Navy is assigned by proper authority to sea duty on a vessel at Guam, he can not be considered as "detailed for shore duty beyond seas," because the naval governor of Guam, by a verbal order, directed him to do duty on shore. (*Furlong v. U. S.*, 45 Ct. Cls., 493.)

Duty performed on shore by a naval officer without having been detailed for shore duty must be regarded as temporary service performed while he officially remains on board the vessel to which he is attached. (*Furlong v. U. S.*, 45 Ct. Cls., 493.)

When a naval officer attached to a vessel and entitled to sea-service pay is ordered by the Secretary of the Navy to report for recruiting service "in addition to your present duties," and he is absent from his vessel on recruiting duty on shore a year, he is not entitled to sea pay though he remains technically attached to his vessel. (*Doyle v. U. S.*, 46 Ct. Cls., 181.)

An officer entirely relieved from all the responsibilities and discomforts of sea service for more than a year while with a recruiting party on shore can not be regarded as on temporary shore service, though technically the order assigning him to recruiting duty did not detach him from his vessel or separate him from sea duty. (*Doyle v. U. S.*, 46 Ct. Cls., 181.)

Where an officer in the performance of sea duty left his vessel on authorized leave, and without rejoining his vessel or resuming his sea duty thereon was placed on special temporary duty ashore in the Bureau of Navigation, he was not, while in the performance of such temporary duty ashore, in a sea-duty status, and was not entitled to sea-duty pay. (18 Comp. Dec., 340.)

**When right to sea pay begins and ends.**—The right of a naval officer to sea pay begins when sea service begins, independent of any order of the Navy Department. (*Wyckoff v. U. S.*, 34 Ct. Cls., 288.)

An officer detached from one vessel and assigned to duty on another, by proper authority, is on shore duty while passing from the one to the other, and entitled only to shore-duty pay. (*Ryan v. U. S.*, 38 Ct. Cls., 143.)

The act of May 13, 1908 (35 Stat., 128), provides that "all officers on sea duty and all

officers on shore duty beyond the continental limits of the United States shall while so serving receive ten per centum additional of their salaries and increase as above provided, and such increase shall commence from the date of reporting for duty on board ship or the date of sailing from the United States for shore duty beyond the seas or to join a ship in foreign waters."

An officer in 1867 and 1868 was not entitled to sea pay after being detached from his vessel on a foreign station and ordered to report to the Secretary of the Navy. (*Bishop v. U. S.*, 38 Ct. Cls., 473.)

Where an officer of the Navy is detached from sea duty he ceases to be entitled to sea pay, and, generally, increased pay will cease when an officer is detached from service entitling him thereto. (*McCully v. U. S.*, 42 Ct. Cls., 275.)

Prior to the act of May 13, 1908, there was no statute giving officers a 10 per cent increase in pay subsequent to detachment abroad from sea duty, unless while returning they were actually in the performance of sea duty. Accordingly, the clause in the act of May 13, 1908, saving officers of the Navy from reduction in pay and allowances then authorized by law, has no application to a claim for sea pay by an officer after detachment abroad from sea duty and while returning to the United States. (*McDonald v. U. S.*, 48 Ct. Cls., 123.)

Prior to the act of May 13, 1908, officers of the Navy were entitled to the increased pay for shore duty beyond seas until their return to the United States; and the act of May 13, 1908, did not change the law so as to deprive naval officers of the right to increased pay while returning home upon orders from foreign shore duty; the saving clause in that act preserved the right of naval officers in this respect under laws previously existing. (*Gearing v. U. S.*, 46 Ct. Cls., 187; see note to sec. 1556, R. S., under "Additional pay for special duty," with respect to "Shore duty beyond seas.")

The statutory situation is anomalous, providing extra compensation for officers on foreign shore duty from the time of departure from the United States to the time of their return, and in restricting the extra allowance in the case of naval officers on sea service to a period extending only to the time consumed in reaching the assignment for sea duty; but there is no escape from that conclusion, which the express language of the statute prescribes. The inequality will not justify the court in departing from the express terms of the law. (*McDonald v. U. S.*, 48 Ct. Cls., 123.)

An officer is not entitled to sea-duty pay while aboard a transport en route to the United States after having been detached from sea duty abroad. (*McDonald v. U. S.*, 48 Ct. Cls., 123, citing *Farenholt v. U. S.*, 42 Ct. Cls., 114.)

In *United States v. Thomas* (195 U. S., 418), the Supreme Court declined to extend the benefits of extra compensation provided for Army officers for service beyond the limits of the United States, under the acts of May 26, 1900 (31 Stat., 211), and March 2, 1901 (31 Stat., 903), to naval officers performing sea service under similar conditions; and doubtless the act of May 13, 1908, allowing increased pay "from

the date of reporting for duty on board ship or the date of sailing from the United States for shore duty beyond the seas or to join a ship in foreign waters," was enacted with this decision in view. Just why the period of computation in allowing the extra per centum is so specifically circumscribed is difficult to perceive; nevertheless the express language of the act so provides, and the express provisions of law must govern. (*McDonald v. U. S.*, 48 Ct. Cls., 123.)

**Sea pay allowed for shore duty.**—See note to section 1556, Revised Statutes, under "Additional pay for special duty," with respect to the pay of the Superintendent of the Naval Academy and of the commandant of the navy yard, Mare Island.

The duty of the Judge Advocate General of the Navy being shore duty, he was entitled only to shore-duty pay under the act of June 8, 1880 (21 Stat., 164), which provided that the Judge Advocate General shall have "the rank, pay, and allowances of a captain in the Navy or a colonel in the Marine Corps, as the case may be." The court knows of no instance where an officer in the Navy is entitled to sea pay and allowances while performing shore duty, except where it is so provided by express statute. (*Lemly v. U. S.*, 28 Ct. Cls., 468.)

Under the amendatory act of June 5, 1896 (29 Stat., 251), which provided that the Judge Advocate General of the Navy should receive the "highest pay of a captain in the Navy," held, that the Judge Advocate General was entitled to the sea pay of a captain. (11 Comp. Dec., 11. For other cases, see note to sec. 421, R. S., relating to pay of chiefs of bureaus in the Navy Department.)

The words "highest rates of pay attached to their respective grades" as used in a special act of Congress, approved July 29, 1886 (24 Stat., 346), increasing the pay of certain officers for exceptional shore service, mean something more than "sea pay"; these words entitle the officers concerned to the highest sea pay of their grade, i. e., the rate of pay allowed for sea duty to officers in that grade entitled to the maximum increase for longevity. (*Schuetze v. U. S.*, 24 Ct. Cls., 299.)

**Officers temporarily absent from their ship.**—See note to section 1556, Revised Statutes, under "Absence from duty"; see also note above, under "Mixed duty, which is paramount."

An officer attached to a vessel at sea, and not detached from it by competent authority, is entitled to sea pay while temporarily in a naval hospital because of a gunshot wound incurred in the line of duty. (*Collins v. U. S.*, 37 Ct. Cls., 222.)

A Navy regulation providing that "an officer temporarily absent from a ship in commission to which he is attached shall continue to receive sea pay" does not contravene section 1556, Revised Statutes. (*Collins v. U. S.*, 37 Ct. Cls., 222.)

Where a naval officer is attached to a vessel when ordered to a hospital for treatment, he is entitled to sea pay while in the hospital; but if when ordered to the hospital he is awaiting the arrival of the vessel to which he has been ordered, he is not then attached, and will not



be entitled to sea pay while in the hospital. (Ackley v. U. S., 40 Ct. Cls., 216.)

Officers of the Navy granted temporary leave of absence from their ships are not, during absence on such leave, on "sea duty," and therefore are not entitled under the act of May 13, 1908, to the 10 per cent additional pay therein authorized for officers "while so serving." (15 Comp. Dec., 656.)

A commissioned officer of the Navy is not entitled to the 10 per cent additional pay for sea duty while on leave of absence, even though the leave be of only one day's duration. (Comp. Dec., June 8, 1915, 172 S. and A. Memo., 3703.)

A warrant officer of the Navy granted leave of absence from duty at sea is entitled, under the act of August 29, 1916 (39 Stat., 578), to full pay at the rate received by him while on sea duty. (23 Comp. Dec., 200. Note: The act of Aug. 29, 1916, provided that "warrant officers shall be allowed such leave of absence, with full pay, as is now or may hereafter be allowed other officers of the United States Navy.")

**Sea service normal duty of naval officers.**—If Army officers should be allowed increased pay when ordered to sea or to a foreign port, it would not follow that naval officers receiving Army pay would be entitled to a like increase, since such service would be wholly exceptional in the case of Army officers, while it is the natural and normal duty of naval officers to engage in sea service, cruise in foreign waters, and lie up in foreign ports. (U. S. v. Thomas, 195 U. S., 418.)

The normal pay of naval officers under the Navy personnel act of March 3, 1899 (30 Stat., 1004), is the higher, i. e., sea service pay; the exceptional pay is for shore service; both are dependent upon the character of the service. (Ryan v. U. S., 38 Ct. Cls., 143.)

Under the Navy personnel act the normal pay of officers in the Navy is sea pay, and the exceptional pay is for shore service; where an officer performs shore duty and receives shore pay, he is not entitled to the normal pay. (Mahan v. U. S., 40 Ct. Cls., 36.)

#### Sec. 1572. [Detention beyond term of enlistment. Superseded.]

This section provided as follows:

"Sec. 1572. All petty officers and persons of inferior ratings who are detained beyond the terms of service, according to the provisions of section fourteen hundred and twenty-two, or who, after the termination of their service, voluntarily re-enter, to serve until the return to an Atlantic port of the vessel to which they belong, and until their regular discharge therefrom, shall, for the time during which they are so detained or so serve beyond their original terms of service, receive an addition of one-fourth of their former pay."—(17 July, 1862, c. 204, s. 17, v. 12, p. 610.)

It was superseded by the act of March 3, 1875 (18 Stat., 484), which also superseded sections 1422-1425, Revised Statutes, and re-

enacted, with amendments, the provisions of all these sections as section 1422, Revised Statutes. See notes to sections 1422-1425, Revised Statutes.

**Additional pay not pay of rating.**—The additional pay to which petty officers and persons of inferior ratings are temporarily entitled, under the provisions of section 1422 and 1572, Revised Statutes, should not be added to their regular rates of pay in computations under a statute (sec. 4631, R. S., par. 5), providing for the distribution of bounty among the officers and crew of a vessel "in proportion to their respective rates of pay in the service." (Engagement off Santiago Bay, 36 Ct. Cls., 200.)

For other cases, see notes to sections 1418, 1422, and 1569, Revised Statutes.

**Sec. 1573. [Honorable-discharge gratuity and continuous-service pay.]** If any enlisted man or apprentice, being honorably discharged, shall reenlist for four years within four months thereafter, he shall, on presenting his honorable discharge or on accounting in a satisfactory manner for its loss, be entitled to a gratuity of four months' pay equal in amount to that which he would have received if he had been employed in actual service: *Provided*, That any enlisted man in the Navy whose term of enlistment has been extended for an aggregate of four years shall, after the expiration of the preceding four-year term of enlistment upon which the extension is made and if otherwise entitled to an honorable discharge, be paid the gratuity above provided: *And provided*, That any man who has received an honorable discharge from his last term of enlistment, or who has received a recommendation for reenlistment upon the expiration of his last term of enlistment, who reenlists for a term of four years within four months from the date of his discharge, shall receive an increase of one dollar and thirty-six cents per month to the pay prescribed for the rating in which he serves for each successive reenlistment: *And provided further*, That an extension of the period of enlistment as hereinbefore authorized, aggregating four years, shall be held and considered as equivalent to continuous

service with respect to all rights, privileges, and benefits granted for such service pursuant to law."

**This section was expressly amended and reenacted** to read as above by act of August 22, 1912 (37 Stat., 331). As originally enacted it read as follows:

"SEC. 1573. If any seaman, ordinary seaman, landsman, fireman, coal heaver, or boy, being honorably discharged, shall reenlist for three years, within three months thereafter, he shall, on presenting his honorable discharge, or on accounting in a satisfactory manner for its loss, be entitled to pay, during the said three months, equal to that to which he would have been entitled if he had been employed in actual service."—(2 Mar. 1855, c. 136, s. 2, v. 10, p. 627. 7 June, 1864, c. 111, v. 13, p. 120.)

**It had previously been amended** by joint resolution of June 11, 1896 (29 Stat., 476), which reads as follows: "That the benefits of honorable discharge, as conferred by section fourteen hundred and twenty-six of the Revised Statutes, and of three months' pay upon reenlistment after honorable discharge, as conferred by section fifteen hundred and seventy-three, upon seamen, ordinary seamen, landsmen, firemen, coal heavers, and boys, be, and the same are hereby, extended and made applicable to all enlisted persons in the Navy. And all accounts of paymasters who have made payments to enlisted men, not of the classes named in sections fourteen hundred and twenty-six and fifteen hundred and seventy-three of the Revised Statutes as if they had been included in the provisions of said sections, shall be allowed and passed by the accounting officers of the Treasury as if they had been included in said sections."

**It was further amended and reenacted** by the Navy personnel act of March 3, 1899, section 16 (30 Stat., 1008), which fixed the term of enlistment in the Navy at four years, and expressly provided that section 1573, Revised Statutes, be amended to read as follows: "If any enlisted man or apprentice, being honorably discharged, shall reenlist for four years within four months thereafter, he shall, on presenting his honorable discharge or on accounting in a satisfactory manner for its loss, be entitled to pay during the said four months equal to that to which he would have been entitled if he had been employed in actual service; and that any man who has received an honorable discharge from his last term of enlistment, or who has received a recommendation for reenlistment upon the expiration of his last term of service of not less than three years, who reenlists for a term of four years within four months from the date of his discharge, shall receive an increase of one dollar and thirty-six cents per month to the pay prescribed for the rating in which he serves for each consecutive reenlistment."

**Other modifications of section 1573** have been made by the following enactments:

By act of August 22, 1912 (37 Stat., 331), provision was made for the discharge of any enlisted man within three months before the expiration of his term of enlistment or extended

enlistment, "without prejudice to any right, privilege, or benefit that he would have received, except pay and allowances for the unexpired period not served, or to which he would thereafter become entitled, had he served his full term of enlistment or extended enlistment."

By act of April 25, 1917 (40 Stat., 38), extension of minority enlistments in the Navy and Marine Corps was authorized under similar conditions as provided by law for extending other enlistments.

By act of August 29, 1916 (39 Stat., 560), it was provided that enlisted men who serve one year at sea shall, in time of peace, if they so elect, be given a discharge without cost; that "an honorable discharge may be granted under this provision, but when so granted shall not entitle the holder, in case of reenlistment, to the benefits of an honorable discharge granted upon completion of an enlistment." This enactment was repealed by act of March 4, 1917 (39 Stat., 1171).

By act of August 29, 1916 (39 Stat., 590), it was provided that "Men who have enrolled in the Fleet Naval Reserve within four months of the date of their discharge from the Regular Navy shall, upon reenlistment in the regular naval service within four months of the date of discharge from the Fleet Naval Reserve, be entitled to the same gratuity and additional pay as if they had reenlisted in the regular naval service within four months of discharge therefrom."

By act of March 4, 1917 (39 Stat., 1174), it was provided that any former member of class 1 of the United States Naval Reserve, established by act of March 3, 1915 (38 Stat., 940), who reenlisted in the Navy prior to May 1, 1917, shall be held and considered to have reenlisted within four months from the date of discharge from the Navy for the purpose of continuous service pay.

By act of May 22, 1917, section 3 (40 Stat., 85), it was provided "that enlistments in the Navy and Marine Corps, during such time as the United States may be at war, shall be for four years, or for such shorter period or periods as the President may prescribe, or for the period of the present war." (This enactment amended sec. 1573, R. S. See 25 Comp. Dec., 315, noted below, under "Short-term enlistments.")

By act of July 1, 1918 (41 Stat., 719), it was provided that retired enlisted men recalled to active service shall be entitled to the benefits of continuous service for such length of time as employed in active service. (See note below, under "Retired enlisted men.")

By act of July 11, 1919 (41 Stat., 134), it was provided that "until June 30, 1920, enlistments in the Navy may be for terms of two, three, or four years, and all laws now applicable to four-year enlistments shall apply, under such regulations as may be prescribed by the Secretary of the Navy, to enlistments for a shorter period with proportionate benefits upon discharge and reenlistment."



By the same act of July 11, 1919 (41 Stat., 139), it was provided that enrolled men of the Naval Reserve Force, who have performed active duty during the war, may be transferred to the Regular Navy to serve out the unexpired term of their enrollment, and that men so transferred "shall be entitled to and receive the same pay, rights, privileges, and allowances in all respects as now provided by existing law for men regularly discharged and reenlisted immediately upon expiration of their full four-year enlistment in the Regular Navy or Marine Corps."

The same act of July 11, 1919 (41 Stat., 139), authorized the issuance of honorable discharges to men who served in the war with the German Government and were discharged, after November 11, 1918, prior to expiration of their full enlistment.

The said act of July 11, 1919 (41 Stat., 139), provided that men who, after February 3, 1917, and before November 11, 1918, enlisted for four years, shall, upon application to the Secretary of the Navy on or before September 1, 1919, be held to have enlisted for the duration of the war, and shall, when discharged, be granted an honorable discharge if otherwise entitled thereto; and that any enlisted man so discharged from the Navy, Marine Corps, or Coast Guard, and thereafter reenlisting in the Navy or Marine Corps within four months, under conditions prescribed by law, for a period of four years, "shall be entitled to receive the benefits of the gratuity pay provided by existing law for reenlistments."

By the same act it was provided that men enlisted for the period of the war, or who are regarded as having enlisted for the duration of the war, may, if entitled to an honorable discharge, extend their enlistments for one, two, three, or four years; and shall be entitled to and receive the same rights, privileges, pay, and allowances in all respects as provided by law for men who extend enlistments on completion of their terms of enlistments, except as to gratuity pay; and that, as to the latter, such men shall be allowed one month's pay for an extension of one year, two months' pay for an extension of two years, three months' pay for an extension of three years, and four months' pay for an extension of four years.

By the same act (41 Stat., 141) it was provided that enlisted men discharged to accept appointments as officers in the Naval Reserve Force who reenlist in the Navy within four months after termination of their reserve service shall be entitled to count his service in the Regular Navy and his active service in the Naval Reserve Force as continuous for purposes of continuous-service pay.

By act of May 18, 1920, section 10 (41 Stat., 603), it was provided "that any enlisted man who shall reenlist in the Navy within one year from the date of his discharge therefrom shall, upon such reenlistment, be entitled to and shall receive the same benefits as are now authorized by law for reenlistment within four months from date of last discharge from the service: *Provided*, That this section shall become inoperative six months after the date of the approval of this act." (This provision was not retroactive, but was effective only from

May 18, 1920, to November 17, 1920, inclusive. (26 Comp. Dec., 1065.)

By act of June 4, 1920 (41 Stat., 836, sec. 7), it was provided "that hereafter enlistments in the Navy and in the Marine Corps may be for terms of two, three, or four years, and all laws now applicable to four-year enlistments shall apply, under such regulations as may be prescribed by the Secretary of the Navy, to enlistments for a shorter period with proportionate benefits upon discharge and reenlistment."

**Historical note.**—Prior to the passage of the Navy personnel act of March 3, 1899, section 16 (30 Stat., 1008), the right of enlisted men of the Navy to increased pay, based on previous continuous service, was governed by regulations of the Navy. (6 Comp. Dec., 589.)

Under section 1569, Revised Statutes, the President had the authority to provide an increase of pay for continuous service, and to make it subject to such conditions as he might deem proper. (4 Comp. Dec., 281.)

Continuous-service certificates and additional pay of \$1 per month for each continuous reenlistment to all persons holding such certificates was provided for in a circular issued by Mr. Borie, Secretary of the Navy, on April 26, 1869, the provisions of which were embodied in the Navy Regulations of 1870, as articles 1070 and 1071, and with slight verbal changes repeated in the Regulations of 1876 as paragraphs 18 and 19 of chapter 10, section 2, page 100. The same general provisions were repeated in General Order No. 327 of November 21, 1884, and incorporated in the Navy Regulations of 1893 as articles 810 and 1172. (3 Comp. Dec., 316.)

Under the Navy Regulations of 1893, article 1172, and 1896, article 1174, in order to entitle a seaman to increased pay for continuous service he must have received an "honorable" discharge from a previous enlistment or a recommendation for reenlistment upon its termination, and must have reenlisted for three years within three months from the date of discharge. An exception, however, was made in the case of enlisted men who were prevented from serving the full term of their enlistments by reasons of the wrecking of the vessel on which they were serving. (4 Comp. Dec., 281.)

Although no specific regulation therefor existed, it was held that an enlisted man discharged prior to expiration of his term of enlistment, in the case where a vessel was wrecked or lost, and who was issued a continuous-service certificate in accordance with the practice of the Navy Department, was entitled to the additional compensation authorized by the Navy Regulations for all persons holding such certificates, the same as though he had actually completed his term of enlistment. (3 Comp. Dec., 316.)

A practice of the Navy Department relating to the pay of enlisted men was the equivalent of a specific regulation of the Secretary of the Navy, and, like all other regulations of the Navy Department relating to the pay of seamen of the Navy, was presumed to be the act of the President prescribing the pay of these men as required by section 1569, Revised Statutes. (3 Comp. Dec., 316.)

The honorable discharge required by the Navy Regulations prescribing continuous-service pay was that provided for in sections 1426 and 1429, Revised Statutes, and was dependent upon fidelity and obedience in the service. It differed from the "ordinary" discharge in that the latter carried with it no testimonial as to the special good qualities and fitness of the holder. Accordingly, *held*, that where an enlisted man upon the expiration of his term of enlistment received an "ordinary" discharge, which contained no recommendation for reenlistment, he was not entitled to the benefit of continuous service. Having thereafter received an honorable discharge and complied with the other conditions of continuous service, he was entitled to increased pay from the date of this first reenlistment after receiving an honorable discharge. (4 Comp. Dec., 281.)

The purpose of the joint resolution of June 11, 1896 (above quoted), was to legalize the practice of paying all enlisted men, upon reenlistment, the extra pay, which practice had crept into the service without warrant of law. This practice doubtless arose from the fact that the honorable discharge provided for in section 1429, Revised Statutes, was confused with the honorable discharge granted under section 1426. The object of the honorable discharge provided for in section 1429 is stated in that section to be "as a testimonial of fidelity and obedience," while the honorable discharge provided for in section 1426, taken in connection with section 1573, is seen to be for the purpose of holding out the extra pay to the six lowest classes of enlisted men in the Navy as an inducement to reenlist. By the joint resolution cited, Congress has seen fit to extend the privileges arising from honorable discharges upon reenlistment far beyond what was originally provided. (2 Comp. Dec., 608.)

The joint resolution of June 11, 1896 (above quoted), extended the benefits conferred by sections 1426 and 1573, Revised Statutes, to all enlisted persons. (2 Comp. Dec., 608.)

For other cases, see note to section 1426, Revised Statutes.

In particular cases, prior to the act of March 3, 1899, the Secretary of the Navy could waive the provision requiring reenlistment within three months from the date of previous honorable discharge as a condition to payment of continuous-service pay. (6 Comp. Dec., 589.)

The increase in monthly pay for continuous service is now fixed by law, instead of by Navy Regulations. (5 Comp. Dec., 929.)

The rate of increased pay for continuous service which, before the Navy personnel act of March 3, 1899, section 16 (30 Stat., 1008), had been fixed by the President under section 1569, Revised Statutes, became by said act a part of the statutory law. Said act fixed the increase of \$1.36 per month to the pay prescribed for the rating, for each consecutive reenlistment, as the measure of the increase of value to the service of one who so reenlists; and it is not within the power of anyone, until the law is changed, to fix a greater or less rate. Under section 1569 the President could fix the pay to be allowed an enlisted man, and

could change same from time to time, as he deemed just and proper; but when he had fixed the rate, then by section 16 of the personnel act Congress declared what increased amount the man should receive for reenlistment. (8 Comp. Dec., 227; see note below, under "Continuous-service pay defined.")

**"Continuous-service pay" defined.**—Broadly speaking, continuous-service pay includes any pay or gratuity which is based upon the element of continuity in the service of enlisted men. So defined, continuous-service pay includes the so-called honorable discharge gratuity, since the payment of such gratuity is dependent on continuity of service. It also includes additional pay allowed under General Order No. 34 of 1906 (noted under sec. 1569, R. S.), as well as continuous-service pay proper. (25 Comp. Dec., 440.)

Reenlistment pay under General Order No. 34 of 1906 (noted under sec. 1569, R. S.), continuous-service pay under the act of August 22, 1912, and honorable-discharge gratuity under the act of August 22, 1912, are three distinct classifications of pay that should be kept separate and apart in any consideration of an enlisted man's respective rights thereto, each being dependent upon conditions peculiar to itself. (26 Comp. Dec., 565.)

Navy Department General Order No. 20 of January 1, 1901 (noted under sec. 1569, R. S.), fixing the pay of mess attendants for the second and third enlistments, and adding \$4 to the monthly pay of the rating for a first reenlistment, and \$4 more per month for a second reenlistment, in addition to the \$1.36 per month for each consecutive reenlistment allowed by section 16 of the Navy personnel act, was contrary to law in that the rate of increased pay to be allowed for continuous service was fixed by Congress in the Navy personnel act, and the order of the President fixed an additional amount per month which constituted an increase in continuous-service pay. (8 Comp. Dec., 227.)

Navy Department General Order No. 34 of November 28, 1906, publishing Executive order of November 27, 1906 (quoted under sec. 1569, R. S.), providing increased compensation for trained men who are citizens of the United States, was within the authority conferred upon the President by section 1569, Revised Statutes, and not contrary to the act of March 3, 1899, section 16, providing continuous-service pay of \$1.36 per month. General Order No. 34 does not attempt to provide for continuous-service pay, but does undertake to provide for pay based on length of service, or longevity pay. The main purpose of the statute providing for continuous-service pay was to encourage immediate reenlistments, while that of General Order No. 34 was to establish higher rates of pay for trained men. Their periods of prior service were not required to immediately precede the last enlistment, but might have been at any time, continuous reenlistment not being required. (13 Comp. Dec., 448, distinguishing 8 Comp. Dec., 227; see also 17 Comp. Dec., 27, 32.)

**"Pay" defined.**—The term "pay" in section 1573, Revised Statutes, entitling men on re-



enlistment to "pay" during the said three months, means regular pay, and does not include increased pay for extra duty. (5 Comp. Dec., 241.)

Neither the additional pay of an enlisted man of the Navy for service as a gun pointer, nor that for service on board of submarine vessels, is "pay" within the meaning of that term as used in section 1573 of the Revised Statutes as amended by the act of March 3, 1899, section 16 (30 Stat., 1008). (12 Comp. Dec., 772.)

The reenlistment pay provided by section 1573, Revised Statutes, as amended by act of March 3, 1899, includes the extra pay provided for the holders of good-conduct medals by article 1257 of the Navy Regulations of 1905. (13 Comp. Dec., 253.)

On reenlistment a man is entitled to the regular pay of his rating during the four months as provided by section 1573, as amended, subject, however, to said pay being increased or reduced during the said four months, and including pay for good-conduct medal awarded on day of discharge. (17 Comp. Dec., 355.)

Under the provisions of the act of July 11, 1919 (41 Stat., 140), the increases in pay authorized by section 15 of the act of May 22, 1917 (40 Stat., 87), became a part of the permanent base rate of pay of an enlisted man in the Navy during the continuance of certain enlistments; and upon this new base rate and permanent increases by continuous service, medals, and General Order No. 34 of 1906 (noted under sec. 1569, R. S.), the honorable-discharge gratuity, which is authorized for men who reenlist in the regular Navy should be computed. (26 Comp. Dec., 139.)

The \$2 per month additional pay authorized by the act of February 4, 1919 (40 Stat., 1056), to each enlisted or enrolled person of the naval service to whom is awarded a medal of honor, distinguished-service medal, or a Navy cross should be included in computing honorable-discharge gratuity of enlisted men who reenlist in the Navy for four years within four months after an honorable discharge. (26 Comp. Dec., 976.)

**Character of discharge.**—See "Historical note" above; see also note to section 1426, Revised Statutes; and see statutes quoted above under this section.

To entitle a seaman in the Navy to the three months' extra pay for reenlisting, known as "honorable-discharge" money, provided for in section 1573, Revised Statutes, his discharge from his previous service must have been honorable within the terms of sections 1426 and 1429, Revised Statutes. An ordinary discharge was not sufficient to entitle him to the three months' extra pay. (4 Comp. Dec., 281.)

An enlisted man of the Navy who received a "bad-conduct" discharge from his last enlistment is not entitled to receive in his present enlistment any continuous-service pay. Under section 1573, Revised Statutes, as amended, he must have received an honorable discharge from his last term of enlistment, or a recommendation for reenlistment upon the expiration of his last term of enlistment; otherwise, on reenlistment he loses the benefit of continuous-service pay which he received under his pre-

vious enlistment, as well as failing to acquire any new right to continuous-service pay. (20 Comp. Dec., 856.)

An enlisted man of the Navy dishonorably discharged, pursuant to the sentence of a general court-martial, within three months preceding the expiration of his enlistment, and recommended for reenlistment, is not entitled on reenlistment within four months to any continuous-service pay. His discharge was pursuant to the sentence of court-martial, and not for expiration of enlistment; although it happened to occur within three months prior to expiration, it was not a discharge authorized by the act of August 22, 1912 (37 Stat., 331, quoted above). As his discharge was not honorable, and as it occurred prior to the expiration of his last term of service, and independently of the act of August 22, 1912, the recommendation for reenlistment received by him was not a "recommendation for reenlistment upon the expiration of his last term of enlistment" within the meaning of section 1573, as amended. (21 Comp. Dec., 871.)

An enlisted man of the Navy who, on being dishonorably discharged after the expiration of his enlistment, is recommended for reenlistment, is entitled upon reenlistment within four months after the date of discharge to additional pay for continuous service. (Comp. Dec., Aug. 31, 1914, 70 MS. Comp. Dec., 1914; cited in 21 Comp. Dec., 871.)

The act of August 22, 1912 (37 Stat., 331), providing for the discharge of men at any time within three months prior to expiration of enlistment, without prejudice, etc., (quoted above), amended section 1573, Revised Statutes. (24 Comp. Dec., 776.)

An enlisted man of the Navy whose preceding period of enlistment expired while he was on furlough without pay, as authorized by act of August 29, 1916 (39 Stat., 580), and who therefore, in accordance with the practice then prevailing, did not receive an honorable discharge upon expiration of his enlistment, his enlistment having been regarded as terminated by furlough, and not by expiration, held, not entitled, on reenlistment, to continuous-service pay as authorized by the act of August 22, 1912 (37 Stat., 331), amending section 1573, Revised Statutes (25 Comp. Dec., 328).

As an enlistment which expires while the enlisted man is in desertion is not a termination of service by expiration of enlistment, *held*, that an enlisted man of the Navy who deserts, surrenders himself subsequent to the period of enlistment, and is permitted to reenlist, is not entitled to continuous-service pay under the act of August 22, 1912 (37 Stat., 331), not having received an honorable discharge from his last term of enlistment, and not having been recommended for reenlistment upon the expiration of his last term of enlistment. (26 Comp. Dec., 250.)

**Period allowed for reenlistment.**—See "Historical note" above. See also act of February 8, 1889 (25 Stat., 657), which permitted persons honorably discharged, in accordance with section 1429, Revised Statutes, to elect a home on any receiving ship, with one ration per day, during any portion of the time allowed them to reenlist with the pecuniary

benefits authorized by section 1573, Revised Statutes.

A seaman who was honorably discharged September 21, 1898, and reenlisted December 21, 1898, reenlisted "within three months" as provided by section 1573, Revised Statutes, and became entitled to pay during the said three months. (5 Comp. Dec., 362.)

The Secretary of the Navy has no authority to waive the three months' limitation in the provision of section 1573, Revised Statutes, as amended by joint resolution of June 11, 1896, which, prior to the passage of the naval personnel act of March 3, 1899, section 16 (30 Stat., 1008), provided for three months' pay on reenlistment in the Navy for a term of three years within a period of three months. (6 Comp. Dec., 589.)

Under article 861, Navy Regulations, 1900, an enlisted man of the Navy who accepted an appointment as paymaster's clerk thereby terminated his enlistment; and where he served as paymaster's clerk more than four months he was not entitled, on subsequently reenlisting, to count his prior service as an enlisted man in computing his longevity pay. (10 Comp. Dec., 528.)

Where an enlisted man was discharged at his own request, with recommendation for reenlistment, prior to the expiration of his term of enlistment but after serving for more than three years, to enable him to accept an appointment as paymaster's clerk, he was entitled, upon reenlisting within four months from the time of his discharge, to the continuous-service pay provided for by the act of March 3, 1899. (11 Comp. Dec., 682.)

The phrase "within four months," as used in section 16 of the act of March 3, 1899 (30 Stat., 1008), amending section 1573, means within four calendar months; and in computing the same the day of discharge and that day only should be excluded. (14 Comp. Dec., 583.)

An enlisted man of the Navy who was honorably discharged January 19, 1907, and reenlisted May 20, 1907, did not reenlist "within four months" within the meaning of section 16 of the act of March 3, 1899, and is not entitled to the honorable-discharge gratuity pay for said four months, nor to the \$1.36 increase of pay, during such reenlistment. (14 Comp. Dec., 583.)

Where an enlisted man of the Navy had been honorably discharged, and applied for reenlistment within the four months allowed by the act of March 3, 1899, but was not then formally reenlisted on account of the fact that his continuous-service certificate had not been returned by the officer to whom he had forwarded same with request for transportation; and said man was formally reenlisted on a date subsequent to the expiration of the four months, having in the meantime actually entered on duty with the knowledge of the commanding officer of the ship upon which he had made application for reenlistment, *held*, that such man had reenlisted within the meaning of the act of March 3, 1899, and is entitled to all the benefits of said act as if his reenlistment had been formally completed on the date of application. (16 Comp. Dec., 359.)

An honorably discharged enlisted man of the Navy applied for reenlistment to a traveling recruiting party; was given a preliminary examination and authorization for reenlistment "subject to reexamination physically"; was physically reexamined and found disqualified for reenlistment and granted permission to enter a naval hospital for operative treatment, if he so desired, with a view to reenlistment—all within four months from the date of his discharge. Subsequent to the expiration of the four months' period he entered the hospital, and on discharge therefrom entered into the formal contract of enlistment and executed the oath of allegiance. *Held*, that he was not reenlisted within four months from the date of discharge, and is not entitled to honorable-discharge gratuity or continuous-service pay on such reenlistment. (19 Comp. Dec., 334.)

**Short-term enlistments.**—While continuous-service pay provided for enlisted men of the Navy under the act of August 22, 1912 (37 Stat., 331), is authorized only when reenlistment is for a term of four years, the act of May 22, 1917 (40 Stat., 85), modifies the provision of the former act as to the term of enlistment, and by a fair construction of the two acts if an enlisted man reenlists for another full term, as prescribed by the latter act, whether it be for four years or for such period as may be prescribed by the President, or for the duration of the present war, he is entitled to continuous-service pay if such reenlistment takes place within four months from the date of discharge. (25 Comp. Dec., 315.)

For the purpose of computing payment of honorable-discharge gratuity, and continuous-service pay, enlistments in the Navy for "the period of the present war," authorized by section 3 of the act of May 22, 1917 (40 Stat., 84), may be considered to have expired on date of discharge; or in case of an extension of enlistment, as provided by the act of July 11, 1919 (41 Stat., 139), on date the extension becomes effective. (26 Comp. Dec., 132.)

Under the act of July 11, 1919 (41 Stat., 134), above quoted, providing for short-term enlistments "with proportionate benefits upon discharge and reenlistment," *held* that a man reenlisting for a term of three years acquired a right to continuous-service increase of pay equal to three-fourths of \$1.36 per month, plus 10 per cent. (26 Comp. Dec., 399.)

The words "with proportionate benefits upon discharge and reenlistment" apply to discharge and reenlistment after expiration of an enlistment for less than four years, entered into under authority of the act of July 11, 1919. Accordingly, a man reenlisting in the Navy after July 11, 1919, for three years, was entitled to increase of continuous-service pay as allowed for a four-year enlistment; but upon his discharge and subsequent reenlistment he would be entitled to "proportionate benefits" or three-fourths of the continuous-service pay allowed upon reenlistment after discharge from a four-year enlistment. (26 Comp. Dec., 706.)

The amount of honorable-discharge gratuity of enlisted men of the Navy on reenlistments for two years, or three years, or four years, authorized by acts of July 11, 1919, and June 4, 1920



(above quoted), is equal to the pay the enlisted men would have received if they had been employed in actual service two months, or three months, or four months, respectively. (27 Comp. Dec., 210, following 27 Comp. Dec., 101.)

In computing continuous-service pay, the unit of service is four years; for each full four years of service the additional pay authorized should be credited for the ensuing four years of service without regard to length of time actually served in any particular enlistment of shorter periods authorized by acts of July 11, 1919, and June 4, 1920 (above quoted). (27 Comp. Dec., 210.)

Enlisted men of the Navy serving over four years continuously, under short-term enlistments or extensions of enlistments, are entitled to continuous-service pay at the expiration of the first four years of continuous service, and at the expiration of each four years of continuous service thereafter. (27 Comp. Dec., 506.)

A man enlisted for three years, May 13, 1896, was honorably discharged May 12, 1899, on account of expiration of enlistment, and reenlisted the next day for a term of four years as prescribed by the act of March 3, 1899. *Held*, that he was entitled to the honorable-discharge gratuity of four months' pay, as prescribed by the act of March 3, 1899, and not to the gratuity of three months' pay as prescribed by section 1573, Revised Statutes, prior to its amendment; further *held*, that he was entitled to continuous-service pay of \$1.36 per month, as prescribed by the act of March 3, 1899, and not to the continuous-service pay of \$1 per month under the Executive orders in force prior to March 3, 1899. (5 Comp. Dec., 929.)

**Minority enlistment.**—A person enlisted in the Navy during minority, and honorably discharged within three months before the expiration of his enlistment (as authorized by act of Aug. 22, 1912, 37 Stat., 331), and who reenlisted for four years the day following his discharge, is entitled to all the benefits accruing to an enlisted man for continuous-service pay, although still a minor at the time of his discharge and reenlistment. (20 Comp. Dec., 409.)

**Extension of enlistment.**—An extension of enlistment for one year, as provided in the act of August 22, 1912 (37 Stat., 330), entitles an enlisted man of the Navy to be credited under such extension with continuous-service certificate pay. (19 Comp. Dec., 819.)

When an enlisted man of the Navy has been detained in the service under section 1422, Revised Statutes, the enlistment in which he is detained may, under the act of August 22, 1912 (37 Stat., 331), be extended before the expiration of the authorized detention, to date not from the expiration of the original enlistment but from the end of the period for which he was legally detained. When so extended, the man is entitled to continuous-service-certificate pay. (20 Comp. Dec., 377, modifying 19 Comp. Dec., 819.)

The first enlistment of a seaman was extended one year, and during extension his rating was changed to gunner's mate, third class; at expiration of extended enlistment he was honorably discharged and reenlisted within four

months. *Held*, that on reenlistment he was entitled to four months' honorable-discharge gratuity computed at the rate of pay he was receiving when discharged, which included his rating pay as a gunner's mate, third class; and that he was entitled to continuous-service pay, and 10 per cent increase thereof. (20 Comp. Dec., 361.)

An enlisted man of the Navy who surrendered from desertion and was restored to duty without trial, and who, after serving a period of probation, was allowed to extend his enlistment, is entitled under such extended enlistment to credit for pay for continuous service, his status being the same as though he had not been absent during his term of enlistment. (25 Comp. Dec., 920.)

The extension of enlistment law granted to enlisted men of the Regular Navy the right to continuous-service pay; and honorable-discharge gratuity is payable if the period for which the extension was made aggregated four full years. (26 Comp. Dec., 33, 34, citing 63 MS. Comp. Dec., 136, Oct. 12, 1912, and 68 MS. Comp. Dec., 1200, Feb. 25, 1914.)

Where under the act of August 22, 1912 (37 Stat., 331), an enlisted man of the Navy acquires a right to the continuous-service increase of pay by extending his enlistment, the right so acquired, except in cases where such extension aggregates four years, terminates upon his discharge at the expiration of the extended period of enlistment; and thereafter the enlisted man acquires a right to continuous-service pay only under the same conditions as such right is acquired upon reenlistment at the completion of a regular term of enlistment. (26 Comp. Dec., 399.)

Where under the act of August 22, 1912, an enlisted man of the Navy extends his enlistment, he is entitled to continuous-service pay during the period of extension as if the extension were in fact a reenlistment; but such right to continuous-service pay, except in cases where the extension aggregates four years, terminates upon discharge at the expiration of the extended enlistment; and thereafter, in computing his continuous-service pay in subsequent reenlistments, the extension under the said act of August 22, 1912, for less than four years, is to be considered a part of the original enlistment thus extended, and not as a separate and distinct enlistment or as part of any subsequent reenlistment. (26 Comp. Dec., 706.)

**Naval reservists.**—An enlisted man in the Navy who, at the expiration of his term of enlistment, is not discharged therefrom, but under the provisions of the act of August 29, 1916 (39 Stat., 556), is transferred to the Fleet Naval Reserve, and who, within four months after the date of expiration of such term of enlistment is discharged from the Fleet Naval Reserve and reenlisted for four years in the Regular Navy, is entitled, in an otherwise proper case, to honorable-discharge gratuity and continuous-service pay. (23 Comp. Dec., 535.)

An enlisted man of the Navy who reenlists within four months of the date of his honorable discharge therefrom is not deprived of the gratuity authorized under the act of August 22,

1912, merely because of service in the Naval Reserve during the interval. (24 Comp. Dec., 129.)

A transferred member of the Fleet Naval Reserve, whose transfer was made after 20 years' service in the Regular Navy and not at the expiration of an enlistment, and who subsequently was discharged from the Fleet Naval Reserve and reenlisted next day in the Regular Navy, is not entitled to credit for continuous-service pay. The cases of transferred members are not covered by the provision in the act of August 29, 1916 (39 Stat., 590, above quoted), with respect to enrolled members of the Naval Reserve Force who are discharged therefrom and reenlist in the Regular Navy, nor is this case covered by 23 Comp. Dec., 535 (above noted), which related to enlisted men of the Navy transferred to the Fleet Naval Reserve at the expiration of a period of enlistment and subsequently reenlisting in the Regular Navy. (25 Comp. Dec., 884.)

Enrolled men transferred from the Naval Reserve Force to the Regular Navy to serve the unexpired term of their enrollment, in accordance with the act of July 11, 1919 (41 Stat., 139, above quoted), are entitled, from the date the transfer is consummated, to increase of pay for continuous service, as well as to honorable-discharge gratuity. (26 Comp. Dec., 33.) But such former reservists who reenlist in the Regular Navy for four years within four months after discharge at the expiration of their period of enrollment thus served in the Regular Navy are not entitled to a further increase of pay for continuous service in addition to that received during the period of enrollment after transfer to the Regular Navy. (27 Comp. Dec., 695.)

Under the act of August 29, 1916 (39 Stat., 590, above quoted), an enlisted man of the Navy who was enrolled in the Fleet Naval Reserve within four months after discharge, and who, after discharge from the Fleet Naval Reserve, was again enlisted in the Regular Navy within the prescribed period, is entitled to honorable-discharge gratuity, computed upon the pay he was receiving at the date of his last discharge from the Regular Navy. (26 Comp. Dec., 489.)

The act of July 11, 1919 (41 Stat., 141, above quoted), relating to enlisted men of the Navy appointed officers in the Naval Reserve Force and subsequently reenlisting, preserves the status previously acquired by continuity of service, which, without the provision, would be lost to such men; but it does not create any right to permanent additions to pay other than those already acquired. (26 Comp. Dec., 565; see note above, under "Continuous-service pay defined.")

*Held*, specifically, that the act of July 11, 1919 (41 Stat., 141), providing that service performed by the men described therein "shall be regarded as continuous for purposes of continuous-service pay" does not entitle such men to an increase in continuous-service pay immediately upon reenlistment; that it does not entitle them to increase in continuous-service pay upon the completion of four years from the date of their last previous enlistment in the Navy; that the pay of such men upon restora-

tion, including permanent additions previously earned by reason of continuity in service, will remain unchanged for the period of their enlistment, except as it may be affected by changes in law or rating; and that such men will not be entitled to honorable-discharge gratuity immediately upon reenlistment or upon completion of four years from the date of their last previous enlistment in the Navy. (26 Comp. Dec., 565.)

An enlisted man of the Navy who enrolls in the Naval Auxiliary Reserve within four months from date of honorable discharge from the Regular Navy is not entitled to honorable-discharge gratuity upon reenlistment in the Navy within four months from date of discharge from the Naval Auxiliary Reserve. (27 Comp. Dec., 8.)

It has repeatedly been held by the comptroller that, except for enrolled members of the Fleet Naval Reserve who reenlist in the Regular Navy, no right to honorable-discharge gratuity can accrue to a former member of any class of the Naval Reserve Force except where the reenlistment takes place within four months from the date of last discharge, at expiration of enlistment, from the Regular Navy. (27 Comp. Dec., 8.)

**Retired enlisted men.**—An enlisted man of the Navy, holding the rating of mate, who is placed on the retired list without having completed the term of his final enlistment, and who thereafter is called into active service, does not, after a period of active service equal to the unexpired portion of his last enlistment, become entitled to the continuous-service increase of pay or the honorable-discharge gratuity. (24 Comp. Dec., 152.)

By act of July 1, 1918 (40 Stat., 719), it was provided that a retired enlisted man recalled into active service shall be eligible for promotion and "shall be entitled to the pay and benefits of continuous service of such rank and for such length of time as he is or has been employed in active service, and when relieved of active service shall retain upon the retired list the rank and service held by him at the time of such relief, with the pay and allowances of such rank on the retired list." *Held*, that as continuous-service pay includes in its broadest sense any pay or gratuity dependent upon continuity of service, retired enlisted men of the Navy who are recalled to active service and who complete a period of service equal to the unexpired term of their enlistment are entitled, when otherwise qualified, to continuous-service pay proper, honorable-discharge gratuity, and pay under General Order No. 34 of 1906 (noted under sec. 1569, R. S.), by virtue of said act of July 1, 1918. (25 Comp. Dec., 440; compare, 26 Comp. Dec., 565, noted above, under "Naval reservists.")

**Men furloughed without pay.**—An enlisted man furloughed without pay in accordance with the act of August 29, 1916 (39 Stat., 580), resumes in all respects his former status upon being recalled to active service, and upon discharge at the completion of the unexpired portion of his enlistment is entitled to travel allowance, and upon reenlistment to the honorable-discharge gratuity, if otherwise authorized. (25 Comp. Dec., 231.)



An enlisted man furloughed without pay, and who was not given a discharge at the expiration of his enlistment, *held*, not entitled to continuous-service pay upon reenlistment. (25 Comp. Dec., 328.)

**Mates.**—Mates of the Navy are petty officers, and their pay being specially fixed by section 1556 of the Revised Statutes, and any additional pay or allowances being prohibited by section 1558, Revised Statutes, they are not entitled, upon reenlistment in the rating of mate, to the \$1.36 increase of pay per month provided therein for enlisted men who reenlist within the provisions of section 1573, Revised Statutes, as amended by the act of March 3, 1899. But such mates on reenlistment are entitled to the honorable-discharge gratuity provided by the same law if they reenlist within four months from the date of discharge. (14 Comp. Dec., 457.)

An enlisted man of the Navy who was appointed as mate and continued to serve as such after the expiration of his term of enlistment, without receiving a discharge, *held*, still in the service and entitled to his discharge; and upon reenlisting after such discharge he is entitled to the benefits of continuous-service pay under article 839, Navy Regulations, 1905. (26 Op. Atty. Gen., 319; but see, 14 Comp. Dec., 457, and 24 Comp. Dec., 152.)

**Sec. 1574. [Crews of wrecked or lost vessels.]** When the crew of any vessel of the United States are separated from such vessel, by means of her wreck, loss, or destruction, the pay and emoluments of such of the officers and men as shall appear to the Secretary of the Navy, by the sentence of a court-martial or court of inquiry, or by other satisfactory evidence, to have done their utmost to preserve her, and, after said wreck, loss, or destruction, to have behaved themselves agreeably to the discipline of the Navy, shall go on and be paid them until their discharge or death.—(17 July, 1862, c. 204, s. 14, v. 12, pp. 608, 609.)

See sections 286–290, Revised Statutes, and notes thereto.

The act of June 4, 1920 (41 Stat., 824), makes provision for compensation to be paid to the widow, and if no widow to the child or children, and if no widow or child to any other dependent relative, previously designated, of any officer, enlisted man, or nurse on the active list, in case of the latter's death from wounds or disease, not the result of the decedent's misconduct; the amount of such compensation to equal six months' pay at the rate received by the decedent at the time of his or her death.

The war risk insurance act of October 6, 1917, Article III (40 Stat., 405), as amended by act of June 25, 1918 (40 Stat., 609), and act

The base pay of mates fixed by section 6 of the act of May 18, 1920 (41 Stat., 602), at \$126 per month, is not to be increased by 25 per cent thereof, the provision in the act of May 13, 1908 (35 Stat., 128), for a 25 per cent increase in the base pay of mates in the Navy, in effect having been repealed and superseded by the act of May 18, 1920; nor does the act of May 18, 1920, operate to grant to mates in the Navy the right to permanent additions to their base pay that are authorized for enlisted men of the Navy generally, under General Order No. 34 of 1906 (noted under sec. 1569, R. S.), or for continuous service, under section 1573, Revised Statutes, as amended, or for good-conduct medals. (27 Comp. Dec., 175.)

**Naval Academy Band.**—Under the act of April 12, 1910 (36 Stat., 297), providing for the enlistment of Naval Academy bandmen and giving them "the same benefits in respect to pay, emoluments, and retirement arising from longevity, reenlistment, and length of service as are or may hereafter become applicable to other enlisted men of the Navy," such bandmen, upon enlistment, are entitled to be credited with all service as members of said band in computing continuous-service pay, such computation to be made as if actually enlisted and discharged as provided by law in effect when such service was rendered. (17 Comp. Dec., 27.)

of December 24, 1919 (41 Stat., 371), makes provision for compensation, in lieu of pension, to be paid to the family of any person in the naval service who is disabled or dies as the result of injury or disease suffered in line of duty and not caused by his own willful misconduct.

**Subsistence of officers separated from their vessel.**—The provision in the act of March 3, 1897 (29 Stat., 657), making appropriation for subsistence of officers temporarily absent from their vessel, does not apply to officers separated from their vessel by reason of its loss or destruction while they are in receipt of their sea pay and allowances under section 1574, Revised Statutes. (5 Comp. Dec., 221.)

**Sec. 1575. [Crews of vessels taken by an enemy.]** The pay and emoluments of the officers and men of any vessel of the United States taken by an enemy who shall appear, by the sentence of a court-martial or otherwise, to have done their utmost to preserve and defend their vessel, and, after the taking thereof, to have behaved themselves agreeably to the discipline of the Navy, shall go on and be paid to them until their exchange, discharge, or death.—(17 July, 1862, c. 204, s. 15, v. 12, p. 609.)

“Enemy” defined.—The first statute providing, in terms, for our naval discipline is the “act for the government of the Navy of the United States,” of March 2, 1799 (1 Stat., 709). The fourth section of that act (1 Stat., 714) provided that “all the pay and wages of such officers and seamen of any of the ships of the United States as are taken by the enemy, and, upon inquiry at a court-martial, shall appear by the sentence of the said court to have done their utmost to defend the ship or ships, and since the taking thereof, to have behaved themselves obediently to their superior officers, according to the discipline of the Navy, and the said articles and orders, hereinbefore established, shall continue and go on as aforesaid,” etc. The act of April 23, 1800, enacts (sec. 4, 2 Stat., 45), “that all the pay and emoluments of such officers and men of any of the ships or vessels of the United States taken by an enemy, \* \* \* shall go on, and be paid them until their death, exchange, or discharge.” The act of 1799 is almost identical with that of 1800. In the former the phrase stands, “the enemy;” in the latter it is changed to “an enemy.” The construction of the act of 1799 might be doubtful, for there is a certain and definitive meaning in the phrase “the enemy.” It is a familiar phrase and means the public enemy, the acknowledged enemy, the enemy of the nation, the enemy with whom we are already at war. But when Congress, in 1800, changed the phraseology, and for this definitive and restricted phrase adopted one so general and comprehensive as to include any and every enemy, they must have done so for some legislative purpose. That purpose appears to have been to provide for engagements with pirates, then common in American seas, and to provide for just such cases as the encounter between the *Chesapeake* and the British ship *Leopard*. (Straughan v. U. S., 1 Ct. Cls., 324.)

John Straughan, a citizen of the United States, enlisted as a seaman on board the United States frigate *Chesapeake* for one year; the *Chesapeake* in time of peace was attacked and taken possession of by the British ship *Leopard*; Straughan, with other seamen, was forcibly carried off by the *Leopard* on the pretext that they were deserters; after five years they were released and returned to the *Chesapeake*; Straughan did duty for a short time and was discharged; he received no pay for the period that he was held by the British Government. His widow brought action in the Court of Claims to recover pay for said period. *Held*,

that the *Leopard*, in her attack upon the *Chesapeake*, was “an enemy” within the meaning of the fourth section of the act of April 23, 1800 (2 Stat., 45). That act enlarges the act of March 2, 1799 (1 Stat., 709), and the third and fourth sections thereof are intended to include all cases where persons in the naval service are “separated from their vessels” by either wreck or capture. (Straughan v. U. S., 1 Ct. Cls., 324. Note: The third section of the act of April 23, 1800, and the third section of the act of March 2, 1799, were both similar to the provisions of section 1574, Revised Statutes, while the fourth sections of those acts were similar to the provisions of section 1575, Revised Statutes.)

An act of hostility by a national ship of war is an act of war. The officer who directs it is not liable to the injured parties, but to his own Government. The rule that a principal is not responsible for the tortious acts of his agent forms no part of the law of nations; and a Government can not relieve itself of responsibility by disavowing the act of its officer. (Straughan v. U. S., 1 Ct. Cls., 324.)

**Pay continues after expiration of enlistment.**—An enlisted man of the Navy captured and separated from his vessel in consequence of an attack by a British vessel in 1807, and held by the British Government for a period of five years, when he was released and returned to his vessel, *held*, entitled to be paid his wages by the United States for the total period of five years, although the enlistment in which he was serving at the time of his capture was for a period of only one year. (Straughan v. U. S., 1 Ct. Cls., 324.)

**Officer interned in neutral country.**—An officer of the Navy interned in a neutral country, if required to hire quarters there for himself, is entitled to commutation thereof as “emoluments” that “shall go on and be paid” as provided by sections 1574 and 1575, Revised Statutes. If quarters have not been so acquired, he is not entitled to commutation. (25 Comp. Dec., 303.)

An officer of the Navy who without fault on his part is interned by a neutral nation is on active duty within the meaning of the act of April 16, 1918 (40 Stat., 530), and is entitled under said act to commutation of quarters, heat, and light, on account of maintaining dependents for the period of his internment. (25 Comp. Dec., 303.)

**Sec. 1576. [Assignment of wages.]** Every assignment of wages due to persons enlisted in the naval service, and all powers of attorney, or other authority to draw, receipt for, or transfer the same, shall be void, unless attested by the commanding officer and paymaster. The assignment of wages must specify the precise time when they commence.—(30 June, 1864, c. 174, s. 12, v. 13, p. 310.)

See section 1430, Revised Statutes, and note thereto; see also sections 3477 and 3620, Revised Statutes; and see note to section 1556, Revised Statutes, under “Allotments of pay.”

**Effect of section.**—The assignment of any claim against the United States is prohibited by section 3477 of the Revised Statutes. This prohibition is held to include the assignment of pay. The assignment of wages by enlisted



men of the Navy is taken out of the prohibition of section 3477 by section 1576 of the Revised Statutes. (17 Comp. Dec., 666.)

**Assignment to attorney.**—Where an enlisted man of the Navy employed an attorney to defend him on a criminal charge before civil authorities, and in compensation therefor gave

said attorney an order on the commanding officer of the vessel on which he served for a portion of the pay due him, such contract is a personal one, not operating to create a liability on the part of the Government, and payment of the amount is not authorized. (25 Comp. Dec., 99.)

### 1577. [Rations of midshipmen. Superseded.]

**This section provided as follows:**

"Sec. 1577. Midshipmen and acting midshipmen in the Navy shall be entitled to one ration, or to commutation therefor."—(28 July, 1866, c. 296, s. 8, v. 14, p. 322. 28 Feb., 1867, c. 100, s. 2, v. 14, p. 416.—Philbrook's Case, 8 C. Cls., 523.)

It was superseded by the act of March 3, 1883 (22 Stat., 472), which abolished the grade of midshipman, which was then, under section 1362, Revised Statutes, the eleventh grade of line officers of the active list of the Navy, and provided that midshipmen then on the active list should "constitute a junior grade of, and be commissioned as, ensigns." The grade of junior ensign thus created was abolished by act of June 26, 1884, section 2 (23 Stat., 60; see notes to secs. 1362 and 1512, R. S.).

**Students at Naval Academy.**—Under the Revised Statutes, section 1512, students at the Naval Academy were designated as "cadet midshipmen," with the exception of a special class, styled "cadet engineers," under sections 1522-1524, Revised Statutes. By act of August 5, 1882 (22 Stat., 285), the title of all undergraduates at the Naval Academy was changed to "naval cadets," which was the title of students at the Naval Academy when the grade of midshipman was abolished by act of March 3, 1883, above quoted.

By act of January 30, 1885 (23 Stat., 291), it

was provided that "all enlisted men and boys in the Navy, attached to any United States vessel or station and doing duty thereon, and naval cadets, shall be allowed a ration, or commutation thereof in money, under such limitations and regulations as the Secretary of the Navy may prescribe." This act in so far as it applied to "naval cadets," was amended by act of July 1, 1902 (32 Stat., 686), which changed the title "naval cadet" to "midshipman," which has ever since continued to be the title of students at the Naval Academy.

**Rations of midshipmen** are now authorized by the act of January 30, 1885, as amended by the act of July 1, 1902, both above quoted. (By joint res. No. 1, Dec. 17, 1903, 33 Stat., 581, reference was made to sec. 1577, R. S., as the authority for allowing commuted rations to midshipmen.)

"Midshipmen are entitled to one ration, or to commutation therefor, at all times." (Art. 4517, par. 1, Navy Regs., 1913; 26 Comp. Dec., 42.)

**Rations of other officers** are provided for by sections 1578 and 1579, Revised Statutes.

**Commutation price of rations** is fixed by section 1585, Revised Statutes, and amendments thereto. The naval appropriation act of June 4, 1920 (41 Stat., 825), made appropriation for "commuted rations for \* \* \* midshipmen at \$1.08 per diem."

**Sec. 1578. [Rations of other officers.]** All officers shall be entitled to one ration, or to commutation therefor, while at sea or attached to a sea-going vessel.—(3 Mar., 1851, c. 34, s. 1, v. 9, p. 621. 16 July, 1862, c. 183, s. 19, v. 12, p. 587).

**Rations of enlisted men:** See act of January 30, 1885 (23 Stat., 291), noted under section 1579, Revised Statutes.

**Section 1578 repealed in part.**—Section 1578, Revised Statutes, is repealed by section 13 of the Navy personnel act, providing that commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army. The latter law was intended to cover, and in exact terms provides for, all pay and allowances for naval officers, except forage. The later act was intended as a substitute for the earlier provisions contained in section 1578. (Gibson v. U. S., 194 U. S., 182.)

While section 13 of the Navy personnel act of March 3, 1899 (30 Stat., 1004), provided that officers of the line of the Navy and of the Medical and Pay Corps should not be reduced in pay by virtue of said act, there is no provision retaining the allowances of the former law. Moreover, section 26 of the Navy personnel act

provides that all acts and parts of acts, so far as they conflict with its provisions, shall be repealed. The allowance of the preceding statute (sec. 1578, R. S.) can not stand consistently with the express provision upon the same subject of the later act. (Gibson v. U. S., 194 U. S., 182.)

In Gibson v. United States (194 U. S., 182) it was held that the personnel act did repeal sections 1578 and 1585, Revised Statutes, allowing sea rations, because the later act covered the same subject matter and superseded the provisions of those sections. (U. S. v. Thomas, 195 U. S., 418, 426.)

Prior to the passage of the act of March 3, 1899, officers of the Navy were entitled to rations or commutation thereof under sections 1578-1579, Revised Statutes. By the Navy personnel act of that date, the pay and allowances of the line, Medical, and Pay Corps were assimilated to those of officers of corresponding rank in the Army, and the pay and allowances of commissioned warrant officers, created by that act, were assimilated to the pay and allowances then

allowed a second lieutenant in the Marine Corps. As the allowance of a ration was not an allowance to which officers of the Army and Marine Corps were entitled, the said officers of the Navy whose pay and allowances were so assimilated were not entitled thereto after the passage of the act of March 3, 1899; but the right of other officers of the Navy to said allowance was not affected thereby. (15 Comp. Dec., 8.)

The act of June 29, 1906 (34 Stat., 554), assimilating the pay and allowances of chaplains in the Navy to those of line officers of the Navy, prevents the allowance of rations to chaplains after the approval of said act. (15 Comp. Dec., 651.)

Following the enactment of the Navy personnel act of March 3, 1899, the appropriation acts for the Navy have since provided for commuted rations for officers on sea duty, other than commissioned officers of the line, Medical and Pay Corps, and chief warrant officers. (26 Comp. Dec., 42.)

By the naval appropriation act of June 4, 1920 (41 Stat., 825), appropriation is made for "commuted rations for officers on sea duty (other than commissioned officers of the line, Medical and Supply Corps, chaplains, chief boatswains, chief gunners, chief carpenters, chief machinists, chief pay clerks, and chief sailmakers) at 68 cents per diem, and midshipmen at \$1.08 per diem \* \* \*."

The law on this subject was incorporated in article 4517 (1), Navy Regulations, 1913, which provides: "With the exception of commissioned officers of the line, Medical Corps, and Pay Corps, and of chaplains and commissioned warrant officers, all officers of the Navy are entitled to one ration or to commutation therefor at the rate of thirty cents a day while doing duty on board a seagoing vessel of the Navy. Midshipmen are entitled to one ration, or to commutation therefor, at all times." (26 Comp. Dec., 42.)

The officers of the Navy who were entitled to receive a ration prior to the passage of the act of May 13, 1908 (35 Stat., 127), are still entitled to that allowance under the provision of said act prohibiting the reduction of pay or allowances, and also by the express terms of the appropriation, "Provisions, Navy," which specifically excludes from its application the said officers who were not entitled to rations under the Navy personnel act. (15 Comp. Dec., 8.)

Under the act of May 13, 1908, all officers of the Navy, other than the commissioned officers of the line, Medical and Pay Corps, and commissioned warrant officers, are entitled to rations or commutation therefor while on sea duty. (15 Comp. Dec., 8; modified, as to chaplains, by 15 Comp. Dec., 651, noted above.)

The act of May 13, 1908 (35 Stat., 127), except as stated in the saving clause thereof, repealed sections 1578 and 1579, Revised Statutes, so far as said sections applied to commissioned officers. (25 Comp. Dec., 125.)

The act of May 13, 1908 (35 Stat., 127), provided that all commissioned officers of the Navy shall receive the same allowances, according to rank and length of service. The effect of this provision was either to confer the right to rations upon commissioned officers not already receiving same or to take away the right

to rations from commissioned officers of the class entitled to receive same under section 1578, Revised Statutes, because their allowances had not been assimilated to those of the Army by the Navy personnel act of March 3, 1899. (25 Comp. Dec., 125.)

In 15 Comp. Dec., 8, it was held that officers of the Navy who were entitled to rations while on sea duty prior to the passage of the act of May 13, 1908, were still entitled thereto because of the provision in said act prohibiting a reduction in pay and allowances. However, it is now held, that a naval constructor appointed to office since the act of May 13, 1908, is not within the saving clause therein prohibiting reduction of pay and allowances, and accordingly is not entitled to commutation of rations while on sea duty. (25 Comp. Dec., 125.)

Under the act of June 30, 1914 (38 Stat., 403), which created the grade of acting chaplain, and provided that "while so serving acting chaplains shall have the rank, pay, and allowances of lieutenant, junior grade, in the Navy," held, that acting chaplains are not entitled to rations or commutation thereof, because lieutenants, junior grade, are not entitled thereto. (File 26254-2333, July 23, 1917.)

**Commissioned warrant officers.**—Neither the Navy personnel act of March 3, 1899 (30 Stat., 1004), which created the grade of chief gunner, nor any other law, authorizes rations or commutation thereof to chief gunners of the Navy. (15 Comp. Dec., 874; see note to sec. 1556, R. S., as to pay and allowances of commissioned warrant officers.)

**Marine officers.**—An officer in the Marine Corps attached to a seagoing vessel is not entitled to the ration allowed by section 1578, Revised Statutes, to a naval officer so attached. (*Reid v. U. S.*, 18 Ct. Cls., 625.)

**Warrant officers.**—A warrant officer while on duty at sea, or attached to a seagoing vessel, is entitled to rations in kind or to commutation therefor; whichever he accepts precludes him from receipt of the other. (26 Comp. Dec., 42.)

**A paymaster's clerk of the Navy** who, while en route to his place of service on the Island of Guam, performed temporary duty on the steamer *Supply*, is not entitled to reimbursement of traveling expenses; but under section 1578, Revised Statutes, he is entitled to a ration or commutation thereof. Under the orders issued to him he was temporarily attached to a seagoing vessel and doing duty thereon. If he did not receive rations in kind, he is entitled to commutation of rations for the period while on said duty. (10 Comp. Dec., 107.)

**Checkage of difference between actual cost and commuted value of rations.**—A warrant officer of the Navy who has been subsisted in the general mess is not entitled to commuted rations, nor is he liable for the difference between the monetary value of the ration in kind and the value of a commuted ration. (26 Comp. Dec., 42, distinguishing Comp. Dec., Feb. 18, 1910, noted below.)

The accounts of officers subsisted by the general mess of a vessel while serving temporarily on shore should be checked with the cost of rations issued, as shown by the actual issues during the period covered by their subsistence,



and not with the commutation value of the ration as fixed by section 1585, Revised Statutes. (Comp. Dec., Feb. 18, 1910, 108 S. and A. Memo., 1335, 52 MS. Comp. Dec., 857. Note: This case is distinguished from that considered in 26 Comp. Dec., 42, noted above, in that the

officers referred to in this decision were not entitled to either a ration in kind or to commutation in lieu thereof. See 26 Comp. Dec., 42.)

For other cases, see note to section 1579, Revised Statutes.

**Sec. 1579. [When rations not allowed.]** No person not actually attached to and doing duty on board a sea-going vessel, except the petty officers, seamen, and ordinary seamen attached to receiving-ships or to the ordinary of a navy-yard, and midshipmen, shall be allowed a ration.—(3 Mar., 1851, c. 34, s. 1, v. 9, p. 621. 28 July, 1866, c. 296, s. 8, v. 14, p. 322. 28 Feb., 1867, c. 100, s. 2, v. 14, p. 416.)

See notes to sections 1578 and 1579, Revised Statutes, and see section 1595, Revised Statutes, as to retired officers.

This section was amended by act of January 30, 1885 (23 Stat., 291), which provided "that all enlisted men and boys in the Navy attached to any United States vessel or station and doing duty thereon, and naval cadets, shall be allowed a ration, or commutation thereof in money, under such limitations and regulations as the Secretary of the Navy may prescribe."

**Enlisted men.**—Section 1577, Revised Statutes, provides that midshipmen shall be entitled to one ration, and section 1578 declares that all officers shall be entitled to one ration; but there is no affirmative law giving a ration to an enlisted man of the Navy. Section 1579 impliedly allows the ration to all men doing duty on seagoing vessels as well as to those within the exceptions mentioned in the section; and this section is referred to in article 1120 (4), Navy Regulations, 1909, as authorizing rations. (19 Comp. Dec., 450; but see act of Jan. 30, 1885, quoted above under this section; and see decisions of the comptroller, noted below.)

The benefits of section 1579, Revised Statutes, granting rations to enlisted men in the Navy, were extended by the act of January 30, 1885 (23 Stat., 291). These statutory provisions limit the allowance of rations to those enlisted men attached to some Government vessel or station and doing duty thereon, and to petty officers, seamen, and ordinary seamen attached to receiving ships or to the ordinary of a navy yard. (4 Comp. Dec., 690.)

The act of January 30, 1885 (23 Stat., 291), extends the right to rations or to commutation thereof in money to all enlisted men and boys in the Navy "attached to any United States vessel or station and doing duty thereon." (5 Comp. Dec., 40.)

Enlisted men in the Navy are given rations or commutation therefor in money by virtue of section 1579, Revised Statutes, and the act of January 30, 1885 (23 Stat., 291). Section 1579 limits the right to rations to certain specified classes of persons in the naval service; the act of January 30, 1885, extends the right to all enlisted men and boys in the service when attached to a United States vessel or station and doing duty thereon. (5 Comp. Dec., 177.)

Yeomen doing duty at the different headquarters of the Coast Signal Service are not attached to any United States vessel or station and doing duty thereon, within the meaning of the act of January 20, 1885, granting rations to certain enlisted men and boys in the Navy, and they are not entitled to rations or commutation thereof. (4 Comp. Dec., 690.)

On reconsideration, *held*, that the different headquarters of the Coast Signal Service where enlisted men on duty are armed perform military service, and are subject to military discipline, are stations within the meaning of the act of January 30, 1885, and yeomen attached to and doing duty at such stations are entitled to rations or commutation thereof. (5 Comp. Dec., 40.)

The naval proving ground at Indianhead, Md., is not a station within the meaning of the act of January 30, 1885, which provides for rations for enlisted men in the Navy attached to a station, and enlisted men stationed there are not entitled to rations or commutation thereof. (5 Comp. Dec., 177.)

The act of 1885, while extending the right of rations to those who before were not entitled to it, did not remove the general prohibition contained in section 1579, except in the cases provided for in that act. Taking the two laws together, it appears that only those enlisted men of the Navy who are attached to some United States vessel or station and doing duty thereon, or attached to the ordinary of a navy yard, are entitled to rations. Had Congress intended that all enlisted men in the service should have the benefit of a daily ration or commutation thereof in money, there would have been no occasion to attach the conditions which the law does to such a right. (5 Comp. Dec., 177.)

The headquarters of the Marine Corps at Washington, D. C., a place where armed forces are stationed and military duties and discipline are imposed, is a station, within the meaning of the act of January 30, 1885, and a hospital steward in the Navy on duty there is entitled to rations or to commutation thereof. (5 Comp. Dec., 561.)

The recruiting rendezvous at Chicago, Ill., is a naval station within the meaning of the act of January 30, 1885. (Comp. Dec., Jan. 5, 1901, cited in 7 Comp. Dec., 408, 410.)

Enlisted men of the Navy are given rations or commutation thereof by virtue of section 1579, Revised Statutes, and the act of Janu-

ary 30, 1885. Under these laws, an enlisted man of the Navy, released from the custody of the civil authorities on bail, who reported at his regular station, the receiving ship at New York, for duty, but was not permitted to enter on duty or to remain at his station, solely because he was on bail, is entitled to commutation of rations during the period of such enforced absence from his regular station. If he had been received on board the receiving ship to which he was attached when he reported there, he would be entitled to rations or commutation thereof; and the erroneous action of the officer in refusing to receive him on board should not deprive him of his right to which he would otherwise be entitled. (22 Comp. Dec., 589.)

**Subsistence when absent from vessel or on detached duty.**—The naval appropriation act of March 3, 1915, under the head of "Provisions, Navy," contained the following appropriation: "For \* \* \* subsistence of officers and men unavoidably detained or absent from vessels to which attached under orders (during which subsistence rations to be stopped on board ship and no credit for commutation therefor to be given) \* \* \*" (38 Stat., 943.) A similar provision was contained in the Navy appropriation act of July 19, 1892 (27 Stat., 243), and in each subsequent act making annual appropriation for the support of the Navy. This provision has been construed as authorizing the payment for subsistence of enlisted men while on duty under orders which require them to be absent from the vessel to which attached or on detached duty under conditions where they are not entitled to rations or commutation thereof. (22 Comp. Dec., 589, citing 10 Comp. Dec., 593, and other decisions.)

Petty officers and other enlisted men who may be temporarily absent from the vessels to which they are attached, under orders and engaged in recruiting service for the time being at places not stations within the purview of the act of January 30, 1885 (quoted above under "Enlisted men"), may be subsisted while so temporarily absent and the expense paid from the appropriation, "Provisions, Navy." Unless, however, they are attached to vessels under orders and unavoidably absent therefrom, they can not be subsisted at the expense of the Government at places not stations within the meaning of the act of June 30, 1885. (7 Comp. Dec., 408.)

Under the act of July 1, 1902 (32 Stat., 679), which provided for the subsistence of officers and enlisted men of the Navy unavoidably detained or absent from their vessels, a petty officer attached to a vessel at the Mare Island Navy Yard, who was detailed for duty at the Union Iron Works at San Francisco, Calif., and thereby deprived of quarters and rations on board ship, was entitled while so detailed to an allowance in lieu of subsistence; and the word "subsistence," as used in said act, must be construed as comprehending both board and lodging. (10 Comp. Dec., 593.)

An enlisted man who is granted leave from a hospital for the convenience of the Government or for the purpose of more rapidly recuperating from his illness is in the status of an enlisted man on detached duty and should be allowed the same subsistence as authorized for

men on detached duty. (File 26254-2883:2, Oct. 30, 1919, 225 S. and A. Memo., 5026.)

It is the duty of the Government to feed and quarter the enlisted men at all times, except when for a man's own pleasure and convenience he absents himself. (26 Comp. Dec., 47.)

The language of the annual appropriations for "Provisions, Navy," entitles enlisted men of the Navy to be subsisted at the expense of the United States when "unavoidably detained or absent from vessels to which attached under orders (during which subsistence rations to be stopped on board ship and no credit for commutation therefor given)" and when on "detached duty." This subsistence, it has been held, may be paid to them directly in the form of a per diem allowance in lieu of the payment of actual expense thereof in each instance to the person supplying it. (Comp. Dec., Mar. 23, 1917, 193 S. and A. Memo., 4198.)

An enlisted man of the Navy who after undergoing treatment at a naval hospital is ordered on sick leave of absence is in a duty status and entitled to the per diem allowance for subsistence for such period. (26 Comp. Dec., 47.)

Where a man's status before entering a hospital and upon return to duty at the Navy Department at the expiration of sick leave of absence was that of an enlisted man "on detached duty from vessel or shore station," he is recognized as "on duty" while on such sick leave of absence, and his status for purposes of subsistence per diem was not changed from "on detached duty" by being ordered to take sick leave. (26 Comp. Dec., 47.)

The provision in the act of March 3, 1897 (29 Stat., 657), for subsistence of officers temporarily absent from their vessels, does not apply to officers separated from their vessel by reason of its loss or destruction, while they are in receipt of their sea pay and allowances under section 1574, Revised Statutes. (5 Comp. Dec., 221.)

Where a naval officer under arrest is confined to a vessel, the mess of which he is a member is entitled to reimbursement of his share of the mess expenses incurred on account of subsistence. (9 Comp. Dec., 711.)

Officers of the Navy on sea duty who are not entitled to a ration or commutation thereof are not entitled to allowance for subsistence when performing temporary duty which requires their absence from the ship to which attached and which does not require their detachment from the ship nor affect their sea-duty status. (Comp. Dec., Jan. 29, 1917, 191 S. and A. Memo., 4145.)

The appropriation "Provisions, Navy," for "subsistence of officers and men unavoidably detained or absent from vessels to which attached under orders (during which subsistence rations to be stopped on board ship and no credit for commutation therefor to be given)," was intended to authorize the payment of subsistence of only such officers of a ship so absent as would have been entitled to a ration or commutation thereof at the expense of the Government had they not been thus absent from their vessels. Accordingly, this appropriation has no application to officers who would not have been entitled to subsistence ration or commutation therefor had they in fact continued on ship-



board. (Comp. Dec., Jan. 29, 1917, 191. S. and A. Memo., 4145.)

The appropriation under "Pay, miscellaneous," for "actual expenses of officers while on shore patrol duty," and for "relief of vessels in distress; recovery of valuables from shipwrecks," does not authorize allowance of subsistence to officers on shore engaged in salvage operations requiring their temporary absence from their vessels; nor are such officers entitled to subsistence allowance from the appropriation for "Contingent, Navy." (Comp. Dec., Jan. 29, 1917, 191 S. and A. Memo., 4145.)

See below, under "Officers temporarily absent from vessel."

**Officers of receiving ships.**—A receiving ship at anchor is not "a seagoing vessel" within the meaning of the Revised Statutes, sections 1578 and 1579; accordingly a boatswain in the Navy attached to such ship is not entitled to a ration. (*Frary v. U. S.*, 24 Ct. Cls., 114.)

Section 1579 is a limitation upon section 1578; the one gives and the other takes away, and that alone which remains stands as the law. To entitle officers and other persons, with some exceptions, to rations, they must be either at sea or actually attached to and doing duty on a seagoing vessel, whether such vessel be at sea or not. That Congress intended to exclude receiving ships from that designation as seagoing vessels is conclusively shown by the exception in section 1579, which, after prohibiting the allowance of rations to persons not on a seagoing vessel expects petty officers, seamen, and ordinary seamen attached to receiving ships. An exception is part of what is previously described and not of something else. (*Frary v. U. S.*, 24 Ct. Cls., 114; 21 Comp. Dec., 318.)

A mate in the Navy on duty on a receiving ship is entitled, under the decision in *Fuller v. United States* (noted below), to rations or commutation therefor. (*Baxter v. U. S.*, 32 Ct. Cls., 75.)

A paymaster's clerk attached to and doing duty on a receiving ship is not entitled to rations, notwithstanding that the vessel used as a receiving ship, instead of being a stationary hulk, as was formerly the case is a seaworthy vessel; that it has a regular complement for sea service which, with the vessel, are held in readiness to go to sea on short notice; and that, in addition, she has a complement as a receiving ship for receiving-ship duty which, if the vessel is ordered to sea, remains, being automatically transferred to another vessel designated to act as receiving ship to take the place of the former vessel ordered to sea. The vessel, acting in her capacity as receiving ship, is stationary and does not go to sea, and, so far as her receiving ship complement is concerned, is not a seagoing vessel within the meaning of section 1579, Revised Statutes. (21 Comp. Dec., 314.)

**Warrant officer on training ship.**—Where a vessel is attached to a naval training station to be used for training landsmen and apprentices, but is also commissioned with all sails bent and kept in readiness to go to sea, a boatswain attached to said training station for such duty as the commandant thereof may assign him at the station under his command, who is detailed by the commandant to duty on board said vessel and such other duty as may be assigned to him

at said station, and is furnished quarters and messes on board of such vessel, is entitled to rations or commutation thereof while on said duty. (14 Comp. Dec., 233.)

**Ordinary of a navy yard.**—The term "ordinary of a navy yard," as used in Revised Statutes, section 1579, refers to ships laid up in ordinary at a navy yard. The meaning of the section is that petty officers, etc., though not upon a "seagoing vessel," may be allowed a ration if "actually attached to and doing duty" on shipboard. But it does not extend to the apothecary of the Navy Academy. (*Button v. U. S.*, 20 Ct. Cls., 423.)

An apothecary in the Navy detailed to and doing duty at the marine barracks is not "attached to the ordinary of a navy yard" within the meaning of the Revised Statutes, section 1579, and therefore is not entitled to a daily ration. (*Herbert v. U. S.*, 21 Ct. Cls., 53.)

See section 1534, Revised Statutes, as to vessels laid up in ordinary.

**Judge Advocate General.**—The provisions of section 1579, Revised Statutes, preclude the allowance of a sea ration to the Judge Advocate General, whose duty is in the Navy Department, the law then in effect providing that the Judge Advocate General shall have the "allowances" of a captain in the Navy. (*Lemly v. U. S.*, 28 Ct. Cls., 468.)

**Mates.**—Mates are petty officers, and as such are entitled to rations or commutation therefor. (*U. S. v. Fuller*, 160 U. S., 593; see also sec. 1408, R. S., as to status of mates.)

The exceptions of mates from section 1569, Revised Statutes, merely indicates that Congress, having already fixed their pay by section 1556, such pay need not be fixed by the President. But they are still within the exception of "petty officers, seamen, and ordinary seamen attached to receiving ships," who are inferentially allowed a ration by section 1579. The exception of mates from other petty officers in section 1569 indicates that they are petty officers, and the exception of petty officers from those who are not entitled to rations under section 1579 indicates that as such they are entitled to a ration. (*U. S. v. Fuller*, 160 U. S. 593.)

**Officers temporarily absent from vessel.**—See above, under "Subsistence when absent from vessel or on detached duty."

Officers of the Navy on sea duty, temporarily located on shore for the convenient and efficient performance of the services required of them under competent orders, are entitled to sea-duty pay but not to commutation of rations under section 1579, Revised Statutes, which authorizes commutation of rations only while actually performing duty on board a seagoing vessel. (27 Comp. Dec., 222.)

Under section 1579, a warrant officer is entitled to commutation of rations only when actually attached to and doing duty on board a seagoing vessel. A pay clerk attached to but not actually doing duty on board a seagoing vessel is not entitled to commutation of rations, although his temporary situation on shore, due to the exigencies of the service, did not change the character of his duty as sea duty; yet the law requires that he must in fact perform duty on board a seagoing vessel to entitle him to a

ration. The word "actually" will not permit a constructive status; and therefore the pay clerk, although on sea duty and attached to a seagoing vessel, while so temporarily located on shore is not entitled to commutation of rations. (Comp. Dec., Sept. 2, 1920, file 26254-3232.)

**Temporarily in hospital.**—See note above, under "Subsistence when absent from vessel or on detached duty."

Where an officer attached to a seagoing vessel was entitled to commutation of rations, under section 1578, Revised Statutes, his temporary absence in hospital, under treatment, without being detached from his vessel, did not deprive him of such commutation. (*Collins v. U. S.*, 37 Ct. Cls., 222, 226.)

By section 4812, Revised Statutes, for every Navy officer, seamen, or marine admitted into a Navy hospital the institution shall be allowed one ration per day during his continuance therein, "to be deducted from the account of the United States with such officer, seamen, or marine." By the annual naval appropriation act, under "Provisions, Navy," appropriation is made for "commuted rations stopped on account of sick in hospital and credited to the naval hospital fund." This appropriation shows that the law contemplates a condition where a man may be in hospital while at the same time he is entitled to be credited with a ration, for otherwise there would be no ration to be stopped for the sick, and no appropriation would be necessary if the ration were to be charged against his pay, as provided by section 4812. This appropriation means simply that the commutation of rations to which a person is entitled by being attached to a seagoing vessel is to be transferred to the hospital to which he is sent, and the statute makes an appropriation to pay for the same. Of course the appropriation would not apply where an officer becomes detached from his vessel while in hospital or on being sent there. (4 Comp. Dec., 458.)

Under the appropriation for commuted rations for the Navy, a paymaster's clerk attached to a seagoing vessel who is temporarily in hospital without being detached from his ship is entitled to commutation of rations, which should be credited to the naval hospital fund in accordance with the language of the appropriation; and no deduction should be made from the pay of such paymaster's clerk on account of rations credited to the hospital, as provided by section 4812, Revised Statutes. (4 Comp. Dec., 458.)

The appropriation for commutation of rations stopped on account of sick in hospital and credited to the naval hospital fund repeals, in effect,

the requirement of section 4812, Revised Statutes, that one ration per day shall be deducted from the account of every naval officer sent to the hospital, in cases where the officer is not detached from sea duty and is entitled to a ration; but the ration to which the officer would otherwise be entitled by reasons of his sea status goes to the hospital. (4 Comp. Dec., 644.)

Where an officer of the Navy not entitled to rations is ordered to a hospital for treatment, charges of the value of one ration per day should be made against the pay of such officer. (17 Comp. Dec., 663.)

Section 4812, Revised Statutes, has been held to mean that the naval hospital fund is entitled to one ration or the value thereof per day for each person treated in a naval hospital, and when the officer is not entitled to rations the value of one ration is deducted from his pay and credited to said fund. This practice began with the first law depriving officers of rations and has continued to the present time. Under Navy Regulations 1909, article 1129 (1), this practice applies to officers under treatment in foreign hospitals. (17 Comp. Dec., 663.)

Although a retired enlisted man on inactive duty is entitled to only \$9.50 per month, "in lieu of rations and clothing," and something less than \$9.50 is in lieu of rations, some portion of the amount being in lieu of clothing, *held*, that under section 4812, Revised Statutes, the account of such enlisted man, while under treatment in a naval hospital, should be checked 68 cents per day as the value of a ration for each day that he is subsisted as a patient and said amount credited to the institution, the act of July 11, 1919 (41 Stat., 147), having fixed this as the commutation value of a Navy ration until the close of the fiscal year 1921. (26 Comp. Dec., 784. Note: By said act of July 11, 1919, under "Provisions, Navy," appropriation was made for "commuted rations stopped on account of sick in hospital and credited at the rate of 50 cents per ration to the naval hospital fund.")

**Court-martial prisoners.**—Annual appropriation, under "Provisions, Navy," is made for "subsistence of \* \* \* general courts-martial prisoners undergoing imprisonment with sentences of dishonorable discharge from the service at the expiration of such confinement," with the proviso, "That the Secretary of the Navy is authorized to commute rations for such general courts-martial prisoners in such amounts as seem to him proper, which may vary in accordance with the location of the naval prison, but which shall in no case exceed 30 cents per diem for each ration so commuted."

**Sec. 1580. [Navy ration, constituents of.]** The Navy ration shall consist of the following daily allowance of provisions to each person: One pound and a quarter of salt or smoked meat, with three ounces of dried or six ounces of canned or preserved fruit, and three gills of beans or pease, or twelve ounces of flour; or one pound of preserved meat, with three ounces of dried or six ounces of canned or preserved fruit and eight ounces of rice or twelve ounces of canned vegetables, or six ounces of desiccated vegetables; together with one pound of



biscuit, two ounces of butter, four ounces of sugar, two ounces of coffee or cocoa, or one-half ounce of tea and one ounce of condensed milk or evaporated cream; and a weekly allowance of one-quarter pound of macaroni, four ounces of cheese, four ounces of tomatoes, one-half pint of vinegar or sauce, one-quarter pint of pickles, one-quarter pint of molasses, four ounces of salt, one-half ounce of pepper, one-eighth ounce of spices, and one-half ounce of dry mustard. Seven pounds of lard, or a suitable substitute, shall be allowed for every hundred pounds of flour issued as bread, and such quantities of yeast and flavoring extracts as may be necessary.

This section was expressly amended and reenacted to read as above by act of June 29, 1906 (34 Stat., 570). As originally enacted, it read as follows:

"Sec. 1580. The Navy ration shall consist of the following daily allowance of provisions to each person: One pound of salt pork, with half a pint of beans or peas; or one pound of salt beef, with half a pound of flour and two ounces of dried apples, or other dried fruit; or three-quarters of a pound of preserved meat, with a half pound of rice, two ounces of butter, and one ounce of desiccated 'mixed vegetables;' or three-quarters of a pound of preserved meat, two ounces of butter, and two ounces of desiccated potatoes; together with fourteen ounces of biscuit, one-quarter of an ounce of tea, or one ounce of coffee or cocoa, and two ounces of sugar; and a weekly allowance of half a pint of pickles, half a pint of molasses, and half a pint of vinegar."—(18 July, 1861, c. 7, s. 1, v. 12, p. 264. 14 July, 1862, c. 164, s. 4, v. 12, p. 565.)

It had previously been amended and reenacted by act of July 1, 1902 (32 Stat., 679), to read as follows:

"Sec. 1580. The Navy ration shall consist of the following daily allowance of provisions to each person: One pound and a quarter salt or smoked meat, with three ounces of dried or six ounces of canned fruit, and three gills of beans or peas, or twelve ounces of flour; or one pound of preserved meat, with three ounces of dried or six ounces of canned fruit, and twelve ounces of rice or eight ounces of canned vegetables or four ounces of desiccated vegetables; together with

one pound of biscuit, two ounces of butter, four ounces of sugar, two ounces of coffee or cocoa or one-half ounce of tea and one ounce of condensed milk or evaporated cream; and a weekly allowance of one-half pound of macaroni, four ounces of cheese, four ounces of tomatoes, one-half pint of vinegar, one-half pint of pickles, one-half pint of molasses, four ounces of salt, one-quarter ounce of pepper, and one-half ounce of dry mustard. Five pounds of lard or a suitable substitute shall be allowed for every hundred pounds of flour issued as bread, and such quantities of yeast as may be necessary."

**Refuse of rations is Government property.**—Theoretically, the component parts of the ration are issued to the individual men, and such may originally have been the practice; but it is the practice now, and has been for a long time, to subsist the men by means of the commissary department of the vessel. The men have nothing to do with the ration, but only with food cooked and placed on the table for their use as food; the whole issue and preparation is done by persons appointed and paid by the Government for the purpose. *Held*, that the enlisted men are entitled to use the articles furnished as food to be eaten, but with no interest in the refuse, which remains public property; and that the proceeds from sale of garbage from the general mess of a receiving ship should be covered into the Treasury as miscellaneous receipts. (19 Comp. Dec., 450.)

**For other cases**, see note to section 1581, Revised Statutes.

**Sec. 1581. [Substitutions in rations, and extra allowance for night watches.]**

The following substitution for the components of the ration may be made when deemed necessary by the senior officer present in command: "For one and one-quarter pounds of salt or smoked meat or one pound of preserved meat, one and three-quarter pounds of fresh meat or fresh fish, or eight eggs; in lieu of the articles usually issued with salt, smoked, or preserved meat, one and three-quarter pounds of fresh vegetables; for one pound of biscuit, one and one-quarter pounds of soft bread or eighteen ounces of flour; for three gills of beans or pease, twelve ounces of flour or eight ounces of rice or other starch food, or twelve ounces of canned vegetables; for one pound of condensed milk or evaporated cream, one quart of fresh milk; for three ounces of dried or six ounces of canned or preserved fruit, nine ounces of fresh fruit; and for twelve ounces of flour or eight ounces of rice or other starch food, or twelve ounces of canned vegetables, three gills of beans or pease; in lieu of the weekly allowance of one-quarter pound

of macaroni, four ounces of cheese, one-half pint of vinegar or sauce, one-quarter pint of pickles, one-quarter pint of molasses, and one-eighth ounce of spices, three pounds of sugar, or one and a half pounds of condensed milk, or one pound of coffee, or one and a half pounds of canned fruit, or four pounds of fresh vegetables, or four pounds of flour.

"An extra allowance of one ounce of coffee or cocoa, two ounces of sugar, four ounces of hard bread or its equivalent, and four ounces of preserved meat or its equivalent shall be allowed to enlisted men of the engineer and dynamo force who stand night watches between eight o'clock postmeridian and eight o'clock antemeridian, under steam."

Any article comprised in the Navy ration may be issued in excess of the authorized quantity, provided there be an under issue of the same value in some other article or articles.

This section was expressly amended and reenacted to read as above by acts of June 29, 1906 (34 Stat., 571), and March 2, 1907 (34 Stat., 1193), the amendment made by the act last cited consisting of the addition to section 1581 of the last paragraph thereof, as above set forth. As originally enacted, it read as follows:

"Sec. 1581. The following substitution for the components of the ration may be made when it is deemed necessary by the senior officer present in command: For one pound of salt beef or pork, one pound and a quarter of fresh meat or three-quarters of a pound of preserved meat; for any or all of the articles usually issued with the salted meats, vegetables equal to the same in value; for fourteen ounces of biscuit, one pound of soft bread, or one pound of flour, or half a pound of rice; for half a pint of beans or peas, half a pound of rice, and for half a pound of rice, half a pint of beans or peas. And the Secretary of the Navy may substitute for the ration of coffee and sugar the extract of coffee combined with milk and sugar, if he shall believe such substitution to be conducive to the health and comfort of the Navy, and not to be more expensive to the Government than the present ration: *Provided*, That the same shall be acceptable to the men."—(18 July, 1861, c. 7, ss. 2, 3, 4, v. 12, p. 265. 17 April, 1862, c. 57, s. 4, v. 12, p. 381.)

It was previously amended by act of May 3, 1880 (21 Stat., 86), which provided that "the Secretary of the Navy may substitute for the ration of 'two ounces of desiccated potatoes' six ounces of desiccated tomatoes if he shall believe such substitution to be conducive to the health and comfort of the Navy, and not to be more expensive to the Government than the present ration, provided the same shall be acceptable to the men. In the event the Secretary of the Navy orders such substitution he is authorized to have sold at public auction any desiccated potatoes on hand, the proceeds of which sale shall be used in the purchase of desiccated tomatoes for the use of the Navy."

It was again amended by act of July 1, 1902 (32 Stat., 680), which expressly repealed the provision above quoted from the act of May 3, 1880, and reenacted section 1581 to read as follows:

"Sec. 1581. The following substitution for the components of the ration may be made when

deemed necessary by the senior officer present in command:

"For one and one-quarter pounds of salt or smoked meat or one pound of preserved meat, one and three-quarters pound of fresh meat; in lieu of the article usually issued with salt, smoked, or preserved meat, fresh vegetables of equal value; for one pound of biscuit, one and one-quarter pounds of soft bread, or eighteen ounces of flour; for three gills of beans or peas, twelve ounces of flour or rice or eight ounces of canned vegetables, and for twelve ounces of flour or rice or eight ounces of canned vegetables, three gills of beans or peas."

The act of July 1, 1902 (32 Stat., 680), also enacted the following clause, but not as a part of section 1581, although, with slight verbal change, embraced in that section as reenacted by the act of June 29, 1906:

"That an extra allowance of one ounce of coffee or cocoa, two ounces of sugar, four ounces of hard bread or its equivalent, and four ounces of preserved meat or its equivalent shall be allowed to enlisted men of the engineer and dynamo force when standing night watches between eight o'clock postmeridian and eight o'clock antemeridian under steam."

A provision similar to that last quoted was enacted by act of May 22, 1917, section 21 (40 Stat., 90), which applied only for the period of the then existing war, and extended said extra allowance to enlisted men of the deck force. See note to section 1584, Revised Statutes.

**Issue of fruits with fresh meat.**—When fresh meat is substituted for salt, smoked, or preserved meat, "three ounces of dried, or six ounces of canned or preserved fruit," may be issued therewith; or "nine ounces of fresh fruit" may be substituted for the dried, canned, or preserved fruit. (File 21177-3, Jan. 25, 1911.)

When "one and three-quarter pounds of fresh vegetables" are issued with fresh meat as a substitute for "the articles usually issued with salt, smoked, or preserved meat," there may be issued therewith "one and a half pounds of canned fruit," or such portion thereof as desired, "in lieu of the weekly allowance of one-quarter pound of macaroni, four ounces of cheese, one-half pint of vinegar or sauce, one-quarter pint of pickles, one-quarter pint of molasses, and



one-eighth ounce of spices." (File 21177-3, Jan. 25, 1911.)

When fresh meat is issued with dried, canned, or preserved fruit, or with fresh fruit, in accordance with above ruling, there may also be issued therewith "four pounds of fresh vegetables," or such portion thereof as desired, "in lieu of the weekly allowance of one-quarter pound of macaroni," and other items specified above. (File 21177-3, Jan. 25, 1911.)

Any of the articles above enumerated may be issued in excess of the quantities stated, "provided there be an under issue of the same

value in some other article or articles." (File 21177-3, Jan. 25, 1911.)

**Substitution for butter.**—The Navy ration includes a daily allowance to each person of "two ounces of butter." Substitutes are authorized for certain components of the ration, not including, however, butter, as to which, accordingly, no substitution can be made. *Held*, therefore, that oleomargarine or butterine can not legally be substituted for butter as a part of the Navy ration. (File 19398-34, Apr. 14, 1913; 148 S. and A. Memo., 2682.)

**Sec. 1582. [Short allowance.]** In case of necessity the daily allowance of provisions may be diminished at the discretion of the senior officer present in command; but payment shall be made to the persons whose allowance is thus diminished, according to the scale of prices for the same established at the time of such diminution. And every commander who makes any diminution or variation shall give to the paymaster written orders therefor, specifying particularly the diminution or variation which is to be made, and shall report to his commanding officer, or to the Navy Department, the necessity for the same.—(18 July, 1861, c. 7, s. 4, v. 12, p. 265.)

**Sec. 1583. [Rations stopped for the sick.]** Rations stopped for the sick on board vessels shall remain and be accounted for by the paymaster as a part of the provisions of the vessels.—(3 Mar., 1851, c. 34, s. 1, v. 9, p. 621. 22 June, 1860, c. 181, s. 3, v. 12, p. 83.)

See note to section 1579, Revised Statutes, under "Temporarily in hospital"; and see section 4812, Revised Statutes.

See act of March 29, 1894 (28 Stat., 47), as to rendition of property accounts, noted under section 236, Revised Statutes, under "III. Limitations upon Jurisdiction."

#### **Sec. 1584. [Additional ration. Repealed.]**

**This section provided as follows:**

"Sec. 1584. An additional ration of tea or coffee and sugar shall be hereafter allowed to each seaman, to be provided at his first 'turning out.'"—(23 May, 1872, c. 195, s. 1, v. 17, p. 151.)

**It was expressly repealed** by act of July 1, 1902 (32 Stat., 680).

**Additional rations in special cases** were authorized as follows: By act of July 1, 1902 (32 Stat., 680), quoted above under section 1581, Revised Statutes, an extra allowance was authorized for men standing night watches. The said enactment of July 1, 1902, was super-

seded and repealed by act of June 29, 1906 (34 Stat., 571), which reenacted same, with a slight verbal change, as part of section 1581 as that section now reads. By act of May 22, 1917, section 21 (40 Stat., 90), the following provision was enacted for the period of the war:

"That during the continuance of the present war an extra allowance of one ounce of coffee or cocoa, two ounces of sugar, four ounces of hard bread or its equivalent, and four ounces of preserved meat or its equivalent shall be allowed to enlisted men of the deck force when standing night watches between eight o'clock postmeridian and eight o'clock antemeridian."

**Sec. 1585. [Ration commutation.]** Forty cents shall in all cases be deemed the commutation price of the Navy ration: *Provided, however*, That after January first, nineteen hundred and eighteen, the commutation price shall not exceed the average cost of the ration during the preceding six months, not to exceed 40 cents.

**This section was expressly amended and reenacted** to read as above by act of October 6, 1917 (40 Stat., 397). As originally enacted, it read as follows

"Sec. 1585. Thirty cents shall in all cases be deemed the commutation price of the Navy ration."—(15 July, 1870, c. 295, s. 4, v. 16, p. 333.)

**Other amendments to this section** have been made by clauses in the naval appropriation acts effective for the ensuing fiscal year. The act of June 4, 1920, (41 Stat., 825), under "Provisions, Navy," contained the following: "For provisions and commuted rations for the seamen and marines, which commuted rations may be paid to caterers of messes, in case of

death or desertion, upon orders of the commanding officers, commuted rations for officers on sea duty (other than commissioned officers of the line, Medical and Supply Corps, chaplains, chief boatswains, chief gunners, chief carpenters, chief machinists, chief pay clerks, and chief sailmakers) at 68 cents per diem, and midshipmen at \$1.08 per diem, and commuted rations stopped on account of sick in hospital and credited at the rate of 68 cents per ration to the naval hospital fund; \* \* \* subsistence of \* \* \* Navy and Marine Corps general courts-martial prisoners undergoing imprisonment with sentences of dishonorable discharge from the service at the expiration of such confinement: *Provided*, That the Secretary of the Navy is authorized to commute rations for such general courts-martial prisoners in such amounts as seem to him proper, which may vary in accordance with the location of the naval prison, but which shall in no case exceed 30 cents per diem for each ration so commuted; and for the purchase of United States Army emergency rations as required." The same act, under "Provisions, Marine Corps" (41 Stat., 831), provided for "commutation of rations to recruiting parties, and enlisted men traveling on special duty, at such rate as the Secretary of the Navy may prescribe."

**Payment to commissary officer.**—By act of July 1, 1902 (32 Stat., 680), it was provided "that money accruing from the rations of enlisted men commuted for the benefit of any mess may be paid on public bills to the commissary officer by the pay officer having their accounts." (See also clause quoted above, from act of June 4, 1920, as to payment to caterers of messes in case of death or desertion.)

Under Navy regulations prior to July 1, 1907 (revoked by G. O. No. 44, Apr. 16, 1907), the commutation value of rations due enlisted men was credited by the pay officer to himself as such, and debited against himself as commissary officer in charge of the general mess, composed of such enlisted men, the money never actually leaving the pay officer's hands until finally paid out in the shape of mess expenditures and not being paid over to the individual enlisted men who composed the mess. It was held by the Comptroller of the Treasury that such commutation money in the hands of the pay officer was public money until actually expended by him, and he should be required

to account for its proper disbursement to the accounting officers of the Treasury, the same as any other public money placed in his hands for disbursement in his official capacity. (12 Comp. Dec., 678; see also 94 S. and A. Memo., 923, relating to midshipmen's mess, noted under sec. 236, Revised Statutes, under "II. Jurisdiction of accounting officers," sub-heading, "Public money.")

The act of July 1, 1902 (32 Stat., 680), authorizing the payment of money accruing from the rations of enlisted men "commuted for the benefit of any mess," does not extend to an officer's mess on shore. Officers' messes on shore are voluntary, and there is no law or regulation which recognizes them. (*Williams v. U. S.*, 44 Ct. Cls., 175.)

Where enlisted men on shipboard were detailed to serve an officer's mess on shore, and were subsisted by the mess, and their rations were commuted and paid to the mess, the accounting officers could disallow the payment and compel the officers to refund the money. (*Williams v. U. S.*, 44 Ct. Cls., 175.)

The chief petty officers' mess and its organization are provided for in part by Navy regulations; the duly elected treasurer of said mess is not an agent of the Government, the commuted rations of each member of such a mess, when paid to said treasurer, are no longer public funds, and may be expended by him in such manner as the mess may direct. (File 26262-3363, G. C. M. Rec. 41585, C. M. O. 190, 1918, pp. 17-19, holding that the treasurer of a chief petty officer's mess was not guilty of "making false and fraudulent official reports in violation of article fourteen of the Articles for the Government of the Navy" by reason of his presenting false and fraudulent vouchers in rendering his official statement of the accounts of said mess to the members of the mess and the auditing board, because the fraud was not against the United States.)

**Commutation defined.**—Commutation in the military or naval service is money paid in substitution of something to which an officer, sailor, or soldier is entitled. The principle which governs the commutation of rations in lieu of subsistence is that commutation will not be allowed where subsistence in kind is provided by the Government. (*Jaegle v. U. S.*, 28 Ct. Cls., 133.)

**For other cases,** see notes to sections 1578 and 1579, Revised Statutes.

**Sec. 1586. [Medicines and medical attendance.]** Expenses incurred by any officer of the Navy for medicines and medical attendance shall not be allowed unless they were incurred when he was on duty, and the medicines could not have been obtained from naval supplies, or the attendance of a naval medical officer could not have been had.—(15 July, 1870, c. 295, s. 17, v. 16, p. 334.)

Payment by officers and enlisted men to naval hospital fund is required by sections 1614 and 4808, Revised Statutes.

**Duty of Government to provide medical stores and attendance.**—It is the peculiar province and duty of the Navy Department to provide medical stores and attendance for the officers and seamen attached to the naval service; this may truly be said to enter into

the contract of the Government with persons so employed. For this purpose a Bureau of Medicine and Surgery is attached to the Navy Department, and numerous medical officers appointed. The law, moreover, exacts from every officer and seaman a monthly contribution from their wages to make provision for the sick and disabled; and these contributions are applied, under the supervision of the President,



to the erection and maintenance of marine hospitals and similar institutions for the benefit of seamen. (U. S. v. Jones, 18 How., 92.)

The exigencies of the service often require the employment of soldiers and sailors at a distance from public hospitals, and when the attendance of medical officers can not be obtained; consequently, in fulfillment of the humane policy of the Government, it frequently becomes necessary to employ temporarily physicians not regularly commissioned, for in this way alone can the department perform the duty assumed by the Government of providing the necessary medical attendance for those who become sick or disabled in its service. (U. S. v. Jones, 18 How., 92.)

**Navy Department's action conclusive upon accounting officers.**—The executive department of the Government to which is intrusted the control of the subject matter must necessarily determine all questions appertaining to the employment and payment of civilian physicians and the exigency which demands their employment. The Secretary of the Navy represents the President and exercises his power on subjects confided to his department. He is responsible to the people and the law for any abuse of the powers intrusted to him. His acts and decisions on subjects submitted to his jurisdiction and control by the Constitution and laws do not require the approval of any officer of another department to make them valid and conclusive. The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of heads of departments. (U. S. v. Jones, 18 How., 92.)

The propriety of detaching an officer of the Navy for special duty in France, of furnishing him with medical attendance while so employed, and of adopting and ratifying his act in the employment of physicians, under all the circumstances, are all subjects peculiarly within the jurisdiction and discretion of the head of the Navy Department, and not subject to revision by the officers of any other department; and the judgment of the lower court, in refusing to charge the officer with the amount disbursed by him for medical attendance, should be affirmed. (U. S. v. Jones, 18 How., 92; see also note to secs. 236 and 285, R. S.; and see note to sec. 1558, R. S., under "Maintenance, attachés.")

The act of March 3, 1835, chapter 27, section 2, provided that "the yearly allowance provided in this act is all the pay, compensation, and allowance which shall be received under any circumstances whatever by any such officer," etc. (See sec. 1558, R. S.) The Secretary of the Navy transmitted to an officer detached on special duty in France a sum of money to be disbursed for medical attendance incurred by such officer. The Treasury Department held that this was an allowance prohibited by the law quoted, and charged the amount so disbursed by the officer, according to the orders of the Secretary, to the officer's pay account and refused to recognize the authority of the Secretary of the Navy in the premises. *Held*, that the action of the Secretary was con-

clusive upon the accounting officers of the Treasury. (U. S. v. Jones, 18 How., 92.)

The determination of the Secretary of the Navy that expenses of an officer of the Navy for medicines and medical attendance are incurred under circumstances entitling him to reimbursement is conclusive. (2 Comp. Dec., 241.)

Where the Navy Department disapproved the claim of an officer for allowance of medical expenses, the auditor correctly disallowed the officer's claim. Thereafter, the Secretary of the Navy having reconsidered his action, and recommended allowance of the claim, although the Surgeon General of the Navy still declined to recommend the allowance, *held*, that this action of the Secretary remove the ground of the auditor's disallowance, and was binding upon all. (2 Comp. Dec., 241.)

A claim for expenses incurred by an officer of the Navy for medical attendance or medicines must be accompanied by the certificate of the proper officer of the Navy Department to the facts in order that the accounting officers may determine whether the allowance of the claim is prohibited by section 1586 of the Revised Statutes. (3 Comp. Dec., 250.)

**Enlisted men.**—An enlisted man of the Navy is not entitled to medical treatment at public expense while on leave of absence or furlough. (19 Comp. Dec., 382.)

Where an enlisted man of the Navy, while serving a court-martial sentence, as mitigated by the Secretary of the Navy, does not forfeit his pay and allowances, but receives the same in full as when in a duty status, such enlisted man is not entitled to dental treatment at Government expense while so confined. The general principle is that where an enlisted man in confinement under sentence of court-martial forfeits his pay and allowances, thus being deprived of the means of procuring the things necessary for his health and comfort, the duty devolves upon the Government, at its own expense, to furnish them to the destitute prisoner; but this does not apply where pay of the prisoner is not forfeited. (17 Comp. Dec., 552.)

An enlisted man furloughed without pay for the unexpired portion of his enlistment is nevertheless an enlisted man in the Navy, and as such is entitled, under the regulations, to treatment in Navy hospitals. (File 7657-411, Nov. 18, 1916, and Feb. 5, 1917; see also note to sec. 1417, R. S., under "Enlisted men furloughed without pay.")

The period of detention beyond the expiration of enlistment of an enlisted man of the Navy undergoing treatment in a Government hospital is to be considered as for the convenience of the Government, and the enlisted man is entitled to pay to and including the date of his actual discharge. (26 Comp. Dec., 447, modifying 26 Comp. Dec., 128.)

**Students at the Naval Academy**, designated as midshipmen, are officers of the Navy within the meaning of section 1586, Revised Statutes, and subject to the same limitations relative to the obtaining of medicines and medical attendance from other sources than the United States as are other officers of the Navy. (9 Comp. Dec., 375.)

A clerk to a commandant of a navy yard is neither an officer, enlisted man, or marine.

and the Secretary of the Navy is not authorized, under sections 1614 and 4808, Revised Statutes, to deduct 20 cents per month from his pay; such a clerk is not entitled to reimbursement for medicines and medical attendance. (1 Comp. Dec., 289.)

It is the opinion of the Navy Department that members of the naval personnel who are required to pay 20 cents monthly to the Navy hospital fund should be entitled to medical attendance and maintenance, or, in the absence thereof, reimbursement for the amount expended for the purpose; and, conversely, that any member of the naval personnel who is not entitled to medical supplies or reimbursement therefor should not be required to pay 20 cents monthly to the hospital fund. (See 1 Comp. Dec., 289, 290.)

**An officer of the Marine Corps injured while engaged in an unusual and dangerous amusement is not entitled to reimbursement for medical expenses incurred by him by reason of such injuries, notwithstanding that at the time he was in a duty status as distinguished from being absent with leave or without leave.** (19 Comp. Dec., 635.)

**Officer on sick leave.**—Section 1586, Revised Statutes, prohibits the payment of medical expenses of an officer incurred while on sick leave. (12 Comp. Dec., 28.)

Accounts for medical attendance by the private physicians of officers or soldiers while on leave of absence have never been allowed. (5 Comp. Dec., 363.)

If an officer or soldier chooses to put himself out of the reach of medical attendance which the government has provided in hospitals, etc., he can not place the Government under obligations to pay any expense he may incur for medical attendance. (5 Comp. Dec., 363.)

See also, above, under "enlisted men."

**Officer residing at distance from station.**—Where an officer of the Navy places himself away from his regular station for his own convenience and comfort, so that the medical department at the station is not available for his treatment in case of illness, such officer can not be reimbursed any expense incurred by him for private medical attendance or for medical supplies. (17 Comp. Dec., 472.)

When an officer takes up his residence outside and so far away as to render it inconvenient or impracticable for a naval medical officer to attend him, the Government is under no obligation to pay for the employment of a private physician or for medicines. (5 Comp. Dec., 363.)

**Naval medical officer available.**—Where the attendance of an Army surgeon could be procured, the Government is not liable for the expenses of a sick officer in a private hospital, though he was carried there involuntarily and though his account was approved by the Surgeon General. (Preston v. U.S., 37 Ct. Cls., 39.)

Section 1586 prohibits the allowance of a physician's claim for attendance upon an officer of the Navy for any time after the services of a naval surgeon have been provided and tendered to the officer. (3 Comp. Dec., 250.)

**Special treatment.**—Payment of expenses incurred by an officer of the Navy for medical attendance while in a duty status may be authorized, notwithstanding the attendance of

a medical officer of the Navy could have been had, if in the judgment of the Navy Department the available medical officers of the Navy were not sufficiently skilled to properly treat the disease with which the officer was afflicted. (12 Comp. Dec., 28.)

In cases of claims for treatment of officers by physicians outside the Medical Corps, it is not understood that the law permits the allowance of such expenses when incurred upon the mere volition of the officer who seeks the treatment and which was in his judgment necessary; but such treatment by doctors outside the Medical Corps in serious cases requiring special treatment, and where medical officers are actually available, should be under the orders and direction and control of the medical establishment of the department, and the claim for the expenses approved by the Secretary of the Navy. (12 Comp. Dec., 28.)

**Private sanitarium.**—Where by proper authority an officer of the Navy was removed to a private sanitarium for treatment, there being no naval hospital to which he could be sent with safety, payment for medicines, care, maintenance, and medical attendance upon such officer while in said sanitarium is authorized. (9 Comp. Dec., 761.)

**Dental treatment.**—An officer of the Navy may be reimbursed the expenses of dental treatment when such treatment is of a surgical nature required for repairing an injury to the teeth resulting from an accident while in the performance of duty, provided it is shown that the services of a naval dental officer or of a naval medical officer, properly qualified and equipped, were not available. (21 Comp. Dec., 624.)

Prior to the act of August 22, 1912 (37 Stat., 344), authorizing the establishment of a Dental Corps in the Navy, no provision was made for furnishing dental service to the personnel of the Navy. Medical attendance, however, has been furnished for years, not only through the officers of the Medical Corps and the hospitals provided and maintained for that purpose, but the employment of private physicians and hospitals in certain cases has been authorized where the regular medical officers and naval hospitals were not available. (19 Comp. Dec., 550.)

Medical attendance within the meaning of the laws and regulations relating to the Navy has not been construed to include dental treatment. (19 Comp. Dec., 550.)

By act of August 22, 1912, the Government has undertaken to furnish dental treatment to the personnel of the naval service, but only in the manner and to the extent therein provided. Neither said act nor any other law makes provision for the employment of civilian dentists; and Congress has made no appropriation for such purpose. Accordingly, *held*, that civilian dentists can not legally be employed where naval dental officers are not available. (19 Comp. Dec., 550.)

See also above, under "Enlisted men."

**For other cases,** see notes to sections 1579, Revised Statutes, under "Temporarily in hospital"; and to section 1571, Revised Statutes, under "Officers temporarily absent from their ship."



**Sec. 1587. [Funeral expenses.]** No funeral expense of a naval officer who dies in the United States, nor expenses for travel to attend the funeral of an officer who dies there, shall be allowed. But when an officer on duty dies in a foreign country the expenses of his funeral, not exceeding his sea-pay for one month, shall be defrayed by the Government, and paid by the paymaster upon whose books the name of such officer was borne for pay.—(15 July, 1870, c. 295, s. 17, v. 16, p. 334.)

By annual appropriation acts for the naval service, under "Bureau of Medicine and Surgery," appropriation is made for "care, transportation, and burial of the dead, including officers who die within the United States, and supernumerary patients who die in naval hospitals." (See act June 4, 1920, 41 Stat., 823.)

By act of June 4, 1920 (41 Stat., 823), appropriation was made "to enable the Secretary of the Navy, in his discretion, to cause to be transferred to their homes the remains of officers and enlisted men of the Navy and Marine Corps, of members of the Nurse Corps, of civilian officers and crews of naval auxiliaries, and of officers and enlisted men of the Naval Militia and National Naval Volunteers and the Naval Reserve Force when on active service with the Navy, who die or are killed in action ashore or afloat, and also to enable the Secretary of the Navy, in his discretion, to cause to be transported to their homes the remains of civilian employees who die outside of the continental limits of the United States," with a proviso that said appropriation "shall be available for payment for transportation of the remains of officers and men who have died while on duty at any time since April 21, 1898, and shall be available until June 30, 1922."

By act of June 4, 1920 (41 Stat., 832), appropriation was made, under "Contingent, Marine Corps," for "funeral expenses of officers and enlisted men, and retired officers on active duty during the war and retired enlisted men of the Marine Corps, including the transportation of bodies and their arms and wearing apparel from the place of demise to the homes of the deceased in the United States."

By act of June 30, 1914 (38 Stat., 406), it was provided, "That the Secretary of the Navy be authorized, at his discretion, to issue free of cost the national flag (United States national ensign No. 7) used for draping the coffin of any officer or enlisted man of the Navy or Marine Corps whose death occurs while in the service of the United States Navy or Marine Corps, upon request, to the relatives of the deceased officer or enlisted man or upon request, to a school, patriotic order, or society to which the deceased officer or man belonged."

By act of April 27, 1904 (33 Stat., 403), a special appropriation was made "to pay for the funeral expenses, including the disinterment, proper care, preparation, and transportation to their homes of the remains of the officers and men who died as the result

of the recent explosion on the United States steamship *Missouri*, to be expended at the discretion of the Secretary of the Navy."

**Section 1587, construed.**—An officer of the Navy is not entitled to mileage or reimbursement of traveling expenses for travel performed in obedience to an order directing him to attend the funeral of an officer who died in the United States. (11 Comp. Dec., 181.)

By act of July 15, 1870 (now sec. 1587, R. S.), the allowance of funeral expenses of a naval officer who died in the United States is prohibited; but such expenses are allowable where the officer died in a foreign country, to an amount not exceeding his sea pay for one month. (13 Op. Atty. Gen., 341.)

The fact that the officer had started on a foreign service, but died in a port of the United States at which his vessel had touched, does not relieve the case from the prohibition of the statute. (13 Op. Atty. Gen., 341.)

The law makes the liability of the Government for funeral expenses to depend on the place where the officer dies and not upon the nature of his service. (13 Op. Atty. Gen., 341.)

Section 1587 was clearly intended to prohibit the payment of any and all expense of travel to attend the funeral of a naval officer who dies in this country. There is no exception or reservation in the statute; it can make no difference in what capacity the officer attends the funeral, whether in connection with a battalion of cadets or as an individual, the prohibition is equally effective and the expense can not be allowed. (11 Comp. Dec., 181.)

An officer of the Navy who died while on duty on the high seas must be regarded as having died in a foreign country within the meaning of section 1587, Revised Statutes; and payment of his funeral expenses, not to exceed one month's sea pay, is authorized by that section. (6 Comp. Dec., 620.)

Officers of the Navy ordered for duty in connection with the funeral of a deceased officer are not entitled to reimbursement of expenses incurred by them in hiring horses. (2 Comp. Dec., 511.)

The act of July 15, 1870 (16 Stat., 354), incorporated into section 1587, Revised Statutes, repealed article 1503 of the Navy Regulations of 1870, wherein it had been attempted to provide that the necessary funeral expenses of all persons who should die in the service of the Navy, whether in the United States or in foreign countries, should, when sanctioned by the Navy Department, be borne by the Government. (3 Comp. Dec., 154.)

**Officers of Marine Corps**—Payment of the cost of transporting the remains of a deceased officer of the Marine Corps from the Island of Guam, where he died, to Mobile, Ala., is not authorized. (6 Comp. Dec., 677.)

Section 1587 has been construed as not applicable to officers of the Marine Corps. Also, the appropriations made for "funeral expenses of marines" have been construed as referring

only to enlisted men. (6 Comp. Dec., 677. But see appropriations quoted above, under this section.)

**Enlisted man furloughed without pay**—The Navy Department is not authorized to defray the burial expenses of an enlisted man who died while furloughed, without pay, under the act of August 29, 1916. (23 Comp. Dec., 504; see note under sec. 1417, R. S.)

**Sec. 1588. [Pay of retired officers.]** The pay of all officers of the Navy who have been retired after forty-five years' service after reaching the age of sixteen years, or who have been or may be retired after forty years' service, upon their own application to the President, or on attaining the age of sixty-two years, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to seventy-five per centum of the sea-pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement. The pay of all other officers on the retired list shall, when not on active duty, be equal to one-half the sea-pay provided by this chapter for the grade or rank held by them, respectively, at the time of their retirement.—(15 July, 1870, c. 295, s. 5, v. 16, p. 333. 3 Mar., 1873, c. 230, s. 1, v. 17, p. 555.)

Amendment to this section was made by act of May 30, 1908 (35 Stat., 501), providing that "in computing the pay of retired officers of the Navy, the 10 per cent additional pay allowed for sea duty or for shore duty beyond the continental limits of the United States shall not be included"; by act of May 13, 1908 (35 Stat., 128), providing that any officer retired on his own application, after 30 years' service, shall receive "three-fourths of the highest pay of his grade"; by act of August 29, 1916 (39 Stat., 579), fixing the age of retirement at 64 years, except in the cases of captains, commanders, and lieutenant commanders who become ineligible for promotion on account of age (56, 50, or 45 years, respectively), who shall be retired at said ages "on a percentage of pay equal to two and one-half per centum of their shore duty pay for each year of service," their total retired pay, however, not to exceed 75 per cent of the shore-duty pay they were entitled to receive while on the active list; and by act of August 22, 1912 (37 Stat., 328), providing that any officer to whom it applied should receive "three-fourths the sea pay of the grade from which he is retired."

**Retirement of officers with the rank and pay of a grade higher than that held by them on the active list at date of retirement** is authorized by the following laws: Acts of March 3, 1899, section 11 (30 Stat., 1007), June 29, 1906 (34 Stat., 554), and March 3, 1909 (35 Stat., 753), on account of civil war service; act of March 4, 1911 (36 Stat., 1267), on account of failing physically for promotion, due to disability incurred in line of duty, which, under acts of August 29, 1916 (39 Stat., 579), and July 1, 1918 (40 Stat., 118), shall not apply to officers of the rank of lieutenant commander and above; section 1481, Revised Statutes, relating to staff

officers retired after specified length of service; and by section 1473, Revised Statutes, and laws noted under section 421, Revised Statutes, relating to chiefs of bureaus.

See note to section 1444, Revised Statutes, under "Historical note," as to laws relating to the retirement of officers "after forty-five years' service after reaching the age of sixteen years," which laws are no longer in effect.

The pay of officers on the retired list, May 13, 1908, was, under the act of that date (35 Stat., 128), fixing new rates of pay for officers of the Navy, to be based on the pay therein provided for officers of corresponding rank and service on the active list.

The rank and pay of officers on the retired list was to be the same that they are when such officers shall be retired, according to a clause in the act of August 5, 1882 (22 Stat., 286), which also prohibited promotion or increase of pay on the retired list.

The act of July 1, 1918 (40 Stat., 717), authorized the promotion of any officer on the retired list, employed on active duty in time of war or national emergency, "to the grade or rank, not above that of lieutenant commander in the Navy or major in the Marine Corps," which the total active service of such officer, both prior and subsequent to retirement, in the manner rendered by him, would have enabled him to attain in due course of promotion had such service been rendered continuously on the active list during the "period of time last past," and provided that officers so promoted to such higher grade or rank "shall thereafter receive the pay and allowances thereof."

The act of June 10, 1896 (29 Stat., 361), provided that no payment shall be made from appropriations made by Congress to any officer in the Navy on the retired list while



such officer is employed by any person or company furnishing naval supplies or war material to the Government.

**Pay based on "grade" at time of retirement.**—The "grade" of an officer in the Navy is his official station, by which are regulated his powers, duties, and pay. His pay may be further governed by his time of service within a grade, either in fact rendered within the grade or constructively performed therein through the force of statutes. (*Roget v. U. S.*, 148 U. S., 167, 171.)

The office of professor of mathematics is a grade. (*Roget v. U. S.*, 148 U. S., 167, 171.)

The periods of five years' service mentioned in Revised Statutes, section 1556, for increase of pay, are "grades" within the meaning of section 1588, fixing the pay of retired officers at 75 per cent of the sea pay of the grade or rank held at the time of retirement. (*Thornley v. U. S.*, 18 Ct. Cls., 111; 113 U. S., 310.)

The word "grade" in section 1588 refers to the divisions of officers into five years' periods of service. An officer retired in the third period of five years' service is entitled to 75 per cent of the sea pay of that grade, and not to 75 per cent of the highest pay of a chief engineer who has served over 20 years. (*Rutherford v. U. S.*, 18 Ct. Cls., 339.)

In the Navy there are grades for duty, for honor, and for pay, some by name and others by description. A lieutenant has the grade of his class, and also a grade in his class upon which his pay is fixed, depending upon length of service. The word "grade" in section 1588 refers to the division of officers into periods of service. A lieutenant retired in the first five years of service, because not recommended for promotion, is entitled to one-half of his sea pay at the time of retirement, and no more. (*McClure v. U. S.*, 18 Ct. Cls., 347.)

"Grade" and "rank" are used synonymously in section 1588; the word "grade" is used by Congress as a general term, indicating any marked distinction fixed by law among officers which would be expressed in their commission, title, or pay, not excluding chiefs of bureaus having a certain rank. (31 Op. Atty. Gen., 505, holding that an officer retired while serving as chief of bureau in the Navy Department, or Judge Advocate General of the Navy, is entitled to the rank attached by law to such office.)

For other cases, see notes to sections 421, 1362, 1457, and 1480, Revised Statutes, relating to definition of the word "grade."

**Pay based on higher grade than that held on active list.**—Under section 11 of the Navy personnel act of March 3, 1899, an officer retired on September 26, 1899, was entitled to the advancement therein authorized on the date of his retirement, and not on the date of the department's notice to him of November 26, 1907. (26 Op. Atty. Gen., 599.)

Mates whose names are borne on the retired list of officers of the Navy in accordance with the act of August 1, 1894 (28 Stat., 212), are officers of the Navy and are placed upon the same footing as warrant officers under the act of June 29, 1906 (34 Stat., 554), which entitles such mates, otherwise eligible, to the rank and retired pay of the next higher grade in the

service, viz, that of the lowest grade of warrant officers. (26 Op. Atty. Gen., 433, 599.)

A captain in the Navy who had served during the civil war, and was retired, pursuant to section 1444 of the Revised Statutes, with the rank and three-quarters of the sea pay of the next higher grade in accordance with section 11 of the Navy personnel act of March 3, 1899, was entitled only to the pay of rear admiral of the lower nine. Under section 11 he passes on retirement into and not over the next pay grade, which is that of the nine lower numbers, the rank of rear admiral being divided into two pay grades. (*Gibson v. U. S.*, 194 U. S., 182.)

The Navy personnel act of March 3, 1899, section 13, makes no distinction in the rank of rear admirals, but does in their pay; and the provision of section 11 of that act, which authorizes the retirement of certain officers with the rank and retired pay "of the next higher grade," must be interpreted with reference to that distinction. Accordingly, *held*, that a captain on the active list, retired under section 11 with the retired pay of the next higher grade, was entitled only to the retired pay of rear admiral of the lower half. Pay and not rank is the paramount purpose of the law, and the grades of pay must therefore be regarded as of paramount importance. (*Lowe v. U. S.*, 38 Ct. Cls., 170.)

A mate retired as a master (now lieutenant, junior grade) in 1871 should be credited under the naval appropriation act of March 3, 1883 (22 Stat., 493), with his actual service as mate, as of the time when he was retired; *held*, therefore, that he is entitled to the pay of a master retired in the second five years of service. (*Bradbury v. U. S.*, 20 Ct. Cls., 187.)

An officer who qualified and was nominated by the President for promotion to the grade of rear admiral to fill a vacancy occurring February 18, 1886, but who was retired on account of age prior to his confirmation by the Senate, may, if subsequently confirmed, be commissioned as a rear admiral with rank from date of vacancy and with the retired pay of that grade. (18 Op. Atty. Gen., 393.)

The act of March 4, 1911 (36 Stat., 1267), which provides that if an officer of the Navy should fail in his physical examination for promotion, and be found incapacitated for service by reason of physical disability contracted in the line of duty, he shall be retired with the rank to which his seniority entitled him to be promoted, does not authorize retirement with a higher rank than that the officer would have had if he had successfully passed his examination; and the rank with which the officer is to be retired is not determined by the date of the action of the retiring board. (*Tappan v. U. S.*, 54 Ct. Cls., 76.)

A captain in the Navy became due for promotion by seniority to rear admiral; he failed in his physical examination, because of disability incurred in the line of duty; subsequently he was retired in consequence of the action of a retiring board. Had he qualified for promotion he would have been commissioned as a rear admiral on the active list, and would have been in the lower half or second nine of the

grade of rear admiral. However, before his retirement his seniority would have placed him in the upper half, or first nine, of the grade of rear admiral had he qualified and been commissioned. He was retired with the rank of rear admiral, pursuant to the act of March 4, 1911 (36 Stat., 1267), and received the retired pay of a rear admiral of the second nine. *Held*, that he was correctly paid as a rear admiral of the second nine; that his rank and position on the retired list are not determined by the date of the action of the retiring board; and the fact that after he became due for promotion, and prior to his retirement, his name was borne on the Navy Register as a rear admiral on the active list, "subject to examination and confirmation," did not make him such, but indicated simply that he was eligible to become a rear admiral. (*Tappan v. U. S.*, 54 Ct. Cls., 76.)

**Effect of increasing pay of active list.**—Section 1588 is somewhat ambiguous; it does not say that each officer shall receive a percentage of the pay which he was actually receiving or entitled to receive at the time of his retirement, but that he shall receive a percentage of the pay of the "grade or rank" which he then held. The act of March 3, 1882 (22 Stat., 286), providing that there shall be no increase of pay in the retired list of the Navy, etc., was intended to render the pay of retired officers fixed and certain, except as might otherwise be specifically provided by Congress. The mere increase in the pay of a grade or rank after the retirement of an officer does not increase his pay on the retired list. (*Fulman v. U. S.*, 32 Ct. Cls., 112. For other cases, see note to sec. 1457, R. S., under "General legislation not applicable to retired officers.")

The act of August 29, 1916 (39 Stat., 581), which had the effect of increasing the pay of chaplains above the rank of lieutenant commander (see note to sec. 1556, R. S.), resulted in increasing from the date of said act the pay of a chaplain who was retired in 1910, notwithstanding that said act of August 29, 1916, did not in terms refer to pay of officers on the retired list. (26 Comp. Dec., 270.)

The accepted principle is that changes in the permanent rates of pay for the active list in the Army and Navy, in the absence of any express provision to the contrary, are applicable to the retired list. (27 Comp. Dec., 233, 234.)

**Longevity pay of retired officers.**—Under sections 1262 and 1263, Revised Statutes, which provide that commissioned officers of the Army below the rank of brigadier general shall be allowed 10 per cent of their current yearly pay for each term of five years' service, the total amount of such increase not to exceed 40 per cent of their current yearly pay, *held*, that an officer of the Army retired from active service is still in the military service of the United States, and, in addition to the percentage of the pay of the rank on which he was retired, is entitled to the 10 per cent allowed by law for each term of five years' service, counting years passed in the service after retirement as well as before. (*U. S. v. Tyler*, 105 U. S., 244.)

Officers on the retired list of the Navy are not entitled to longevity pay for time spent in the service after retirement. (*Thornley v. U. S.*,

113 U. S., 310; affirmed, *Brown v. U. S.*, 113 U. S., 568.)

The case of *United States v. Tyler* (105 U. S., 244), which held that officers of the Army on the retired list were entitled to longevity pay, does not support the contention that officers of the Navy, whose pay is fixed by different statutes, are entitled to similar increase. By no act since the foundation of the Government has Congress ever given longevity pay to officers of the Navy, except those on the active list; and the statute book is now bare of any enactment which awards to any officer of the Navy not on the active list any increase of pay for length of service. The court is not called on to explain why Congress should apply one rule to the officers of the Army and another to the officers of the Navy. It is sufficient to say that it has clearly done so. If the law is unequal and unjust, the remedy is with Congress and not with the courts. (*Thornley v. U. S.*, 113 U. S., 310; *Brown v. U. S.*, 113 U. S., 568.)

*Held*, that section 13 of the Navy personnel act of March 3, 1899 (30 Stat., 1004), providing Army pay for all commissioned officers of the line of the Navy and of the Medical and Pay Corps, virtually superseded the act of August 5, 1882 (22 Stat., 286), providing that there shall be no increase of pay on the retired list of the Navy, so far as relates to officers retired on Army pay, and that such officers retired on Army pay are entitled to longevity pay as retired officers in the same manner as retired officers of the Army. (5 Comp. Dec., 809, 811.)

By act of March 2, 1903 (32 Stat., 932), relating to the Army, it was provided that "hereafter, except in cases of officers retired on account of wounds received in battle, no officer now on the retired list shall be allowed or paid any further increase of longevity pay, and officers hereafter retired, except as herein provided, shall not be allowed or paid any further increase of longevity pay above that which had accrued at date of their retirement."

Officers of the Navy whose pay is assimilated to that of officers of corresponding rank in the Army by the Navy personnel act of March 3, 1899, are not entitled to increased retired pay for length of service after retirement. The pay of officers of the Navy on the retired list, whether retired before or after the act of March 3, 1899, is governed by the retirement laws of the Navy and not by those of the Army. (15 Comp. Dec., 767, citing *Hannum v. U. S.*, 43 Ct. Cls., 323, and overruling 5 Comp. Dec., 809, above noted.)

The plain meaning of section 1588, Revised Statutes, is that the pay of each retired officer shall be three-fourths of the sea pay to which he was entitled when he was retired; to give that section a meaning which would entitle the officers to increased pay for every period of five years after retirement would be legislation and not interpretation. (*Thornley v. U. S.*, 113 U. S., 310.)

An officer retired from active service, thereafter employed on active duty, and then detached from such duty, can not be held to have been retired a second time on the date that he was relieved from active duty. The retirement of an officer is a proceeding that can only take place in a prescribed manner, and it is not



pretended that such proceeding occurred with reference to this officer more than once. (*Roget v. U. S.*, 148 U. S., 167, 172.)

The pay of a retired officer of the Navy is fixed by statute at a certain percentage of the active-service pay of the grade held by him at the time of his retirement; and there is nothing in the act of March 3, 1883 (22 Stat., 472), to modify this rule. (*Roget v. U. S.*, 148 U. S., 167.)

An officer of the Navy who was retired in the first five years of service from a rank having longevity pay, but who was continued on active duty until he had passed into his second five years of service, is not entitled, under the act of March 3, 1883, to a greater rate of pay after active service ceased than 75 per cent of the pay of the grade or rank which he held at the time of retirement. (*Roget v. U. S.*, 148 U. S., 167.)

The act of July 1, 1918 (40 Stat., 717, quoted above under this section), authorizing the promotion of retired naval officers who serve on active duty during time of war or national emergency, provides that officers so promoted to higher grades "shall thereafter receive the pay and allowances thereof." This does not mean that upon relief from active duty their active-duty pay is to continue; but means that the increased rate of pay that is acquired by reason of the promotion on the active list is to be the rate upon which is to be computed their retired pay as well as their active duty pay. (26 Comp. Dec., 306.)

Under the act of July 1, 1918 (40 Stat., 717), where a retired chief warrant officer of the Navy is advanced in "pay grade" by reason of active service performed both prior and subsequent to retirement, the increased rate of pay acquired by such promotion is the rate upon which is to be computed his retired pay. (26 Comp. Dec., 306.)

Retired warrant officers of the Navy called to active duty under the act of July 1, 1918 (40 Stat., 717), are entitled to count their active service since retirement in determining their right to promotion in the various pay grades of warrant officers as provided by section 1556, Revised Statutes, the pay grade to which thus promoted becoming the basis upon which their retired pay subsequent to release from active duty is to be computed. (26 Comp. Dec., 409.)

Retired officers called to active duty under the act of July 1, 1918 (40 Stat., 717), and temporarily advanced in grade or rank, are not entitled to count their active service since retirement in computing their pay under such temporary appointments. (26 Comp. Dec., 409; 25 Comp. Dec., 601; but see *Bailey v. U. S.*, 53 Ct. Cls., 639, file 26254-2376:3; see also *Jonas v. U. S.*, 53 Ct. Cls., 254.) But such officers who are permanently advanced in grade or rank under other provisions in the same act are entitled to count their active service since retirement for longevity increase of pay. (25 Comp. Dec., 601.)

**Cause of retirement can not be altered.**—Where an officer of the Navy was retired under section 1454, Revised Statutes, for incapacity not originating in the line of duty, and upon a full review of the facts the Secretary of the Navy found that the causes of incapacity were incident to the service, and the officer was

accordingly transferred by the President, by and with the advice and consent of the Senate, to the 50 per cent retired pay list, in accordance with section 1595, Revised Statutes, and later, by a private act of Congress, was transferred to the 75 per cent pay list of retired officers under section 1588, he can not thereafter be placed on the retired list with the retired pay of one grade above that actually held by him at the time of his retirement, pursuant to the act of June 29, 1906 (34 Stat., 554), which authorized such advancement to certain officers of the Navy retired on account of disability incident to the service. The action taken in this case did not change the fact that the officer was retired for incapacity not originating in the line of duty, however, erroneous such action may have been. (27 Op. Atty. Gen., 221; for other cases, see note to sec. 1454, R. S.)

An officer was retired under section 3 of an act approved February 21, 1861, authorizing the retirement of officers of the Navy "proved to be permanently incapable from physical or mental infirmity for further service at sea," etc. The board in its report expressed its opinion that his disability "did not occur in the line of his duty." Under the act cited it was immaterial whether his disability originated in line of duty or not. Accordingly, the board's opinion as to the cause of the disability was mere surplusage. Subsequently to his retirement, new provisions were made by an act approved August 3, 1861, sections 21, 22, and 23, for the retirement of officers, which, among other things, divided the causes for retirement into disability incurred in the line of duty and disability proceeding from other causes. This act did not affect officers already on the retired list. Thereafter, by act of March 3, 1873, embodied in section 1588, Revised Statutes, two rates of retired pay were established. Upon application of the officer, the Secretary of the Navy convened a board in 1876 which made a further examination of the cause of his disability, and reported that it originated in the line of duty; and the Secretary of the Navy approved this report and directed that the officer be regarded as having been retired for incapacity occasioned while in the line of duty. *Held*, that the Secretary of the Navy was not authorized by law to submit the case of this officer to a medical board for reexamination as to the origin of the disability for which he was retired, and that the Secretary's action, based on the report of such board, was without legal effect as regards the cause for retirement in the case of said officer or his right of pay; *held*, further that said officer was entitled only to one-half sea pay under the latter clause of section 1588, applicable to "all other officers on the retired list." (17 Op. Atty. Gen., 178.)

The act of July 1, 1918 (40 Stat., 717, quoted above), authorizing the promotion of retired officers on active duty in certain cases, and entitling such retired officers when relieved of active duty to the retired pay of the rank or grade to which permanently promoted during such active service, does not change the status of an officer who was retired on furlough pay for disability not incident to the service, nor entitle such officer to a different percentage of

pay than that to which he was entitled under the law governing his retirement. (27 Comp. Dec., 78.)

For other cases, see note to section 1454, Revised Statutes, and see note below, under "Officer transferred from half-pay list to three-quarters pay list."

**Officers retired on furlough pay.**—See section 1593, Revised Statutes.

Section 1588, Revised Statutes, does not apply to officers retired on furlough pay; their pay is governed by section 1593, Revised Statutes. (*Brown v. U. S.*, 113 U. S., 568.)

The act of July 15, 1870 (16 Stat., 321), did not abolish the furlough pay list; and an order after the passage of that act retiring a naval officer on furlough pay was made in pursuance of law. The statutes distinguish between officers on the retired list and officers on the retired list on furlough pay, and this distinction is preserved by the Revised Statutes. Thus sections 1588 and 1592 prescribe rates of pay for retired officers, and section 1593 a different rate for officers on the retired list on furlough pay; and section 1594 authorizes the President, by and with the advice and consent of the Senate, to transfer any officer of the Navy on the retired list from the furlough to the retired pay list. (*Brown v. U. S.*, 113 U. S., 568.)

For other cases, see note to section 1593, Revised Statutes; and see note below, under "Pay reduced by Congress."

**Officer transferred from furlough to retired pay list.**—See note to section 1594, Revised Statutes.

Where a naval officer is transferred, under section 1594, Revised Statutes, from the furlough list to the retired pay list, the cause for his retirement determines the rate of pay to which he is entitled under section 1588. An officer retired on furlough pay, from causes not incident to the service, can not, by the action of the President, be transferred to the 75 per cent retired pay list provided for by the last-mentioned section, but becomes entitled to only one-half pay, as provided by section 1588, for officers retired for causes other than those entitling them to 75 per cent of sea pay. (16 Op. Atty. Gen., 22.)

A naval officer being retired on furlough pay, under Revised Statutes section 1454, for incapacity not the result of any incident of the service, and being subsequently transferred by the President, with the advice and consent of the Senate, from the furlough to the retired pay list under Revised Statutes section 1594, is entitled thereafter, under the second clause of section 1588, when not on active duty, to one-half the sea pay provided for the grade or rank held by him at the time of his retirement. (*Potts v. U. S.*, 125 U. S., 173.)

**Officer transferred from half-pay list to three-quarters pay list.**—A special act (June 10, 1902, 32 Stat., 1444) which authorized the Secretary of the Navy to transfer an officer on the retired list "from the half-pay list to the 75 per cent list under section 1588, Revised Statutes," did not operate to change his status from that of an officer retired for incapacity not incident to the service to that of an officer retired for incapacity incident to the service. Accordingly, *held*, that a lieutenant in the

Navy retired for incapacity which did not originate in the line of his duty, on furlough pay, and later transferred from the furlough pay list to the one-half retired pay list, and afterward transferred by special act of Congress from the half-pay list to the three-fourths pay list, and thereafter nominated by the President and confirmed by the Senate for advancement to the rank of lieutenant commander on the retired list, under the act of June 29, 1906 (34 Stat., 554), authorizing such advancement in the cases of certain officers who had been retired "on account of wounds or disability incident to the service," was not entitled to the retired pay of a lieutenant commander for the reason that his advancement to that rank was not authorized by the act of June 29, 1906. (*Morse v. U. S.*, 46 Ct. Cls., 361, affirmed, 229 U. S., 208, following *Potts v. U. S.*, 125 U. S., 173, and *Burchard v. U. S.*, 125 U. S., 176.)

For other cases, see note to section 1454, Revised Statutes.

**Retired pay reduced by Congress.**—

A colonel in the Regular Army, holding at the same time the rank of brigadier general of Volunteers, was retired by the President from active service with the rank and retired pay of major general, pursuant to an act of Congress of 1866 which authorized the retirement of officers in certain cases with a higher rank than that held by them on the active list at the time of retirement. Later Congress provided by an act approved March 3, 1875, that a class of retired officers, which included this officer, who were wounded in action, should be "considered as retired upon the actual rank held by them, whether in the regular or volunteer service, at the time when such wound was received, and shall be borne on the retired list and receive pay hereafter accordingly." Pursuant to this act the President fixed the rank of this officer as that of brigadier general from March 3, 1875, the date of the act last cited. In behalf of the officer it was contended that he held the office of major general on the retired list of the Army by appointment of the President, and that Congress had no power to remove him from that office and appoint him to the office of brigadier general on the retired list. *Held*, that an officer of any grade on the active list, appointed thereto in the manner required by the Constitution, may be retired with a different rank from that which belongs to his office, when Congress so provides; that this is not the appointment of such officer to a new and different office, but is the transferring of him to the retired list and the changing of his rank while he holds the same office; and that, in connection with this change of rank, his pay may be changed; that in this case, the retirement of the officer with the rank of major general while he held the office of colonel in the Army did not confer on him the office of major general; that he remained in the office of colonel and acquired a higher rank and higher pay as a retired officer; that such rank, not being an office, Congress could change his rank and with it his pay, as it did by the act of 1875; that Congress had the same right to change this officer's rank and pay by reducing them that it has to change the rank and pay of another officer by increasing them, the standard in both



cases being the actual rank held by the officer at the time he was wounded; that the offices of both were left untouched; and that the pay of retired officers is a matter entirely within the control of Congress and so is their rank. (*Wood v. U. S.*, 107 U. S., 414; 15 Ct. Cls., 151.)

A provision in the Revised Statutes reducing the pay of a retired naval officer is not affected by the general provision of the Revised Statutes, section 5597, that the repeal of previous statutes by the revision shall not affect acts done or rights accrued under them, nor change the term or tenure of any office. (*Magaw v. U. S.*, 16 Ct. Cls., 3.)

Sections 1588, 1590, and 1593, Revised Statutes, which contain provisions both of a general and special character prescribing the compensation of retired naval officers and embrace within their scope all such officers, whether of the line or staff, superseded all provisions in force at the adoption of the Revised Statutes by which that compensation was previously regulated, and those sections thereafter furnished the only law upon the subject. Accordingly, *held*, that an officer retired in 1871 on furlough pay was entitled after the enactment of the Revised Statutes to only one-half of leave of absence pay as fixed by section 1593, Revised Statutes, although prior to the enactment of the Revised Statutes he had been entitled to one-half of the highest pay of his grade, under section 5 of the act of July 15, 1870; and said officer having thereafter been transferred to the retired pay list in accordance with section 1594, Revised Statutes, was entitled to one-half sea pay as provided by section 1588, Revised Statutes. (15 Op. Atty. Gen., 316.)

In the absence of constitutional restriction, the future compensation of a public officer may be reduced at pleasure by the legislature during his incumbency, without violating any legal right vesting in him by virtue of his appointment. (15 Op. Atty. Gen., 316.)

**Retired pay is salary.**—See note to section 1457, Revised Statutes, under "Status of retired officers, part of the Navy;" and "Retired pay not 'pension.'"

A retired naval officer is still an officer of the Navy, and his retired pay is the equivalent of salary. When serving on a board as to which a statute prescribes, for members who are "not salaried officers," a salary, and for members who are "salaried officers," their "actual necessary expenses," he is entitled to the latter and not to the former. (*Franklin v. U. S.*, 29 Ct. Cls., 6.)

**Retired pay of mates.**—See note to section 1408, Revised Statutes; and see note above under "Pay based on higher grade than that held on active list."

A mate in the Navy on August 1, 1894 (28 Stat., 212), which prescribed special rates of pay for such mates while on sea duty, shore duty, or leave or waiting orders, and who was retired on his own application, after 30 years' service, under the act of March 3, 1899 (30 Stat., 1008), providing for the retirement of enlisted men and petty officers with 75 per cent of the "pay and allowances" of the rank or rating upon which retired, was entitled to such percentage of the sea pay which he was receiving at the time of his retirement. Section 1588, Revised Statutes, entitling officers to 75

per cent of sea pay on retirement, was not repealed by the said act of 1899, which was silent as to the kind of pay which a petty officer shall receive on retirement. (*Creighton v. U. S.*, 37 Ct. Cls., 327.)

**Retirement under a special act of Congress.**—An act of February 16, 1897, provided for the reappointment of John N. Quackenbush, late a commander in the United States Navy, to the grade and rank of commander as of the date of August 1, 1883, and that the said Quackenbush be placed on the retired list of the Navy as of the date of June 1, 1895: "Provided, That he shall receive no pay or emoluments except from the date of such reappointment." *Held*, first, that the only apparent office of the proviso was to forbid the allowance of pay or emoluments from August 1, 1883, by limiting such allowance to the date of reappointment, which in that view must be regarded as the date of appointment under the act; second, that it was remedial in its character, and should be construed as ratifying prior payments which the Government in its counterclaim was seeking to recover back. If it had not been for the proviso, the effect of the appointment would have been, in addition to fixing his status, as to grade and rank, as of August 1, 1883, to entitle him to pay from that date, but not to pay prior thereto. The date of reappointment was the date when it was actually made, and to substitute the date to which the appointment related for the actual date would defeat the obvious object of the proviso, which was to narrow the effect of giving the reappointment a retroactive operation. It was allowed that effect as to grade and rank, but not as to current pay or emoluments. (*Quackenbush v. U. S.*, 177 U. S., 20.)

For other cases, see note to section 1457, Revised Statutes, under "When retirement or advancement on retired list takes effect."

**Officer wholly retired from the service.**—See note to section 1454, Revised Statutes.

There is a manifest difference in the two kinds of retirement, namely, retiring from active service, and retiring wholly from the service. In the latter case such reward or compensation as Congress thought proper to bestow, namely, one year's pay and allowances, in addition to what was previously allowed, is given at once, and the connection is ended; in the former case the compensation is continued at a reduced rate and the connection is continued, with a retirement from active service only. (*U. S. v. Tyler*, 105 U. S., 244.)

**Officer retired because not recommended for promotion.**—See act of March 4, 1911 (36 Stat., 1267), and amendatory statutes, quoted above, under this section.

An officer retired in the first five years of service, because not recommended for promotion, is entitled to one-half of his sea pay at the time of retirement, and no more. (*McClure v. U. S.*, 18 Ct. Cls., 347.)

**Irregularities in retirement.**—The administrator of a retired naval officer can not, in order to recover from the United States an increase in the compensation of his intestate, take advantage of an alleged defect in the proceedings by which he was retired and which he acquiesced in without objection during his lifetime. (*Brown v. U. S.*, 113 U. S., 568.)

An officer whose name is placed on the retired list of the Army by the Secretary of War, in apparent compliance with provisions of law, is an officer *de facto* if not *de jure*, and money paid to him as salary can not be recovered back by the United States. (*Badeau v. U. S.*, 130 U. S., 439.)

**When retired pay commences.**—See note to section 1457, Revised Statutes, under, “when retirement or advancement on the retired list takes effect.”

The retirement of a naval officer for disability under section 1453, Revised Statutes, becomes

effective only upon the approval of the finding of the retiring board by the President. Accordingly, the retirement of such officer with the higher rank on the retired list to which his seniority entitled him to be promoted on the active list, as authorized by act of March 4, 1911 (36 Stat., 1267), can not be made effective prior to the President's approval of his retirement, and his retired pay of the higher rank will date from such approval, notwithstanding that an earlier date of rank is stated in his commission. (27 Comp. Dec., 512.)

### Sec. 1589. [Retired rear admirals.

This section provided as follows:

“Sec. 1589. Rear-admirals on the retired list of the Navy, who were retired as captains when the highest grade in the Navy was captain, at the age of sixty-two years, or after forty-five years' service, and who, after their retirement, were promoted to the grade of rear-admiral, and performed the duties of that grade

### Obsolete.]

in time of war, shall be considered as having been retired as rear-admirals.” (5 June, 1872, c. 307, s. 1, v. 17, p. 226. 3 Mar., 1873, c. 230, s. 1, v. 17, p. 555.)

It is rendered obsolete by the fact that there are now no officers in the Navy to whom it could apply.

### Sec. 1590. [Third assistant engineers. Obsolete.]

This section provided as follows:

“Sec. 1590. Officers who have been retired as third assistant engineers shall continue to receive pay at the rate of four hundred dollars a year.”—(3 Mar., 1859, c. 76, s. 2, v. 11, p. 407. 3 Aug., 1861, c. 42, s. 22, v. 12, p. 290. 16 July, 1862, c. 183, s. 20, v. 12, p. 587. 21 April, 1864, c. 63, s. 7, v. 13, p. 54. 15 July, 1870, c. 295, s. 5, v. 16, p. 333.)

The grade of third assistant engineer was abolished on the active list, by act of July 15, 1870, section 6 (16 Stat., 333), which act and section further provided that “retired third assistant engineers shall continue to re-

ceive the same rate of pay they have received up to the time of the passage of this act.” However, on the date of the Revised Statutes, there were no third assistant engineers on the retired list, so that section 1590 never had any force or effect. The last of the third assistant engineers were Theron Skeel, who was retired as such June 22, 1869, and resigned November 12, 1870; and Nicholas H. Lamdin, who was retired as third assistant engineer, June 22, 1869, was restored to the active list, as second assistant engineer, July 17, 1872, and was commissioned as passed assistant engineer June 3, 1879.

**Sec. 1591. [Pay not increased by promotion.]** No officer heretofore or hereafter promoted upon the retired list, shall, in consequence of such promotion, be entitled to any increase of pay.—(2 Mar., 1867, c. 174, s. 9, v. 14, p. 517. 15 July, 1870, c. 295, s. 5, v. 16, p. 333.)

By act of August 5, 1882 (22 Stat., 286), it was provided that “hereafter there shall be no promotion or increase of pay in the retired list of the Navy, but the rank and pay of officers on the retired list shall be the same that they are when such officers shall be retired.”

By act of July 1, 1918 (40 Stat., 717), the promotion was authorized of retired officers employed on active duty in time of war, such promotion being permanent under certain conditions, and in other cases continuing only until the officer's relief from active duty; in either case the law in terms entitled such officers to the pay of the grade to which promoted. As to retired enlisted men promoted while on active duty, see notes to sections 1569 and 1592. Revised Statutes.

See sections 1459-1465, 1481, and 1588, Revised Statutes, and notes thereto, as to promotion of retired officers.

**Sec. 1591 not modified by laws relating to active list.**—The act of June 22, 1874 (18

Stat., 191), quoted under section 1561, Revised Statutes, which provided that any officer promoted in course to fill a vacancy “shall be entitled to the pay of the grade to which promoted from the date he takes rank therein,” etc., was manifestly designed to fix the commencement of the increased pay of promoted officers in active service only, and it in no way affected section 1591, Revised Statutes, which thereafter, as before, remained in force. (17 Op. Atty. Gen., 495.)

**Applicable to all promotions on retired list.**—Section 1591, Revised Statutes, is applicable alike to officers promoted under section 1461, Revised Statutes, and to those promoted under section 1460, as amended. (17 Op. Atty. Gen., 495.)

The act of August 5, 1882 (22 Stat., 286), above quoted, prevents either rank or pay of officers on the retired list from being increased in any way after such officers shall have been placed thereon. (18 Op. Atty. Gen., 96.)

**Officers promoted on retired list entitled to increased pay.**—An officer was promoted



on the retired list from the grade of lieutenant commander to that of commander, pursuant to a special act of Congress, approved March 11, 1902, which made no express provision for increasing his retired pay, but provided "that the President is hereby authorized to nominate to the Senate Lieutenant Commander R. M. G. Brown, now on the retired list, to be a commander on the retired list." *Held*, that under said act the officer on promotion was entitled to the retired pay of a commander, notwithstanding the provisions of section 1591 of the Revised Statutes and the act of August 5, 1882, forbidding increase of pay on the retired list. (Comp. Dec., May 3, 1902, 2 S. and A. Memo., 31.)

A chief engineer was advanced on the retired list from the rank of captain to the rank of rear admiral, pursuant to a special act of Congress, February 5, 1903, which said nothing about any increase in his retired pay, but provided "That Chief Engineer David Smith, United States Navy, retired, who served with credit through both the civil and Spanish-American Wars, and who, in the performance of duty, incurred disabilities from exposure, rendering him an invalid requiring the services of an attendant ever since his detachment, February 7, 1899, be advanced on the retired list from March 3, 1899, to the next higher grade." *Held*, that under this act the officer in question became entitled to three-fourths the sea pay of a rear admiral of the lower half. (Comp. Dec., Mar. 27, 1903, 22 S. and A. Memo., 173.)

**Officers not entitled to increased pay on promotion.**—An officer of the Navy retired as second assistant engineer with the rank of master (now lieutenant, junior grade), and thereafter promoted on the retired list and commissioned as a first assistant engineer with the rank of lieutenant, under the provisions of section 9 of the act of March 2, 1867 (14 Stat., 517), did not thereby become entitled to any increase of pay, such increase in pay being forbidden by the act of July 15, 1870 (16 Stat., 333), now section 1591, Revised Statutes. The act of May 13,

1908 (35 Stat., 128), fixing new rates of pay for officers of the Navy, and providing that the pay of retired officers should be based on the pay therein fixed for officers of corresponding rank and service on the active list, did not repeal section 1591 so as to entitle this officer to the retired pay of the rank of lieutenant, to which he had been promoted; but merely entitled him to compute his percentage of active-duty pay upon the new rates of pay prescribed by said act of May 13, 1908, for the rank of lieutenant (junior grade), which was the rank with which he had been retired, and upon which his pay was to be based under section 1588, Revised Statutes. (Comp. Dec., July 28, 1908, 89 S. and A. Memo., 6790.)

**Pay of officers promoted under act of July 1, 1918.**—The act of July 1, 1918 (40 Stat., 717), authorizes the permanent promotion of certain retired officers employed on active duty in time of war, and entitles officers so permanently promoted to a higher grade to retired pay upon their release from active duty based on the active duty pay of the grade to which promoted. (27 Comp. Dec., 78, 79, citing 26 Comp. Dec., 306, 409.)

Retired warrant officers of the Navy called to active duty in time of war, under the act of July 1, 1918 (40 Stat., 717), are entitled to count their active service since retirement in determining their right to promotion in the various pay grades of warrant officers as provided by section 1556, Revised Statutes, the pay grade to which thus promoted becoming the basis upon which their retired pay subsequent to release from active duty is to be computed. (26 Comp. Dec., 409.)

A commissioned warrant officer advanced to the pay grades of lieutenant (junior grade) or lieutenant, in accordance with the act of July 1, 1918 (40 Stat., 717), on account of active duty rendered in time of war, is entitled upon relief from active duty to have his retired pay thereafter computed upon the higher pay grade to which so permanently advanced. (26 Comp. Dec., 306.)

**Sec. 1592. [Pay on active duty.]** Officers on the retired list, when on active duty, shall receive the full pay of their respective grades.—(1 June, 1860, c. 67, s. 5, v. 12, p. 27. 2 Mar., 1867, c. 174, s. 9, v. 14, p. 517.)

Active duty by retired officers in time of war was authorized by sections 1462, 1463, and 1464, Revised Statutes.

Active duty for retired officers, with the pay and allowances of the grade from which retired, was authorized by act of June 7, 1900 (31 Stat., 703), which expired by its terms at the end of 12 years from date of its enactment.

Active duty for retired officers, with their consent, with the pay and allowances, in time of peace, of an officer of the active list of the same rank, not to exceed the pay and allowances of a lieutenant (senior grade), was authorized by act of Aug. 22, 1912, 37 Stat., 329.)

By act of August 29, 1916 (39 Stat., 581), it was provided that any retired officer detailed to active duty shall, while so serving, receive the active-duty pay and allowances

of the grade, not above that of lieutenant commander in the Navy or of major in the Marine Corps, that he would have attained in due course of promotion if he had remained on the active list for a period beyond the date of his retirement equal to the total amount of time he has been detailed to active duty since retirement. (Act Aug. 29, 1916, 39 Stat., 581.)

By act of April 10, 1918, section 1 (40 Stat., 516), it was provided that retired chief warrant officers, while detailed to active duty, shall be entitled to the pay and allowances of a lieutenant (junior grade), if their total service, active and retired, since date of commission equals six years, and to the pay and allowances of a lieutenant if such total service equals 12 years.

By act of April 10, 1918, section 2 (40 Stat., 516), it was provided that retired warrant officers,

while on active duty, shall be entitled to the pay and allowances of a lieutenant (junior grade), if their total service, active and retired, since date of warrant, equals 12 years; and to the pay and allowances of a lieutenant if such total service equals 18 years.

By act of July 1, 1918 (40 Stat., 717), it was provided that retired commissioned or warrant officers of the Navy or Marine Corps ordered to active duty in time of war or national emergency shall be entitled to promotion on the retired list to the grade or rank, not above that of lieutenant commander in the Navy or major in the Marine Corps, and shall thereafter receive the pay and allowances thereof, which their total active service as officers, prior and subsequent to retirement, in the manner rendered by them, would have enabled them to attain in due course of promotion had such service been rendered continuously on the active list during the period of time last past.

By the act of July 1, 1918 (40 Stat., 717), it was provided that retired commissioned or warrant officers of the Navy or Marine Corps, while on active duty during the existence of war or national emergency, may be temporarily commissioned in such higher grade or rank on the retired list, not above lieutenant commander or major, as the case may be, as the President may determine, and when so advanced, shall, while on such active duty, be entitled to the same pay and allowances as officers of like grade or rank on the active list; and upon relief from active duty, not later than six months after the war or emergency terminates, shall revert to their former grade or rank, and pay and allowance status on the retired list.

Detail of retired officers to educational institutions was authorized by section 1225, Revised Statutes, as amended, and other laws noted under that section.

Retired enlisted men on active duty.—See acts of March 3, 1915 (38 Stat., 941), August 29, 1916 (39 Stat., 591), and July 1, 1918 (40 Stat., 719); and see note to section 1569, Revised Statutes.

**Marine officers.**—Section 1622, Revised Statutes, simply provides for the conditions precedent to the retirement of an officer of the Marine Corps and in no way changes the jurisdiction to which he is subject or the conditions under which he may be again placed on active duty. (*Jonas v. U. S.*, 50 Ct. Cls., 281.)

The Secretary of the Navy exercised his authority properly under the act of August 22, 1912 (37 Stat., 329), when he assigned a retired Marine officer to active duty as post quartermaster, and upon such assignment the officer became entitled to the pay and allowances provided in said act. (*Jonas v. U. S.*, 50 Ct. Cls., 281.)

**Commissioned warrant officers.**—A commissioned warrant officer ranks with but after ensign; as such commissioned officer there is no actual rank or grade to which he would attain in due course of promotion on the active list, for there is no due course of promotion for such

officers as a class. However, the act of August 29, 1916 (39 Stat., 578), authorizes the advancement of commissioned warrant officers after prescribed periods of service to the pay and allowances of lieutenant (junior grade) and lieutenant, respectively. Such advancement in "pay grades" which a commissioned warrant officer might attain in due course on the active list is applicable, under the act of July 1, 1918 (40 Stat., 717), to such commissioned warrant officers employed on active duty in time of war, based upon their active service both prior and subsequent to retirement. Such commissioned warrant officers so advanced in pay while on active duty are entitled, upon relief from such duty, to have their retired pay computed upon the higher pay grade to which advanced. (26 Comp. Dec., 306.)

A retired chief warrant officer on active duty since August 29, 1916, was not entitled to the pay and allowances of a lieutenant (junior grade) under the first section of the act of April 10, 1918 (40 Stat., 516), because he had not served a total of six years from the date of his commission as a chief warrant officer; he would have been entitled to the pay of a lieutenant (junior grade) under the second section of the act of April 10, 1918, but for his promotion to chief warrant officer. Neither section of that act, therefore, entitled him to such increased pay. Nor is he entitled to such pay under the provision in the act of March 3, 1909 (35 Stat., 771), providing that "no warrant officer, heretofore or hereafter promoted six years from date of warrant, shall suffer a reduction in pay which, but for such promotion, would have been received by him." This latter act merely protected him from reduction in the pay which attached to the warrant office at the time he vacated it by promotion; and his promotion occurred prior to the passage of the act of April 10, 1918. The act of March 3, 1909, does not entitle a chief warrant officer to the benefit of increased pay made a part of the warrant grade by legislation enacted after his promotion. (26 Comp. Dec., 935.)

**Increased pay from date stated in commission.**—A retired officer of the Navy, temporarily advanced to the grade of lieutenant commander on the retired list, while on active duty pursuant to the provision in the act of July 1, 1918 (40 Stat., 717), authorizing such temporary advancement in grade, *held*, entitled to the active-duty pay of a lieutenant commander from the date stated in his commission, provided he was on active duty on that date. (Comp. Dec., Oct. 11, 1918, 212 S. and A. Memo., 4681. Compare, 17 Op. Atty. Gen., 495, noted under sec. 1591; and *White v. U. S.*, 239 U. S. 608, noted below, under "Active duty in time of peace.")

**Increased pay under act of August 29, 1916.**—A retired officer detailed to active duty is entitled, under the act of August 29, 1916 (39 Stat., 581), to the increased pay of a higher rank while on active duty from the date that his running mate on the active list of the Navy receives a temporary appointment in such higher rank, "in due course of promotion." (Comp. Dec., Nov. 12, 1918, 213 S. and A. Memo., 4724.)

**Active duty in time of peace.**—Reference to sections 1462, Revised Statutes, shows that



section 1592 is intended to apply to the rates of pay of naval officers only in time of war, and consequently can have no bearing upon the issue involved in the case of an officer ordered to active duty under more recent statutes. (*Sears v. U. S.*, 46 Ct. Cls., 105.)

A retired officer employed on active duty in time of peace, pursuant to the act of June 7, 1900 (31 Stat., 703), was entitled only to the pay of the rank held by him on the active list at the time of retirement and not to the active-duty pay of an officer of corresponding rank and service on the active list. (*Sears v. U. S.*, 46 Ct. Cls., 105.)

A retired officer performing active duty under the act of June 7, 1900 (31 Stat., 684), was entitled only to the same pay that he was receiving at the time of his retirement; he was not entitled while on active duty to the benefits of longevity increase accruing after the date of his retirement. There is no apparent reason for giving a retired officer on active duty a higher rate of pay than he was receiving at the time of his retirement. (*Faust v. U. S.*, 42 Ct. Cls., 94.)

The pay of a retired officer of the Navy ordered to active duty is governed by the law under which his orders are issued. Thus, an officer who held the grade of lieutenant commander on the active list, but was retired with the rank of commander, was entitled, while on active duty under the act of June 7, 1900 (31 Stat., 703), to

the active-duty pay of the grade of lieutenant commander, which was the grade from which he was retired, and not to the active duty pay of the rank of commander, held by him on the retired list. (*Sears v. U. S.*, 46 Ct. Cls., 105.)

The act of March 4, 1913 (37 Stat., 891, 892), provided that "all officers of the Navy who, since the third day of March, eighteen hundred and ninety-nine, have been advanced or may hereafter be advanced in grade or rank pursuant to law shall be allowed the pay and allowances of the higher grade or rank from the dates stated in their commissions." Certain officers were advanced in rank at the time of their retirement, in accordance with sections 8 and 11 of the naval personnel act of March 3, 1899 (30 Stat., 1006, 1007), and continued on active duty for several years thereafter, in accordance with the act of June 7, 1900 (31 Stat., 703). For such active duty they were allowed the active duty pay of the rank which they held prior to their retirement. Held, that the act of 1913 applied only to officers on the active list. The act of August 22, 1912 (37 Stat., 328, 329), which limited the pay which retired officers thereafter ordered to active duty might receive, confirms this conclusion. (*White v. U. S.*, 239 U. S., 608. See note above, under "Increased pay from date stated in commission.")

For other cases, see notes to sections 1588 and 1591, Revised Statutes.

**Sec. 1593. [Officers retired on furlough pay.]** Officers placed on the retired list, on furlough pay, shall receive only one-half of the pay to which they would have been entitled if on leave of absence on the active list.—(3 Mar., 1835, c. 27, s. 1, v. 4, pp. 756, 757. 28 Feb., 1855, c. 127, s. 2, v. 10, p. 616. 16 Jan., 1857, c. 12, s. 1, v. 11, p. 154. 3 Aug., 1861, c. 42, s. 23, v. 12, p. 291. 28 July, 1866, c. 312, s. 2, v. 14, p. 345. 30 Jan., 1875, c. 30, v. 18, p. 304.)

See sections 1442, 1454, 1557, 1558, and 1594, Revised Statutes; and notes to those sections.

**Section 1593 not repealed.**—Section 1442 gives the right to furlough an officer of the Navy, and section 1557 fixes the proportion of pay that he shall have while on furlough. Section 1454 provides for retiring officers of the Navy on furlough pay, and section 1593 provides specifically that such officers "shall receive only one-half of the pay to which they would have been entitled if on leave of absence on the active list." These sections are not repealed. (15 Comp. Dec., 70.)

Under the act of May 13, 1903, one-half of full pay based on the rates fixed by that act is the proper pay to be allowed an officer of the Navy while on furlough, or while on the retired list on furlough pay. (15 Comp. Dec., 70.)

The assimilating clause of section 13 of the Navy personnel act of March 3, 1899 (30 Stat., 1004, 1007), giving certain officers of the Navy the same pay as allowed officers of corresponding rank in the Army, applied only to officers on the active list, and did not, therefore, repeal the prior laws respecting the pay fixed by section 1593 of the Revised Statutes for officer

compulsorily retired, under section 1452, for incapacity not resulting from any incident of the service. (*Hannum v. U. S.*, 226 U. S., 436.)

**Not applicable to Marine officers.**—Section 1593 does not apply to officers of the Marine Corps. Accordingly, such an officer, retired for disability not incident to the service, and in whose case it was directed by the President that he be retired on furlough pay, was nevertheless entitled to full retired pay as provided by section 1274, Revised Statutes, relating to the Army, and made applicable to the Marine Corps by sections 1622 and 1623, Revised Statutes. It is not competent for the President to place retired officers on a different rate of pay than that which the law has fixed. (15 Op. Atty. Gen., 442.)

**Report of board under which officer retired.**—An officer is legally retired on furlough pay for incapacity not the result of an incident of the service where the retiring board reports that there was no evidence that his incapacity was the result of any incident of the service. It is incumbent on the officer whose case comes before a retiring board to show, in order to secure a report which will entitle him to be placed on the retired list,

rather than on the retired list on furlough pay, that his incapacity was the result of some incident of the service. Accordingly, the report of the board that there was no evidence to sup-

port such a finding is to all intents and purposes a report that the incapacity was not the result of an incident of the service. (*Brown v. U. S.*, 113 U. S., 568, 573.)

**Sec. 1594. [Transfer from furlough to retired pay list.]** The President, by and with the advice and consent of the Senate, may transfer any officer on the retired list from the furlough to the retired-pay list.—(16 Jan., 1857, c. 12, s. 3, v. 11, p. 154. 16 July, 1862, c. 183, s. 20, v. 12, p. 587. 30 Jan., 1875, c. 30, v. 18, p. 304.)

See sections 1442, 1454, 1557, 1558, and 1593, Revised Statutes; and notes to those sections.

**Increased pay prohibited.**—By act of August 5, 1882 (22 Stat., 286), it was provided that "hereafter there shall be no promotion or increase of pay in the retired list of the Navy, but the rank and pay of officers on the retired list shall be the same that they are when such officers shall be retired." *Held*, that this statute prohibits the transfer of an officer from the furlough to the retired pay list, under section 1594, Revised Statutes, with increase of pay; also *held*, that such officer can not be simultaneously retired on furlough pay and transferred to the retired pay list, so as to give him the pay of the latter. (18 Op. Atty. Gen., 96.)  
(That furlough pay is now the same as the pay received by officers on the half-pay retired list,

see 15 Comp. Dec., 70, noted under section 1593, Revised Statutes; see also note to section 1588, Revised Statutes. Transfer from the furlough to the retired pay list would not, therefore, involve any increase of pay under existing laws.)

**Liberal construction.**—Section 1594, Revised Statutes, authorizing the transfer of a retired officer of the Navy from the furlough to the retired pay list, being intended to afford relief from the consequences of the findings of retiring boards, should be construed liberally; and being so construed, it is held that the President has power under it, with the advice and consent of the Senate, to make the transfer relate back to a time when in his judgment it ought to have been granted. (*U. S. v. Burchard*, 125 U. S., 176.)

**Sec. 1595. [Rations.]** Rations shall not be allowed to officers on the retired list.—(16 July, 1862, c. 183, s. 20, v. 12, p. 587.)

See notes to sections 1578 and 1579, Revised Statutes, as to rations of officers on the active list; and see note to section 1592,

Revised Statutes, as to pay and allowances of retired officers on active duty.



## CHAPTER NINE.

### THE MARINE CORPS.

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#### Sec. 1596. [Number and grades of officers and enlisted men.]

**This section provided as follows:**

"SEC. 1596. The Marine Corps of the United States shall consist of one commandant, with the rank of brigadier-general, one colonel, two lieutenant-colonels, four majors, one adjutant and inspector, one paymaster, one quartermaster, two assistant quartermasters, twenty captains, thirty first lieutenants, thirty second lieutenants, one sergeant-major, one quartermaster-sergeant, one drum-major, one principal musician, two hundred sergeants, two hundred and twenty corporals, thirty musicians for a band, sixty drummers, sixty fifers, and twenty-five hundred privates."—(25 July, 1861, c. 19, s. 7, v. 12, p. 275. 2 Mar., 1867, c. 174, s. 7, v. 12, p. 517.)

It was amended by acts of June 30, 1876 (19 Stat., 71), and January 30, 1885 (23 Stat., 293), which provided for a permanent reduction in the number of commissioned officers of the Marine Corps to "not exceed seventy-five;" and by act of May 4, 1898 (30 Stat., 369, 370), which authorized the appointment by the President within twelve months following said act of such additional temporary officers of the Marine Corps, not above the rank of captain, as might be requisite, such officers to serve "only during the continuance of the exigency under which their services are required in the existing war;" and further authorized the Secretary of the Navy to enlist, as a temporary force during the existing war, not more than 60 gunnery sergeants with the rank of first sergeant, not more than 80 corporals, and not more than 1,500 privates.

It was superseded by sections 18-24 of the Navy personnel act of March 3, 1899 (30 Stat., 1008, 1009), section 18 of which act prescribed the number of line officers; section 22, the

number of staff officers; section 23, the number of enlisted men; and section 24, the number constituting the Marine Band. These sections are more fully noted below, with references to amendatory statutes since enacted.

#### LAWS PRESCRIBING ORGANIZATION OF MARINE CORPS.

##### *Number and grades of commissioned officers.—*

By act of March 3, 1899, section 18 (30 Stat., 1008), it was provided that the active list of the line officers of the Marine Corps shall consist of—

- 1 Brigadier general commandant;
- 5 Colonels;
- 5 Lieutenant colonels;
- 10 Majors;
- 60 Captains;
- 60 First lieutenants, and
- 60 Second lieutenants.

By the same act, section 22 (30 Stat., 1009), it was provided that the staff of the Marine Corps shall consist of 1 adjutant and inspector, 1 quartermaster, and 1 paymaster, each with the rank of colonel; 1 assistant adjutant and inspector, 2 assistant quartermasters, and 1 assistant paymaster, each with the rank of major; and 3 assistant quartermasters with the rank of captain.

By act of July 1, 1902 (32 Stat., 686), the commandant was given the rank of major general during the service of the then incumbent.

By act of March 3, 1903 (32 Stat., 1198), the following additional officers were authorized: 1 Colonel; 1 lieutenant colonel; 5 majors; 12 captains; 25 first lieutenants; 12 second lieutenants; 1 assistant adjutant and inspector with the rank of lieutenant colonel; 2 assistant adjutants and inspectors with the rank of

major; 1 assistant quartermaster with the rank of lieutenant colonel; 5 assistant quartermasters with the rank of captain; 1 assistant paymaster with the rank of lieutenant colonel, 1 assistant paymaster with the rank of captain.

By act of May 13, 1908 (35 Stat., 155), the following further increases were made in the commissioned personnel: 1 Major general commandant, in lieu of the then brigadier general commandant; 1 colonel; 1 lieutenant colonel; 2 majors; 18 captains; 7 first lieutenants; and 14 second lieutenants.

By act of December 19, 1913 (38 Stat., 241), it was provided that appointments as commandant thereafter made should be for a term of four years, that the appointee should be an officer of the active list not below the grade of field officer, who while serving as commandant should have the rank of major general, and be carried as an additional number in his grade and after his return to duty in his grade until said grade is reduced to the number authorized by law; and that nothing contained in said act "shall operate to increase or reduce the total number of officers in the Marine Corps now provided by law." (For amendment to this provision, see act of Aug. 29, 1916, quoted below.)

By act of June 12, 1916, section 3 (39 Stat., 224), the following additional officers were authorized: 2 majors; 12 captains; 18 first lieutenants; 2 assistant quartermasters with the rank of captain; and 1 assistant paymaster with the rank of captain.

By act of August 29, 1916 (39 Stat., 609, 610), the commissioned strength of the Marine Corps, line and staff, was fixed on a percentage basis of the enlisted strength, as follows:

"Hereafter the total number of commissioned officers of the active list of the line and staff of the Marine Corps, exclusive of officers borne on the Navy list as additional numbers, shall be four per centum of the total authorized enlisted strength of the active list of the Marine Corps, exclusive of the Marine Band, and of men under sentence of discharge by court-martial, distributed in the proportion of one officer with rank senior to colonel to four with the rank of colonel, to five with the rank of lieutenant colonel, to fourteen with the rank of major, to thirty-seven with the rank of captain, to thirty-one with the rank of first lieutenant, to thirty-one with the rank of second lieutenant: \* \* \*

*Provided further*, That in determining the officers with rank senior to colonel there shall be included the officer serving as major general commandant: *And provided further*, That appointments hereafter made to the position of major general commandant under the provisions of the Act approved December nineteenth, nineteen hundred and thirteen, entitled "An Act to make the tenure of office of the major general commandant of the Marine Corps for a term of four years," shall be made from officers of the active list of the Marine Corps not below the rank of colonel: *Provided further*, That the officers serving in the senior grade of the Adjutant and Inspector's, Quartermaster's, and Paymaster's Departments shall, while serving therein, have the rank, pay, and allowances of a brigadier general: *And provided further*, That for the purpose of determining the number of

officers in the various ranks as herein provided such staff officers shall be counted as being of the rank of colonel."

(As to total authorized enlisted strength, see laws noted below under this section. As to number of staff officers, see note to section 1598.)

By act of May 22, 1917, section 4 (40 Stat., 85), it was provided that additional commissioned officers of the Marine Corps shall be temporarily appointed by the President, in his discretion, based upon the temporary increase in the number of enlisted men authorized by said act; no such temporary appointment to be made above the rank of major; and it was further provided that during the period of the existing war, vacancies in the total number of commissioned officers in the Marine Corps authorized by the act of August 29, 1916, might be supplied by temporary appointments in the lowest grades, and by temporary promotions to all other grades, until a sufficient number of officers should be available for regular appointment or promotion.

By act of July 1, 1918 (40 Stat., 715), the said act of May 22, 1917, section 4, was amended so as to authorize the temporary appointment of not exceeding 6 brigadier generals, 22 colonels, and 22 lieutenant colonels, based on the temporary increase in the enlisted force of the Marine Corps.

By said act of July 1, 1918 (40 Stat., 715), the rank and title of major general was created in the Marine Corps, and the President was authorized to appoint, with the advice and consent of the Senate, one major general, "who shall at all times be junior in rank to the Major General Commandant," and also one temporary major general, "who shall at all times be junior to the permanent major general."

By act of January 12, 1919 (40 Stat., 1054), it was provided that temporary vacancies in the Marine Corps, caused by the temporary promotion of marine officers to higher grades in the Army, while detached for service with the Army under section 1621, Revised Statutes, "shall be temporarily filled in the same manner as is now prescribed by law."

By act of June 4, 1920 (41 Stat., 830), which authorized certain permanent appointments in the Marine Corps, to be accomplished by June 30, 1921, it was provided: "That the officers now holding temporary appointments as commissioned officers in the Marine Corps may retain their temporary commissions until the permanent appointments provided for in the foregoing section shall have been made."

As to additional number officers, Marine Corps Reserve, etc., see note below under this section.

*Warrant officers and pay clerks.*—By act of August 29, 1916 (39 Stat., 611), "the warrant grades of marine gunner and quartermaster clerk" were established, and the number in each grade fixed at twenty; and it was provided that officers in said grades "shall have the rank and receive the pay, allowances, and privileges of retirement of warrant officers in the Navy."

By act of May 22, 1917, section 11 (40 Stat., 87), the appointment was authorized of 30 marine gunners and 30 quartermaster's clerks,



additional to the number then prescribed by law.

By act of June 4, 1920 (41 Stat., 830), it was provided that "officers now holding temporary commissions in the Marine Corps and who have had more than ten years' service therein, if not found qualified for permanent commissions, and who are recommended by the board herein provided for, may be appointed warrant officers in the Marine Corps; and the authorized number of warrant officers is hereby increased by a number not to exceed fifty to provide for the appointment of the aforesaid officers."

By act of July 1, 1918 (40 Stat., 735), it was provided that "the title of clerks for assistant paymasters is hereby changed to pay clerk, who shall hereafter receive the same pay, allowances, and other benefits now provided by law for clerks for assistant paymasters; and the total number of pay clerks shall not exceed ten for duty in the office of the paymaster, Marine Corps, fifteen for duty in the paymaster's department at large, and one for each assistant paymaster." (As to pay and allowances, etc., of pay clerks, see note to sec. 1612.) By act of June 24, 1910 (36 Stat., 625), appropriating for one clerk for each assistant paymaster, it was provided that hereafter such clerk shall be available where his services are required.

*Number and grades of enlisted men.*—By act of March 3, 1899, section 23 (30 Stat., 1009), it was provided that the enlisted force of the Marine Corps shall consist of 5 sergeant majors, 1 drum major, 20 quartermaster sergeants, 72 gunnery sergeants with the rank and allowance of first sergeant, 60 first sergeants, 240 sergeants, 480 corporals, 80 drummers, 80 trumpeters, and 4,962 privates.

By subsequent enactments, the following additional noncommissioned officers and privates were authorized:

Act July 1, 1902 (32 Stat., 687): 10 gunnery sergeants, 40 sergeants, 60 corporals, 10 drummers, 10 trumpeters, and 620 privates.

Act March 3, 1903 (32 Stat., 1198): 1 sergeant major, 40 quartermaster sergeants, 12 first sergeants, 65 sergeants, 55 corporals, 10 drummers, 10 trumpeters, and 527 privates.

Act March 3, 1905 (33 Stat., 1113): 10 first sergeants, 67 sergeants, 142 corporals, 10 drummers, 10 trumpeters, and 1,000 privates.

Act May 13, 1908 (35 Stat., 155): 2 sergeant majors, 15 quartermaster sergeants, "five of whom are to serve in the pay department," 20 first sergeants, 50 sergeants, 125 corporals, 10 drummers, 10 trumpeters, and 518 privates.

Act August 22, 1912 (37 Stat., 350, 351): 4 sergeant majors, 4 quartermaster sergeants, 4 gunnery sergeants, 12 first sergeants, 18 sergeants, 35 corporals, 4 drummers, 4 trumpeters, and 315 privates.

Act March 3, 1915 (38 Stat., 948): 20 gunnery sergeants, 20 sergeants, and 70 corporals. The number of privates was reduced by 110 in this act.

Act June 12, 1916 (39 Stat., 223, 224): 5 quartermaster sergeants, 5 gunnery sergeants, 5 first sergeants, and 11 sergeants.

Act August 29, 1916 (39 Stat., 612): 28 sergeant majors, 117 quartermaster sergeants, 107 gunnery sergeants, 107 first sergeants, 500 sergeants, 835 corporals, 50 drummers, 50 trumpeters, and 3,235 privates.

The total strength of the above enlisted grades, as fixed by the acts cited, was as follows: 40 sergeant majors, 1 drum major, 201 quartermaster sergeants, 218 gunnery sergeants, 226 first sergeants, 1,011 sergeants, 1,802 corporals, 174 drummers, 174 trumpeters, and 11,067 privates, making a grand total in all said grades of 14,914. (As to number of Marine Band, see below.)

By act of August 29, 1916 (39 Stat., 612), it was provided that "the President is authorized, when, in his judgment, it becomes necessary to place the country in a complete state of preparedness, to further increase the enlisted strength of the Marine Corps to 17,400: *And provided*, That the distribution in the various grades shall be in the same proportion as that authorized at the time when the President avails himself of the authority herein granted." (In accordance with this provision, the enlisted strength of the Marine Corps was increased to 17,400 by the President's order of Mar. 26, 1917.)

By act of May 22, 1917, section 2 (40 Stat., 84), it was provided "that the authorized enlisted strength of the active list of the Marine Corps is hereby temporarily increased from 17,400 to 30,000, this authorized strength being distributed in the various grades of the enlisted force in the same proportion as those authorized at the date of the approval of this act."

By act of July 1, 1918 (40 Stat., 714), the act of May 22, 1917, section 2, was reenacted to read as follows: "That the authorized enlisted strength of the active list of the Marine Corps is hereby temporarily increased from 17,400 to 75,500, this authorized strength being distributed in the various grades of the enlisted force in the same proportion as those authorized at the date of the approval of this act: *Provided*, That not more than 25 per centum of the authorized number of privates in the Marine Corps shall have the rank of private, first class, which rank is hereby established in the Marine Corps."

By act of July 11, 1919 (41 Stat., 152), it was provided that "the authorized enlisted strength of the active list of the Marine Corps is hereby temporarily increased to 27,400, plus such number of men as may be serving with the American expeditionary forces abroad: *Provided*, That the average number of enlisted men of the Marine Corps on active duty during the fiscal year ending June 30, 1920, shall not exceed 27,400, distribution in the various grades to be made in the same proportion as provided under existing law."

By act of June 4, 1920 (41 Stat., 830), it was provided that "the authorized enlisted strength of the active list of the Marine Corps is hereby permanently established at 27,400, distribution in the various grades to be made in the same proportion as provided under existing law."

By act of May 13, 1908 (35 Stat., 155), it was provided that "hereafter the number of enlisted men in the United States Marine Corps shall be such as the Congress may from time to time authorize."

By act of June 30, 1914 (38 Stat., 403), it was provided "that hereafter the number of enlisted men of the Navy and Marine Corps provided for shall be construed to mean the

daily average number of enlisted men in the naval service during the fiscal year."

By act of August 29, 1916 (39 Stat., 612), it was provided that "hereafter the number of enlisted men of the Marine Corps shall be exclusive of those sentenced by court-martial to discharge."

By act of July 1, 1918 (40 Stat., 714, quoted above), the rank of private, first class, was established.

By act of July 11, 1919 (41 Stat., 152), it was provided "that the words 'enlisted men,' as contained in prior appropriation acts, shall not be construed to deprive women, enlisted or enrolled in the naval service, of the pay, allowances, gratuities, and other benefits granted by law to the enlisted personnel of the Navy and Marine Corps."

By act of June 4, 1920, section 7 (41 Stat., 836), it was provided "that hereafter the Secretary of the Navy is authorized, in his discretion, to establish such grades and ratings as may be necessary for the proper administration of the enlisted personnel of the Navy and Marine Corps."

*Marine Band.*—The provision of section 1596, Revised Statutes, above set forth, that "the Marine Corps of the United States shall consist of \* \* \* thirty musicians for a band," was superseded by section 24 of the Navy personnel act approved March 3, 1899 (30 Stat., 1009), which provided "That the band of the United States Marine Corps shall consist of one leader, with the pay and allowances of a first lieutenant; one second leader, whose pay shall be seventy-five dollars per month, and who shall have the allowances of a sergeant major; thirty first-class musicians, whose pay shall be sixty dollars per month; and thirty second-class musicians, whose pay shall be fifty dollars per month and the allowances of a sergeant; such musicians of the band to have no increased pay for length of service." (As to pay of Marine Band, see also note to sec. 1613, R. S.)

By act of August 29, 1916 (39 Stat., 609, above quoted), the total number of commissioned officers of the Marine Corps is fixed at a percentage of "the total authorized enlisted strength of the active list of the Marine Corps, exclusive of the Marine Band \* \* \*." The same act (39 Stat., 612) provided "that the band of the United States Marine Corps shall consist of one leader, whose pay and allowances shall be those of a captain in the Marine Corps; one second leader, whose pay shall be \$150 per month and who shall have the allowances of a sergeant major; ten principal musicians, whose pay shall be \$125 per month; twenty-five first-class musicians, whose pay shall be \$100 per month; twenty second-class musicians, whose pay shall be \$85 per month; and ten third-class musicians, whose pay shall be \$70 per month; such musicians of the band to have the allowances of a sergeant and to have no increase in the rates of pay on account of length of service."

*Additional officers and enlisted men.*—By act of March 3, 1901 (31 Stat., 1108), it was provided that officers of the Marine Corps advanced under section 1605, Revised Statutes, for services rendered during the war with Spain, shall be carried as additional numbers in their grades. By act of June 16, 1906 (34 Stat.,

296), it was provided that officers of the Marine Corps advanced in rank for eminent and conspicuous conduct in battle or extraordinary heroism, shall be carried as additional numbers in each grade in which they serve. (See secs. 1605-1608, R. S.)

By act of August 29, 1916 (39 Stat., 609), it was provided that "the promotion to the grade of brigadier general of any officer now or hereafter carried as an additional number in the grade or with the rank of colonel shall be held to fill a vacancy in the grade of brigadier general." (This provision does not apply to the officer serving as Major General Commandant and carried as an additional number in his grade under the act of December 19, 1913, 38 Stat., 241, quoted above, under "Number and grades of commissioned officers." (See note to sec. 1601, R. S.)

The said act of August 29, 1916 (39 Stat., 611), further provided that within two years from the date thereof certain officers retired for physical disability might be transferred to the active list of the Marine Corps, and that any officer so transferred "shall be carried as an additional number in the grade to which he may be transferred or at any time thereafter promoted."

The said act of August 29, 1916 (39 Stat., 582, 586), authorized a Naval Flying Corps, to be composed in part of 150 officers, detailed from the line of the Navy and from the Marine Corps, or appointed to the line of the Navy or Marine Corps, for aeronautic duties only, and 350 enlisted men, the said officers and enlisted men to be in addition to the total number of officers and enlisted men which "is now or may hereafter be provided by law for the other branches of the naval service."

*Marine Corps Reserve.*—The act of August 29, 1916 (39 Stat., 593), created a Marine Corps Reserve, "to be a constituent part of the Marine Corps and in addition to the authorized strength thereof," under the same provisions in all respects, except as may be necessary to adapt the said provisions to the Marine Corps, as those providing for the Naval Reserve Force in the same act. (For amendments to said act of Aug. 29, 1916, see acts of Mar. 4, 1917, 39 Stat., 1174, Apr. 25, 1917, 40 Stat., 37, Apr. 25, 1917, 40 Stat., 38, May 22, 1917, 40 Stat., 84, July 1, 1918, 40 Stat., 708-712, and June 4, 1920, 41 Stat., 834.)

*Marine Corps instruction camps.*—By act of August 29, 1916 (39 Stat., 614), the Secretary of the Navy was authorized to establish camps of instruction for volunteer citizens designated for such training.

*Computing number of officers.*—The naval appropriation act of August 29, 1916 (39 Stat., 577), provides that "whenever a final fraction occurs in computing the authorized number of any corps, grade or rank in the naval service, the nearest whole number shall be regarded as the authorized number: *Provided*, That at least one officer shall be allowed in each grade or rank." *Held*, that the words "naval service" in this provision include the Marine Corps, although the method of computing by percentages the authorized number of commissioned officers in that corps was prescribed in a different part of the act. This



conclusion is strengthened by the fact that Congress in the same act elsewhere made specific reference to the "naval service" with indisputable application to the Marine Corps, in connection with the reinstatement of "former officers of the Marine Corps who resigned from the naval service in good standing." (File 28687-5, Aug. 29, 1916. See also note to sec. 1621, R. S.)

**Reduction in number of officers.**—Congress might disband the whole Marine Corps without any violation of the Constitution of the United States and without any breach of contract with the officers of the corps. If they might do the greater act, they might certainly do the less. If they might disband wholly, they may surely disband partially, without any imputation of their having transcended either their power or their duty. They have disbanded the majors; that grade exists no longer; and with the grade falls the claim to pay. (1 Op. Atty. Gen., 489, 490; see also note to sec. 1604, R. S.)

**Distribution of enlisted men.**—Under the naval appropriation act of June 4, 1920 (above quoted), fixing the permanent strength of the active list of enlisted men in the Marine Corps,

held that the words "in the same proportion as provided under existing laws" continue the grades existing at the date of the approval of said act and definitely establish the number in each; and the Secretary of the Navy is without authority to increase the numbers in said grades. (File 1112-1617, June 22, 1920.)

The further provision in said act, authorizing the Secretary of the Navy to establish grades and ratings, does not modify the provision first above quoted, except in so far as it authorizes the Secretary of the Navy to establish such new grades and ratings in the Marine Corps as may be necessary for the proper administration of the enlisted personnel thereof, and assign thereto such numbers of enlisted men as he may deem expedient. In the event of the Secretary of the Navy not availing himself of the authority to establish new grades and ratings, those provided for under existing law prior to June 4, 1920, will continue as before. (File 1112-1617, June 22, 1920.)

**Grades established for pay purposes.**—See note to section 1612, Revised Statutes.

**Status of Marine Corps; part of the Navy.**—See note to section 1621, Revised Statutes.

### Sec. 1597. [When number of officers may be exceeded. Obsolete.]

#### This section provided as follows:

"Sec. 1597. The provisions of the preceding section shall not preclude the advancement of any officer to a higher grade for distinguished conduct in conflict with the enemy, or for extraordinary heroism in the line of his profession, as authorized by sections sixteen hundred and five and sixteen hundred and seven."—(25 July, 1861, c. 19, s. 2, v. 12, p. 275. 16 July, 1862, c. 183, s. 9, v. 12, p. 584. 24 Jan., 1865, c. 19, s. 2, v. 13, p. 424.)

It was rendered obsolete by the Navy personnel act of March 3, 1899, section 18 (30 Stat., 1008), which superseded "the provisions of the preceding section," referred to herein, namely, section 1596, Revised Statutes, by making new and complete provisions as to the number of officers who should compose the active list of the Marine Corps.

Other enactments on this subject are contained in the following statutes: Act March 3,

1901 (31 Stat., 1108), June 16, 1906 (34 Stat., 296), and August 29, 1916 (39 Stat., 609), noted under section 1596, Revised Statutes, "Additional officers and enlisted men." See also section 1606, Revised Statutes.

By act of August 29, 1916 (39 Stat., 609, 610), quoted under section 1596, Revised Statutes, under "Number and grades of commissioned officers," new provisions were enacted as to the number of officers allowed in the various grades of the Marine Corps, and it was therein provided that the total number of commissioned officers therein authorized, was "exclusive of officers borne on the Navy list as additional numbers." Officers advanced under sections 1605 and 1607, Revised Statutes, become additional numbers in grade under the acts of March 3, 1901, and June 16, 1906, above cited.

See notes to sections 1363 and 1364, Revised Statutes.

### Sec. 1598. [Staff separate from line. Superseded.]

#### This section provided as follows:

"Sec. 1598. The staff of the Marine Corps shall be separate from the line."—(30 June, 1834, c., 132, s. 6, v. 4, p. 713. 2 Mar., 1847, c. 40, s. 3, v. 9, p. 154.)

It was superseded by the act of August 29, 1916 (39 Stat., 610), which abolished the permanent staff system in the Marine Corps and substituted therefor a system of temporary details from the line, as follows:

"No further permanent appointments shall be made in any grade in any staff department. Any vacancy hereafter occurring in the lower grade of any staff department shall be filled by the detail of an officer of the line for a period of four years unless sooner relieved; any vacancy hereafter occurring in the upper grade of any staff department shall be filled by the appoint-

ment of an officer with the rank of colonel holding a permanent appointment in the staff department in which the vacancy exists, or of some other officer holding a permanent appointment in such staff department in case there be no permanent staff officer with the rank of colonel in that department, or of a colonel of the line in case there be no officer holding a permanent appointment in such staff department. Such appointments shall be made by the President and be for a term of four years, and the officer so appointed shall be re-commissioned in the grade to which appointed."

The said act of August 29, 1916 (39 Stat., 610), also made provision for transfers of permanent staff officers to the line, the said provision, which was temporary and has now expired, being as follows:

"That prior to June thirtieth, nineteen hundred and eighteen, an officer holding a permanent appointment in any staff department may, upon his own application, with the approval of the President, be reappointed in the line of the Marine Corps in the grade and with the rank he would hold on the date of his reappointment if he had remained continuously in the line: *Provided*, That no officer holding a permanent appointment in any staff department shall be recommissioned in the line with the rank of colonel or lieutenant colonel: *Provided further*, That such staff officer shall, before being reappointed in the line of the Marine Corps as above provided, perform line duties for one year, at the expiration of which time he shall as a prerequisite to reappointment in the line be required to establish to the satisfaction of an examining board consisting of line officers of the Marine Corps his physical, mental, and professional fitness for the performance of line duty."

By another clause in the same act (39 Stat., 610) it was provided "that officers holding permanent appointments in the staff departments shall not be eligible for appointment to the grade of brigadier general of the line as hereinbefore provided."

**Proportion of officers in the staff.**—By act of August 29, 1916 (39 Stat., 610), it was provided that—

"The total commissioned personnel of the active list of the staff departments, whether serving therein under permanent appointments or under temporary detail, as herein provided, shall be eight per centum of the authorized commissioned strength of the Marine Corps, and of this total one-fifth shall constitute the adjutant and inspector's department, one-fifth the paymaster's department, and three-fifths the quartermaster's department."

As to rank of senior staff officers see note to section 1602, Revised Statutes.

As to promotion of officers in staff departments, see note to section 1599, Revised Statutes.

**Duties of staff officers.**—An adjutant was provided for the Marine Corps as early as July 11, 1798 (1 Stat., 594), and the quartermaster and paymaster at least as early as Apr. 16, 1814 (3 Stat., 124). The act of March 3, 1899, section 22 (noted under section 1596,

R. S.), simply increased the number of assistants to the three principal officers. It is to be noted that in none of these acts are the duties and functions of the three staff officers in question at all specified, but it can not on this account be held that the statute itself imposes none. On the contrary, it is clear that these duties and functions were presumed by Congress to be so well understood as not to require specific mention. Broadly, the adjutant is the aid of the commander in maintaining military discipline; the quartermaster attends to the supplies of the command; and the paymaster to the payment thereof. (30 Op. Atty. Gen., 234.)

A regulation which would deprive the senior staff officers in the Marine Corps of the functions above enumerated, or place them in a situation where they would be unable to perform them, is necessarily invalid. The headquarters of the command is the only place where in the nature of things those duties can be properly performed. (30 Op. Atty. Gen., 234.)

**Detachment of senior staff officers from headquarters.**—The President, as commander in chief of the Army and Navy, may temporarily detail said staff officers (adjutant and inspector, quartermaster, and paymaster) away from the headquarters of their command, or order them to perform temporarily additional duties in the line of their staff functions or outside of them. (30 Op. Atty. Gen., 234.)

A Navy regulation is invalid which permits officers of the staff departments of the Marine Corps to be detached permanently from the headquarters of the Marine Corps, and gives the power to the commandant of that corps to impose duties upon these staff officers inconsistent with their staff functions. (30 Op. Atty. Gen., 234.)

**Detail of junior staff officer as head of department.**—It is clearly inconsistent with the acts of Congress relating to the staff of the Marine Corps, up to and including the act of March 3, 1899, section 22 (noted under sec. 1596, R. S.), to relegate the quartermaster, for example, to the position of an officer in his own department, and to raise one of his assistants to a position not recognized in the statutes, namely, "officer in charge of the quartermaster's department." (30 Op. Atty. Gen., 234. But see act Aug. 29, 1916, quoted above.)

## Sec. 1599. [Qualifications for appointment and promotion. Superseded.]

This section provided as follows:

"SEC. 1599. No person under twenty or over twenty-five years of age shall be appointed from civil life as a commissioned officer of the Marine Corps, nor shall any person be so appointed until his qualifications for such service have been examined and approved, under the directions of the Secretary of the Navy."—(25 July, 1861, c. 19, s. 3, v. 12, p. 275.)

It was superseded by act of March 3, 1899, section 20 (30 Stat., 1008), which provided "that no person except such officers or former graduates of the Naval Academy as have served in the war with Spain, as hereinbefore provided for, shall be appointed a commissioned officer in the Marine Corps who is under twenty or over thirty years of age; and that no person shall be

appointed a commissioned officer in said corps until he shall have passed such examination as may be prescribed by the President of the United States, except graduates of the Naval Academy, as above provided \* \* \*."

The said act of March 3, 1899, Section 19 (30 Stat., 1008), provided that "the vacancies existing in said Corps after the promotions and appointments herein provided for shall be filled by the President from time to time, whenever the actual needs of the naval service require it, first, from the graduates of the Naval Academy in the manner now provided by law; or second, from those who are serving or who have served as second lieutenants in the Marine Corps during the war with Spain; or, third, from meritorious noncommissioned officers of the



Marine Corps; or, fourth, from civil life: *Provided*, That after said vacancies are once filled there shall be no further appointments from civil life."

#### OTHER LAWS RELATING TO APPOINTMENT.

*Act of March 3, 1903* (32 Stat., 1198), provided "that the vacancies now existing in the line and the staff departments of the Marine Corps and those created by this Act below the grade of brigadier-general shall be filled, respectively, first by promotion by seniority and then by selection and appointment as now provided by law, excepting that vacancies in the grade of second lieutenant shall be filled first, as far as practicable, from graduates of the Naval Academy each year on completing the prescribed course at the Naval Academy, exclusive of the probationary tour of sea service before final graduation, then from meritorious noncommissioned officers and from civil life between the ages of twenty-one and twenty-seven years."

*Act of May 13, 1908* (35 Stat., 155), provided "that the vacancies now existing in the line and staff departments of the United States Marine Corps and those created by this Act shall be filled in the manner provided by law."

*Act of July 9, 1913* (38 Stat., 103), provided that "midshipmen on graduation shall be commissioned ensigns in the Navy, or may be assigned by the Secretary of the Navy to fill vacancies in the lowest commissioned grades of the Marine Corps or Staff Corps of the Navy." (For other laws relating to appointment of midshipmen on graduation, see note to sec. 1521, R. S.)

*Act of August 29, 1916* (39 Stat., 611), provided "that no midshipman at the United States Naval Academy or cadet at the United States Military Academy who fails to graduate therefrom shall be eligible for appointment as a commissioned officer in the Marine Corps until after the graduation of the class of which he was a member."

The said act of August 29, 1916 (39 Stat., 610), further provided that "appointees to the grade of second lieutenant, if appointed from civil life, shall be between the ages of twenty and twenty-five years, and before receiving a commission in the Marine Corps, each appointee shall establish to the satisfaction of the Secretary of the Navy his mental, physical, moral, and professional qualifications for such commission."

The said act of August 29, 1916 (39 Stat., 610), further provided that "the President of the United States be, and hereby is, authorized, by and with the advice and consent of the Senate, to appoint as second lieutenants on the active list in the United States Marine Corps, to take rank at the foot of the list of second lieutenants as it stands at the date of reinstatement, former officers of the Marine Corps who resigned from the naval service in good standing: *Provided*, That they shall establish their moral, physical, mental, and professional qualifications to perform the duties of that grade to the satisfaction of the Secretary of the Navy: *Provided further*, That the Secretary of the Navy, in his discretion, may

waive the age limit in favor of the aforesaid former officers of the Marine Corps: *Provided further*, That the prior service of such officers and the service after reinstatement shall be not less than thirty years before the age of retirement."

The same act (39 Stat., 611), provided "that appointments from noncommissioned officers of the Marine Corps and from civil life shall be for a probationary period of two years and may be revoked at any time during that period by the Secretary of the Navy: *Provided further*, That the rank of such officers of the same date of appointment among themselves at the end of said probationary period shall, with the approval of the Secretary of the Navy, be determined by the report of a board of Marine officers who shall conduct a competitive professional examination under such rules as may be prescribed by the Secretary of the Navy and the rank of such officers so determined shall be as of date of original appointment with reference to other appointments to the Marine Corps." The act of May 22, 1917, section 10 (40 Stat., 87), authorized promotion, during the existing war, of probationary second lieutenants without change in their probationary status.

The same act (39 Stat., 611), contained a provision, which expired two years after the date of its approval, authorizing the transfer to the active list of the Marine Corps of certain retired officers, officers so restored to be additional numbers and to have the position on the active list which they would have had if not retired.

*By act of June 4, 1920* (41 Stat., 830), provision was made for permanent appointment in the Marine Corps of officers serving temporarily in the grades of captain and below, such appointments to be made without regard to age, in the same grades as held temporarily or lower grades, according to qualifications, it being required that such officers "shall establish to the satisfaction of the Secretary of the Navy, under such rules as he may prescribe, their mental, moral, professional, and physical qualifications to perform the duties of the grade to which transferred or reappointed," and that they take precedence with each other and with other officers of the Marine Corps in such order as may be recommended by a board of Marine officers and approved by the Secretary of the Navy.

The same act (41 Stat., 830), provided "that all persons who served honorably as officers in the Marine Corps or Marine Corps Reserve on active duty at any time between April 6, 1917, and the date of the passage of this act, and who have been honorably discharged or assigned to inactive duty shall be eligible for permanent appointment in the same or a lower rank than that held on discharge or assignment to inactive duty, but not above the rank of captain, to fill vacancies existing or hereby created in the permanent authorized strength of the Marine Corps," under the same conditions as those above set forth for officers then in the service.

All appointments under the act of June 4, 1920, from former officers, or officers holding temporary appointments, or members of the Marine Corps Reserve, were required to be accomplished by June 30, 1921. (41 Stat., 830.)

*Officers dropped from the rolls of the Navy or Marine Corps on account of absence without leave or imprisonment under sentence of civil courts, shall not be eligible for reappointment.* (Act Apr. 2, 1918, 40 Stat., 501. See sec. 1441, R. S., and note thereto for other provisions disqualifying former officers and midshipmen for reappointment in the Navy or Marine Corps.)

*Qualifications for warrant officers.*—By act of August 29, 1916 (39 Stat., 611), creating the warrant grades of marine gunner and quartermaster clerk, noted under section 1596, Revised Statutes, it was provided that "they shall be appointed from the noncommissioned officers of the Marine Corps and clerks to quartermasters now serving as such and who have performed field service."

By act of June 4, 1920 (41 Stat., 830), it was provided that officers then holding temporary commissions in the Marine Corps, and who had more than 10 years' service therein, if not found qualified for permanent commissions, may be appointed warrant officers in the Marine Corps if "recommended by the board herein provided for."

#### LAWS RELATING TO PROMOTION.

See sections 1605–1607, Revised Statutes, as to advancement for heroism, etc.

*Act of July 28, 1892* (27 Stat., 321), provided "That hereafter promotions to every grade of commissioned officers in the Marine Corps below the grade of Commandant shall be made in the same manner and under the same conditions as now are or may hereafter be prescribed, in pursuance of law, for commissioned officers of the Army: *Provided*, That examining boards which may be organized under the provisions of this act to determine the fitness of officers of the Marine Corps for promotion shall in all cases consist of not less than five officers, three of whom shall, if practicable, be officers of the Marine Corps, senior to the officer to be examined, and two of whom shall be medical officers of the Navy: *Provided further*, That when not practicable to detail officers of the Marine Corps as members of such examining boards, officers of the line in the Navy shall be so detailed."

*Act of October 1, 1890* (26 Stat., 562), relating to promotions in the Army, and extended to Marine Corps by above act of July 28, 1892, contained the following provision in section 1:

"That hereafter promotion to every grade in the Army below the rank of brigadier general, throughout each arm, corps, or department of the service, shall, subject to the examination hereinafter provided for, be made according to seniority in the next lower grade of that arm, corps, or department \* \* \*." The same act of October 1, 1890, section 3, contained the following: "That the President be, and he is hereby, authorized to prescribe a system of examination of all officers of the Army below the rank of major to determine their fitness for promotion, such an examination to be conducted at such times anterior to the accruing of the right to promotion as may be best for the interests of the service: \* \* \* *And provided*, That if any officer fails to pass a satisfactory examination and is reported unfit for promotion, the officer next below him in rank,

having passed said examination, shall receive the promotion: *And provided*, That should the officer fail in his physical examination and be found incapacitated for service by reason of physical disability contracted in line of duty he shall be retired with the rank to which his seniority entitled him to be promoted; but if he should fail for any other reason he shall be suspended from promotion for one year, when he shall be reexamined, and in case of failure on such reexamination he shall be honorably discharged with one year's pay from the Army."

*Act of March 3, 1899*, section 20 (30 Stat., 1009), provided, "That the officers of the Marine Corps above the grade of captain, except brigadier general, shall, before being promoted, be subject to such physical, mental and moral examination as is now, or may hereafter be, prescribed by law for other officers of the Marine Corps."

By said act of March 3, 1899, section 18 (30 Stat., 1008), it was provided that "vacancies in the grade of brigadier general shall be filled by selection from officers on the active list of the Marine Corps not below the grade of field officer." By act of August 29, 1916 (39 Stat., 609, 610), it was provided that "brigadier generals shall be appointed from officers of the Marine Corps senior in rank to lieutenant colonel"; that the Commandant shall be appointed from officers of the active list not below the rank of colonel; and that officers holding permanent appointments in the staff departments shall not be eligible for appointment to the grade of brigadier general of the line.

*Act of June 3, 1916*, section 24 (39 Stat., 183), made applicable to the Marine Corps by act of July 28, 1892, above quoted, provided, "That the provisions of existing law requiring examinations to determine fitness for promotion of officers of the Army are hereby extended to include promotions to all grades below that of brigadier general: *Provided further*, That examinations of officers in the grades of major and lieutenant colonel shall be confined to problems involving the higher functions of staff duties and command."

*Act of August 29, 1916* (39 Stat., 610), provided "That for the purpose of advancement in rank to and including the grade of colonel, all commissioned officers of the line and staff of the Marine Corps shall be placed on a common list in the order of seniority each would hold had he remained continuously in the line. All advancements in rank to captain, major, lieutenant colonel, and colonel shall, subject to the usual examinations, be made from officers with the next junior respective rank, whether of the line or staff, in the order in which their names appear on said list."

The said act of August 29, 1916 (39 Stat., 611), further enacted that "the provisions of sections fourteen hundred and ninety-three and fourteen hundred and ninety-four of the Revised Statutes of the United States shall apply to the Marine Corps." (See said sections and notes thereto. Sec. 1493 required physical qualification for promotion to all grades in the Navy, except in the case specified in sec. 1494, of partial disability incurred in line of duty.)



By said act of August 29, 1916 (39 Stat., 611, 612), it was provided that—

"In lieu of suspension from promotion of any officer of the Marine Corps who hereafter fails to pass a satisfactory professional examination for promotion, or who is now under suspension from promotion by reason of such failure, such officer shall suffer loss of numbers, upon approval of the recommendation of the examining board, in the respective ranks, as follows: Lieutenant colonel, one; major, two; captain, three; first lieutenant, five; second lieutenant, eight: *Provided*, That any such officer shall be reexamined as soon as may be expedient after the expiration of six months if he in the meantime again becomes due for promotion, and if he does not in the meantime again become due for promotion he shall be reexamined at such time anterior to again becoming due for promotion as may be for the best interests of the service: *Provided further*, That if any such officer fails to pass a satisfactory professional reexamination he shall be honorably discharged with one year's pay from the Marine Corps."

Act of March 4, 1917 (39 Stat., 1171), empowered commanding officers on foreign stations, when authorized by the Secretary of the Navy, to order boards of medical examiners and examining boards for examination of candidates for promotion in the Marine Corps. (See note to sec. 1493, R. S.)

Act of June 4, 1920 (41 Stat., 774), relating to the Army provided that "Existing laws providing for the examination of officers for promotion are hereby repealed, except those relating to physical examination, which shall continue to be required for promotion to all grades below that of brigadier general, and except also those governing the examination of officers of the Medical, Dental, and Veterinary Corps." (As to effect of this act upon promotions in the Marine Corps, see decisions noted below.)

By said act of June 4, 1920, section 51 (41 Stat., 785, amending act June 3, 1916, sec. 127, 39 Stat., 217), it was provided that "in time of war any officer of the Regular Army may be appointed to higher temporary rank without vacating his permanent commission, such appointments in grades below that of brigadier general being made by the President alone, but all other appointments of officers in time of war shall be in the Officers' Reserve Corps."

**Probationary appointments.**—The act of August 29, 1916 (above quoted), does not contemplate the issuance of probationary appointments to former officers of the Marine Corps appointed as second lieutenants in accordance with that act. (File 13261-544: 1, Oct. 10, 1916.)

**Appointment of former student at Naval Academy.**—Under the act of March 3, 1899, providing for filling vacancies thereby created in the staff of the Marine Corps, and making eligible for appointment thereunder line officers on the active list of the Marine Corps not below the grade of captain, "who shall have seen not less than ten years' service in the Marine Corps," *held* that in estimating the time which is necessary for qualification for the promotion provided for, the time of service as a naval cadet at the Naval Academy and at sea before being commissioned should be

counted. This view is sustained by the act of June 10, 1896 (noted under sec. 1600, R. S.). (22 Op. Atty. Gen., 377.)

There can be no doubt about the proposition that the time of service of a cadet at the Naval Academy and at sea anterior to commission is as much a time of preparation for service in the Marine Corps as it is in the Navy proper, because the Marine Corps is an essential part of the naval organization. Such time of preparation at the Academy and at sea having always been counted for appointments and promotions in the Navy proper, and the Marine Corps being part of the Navy, there is no reason why the benefits of time at the Academy and at sea anterior to commission should not be given to persons seeking promotion in the Marine Corps as well as in the Navy proper. (22 Op. Atty. Gen., 377, 379.)

A person who took the regular four years' course at the Naval Academy, and received a certificate of graduation issued pursuant to the act of August 5, 1882 (22 Stat., 284), without rendering the two years' service at sea then required for final graduation, *held* to be a graduate of the Naval Academy within the meaning of section 20 of the Navy personnel act approved March 3, 1899, providing for filling vacancies in the Marine Corps. (22 Op. Atty. Gen., 485.)

The exemption as to age limit in section 20 of the act of March 3, 1899 (above quoted), with reference to the eligibility to appointments in the Marine Corps, is not restricted to those who served in the Marine Corps during the war with Spain, but extends to all graduates of the Naval Academy who served in that war, including one who so served in the line of the Navy. (22 Op. Atty. Gen., 485.)

See act of March 4, 1913 (37 Stat., 891), providing that service of a midshipman at the Naval Academy, thereafter appointed to said Academy, "shall not be counted in computing for any purpose the length of service of any officer in the Navy or in the Marine Corps."

See section 1520, Revised Statutes, and amendments noted thereunder, as to four years' course at the Naval Academy.

See section 1621, Revised Statutes, and note thereto, as to status of Marine Corps.

**Appointments from enlisted men and civil life.**—Section 19 of the Navy personnel act of March 3, 1899, and the act of March 3, 1903 (both above quoted), considered, and *held*, 1st. That appointments to the grade of second lieutenant in the Marine Corps may be made from civil life; 2d. That the limitation as to age of appointees, contained in the latter act, applies only to appointments from civil life; 3d. That enlisted men of the Marine Corps, other than noncommissioned officers, and also enlisted men of the Navy, may be appointed as second lieutenants. (File 13261-426, May 29, 1913, citing file 3727-2, Feb. 17, 1906, and 3259-98, May 19, 1898.)

**Appointment and promotion distinguished.**—See note to sections 1458 and 1603, Revised Statutes:

**Laws relating to promotion construed.**—Previous to the act of July 16, 1862, chapter 183, there was no law which required officers in any branch of the naval service, including the

Marine Corps, to pass a physical examination as a preliminary to promotion. The fourth section of that act directed the Secretary of the Navy to appoint an advisory board of naval officers, whose duty it was to carefully scrutinize the active list of line officers in the Navy above and including the grade of master, and report to the Secretary in writing those found to be worthy of promotion. The board in recommending an officer for promotion was to certify that he "has the moral, mental, physical, and professional qualifications to perform efficiently all his duties, both at sea and on shore, of the grade to which he is to be promoted." By the sixth section of the same act a similar advisory board was to be appointed at least once in every four years. These provisions applied solely to line officers of the Navy, but were superseded by other provisions on the same subject contained in the act of April 21, 1864, chapter 63. The latter provisions are embodied in sections 1493, et seq., of the Revised Statutes. They include both line and staff officers, but in terms extend to those only who are "on the active list of the Navy." There is no statutory provision of this character which expressly or impliedly includes officers of the Marine Corps. (17 Op. Atty. Gen., 117, June 11, 1881.)

Section 1493 of the Revised Statutes, requiring physical examinations for promotion in the Navy, is not extended to the Marine Corps by section 1621, Revised Statutes. (17 Op. Atty. Gen., 117, June 11, 1881.)

It would seem that the examination, physical or other, of a retiring board, constituted under section 1623, Revised Statutes, is the only one to which an officer of the Marine Corps is by law subjected in order to determine his fitness for active duty; and unless the officer is by this board found incapacitated for active service, and the finding is approved by the President, he remains in the line of promotion on the active list as he previously was, and is entitled to all the rights which belong to his position. (17 Op. Atty. Gen., 117, June 11, 1881.)

The act of October 1, 1890 (26 Stat., 562), which was extended to the Marine Corps by the act of July 28, 1892 (above quoted), provided that examinations for promotion were to be held at such times "anterior to the accruing of the right to promotion" as may be best for the interests of the service. A question having arisen as to whether certain officers to be promoted in the Marine Corps to vacancies created on July 10, 1892, in the offices of major, captain, and first lieutenant, should or should not be examined under the act of July 28, 1892, *held*, that said promotions might be made without the examinations in question; that the right of the officers in question to promotion existed from July 10, 1892, prior to the passage of the law requiring examination; that the act of October 1, 1890, having been construed by the Army as not requiring examinations for officers who had previously become due for promotion, it must be understood that Congress enacted the law of July 28, 1892, with full knowledge of such construction, and did not intend that a right of promotion earned by long service and actually accrued should be taken away by force of the

latter enactment. (20 Op. Atty. Gen., 433; compare cases noted under sec. 1458, R. S.)

The words "usual examinations," as used in the act of August 29, 1916 (above quoted), referred to the mental, moral, professional, and physical examinations for promotion which officers of the Marine Corps below the grade of major were required to undergo by virtue of the Army act of October 1, 1890, made applicable to the Marine Corps by act of July 28, 1892; the mental, moral, and physical examinations which officers of the Marine Corps above the rank of captain, except brigadier generals, were required to undergo by the act of March 3, 1899; the professional examination which officers of the Marine Corps of the ranks of major and lieutenant colonel were required to undergo by virtue of the Army act of June 3, 1916, made applicable to the Marine Corps by the act of July 28, 1892; and the physical examination which all officers of the Marine Corps were required to undergo by virtue of section 1493 of the Revised Statutes, relating to the Navy, and made applicable to the Marine Corps by the act of August 29, 1916. (File 26521-405:1, Sept. 15, 1920; see also 26521-405, June 30, 1920. The laws referred to are quoted above, under this section.)

The act of August 29, 1916, should be construed as referring to the "usual examinations" which were required by law in the Marine Corps on that date, regardless of whether such examinations were originally prescribed by Army laws, Navy laws, laws relating specifically to the Marine Corps, or a lawful regulation of the Executive. No reference was made in said act to examinations which might thereafter be prescribed by law for the Army or Navy, and accordingly the system of examinations then in force, and specifically required for the Marine Corps by the act of August 29, 1916, must continue to be required until otherwise provided by Congress; it could not be affected by any subsequent legislation relating specifically to examinations in the Army and which, in terms, is inapplicable to the Marine Corps. So long as promotions in the Marine Corps are made pursuant to the act of August 29, 1916, such promotions must be subject to the "usual examinations" which were required at the time said act was enacted, unless and until Congress otherwise directs. (File 26521-405:1, Sept. 15, 1920; see also 26521-405, June 30, 1920.)

Prior to the enactment of the Army act of June 4, 1920 (41 Stat., 774), the system of promotion in the Marine Corps was well understood. The act of August 29, 1916, provided that advancements in rank in the Marine Corps, to and including the grade of colonel, were to be made according to seniority from a "common list," and that advancements in rank to captain, major, lieutenant colonel, and colonel were to be made "subject to the usual examinations." There were other provisions in the act which clearly indicated that the usual examinations were also intended to apply to promotions to the grade of first lieutenant. (File 26521-405:1, Sept. 15, 1920; see also 26521-405, June 30, 1920.)

The repeal of prior Army laws on the subject of promotion, by the act of June 4, 1920 (41



Stat., 774), without the substitution of any other constructive legislation applicable to the Marine Corps, leaves nothing upon which the act of July 28, 1892, can operate, and the Marine Corps is now governed wholly by the system of promotion provided for by the act of August 29, 1916, and prior statutes adopted by reference therein or which are not inconsistent therewith. Query: Whether the act of July 28, 1892, has been superseded or repealed in its entirety? (File 26521-405:1, Sept. 15, 1920; see also 26521-405, June 30, 1920.)

The system of promotion in the Marine Corps, including examinations and penalties, continues in force unaffected by anything contained in the act of June 4, 1920, establishing a new system of promotion in the Army. (File 26521-405:1, Sept. 15, 1920; see also 26521-405, June 30, 1920.)

The promotion legislation in the Army act of June 4, 1920, which covers several printed pages of that act, is clearly not applicable to the Marine Corps in its entirety. For example, said act requires that promotions shall be made from a common list of all officers of the Army below the grade of colonel, with certain exceptions, and that this "promotion list" shall be formed by a board of officers appointed by the Secretary of War, "consisting of one colonel of each of six branches of the service in which officers are permanently commissioned under the terms of this act, and one officer who, as a member of the personnel branch of the General Staff, has made a special study of merging the present promotion lists into a single list." It would be impossible to convene a board in the Marine Corps constituted as required by this provision to form a promotion list for that service. The further provisions of the Army act make it clear that the system which it creates was never intended to apply to promotions in the Marine Corps. (File 26521-405:1, Sept. 15, 1920; see also 26521-405, June 30, 1920.)

The Army legislation of June 4, 1920, relating to promotions, being as a whole clearly inapplicable to the Marine Corps, it can not be held that a part of one sentence therein, which repeats "existing laws providing for the examination of officers for promotion \* \* \* except those relating to physical examination, which shall continue to be required for promotion to all grades below that of brigadier general \* \* \*," should be applied to the Marine Corps, and given the far-reaching effect of tearing down a carefully constructed system already in operation in that service, without providing anything in its place. The repealing clause

can not be separated from the remainder of the act, which provides a complete substitute for the former system of promotion in the Army, and which was apparently regarded as dispensing with the necessity for the former tests of efficiency, thus explaining the repeal of the former laws relating to examinations, in so far as such laws affected the Army. (File 26521-405:1, Sept. 15, 1920; see also 26521-405, June 30, 1920.)

The new Army system of promotion was established as a substitute for and supersedes the former system followed in the Army under the act of October 1, 1890, and amendments thereto. It does not, however, provide any substitute for the system of promotion already in force in the Marine Corps, and therefore does not supersede the Marine Corps system which the act plainly indicates was not intended to be affected thereby. It is not reasonable to assume that Congress intended with respect to the Marine Corps to repeal prior laws relating to examinations for promotion without providing any substitute therefor, at the very time it was creating in detail a complete substitute for such laws in the Army. (File 26521-405:1, Sept. 15, 1920; see also 26521-405, June 30, 1920.)

The provision in the Army act of June 4, 1920, requiring physical examinations for promotion to all grades below that of brigadier general, is not applicable to the Marine Corps, for the reason that physical examinations prior to promotion to all grades in the Marine Corps, without exception, are required by the Navy law contained in section 1493 of the Revised Statutes, as extended and applied to the Marine Corps by the act of August 29, 1916, which legislation for physical examinations in the Marine Corps in accordance with Navy laws, certainly is not repealed by said act of June 4, 1920. (File 26521-405:1, Sept. 15, 1920; see also 26521-405, June 30, 1920.)

Under the laws in force prior to June 4, 1920, and which continued in force unaffected by the Army act of that date, held: (1) A mental, moral, and professional examination is required for promotion in the Marine Corps to the grades of first lieutenant, captain, major, lieutenant colonel, and colonel; but not to the grades of brigadier general and major general. (2) A mental, moral, and physical examination is required in the Marine Corps for promotion to the grade of brigadier general, and a physical examination is required for promotion to the grade of major general. (File 26521-405:1, Sept. 15, 1920; see also 26521-405, June 30, 1920.)

**Sec. 1600. [Credit for volunteer service.]** All marine officers shall be credited with the length of time they may have been employed as officers or enlisted men in the volunteer service of the United States.—(2 Mar., 1867, c. 174, s. 3, v. 14, p. 516.)

All officers appointed to any corps of the Navy or to the Marine Corps, after service in a different corps of the Navy or of the Marine Corps, shall have all the benefits of their previous service in the same manner as if said appointments were a reentry into

the Navy or into the Marine Corps. (Act June 10, 1896, 29 Stat., 361.) Any warrant officer or pay clerk in the Marine Corps who accepts appointment as commissioned officer in Marine Corps Reserve shall be entitled, upon termination of such

appointment, to revert to his former status as a warrant officer or pay clerk in the Marine Corps, and shall be entitled to count all active reserve service for purposes of longevity pay and retirement. (Act July 11, 1919, 41 Stat., 141.)

Enlisted men of the Marine Corps discharged to be commissioned or warranted as officers in the Marine Corps Reserve, and who reenlist in the Marine Corps after termination of reserve service, shall be entitled in computing service for retirement to credit for all active reserve service. (Act July 11, 1919, 41 Stat., 141.)

Enlisted men of the Marine Corps discharged to be commissioned or warranted in the Marine Corps Reserve, and who reenlist in the Marine Corps within three months from date of termination of reserve service, shall be restored to grade or rank held before being discharged from Marine Corps, and service in the regular Marine Corps, including active service in the Marine Corps Reserve shall be regarded as continuous for purposes of continuous service pay. (Act July 11, 1919, 41 Stat., 141.)

Longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey, shall be based on the total of all service in any or all of said services. (Act May 18, 1920, sec. 11, 41 Stat., 604.)

Musicians of the Marine Band are to have no increase in their rates of pay on account of length of service. (Act Aug. 29, 1916, 39 Stat., 612.)

Service of a midshipman at the Naval Academy or of a cadet at the Military Academy hereafter appointed to either of said

academies, shall not be counted in computing for any purpose the length of service of any officer in the Navy or Marine Corps. (Act Mar. 4, 1913, 37 Stat., 891.)

**Service as paymaster's steward.**—The Revised Statutes, Title XV, chapter 9, classify the Marine Corps as part of the Navy, and provide (sec. 1600), that all marine officers shall be credited with the length of time they may have been employed as officers or enlisted men in the volunteer service of the United States. An officer of the Marine Corps who served as a paymaster's steward in the Volunteer Navy is entitled to have the time of such service credited to him in the computation of his longevity pay. (Muse v. U. S., 19 Ct. Cls., 441.)

The Navy Regulations classify paymasters' stewards as petty officers, and the Revised Statutes (sec. 1410) include petty officers in the more general designation of "all officers." It is not, however, to be understood that all petty officers are officers within the intent of the Constitution or of a penal statute. In the Navy, warrant officers and petty officers are spoken of generally as officers, and section 1410 merely recognizes the usage. (Muse v. U. S., 19 Ct. Cls., 441.)

The Navy consists of officers, warrant officers, petty officers, and seamen. The two terms used in section 1600, "officers" and "enlisted men" embrace, for the purpose of computing longevity pay, all four classes in the Navy. (Muse v. U. S., 19 Ct. Cls., 441.)

**For other cases,** see note to section 1612, Revised Statutes, respecting longevity pay; see also note to section 1599, Revised Statutes, under "Appointment of former student at the Naval Academy."

## Sec. 1601. [Rank of commandant.

This section provided as follows:

"Sec. 1601. The commandant of the Marine Corps shall have the rank of a brigadier-general of the Army." (2 Mar., 1867, c. 174, s. 7, v. 14, p. 517. 6 June, 1874, c. 216, v. 18, p. 58.)

It was repealed by act of June 6, 1874 (18 Stat., 58), which provided that "the office of commandant of the Marine Corps having the rank of a brigadier general of the Army shall continue until a vacancy shall occur in the same and no longer; and when such vacancy shall occur in said office, immediately thereupon all laws and parts of laws creating said office shall become inoperative, and shall by virtue of this act from thenceforth be repealed: *And provided further,* That thereafter the commandant of the Marine Corps shall have the rank and pay of a colonel, and shall be appointed by selection by the President from the officers of said corps." (See sec. 5601, R. S.)

**Rank of brigadier general restored.**—By act of March 3, 1899, section 18 (39 Stat., 1008), it was provided "that from and after the date of the approval of this Act the active list of the line officers of the United States Marine Corps shall consist of one brigadier general commandant \* \* \*."

## Repealed.]

**Rank of major general created.**—By act of July 1, 1902 (32 Stat., 686), the commandant was given the rank of major general during the service of the then incumbent; by act of May 13, 1908 (35 Stat., 155), there was authorized "one major general commandant, in lieu of the present brigadier general commandant;" and by act of December 19, 1913 (38 Stat., 241), which fixed the commandant's term of office at four years, it was provided that the appointee should be an officer of the active list not below the grade of field officer who, while serving as commandant, should have the rank of major general and be carried as an additional number in his grade and after his return to duty in his grade until said grade is reduced to the number authorized by law. By act of August 29, 1916 (39 Stat., 609), it was provided that appointments thereafter made to "the position of major general commandant," shall be from officers of the active list of the Marine Corps not below the rank of colonel, and that "in determining the officers with rank senior to colonel there shall be included the officer serving as major general commandant."

The act of July 1, 1918 (40 Stat., 715), which created the permanent grade of major general in the Marine Corps, authorized the appoint-



ment to that grade of one major general, "who shall at all times be junior in rank to the Major General Commandant, and also one temporary major general in the Marine Corps, who shall at all times be junior to the permanent major general."

**Rank on retirement.**—The Major General Commandant, if retired from that position in accordance with sections 1251, 1622, and 1623, Revised Statutes (physical disability incident to the service), or by reason of age or length of service, shall have the rank and retired pay of major general; if retired for any other reason, he shall be placed on the retired list of officers of the grade to which he belonged at the time of his retirement. (Act Dec. 19, 1913, 38 Stat., 241.)

**Active duty after retirement.**—After a Commandant of the Marine Corps is placed upon the retired list of officers of that corps on account of age, he can not legally be retained in his former office of Commandant until his successor is appointed. The general statute authorizing the detail of retired officers to active duty did not modify the special provision of law that the Commandant shall be appointed from officers of the active list, which applies to all appointments, whether regular or for a limited time. (28 Op. Atty. Gen., 486; see also note to sec. 1622, R. S.)

**Filling of temporary vacancy.**—An officer on the active list of the Marine Corps can not be temporarily detailed to fill a vacancy created by the retirement of the Commandant, with authority to transact official business and sign orders and correspondence as "Acting Commandant, U. S. Marine Corps." (28 Op. Atty. Gen., 486.)

During a vacancy caused by the retirement of a Commandant of the Marine Corps, the orders and correspondence connected with his office should be signed by the Secretary of the Navy or by the Acting Secretary of the Navy, in person. (28 Op. Atty. Gen., 486.)

For other cases, see notes to sections 177–182, Revised Statutes.

**Commandant's status as additional number.**—Under the act of August 29, 1916,

officers of the Marine Corps carried as additional numbers in grade will, if promoted to the grade of brigadier general, immediately become regular numbers in the latter grade, and will continue to be carried as regular numbers therein, unless, by operation of some other law applicable to a specific case, the status of such an officer should revert to that of an additional number in grade. The act of December 19, 1913, relating to the Major General Commandant is an exception to the general provisions contained in the act of August 29, 1916, and a Major General Commandant whose permanent grade is that of colonel would continue to be an additional number if promoted to the grade of brigadier general. (File 28687–1, Aug. 18, 1916.)

**Rank from which commandant appointed.**—Should a vacancy occur in the position of Major General Commandant, the President would be authorized to appoint any officer of the rank of colonel or brigadier general to fill such vacancy. Such officer would, by virtue of the act of December 19, 1913, immediately become an additional number in his grade. Should the number of officers senior to colonel be full, the President would not thereby be restricted to the selection of a brigadier general to fill the vacancy, but would have discretion to appoint a colonel whom he might consider better fitted for the office. The act of August 29, 1916, deals only with the apportionment of regular number officers, and allows more than the authorized percentage of officers senior to colonel, when such a result is made necessary by the appointment of a colonel to fill a vacancy in the position of Major General Commandant as specifically authorized by the same act, notwithstanding the provision therein that "in determining the officers with rank senior to colonel there shall be included the officer serving as major general commandant," which has the effect of making the Major General Commandant one of the authorized number of officers above the rank of colonel. (File 28687–1, Aug. 18, 1916.)

## Sec. 1602. [Staff rank. Superseded.]

This section provided as follows:

"SEC. 1602. The adjutant and inspector, the paymaster, and the quartermaster shall have the rank of major; [the] [each] assistant quartermaster shall have the rank of captain."—(2 Mar., 1847, c. 40, s. 3, v. 9, p. 154. 27 Feb., 1877, c. 69, v. 19, p. 244.)

It was amended by act of February 27, 1877 (19 Stat., 244), which substituted the word "each" for "the," as indicated in the above reproduction of this section as it appeared in the second edition of the Revised Statutes.

It was superseded by the Navy personnel act of March 3, 1899, section 22 (30 Stat., 1009), which provided, in part, that "the staff of the Marine Corps shall consist of one adjutant and inspector, one quartermaster and one paymaster, each with the rank of colonel; one assistant adjutant and inspector, two assistant quartermasters and one assistant paymaster, each with the rank of major; and three assistant quartermasters with the rank of captain."

By act of August 29, 1916 (39 Stat., 609), it was provided "that the officers serving in the senior grade of the Adjutant and Inspector's, Quartermaster's, and Paymaster's Departments shall, while serving therein, have the rank, pay, and allowances of a brigadier general: *And provided further*, That for the purpose of determining the number of officers in the various ranks as herein provided [see note to sec. 1596, R. S.] such staff officers shall be counted as being of the rank of Colonel: *And provided further*, That officers holding permanent appointments in the staff departments shall not be eligible for appointments to the grade of brigadier general of the line as hereinbefore provided."

See note to section 1598, Revised Statutes, for other provisions of said act of August 29, 1916, relating to the rank of officers from whom appointments shall be made to the upper grades of the staff departments, their tenure of office, etc.

**Sec. 1603. [Relative rank with the Army.]** The officers of the Marine Corps shall be, in relation to rank, on the same footing as officers of similar grades in the Army.—(30 June, 1834, c. 132, s. 4, v. 4, p. 713.)

Army and Navy officers; relative rank of:

See section 1466, Revised Statutes.

Brigadier generals and rear admirals of the lower half; relative rank of: See note to section 1466, Revised Statutes.

Command when different corps or commands happen to join or do duty together: See note to section 1342, Revised Statutes, under articles 119 and 120 of the Articles of War, and note to section 1621, Revised Statutes.

Command of joint forces of the Army and Navy: See note to section 1466, Revised Statutes.

Command of Navy yards or vessels: See section 1617, Revised Statutes.

In the absence of special assignment by the President, officers of the same grade shall rank and have precedence in the following order, without regard to date of rank or commission as between officers of different classes, namely: First, officers of the Regular Army and officers of the Marine Corps detached for service with the Army by order of the President; second, officers of forces drafted into the military service of the United States. (Joint Res. 23, July 1, 1916, sec. 4, 39 Stat., 340.)

“In determining relative rank and increase of pay for length of service \* \* \* active duty performed while under appointment from the United States Government, whether in the Regular, provisional, or temporary forces, shall be credited to the same extent as service under a Regular Army commission.” (Act June 4, 1920, sec. 51, 41 Stat., 785, amending act June 3, 1916, sec. 127, 39 Stat., 217.)

Precedence between officers of the Marine Corps and line officers of the Navy, and between officers of the Marine Corps and staff officers of the Navy: See note to section 1466, Revised Statutes.

Precedence of Naval Academy graduates commissioned in the line of the Navy and in the Marine Corps: See note to section 1483, Revised Statutes.

“Unless special assignment is made by the President under the provisions of the one hundred and nineteenth article of war, all officers in the active service of the United States in any grade shall take rank according to date, which, in the case of an officer of the Regular Army, is that stated in his commission or letter of appointment, and, in the case of a reserve officer or an officer of the National Guard called into the service of the United States, shall precede that on which he is placed on active duty by a period equal to the total length of active service which he may have performed in the grade in which called or any higher grade. When dates of rank are the same, precedence shall be determined by length of active commissioned service in the Army. When length of such service is the same, officers of the Regular Army shall take rank among themselves according to their

places on the promotion list, preceding reserve and National Guard officers of the same date of rank and length of service, who shall take rank among themselves according to age.” (Act June 4, 1920, sec. 51, 41 Stat., 785, amending act June 3, 1916, sec. 127, 39 Stat., 217.)

“Senior in rank,” construed.—An officer in one branch of the service can not with accuracy be called senior in rank to an officer of another branch. A major in the Army is no more senior to a captain of marines than he is to a captain in the Navy. The term in its military sense is applicable only to relatively higher grades of the same service. Its use otherwise would create confusion. (10 Op. Atty. Gen., 116. See also sec. 1623, R. S.)

Officers having same date of “appointment.”—Section 1219, Revised Statutes, provides that “in fixing relative rank between officers of the same grade and date of appointment and commission, the time each may have actually served as a commissioned officer of the United States, whether continuously or at different periods, shall be taken into account,” etc. Held, that the word “appointment” as used in this section comprehends only the appointment of an officer on his original entry into the regular service, and does not include his appointment on promotion thereafter made. (23 Op. Atty. Gen., 155, affirming 17 Op. Atty. Gen., 196, and 17 Op. Atty. Gen., 362. See also cases noted below, and note to sec. 1458, R. S.)

Officers having same date of rank.—Under the act of March 3, 1899 (30 Stat., 1004), reorganizing the personnel of the Navy and Marine Corps, Charles H. Lauchheimer, a captain of the line in the Marine Corps, was upon the date of the passage of that act, appointed and commissioned, by selection, as adjutant and inspector with the rank of major, and on March 11 following, took the oath of office. On March 23, 1899, Charles H. McCawley, a captain and assistant quartermaster in the Marine Corps, was promoted by seniority to assistant quartermaster with the rank of major, to date from March 3, and took the oath of office on March 30. The question of the relative rank of these officers being presented for determination, held: (1) That the advancement of an officer to a higher grade, one to which he could not then succeed in due course by seniority, while called an appointment, is, in fact and effect, a promotion. Maj. Lauchheimer’s advancement should, therefore, be taken as a promotion, and there is nothing in this regard to affect the relative rank of the two officers. (2) That as Maj. Lauchheimer’s commission and induction into office each antedate by several days that of Maj. McCawley’s, during that period the former ranked the latter. This rank was not lost nor a superior one conferred by the subsequent promotion of Maj. McCawley. (3) As both officers were in fact promoted, the earlier commission and rank of Maj. Lauchheimer entitle him to precedence in rank. (4) The Secretary of the Navy, by virtue of his general power under the



President to make rules and regulations for the government of the Navy, may determine with the force and effect of law the relative rank of officers of the Marine Corps. Usually this is better done by general rules than by decisions in particular cases, but it may be done either way. (23 Op. Atty. Gen., 155.)

Section 1219, Revised Statutes, has no application to the cases of Lauchheimer and McCawley, except as it recognizes the general rule which has regard for previous service. According to the preference given throughout the statutes and by the rules and practice of the War and Navy Departments to seniority of service, the longer service of Maj. Lauchheimer would, other things being equal, give him precedence in rank. (23 Op. Atty. Gen., 155.)

**Precedence not disturbed by promotion.**—Until May 17, 1877, Col. Reid outranked Col. Goodloe by seniority in commission. On that date, Col. Goodloe was appointed major and paymaster, and subsequently, on May 2, 1894, Col. Reid was appointed major, adjutant and inspector. Both of these last-named commissions were appointments by selection at the discretion of the appointing power, and were not promotions under the statutes regulating such promotions. Therefore, from May 17, 1877, Col. Goodloe outranked Col. Reid by seniority of commission, and on March 3, 1899, under the act of that date (30 Stat., 1008), both officers were promoted to the rank of colonel. *Held*, that the mere promotion of the two officers does not disturb their preexisting relative rank; that the promotions of March 3, 1899, were not "appointments" within the meaning of section 1219, Revised Statutes; and that therefore Col. Goodloe continues to outrank Col. Reid. (24 Op. Atty. Gen., 74, affirming 17 Op. Atty. Gen., 196 and 362; see note above, under "Officers having same date of appointment.")

**Officers of Marine Corps and officers of Navy.**—By an unwritten law of the Army and Navy, officers of the Army and officers of the Navy take relative rank as respects the two classes according to their respective grades; and if of similar grade, then according to dates of commission. Officers of the Marine Corps, who are in relation to rank on the same footing as officers of similar grades in the Army, take rank and precedence relatively to line officers in the Navy according to grade; and if of similar grade, then according to dates of commission. (25 Op. Atty. Gen., 517.)

There is no law making any distinction as to relative rank and precedence between the officers of the Marine Corps who are and those who are not graduates of the Naval Academy, either as respects themselves or officers of the line of the Navy. (25 Op. Atty. Gen., 517; see also sec. 1483, R. S., and note thereto.)

There is no statutory provision expressly regulating the relative rank and precedence of officers of the Marine Corps and officers of the several staff corps of the Navy; but there are

provisions which, with the long established and settled usage and practice of the Army and Navy, regulate it with the same certainty as if by enactment in terms. (26 Op. Atty. Gen., 16.)

Whatever will be the relative rank and its resulting precedence of an officer of the Army to either line or staff officers of the Navy, that would also be the relative rank as to them of officers of the Marine Corps. (26 Op. Atty. Gen., 16.)

The Secretary of the Navy is without authority to make such a change in article 23 of the Navy Regulations, 1909, as to fix the relative rank of officers of the Marine Corps with officers of the Navy according to length of service, rather than by date of commission. (29 Op. Atty. Gen., 264.)

**Officers of Army, Navy, and Marine Corps.**—Paragraph 3 of article 25 of the Navy Regulations, 1909, may be amended in form so as to read: "When officers of the Army are associated jointly with officers of the Navy or Marine Corps, their corresponding rank shall be determined according to the dates of their respective commissions, when of the same or corresponding grades; and when of different rank, as set forth in the first paragraph of this article." (29 Op. Atty. Gen., 264. Compare secs. 1485 and 1486, R. S., and notes thereto, as to precedence of line and staff officers of the Navy according to length of service.)

**Officers of Marine Corps.**—The relation as to rank which officers of the Marine Corps hold to other officers is prescribed by section 1603, Revised Statutes, and could not be changed by any act of the President. Whatever relation as to rank one Army officer may hold as to another officer, that is the relation which an officer of the Marine Corps of similar grade holds. Accordingly, the Navy Department would not have the authority, with the approval of the President, to amend the Navy Regulations so as to do away with the practice as to relative rank of officers of the Marine Corps and line officers of the Navy, established in accordance with 25 Op. Atty. Gen., 517. (26 Op. Atty. Gen., 16.)

**Date of rank on promotion.**—Officers of the Marine Corps on promotion should ordinarily be given rank from the date of the vacancy to which promoted; in no case, however, will an officer permanently or temporarily promoted be given rank from a date earlier than his date of rank in the lower grade. Vacancies resulting from the President's order of March 26, 1917, increasing the authorized number of enlisted men in the Marine Corps, were created on the date of said order, and vacancies resulting from the temporary increase in the number of enlisted men authorized by the act of May 22, 1917, were created on the date of the act. (File 28687-5:1, Sept. 7, 1917.)

**Sec. 1604. [Brevets.]** Commissions by brevet may be conferred upon commissioned officers of the Marine Corps in the same cases, upon the same conditions, and in the same manner as are or may be provided by law for officers of the Army.—(6 July, 1812, c. 137, s. 4, v. 2, p. 785. 16 April, 1814, c.

58, s. 3, v. 3, p. 124. 16 April, 1818, c. 64, s. 2, v. 3, p. 427. 30 June, 1834, c. 132, s. 9, v. 4, p. 713. 1 Mar., 1869, c. 52, s. 2, v. 15, p. 281. 3 Mar., 1869, c. 124, s. 7, v. 15, p. 318. 15 July, 1870, c. 294, s. 16, v. 16, p. 319.)

Brevet commissions may be conferred by the President, by and with the advice and consent of the Senate, upon commissioned officers of the Army, in time of war, for distinguished conduct and public service in presence of the enemy. (Sec. 1209, R. S.)

Brevet commissions shall bear date from the particular action or service for which the officers were brevetted. (Sec. 1210, R. S.)

Brevet rank shall be considered strictly honorary, and shall confer no privilege of precedence or command not already provided for in the statutes which embody the rules and articles governing the Army of the United States. (Act Feb. 27, 1890, section 3, 26 Stat., 14.)

No officer shall be entitled on account of having been brevetted to wear while on duty any uniform other than that of his actual rank; and no officer shall be addressed in orders or official communications by any title other than that of his actual rank. (Sec. 1212, R. S.)

Officers may be assigned to duty or command according to their brevet rank, by special assignment of the President; and brevet rank shall not entitle an officer to precedence or command except when so assigned. (Sec. 1211, R. S.)

Officers of the Army shall only be assigned to duty or command according to their brevet rank when actually engaged in hostilities. (Act Mar. 3, 1883, 22 Stat., 457.)

**Rank of brevet major abolished.**—"There is no act of Congress now in force [Apr. 22, 1820] which recognizes any such office as that of brevet major of marines;" the President can not confer that rank under the act of April 16, 1814. (1 Op. Atty. Gen., 352.)

The act of March 3, 1817, fixing the peace establishment of the Marine Corps, not having retained any majors in service, the brevets theretofore conferred were thereby made to cease with the termination of the lineal rank of majors by commission. (1 Op. Atty. Gen., 489.)

"The act of 1814 was predicated on a state of things which no longer exists. We were then at war, and the commissioned rank of major then existed; the design of that act was to augment that corps, and to stimulate it to deeds of arms. We are now at peace; the corps has been reduced and adapted to the state of peace; the grade of major exists no longer, even though it had been conferred by commission, much less when conferred by brevet; and with the grade falls the claim to pay. There is no breach of contract in this." (1 Op. Atty. Gen., 489, 490.)

**Captains brevetted as lieutenant colonels.**—Congress having, by the act of April 16, 1814, authorized the President to confer brevet rank, and having, by the act of March 3, 1817, fixing the peace establishment of the Marine Corps, abolished the rank of

major, *held* that the President is authorized to issue to a captain of the Marine Corps the brevet rank of lieutenant colonel. This will not operate to give the officer an advance of two steps instead of one. In the present organization of the Marine Corps there is but one step from the post of captain to that of lieutenant colonel, the former intermediate step of major having been abolished. (1 Op. Atty. Gen., 578.)

**Questions of duty and command are military questions.**—Under the law allowing officers of the Marine Corps their brevet pay and emoluments when on duty having a command according to their brevet rank, the question when and under what circumstances an officer is properly to be regarded as "on duty, and having a command according to his brevet rank," is a military question, strictly and technically a military question, properly determinable by the Department of the Navy or of War as it may arise in one or the other. Congress not having defined what shall constitute the fact of "having a command according to brevet rank," has left it as a military fact or question to be settled by the military authorities of the Government. (5 Op. Atty. Gen., 513.)

Laws on military subjects seldom fall within the sphere of a lawyer's practice or consideration, and he is consequently without that key of experience in the subject matter which is so essential to their just construction. The origin and nature of brevet rank—for example, the cases in which it is conferred, and the effects which it produces—are purely questions of military experience, with regard to which we have no written laws; and all questions in relation to that rank must be, of necessity, beyond the province of the mere jurist. Accordingly, suggested that the President would be much more safe in resting on the opinion of military men upon such a question than upon that of the Attorney General. (1 Op. Atty. Gen., 578, 579.)

**Brevet pay and emoluments.**—Brevet majors of the Marine Corps are entitled to the same pay and emoluments which are allowed to officers of similar grades in the infantry of the Army. (5 Op. Atty. Gen., 513.)

Whatever may have been a different practice, brevet officers of the Marine Corps have always been by law upon the same footing with other officers of the military establishment of the United States in respect to the circumstances which entitle them to pay and emoluments. (U. S. v. Freeman, 3 How., 556.)

Brevet pay and emoluments were given to officers of the Army by an act of July 6, 1812, section 4, and to the Marine Corps by act of April 16, 1814, section 3, which was substantially identical with the Army act. By act of April 16, 1818, it was provided that "the officers of the Army who have brevet commissions shall be entitled to, and receive, the pay and emoluments of their brevet rank



when on duty and having a command according to their brevet rank, and at no other time." *Held*, that said act of 1818, although in terms applicable only to officers of the Army, operated to repeal the enactment of 1814 providing brevet pay for the Marine Corps as well as that of 1812 relating to brevet pay in the Army. (U. S. v. Freeman, 3 How., 556.)

It can not be denied that the Marine Corps is an addition to the military establishment of the United States. It is declared to be so in the act by which it was organized. Though neither that fact nor the words "military establishment" as they are used in the acts of Congress will of themselves authorize the inclusion of officers of the Marine Corps within the words "officers of the Army," nevertheless, considering the subject matter of the act of 1818, the application of the second section of that act to all brevetted officers, and the assimilation of the Marine Corps by the act of 1814 to the Army, giving to its officers brevet commissions and pay in exactly the same way as they were given to the officers of the Army by the act of 1812, *held* that Congress intended by the act of 1818 to place the officers of the Marine Corps and the officers of the Army upon the same footing in respect to brevet pay and emoluments. (U. S. v. Freeman, 3 How., 556.)

The words, "officers of the Army," in the act of 1818, though descriptive of a particular

class, were intended, as shown by their connection with the subject matter of the act, to comprehend all officers of the military establishment of the United States who, when the act was passed, were only under like circumstances entitled to brevet pay and emoluments. (U. S. v. Freeman, 3 How., 556.)

Where a captain in the Marine Corps acts as brevet lieutenant colonel, and is paid as such, he can not, during the same period, receive either the pay or allowances attached to the duties of captain. (U. S. v. Freeman, 25 Fed. Cas. No. 15163.)

Brevet officers of the Marine Corps were included under the Army Regulations of March 1, 1825, and also in the regulation upon the subject of brevet pay sanctioned by the President December 1, 1836, and could claim brevet pay and emoluments under the Army Regulations of 1841. This right to brevet pay results from the Marine Corps having been subjected by the act of 1798 and by other acts of Congress to the same rules and articles of war "as are prescribed for the military establishment of the United States," and from the exception in section 2 of the act of June 30, 1834, taking them out of the regulations which might be established for the Navy, when detached for service with the Army by order of the President of the United States. (U. S. v. Freeman, 3 How., 556.)

**Sec. 1605. [Advancement in number.]** Any officer of the Marine Corps may, by and with the advice and consent of the Senate, be advanced not exceeding thirty numbers in rank, for eminent and conspicuous conduct in battle or extraordinary heroism.—(21 Apr., 1864, c. 63, s. 6, v. 13, p. 54. 24 Jan., 1865, c. 19, s. 1, v. 13, p. 424.)

By sections 1506-1508, Revised Statutes, provision is made for the Navy similar to sections 1605-1607, relating to the Marine Corps; by acts of March 3, 1901 (31 Stat., 1108), and June 16, 1906 (34 Stat., 296), officers so advanced are to be carried as additional to the numbers of each grade in which they serve; by act of August 29, 1916 (39 Stat., 608), the promotion to the grade of brigadier general of any officer

carried as an additional number in the grade or with the rank of colonel shall be held to fill a vacancy in the grade of brigadier general.

See note to section 1597, Revised Statutes; and see, generally, note to section 1506, Revised Statutes.

See notes to section 1407, Revised Statutes, as to medals of honor, etc.

**Sec. 1606. [Promotion when grade is full.]** Any officer who is nominated to a higher grade by the provisions of the preceding section shall be promoted, notwithstanding the number of said grade may be full, but no further promotion shall take place in that grade, except for like cause, until the number is reduced to that provided by law.—(24 Jan., 1865, c. 19, s. 2, v. 13, p. 424.)

See section 1605, Revised Statutes, and references thereunder.

**Sec. 1607. [Promotion for gallantry.]** Any officer of the Marine Corps may, by and with the advice and consent of the Senate, be advanced one grade, if, upon recommendation of the President by name, he receives the thanks of Congress for highly distinguished conduct in conflict with the enemy, or for extraordinary heroism in the line of his profession.—(16 July, 1862, c. 183, s. 9, v. 12, p. 584. 24 Jan., 1865, c. 19, s. 2, v. 13, p. 424.)

See section 1605, Revised Statutes, and references thereunder.

## Sec. 1608. [Enlistment. Superseded.]

This section provided as follows:

"SEC. 1608. Enlistments into the Marine Corps shall be for a period not less than five years."—(11 July, 1870, Res. 106, v. 16, p. 387.)

It was superseded by act of March 3, 1901 (31 Stat., 1132), which provided "that hereafter the enlistments into the Marine Corps shall be for a period of not less than four years."

By act of June 4, 1920, section 7 (41 Stat., 836), it is provided that hereafter enlistments in the Navy or Marine Corps may be for terms of two, three, or four years, and all laws now applicable to four years enlistments shall apply, under such regulations as may be prescribed by the Secretary of the Navy to enlistments for a shorter period, with proportionate benefits upon discharge and reenlistment.

**Absence to be made good.**—By act of August 29, 1916 (39 Stat., 580), as amended by act of July 1, 1918 (40 Stat., 717), it was provided that no enlistment in the Navy or Marine Corps shall be regarded as complete until the enlisted man has made good all time lost on account of injury, sickness, or disease resulting from his own misconduct. (See note to sec. 1624 R. S., art. 8.)

**Detention after expiration of enlistment.**—See note to section 1422, Revised Statutes.

**Transfers from the Hospital Corps to the Marine Corps,** and transfers of the marines to the Hospital Corps, are authorized by act of August 29, 1916 (39 Stat., 572). See note to section 1421, Revised Statutes.

**Transfers from Army to Marine Corps.**—See section 1421, Revised Statutes.

**Minority enlistments** in the Marine Corps are governed by section 1418, Revised Statutes, relating to the Navy. (See note to that section, under "Minority enlistments in Marine Corps governed by Navy laws," and note to sec. 761, R. S., under "Disposition of party claiming discharge from Marine Corps on ground of fraudulent enlistment.")

**Qualifications for enlistment** in the Navy are prescribed by sections 1418-1420, Revised Statutes, which apply to the Marine Corps, except as otherwise specifically provided. (See notes to said sections.)

**Extension of enlistments in the Marine Corps.**—See note to section 1418, Revised Statutes. See also act of April 25, 1917 (40 Stat., 38), expressly authorizing extension of minority enlistments in the Marine Corps.

**Naturalization of aliens** serving in the Marine Corps is provided for by act of May 9, 1918 (40 Stat., 542). Naturalization of aliens serving in the Marine Corps Reserve is authorized by act of Mar 22, 1917 (40 Stat., 84), made applicable to the Marine Corps Reserve by act of August 29, 1916 (39 Stat., 593).

As to enlistment of aliens in the Marine Corps, see note to section 1420, Revised Statutes, under "Aliens not to be enlisted."

**For decisions relating to enlistments** in the Navy and Marine Corps, see generally notes to sections 1418-1422, Revised Statutes.

**Advertising for recruits.**—By act of July 1, 1918 (40 Stat., 736), under "Transportation and recruiting, Marine Corps," it

was provided "that hereafter authority is hereby granted to employ the services of advertising agencies in advertising for recruits under such terms and conditions as are most advantageous to the Government."

**Enlistment of women.**—By act of July 11, 1919 (41 Stat., 152), it was provided "that the words 'enlisted men,' as contained in prior appropriation Acts, shall not be construed to deprive women, enlisted or enrolled in the naval service, of the pay, allowances, gratuities, and other benefits granted by law to the enlisted personnel of the Navy and Marine Corps."

**Status of applicants for enlistment.**—See note to section 1418, Revised Statutes, under "When enlistment complete"; see also note to section 1609, Revised Statutes.

**Discharge prior to expiration of enlistment.**—The act of March 3, 1809, directed enlistments in the Marine Corps to be for five years, unless sooner discharged; but did not provide by whom such discharges should be granted. *Held*, that the commandant of the Marine Corps can not legally grant discharges to marines before the expiration of their term of enlistment; but that such discharges can only be granted by the President of the United States or in conformity to such regulations as he may think proper to prescribe. (2 Op. Atty. Gen., 353.)

The authority to rescind a contract between the United States and the individual, which is the effect of a discharge from the Marine Corps prior to expiration of enlistment, is a power which can exist only by virtue of an express grant. Under the Army law (held applicable in this case to the Marine Corps) the major general commanding the Army of the United States can not grant a discharge; accordingly *held* that it is not competent for the commandant of the Marine Corps to grant discharges to marines before the expiration of their enlistment, and that, until Congress shall otherwise provide, such discharges can only be granted by the President or in conformity to such regulations as he may think proper to prescribe. (2 Op. Atty. Gen., 353.)

A private in the Marine Corps of the United States, discharged from the service as a person of bad character and unfit for service, by order of the Secretary of the Navy through the commandant of the corps, without court-martial or other competent military proceeding, forfeits thereby his retained pay under the provisions of section 1281, Revised Statutes; but he may claim and recover his transportation and subsistence from the place of his discharge to the place of his enlistment, enrollment, or original muster into the service, under the provisions of section 1290, Revised Statutes. (*U. S. v. Kingsley*, 138 U.S., 87, reversing 24 Ct. Cls., 219.)

A discharge issued for unfitness for service and general bad character, without trial by court-martial, can not be considered as "a punishment for an offense" within the meaning of section 1290, Revised Statutes; the question whether such punishment must necessarily be awarded by the judgment of a court-martial, not presented in this case and no



opinion expressed on it. (*U. S. v. Kingsley*, 138 U. S., 87.)

By his enlistment the soldier contracts for honest and faithful service, and the rendition of such service is a condition precedent to his right to recover his retained pay. The fact that he has not rendered such service may be shown as well by his military record as by the judgment of a court-martial. (*U. S. v. Kingsley*, 138 U. S., 87, reversing 24 Ct. Cls., 219.)

**"Reenlistment" construed.**—An enlistment in the Marine Corps after an honorable discharge from the Army or Navy is not a

"reenlistment" within the meaning of section 7 of the act of June 4, 1920 (41 Stat., 836). The term "reenlistment" as therein used signifies an entry into the same branch of the service from which honorably discharged. (27 Comp. Dec., 170.)

A soldier honorably discharged from the Army who enlists in the Marine Corps is entitled, under section 1612, Revised Statutes, to the same additional pay that he would be entitled to if his reenlistment had been in the Army. (*Walton v. U. S.*, 31 Ct. Cls., 196, construing sec. 1234, R. S.)

**Sec. 1609. [Oath.]** The officers and enlisted men of the Marine Corps shall take the same oaths, respectively, which are provided by law for the officers and enlisted men of the Army.—(11 July, 1798, c. 72, s. 4, v. 1, p. 595.)

By act of March 3, 1899, section 25 (30 Stat., 1009), it was provided that "the oath of allegiance now provided for the officers and men of the Army and Marine Corps shall be administered hereafter to the officers and men of the Navy."

The oath of allegiance provided by the Revised Statutes for enlisted men of the Army was contained in section 1342, Revised Statutes, article 2, quoted under section 1418, Revised Statutes.

The oath of allegiance now provided by law for enlisted men of the Army is contained in article 109 of the Articles of War, as embodied in act of June 4, 1920 (41 Stat., 809), as follows: "At the time of his enlistment every soldier shall take the following oath or affirmation: 'I, . . . , do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Rules and Articles of War.' This oath or affirmation may be taken before any officer."

The oath of office prescribed for persons in the military service is set forth in Revised Statutes, section 1757, as amended by act of May 13, 1884, section 2 (23 Stat., 22).

The oath of office to be taken by enlisted men of the Navy and Marine Corps designated as Navy mail clerks or assistant Navy mail clerks is that prescribed for employees of the Postal Service. (See secs. 391 and 392, R. S., and note thereto, for form of this oath.)

**Men drafted into service.**—The Articles of War, requiring every soldier at the time of his enlistment to take an oath of allegiance, apply only to voluntary enlistment; and one certified into the military service under the selective draft act of May 18, 1917 (40 Stat., 76), can not escape liability to military service because he had not taken the required oath. (*Franke v. Murray*, 248 Fed. Rep., 865.)

**Applicants for enlistment.**—Applicants for enlistment who have been accepted provisionally, but have yet to be subjected to the first examination at the recruiting depots and to take the oath before they become a part of the soldiery of the Nation, are not "troops of the United States" (as used in the land-grant acts in relation to transportation for the Government). It is the actual enlistment, the oath of allegiance, that changes the status from a civilian to a soldier. The officers at the recruiting stations are expressly forbidden by Army Regulations to administer this oath. Such applicant is then not even a potential soldier; for he may be rejected on final examination. And it is the actual and not the potential status that must govern. The fact that under the Army Regulations he receives the same rations as an enlisted man, and that he is subject to the same medical attention, does not effect a change of status. And the fact that the transportation is for the purposes of the Government in connection with its military establishment is immaterial. The Army appropriation acts make specific provision for the transportation of "troops" and of "recruits." (*U. S. v. Union Pac. R. Co.*, 249 U. S., 354, 359, affirming 52 Ct. Cls., 226.)

For other cases, see note to section 1418, Revised Statutes, under "When enlistment complete."

**Sec. 1610. [Exemption from arrest.]** Marines shall be exempt, while enlisted in said service, from all personal arrest for debt or contract.—(11 July, 1798, c. 72, s. 5, v. 1, pp. 595, 596. 30 June, 1834, c. 132, s. 3, v. 4, p. 713.)

As to privilege from arrest in civil cases, see note to Constitution, Article I, section 6, clause 1.

As to jurisdiction of civil authorities over persons in the military service, see notes to Constitution, Article I, section 8, clauses

11, 13, and 14; and notes to sections 355, 417, and 753, Revised Statutes.

Officers of the Navy or Marine Corps, finally sentenced by civil authorities to imprisonment in State or Federal penitentiary, may be dropped from the rolls of the Navy or

Marine Corps, and shall be ineligible for reappointment. (Act Apr. 2, 1918, 40 Stat., 501.)

**Exemption limited to marines.**—The proper construction of the act of July 11, 1798, section 5, relating to the Marine Corps, fails to include midshipmen, who are, therefore, not

exempt from arrest. If public policy requires the extension of this privilege to these officers, it is not to be doubted that Congress will so direct in explicit terms whenever their attention may be called to it. (3 Op. Atty. Gen., 119.)

**Sec. 1611. [Companies and detachments.]** The Marine Corps may be formed into as many companies or detachments as the President may direct, with a proper distribution of the commissioned and non-commissioned officers and musicians to each company or detachment.—(11 July, 1798, c. 72, s. 1, v. 1, p. 594.)

By act of August 29, 1916 (39 Stat., 586), it was provided that summary courts-martial may be ordered by the commanding officer of any "brigade, regiment, or separate or detached battalion, or other separate or detached command," etc., for the trial of enlisted men in the naval service; and that when empowered by the Secretary of the Navy, general courts-martial may be convened by the commanding officer of "a brigade or larger force of the naval service on shore beyond the continental limits of the United States"; and in time of war by the commanding officer of "a brigade or larger force of the Navy or Marine Corps on shore not attached to a navy yard or naval station," if so empowered by the Secretary of the Navy.

**Organization into regiments and brigades.**—The organization of the Marine Corps is sui generis, in that there is no provision of law for its formation into regiments or battalions, or the assignment of its officers to any particular command. (Berryman v. U. S., 43 Ct. Cls., 397.)

By order of the Major General Commandant the officers in charge of the marines at Cavite,

P. I., were organized into the first brigade of marines, composed of two regiments of two battalions each. The order of the commandant was presumably made by direction of the President, pursuant to section 1611, Revised Statutes, and the name of regiments given to said bodies of marines did not change their character, but they remained under the generic term of "detachments" contained in section 1611. (Berryman v. U. S., 43 Ct. Cls., 397.)

The act of April 26, 1898, section 7 (30 Stat., 365), provided that "in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised." A lieutenant colonel of the Marine Corps was assigned to the command of a so-called regiment. *Held*, that he was not an officer having a command above that pertaining to his grade, within the act of April 26, 1898, and was not entitled to the pay of a colonel in the Marine Corps. (Berryman v. U. S., 43 Ct. Cls., 397.)

**Sec. 1612. [Pay and allowances.]** The officers of the Marine Corps shall be entitled to receive the same pay and allowances, and the enlisted men shall be entitled to receive the same pay and bounty for re-enlisting, as are or may be provided by or in pursuance of law for the officers and enlisted men of like grades in the infantry of the Army.—(30 June, 1834, c. 132, s. 5, v. 4, p. 713. 5 Aug., 1854, c. 268, s. 1, v. 10, p. 586.)

**General note.**—Many statutory enactments subsequent to the Revised Statutes relate specifically to the pay and allowances of the Marine Corps, and section 1612, Revised Statutes, making the Marine Corps subject to Army laws as to pay and allowances, is modified to the extent that Congress has thus otherwise provided. Such specific enactments relating to the Marine Corps are set out separately below.

By act of May 18, 1920 (41 Stat., 601), temporarily increasing the pay and allowances of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service, it was provided (sec. 13, 41 Stat., 604) that "a special committee, to be composed of five Members of the Senate, to be appointed by the Vice President, and five Members of the House of Representatives, to be appointed

by the Speaker of the House of Representatives, shall make an investigation and report recommendations to their respective Houses not later than the first Monday in January, 1922, relative to the readjustment of the pay and allowances of the commissioned and enlisted personnel of the several services herein mentioned."

#### LAWS RELATING SPECIFICALLY TO MARINE CORPS.

**Sea duty pay.**—By act of March 3, 1915 (38 Stat., 948), it was provided "that the increased compensation as now fixed by law for the Marine Corps for foreign shore service shall hereafter be paid to the officers and enlisted men of that corps while on sea duty, in the same manner and under the same conditions as is provided by the act approved May thirteenth,



nineteen hundred and eight, for officers of the Navy." (See Army laws noted below as to pay for foreign shore service; see note to secs. 1556 and 1571, R. S., as to sea pay allowed officers of the Navy.)

*Shore duty beyond seas.*—See note below, under Army laws applicable to Marine Corps.

*Foreign shore service, warrant officers.*—"That marine gunners and quartermaster clerks of the Marine Corps assigned to foreign shore service shall hereafter be entitled to the same increased compensation and under the same conditions as is now or hereafter allowed by law to commissioned officers of the Marine Corps." (Act Mar. 4, 1917, 39 Stat., 1188.)

*Marines serving as firemen.*—See section 1570, Revised Statutes, as amended by act of March 29, 1918 (40 Stat., 499).

*Marines detained after expiration of enlistment.*—See section 1422, Revised Statutes, and note thereto.

*Navy mail clerks.*—See note to section 1569, Revised Statutes.

By act of May 27, 1908 (35 Stat., 417), additional compensation was authorized for enlisted men of the Navy designated as Navy mail clerks and assistant Navy mail clerks, in amounts to be fixed by the Secretary of the Navy, not exceeding \$500 per annum for mail clerks and \$300 per annum for assistant mail clerks. By act of August 24, 1912, section 11 (37 Stat., 560), this provision was expressly extended to include enlisted men of the Marine Corps so designated. (See also, acts Aug. 24, 1912, 37 Stat., 554; Mar. 4, 1917, 39 Stat., 1188; and July 1, 1918, 40 Stat., 718.)

*Aviation duty.*—Additional pay and allowances for officers and enlisted men of the Navy and Marine Corps detailed for duty involving actual flying in air craft, were authorized by act of March 3, 1915 (38 Stat., 939), as amended by act of August 29, 1916 (39 Stat., 582-586). See note to section 1556, Revised Statutes. Increased "allowances" for aviation duty were prohibited in the cases of "officers, enlisted men, and student flyers of the naval service," by act of July 1, 1918 (40 Stat., 718.)

*Absence from duty.*—By act of August 29, 1916 (39 Stat., 580), as amended by act of July 1, 1918 (40 Stat., 717), it was provided that no officer or enlisted man of the Navy or Marine Corps shall receive pay for any period in excess of one day that he is absent from duty on account of injury, sickness, or disease resulting from his own intemperate use of drugs of alcoholic liquors, or other misconduct.

By act of March 4, 1917 (39 Stat., 1191), it was provided "that hereafter no part of the pay and allowances authorized for enlisted men detailed as clerks and messengers in the office of the Major General Commandant and the several staff offices shall be forfeited when granted furlough for not exceeding thirty days in each calendar year."

*Longevity pay.*—"Hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services." (Act May 18, 1920, sec. 11, 41 Stat., 604.)

See also statutory enactments noted under section 1600, Revised Statutes.

*Allotments of pay* by officers of the Navy and Marine Corps are authorized by act of June 10, 1896 (29 Stat., 361.)

*Employment by contractors* furnishing naval supplies or war material to the Government, was prohibited in cases of officers of the Navy and Marine Corps by act of June 10, 1896 (29 Stat., 361), which provided that no payments were to be made to such officers while so employed.

*Warrant officers and pay clerks.*—By act of August 29, 1916 (39 Stat., 611), it was provided that marine gunners and quartermaster clerks shall "receive the pay, allowances, and privileges of retirement of warrant officers in the Navy." (See note to sec. 1556, R. S., as to pay of warrant officers in the Navy. See also note above, under "Foreign shore service, warrant officers.")

By act of July 1, 1918 (40 Stat., 735), it was provided that pay clerks shall "receive the same pay, allowances, and other benefits now provided by law for clerks for assistant paymasters."

By act of June 24, 1910 (36 Stat., 625), it was provided that clerks to assistant paymasters "shall receive the same pay, allowances, and other benefits as are now or may hereafter be provided for paymasters' clerks of corresponding length of service in the United States Army."

By act of March 3, 1911 (36 Stat., 1044), it was provided that "hereafter the pay and allowances of Army paymasters' clerks shall be the same as provided by law for Navy paymasters' clerks on shore duty, and they shall also be entitled to the same right of retirement with the same retired pay as is now allowed Navy paymasters' clerks."

By act of June 24, 1910 (36 Stat., 606), relating to the Navy, it was provided that "all paymasters' clerks shall, while holding appointment in accordance with law, receive the same pay and allowances and have the same rights of retirement as warrant officers of like length of service in the Navy." (As to pay and allowances of warrant officers, see notes to secs. 1556, 1558, and 1578, Revised Statutes.)

By act of August 24, 1912 (37 Stat., 592), it was provided that Army paymaster's clerks shall be known as pay clerks, and shall continue to have the pay, allowances, rights, and privileges now allowed by law.

By act of March 2, 1913 (37 Stat., 708), relating to the Army, appropriations were made for 85 pay clerks, and it was provided "that hereafter no further appointments of pay clerks shall be made." Appropriations for Army pay clerks were continued in annual appropriation acts to and including act of March 4, 1915 (38 Stat., 1068); since which date such appropriations have been discontinued, except for retired pay clerks.

By act of March 3, 1915 (38 Stat., 942), the title "paymaster's clerk" in the Navy was changed to pay clerk, and the grades of acting pay clerk, pay clerk, and chief pay clerk created, with a provision that pay clerks were thereafter to be warranted from acting pay clerks, and that pay clerks and acting pay clerks "shall have the same pay, allowances, and other benefits as are now or may hereafter

be allowed other warrant officers and acting warrant officers, respectively."

By act of June 3, 1916 (39 Stat., 170), it was provided that the Quartermaster Corps in the Army shall consist, among others, of "the pay clerks now in active service, who shall hereafter have the rank, pay, and allowances of a second lieutenant, and the President is hereby authorized to appoint and commission them, by and with the advice and consent of the Senate, second lieutenants in the Quartermaster Corps, United States Army." (See 23 Comp. Dec., 508.)

By act of August 29, 1916 (39 Stat., 625, 626), it was provided that Army field clerks, and field clerks, Quartermaster Corps, "shall receive the same allowances, except retirement, as heretofore allowed by law to pay clerks." By act of June 4, 1920 (41 Stat., 761), further appointments as Army field clerks and field clerks, Quartermaster Corps, were prohibited, and persons serving as such were rendered eligible for appointment as warrant officers in the Army.

*Gunnery sergeants.*—By act of August 22, 1912 (37 Stat., 351), "gunnery sergeants of the Marine Corps shall hereafter receive the same pay, and be entitled to the allowances, rank, continuous-service pay, and retired pay of a first sergeant in said corps." (See also note to sec. 1596, R. S.)

*Drum major.*—"The pay of the drum major shall be the same as that now established, or that may be hereafter established, for first sergeants in the Marine Corps of the same length of service." (Act July 26, 1894, 28 Stat., 138.)

*Cooks.*—"That hereafter privates regularly detailed and serving as cooks shall receive, in addition to the pay otherwise allowed by law, the following: First-class cooks, ten dollars per month; second-class cooks, eight dollars; third-class cooks, seven dollars; and fourth-class cooks, five dollars." (Act Mar. 2, 1907, 34 Stat., 1200.)

*Forage.*—By act of March 3, 1885 (23 Stat., 432), under "Marine Corps," appropriations were made for forage, with the proviso "that no commutation for forage shall be paid."

*Extra-duty pay.*—"That hereafter extra-duty pay will not be allowed to enlisted men of the Marine Corps except when they are regularly detailed thereon by a written order of the commandant of the corps." (Act Mar. 3, 1909, 35 Stat., 776. See Army law noted below as to extra-duty pay.)

*Duty in Haiti.*—Officers and enlisted men of the Marine Corps detailed for duty to assist the Republic of Haiti shall be entitled to the same credit for such service, for longevity, retirement, foreign service, pay, and for all other purposes, that they would receive if they were serving with the Marine Corps. (Act June 12, 1916, sec. 5, 39 Stat., 224.)

*Gun pointers.*—During the period of the present war any enlisted man of the Marine Corps qualified and detailed as a gun pointer or gun captain shall be entitled to the additional pay provided for such qualification and detail, while temporarily absent by proper authority or while performing other temporary duty. (Act Mar. 29, 1918, 40 Stat., 500. See below, under "Additional pay for special qualifica-

tions, details, etc.," and see decisions of Comptroller of the Treasury noted below.)

*Enlistments changed to duration of war.*—Any man who enlisted in the Marine Corps after February 13, 1917, and before November 11, 1918, for a term of four years, and who, upon his own application, was regarded as having enlisted for the duration of the war and honorably discharged, and within four months thereafter reenlisted in the Marine Corps for a period of four years, "shall be entitled to receive the benefits and gratuity pay provided by existing law for reenlistments;" or, if otherwise entitled to an honorable discharge, may extend his enlistment for a period of one, two, three, or four years, and shall be entitled to the same rights, privileges, pay and allowances in all respects as now provided by law for men who extend enlistments on completion of terms of enlistment, except as to gratuity pay; and as to such gratuity pay he shall be entitled to an allowance of one month's pay for extension of one year, two months' pay for extension of two years, and three months' pay for extension of three years. (Act July 11, 1919, 41 Stat., 139, 140.)

*Reenlistment after reserve service.*—Enlisted men of the Marine Corps discharged to accept appointments as commissioned or warrant officers in the Marine Corps Reserve, who reenlist in the Marine Corps within three months after termination of their reserve service, shall be restored to the grade or rank held by them before being discharged to accept such appointments, and their service in the Regular Marine Corps including their active service in the Marine Corps Reserve shall be regarded as continuous for purposes of continuous service pay. (Act July 11, 1919, 41 Stat., 141.)

*Warrant officers and pay clerks having reserve service.*—Any warrant officer or pay clerk in the Marine Corps who has accepted or may hereafter accept appointment as a commissioned officer in the Marine Corps Reserve shall be entitled, upon termination of his appointment as a commissioned officer, to revert to his former status as a warrant officer or pay clerk in the Marine Corps, and to count all active service for purposes of longevity pay and retirement. (Act July 11, 1919, 41 Stat., 141.)

*Special allowances for maintenance.*—By act of June 4, 1920 (41 Stat., 813), under "Pay, Miscellaneous," it was provided that "this appropriation and the appropriation 'Pay, Marine Corps,' shall be available for special allowances for maintenance to officers and enlisted men of the Navy and Marine Corps serving under unusual conditions."

*Retired enlisted men.*—See note to Section 1622, Revised Statutes.

*Marine Band.*—See note to section 1613, Revised Statutes.

*Additional pay for special qualifications, details, etc.*—The naval appropriation act June 4, 1920 (41 Stat., 829), under "Pay, Marine Corps," makes appropriation for "additional compensation for enlisted men of the Marine Corps qualified as expert riflemen, sharpshooters, marksmen, or regularly detailed as gun captains, gun pointers, mess sergeants, cooks, messmen, signalmen, or holding good-



conduct medals, pins, or bars, including interest on deposits by enlisted men, post-exchange debts of deserters, under such rules as the Secretary of the Navy may prescribe, and the authorized travel allowance of discharged enlisted men, and for prizes for excellence in gunnery exercise and target practice, and for pay of enlisted men designated as Navy mail clerks and assistant Navy mail clerks, both afloat and ashore." (See Army laws, and decisions of Comptroller of the Treasury, noted below, and see notes above, under "Cooks" and "Gun pointers.")

*Medals of honor, etc.*—See note to section 1407, Revised Statutes, and see 24 Op. Atty. Gen., 579, noted thereunder. See also act of February 4, 1919 (40 Stat., 1056), and 26 Comp. Dec., 464.

*Commutation of fuel, enlisted men.*—By act of April 27, 1904 (33 Stat., 407), it was provided that "the quartermaster of the Marine Corps be, and is hereby, authorized and directed to pay from appropriations fuel, Marine Corps, to enlisted men of the Marine Corps employed as clerks and messengers in the office of the commandant and in the offices of the staff officers of the Marine Corps commutation of fuel, at nine dollars each per month for clerks and eight dollars each per month for messengers, from and after January twenty-second, nineteen hundred and four, when, by a decision of the Comptroller of the Treasury, enlisted men so employed were denied the right to said commutation in said amounts."

*Commutation of quarters, enlisted men.*—By act of June 4, 1920 (41 Stat., 832), appropriation was made for "commutation of quarters for enlisted men on recruiting duty, for officers and enlisted men serving with troops where there are no public quarters belonging to the Government, and where there are not sufficient quarters possessed by the United States to accommodate them, for enlisted men employed as clerks and messengers in the offices of the commandant, adjutant and inspector, paymaster, and quartermaster, and the offices of the assistant adjutant and inspectors, assistant paymasters, assistant quartermasters, at \$21 each per month, and for enlisted men employed as messengers in said offices, at \$10 each per month."

*Bounty for reenlisting.*—By act of June 4, 1920, section 7 (41 Stat., 836), authorizing short-term enlistments in the Marine Corps, it was provided that "all laws now applicable to four-year enlistments shall apply, under such regulations as may be prescribed by the Secretary of the Navy, to enlistments for a shorter period with proportionate benefits upon discharge and reenlistment: *Provided*, That hereafter the Secretary of the Navy is authorized, in his discretion, to establish such grades and ratings as may be necessary for the proper administration of the enlisted personnel of the Navy and Marine Corps." (See 27 Comp. Dec., 101, noted below, as to repeal in part of sec. 1612.)

*Mileage, travel without troops.*—By act of June 10, 1896 (29 Stat., 376), it was provided that "hereafter officers of the Marine Corps traveling under orders without troops shall be allowed the same mileage as is now allowed officers of the Navy traveling without troops."

(See note to sec. 1566, R. S. And see decisions of Comptroller of the Treasury, noted below.)

*Repeated travel.*—"Hereafter in cases where orders are given to officers of the Navy or Marine Corps for travel to be performed repeatedly between two or more places in such vicinity as in the discretion of the Secretary of the Navy is appropriate, he may direct that actual and necessary expenses only be allowed." (Act July 1, 1902, 32 Stat., 663. See note to sec. 1566, R. S.)

*Transportation furnished.*—"Hereafter no mileage shall be paid to any officer where Government transportation is furnished such officer." (Act June 30, 1914, 38 Stat., 410, under "Pay, Marine Corps.")

*Furlough certificates.*—The Secretary of the Navy is authorized to issue to wounded and otherwise disabled sailors or marines, under treatment in any hospital, who are given furloughs at any time, a furlough certificate which shall entitle such sailor or marine to purchase a ticket to and from his home during the period of furlough at the rate of one cent per mile. (Act June 5, 1920, 41 Stat., 975, 976.)

*Transportation of families.*—By act of May 18, 1920, section 12 (41 Stat., 604), transportation in kind was authorized for the wife and dependent child or children of any commissioned officer, noncommissioned officer of the grade of color sergeant and above, including any noncommissioned officer of the Marine Corps of corresponding grade, or warrant officer, upon the permanent change of station by such officer or noncommissioned officer. (By Army act of June 4, 1920, sec. 4, 41 Stat., 761, it was provided that this transportation privilege "shall apply only to enlisted men of the first three grades.")

*Reimbursement for lost clothing, etc.*—By act of October 6, 1917 (40 Stat., 389), provision was made for reimbursement in money by the paymaster of the Marine Corps, or reimbursement in kind by the quartermaster of the Marine Corps to persons in the Marine Corps for property lost or destroyed in the service. (See sec. 290, R. S.)

*Quarters for dependents.*—By act of December 24, 1919 (41 Stat., 384), it was provided that officers of the Marine Corps shall be entitled, during the present emergency, to all the rights and benefits under the act of April 16, 1918 (40 Stat., 530), authorizing quarters in kind for dependents of officers of the Army during absence in the field, or the authorized commutation therefor, including allowance of heat and light. By act of May 18, 1920, section 2 (41 Stat., 602), said rights and benefits were continued until June 30, 1922, and it was provided "That such rights and benefits as are prescribed for officers shall apply equally for enlisted men now entitled by regulations to quarters or to commutation therefor."

*When quarters not available.*—By act of July 1, 1918 (40 Stat., 718), it was provided that "hereafter the Secretary of the Navy may determine where and when there are no public quarters available for persons in the Navy and Marine Corps, or serving therewith, within the meaning of any Act or parts of Acts relating to the assignment of quarters or commutation therefor."

*Travel allowance on discharge.*—By act of February 28, 1919, section 3 (40 Stat., 1202, 1203), it was provided that any enlisted man honorably discharged from the Marine Corps shall receive 5 cents per mile from place of discharge to his actual bona fide home or residence, or original muster into the service, at his option, with a proviso that for sea travel on discharge transportation and subsistence only shall be furnished. (See note to sec. 1569, R. S.) By act of June 4, 1920, section 6 (41 Stat., 836), said travel allowance was made payable to any enlisted man thereafter discharged from any branch of the naval service for the purpose of reenlisting in the Navy or Marine Corps, or who should thereafter extend his enlistment therein.

*Deposits of savings.*—By act of June 29, 1906 (34 Stat., 579), enlisted men of the Marine Corps were authorized to deposit their savings, and receive interest thereon from the Government, in the same manner and under the same conditions as provided for enlisted men of the Navy, except that sums so deposited shall pass to the credit of the appropriation for pay of the Marine Corps. (See note to sec. 1569, R. S.)

*Death gratuity.*—Payment of an amount equal to six months' pay to the widow, child or children, or other designated dependent relative of any officer or enlisted man of the Regular Marine Corps dying from wounds or disease not the result of his own misconduct, was authorized by act of June 4, 1920 (41 Stat., 824).

*Sale of uniforms at cost.*—By act of July 11, 1919 (41 Stat., 154), under "Clothing, Marine Corps," it was provided that "hereafter this appropriation shall be available for the purchase of uniforms, accoutrements, and equipment for sale at cost price to officers under such regulations as the Secretary of the Navy may prescribe."

*Sale of subsistence stores, etc.*—By act of August 29, 1916 (39 Stat., 613), under "Provisions, Marine Corps," it was provided: "That hereafter so much of this appropriation as may be necessary may be applied for the purchase, for sale to officers, enlisted men, and civilian employees, of such articles of subsistence stores as may from time to time be designated and under such regulations as may be prescribed by the Secretary of the Navy." (The same provision was contained in identical language in appropriation acts for prior years. It was omitted from the act of March 4, 1917, and has not since appeared, its omission being for the reason that it was regarded as permanent legislation as it already existed. (See Hearings before Committee on Naval Affairs, House of Representatives, 64th Cong., 2d sess., p. 365, with reference to "Provisions, Marine Corps"; see also act Mar. 4, 1913, 37 Stat., 909, and note thereto.)

Honorably discharged officers and enlisted men of the Navy or Marine Corps, while under medical treatment by public health service, may be permitted to purchase subsistence stores and articles of other authorized supplies, except articles of uniform, from the Army, Navy, and Marine Corps, at the same price as charged the officers and enlisted men of the Army, Navy, and Marine Corps. (Act June 5, 1920, 41 Stat., 976.)

Subsistence supplies of the Army may be sold to officers and enlisted men of the Navy and Marine Corps at same prices charged officers and enlisted men of the Army. (Act Aug. 29, 1916, 39 Stat., 630, which also provided that the officers and enlisted men of the Army shall be permitted to purchase subsistence supplies from the Navy and Marine Corps at the same price as is charged officers and enlisted men of the Navy and Marine Corps.)

Articles of serviceable quartermaster property may be sold by the Quartermaster General of the Army to officers of the Navy and Marine Corps, for their use in the public service, in the same manner as these articles are now sold to officers of the Army. (Act Mar. 4, 1915, 38 Stat., 1079.)

*Temporary increases in pay of Marine Corps.*—See act May 18, 1920 (41 Stat., 601), noted below under "Army laws applicable to Marine Corps."

#### ARMY LAWS APPLICABLE TO MARINE CORPS.

*Pay of officers.*—By act May 11, 1908 (35 Stat., 108), it was provided "that hereafter the annual pay of officers of the Army of the several grades herein mentioned shall be as follows: Major-general, eight thousand dollars; brigadier-general, six thousand dollars; colonel, four thousand dollars; lieutenant-colonel, three thousand five hundred dollars; major, three thousand dollars; captain, two thousand four hundred dollars; first lieutenant, two thousand dollars; second lieutenant, one thousand seven hundred dollars."

*Mounted pay.*—"Hereafter the United States shall furnish mounts and horse equipments for all officers of the Army below the grade of major required to be mounted, but in case any officer below the grade of major required to be mounted provides himself with suitable mounts at his own expense, he shall receive an addition to his pay of one hundred and fifty dollars per annum if he provides one mount, and two hundred dollars per annum if he provides two mounts." (Act May 11, 1908, 35 Stat., 108.)

See note above, under "Forage," for law relating to commutation of forage for Marine officers.

*Longevity pay of officers.*—"There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service." (Sec. 1262, R. S.)

"That from and after the first day of July, eighteen hundred and eighty-two, the ten per centum increase for length of service allowed to certain officers by section twelve hundred and sixty-two of the Revised Statutes shall be computed on the yearly pay of the grade fixed by sections twelve hundred and sixty-one and twelve hundred and seventy-four of the Revised Statutes." (Act June 30, 1882, 22 Stat. 118. See decisions of Supreme Court noted below as to longevity pay.)

"The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law." (Sec. 1263, R. S.)



"In no case shall the pay of a colonel exceed five thousand dollars a year; the pay of a lieutenant-colonel exceed four thousand five hundred dollars a year, or the pay of a major exceed four thousand dollars a year." (Sec. 1267, R. S., as reenacted by act May 11, 1908, 35 Stat., 108. But see act May 18, 1920, 41 Stat., 601, noted below, temporarily increasing pay of Army and Marine officers.)

"In determining relative rank and increase of pay for length of service, \* \* \* active duty performed while under appointment from the United States Government, whether in the Regular, provisional, or temporary forces, shall be credited to the same extent as service under a Regular Army commission." (Act June 4, 1920, sec. 51, 41 Stat., 785, amending Act June 3, 1916, sec. 127, 39 Stat., 217. See also note to sec. 1600, R. S.)

*Pay not reduced.*—"That nothing herein contained shall be construed so as to reduce the pay or allowances now authorized by law for any officer or enlisted man of the Army." (Act May 11, 1908, 35 Stat., 110.)

*Aids to general officers.*—"The officers of the Army shall be entitled to the pay herein stated after their respective designations: \* \* \* Aid to major general: two hundred dollars a year, in addition to pay of his rank. Aid to brigadier general: one hundred and fifty dollars a year, in addition to pay of his rank." (Sec. 1261, R. S.)

See note to section 1556, Revised Statutes, as to additional pay allowed aids in the Navy.

*Foreign shore service.*—See note above, under "Laws relating specifically to Marine Corps."

"Officers and enlisted men of the Marine Corps, who have been detailed, or may hereafter be detailed, for shore duty in Alaska, the Philippine Islands, Guam, or elsewhere beyond the continental limits of the United States, shall be considered as having been detailed for 'shore duty beyond seas,' and shall receive pay accordingly, with such additional pay as may be provided by law for service in island possessions of the United States." (Act Mar. 3, 1901, 31 Stat., 1108.)

"That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto." (Act June 30, 1902, 32 Stat., 512.)

"That increase of pay for service beyond the limits of the States comprising the Union, and the territories of the United States contiguous thereto, shall be as now provided by law." (Act May 11, 1908, 35 Stat., 110.)

"That hereafter the laws allowing increases of pay to officers and enlisted men for foreign service shall not apply to service in the Canal Zone, Panama, or Hawaii, or Porto Rico." (Act Aug. 24, 1912, 37 Stat., 576.)

Officers and enlisted men who may hereafter serve on Army transports in the Philippine

Archipelago, under the control and orders of the commanding general, Philippine Division, shall be entitled to receive the same rate of pay as is provided by law for officers and enlisted men serving at shore stations beyond the limits of the United States. (Act May 11, 1908, 35 Stat., 114.)

*Pay during absence.*—"Officers when absent on account of sickness or wounds, or lawfully absent from duty and waiting orders, shall receive full pay; when absent with leave, for other causes, full pay during such absence not exceeding in the aggregate thirty days in one year, and half-pay during such absence exceeding thirty days in one year. When absent without leave, they shall forfeit all pay during such absence, unless the absence is excused as unavoidable." (Sec. 1265, R. S.)

"All officers on duty shall be allowed, in the discretion of the Secretary of War, sixty days' leave of absence without deduction of pay or allowance: *Provided*, That the same be taken once in two years: *And provided further*, That the leave of absence may be extended to three months, if taken once only in three years, or four months if taken only once in four years." (Act July 29, 1876, 19 Stat., 102, amending act May 8, 1874, 18 Stat., 43.)

Leaves of absence which may be granted officers of the Regular or Volunteer Army serving in the Territory of Alaska or without the limits of the United States, for the purpose of returning thereto, shall be regarded as taking effect on the dates such officers reach the United States, and as terminating on the respective dates of their departure from the United States in returning to their commands. (Act Mar. 2, 1901, 31 Stat., 902.)

"Leaves to be absent from the Philippine Islands, other than to return to the United States, which may be granted officers of the Army serving in said islands and sailing from Manila, shall be regarded as taking effect on the date such officers reach Manila, and as terminating on the dates of their departure from Manila, in returning to their stations." (Act Mar. 2, 1907, 34 Stat., 1171.)

"Officers appointed to the Regular Army from the volunteer service, whose service has been continuous, shall, in the computation of leaves of absence after their appointment in the Regular Army, be entitled to the leave credits which accrued to them as volunteer officers where such leave credits were not availed of during their volunteer service." (Act June 30, 1902, 32 Stat., 508.)

Absence resulting from misconduct: See laws noted above, under "Laws relating specifically to Marine Corps."

*Temporary increases in pay of officers.*—By act of May 18, 1920 (41 Stat., 601-605), the pay of officers of the Army and Marine Corps was increased, as set forth below, commencing January 1, 1920, and remaining effective until June 30, 1922; such annual increases being "in addition to all pay and allowances now allowed by law:" Colonels in the Army and Marine Corps, \$600; lieutenant colonels in the Army and Marine Corps, \$600; majors in the Army and Marine Corps, \$840; captains in the Army and Marine Corps, \$720; first lieutenants in the

Army and Marine Corps, \$600; second lieutenants in the Army and Marine Corps, \$420.

*Pay of enlisted men.*—General rates of pay for enlisted men of the Army were prescribed by act of May 11, 1908 (35 Stat., 109). Increases in the pay of enlisted men were made by act of May 18, 1917, section 10 (40 Stat., 82), to continue "until the termination of the emergency." These increases were "continued in force and effect from and after the date and approval of this Act," by act approved July 11, 1919 (41 Stat., 110).

By act of May 18, 1920 (41 Stat., 601-605), it was provided that, "commencing January 1, 1920, the pay of all enlisted men of the Army and Marine Corps and of members of the female Nurse Corps of the Army and Navy is hereby increased 20 per centum: *Provided*, That such increase shall not apply to enlisted men whose initial pay, if it has already been permanently increased since April 6, 1917, is now less than \$33 per month." Such increases were to remain effective until June 30, 1922, unless sooner amended or repealed, but were to "be the rates of pay during the current enlistment of all men in active service on the date of the approval of this Act, and for those who enlist, reenlist, or extend their enlistments prior to July 1, 1922, for the term of such enlistment, reenlistment, or extended enlistment."

By act of June 4, 1920, section 4 (41 Stat., 761), new rates of base pay were prescribed for enlisted men, as set forth below, and it was provided that the temporary increase of pay for enlisted men of the Army authorized by act of May 18, 1920, above quoted, "shall be computed upon the base pay provided for in this section, and shall apply only to enlisted men of the first five grades," and it was further provided "that nothing in this section shall operate to reduce the pay which any enlisted man is now receiving, during his current enlistment and while he holds his present grade, nor to change the present rate of pay of any enlisted men now on the retired list."

"On and after July 1, 1920, the grades of enlisted men shall be such as the President may from time to time direct, with monthly base pay at the rate of \$74 for the first grade, \$53 for the second grade, \$45 for the third grade, \$45 for the fourth grade, \$37 for the fifth grade, \$35 for the sixth grade, and \$30 for the seventh grade. Of the total authorized number of enlisted men, those in the first grade shall not exceed 0.6 per centum, those in the second grade 1.8 per centum, those in the third grade 2 per centum, those in the fourth grade 9.5 per centum, those in the fifth grade 9.5 per centum, those in the sixth grade 25 per centum." (Act June 4, 1920, sec. 4, 41 Stat., 761, amending act of June 3, 1916, sec. 4, 39 Stat., 167.) See note above, under "Short term enlistments," for law authorizing Secretary of the Navy to establish grades and ratings in Marine Corps.

*Longevity pay of enlisted men.*—"Existing laws providing for continuous service pay are repealed to take effect July 1, 1920, and thereafter enlisted men shall receive an increase of 10 per centum of their base pay for each five years of service in the Army, or service which by existing law is held to be the equivalent of Army service, such increase not to exceed 40

per centum." (Act June 4, 1920, sec. 4, 41 Stat., 761, amending act of June 3, 1916, sec. 4, 39 Stat., 167.)

*Enlistment and reenlistment allowance.*—"Existing laws providing for the payment of three months' pay to certain soldiers upon reenlistment are hereby repealed, and hereafter an enlistment allowance equal to three times the monthly pay of a soldier of the seventh grade shall be paid to every soldier who enlists or reenlists for a period of three years, payment of the enlistment allowance for original enlistment to be deferred until honorable discharge." (Act June 4, 1920, sec. 27, 41 Stat., 775, amending act of June 3, 1916, sec. 27, 39 Stat., 185. See 27 Comp. Dec., 101, noted below, as to repeal in part of sec. 1612.)

*Specialist ratings.*—"Under such regulations as the Secretary of War may prescribe, enlisted men of the sixth and seventh grades may be rated as specialists, and receive extra pay therefor per month, as follows: First class, \$25; second class, \$20; third class, \$15; fourth class, \$12; fifth class, \$8; sixth class, \$3. Of the total authorized number of enlisted men in the sixth and seventh grades, those rated as specialists of the first class shall not exceed 0.7 per centum; of the second class, 1.4 per centum; of the third class, 1.9 per centum; of the fourth class, 4.7 per centum; of the fifth class, 5 per centum; of the sixth class, 15.2 per centum." (Act June 4, 1920, sec. 4, 41 Stat., 761, amending act June 3, 1916, sec. 4, 39 Stat., 167.)

*Extra duty pay.*—"All laws and parts of laws providing for extra duty pay for enlisted men are repealed, to take effect July 1, 1920." (Act June 4, 1920, sec. 4, 41 Stat., 761, amending act June 3, 1916, sec. 4, 39 Stat., 167.)

*Enlistment bounty.*—"No bounty shall be paid to induce any person to enlist in the military service of the United States." (Act May 18, 1917, sec. 3, 40 Stat., 78. See above, as to "Enlistment allowance.")

*Additional pay for marksmen, etc.*—"That hereafter enlisted men now qualified or hereafter qualifying as marksmen shall receive \$2 per month\* as sharpshooters, \$3 per month; as expert riflemen, \$5 per month; as second-class gunners, \$2 per month; as first-class gunners, \$3 per month; as expert first-class gunners, Field Artillery, \$5 per month; as gun pointers, gun commanders, observers second class, chief planters, and chief loaders, \$7 per month; as plotters, observers first class, casemate electricians, and coxswains, \$9 per month, all in addition to their pay, under such regulations as the Secretary of War may prescribe, but no man shall receive at the same time additional pay for more than one of the classifications named in this section." (Act May 11, 1908, 35 Stat., 110, as amended and reenacted by act May 12, 1917, 40 Stat., 45. See decisions of the Comptroller of the Treasury, noted below, as to additional pay for special qualifications, details, etc., in the Marine Corps.)

*Mess sergeants* shall receive six dollars per month in addition to their pay." (Act May 11, 1908, 35 Stat., 109.)

*Quarters and commutation thereof.*—"That at all posts and stations where there are public quarters belonging to the United States officers may be furnished with quarters in kind in such



public quarters, and not elsewhere, by the Quartermaster's Department, assigning to the officers of each grade, respectively, such number of rooms as is stated in the following table, namely: Second lieutenants, two rooms; first lieutenants, three rooms; captains, four rooms; majors, five rooms; lieutenant-colonels, six rooms; colonels, seven rooms; brigadier-generals, eight rooms; major-generals, nine rooms; lieutenant-general, ten rooms: *Provided further*, That at places where there are no public quarters commutation therefor may be paid by the Pay Department to the officer entitled to the same at a rate not exceed twelve dollars per month per room." (Act June 17, 1878, Sec. 9, 20 Stat., 151, as amended and reenacted by act Mar. 2, 1907, 34 Stat., 1168, 1169.)

"That hereafter, at places where there are no public quarters available, commutation for the authorized allowance therefor shall be paid to commissioned officers, acting dental surgeons, veterinarians, members of the Nurse Corps, and pay clerks at the rate of \$12 per room per month; and, when specifically authorized by the Secretary of War, to enlisted men at the rate of \$15 per month, or in lieu thereof he may, in his discretion, rent quarters for the use of said enlisted men when so on duty." (Act Mar. 4, 1915, 38 Stat., 1069.)

"Officers temporarily absent on duty in the field shall not lose their right to quarters or commutation thereof at their permanent station while so temporarily absent." (Act Feb. 27, 1893, 27 Stat., 480. As to quarters for dependents, see laws noted above, under "Laws relating specifically to Marine Corps.")

*Heat and light.*—"The heat and light actually necessary for the authorized allowance of quarters for officers and enlisted men shall be furnished at the expense of the United States under such regulations as the Secretary of War may prescribe." (Act Mar. 2, 1907, 34 Stat., 1167.)

By annual appropriation for the Marine Corps, under "Maintenance, Quartermaster's Department," provision is made "for heat, light, and commutation thereof for the authorized allowance of quarters for officers and enlisted men." (Act June 4, 1920, 41 Stat., 831.)

*Sale of fuel to officers.*—"Hereafter fuel may be furnished to commissioned officers on the active list by the Quartermaster's Department, for the actual use of such officers only, at the rate of three dollars per cord for standard oak wood, or at an equivalent rate for other kinds of fuel, the amount so furnished to each to be limited to the officer's actual personal necessities as certified to by him." (Act June 12, 1906, 34 Stat., 250.)

*Traveling expenses.*—"That for all sea travel actual expenses only shall be paid to officers \* \* \* when traveling on duty under competent orders, with or without troops, and the amount so paid shall not include any shore expenses at port of embarkation or debarkation but for the purpose of determining allowances for all travel under orders, or for officers and enlisted men on discharge, travel in the Philippine Archipelago, the Hawaiian Archipelago, the home waters of the United States, and between the United States and Alaska shall not be regarded as sea travel and shall be paid for

at the rates established by law for land travel within the boundaries of the United States." (Act June 12, 1906, 34 Stat., 247. As to travel with troops, see note above, under "Laws relating specifically to Marine Corps"; and see decisions of Comptroller of the Treasury, noted below.)

"That hereafter officers of the Army and Navy detailed for service in connection with the Lighthouse Establishment shall be paid their actual traveling expenses when traveling under orders on official duty to and from points which can not be conveniently reached by vessel or railroad." (Act Feb. 26, 1907, sec. 6, 34 stat., 997.)

"That hereafter under such regulations and within such maximum rates as may be prescribed by the Secretary of War enlisted men may be reimbursed for actual expenses of travel, including subsistence and lodging, incurred while traveling under competent orders and not embraced in the movement of troops, or they may be paid a flat per diem therefor in lieu of such reimbursement." (Act Apr. 20, 1918, 40 Stat., 534.)

*Travel allowance of discharged officers.*—"That hereafter when an officer shall be discharged from the service, except by way of punishment for an offense, he shall receive for travel allowances from the place of his discharge to the place of his residence at the time of his appointment or to the place of his original muster into the service four cents per mile \* \* \* : *Provided further*, That for sea travel on discharge actual expenses only shall be paid to officers." (Act Mar. 2, 1901, 31 Stat., 903.)

**Prior laws repealed by section 1612.**—The act of June 30, 1834, section 5 (embodied in section 1612, R. S.), repealed the joint resolution of May 25, 1832, respecting the pay and emoluments of the Marine Corps. (U. S. v. Freeman, 3 How., 556.)

It was provided by section one of the act of August 5, 1854 (now embodied in section 1612, R. S.), "that the noncommissioned officers, musicians, and privates of the U. S. Marine Corps shall be entitled to and receive the same pay and bounty for reenlisting as are now or may hereafter be allowed to the noncommissioned officers, musicians, and privates in the Infantry of the Army." It would seem that this provision was intended to supersede all laws then in force relating to the pay of enlisted men of the Marine Corps, and to repeal, among other provisions, that portion of the act of March 2, 1837, as amended, which gave marines one-fourth additional pay for serving beyond their enlistments. But the former practice of allowing marines this increase was continued as though the law did not apply to cases of that kind. This long-continued construction of the law should not be overturned. (5 Comp. Dec., 524; see sec. 1422, R. S., and note thereto.)

**Section 1612 repealed as to bounty for reenlisting.**—So much of section 1612, Revised Statutes, as provides that enlisted men of the Marine Corps shall be entitled to receive the same bounty for reenlisting, usually designated as honorable discharge gratuity, as enlisted men of like grades in the Infantry of the

Army, is repealed and superseded by section 7 of the act of June 4, 1920 (41 Stat., 836), under the provisions of which enlisted men of the Marine Corps reenlisting on or after June 4, 1920, for four years, three years, or two years, are entitled to receive four months, three months, or two months' extra pay, respectively, at the rate of pay they were receiving at the time of honorable discharge. (27 Comp. Dec., 101; see Army law noted above, under "Enlistment and reenlistment allowance," and Marine Corps law noted above under "Bounty for reenlisting." See also sec. 1573, R. S., and note thereto.)

**Section 1612 not repealed as to pay.**—So much of section 1612 as provides that enlisted men of the Marine Corps shall be entitled to receive the same pay as enlisted men of like grades in the Infantry of the Army is still in full force and effect. The pay of enlisted men of the Marine Corps is accordingly that prescribed for the corresponding grades of the Army by the act of June 4, 1920 (41 Stat., 761), plus the 20 per cent increase temporarily authorized by act of May 18, 1920 (41 Stat., 601), plus longevity increase allowed by the Army act of June 4, 1920 (41 Stat., 761), and additional pay for specialists as prescribed in that act. (27 Comp. Dec., 101; see also, 27 Comp. Dec., 170.)

**General effect of section 1612.**—The pay of the Marine Corps is regulated by the laws which govern the pay of the Army, and as changes are made in the Army pay those changes take effect simultaneously in the pay roll of the Marine Corps. This is the legal effect of section 1612. (*Reid v. U. S.*, 18 Ct. Cls., 625.)

Section 1612 was intended to operate upon future as well as existing legislation on pay, allowances, and bounty in the Army. (19 Op. Atty. Gen., 616, 622.)

**Limitations upon operation of section 1612.**—The pay of the Marine Corps is regulated by the law which governs the Army pay, and this is accomplished automatically by the Revised Statutes (sec. 1612). But this does not extend to a case where Congress has made a specific provision for the pay of an officer or grade of officers or enlisted men in the Marine Corps. (*Bristow v. U. S.*, 47 Ct. Cls., 46.)

Where the pay of a new grade of officers is specifically prescribed by statute, the general provision of law that the pay of the Marine Corps shall be the same as the pay of the Army can not be construed so that the specific pay shall be either increased or diminished by reason of a change of Army pay. (*Bristow v. U. S.*, 47 Ct. Cls., 46.)

The fact that section 1612 provides that enlisted men of the Marine Corps shall receive the same pay, grade for grade, as enlisted men of the Army, does not add grades to the Marine Corps to correspond to additional grades added to the Army, especially where the law has made specific provision for the different grades in the Marine Corps and the number of men to be assigned to each. The law adding to the Army a grade of enlisted men unknown to the Marine Corps does not make a similar grade in the Marine Corps. (8 Comp. Dec., 419.)

The Army appropriation act of April 27, 1914 (38 Stat., 353), provided, first, that no

officer or enlisted man absent from duty on account of disease resulting from his own intemperate use of drugs or alcoholic liquors or other misconduct shall receive pay for such period of absence; and second, that an enlistment shall not be regarded as complete until the soldier shall have made good any time in excess of one day lost by unauthorized absences. *Held*, that the first provision is one affecting the pay to be received by officers and enlisted men in the Army, and therefore is made applicable to the Marine Corps by section 1612, Revised Statutes; but that the second provision is one affecting the term of enlistment in the Army, and does not apply to the Marine Corps, as the term of enlistment in the Marine Corps is governed by the laws and regulations of the Navy under section 1621, Revised Statutes. (Comp. Dec., June 3, 1914, 160 S. and A. Memo., 3250. See later law, above quoted, relating specifically to the Marine Corps.)

Enlisted men of the Marine Corps are not entitled to the bounty provided by act of July 29, 1861, section 5 (12 Stat., 280), for the men "enlisted in the regular forces." (11 Op. Atty. Gen., 100, Sept. 29, 1864.)

The act of June 16, 1890, entitled "An Act to prevent desertions from the Army, and for other purposes," provided in section one that there shall be retained from the pay of each enlisted man of the Army the sum of \$4 per month for the first year of his enlistment, which shall not be paid to him until his discharge from the service and shall be forfeited unless he served honestly and faithfully to the date of his discharge; and that sums so retained shall be treated as deposits upon which interest shall be paid. This section of the act was applicable to the Marine Corps by force and effect of section 1612, Revised Statutes. Section 2 of the same act related to the terms of enlistment in the Army, and provided that soldiers discharged prior to expiration of enlistment shall not be entitled to the allowances provided in section 1290, Revised Statutes. This section held not applicable to the Marine Corps [although sec. 1290, Revised Statutes, relating to transportation on discharge, did apply to the Marine Corps]. Section 3 of said act, relating to the arrest of deserters by civil officers, and section 4, authorizing the President to permit enlisted men to purchase their discharge in time of peace, also held inapplicable to the Marine Corps. (19 Op. Atty. Gen., 616.)

Sections 1305-1308, Revised Statutes, which provide for the deposit with any Army paymaster by any enlisted man of the Army of his savings, have no application to the Marine Corps, and the enlisted men of that corps have not the right or privilege of making such deposits with a paymaster of their branch of the service. Special legislation referring only to the Army, like these sections of the Revised Statutes, would not ordinarily be construed to apply to the Marine Corps any more than to the Navy. (25 Op. Atty. Gen., 190. See later law above noted relating to the Marine Corps.)

Section 1216, Revised Statutes, as amended (act Mar. 29, 1892, 27 Stat., 12), which empowers the President to grant a certificate of merit to an enlisted man of the Army who has distinguished himself in the service and has



been recommended therefor by the commanding officer of the regiment or the chief of the corps to which such man belongs, applies only to enlisted men of the Army, and not to members of the Marine Corps who have been similarly commended. Section 1612 is not applicable to the special reward for gallant service, so as to bring the Marine Corps within section 1216. There is a corresponding provision in section 1407, Revised Statutes, which was expressly amended to include enlisted men of the Marine Corps. (24 Op. Atty. Gen., 579. See note to sec. 1407, R. S.)

**Navy laws held applicable to Marine Corps.**—Officers and enlisted men of the Marine Corps are not entitled to reimbursement for loss of personal effects in accordance with laws relating to the Army; but are entitled to such reimbursement under the same circumstances as if they were in the Navy proper. (3 Comp. Dec., 659; *Harlee v. U. S.*, 51 Ct. Cls., 342; compare 4 Comp. Dec., 26. See note to sec. 290, R. S., and see act of Oct. 6, 1917, 40 Stat., 389.)

Section 1563, Revised Statutes, authorizing advances of pay to persons in the naval service, has been invariably construed by the accounting officers as applying to Marine officers. (*Reid v. U. S.*, 18 Ct. Cls., 625.)

**Navy laws held inapplicable to Marine Corps.**—Officers of the Marine Corps have not been considered as "appointed to the Navy," within the meaning of the constructive service provision in the Navy personnel act of March 3, 1899, section 13 (30 Stat., 1007), providing that "all officers, including warrant officers, who have been or may be appointed to the Navy from civil life shall, on the date of appointment, be credited, for computing their pay, with five years' service." (23 Comp. Dec., 508.)

An officer of the Marine Corps attached to a seagoing vessel is not entitled to the ration allowed by Revised Statutes, section 1578, to a naval officer so attached. Such officer of the Marine Corps is by the Revised Statutes (section 1612), subjected to the provisions of Revised Statutes, section 1269, which restricts allowances to officers of the Army. Commissioned officers of the Army are not allowed rations, although they are allowed to noncommissioned officers and enlisted men by section 1293. The only advantage which the commissioned officer has in this respect is the right to purchase rations for his own use at cost when

serving in the field. (*R. S.* 1145). (*Reid v. U. S.*, 18 Ct. Cls., 625.)

Section 1578, authorizing rations, is part of chapter 8 of Title XV, Revised Statutes, entitled "Pay, emoluments, and allowances." The enactments regulating the pay of officers of the Marine Corps are contained in chapter 9 of the same title. Congress, by placing in another chapter the enactments relating to pay of the Marine Corps, indirectly but unmistakably indicated its intent to confine allowances made by chapter 8 to the naval officers whose pay is fixed by the provisions of that chapter, viz, those enumerated in section 1556, Revised Statutes. While section 1563, authorizing advances to persons in the naval service employed on distant stations, is part of chapter 8, and has nevertheless been construed as applying to Marine officers, the language of that section, which does not speak of "officers" but of "persons employed in the naval service," is different from that in section 1578, and it would appear that Congress intended to give the marines the benefit of the legislation in section 1563. (*Reid v. U. S.*, 18 Ct. Cls., 625.)

The act of February 9, 1889 (25 Stat., 657), to provide for the deposit of savings by "seamen of the United States Navy," does not extend to enlisted men of the Marine Corps. (19 Op. Atty. Gen., 616. See note to sec. 1621, R. S.; and see later law noted above, relating to deposits by enlisted men of the Marine Corps.)

**Pay grades, enlisted men.**—See Army law of June 4, 1920, quoted above under "Pay of enlisted men."

By Marine Corps orders No. 18, June 25, 1920, the enlisted grades of the Marine Corps are grouped as follows: First grade, sergeants major and quartermaster sergeants; second grade, first sergeants, gunnery sergeants, drum major; third grade, none; fourth grade, sergeants; fifth grade, corporals; sixth grade, privates first class; seventh grade, drummers, trumpeters, and privates. (27 Comp. Dec., 101.)

The following table shows the rates of pay of the above mentioned grades as fixed by the Army act of June 4, 1920 (41 Stat., 761), plus the 20 per cent increase temporarily authorized by act of May 18, 1920 (41 Stat., 761), and additional pay for specialists as prescribed in that act, as published by the Comptroller of the Treasury (27 Comp. Dec., 35 and 101; see Army laws quoted above):

Grade.	Base pay.	Add 20 per cent increase as of first 5 grades.	Less than five years' service.	After five years' service.	After ten years' service.	After fifteen years' service.	After twenty years' service.
1st.....	\$74. 00	\$14. 80	\$88. 80	\$96. 20	\$103. 60	\$111. 00	<sup>1</sup> \$118. 40
2d.....	53. 00	10. 60	63. 60	68. 90	74. 20	79. 50	<sup>1</sup> 84. 80
3d.....	45. 00	9. 00	54. 00	58. 50	63. 00	67. 50	<sup>1</sup> 72. 00
4th.....	45. 00	9. 00	54. 00	58. 50	63. 00	67. 50	72. 00
5th.....	37. 00	7. 40	44. 40	48. 10	51. 80	55. 50	59. 20
6th.....	35. 00	( <sup>2</sup> )	35. 00	38. 50	42. 00	45. 50	49. 00
7th.....	30. 00	( <sup>2</sup> )	30. 00	33. 00	36. 00	39. 00	42. 00

<sup>1</sup> The enlisted men of the first, second, and third grades are entitled to the additional ration and the transportation privileges under sections 5 and 12 of the act of May 18, 1920.

<sup>2</sup> Enlisted men of sixth and seventh grades may be rated as specialists and receive extra pay therefor per month, as follows: First class, \$25; second class, \$20; third class, \$15; fourth class, \$12; fifth class, \$8; sixth class, \$3.

**Pay not reduced by act June 4, 1920.**—The effect of the saving clause in section 4 of the Army reorganization act of June 4, 1920 (41 Stat., 762), that "nothing in this section shall operate to reduce the pay which any enlisted man is now receiving during his current enlistment and while he holds his present grade," is to grant to enlisted men of the Army and Marine Corps the right to continue to receive the higher rates of pay they were receiving on June 4, 1920, under earlier laws then in force, until the termination or extension of the enlistment in which serving on that date, if they continue in the same grade during such period, but not during service under an extended enlistment which may be extended on or after June 4, 1920, nor after a change in grade. (27 Comp. Dec., 31.)

**Additional pay as specialists.**—The provision of section 4 of the Army reorganization act of June 4, 1920 (41 Stat., 761), that enlisted men of the Army of the sixth and seventh grades may be rated as specialists and receive extra pay therefor at certain specified rates per month, is applicable to the Marine Corps in so far as the Secretary of War may apply said provisions of law to the infantry of the Army. (27 Comp. Dec., 31.)

**Extra-duty pay.**—On and after July 1, 1920, the payment of any extra-duty pay to enlisted men of the Army and Marine Corps is prohibited notwithstanding provisions in Army and Navy appropriation acts authorizing such payments, section 4 of the Army reorganization act of June 4, 1920 (41 Stat., 761), having repealed from July 1, 1920, all laws or parts of laws providing for extra-duty pay. (27 Comp. Dec., 31.)

The term "extra-duty" is obviously a relative one, and it can not be determined that an enlisted man was performing extra duty without a complete understanding of the scope of the duties which he might properly be expected to perform in accordance with his enlistment without receiving extra pay. A member of the hospital corps was as such bound to perform, without extra pay, any of the duties which pertain to that service. Duties incident to the conduct of hospitals as efficient institutions, including maintenance of telephone and telegraph offices, when necessary in the judgment of the military authorities, were part of the current duties of enlisted men of the hospital corps and did not entitle them to extra pay any more than any other necessary activities which the successful administration of the hospital might demand. (*U. S. v. Ross*, 239 U. S., 530.)

From an early date provision has been made for the payment of enlisted men on extra duty at "constant labor of not less than ten days." It may be assumed that section 1235 of the Revised Statutes, requiring written orders, was not intended to preclude a recovery of extra-duty pay where there had been a detail to extra duty by competent authority, although not in writing, and extra duty entitling the enlisted man to extra pay under the statute had actually been performed. However, where an enlisted man was not in fact assigned on extra duty, there being no such detail in accordance with regulations or the statute as there should have been if he was considered

to be on extra duty, and where it was the judgment of the War Department that the man was not on extra duty, this Departmental judgment will not be overruled unless there is a clear abuse of the necessary official discretion. (*U. S. v. Ross*, 239 U. S., 530.)

It is well settled that the mere designation of duty as "special duty" can not of itself determine the character of the duty and deprive the man of his rights to compensation therefor if in fact the duty was "extra duty." Whether it was special duty or extra duty is to be determined from the facts themselves. (*Scheid v. U. S.*, 52 Ct. Cls., 247.)

The requirement of the statutes that details for extra duty must be in writing was not intended to preclude a recovery of extra-duty pay to which a man might be entitled under the law where it appeared that he had been detailed to such extra duty by competent authority, and that the extra duty had been actually performed. A provision in the Marine Corps "System of Accountability" could not in any manner serve to abridge a right which a man might have under the law. (*Scheid v. U. S.*, 52 Ct. Cls., 247.)

The appropriation in the Army act of March 3 1885 (23 Stat., 359), for enlisted men on extra duty, was limited in its provisions to the Quartermaster Corps, but the other language in the same section, amendatory of section 1287, Revised Statutes, had no relation to the Quartermaster Corps but was permanent legislation applicable to the rest of the service as well as to that corps. (*Scheid v. U. S.*, 52 Ct. Cls., 247.)

A sergeant in the Marine Corps performed the duty of schoolmaster at the Marine Barracks for 15 years; he received, in addition to his pay as sergeant, one dollar per month from each apprentice in accordance with an agreement in their enlistment papers prescribed by the Navy Department. *Held*, that he was not entitled to extra-duty pay from the Government. Section 1287, Revised Statutes, providing extra-duty pay for the Army, and Army Regulations issued under authority of the appropriations for extra-duty, do not extend to one who performs the duties of a schoolmaster and who receives extra pay from his pupils. (*Fugitt v. U. S.*, 28 Ct. Cls., 253.)

**Longevity pay, enlisted men.**—Section 4 of the Army reorganization act of June 4, 1920 (41 Stat., 761), repeals, from July 1, 1920, all preceding legislation providing for continuous-service pay in the Army and Marine Corps, except in so far as the saving clause in said section may prevent the reduction of the pay of enlisted men, continuous-service pay being "pay" within the term as used in the saving clause. (27 Comp. Dec., 31.)

In computing the longevity pay of an enlisted man now in the Marine Corps, or of any person who hereafter enlists or reenlists in the corps, under the act of June 4, 1920 (41 Stat., 761), all prior service on the active list in the Army, Navy, and Marine Corps, whether in consecutive or dis severed periods, shall be counted. (27 Comp. Dec., 170.)

The act of June 4, 1920 (41 Stat., 761), repealing all laws providing for continuous-service



pay, substituted in lieu thereof longevity pay. (27 Comp. Dec., 170.)

Under the Army reorganization act of June 4, 1920 (41 Stat., 761), the service which by existing law is held to be the equivalent of Army service in counting length of service for increase of pay or for retirement is service in the Marine Corps and service in the Navy. (27 Comp. Dec., 170, citing acts Feb. 24, 1881, 21 Stat., 346; Sept. 30, 1890, 26 Stat., 504; and June 22, 1906, and Mar. 2, 1907, 34 Stat., 451 and 1217.)

The provisions of sections 1281 and 1282, Revised Statutes, relating to increased pay for length of service and retention of pay until expirations of enlistment, form part of the legislation regulating the pay of enlisted men in the Army and are applicable to the Marine Corps by force of section 1612. (19 Op. Atty. Gen., 616, 623.)

**Reenlistment pay; honorable discharge gratuity.**—So much of section 1612 as provided that enlisted men of the Marine Corps shall be entitled to receive the same bounty for reenlisting, usually designated as honorable discharge gratuity, as enlisted men of like grades in the infantry of the Army was repealed and superseded by section 7 of the act of June 4, 1920 (41 Stat., 836). (27 Comp. Dec., 101; see laws quoted above relating to Marine Corps.)

The provision of section 27 of the Army reorganization act of June 4, 1920 (41 Stat., 775), that an enlistment allowance equal to three times the monthly pay of a soldier of the seventh grade shall be paid to every soldier who reenlists for a period of three years has no application to the Marine Corps, but the reenlistment pay, otherwise known as honorable discharge gratuity, of members of the Marine Corps, depends entirely upon laws providing therefor in effect prior to June 4, 1920, and the provisions of section 7 of the naval appropriation act of June 4, 1920 (41 Stat., 836). (27 Comp. Dec., 31.)

Under the provisions of the naval appropriation act of June 4, 1920, section 7, enlisted men of the Marine Corps reenlisting on or after June 4, 1920, for four years, three years, or two years are entitled to receive four months, three months, or two months extra pay, respectively, at the rate of pay they were receiving at the time of honorable discharge. (27 Comp. Dec., 101; see sec. 1573, R. S., and note thereto.)

An enlistment in the Marine Corps after an honorable discharge from the Army or Navy is not a "reenlistment" within the meaning of section 7 of the act of June 4, 1920 (41 Stat., 836); the term "reenlistment" signifies an entry into the same branch of the service from which honorably discharged. (27 Comp. Dec., 170.)

An enlistment in the Marine Corps after an honorable discharge from the Army is a "reenlistment" within the meaning of section 1284, Revised Statutes, providing longevity pay in the Army, made applicable to the Marine Corps by section 1612, Revised Statutes. Such enlisted man is entitled to the same benefits that he would be entitled to if his reenlistment had been in the Army. (Walton v. U. S., 31 Ct. Cls., 196.)

Bounties on reenlistment in the Marine Corps were, by virtue of section 1612 of the Revised Statutes, based upon the law governing bounties to the enlisted men of the Army contained in the Army appropriation act of May 11, 1908 (35 Stat., 110). (21 Comp. Dec., 848.)

The bounty payable to enlisted men of the Marine Corps upon reenlistment should be computed on all items of pay, as distinguished from allowance, which they may be receiving at the time of discharge. (21 Comp. Dec., 848.)

**Additional pay for special qualifications, details, etc.**—There is no law that provides for cooks in the Marine Corps or for an increase of pay for extra duty of privates of that corps detailed in service as cooks. (8 Comp. Dec., 419.)

Enlisted men of the Marine Corps regularly detailed as messmen, whether for duty afloat or ashore, may be paid such additional compensation as provided for by regulations approved and promulgated by the Secretary of the Navy; Congress having appropriated for such additional compensation under the caption, "Pay, Marine Corps," but not having fixed the amount. These appropriations do not create the grade of messman in the Marine Corps, but do provide for additional pay to men regularly detailed to perform the duties of messmen. If additional pay were provided for like service in the Army, to which it would be assimilated, the additional pay would be fixed by law and would govern without regard to the President's order; but there is no grade in the Army to which the additional compensation of an enlisted man in the Marine Corps regularly detailed to perform the duties of messman can be assimilated. (13 Comp. Dec., 136.)

Under annual appropriation acts, and Executive Order of September 18, 1906, relating to additional pay for enlisted men of the Marine Corps regularly detailed as messmen, held that where a man is properly detailed as messman for a month or more, as prescribed by said order, he is entitled to the additional pay even though, by reason of illness or other cause, he is lawfully absent from duty for a part of the month. (13 Comp. Dec., 574.)

Enlisted men of the Marine Corps who have qualified as expert riflemen are entitled to the additional monthly pay allowed enlisted men of the infantry of the Army, which extra pay shall cease at the close of the first subsequent target year in which such riflemen shall fail to qualify. (Comp. Dec., Sept. 26, 1905, 55 S. and A. Memo., 7; modifying 11 Comp. Dec., 788.)

The act of May 11, 1908 (35 Stat., 110), providing "that hereafter enlisted men now qualified or hereafter qualifying as marksmen shall receive two dollars per month; as sharpshooters, three dollars per month; as expert riflemen, five dollars per month; \* \* \* all in addition to their pay, under such regulations as the Secretary of War may prescribe," was made applicable to the Marine Corps by section 1612, Revised Statutes. (21 Comp. Dec., 123 and 848.)

The extra pay provided for gun pointers and gun captains is extra pay for special service,

and payable only when under detail for the special service. (21 Comp. Dec., 811, 814.)

The enlisted men of the Marine Corps derive their right to additional compensation or allowance as messmen, gun captains, and gun pointers from the annual appropriation acts and the regulations made in pursuance thereof. (21 Comp. Dec., 811, 812; citing 13 Comp. Dec., 136.)

Under the Navy Regulations of 1913, article 4442 (11), "all enlisted men of the United States Marine Corps regularly detailed as gun pointers, Navy mail clerks, gun captains, messmen, or signalmen, or holding good conduct medals, pins, or bars, shall receive the same extra compensation in addition to their monthly pay as is now or may hereafter be allowed enlisted men of the Navy." (See 21 Comp. Dec., 812.)

**Retained pay.**—Section 1281, Revised Statutes, and amendments thereto, authorizing certain increases in the pay of enlisted men during their first enlistment in the Army, such increased pay to be "considered as retained pay" and not to be paid until discharge, were held applicable to the Marine Corps. (See 19 Op. Att'y. Gen., 616, 623; *U. S. v. Kingsley*, 138 U. S., 87, 24 Ct. Cls., 219.) Said section of the Revised Statutes was expressly repealed by act of May 11, 1908 (35 Stat., 110.)

By act of June 4, 1920, section 27, relating to the Army (quoted above under "Enlistment and reenlistment allowance"), provision was made for an allowance to soldiers during their first enlistment, payment thereof "to be deferred until honorable discharge." (See decisions noted above under "Reenlistment pay; honorable discharge gratuity.")

**Increased pay for sea duty and foreign shore service.**—In computing the 20 per cent additional pay for foreign service of enlisted men of the Marine Corps, the additional monthly pay allowed as expert riflemen should be included. (Comp. Dec., Sept. 26, 1905, 55 S. and A. Memo., 67.)

Enlisted men of the Marine Corps are not entitled to have the additional compensation authorized for marksmanship qualifications included in their pay proper upon which is computed the 20 per cent increase for sea duty; but are entitled to have such increase computed on pay for good conduct medals. (21 Comp. Dec., 848.)

Enlisted men of the Marine Corps on sea duty are not entitled to have the additional compensation of gun pointers and gun captains included in their "pay proper" upon which is computed the 20 per cent increase of pay for foreign shore duty. (21 Comp. Dec., 811.)

Officers of the Marine Corps are not entitled to have the additional compensation as aid, or the allowance for mounts, included in their pay proper upon which is computed the ten per cent increase for sea duty. (21 Comp. Dec., 848.)

An officer of the Marine Corps was entitled, under section 1612, Revised Statutes, and the act of May 11, 1908, to the increased pay for service beyond seas allowed by the act of June 30, 1902, for service in Porto Rico, notwithstanding the provisions in the appropriation acts of 1906 and 1907, excepting Hawaii and Porto Rico from the operation of the said act of 1902. Those exceptions were temporary, and

did not have a general and permanent application to all future appropriations. The Army act of May 11, 1908, having provided that "increase of pay for service beyond the limits of the states comprising the Union and the territories of the United States contiguous thereto shall be as now provided by law," the law contained in the act of 1902, and not the exception contained in the appropriations of 1906 and 1907, was thereby continued in effect. (*U. S. v. Vulte*, 233 U. S., 509; but see later act of Aug. 24, 1912, quoted above under Army laws relating to foreign shore service.)

**Pay and allowances defined.**—See cases noted above, under "Increased pay for sea duty and foreign shore service"; see also notes to sections 1558 and 1615, Revised Statutes.

Whether extra pay for special assignments (gun pointers and gun captains) is an "allowance" or "in the nature of an allowance," or "pay" in the broad meaning of that term, it is not "pay proper" within the meaning of the act of June 30, 1902 (32 Stat., 512), relating to foreign shore service pay. (21 Comp. Dec., 811.)

Mileage has been held both by the courts and the accounting officers to be an allowance. (13 Comp. Dec., 333.)

Extra duty pay is not "pay" within the meaning of the saving clause contained in the act of June 4, 1920, section 4 (41 Stat., 761), that "nothing in this section shall operate to reduce the pay which any enlisted man is now receiving" etc. (27 Comp. Dec., 31, 36. Compare 27 Comp. Dec., 31, holding that act of June 4, 1920, sec. 4, 41 Stat., 761, repealing Army laws as to extra duty pay, applied to Marine Corps.)

Continuous service pay is "pay" within the term as used in the saving clause of the Army act approved June 4, 1920, section 4 (41 Stat., 761). (27 Comp. Dec., 31.)

The Army act of March 3, 1885 (23 Stat., 350), providing for reimbursement of officers and enlisted men of the military service for private property lost in the service, does not provide an "allowance" to officers of the Army which, by virtue of section 1612, Revised Statutes, can be available to officers of the Marine Corps. (*Harlee v. U. S.*, 51 Ct. Cls., 342.)

The term "allowances" has acquired an extended meaning, but it has its limitations. It has been held that allowance does not include commutation for fuel and quarters, and is limited to compensation for services other than pay (citing *Landers v. U. S.*, 30 Ct. Cls., 311; *Sherburne's Case*, 16 Ct. Cls., 491; *McLean v. U. S.*, 226 U. S., 374, 382, 45 Ct. Cls., 95). Pay and allowances as used in the statutes relate to compensation for service. The allowance may at times take the form of reimbursement, but it is reimbursement for something expended in service and the amount of allowance is fixed or regulated by statute or regulation which has the effect of a statute. The term can not be applied to the case of a soldier claiming under the act of 1885 for losses sustained for which, under that act, he may recover. The act is one of indemnity; it does not purport to pay for service. (*Harlee v. U. S.*, 51 Ct. Cls., 342.)

See note below under "Mileage and transportation."



**Mileage and transportation.**—Officers of the Marine Corps are entitled, under section 1612, Revised Statutes, to the same allowance for sea travel with troops as is provided for officers of the Army by act of June 12, 1906 (34 Stat., 246, 247), and such allowance is payable from appropriations for pay and allowances of officers of the Marine Corps. (13 Comp. Dec., 332.)

The act of June 10, 1896 (noted above, under laws relating to the Marine Corps), which provides that officers of the Marine Corps traveling under orders, without troops, shall be allowed the same mileage as was then allowed officers of the Navy traveling without troops, applies both to travel within the United States and to travel abroad; and an officer of the Marine Corps so traveling is entitled to mileage at the rate of eight cents per mile for travel in the United States, and to actual and reasonable expenses only for travel abroad. (8 Comp. Dec., 123; see note to sec. 1566, R. S.)

The act of June 10, 1896, is applicable only to officers of the Marine Corps traveling without troops; and officers of the Marine Corps traveling with troops are governed by the provisions of section 1612 and the Army act of June 12, 1906 (34 Stat., 246, 247). In other words, an officer of the Marine Corps traveling under orders without troops is entitled to the same mileage as was allowed an officer of the Navy on June 10, 1896; but when traveling under orders with troops he is entitled to the same travel allowance as an officer of the Army traveling with troops. (Comp. Dec., Mar. 7, 1907, 73 S. and A. Memo., 248; 13 Comp. Dec., 333.)

There is no law providing for traveling expenses for officers of the Army or Marine Corps traveling with troops within the United States. (Comp. Dec., Mar. 7, 1907, 73 S. and A. Memo., 248.)

The expenses necessarily growing out of the transportation and subsistence of the marines detailed for the Navy Department exhibit at the World's Columbian Exposition may be paid from the fund provided for the Marine Corps and its subsistence. (20 Op. Atty. Gen., 577.)

The provisions of section 1290, Revised Statutes, relating to allowance for transportation from the place of discharge to the place of enlistment, form part of the legislation regulating the pay of enlisted men in the Army, and are applicable to the Marine Corps by force of section 1612, Revised Statutes. (19 Op. Atty. Gen., 616, 623.)

Revised Statutes, section 1290, as amended by act of February 27, 1877 (19 Stat., 240, 244), provided that "when a soldier is discharged from the service, except by way of punishment for an offense, he shall be allowed transportation and subsistence from the place of his discharge to the place of his enlistment, enrollment, or original muster into the service. The Government may furnish the same in kind, but in case it shall not do so, he shall be allowed travel pay and commutation of subsistence, for such time as may be sufficient for him to travel from the place of discharge to the place of his enlistment, enrollment, or original muster into the service, computed at the rate of one day for every twenty miles." *Held*,

that one who originally enlisted at Washington, and was discharged at Mare Island, California, receiving travel pay and commutation of subsistence from Mare Island to Washington, but did not return to Washington, reenlisting at Mare Island as a private; and in the course of his service was returned to Washington, where he was discharged at his own request, was not entitled to his commutation of travel and subsistence to the place of his second enlistment, as his service was practically a continuous one, and his second discharge occurred at the place of his original enlistment. (*U. S. v. Thornton*, 160 U. S., 654.)

A private in the Marine Corps, discharged from the service as a person of bad character and unfit for service, by order of the Secretary of the Navy through the commandant of the corps, without court-martial or other competent military proceeding, does not forfeit transportation and subsistence from the place of his discharge to the place of his enlistment, enrollment, or original muster into the service, under the provisions of section 1290, Revised Statutes, which makes such allowance in all cases other than discharge from the service "by way of punishment for an offense." That section contemplates a discharge as a punishment, inflicted by the judgment of a court-martial or other military authority. While unfitness for service and general bad character may justify the proper authorities in ordering the discharge of the soldier as a worthless member of the service, such a discharge can not be considered as "a punishment for an offense." The question whether such punishment must necessarily be inflicted by the judgment of a court-martial, not presented by the record in this case and no opinion expressed on it. (*U. S. v. Kingsley*, 138 U. S., 87; 24 Ct. Cls. 219.)

The effect of section 6 of the naval appropriation act of June 4, 1920 (41 Stat., 836), is to extend to enlisted or enrolled men of the Navy and Marine Corps, having war service, who, since November 11, 1918, have reenlisted in the Navy or Marine Corps, or who have extended their enlistments either before or after that date, or may hereafter do so, the right to receive the war service payment of \$60 provided by the act of February 24, 1919 (40 Stat., 1151), and the travel allowance on discharge, under the act of February 28, 1919 (40 Stat., 1203); such persons having been theretofore excluded from the benefits of said acts. (27 Comp. Dec., 31.)

**Longevity pay, officers.**—See section 1600, Revised Statutes, and note thereto.

The words "current yearly pay," as used in section 1262, Revised Statutes, allowing increased pay for periods of five years' service, mean the original salary of the officer's rank plus any additions previously earned for length of service; and the ten per cent increase for periods of five years' service should accordingly be computed upon the regular salary of the officer's rank plus previous increases for length of service. (*U. S. v. Tyler*, 105 U. S., 244.)

The act of June 30, 1882 (22 Stat., 118), directing that the longevity increase provided for in section 1262, Revised Statutes, should be "computed on the yearly pay of the grade,"

was passed for the express purpose of commanding a method of computation which would render inapplicable the construction adopted by the Supreme Court in the Tyler case (above noted). Accordingly, a subsequent enactment, allowing officers of the Navy ten per cent increase of their "current yearly pay" for each term of five years' service, should be construed as requiring that such increase be computed on the yearly pay of their grade, in accordance with the rule prescribed by the act of 1882, and not upon their base pay plus previous longevity increases, in accordance with the rule laid down in the Tyler case. (*Plummer v. U. S.*, 224 U. S., 137, 144.)

As to allowance of constructive service in computing length of service for longevity increases in the Marine Corps, see note above, under "Navy laws held inapplicable to Marine Corps;" and note below, under "Pay clerks."

**Quarters.**—Commutation for quarters, fuel, and light not furnished to an officer or enlisted man can not be paid unless authorized by some statute or regulation; that is, the right to commutation does not arise automatically but must be based upon some specific provision of law. (*Smith v. U. S.*, 47 Ct. Cls., 313.)

Commissioned officers of the Army on duty where quarters can not be furnished are entitled to commutation by virtue of the Army Regulations; but there is no such provision for enlisted men. (*Smith v. U. S.*, 47 Ct. Cls., 313.)

In the absence of express appropriation therefor, the hiring of quarters for marines on duty in Washington was forbidden by act of June 22, 1874 (18 Stat., 144), which provided that "hereafter no contract shall be made for the rent of any building, or part of any building, in Washington, not now in use by the Government, to be used for the purposes of the Government until an appropriation therefor shall have been made in terms by Congress." (*Smith v. U. S.*, 47 Ct. Cls., 313.)

See note under section 1613, Revised Statutes.

**Pay clerks.**—By virtue of the act of June 24, 1910 (36 Stat., 625), clerks to assistant paymasters in the Marine Corps are entitled to the same pay and allowances provided by the act of June 3, 1916, section 9 (39 Stat., 170), for paymasters' clerks in the Army; that is, to the pay and allowances of a second lieutenant in the Army. (23 Comp. Dec., 508.)

Clerks to assistant paymasters in the Marine Corps are not entitled to credit for constructive service in computing their pay under the act of June 3, 1916, section 9 (39 Stat., 170), which entitled them to the pay and allowances of a second lieutenant by virtue of the act of June 24, 1910 (36 Stat., 625), giving them the same pay and allowances as Army paymasters' clerks; although they were previously entitled to constructive service in computing their pay under the act of March 3, 1911 (36 Stat., 1044), giving them the pay and allowances of warrant officers in the Navy, by virtue of the said act of June 24, 1910. Warrant officers in the Navy appointed from civil life were entitled to constructive service, but second lieutenants in the Army appointed from civil life were not. (23 Comp. Dec., 508. See note

above, under "Navy laws held inapplicable to Marine Corps.")

**Gunnery sergeants.**—The grade of "gunnery sergeant" was first established in the Marine Corps by the Navy personnel act of March 3, 1899, section 23 (30 Stat., 1009) and the pay was specifically fixed by the same statute at \$35 per month, while other sergeants received only \$25. Subsequently the pay of sergeants in the Army was advanced by act of May 11, 1908 (35 Stat., 106, 109), to \$45 per month. There was no statute specifically changing the pay of gunnery sergeants. *Held*, that gunnery sergeants of the Marine Corps did not become entitled to \$45 per month under the Army appropriation act. (*Bristow v. U. S.*, 47 Ct. Cls., 46. But see act of Aug. 22, 1912, as to pay of gunnery sergeants, noted above under laws relating to the Marine Corps.)

**Forfeiture of pay.**—Neither the pay, lodging, nor clothing of enlisted marines taken by the civil authorities for violation of law can be withheld during their confinement and absence from their military stations. The existing law (act July 11, 1798, sec. 2), authorizes the President to fix the pay and subsistence of the noncommissioned officers, privates, and musicians of the Marine Corps. Under this authority it would be competent for the President not merely to determine the quantum of pay but to prescribe the conditions on which it shall be received. In the absence of such a regulation by him, or under his authority, recourse must be had to the implied contract entered into on the enlistment; this is a stipulation for payment, subsistence, and clothing, in consideration of services to be performed. A willful failure to perform this service would seem to exempt the Government from the obligation which would have resulted from its performance. But it does not follow that an enlisted marine, because taken by the civil authorities for violation of the laws, has violated them; he is presumed to be innocent until proved to be guilty. In cases where conviction takes place and is followed by a sentence which incapacitates him from the fulfillment of his duty as a marine, from the time of such conviction his pay might perhaps, properly be withheld; but in such a case it would be better for the Government to discharge the convicted marine from the service and thus terminate his claim for compensation. (2 Op. Atty. Gen., 396. See cases noted under sections 1556 and 1569, Revised Statutes.)

A private in the Marine Corps discharged from the service as a person of bad character and unfit for service, by order of the Secretary of the Navy through the commandant of the corps, although without court-martial or other competent military proceeding, forfeits thereby his retained pay under the provisions of Revised Statutes 1281, which provides that such retained pay of an enlisted man "shall be forfeited unless he serves honestly and faithfully to the date of discharge." (*U. S. v. Kingsley*, 138 U. S., 87; see also note above, under "Mileage and transportation.")

**Pay of two grades.**—Where a captain in the Marine Corps acts as brevet lieutenant-colonel and is paid as such, he can not during the same period receive either the pay or al-



lowances attached to the duties of captain. (U. S. v. Freeman, 25 Fed. Cas. No. 15,163.)

**Deposits of savings.**—The act of February 9, 1889 (25 Stat., 657), providing for the deposit of savings by "seamen of the United States Navy," does not extend to enlisted men of the Marine Corps. (19 Op. Atty. Gen., 616.)

Sections 1305-1308, Revised Statutes, which provide for the deposit with any Army paymaster by any enlisted man of his savings, have no application to the Marine Corps, and the enlisted men of that corps have not the right or privilege of making such deposits with a paymaster of their branch of the service. (25 Op. Atty. Gen., 190.)

If the act of 1889, for the benefit of enlisted men and petty officers of the Navy, could not properly be construed to apply to the Marine Corps, which is primarily a component part of the Navy, sections 1305-1308 of the Revised Statutes, for the benefit of enlisted men of the Army, can not be so construed. (25 Op. Atty. Gen., 190.)

See later law quoted above with respect to deposit of savings by enlisted men of the Marine Corps.

**Sale of fuel.**—The provision in the act of June 12, 1906 (34 Stat., 250), amending the provision relative to furnishing fuel to officers of the Army in the act of June 18, 1878 (20 Stat., 150), by limiting the amount to be purchased to the "actual personal necessities" of commissioned officers on the active list as certified to by them, is applicable to commissioned officers of the Marine Corps on the active list. (13 Comp. Dec., 27.)

**Illegal payments.**—Payments made to officers of the Marine Corps under an act which had been repealed by a later law relating to the Army, although not construed by the accounting officers as repealed, are binding upon the Government and can not be recalled to the

pecuniary disadvantage of any officer; but no erroneous practice of however long standing can justify the allowance of a claim, contested by the Government in a suit, contrary to what is the true meaning and intent of the statute. (U. S. v. Freeman, 3 How., 556. For other cases, see note to sec. 236, R. S.)

**Pay of officers while out of the service.**—Marine Corps officers who were reduced under the act of March 2, 1847, and restored under a subsequent act are not entitled to pay during the interval. Had it been the design of the act which restored them to give them pay during the interval of the reduction, as well as rank, it would have been so declared. The relation back was for rank, not for pay. The whole object of the act was to place these officers back in the service by a new commission. All principle is against the allowance of such pay. When no service is needed, no compensation should be allowed. (5 Op. Atty. Gen., 101.)

**Extra allowance for disbursing money.**—Congress having prohibited extra allowance or compensation in any form to an officer of the Army on account of the disbursing of any public money appropriated by law, held that the quartermaster of the Marine Corps is not thereafter entitled to such extra compensation. (3 Op. Atty. Gen., 516; compare, U. S. v. Kuhn, 26 Fed. Cas. No. 15, 545.)

**For other cases,** see generally notes to section 1556, et seq., relating to "Pay, emoluments, and allowances" of the Navy; as to retired pay of officers and enlisted men of the Marine Corps, see note to section 1622; as to brevet pay and emoluments, see note to section 1604; as to additional pay allowed officers exercising higher command in time of war, see note to section 1611; as to pay of enlisted men detained in the service after expiration of enlistment, see section 1422, and note thereto; as to pay of Marine Band, see section 1613, and note thereto.

**Sec. 1613. [Marine band.]** The marines who compose the corps of musicians known as the "Marine band" shall be entitled to receive at the rate of four dollars a month, each, in addition to their pay as non-commissioned officers, musicians, or privates of the Marine Corps, so long as they shall perform, by order of the Secretary of the Navy, or other superior officer, on the Capitol grounds or the President's grounds.—(5 Aug., 1854, c. 268, s. 1, v. 10, p. 586. 18 Aug., 1856, c. 162, s. 5, v. 11, p. 118.)

"A member of the said band shall not, as an individual, furnish music, or accept an engagement to furnish music, when such furnishing of music places him in competition with any civilian musician or musicians, and shall not accept or receive remuneration for furnishing music except under special circumstances when authorized by the President." (Act Aug. 29, 1916, 39 Stat., 612, relating to Marine Band.)

As to composition and pay of Marine Band, see section 1596, Revised Statutes, and act of August 29, 1916 (39 Stat., 612), quoted thereunder.

Detail of musicians to companies or detachments of marines: See section 1611, Revised Statutes.

Worn-out band instruments, sewing machines, machinery, and rubber tires may be ex-

changed in part payment for the purchase of like articles. (Act Mar. 4, 1917, 39 Stat., 1189.)

**Status of Marine Band.**—While the Marine Corps was established in 1775, and its band is one of the best known organizations of the character in the country, curiously this band has never had formal statutory recognition. Drums and fifes were provided for the Navy as long ago as 1794 (1 Stat., 350), while in 1798 "musicians," then understood to mean drummers and fifiers, were given to the Marine Corps (1 Stat., 590). Section 1596, Revised Statutes, describes the organization of the Marine Corps as consisting of a certain number of officers, noncommissioned officers, and privates, together with a drum major, a principal musician, 30 musicians, 60 drummers, and 60 fifiers; but no mention is made of a musical organization until the enact-

ment of the laws now condensed in section 1613 of the Revised Statutes. The only other provision looking even indirectly to a musical organization is that of section 1596. (*Bond v. U. S.*, 21 Ct. Cls., 457; see also, *Keppler v. U. S.*, 27 Ct. Cls., 482.)

Not a "Navy" band.—The provisions of the act of May 13, 1908 (35 Stat., 153), which prohibit "Navy bands or members thereof" from receiving remuneration for furnishing music outside the limits of military posts, when the furnishing of such music places them in competition with local musicians, do not apply to the Marine Band, notwithstanding that similar provision for "Army bands" was made by act of May 11, 1908 (35 Stat., 106, 110). (27 Op. Att. Gen., 90.)

The words, "Navy bands," do not include the Marine Band, and in the service would not ordinarily be understood to include a band made up of marines. (27 Op. Att. Gen., 90.)

Section 1613, Revised Statutes, recognizes the band as having a particular title of its own, viz, "Marine Band." In construing subsequent legislation it should be assumed that Congress appreciated the significance of the fact that this organization was generally known as the "Marine Band," as recognized by said section. (27 Op. Att. Gen., 90.)

It is, however, undoubtedly true that attendant circumstances might show an intention on the part of Congress to include the Marine Band by the term "Navy bands." No such circumstances exist in this case, in which the statute restricting such bands in furnishing music outside is quasi penal and should be strictly construed. (27 Op. Att. Gen., 90.)

See later statute quoted above with specific reference to the Marine Band.

Private detailed to duty with Marine Band.—A private in the Marine Corps was assigned to duty with the Marine Band at the time of his enlistment, and remained and performed duty with the band, as a private, until he was rated as a musician. *Held*, that he was one of "the musicians who compose the organization known as the Marine Band," while so detailed; and having performed on the Capitol Grounds and on the President's grounds under proper orders, was entitled to the additional pay provided for by Revised Statutes, section 1613. (*U. S. v. Bond*, 124 U. S., 301.)

The additional compensation given by section 1613 to the marines who compose the organization known as the Marine Band, is not restricted to those who are formally rated as musicians, but extends to all marines attached to the band so performing. (*Bond v. U. S.*, 21 Ct. Cls., 457.)

The statute does not say that the "members of the Marine Band" shall receive extra compensation, for no such band is known to the law; but the pay is given to those "marines who compose the corps of musicians known as the Marine Band." The phraseology of section 1613 is extremely peculiar. It seems to recognize the fact that marines other than those rated as musicians performed in the band. (*Bond v. U. S.*, 21 Ct. Cls., 457.)

Pay of Marine Band.—See laws noted under section 1596, Revised Statutes, as to the composition and pay of the Marine Band.

Prior to the act of March 3, 1899, section 24 (30 Stat., 1009), relating to the pay of the Marine Band, the pay of enlisted men in the Marine Corps was assimilated to Army pay, which was less than that provided in said section; and it was doubtless for that reason that Congress added the last clause to that section, viz, "such musicians of the band to have no increased pay for length of service." Under this section, *held* that as to musicians of the band of the Marine Corps, section 1284, Revised Statutes, providing for pay for length of service to enlisted men of the Army, is superseded, and that an enlisted man in the Marine Corps, member of said band, who was retired after 30 years' service, is not entitled to recover the additional pay under section 1284, allowed soldiers for reenlistment. (*Giacchetti v. U. S.*, 39 Ct. Cls., 381.)

Under existing statutes relating to the Marine Band, the question of the emoluments of that excellent organization is unfortunately involved in some doubt. (*Keppler v. U. S.*, 27 Ct. Cls., 482, 485.)

The band at the Military Academy, popularly known as the West Point Band, was once one of fifteen bands, all upon the same footing; but since the act of March 3, 1869, has been the only military band in the Army of the United States. Members of that band are allowed the pay of engineer soldiers; it is well settled that what the officers and enlisted men of the Army receive, the officers and enlisted men of the Marine Corps shall likewise receive. Members of the Marine Band, under section 1612, Revised Statutes, are entitled to the pay of "enlisted men of like grades in the infantry of the Army." The only enlisted men of like grades in the infantry of the Army were, at the time of the enactment, the members of the West Point Band. *Held*, that members of the Marine Band are entitled to the same retained pay as received by members of the West Point Band and engineer soldiers. (*Patyschke v. U. S.*, 31 Ct. Cls., 384.)

Allowances of second leader.—The "second leader" of the Marine Band is entitled by statute to the allowances of a sergeant major. By Army Regulations sergeants major are entitled to quarters at the rate of one room, and by the act of March 2, 1907 (34 Stat., 1167), they are entitled to heat and light for the same. (*Smith v. U. S.*, 47 Ct. Cls., 313.)

No quarters being available for the second leader at the Marine Barracks, *held* that he is not entitled to commutation therefor, not being a commissioned officer, but only ranking as an enlisted man, and no statute or regulation providing for commutation of quarters for enlisted men of the Army. (*Smith v. U. S.*, 47 Ct. Cls., 313.)

By act of May 4, 1898 (30 Stat., 388), an appropriation was made for the hire of quarters for certain enlisted men employed in the office of the Marine Corps in Washington, including the leader of the band, but no appropriation was made for quarters for the second leader, and in the absence of express appropriation therefor quarters can not be hired for him. (*Smith v. U. S.*, 47 Ct. Cls., 313.)



**Sec. 1614. [Deduction for hospitals.]** The Secretary of the Navy shall deduct from the pay due each of the officers and enlisted men of the Marine Corps at the rate of twenty cents per month for every officer and marine, to be applied to the fund for Navy hospitals.—(2 Mar., 1799, c. 36, s. 2, v. 1, p. 729. 26 Feb., 1811. c. 26, s. 1, v. 2, p. 650.)

Similar provision is made by section 4808, Revised Statutes.

See section 1586, Revised Statutes, and note thereto, as to medicine and medical attendance.

A clerk to a commandant of a navy yard is neither an officer, enlisted man, nor marine, and the Secretary of the Navy is not authorized

under section 1614, to deduct 20 cents per month from his pay. Such a clerk is not entitled to reimbursement for medicines and medical attendance. (1 Comp. Dec., 289. But see 25 Comp. Dec., 745, in which clerks to commandants were held to be officers of the Navy in another connection.)

**Sec. 1615. [Rations of enlisted men.]** The non-commissioned officers, privates, and musicians of the Marine Corps shall, each, be entitled to receive one Navy ration daily.—(1 July, 1797, c. 7, s. 6, v. 1, p. 524. 11 July, 1798, c. 72, s. 2, v. 1, p. 595.)

Amendment to this section was made by act of March 4, 1917 (39 Stat., 1189), under "Provisions, Marine Corps," as follows: "Hereafter no law shall be construed to entitle enlisted men on shore duty to any rations or commutation therefor other than such as are now or may hereafter be allowed enlisted men in the Army: *Provided*, That when it is impracticable or the expense is found greater to supply marines serving on shore duty in the island possessions and on foreign stations with the Army ration, such marines may be allowed the Navy ration or commutation therefor." (It had previously been provided by a clause in the annual naval appropriation act of March 2, 1891, and subsequent years, under "Provisions, Marine Corps," that "no law shall be construed to entitle enlisted marines on shore duty to any rations or commutation therefor other than such as now are or may hereafter be allowed enlisted men in the Army." Commencing with the act of Mar. 3, 1901, there was added to this clause in the annual appropriation act, the following proviso: "That when it is impracticable or the expense is found greater to supply marines serving on shore duty in the island possessions and on foreign stations with the Army ration, such marines may be allowed the Navy ration or commutation therefor." These clauses were thereafter repeated annually, until the act of Mar. 4, 1917, above quoted, in which they were made permanent legislation by the use of the word "hereafter.")

Amendment was also made to this section by act of July 11, 1919 (41 Stat., 154).

By act of May 18, 1920, section 5 (41 Stat., 602), it was provided "that all noncommissioned officers of the Army of grade of color sergeant and above as fixed by existing Army Regulations and noncommissioned officers of the Marine Corps of corresponding grades shall be entitled to one ration or commutation therefor in addition to that to which they are now entitled. The commutation value shall be determined by the President on July 1 of each fiscal year, and

for the current fiscal year the value shall be computed on the basis of 55 cents per ration." By section 13 of the same act (41 Stat., 604), it was provided that this provision shall remain effective until June 30, 1922, unless sooner amended or repealed. By act of June 4, 1920, section 4 (41 Stat., 761), establishing new grades and pay for enlisted men (noted under sec. 1612, R. S., under "Army laws applicable to Marine Corps"), it was provided that "the temporary allowance of rations authorized by section 5" of the act approved May 18, 1920, "shall apply only to enlisted men of the first three grades."

"Commutation of rations to recruiting parties, and enlisted men traveling on special duty, at such rate as the Secretary of the Navy may prescribe," is authorized by clause in the annual naval appropriation act under "Provisions, Marine Corps." (Act June 4, 1920, 41 Stat., 831.)

Rations of enlisted men of the Navy: See sections 1579-1585, Revised Statutes, and notes thereto.

**Rations are "allowance" and not "pay."**—The clause referring to additional ration or commutation therefor, in section 5 of the act of May 18, 1920 (41 Stat., 602), which, under section 4 of the Army reorganization act of June 4, 1920 (41 Stat., 761), shall apply only to enlisted men of the Army and Marine Corps of the first three grades, became effective from May 18, 1920, such additional ration being an allowance, and not one of the increases of pay which, under said act of May 18, 1920, became effective from January 1, 1920. (27 Comp. Dec., 31.)

**Commutation defined.**—Commutation in the military or naval service is money paid in substitution of something to which an officer, sailor, or soldier is entitled. Being regulated by statute, commutation can not be allowed by inferior authority. (*Jaegle v. U. S.*, 28 Ct. Cls., 133.)

Under a usage in the Marine Corps, musicians at their option were allowed to take the cost price of their rations, instead of being subsisted on the rations issued. This payment to musicians of the cost price of rations was not commu-

tation, but was virtually a purchase of the rations from them at the invoice price, and a musician who elected to take the price instead of subsistence in kind was not thereafter entitled to the commutation price of a Navy ration prescribed by Revised Statutes section 1585, notwithstanding that the money paid to him was not the commutation price of the Navy ration prescribed by sections 1580 and 1581, Revised Statutes, but was the actual cost of an inferior ration which during his period of service was issued to the corps. (*Jaegle v. U. S.*, 28 Ct. Cls., 133.)

Commutation is not necessarily equal to the value of the thing for which it is a substitute, but is supposed to be in the general average of cases a fair equivalent. (*Jaegle v. U. S.*, 28 Ct. Cls., 133.)

The principle which governs the commutation of rations in lieu of subsistence is that commutation will not be allowed where sub-

sistence in kind is provided by the Government. (*Jaegle v. U. S.*, 28 Ct. Cls., 133.)

**Rations of officers.**—An officer of the Marine Corps attached to a seagoing vessel is not entitled to the ration allowed by Revised Statutes, section 1578, to a naval officer so attached. Such an officer is, by section 1612, subjected to the provisions of section 1269. Commissioned officers of the Army are not allowed rations, although they are allowed to the noncommissioned officers and enlisted men by section 1293. (*Reid v. U. S.*, 18 Ct. Cls., 625.)

**Subsistence of enlisted men.**—The expenses necessarily growing out of the transportation and subsistence of marines detailed for the Navy Department's exhibit at the World's Columbian Exposition may be paid from the fund provided for the Marine Corps and its subsistence. (20 Op. Atty. Gen., 577.)

**Sec. 1616. [Service on armed vessels.]** Marines may be detached for service on board the armed vessels of the United States, and the President may detach and appoint, for service on said vessels, such of the officers of said corps as he may deem necessary.—(1 July, 1797, c. 7, s. 4, v. 1, p. 523. 11 July, 1798, c. 72, ss. 1, 3, v. 1, p. 595.)

By act of March 3, 1909 (35 Stat., 773), making appropriations for pay of the Marine Corps for the ensuing fiscal year, it was provided "that no part of the appropriations herein made for the Marine Corps shall be expended for the purpose for which said appropriations are made unless officers and enlisted men shall serve as heretofore on board all battleships and armored cruisers, and also upon such other vessels of the navy as the President may direct, in detachments of not less than eight per centum of the strength of the enlisted men of the Navy on said vessels." (This proviso was not repeated in subsequent years.)

"When a force of marines is embarked on a naval vessel, or vessels, as a separate organization, not a part of the authorized complement thereof, the authority and powers of the officers of such separate organization of marines shall be the same as though such organization were serving at a navy yard on shore, but nothing herein shall be construed as impairing the paramount authority of the commanding officer of any naval vessel over the vessel under his command and all persons embarked thereon." (Act Aug. 29, 1916, 39 Stat., 586.)

**Power of Congress to regulate duty of Marine Corps.**—The Attorney General entertains no doubt as to the constitutionality of the clause contained in the naval appropriation act of March 3, 1909 (above quoted). If the President, as Commander in Chief, desires to direct the Marine Corps to perform any function which shall involve the application of the appropriation therein made, he must direct that officers and enlisted men of the corps shall serve as theretofore on board all battleships and armored cruisers, and upon such other vessels as he may direct, in detachments of not less

than eight per centum of the strength of the enlisted men of the Navy on said vessels. (27 Op. Atty. Gen., 259.)

Inasmuch as Congress has power to create or not to create, as it shall deem expedient, a Marine Corps, it has power to create such corps and make appropriation for its pay, but provide that such appropriation shall not be available unless the corps be employed in some designated way. (27 Op. Atty. Gen., 259.)

See cases noted under Constitution, Article II, section 2, clause 1, as to powers of the President as Commander in Chief.

**Accounts of marines carried on vessels; serving on shore.**—Marines doing duty in Cuba, whose pay accounts were kept on the paymaster's books of a vessel for convenience, but who were never attached to the vessel for naval duty, were not entitled to share in the bounty awarded said vessel. Never having served on the vessel, they could not be considered to be temporarily absent therefrom within the meaning of section 4633, Revised Statutes, which provided that "no officer or other person who shall have been temporarily absent on duty from a vessel on the books of which he continued to be borne, while so absent, shall be deprived, in consequence of such absence, of any prize money to which he would otherwise be entitled." (Engagement off Santiago Bay, 36 Ct. Cls., 200.)

The words "detached" and "detach" are undoubtedly used in this section in their proper military significance. Marines on board the armed vessels of the United States are for the time being out of their normal relations to the Marine Corps and removed from the direct command of those officers who would otherwise exercise such direct command under the law. (File 21277, Mar. 31, 1906; see note to sec. 1617.)



**Sec. 1617. [Command of navy yards or vessels.]** No officer of the Marine Corps shall exercise command over any navy-yard or vessel of the United States.—(30 June, 1834, c. 132, s. 4, v. 4, p. 713.)

Commandants of navy yards to be selected "from officers not below the grade of commander." (Sec. 1542, R. S.; see note to that section.)

The President is authorized "to formulate appropriate rules governing assignments to command of vessels and squadrons." (Act Mar. 3, 1901, 31 Stat., 1133; see note to sec. 1529, R. S.)

**Purpose of section.**—It seems clear that the act of June 30, 1834, embodied in this section, was passed to avoid the danger lest an officer of marines, who might be altogether ignorant of navigation and inexperienced in nautical matters, should find himself accidentally the officer of highest rank on board a ship and claim the command by virtue of his rank. Navy yards were evidently included in the terms of the act of 1834 because the objections to the exercise of command over them on the part of officers of marines, although less in degree, were the same in kind as those existing to the exercise of like command by such officers over ships of war. (File 21277, Mar. 31, 1906.)

**Rank of officer immaterial.**—Whatever the rank of a marine officer, he is always subject to the orders of the captain of the ship or the commandant of the navy yard on or at which he serves. (File 21277, Mar. 31, 1906.)

**Authority of higher officers of corps.**—Certain higher officers of the corps not only may legally but are evidently intended by this law to exercise some measure of authority over those officers and enlisted men who may be "detached" for service on board vessels or at navy yards; as they may and indeed must exercise a like measure of authority over any of the forces who may be detached for service with the Army under section 1621. (File 21277, Mar. 31, 1906.)

**Jurisdiction at naval stations.**—It will be noted that this statute refers only to navy

yards, and does not apply to naval stations which are not navy yards, and moreover that it does not prohibit the exercise of command within a ship or within a navy yard by officers of marines; it merely provides that they shall not have command "over" the ship or "over" the yard. (File 21277, Mar. 31, 1906.)

"No officer of the Marine Corps shall exercise command over any naval station of the United States." (Navy. Regs., 1913, art. 4101, par. 6. See also file 5530, Nov. 8, 1906.)

While section 1617 refers only to navy yards and vessels, and "does not apply to naval stations which are not navy yards," nevertheless the Marine Corps is at all times subject to the regulations for the government of the Navy, except in the single contingency of being detached and assigned temporarily to duty with the Army; and as the Navy Regulations provide that no officer of the Marine Corps shall exercise command over any station, *held* that a marine officer could not exercise command over the naval station, Hawaii, by succession, in the absence of line officers of the Navy. (File 5530, Nov. 8, 1906.)

**Marine brigade, Philippine Islands.**—The officer commanding the marine brigade in the Philippines should have full command over so much of this force as is not "detached" for duty on board any armed vessel or at any navy yard. There is no legal impediment to his exercising authority for administrative or disciplinary purposes over the detachments which are on duty at navy yards, or in giving him control for such purposes over all the marines on duty in the Philippines. (File 21277, Mar. 31, 1906.)

The officer in command of the marine brigade in the Philippines is subject to the orders of the commander of the Philippine squadron, as well as of the commander in chief of the Asiatic fleet. (File 21277, Mar. 31, 1906.)

**Sec. 1618. [Marines substituted for landsmen.]** The President may substitute marines for landsmen in the Navy, as far as he may deem it for the good of the service.—(3 Mar., 1849, c. 103, s. 1, v. 9, p. 377.)

"The Secretary of the Navy is authorized, in his discretion, to establish such grades and ratings as may be necessary for the proper administration of the enlisted personnel of the Navy and Marine Corps." (Act June 4, 1920, sec. 7, 41 Stat., 836.)

The transfer of marines to the Hospital Corps of the Navy is authorized by act of August 29, 1916 (39 Stat., 572), which also authorizes similar transfers from the Hospital Corps to the Marine Corps.

**Sec. 1619. [Duty on shore.]** The Marine Corps shall be liable to do duty in the forts and garrisons of the United States, on the sea-coast, or any other duty on shore, as the President, at his discretion, may direct.—(11 July, 1798, c. 72, s. 6, v. 1, p. 596.)

See notes to sections 1616, 1617, and 1621, Revised Statutes.

**Normal duty of marines.**—This section indicates what are the duties of the Marine

Corps under normal conditions contemplated by its organization. (File 21277, Mar. 31, 1906.)

**Sec. 1620. [Regulations.]** The President is authorized to prescribe such military regulations for the discipline of the Marine Corps as he may deem expedient.—(30 June, 1834, c. 132, s. 8, v. 4, p. 713.)

As to regulations in general, see sections 161 and 1547, Revised Statutes, and notes thereto.

As to regulations governing the Marine Corps, see section 1621, Revised Statutes, and note thereto.

**Post exchanges.**—Navy regulations authorizing the establishment of post exchanges in the Marine Corps conflict with no law. A post exchange so established is not a voluntary association but an institution established by the Government for the benefit of commissioned

officers and enlisted men. A disbursing officer of the Marine Corps who receives money from enlisted men under such regulations is as responsible for it as for any other money confided to his care. The Government has such an interest in the funds of the post exchange as to justify a deduction of the pay of the disbursing officer in charge in order to reimburse the enlisted men for their losses incurred by reason of his neglect and want of care. (*Woog v. U. S.*, 48 Ct. Cls., 80.)

**Sec. 1621. [When detached for service with the Army.]** The Marine Corps shall, at all times, be subject to the laws and regulations established for the government of the Navy, except when detached for service with the Army by order of the President; and when so detached they shall be subject to the rules and articles of war prescribed for the government of the Army.—(11 July, 1798, c. 72, s. 4, v. 1, p. 595. 30 June, 1834, c. 132, s. 2, v. 4, p. 713.)

Amendment to this section was made by act of August 29, 1916 (39 Stat., 651), now embodied in act of June 4, 1920 (41 Stat., 787-812), prescribing new Articles of War, article 2 of which provides that "the following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles: \* \* \* (c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: *Provided*, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases."

By act of August 29, 1916 (39 Stat., 573), it was provided that "officers and enlisted men of the Medical Department of the Navy, serving with a body of marines detached for service with the Army in accordance with the provisions of section sixteen hundred and twenty-one of the Revised Statutes, shall, while so serving, be subject to the rules and articles of war prescribed for the government of the Army in the same manner as the officers and men of the Marine Corps while so serving."

"Commissioned officers of the Marine Corps, detached for duty with the Army under the provisions of section sixteen hundred and twenty-one, Revised Statutes, shall be eligible, in the same manner as officers of the Regular Army, for temporary promotion to higher grades in any of the forces provided by the Act entitled 'An Act to authorize the President to increase temporarily the Military Establishment of the United States,' approved May eighteenth,

nineteen hundred and seventeen: *Provided*, That officers of the Marine Corps temporarily promoted to higher grades in any of the forces of the Army under the provisions of this Act shall not thereby vacate their permanent appointments or commissions or be prejudiced in their relative lineal standing in the Marine Corps: *Provided further*, That temporary vacancies in the Marine Corps caused by the appointment of officers to higher grades in the Army shall be temporarily filled in the same manner as is now prescribed by law: *And provided further*, That the temporary promotions herein authorized shall continue only while such officers are detached for duty with the Army." (Act Jan. 12, 1919, 40 Stat., 1054.)

See section 1135, Revised Statutes, as to supplies and transportation for marine detachments cooperating with land troops.

The Secretary of War was authorized and directed to transfer to the Secretary of the Navy, for the use of the Marine Corps without payment therefor, such reserve stock of clothing, arms, equipment, and other necessary military supplies, inventoried at the cost to the Army, and not to exceed in the aggregate \$7,000,000, as the same may from time to time be requisitioned. (Act Feb. 25, 1919, 40 Stat., 1174.)

**Jurisdiction of the Secretary of the Navy.**—The Secretary of the Navy is the organ through which the President, who is commander in chief, makes known his will to the Navy. Whether the Marine Corps shall be doing service on shipboard or on shore, the President's orders may properly pass through the Secretary of the Navy to it, except where the corps shall have been incorporated with the Army for a given service on land. (1 Op. Atty. Gen., 380.)

The Marine Corps belonging to the naval establishment, and the orders issued by the Secretary of the Navy being, in contemplation



of law, the orders of the President, it follows that the Secretary may suspend, modify, or rescind any order issued by the commandant of the corps or any subordinate officer, except where a direct authority has been given by Congress to an officer to perform any particular function, such as to order courts-martial in certain cases. (1 Op. Atty. Gen., 380.)

In the absence of a special order from the President detaching the Marine Corps for service with the Army, the office of commandant of the Marine Corps is under the direct supervision and control of the Secretary of the Navy, and in the event of a vacancy its duties may be performed by the Secretary or by the Acting Secretary. (28 Op. Atty. Gen., 486, 490.)

The Secretary of the Navy has authority, under section 1621, to detail men to guard and protect property of the Government placed on exhibition at the World's Columbian Exposition; the cost of transportation and sustenance of such detail must be paid from the fund provided for the Marine Corps and its subsistence, and is only limited by the consideration of the question whether there are sufficient funds available for that purpose, as to which the Secretary is the sole judge. (20 Op. Atty. Gen., 576.)

**Not a bureau of the Navy Department.**—The Marine Corps is a part of the naval establishment, but it is not part of the Navy Department as established at the seat of government; it is under the supervision of an executive department, but that relation to the department is not the same as being part of it. The Navy Department is established by section 415, Revised Statutes, and section 419 establishes certain bureaus among which is to be distributed the business of the department; the Marine Corps is not one of the bureaus, and there is no law making it a bureau, office, or branch of the Navy Department. (11 Comp. Dec., 558; see also 28 Op. Atty. Gen., 487, where this question suggested but not decided.)

**Jurisdiction over Marine Corps when serving alone.**—This section clearly subjects the Marine Corps when serving alone and without the cooperation of either the Army or Navy, to the laws and regulations established for the government of the latter. (File 21277, Mar. 31, 1906.)

**Normal status of Marine Corps part of the Navy.**—See notes to sections 761, 1418, and 1422, Revised Statutes.

Does the Marine Corps belong to the Army or the Navy? Its name would seem to answer this question. It is called a marine corps; its characteristic action, then, is to perform duty at sea; and by its primary and fundamental character, therefore, it belongs to the Navy. It is true that the President may order it to perform service on shore; but it would still be the marine corps performing service on shore. The order directing it to such service would pass through the Secretary of the Navy, as would all the President's orders while engaged in such service, while its action was single or separate from that of the Army. (1 Op. Atty. Gen., 380); compare 2 Op. Atty. Gen., 353, 354, where it is stated that the Marine Corps is more assimilated to the Army proper than to

the naval branch of our military establishment.)

The act of July 1, 1797 (1 Stat., 523), "providing a naval armament," assigns to each ship, besides mariners, and so forth, a certain number of marines. The duty of marines is exclusively maritime; for sea service only. By this act they have no connection with the Army, in character of duty to be performed. Here they are not amphibious. The next act on the subject of the Marine Corps is that "for establishing and organizing a Marine Corps" of July 11, 1798 (1 Stat., 594). The use of the words in this act, "in addition to the present military establishment, there shall be raised a corps of marines," and so forth, did not constitute the marines in fact part of the military establishment, nor make applicable to the Marine Corps general provisions relating to the Army; nor did this follow from the last section of that act, authorizing the President to employ the marines on shore, and so forth. The marines were a body known to the law by act of July 1, 1797, as a purely maritime or naval force; and the enlargement of that force or the assigning to them of duties on shore, does not necessarily identify them with the Army, and those words could not have the effect of constituting as part of the Army, a force governed by different rules and regulations, and destined to a service unknown to and incompatible with the character and duties and service of the Army. The marines are certainly a military force as well as the Army, and are in addition to the then existing military establishment. It is to be remarked, also, that although the marines may be compelled to do duty on shore, it is not part of their ordinary duty but at the discretion of the President as in case of the invasion of the territories of an enemy's coast by a naval force the seamen may be compelled to do the duty of soldiers or marines at the discretion of the commander of the ship or squadron. (U. S. v. Kuhn, 26 Fed. Cas. No. 15,545, pp. 821, 822.)

The Marine Corps are at all times subject to the laws and regulations established for the better government of the Navy, except when detached for service with the Army by order of the President. They are organized, as the name implies, for sea service, and are subject to the direction and control of the Secretary of the Navy. (10 Op. Atty. Gen., 116, 118; see also, 10 Op. Atty. Gen., 129.)

Although marines are not in some senses, "seamen," and their duties are in some respects different, yet they are, while employed on board public vessels, persons in the naval service, persons subject to the orders of naval officers, persons under the government of the naval code as to punishment, and persons amenable to the Navy Department. Their very name of "marines" indicates the place and nature of their duties generally. And besides the analogies of their duties in other countries, their first creation here to serve on board ships expressly declared them to be a part "of the crews of each of said ships" (act Mar. 27, 1794, 1 Stat., 350, sec. 4). Their pay was also to be fixed in the same way as that of seamen (sec. 6, p. 351). So it was again, by the act of April 27, 1798 (1 Stat., 552). And they have ever since

been associated with the Navy, except when specially detailed by the President for service in the Army (see act July 11, 1798, 1 Stat., 595, 596). Thus paid, thus serving, and thus governed like and with the Navy, it is certainly no forced construction to consider them as embraced in the spirit of the act under consideration by the description of persons "enlisted for the Navy." (*Wilkes v. Dinsman*, 7 How., 89. See note below, under "Navy laws held applicable to Marine Corps.")

The act of June 30, 1834 (4 Stat., 713), adds much strength to these conclusions. By section 2 it provides "that the said corps shall at all times be subject to and under the laws and regulations which are or may hereafter be established for the better government of the Navy," etc. That corps thus in some respects became still more closely identified with the Navy. (*Wilkes v. Dinsman*, 7 How., 89.)

The Marine Corps occupies a position intermediate in some respects between the Army and the Navy. (See secs. 1616, 1619, 1620, and 1621, R. S.) It would thus seem to be, to some extent, an independent organization. There are several sections of the Revised Statutes which refer to it distinctively, apart from the naval service (see secs. 1551, 1596, 1600, 1609, 1612, 1617). Notwithstanding this intermediate character of the Marine Corps, and these several provisions allying it in several respects with the military service, *held* that it is properly classed with and is a part of the naval service of the United States. (In *re Doyle*, 18 Fed. Rep., 369, citing 1 Op. Atty. Gen., 381; 11 Op. Atty. Gen., 100; 10 Op. Atty. Gen., 118, 129; In *re Bailey*, 2 Taney, 200.)

In various acts of Congress making appropriations the Marine Corps are frequently referred to as a part of the naval service, and are sometimes described as "marines of the United States Navy" (see 10 Stat., 100; 22 Stat., 472, 479, 589, 284). In the revision of the statutes, the Marine Corps is provided for by chapter 9 of Title XV, "The Navy," while "The Army" is the subject of Title XIV. (In *re Dove*, 18 Fed. Rep., 369.)

The military establishment of this country is divided by the general laws of the United States into the Army and the Navy, and over each of these one of the great heads of departments, called secretaries, is appointed to preside, to manage and to administer its affairs. The Marine Corps is a military body, designed to perform military services; and while they are not necessarily performed on board ships, their active service in time of war is chiefly in the Navy, and accompanying or aiding naval expeditions. In time of peace they are located in navy yards, mainly, although occasionally they may be used in forts and arsenals belonging more immediately to the Army. The statutes of the United States, in prescribing the duties which they may be required to perform, have not been very clear in any expression which goes to show how far these services are to be rendered under the control of the officers of the Navy or of the Army. It is clear that they may be ordered to service in either branch; but taking all these statutes and the practice of the Government together, *held* that they are a military body, primarily belonging

to the Navy and under the control of the head of the naval department, with liability to be ordered to service in connection with the Army and in that case under the command of Army officers. (*U. S. v. Dunn*, 120 U. S., 249.)

It must be conceded that the Marine Corps, a military body in the regular service of the United States, occupies something of an anomalous position, and is often spoken of in statutes which enumerate "the Army, the Navy, and the Marine Corps," or "the Army and the Marine Corps," or "the Navy and the Marine Corps," in a manner calculated and intended to point out that it is not identical with either the Army or the Navy. And this argument is the one very much pressed to show that service in the Marine Corps is not service in the Army or in the Navy. On the other hand, the services rendered by that corps are always of a military character, and are rendered as part of the duties to be performed by either the Army or the Navy. If there are services prescribed for that corps by the statutes of the United States, or the regulations of either the Army or the Navy, which are not performed in immediate connection with the Army or the Navy, and under the control of the heads of the Army or Navy, either civil or military, the court is not aware of them. (*U. S. v. Dunn*, 120 U. S., 249.)

The provisions of the Revised Statutes (secs. 1599, 1600, 1613, 1614, 1615, 1616, 1621, and 1623), bringing together the enactments of Congress on the subject of the Marine Corps, show that the primary position of that body in the military service is that of a part of the Navy, and its chief control is placed under the Secretary of the Navy, there being exceptions when it may, by order of the President or some one having proper authority, be placed more immediately, for temporary duty, with the Army and under the command of superior Army officers. (*U. S. v. Dunn*, 120 U. S., 249.)

Whatever view may be taken, the Marine Corps can not be considered as a distinct military organization, independent of the departments of the Army and Navy, and under the supervision and control of neither of them, having no superior outside of its own officers except the President. While it may be true that it is not so exclusively a part of the Navy as ships and navy yards are, yet its general supervision and control remain with the Navy Department. (*U. S. v. Dunn*, 120 U. S., 249.)

The statutes relating to the Marine Corps, and decisions of the Supreme Court of the United States, reviewed and *held*: "These provisions, together with many others that might be cited, indicate beyond doubt that the Marine Corps in the contemplation of Congress constitutes a constituent part of the naval service of the country, subject to the laws and regulations that govern that arm of the service, and this, we think, has been so held by the Supreme Court of the United States." (*Elliott v. Harris*, 24 App. D. C., 11; file 10245-03; followed and applied by Navy Department Aug. 19, 1913, file 26251-6297: 4&5; compare, *McCalla v. Facer*, 144 U. S., 61, noted under sec. 1418, R. S.)

The military establishment of the United States consists of three principal organizations,



the Army, the Navy, and the Marine Corps. Each has an organization distinct from that of the others, as plainly appears in the Revised Statutes; and each is the subject of distinct annual appropriations by Congress. (19 Op. Attv. Gen., 616, 618, 619.)

The organization of the Marine Corps is assimilated to that of the Army, but its sphere of duty is mostly on board ships or at naval stations on land, and it may be called the police of the Navy; while on the other hand it is always liable to be ordered to service in conjunction with the Army, and is subject to the Articles of War or the Articles for the Government of the Navy, according as it serves with the one or the other of these branches of the service. (19 Op. Attv. Gen., 616, 618, 619.)

That the Marine Corps has a closer affinity with the Navy than with the Army is manifest both from its designation and from section 1621 of the Revised Statutes. According to this section, the service of the Marine Corps with the Navy is its usual and regular service, while that with the Army is unusual and exceptional. This view was substantially adopted by the Supreme Court in the case of *United States v. Dunn and Wilkes v. Dinsman*, above noted. (19 Op. Attv. Gen., 616, 618, 619.)

The Marine Corps, though a distinct organization from the Army or Navy is nevertheless subject to the laws and regulations for the government of the Navy, except when detached for service with the Army by order of the President (sec. 1621, R. S.). In relation to rank, the officers of the Marine Corps shall be on the same footing as officers of similar grades in the Army (sec. 1603). And they shall take the same oath prescribed for officers and enlisted men of the Army (sec. 1609). By section 1622, commissioned officers of the Marine Corps shall be retired in like cases, etc., as officers of the Army, except as provided in section 1623. The noncommissioned officers, privates and musicians of the Marine Corps are, by section 1615, entitled to receive one Navy ration daily, and by section 1617 it is provided that no officer of the Marine Corps shall exercise command over any navy yard or vessel of the United States. By section 1616 the officers and enlisted men of the corps are subject to duty on board the armed vessels of the United States; and by section 1619 the corps shall be liable to do duty in the forts and garrisons of the United States or other duty on shore, etc. Terms of enlistment in the Army, Navy, and Marine Corps are prescribed by sections 1119, 1418, and 1608, respectively. In *Wilkes v. Dinsman* (above noted), the court, construing act of March 2, 1837 (5 Stat., 157), providing for enlistments in the Navy, held that the words "any person enlisted for the Navy" includes marines; see also, *United States v. Dunn* (above noted). It will thus be seen that the status of the Marine Corps is a variable one, and though subject to the laws and regulations established for the government of the Navy, except when detached by the President for service with the Army, they are, in relation to rank, oath, pay, and retirement, assimilated to the Army and subject to the direction of the President they may, under section 1619, be detached for service

with the Army anywhere in the United States. (*Walton v. U. S.*, 31 Ct. Cls., 196.)

A perusal of Revised Statutes, section 1612, 1621, and 1622, will indicate the somewhat anomalous position occupied by the Marine Corps in the military service. It looks to the Army statutes for its rate of pay and to the Navy for its laws and regulations, except where detached for service with the Army, and the same uncertainty as to its position runs all through the statutes relating to the Army and Navy. Nevertheless, generally speaking and as its name indicates the Marine Corps is a part of the Navy. It is that part of the Navy which may on occasions become a part of the Army. The courts have kept this fact in mind in the construction of statutes relating to the military service. (*Jonas v. U. S.*, 50 Ct. Cls., 281.)

The Marine Corps is clearly organized under the authority conferred by clause 13 of section 8 of Article I of the Constitution, which declares that the Congress "shall have power to provide and maintain a Navy," and it is governed under so much of the authority conferred by clause 14 of the same section as empowers the Congress "to make rules for the government and regulation of the \* \* \* naval forces." This conclusion is established by the decision of the Supreme Court in *Wilkes v. Dinsman* (above noted), in which it was determined that a private in the Marine Corps was a "person enlisted for the Navy" in the language of the act under consideration in that case. That decision was cited with approval in *United States v. Dunn* (above noted). These two decisions support the statement made by the Attorney General while Secretary of the Navy, that "its legal status is, beyond a doubt or question, a part of the naval forces of the country, if not a part of the Navy in its strictest sense." (27 Op. Attv. Gen., 90.)

The Marine Corps has a composition and primary organization distinct from those of both the Army and the Navy, pursuant to chapter 9, Title XV of the Revised Statutes; but that chapter itself is a part of the title concerning the Navy. In *United States v. Dunn* (noted above), the Supreme Court states what the Revised Statutes, section 1621, makes altogether clear; that the Marine Corps is a part of the naval establishment, and is subject to the laws and regulations for the government of the Navy save in the single case when it has been detached for service with the Army by order of the President. Nothing but such order by the President or by his authority can alter the ordinary connection of the Marine Corps with the Navy and connect that corps with the Army. (28 Op. Attv. Gen., 15, 17.)

The statutes recognize the Marine Corps as part of the Navy; the Marine Corps is carried upon the Navy Register, and the Navy Regulations assign their duties, except where detached for duty in the Army. (*Harlee v. U. S.*, 51 Ct. Cls., 342. Compare *Reid v. U. S.*, 18 Ct. Cls., 625.)

The recent trend of legislation, and departmental regulations, as well as decisions of the courts and executive departments, has been in the direction of fixing the status of the Marine Corps even more definitely as an integral part

of the naval service than was the case in prior years. (File 5252-66, May 13, 1915, citing, *inter alia*, act of June 30, 1914 (38 Stat., 403). "that hereafter the number of enlisted men of the Navy and Marine Corps provided for shall be construed to mean the daily average number of enlisted men in the naval service during the fiscal year.")

There is properly speaking no warrant in law for regarding the Marine Corps as an anomalous body, intermediate between the Army and Navy, and having relations with both. It is true that the Marine Corps is assimilated to the Army in some respects, as by sections 1604, 1609, 1612, 1622 of the Revised Statutes, and the act of July 28, 1892 (27 Stat., 321); but its legal status is beyond a doubt or question a part of the naval forces of the country, if not a part of the Navy in the strictest sense. (File 21277, Mar. 31, 1906; quoted in 27 Op. Atty. Gen., 90.)

Giving to the word "detached" in section 1621, the same appropriate significance which it has in section 1616, it becomes evident that service with the Army and consequent subjection to the Articles of War is regarded as an exceptional and abnormal condition for the Marine Corps, as clearly as it would be for a force of blue-jackets landed and placed temporarily under the orders of an Army officer. (File 21277, Mar. 31, 1906.)

**Status when detached for service with the Army.**—The law is well settled that members of the Marine Corps detached by the President for service with the Army are, while so serving, a part of the Army and not under naval jurisdiction. (File 26250-2335, Dec. 18, 1920.)

Section 1621 is explicit in saying that when detached by order of the President for service with the Army the Marine Corps shall be subject to the rules and articles of war prescribed for the government of the Army; and then, of course, it becomes a "corps of the Army" within the scope of the 122d article of war. (28 Op. Atty. Gen., 15, 19; see note to sec. 1342, R. S.)

Where the President should, by order, incorporate it with an army for any given service on land, its identity as a Marine Corps, *pro hac vice*, would be lost in that of the Army, and the whole body become, for the time, one. (1 Op. Atty. Gen., 380.)

**Court-martial jurisdiction.**—See article 2 of the Articles of War, quoted above under this section.

Whether an officer of the Marine Corps is liable to be tried by a naval court-martial or one composed of officers of the Army will depend upon whether the alleged misconduct took place while he was employed in the land service. (5 Op. Atty. Gen., 706.)

Courts-martial of marine officers stationed on shore and convened under the Articles of War may try and sentence to suffer corporal punishment marines who have deserted from the public ships, although it would have been otherwise had the offense been committed while the marines were employed in any service upon the land, as in the latter case the abolition of corporal punishment by act of May 16, 1812, in reference to the Army would be applicable and exclude its infliction upon marines. (1 Op. Atty. Gen., 187.)

Under Revised Statutes, section 1621, a private in a brigade of the Marine Corps is not, while that brigade is detached for service with the Army by order of the President, subject to the laws and regulations of the Navy, and a naval court-martial has no jurisdiction over him based on an act constituting an offense both by the rules and regulations of war prescribed for the government of the Army and the laws and regulations established for the government of the Navy. (U. S. ex rel. Davis v. Waller, 225 Fed. Rep., 673.)

Section 1621 may be construed as though it read: "The Marine Corps is subject to the Articles of War while on service with the Army by order of the President. At all other times it is subject to the laws and regulations of the Navy." (U. S. ex rel. Davis v. Waller, 225 Fed. Rep., 673.)

Granted that the status of the Marine Corps was at first doubtful. It rendered service at times with the Navy and at times with the Army, without being definitely or permanently attached to either department. Its "primary" relation was finally settled to be with the Navy, but it had special and temporary Army relations when on service with the Army. The early statutes gave recognition to this by providing that it should be subject to the laws and regulations of the Navy, except when detached by order of the President for service with the Army. Later the statutes added the clause contained in section 1621, that when so detached it should be subject to the Articles of War. This confirms the conclusion that Congress did not intend by section 1621 that a marine should be subject to trial by naval court-martial for an offense committed by him while detached for service with the Army. (U. S. ex rel. Davis v. Waller, 225 Fed. Rep., 673.)

Under section 1621, Revised Statutes, a marine detached for service with the Army and thereafter returned to the jurisdiction of the Navy could not be tried by a naval court-martial for an offense committed by him while detached for service with the Army, which was a violation of Army Regulations. The same laws and regulations which define the offense constitute and designate the court which is to try the offender. (U. S. ex rel. Davis v. Waller, 225 Fed. Rep., 673.)

The fifth regiment of marines was organized by direction of the President under Confidential Orders 28790-3, dated May 29, 1917, and was by said order detached for service with the Army in accordance with section 1621, Revised Statutes. No order having been issued detaching said regiment from duty with the Army and returning it to the jurisdiction of the Navy, it would appear that the Army has jurisdiction to try a member of that regiment by court-martial for offenses alleged to have been committed by him while an inmate of an Army hospital in this country to which he had been transferred after his return to the United States, having in the meantime been under treatment in naval hospitals in Norfolk and Brooklyn. The said private, not having been detached from duty with the Army and returned to naval jurisdiction, continued subject to Army jurisdiction. (File 27228-547, May 26, 1919.)



By War Department General Orders No. 96, July 30, 1919, it was provided: "By direction of the President, it is ordered that all officers and enlisted men of the Marine Corps who have heretofore been detached for service with the Army in connection with the war against Germany and her allies, and who shall hereafter arrive in the United States shall, upon reporting at any station, post, camp, garrison, hospital, office, or other unit or organization of the Navy or Marine Corps for duty, forthwith stand detached from service with the Army and shall revert to their former status of duty with the Navy. All officers and enlisted men of the Marine Corps who have been detached as aforesaid and who have heretofore arrived in the United States shall stand detached from service with the Army from this date, provided they have not already been returned to duty with the Navy. Officers and enlisted men of the Marine Corps who are patients in Army hospitals shall not come under the provisions of this order until they shall have been discharged therefrom."

**Jurisdiction to review proceedings of Army board.**—The naval authorities are without jurisdiction to review the proceedings or action of the Army authorities in the case of a private in the Marine Corps who died August 29, 1919, while serving with the American Forces in France, an Army board having convened on September 29, 1919, and reported that his death was in the line of duty and not the result of his own misconduct, which said report was approved by the convening authority and forwarded to the commanding general, headquarters American Forces in France, by whom it was transmitted to the Adjutant General of the Army and thence to the Major General Commandant of the Marine Corps. At the time of his death, said private had not been returned to the jurisdiction of the Navy as he was still with the American Forces in France and did not return to the United States. (File 26250-2335, Dec. 18, 1920. See War Dept. G. O. 96, July 30, 1919, quoted above under "Court-martial jurisdiction.")

**Status when cooperating or traveling with Army.**—The Articles of War do not operate to give the officers of the Marine Corps any authority to exercise command in the Army unless they have been detached for service with the Army by order of the President and are still serving with the Army under that order. (28 Op. Atty. Gen., 15; see note to sec. 1342, R. S., as to art. 120 A. W.)

When any part of the Marine Corps is present with the Army and engaged in a common enterprise with it, without an order of the President detaching it for service with the Army, the case is one of cooperation and not of incorporation; and in such a case no officer of the Marine Corps can exercise command over the Army any more than a naval officer can when some part of the Navy is cooperating with the Army; and the converse is true of Army officers cooperating with the Marine Corps. The Marine Corps is a part of the Naval Establishment, and is subject to the laws and regulations for the government of the Navy save in the single instance when it has been detached for service with the Army by order of the Presi-

dent. (28 Op. Atty. Gen., 15; see notes to secs. 1342 and 1466, R. S.)

Enlisted men of the Navy and Marine Corps, while being transported on board an Army transport are subject to the rules and regulations of said transport, but are not amenable to trial by Army court-martial unless attached to the Army by Executive order. (File 26287-534, June 15, 1910.)

The statutes are clear that marines are not subject to the Articles of War unless detached for service with the Army by order of the President. It is equally clear that officers and enlisted men of the Navy are not under any circumstances subject to the Articles of War except while serving with marines detached for service with the Army by order of the President, as provided in the act of August 29, 1916 (quoted above, under this section). (Op. J. A. G., Army, Nov. 19, 1920, No. 250401, Navy Dept. file No. 26287-7305:1.)

Officers and enlisted men of the Navy and Marine Corps traveling on Army transports, but not detached for service with the Army, although subject to Army Transport Regulations, are not subject to trial by Army courts-martial. (Op. J. A. G., Army, Nov. 19, 1920, No. 250401, Navy Dept. file No. 26287-7305:1.)

Under first views the Marine Corps is to be taken as an adjunct of the Navy; nor can it be supposed that the mere fact of its bodily presence upon the law would be sufficient to divest the service which may have been there performed of the substantial characteristics of naval service. How long soever such bodily presence may have been continued, it may still well be conceived to have brought with it constructively but essentially nothing but the fulfillment of naval duty. (5 Op. Atty. Gen., 706.)

**What laws and regulations are included by section 1621.**—The term, "the better government of the Navy," as used in the law (now embodied in sec. 1621, R. S.), need not be restricted to mere punishment, or to courts-martial, but may include any provision by law intended to secure the safety of the crew and vessel, and insure due subordination and sound discipline in any exigency of the public service. (*Wilkes v. Dinsman*, 7 How., 89, holding that the law now embodied in sec. 1422, R. S., affecting terms of enlistment in the Navy, was applicable to Marine Corps.)

The obvious purpose of section 1621, Revised Statutes, is to provide rules for the discipline of the Marine Corps in the different spheres of duty (military and naval) in which it is liable to serve. Its language does not warrant the inference that it was intended thereby to subject that corps to any other laws and regulations of the Navy than such as relate to discipline and its maintenance. Within this category section 1493, Revised Statutes (relating to examinations for promotion in the Navy), does not fall. (17 Op. Atty. Gen., 117, 118. See act Aug. 29, 1916, 39 Stat., 611, extending sec. 1493, R. S., to the Marine Corps; and see note to sec. 1599, R. S., under "Laws relating to promotion construed.")

The act of August 3, 1861, section 17, authorizing the Secretary of the Navy to assemble boards for the retirement of marine officers,

does not provide that the board shall consist of officers of that corps, but simply that it shall consist of commissioned officers; this being a law for the government of the Navy within the meaning of the act of 1834 (sec. 1621, R. S.), *held* that the Secretary of the Navy, under the President, has full power to organize boards for the retirement of marine officers from officers of the Navy of senior rank, under section 17 of said act of 1861. (10 Op. Atty. Gen., 129, 130.)

The effect of the act of June 30, 1834, section 2 (sec. 1621, R. S.), is to subject this corps to the operation of laws for the government of the Navy, except where by special enactment they are made subject to different laws, as, for instance, by the act of June 30, 1834, section 5, relating to pay and allowances. (10 Op. Atty. Gen., 129.)

**Navy laws held applicable to Marine Corps.**—See notes to sections 761, 1418, and 1422, Revised Statutes, as to enlistments in the Marine Corps; note to section 1596, under "Computing number of officers;" and note to section 1599, under "Appointment of former student at Naval Academy."

The act of Congress passed March 2, 1837 (5 Stat., 153), authorized a reenlistment of marines to serve during the cruise then about to take place, they being included in the denomination of "persons enlisted for the Navy." Under the same act the commander of a squadron had power to detain a marine after the term of his enlistment expired, if in the opinion of the commander public interest required it. (*Wilkes v. Dinsman*, 7 How., 89. See sec. 1422, R. S., and note thereto.)

At the time of enlistment the Marine Corps being subject to such laws and regulations as might at any time be established for the better government of the Navy, it was a part of the contract of enlistment that the marine in this case should obey them whenever passed; it was, therefore, no objection to such laws that they were passed after his entering the service. (*Wilkes v. Dinsman*, 7 How., 89.)

The limitations in sections 1418 and 1419, Revised Statutes, undoubtedly apply to enlistments in the Marine Corps, under section 1608. (In *re Doyle*, 18 Fed. Rep., 369; see notes to sections cited.)

The Marine Corps is part of the naval service, in which minors over 18 years of age may be enlisted, under sections 1608 and 1418, 1419, 1420, and 1624 (art. 19), without the consent of their parents or guardians. (In *re Doyle*, 18 Fed. Rep., 369; see also *Elliott v. Harris*, 24 App. D. C., 11, followed by Navy Dept., Aug. 19, 1913, file 26251-6297: 4 & 5, with reference to unauthorized detention of enlisted men of the Marine Corps after expiration of enlistment to make good time lost by unauthorized absence as provided for in Army laws.)

Service by an officer of the Navy as an enlisted man in the Marine Corps is to be credited to him in calculating his longevity pay, under the act of March 3, 1883 (22 Stat., 472, 473), providing that "all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both," etc. (*U. S. v. Dunn*, 120 U. S., 249.)

The naval appropriation act of August 22, 1912 (37 Stat., 328), authorizing enlisted men of the Navy by their voluntary agreement to extend their enlistments for a period of one, two, three, or four years, *held* applicable to enlisted men of the Marine Corps. (File 26507-214 : 8, Apr. 5, 1915, following *Wilkes v. Dinsman*, above noted. See also note to sec. 1418, R. S.)

The act of June 30, 1914 (38 Stat., 410), authorizing appointments to the Naval Academy from "enlisted men of the Navy," *held* to authorize such appointments to be made from enlisted men of the Marine Corps. (File 5252-66, May 13, 1915.)

The provisions contained in the naval appropriation act of March 3, 1915 (38 Stat., 940), creating a "United States naval reserve," did not authorize the creation of a Marine Corps reserve, for the reason that several provisions contained in said legislation clearly manifested that Congress did not intend to include the Marine Corps therein. (File 28550-1 : 3, June 15, 1915.)

Section 1563, Revised Statutes, which forms part of chapter 8 of Title XV, authorizing advances of pay to "persons in the naval service," has been invariably construed by the accounting officers as applying to marine officers. (See *Reid v. U. S.*, 18 Ct. Cls., 625.)

**Navy laws held not applicable to Marine Corps.**—An officer in the Marine Corps attached to a seagoing vessel is not entitled to the ration allowed by Revised Statutes, section 1578, to a naval officer so attached. (*Reid v. U. S.*, 18 Ct. Cls., 625.)

The term "Navy hands" as used in the statute under consideration, *held* not to include the Marine Band. (27 Op. Atty. Gen., 90, noted under sec. 1613, R. S.)

The act of February 9, 1889 (25 Stat., 657), "to provide for the deposit of savings of seamen of the United States Navy," does not extend to enlisted men of the Marine Corps. (19 Op. Atty. Gen., 616; see also 25 Op. Atty. Gen., 190.)

For other cases, see note to section 1418, Revised Statutes, under "Enlistments in the Marine Corps not governed by Navy laws"; and see note to section 1422, Revised Statutes, with respect of marine officers for Civil War service.

**Intention of Congress.**—In many cases statutes relating to the Navy are obviously inapplicable to the Marine Corps; either because of express language used therein or because of the manifest purpose of Congress as apparent from a reading of the law itself or from a consideration of the conditions and circumstances surrounding its enactment. The word "Navy" may be given an extended meaning to embrace the Marine Corps, as has been done in many cases, while on the other hand the facts of a particular case may be such as to show that it was used in a more restricted sense as referring to the Navy proper, as has likewise been held in many cases. Accordingly, each statute must be construed with reference to specific questions arising thereunder; and the word "Navy" thus being susceptible of two interpretations, it is always permissible to consider the purpose and spirit of the law, and the object



which it was intended to accomplish, as indicated not only by the language used in the statute but by other recognized aids to interpretation. (File 5252-66, May 13, 1915; 28687-5, Aug. 29, 1916.)

It does not follow from the decisions holding that the word "Navy" includes the Marine Corps that Congress can not enact any law with reference to the Navy which does not, *ipso fure*, include the Marine Corps. On the contrary, the Navy Department fully recognizes the fact that many laws relating to the Navy are not intended to include the Marine Corps, and that the question is largely one of intent. (File 28687-5, Aug. 29, 1916.)

In nearly all cases where Congress intends to legislate with reference to the Marine Corps it designates it especially, even in cases where it might properly be held to be included by the term "Navy," as, for example, in the pension laws, and the laws establishing hospitals for the Navy; which shows that Congress has not always regarded the term Navy as a sufficiently clear designation for the Marine Corps. (19 Op. Atty. Gen., 616, 620.)

The literal sense of the law is not necessarily its true sense; for if, by taking the law by its four corners, or by looking at it in the light of the circumstances in which it was passed, or by doing both, it appears that its meaning should be restricted or enlarged in order to carry out the intention of the legislature, it is the duty of the expounder to limit or amplify that meaning as the case may require. (19 Op. Atty. Gen., 616, 618.)

In view of the peculiar and irregular position of the Marine Corps in the public service, it is not at all surprising that instances occur where legislation in terms confined to the Army and Navy has been held to include the officers and men of the Marine Corps. (19 Op. Atty. Gen., 616, 619.)

It is quite safe to say that, in the absence of language or attendant circumstances indicating different intention, the term in a statute, "officers of the Navy," would not include officers of the Marine Corps, and "enlisted men of the Navy" would not include enlisted men of the Marine Corps. (27 Op. Atty. Gen., 90.)

**Army laws held inapplicable to Marine Corps.**—Section 1117, Revised Statutes, prohibiting enlistment of any person under 21 years in the military service of the United States, without the written consent of his parents or guardians, applies only to enlistments in the Army, and does not include the Marine Corps. (In re Doyle, 18 Feb. Rep., 369; see note to sec. 1418, R. S.)

Sections 1305-1308, Revised Statutes, which provide for the deposit with any Army paymaster by any enlisted man of the Army of his savings, have no application to the Marine Corps; and the enlisted men of that corps

have not the right or privilege of making such deposits with a paymaster of their branch of the service. (25 Op. Atty. Gen., 190.)

If the act of February 9, 1889 (25 Stat., 657), providing for deposits by enlisted men of the Navy, could not properly be construed to apply to the Marine Corps, which is primarily a component part of the Navy, the sections of the Revised Statutes authorizing such deposits by enlisted men of the Army can not be so construed. (25 Op. Atty. Gen., 190.)

The act of March 3, 1885 (23 Stat., 350), relating to reimbursement for losses of personal effects by persons in the Army, does not apply to the Marine Corps, which is governed in this respect by the act of March 2, 1895 (28 Stat., 962), relating to losses by persons in the naval service. (Harlee v. U. S., 51 Ct. Cls., 342.)

The Army appropriation act of April 27, 1914 (38 Stat., 353, 354), providing that no enlistment shall be regarded as complete until the soldier shall have made good any time in excess of one day lost by unauthorized absences, does not apply to the Marine Corps, although a provision in the same paragraph, as to forfeiture of pay in certain cases of absence from duty, is applicable to the Marine Corps by virtue of section 1612, Revised Statutes. (Comp. Dec., June 3, 1914, 160 S. and A. Memo., 3250.)

The provisions of sections 2, 3, and 4 of the act of June 16, 1890, entitled "An Act to prevent desertions from the Army, and for other purposes," are not applicable to the Marine Corps. Section 2 relates to the terms of enlistment in the Army, and provides that soldiers discharged prior to expiration of enlistment shall not be entitled to certain allowances; section 3 provides for the arrest of deserters by civil officers; and section 4 authorizes the President to permit enlisted men to purchase their discharges in time of peace. However, section one of the same act, relating to the retention of certain pay until discharge, is applicable to the Marine Corps by virtue of section 1612, Revised Statutes. (19 Op. Atty. Gen., 616.)

Section 1216, Revised Statutes, as amended by act of March 29, 1892 (27 Stat., 12), providing for the issuance of certificates of merit to enlisted men of the Army distinguishing themselves in the service, etc., does not apply to enlisted men of the Marine Corps, who are entitled to the benefits of a corresponding provision in section 1407, Revised Statutes, as amended. (24 Op. Atty. Gen., 579.)

See *United States v. Freeman* (3 How., 556), noted under section 1604, Revised Statutes, under "Brevet pay and emoluments," which held that the words "officers of the Army" in an act of April 16, 1818, included officers of the Marine Corps; see also note to section 1622, Revised Statutes, as to retirement of officers for Civil War service.

**Sec. 1622. [Retirement.]** The commissioned officers of the Marine Corps shall be retired in like cases, in the same manner, and with the same relative conditions, in all respects, as are provided for officers of the Army, except as is otherwise provided in the next section.—(3 Aug., 1861, c. 42, ss. 15, 16, 17, v. 12, p. 289. 17 July, 1862, c. 200, s. 12, v. 12, p. 596. 21 Jan., 1870, c. 9, s.

1, v. 16, p. 62. 15 July, 1870, c. 294, s. 4, v. 16, p. 317. 10 June, 1872, c. 419, s. 1, v. 17, p. 378.)

## ARMY LAWS APPLICABLE TO MARINE CORPS.

*Age or length of service.*—"When an officer has served forty consecutive years as a commissioned officer, he shall, if he makes application therefor to the President, be retired from active service and placed upon the retired list. When an officer has been thirty years in service, he may, upon his own application, in the discretion of the President, be so retired, and placed on the retired list." (Sec. 1243, R. S.)

"When any officer has served forty-five years as a commissioned officer, or is sixty-two years old, he may be retired from active service at the discretion of the President." (Sec. 1244, R. S.)

"When an officer has served forty years either as an officer or soldier in the regular or volunteer service, or both, he shall, if he make application therefor to the President, be retired from active service and placed on the retired list, and, when an officer is sixty-four years of age, he shall be retired from active service and placed on the retired list." (Act June 30, 1882, 22 Stat., 118.)

Nothing contained in the act of June 30, 1882 (above quoted), "shall be so construed as to prevent, limit, or restrict retirements from active service in the Army, as authorized by law in force at the date of the approval of said act, retirements under the provisions of said act of June thirtieth, eighteen hundred and eighty-two, being in addition to those theretofore authorized by law." (Act Mar. 3, 1883, 22 Stat., 457.)

"That hereafter no officer holding a rank above that of colonel shall be retired except for disability or on account of having reached the age of sixty-four years until he shall have served at least one year in such rank." (Act June 12, 1906, 34 Stat., 245.)

"In the case of officers of the Regular Army, in determining rights of retirement, active duty performed while under appointment from the United States Government, whether in the regular, provisional, or temporary forces, shall be credited to the same extent as service under a Regular Army commission." (Act June 4, 1920, sec. 51, 41 Stat., 785, amending act June 3, 1916, sec. 127, 39 Stat., 217. See also note to sec. 1600, R. S.)

*Disability.*—"When any officer has become incapable of performing the duties of his office, he shall be either retired from active service, or wholly retired from the service, by the President, as hereinafter provided." (Sec. 1245, R. S.)

*Composition of board.*—"The Secretary of War, under the direction of the President, shall, from time to time, assemble an Army retiring board, consisting of not more than nine nor less than five officers, two-fifths of whom shall be selected from the Medical Corps. The board, excepting the officers selected from the Medical Corps, shall be composed, as far as may be, of seniors in rank to the officer whose disability is inquired of." (Sec. 1246, R. S.)

See section 1623, Revised Statutes, as to composition of retiring board in the cases of

Marine officers. See also act of March 4, 1916 (39 Stat., 1171), noted below, under "Laws relating specifically to Marine Corps," as to retiring boards on foreign stations.

*Oath of members.*—"The members of said board shall be sworn in every case to discharge their duties honestly and impartially." (Sec. 1247, R. S.)

*Powers and duties.*—"A retiring board may inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office, and shall have such powers of a court-martial and of a court of inquiry as may be necessary for that purpose." (Sec. 1248, R. S.)

*Findings.*—"When the board finds an officer incapacitated for active service, it shall also find and report the cause which, in its judgment, has produced his incapacity, and whether such cause is an incident of service." (Sec. 1249, R. S.)

*Revision by the President.*—"The proceedings and decision of the board shall be submitted to the Secretary of War, and shall be laid by him before the President for his approval or disapproval and orders in the case." (Sec. 1250, R. S.)

See act of June 8, 1880 (21 Stat., 164), noted below under "Laws relating specifically to Marine Corps," as to revision of retiring boards by the Judge Advocate General.

*Disability incident to service.*—"When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of service, and such decision is approved by the President, said officer shall be retired from active service and placed on the list of retired officers." (Sec. 1251, R. S.)

*Disability not incident to service.*—"When the board finds that an officer is incapacitated for active service, and that his incapacity is not the result of any incident of service, and its decision is approved by the President, the officer shall be retired from active service, or wholly retired from the service, as the President may determine. The names of officers wholly retired from the service shall be omitted from the Army Register." (Sec. 1252, R. S.)

*Officers entitled to hearing.*—"Except in cases where an officer may be retired by the President upon his own application, or by reason of his having served forty-five years, or of his being sixty-two years old, no officer shall be retired from active service, nor shall an officer, in any case, be wholly retired from the service, without a full and fair hearing before an Army retiring board, if, upon due summons, he demands it." (Sec. 1253, R. S.)

*Retired rank.*—"Officers hereafter retired from active service shall be retired upon the actual rank held by them at the date of retirement." (Sec. 1254, R. S.)

See laws noted below, under "Laws relating specifically to Marine Corps," as to retirement of officers with higher rank than that held on the active list.



By act of October 1, 1890, sec. 3 (26 Stat., 563), relating to examinations for promotion of officers of the Army below the rank of major, it was provided "that should the officer fail in his physical examination, and be found incapacitated for service by reason of physical disability contracted in line of duty he shall be retired with the rank to which his seniority entitled him to be promoted." By act of June 3, 1916, section 24 (39 Stat., 183), existing laws requiring examinations of officers of the Army prior to promotion were extended "to include promotions to all grades below that of brigadier general." By act of June 4, 1920 (41 Stat., 774), existing laws providing for the examination of officers of the Army for promotion were repealed, "except those relating to physical examination, which shall continue to be required for promotion to all grades below that of brigadier general \* \* \*." (See laws and decisions noted under section 1599, R. S., as to qualifications for promotion. See also secs. 1493 and 1494, R. S., and notes thereto.)

"Any officer now holding office in any corps or department who shall hereafter serve as chief of a staff corps or department and shall subsequently be retired, shall be retired with the rank, pay, and allowances authorized by law for the retired of such corps or department chief." (Act Feb. 2, 1901, sec. 26, 31 Stat., 755.)

"Any officer who shall have served four years as chief of a branch, and who may subsequently be retired, shall be retired with the rank, pay, and allowances authorized by law for the grade held by him as such chief." (Act June 4, 1920, 41 Stat., 762, sec. 4, amending act June 3, 1916, sec. 4, 39 Stat., 167.)

*Retired pay.*—"Officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired." (Sec. 1274, R. S.)

"Officers wholly retired from the service, shall be entitled to receive, upon their retirement, one year's pay and allowances of the highest rank held by them, whether by staff or regimental commission, at the time of their retirement." (Sec. 1275, R. S.)

"That hereafter, except in case of officers retired on account of wounds received in battle, no officer now on the retired list shall be allowed or paid any further increase of longevity pay, and officers hereafter retired, except as herein provided, shall not be allowed or paid any further increase of longevity pay above that which has accrued at the date of their retirement." (Act Mar. 2, 1903, 32 Stat., 932.)

"That hereafter any retired officer of the Army who has been detailed to active duty, and who has since his retirement, served on active detail shall be entitled to increases of longevity pay, to be computed as provided by existing statute for the computation of longevity pay, for the time of his service before retirement and on active detail since his retirement." (Act May 12, 1917, 40 Stat., 48.)

"That hereafter any retired officer who has been or shall be detailed on active duty, shall receive the rank, pay, and allowances of the grade, not above that of major, that he would have attained in due course of promotion if he had remained on the active list for a period be-

yond the date of his retirement equal to the total amount of time during which he has been detailed on active duty since his retirement." (Act June 3, 1916, 39 Stat., 183, sec. 24, repealed by act June 4, 1920, sec. 24, 41 Stat., 771.)

"Hereafter any retired officer who has been or shall be detailed on active duty shall receive the rank, pay, and allowances of the grade, not above that of colonel, that he would have attained in due course of promotion if he had remained on the active list for a period beyond the date of his retirement equal to the total amount of time during which he has been detailed to active duty since his retirement." (Act June 4, 1920, sec. 51, 41 Stat., 786, amending act June 3, 1916, sec. 127, 39 Stat., 217. See laws and decisions noted below, as to retired officers of the Marine Corps on active duty.)

"Hereafter retired officers below the grade of brigadier general and retired warrant officers and enlisted men shall, when on active duty, receive full pay and allowances." (Act June 4, 1920, sec. 33, 41 Stat., 777, amending act June 3, 1916, sec. 40, 39 Stat., 191, 192.)

"In time of war retired officers may be employed on active duty in the discretion of the President, and when so employed they shall receive the full pay and allowances of their grades." (Act June 4, 1920, sec. 51, 41 Stat., 785, amending act June 3, 1916, sec. 127, 39 Stat., 217.)

#### LAWS RELATING SPECIFICALLY TO MARINE CORPS.

*Civil war service.*—"Officers of the Marine Corps with creditable records who served during the civil war shall, when retired, be retired in like manner and under the same conditions as provided for officers of the Navy who served during the civil war." (Act Apr. 27, 1904, 33 Stat., 349.)

"Any officer of the Marine Corps below the grade of brigadier-general who served with credit as an officer or as an enlisted man in the regular or volunteer forces during the civil war prior to April ninth, eighteen hundred and sixty-five, otherwise than as a cadet, and whose name is borne on the official register of the Marine Corps, and who has heretofore been, or may hereafter be, retired on account of wounds or disability incident to the service, or on account of age or after forty years' service, may, in the discretion of the President, by and with the advice and consent of the Senate, be placed on the retired list of the Marine Corps with the rank and retired pay of one grade above that actually held by him at the time of retirement: *Provided*, That this Act shall not apply to any officer who received an advance of grade since the date of his retirement or who has been restored to the Marine Corps and placed on the retired list by virtue of the provisions of a special Act of Congress." (Act June 29, 1906, 34 Stat., 554.)

*New commissions.*—"Commissioned officers of the Army, Navy, and Marine Corps on the retired list whose rank has been or shall hereafter be advanced by operation of or in accordance with law shall be entitled to and shall receive commissions in accordance with such

advanced rank." (Act Mar. 4, 1911, 36 Stat., 1354.)

*Major General Commandant.*—"Any officer appointed under the provisions of this Act who shall be retired from the position of commandant of the Marine Corps, in accordance with the provisions of sections twelve hundred and fifty-one, sixteen hundred and twenty-two, and sixteen hundred and twenty-three, Revised Statutes of the United States, or by reason of age or length of service, shall have the rank and retired pay of a major general; if retired for any other reason, he shall be placed on the retired list of officers of the grade to which he belonged at the time of his retirement." (Act Dec. 19, 1913, 38 Stat., 241, amended by act Aug. 29, 1916, 39 Stat., 609.)

*Retirement of colonels.*—"That the provisions of the Act entitled 'An Act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' approved August twenty-ninth, nineteen hundred and sixteen, which read as follows: \* \* \* 'That officers of the Marine Corps with the rank of colonel who shall have served faithfully for forty-five years on the active list shall, when retired, have the rank of brigadier general; and such officers who shall hereafter be retired at the age of sixty-four years before having served for forty-five years, but who shall have served faithfully on the active list until retired, shall, on the completion of forty years from their entry in the naval service, have the rank of brigadier general.' are hereby repealed." (Act May 22, 1917, sec. 14, 40 Stat., 87.)

*Revision of retiring board records.*—"The office of the said judge advocate general shall be in the Navy Department, where he shall, under the direction of the Secretary of the Navy, receive, revise, and have recorded the proceedings of all \* \* \* boards for the examination of officers for retirement \* \* \* in the naval service." (Act June 8, 1880, 21 Stat., 164.)

*Retiring boards on foreign stations.*—"That hereafter the Secretary of the Navy may authorize the senior officer present, or other commanding officer, on a foreign station to order \* \* \* retiring boards for the examination of such candidates for \* \* \* retirement in the Navy and Marine Corps as may be serving in such officer's command and may be directed to appear before any such board." (Act Mar. 4, 1917, 39 Stat., 1171.)

*Officers holding temporary rank.*—"That any officer of the permanent Navy or Marine Corps, temporarily advanced in grade or rank in accordance with the provisions of this Act, who shall be retired from active service under his permanent commission while holding such temporary rank, except for physical disability incurred in line of duty, shall be placed on the retired list with the grade or rank to which his position in the permanent Navy or Marine Corps at the date of his retirement would entitle him, and any person originally appointed temporarily, as provided in this Act, shall not be entitled to any rights of retirement, except for physical disability incurred in line of duty." (Act May 22, 1917, sec. 9, 40 Stat., 86.)

*Retired officers on active duty.*—"That hereafter any retired officer of the naval service who shall be detailed on active duty shall, while so serving, receive the active-duty pay and allowances of the grade, not above that of lieutenant commander in the Navy or of major in the Marine Corps, that he would have attained in due course of promotion if he had remained on the active list for a period beyond the date of his retirement equal to the total amount of time during which he has been detailed on active duty since his retirement: *Provided*, That nothing herein shall be construed to reduce the pay of any retired officer on active duty whose retired pay exceeds the active-duty pay and allowances for the grade of lieutenant commander." (Act Aug. 29, 1916, 39 Stat., 581.)

"That hereafter, during the existence of war or of a national emergency declared by the President to exist, any commissioned or warrant officer of the Navy, Marine Corps, or Coast Guard of the United States on the retired list may, in the discretion of the Secretary of the Navy, be ordered to active duty at sea or on shore; and any retired officer performing such active duty in time of war or national emergency, declared as aforesaid, shall be entitled to promotion on the retired list to the grade or rank, not above that of lieutenant commander in the Navy or major in the Marine Corps or captain in the Coast Guard, and shall thereafter receive the pay and allowances thereof which his total active service as an officer both prior and subsequent to retirement, in the manner rendered by him, would have enabled him to attain in due course of promotion had such service been rendered continuously on the active list during the period of time last past." (Act July 1, 1918, 40 Stat., 717.)

"That during the existence of war or of a national emergency, declared as aforesaid, any commissioned or warrant officer of the Navy, Marine Corps, or Coast Guard of the United States on the retired list, while on active duty, may be temporarily advanced to and commissioned in such higher grade or rank on the retired list, not above that of lieutenant commander in the Navy or major in the Marine Corps or captain in the Coast Guard, as the President may determine, and any officer so advanced shall, while on active duty, be entitled to the same pay and allowances as officers of like grade or rank on the active list: *Provided*, That any such commissioned or warrant officer who has been so temporarily advanced in grade or rank shall, upon his relief from active duty, or in any case not later than six months after the termination of the war or of the national emergency, declared as aforesaid, revert to the grade or rank on the retired list and to the pay and allowance status which he would have held had he not been so temporarily advanced: *Provided further*, That nothing in this Act shall operate to reduce the pay and allowances now allowed by law to retired officers." (Act July 1, 1918, 40 Stat., 717.)

As to details to educational institutions, see section 1225, Revised Statutes, and laws and decisions noted thereunder.



*Retired enlisted men.*—"That when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, and that said allowances shall be as follows: Nine dollars and fifty cents per month in lieu of rations and clothing and six dollars and twenty-five cents per month in lieu of quarters, fuel, and light: *Provided*, That in computing the necessary thirty years' time all service in the Army, Navy, and Marine Corps shall be credited." (Act Mar. 2, 1907, 34 Stat., 1217. By act of Mar. 3, 1899, sec. 17, 30 Stat., 1008, service in the Civil or Spanish-American War was to be credited as double time in computing the 30 years necessary for retirement of enlisted men, and applicants for retirement thereunder were required to be at least 50 years of age unless physically disqualified for service.)

"The Secretary of the Navy is authorized in time of war or when a national emergency exists to call any enlisted man on the retired list into active service for such duty as he may be able to perform. While so employed such enlisted men shall receive the same pay and allowances they were receiving when placed on the retired list." (Act Aug. 29, 1916, 39 Stat., 591, superseding similar provision in act Mar. 3, 1915, 38 Stat., 941.)

"That any enlisted man of the Navy or Marine Corps upon the retired list who has been ordered into active service since April sixth, nineteen hundred and seventeen, or who may hereafter be ordered into active service, shall be eligible for promotion and he shall be entitled to the pay and benefits of continuous service of such rank and for such length of time as he is or has been employed in active service, and when relieved of active service shall retain upon the retired list the rank and service held by him at the time of such relief, with the pay and allowances of such rank on the retired list; and the accounting officers of the Treasury are hereby directed to allow in the accounts of any enlisted man of the Navy or Marine Corps who resigned from the retired list in order to reenlist for appointment in a higher grade the same continuous service pay and the benefits of such rank to which he may have been appointed upon reenlistment, as if his service had been continuous, and any difference in pay from the date of reenlistment shall be credited to his account." (Act July 1, 1918, 40 Stat., 719.)

"That so much of the Act of July 1, 1918 (Public Numbered 182), as authorizes the promotion of retired enlisted men of the Navy and Marine Corps ordered to active duty shall not be so construed as to make illegal promotions of such men as have heretofore been made to warrant grades or as to deprive them of any of the pay, allowances, or other benefits accruing under such promotion." (Act July 11, 1919, 41 Stat., 153.)

#### Construction of section 1622 in general.

—Section 1622, Revised Statutes, simply provides for the conditions precedent to the retirement of an officer of the Marine Corps, but in no way changes the jurisdiction to which he is subject or the conditions under which he may

be again placed on active duty. (*Jonas v. U. S.*, 50 Ct. Cls., 281.)

These "conditions" unquestionably are conditions precedent to retiring, and not conditions subsequent. Section 1622 is simply a provision that a commissioned officer of the Marine Corps is entitled to the same right of retirement as an officer of the Army. When so retired, he is a retired officer of the Marine Corps, subject to the laws and regulations established for the government of the Navy. (*Jonas v. U. S.*, 50 Ct. Cls., 281.)

It will be observed that while section 1622 refers to the retirement of officers of the Marine Corps and entitles them to the benefit of all laws relating to the retirement of officers of the Army, the provision in the act of April 23, 1904 (33 Stat., 259, 264), relating to advancement of Army officers on the retired list who had Civil War service, refers to what may be done in the discretion of the President, by and with the advice and consent of the Senate, for the benefit of certain officers of the Army after their retirement is an accomplished fact, whether theretofore or thereafter retired. In other words, the provision is not a law in reference to the retirement of officers of the Army, but an act authorizing special benefits to certain officers of the Army who have been or may be retired. (25 Op. Atty. Gen., 262.)

The conditions mentioned in section 1622 are unquestionably conditions precedent to retirement, and not conditions subsequent; accordingly, *held* that the Army act of June 3, 1916, section 24, above quoted, is not applicable to the Marine Corps, under section 1622, in so far as it affects the rank of retired officers who have performed or who may in the future perform the required amount of active duty. (File 26509-158 : 2, June 27, 1916.)

It is well settled that the Marine Corps, while in many respects a separate and distinct organization, is primarily a part of the Navy. In the matter of retirement, however, as of pay, the Marine Corps has been classed with the Army (secs. 1612, 1622). The language of section 1622 is broad and sweeping, and as it is the only provision upon the subject of retirement it must be held to mean just what it says; in other words, officers of the Marine Corps, in the matter of retirement, were placed by that section upon exactly the same footing as officers of the Army. (25 Op. Atty. Gen., 262.)

**Employment of retired officers on active duty.**—When a marine officer was put upon the retired list he was subject to the orders of the Secretary of the Navy within the statutory conditions, and came within the provisions of the act of August 22, 1912 (37 Stat., 329), as to assignment of retired "naval" officers to active duty, and not the act of April 23, 1904 (33 Stat., 264), relating to assignment of retired officers of the Army to active duty. Each of these statutes contained provisions relating to the pay of retired officers assigned to active duty thereunder. *Held*, that the retired marine officer so assigned to active duty under the act of 1912, became entitled upon such assignment to the pay and allowances provided for in said act. (*Jonas v. U. S.*, 50 Ct. Cls., 281.)

The act of June 7, 1900 (31 Stat., 703), authorized the assignment of "any naval officer on the retired list" to active duty during a period of twelve years from its passage. During the life of this statute the Secretary of the Navy detailed retired officers of the Marine Corps to active duty, and his right to do so seems never to have been questioned. And during the interim between the expiration of this statute by limitation and its substantial reenactment by the act of August 22, 1912 (37 Stat., 329), neither retired naval nor marine officers were employed on active duty. After the enactment of the latter statute, the Secretary of the Navy renewed the practice followed under the former statute. This substantial reenactment of the statute by Congress was indicative of legislative approval of the departmental construction of the same, as stated. (*Jonas v. U. S.*, 50 Ct. Cls., 281.)

Congress, by the act of June 3, 1916 (39 Stat., 183), gave to retired officers of the Army detailed on active duty the longevity pay which would accrue to them by reason of their added active service after retirement, which pay they could not thereafter receive by reason of the act of March 2, 1903 (32 Stat., 932). The said act of June 3, 1916, applied to a retired officer of the Marine Corps on active duty so as to entitle him to increase in longevity pay, although he held the rank of major, and an Army officer of the rank of major could not be advanced to a higher rank under said act. (*Jonas v. U. S.*, 53 Ct. Cls., 254. See above, under "Construction of section 1622, in general." See also act of Aug. 29, 1916, quoted above, with respect to retired officers of the Marine Corps on active duty.)

**Rank on retirement.**—The Army law (sec. 1254, R. S.), providing that "officers hereafter retired from active service shall be retired upon the actual rank held by them at the date of retirement," is applicable to the Marine Corps. A captain in that corps, holding the office of Judge Advocate General of the Navy with the rank, pay, and allowances of a colonel while so serving, was in law and in fact a colonel in the Marine Corps while holding said office of Judge Advocate General, and was entitled to be retired as such; and under section 1274, R. S., was entitled to receive 75 per centum of the pay of colonel. Under the act of June 8, 1880 (21 Stat., 164), the rank of a Judge Advocate General of the Navy is not assimilated but actual rank. (*Remey v. U. S.*, 33 Ct. Cls., 218. See note to sec. 421, R. S., as to retirement of chiefs of bureaus.)

**Rank on retirement for Civil War service.**—See note above, under "Construction of section 1622, in general."

Section 11 of the act of March 3, 1899 (30 Stat., 1007), which fixes the rank and pay of retired officers of the Navy who served with credit during the Civil War, held not applicable to officers of the Marine Corps. (24 Op. Atty. Gen., 709.)

The said act of March 3, 1899, was evidently drafted with care, and with a clear understanding of the distinctions between the Navy and the Marine Corps. The first seventeen sections, in definite terms, apply to the Navy; then follow the sections which with equal exactness apply to the Marine Corps. These two arms of

the service are recognized and treated throughout the entire statute as separate and distinct, and for each of them appropriate provision is made. The unambiguous language of section 11 makes it apply only to officers of the Navy, and there is nothing within the entire act which in any way indicates that any officer not in the Navy was intended to be included within the provisions of said section. The mere fact that one set of officers, not mentioned, are as meritorious as those expressly provided for can not justify a construction liberal enough to give to the former benefits granted in clear terms only to the latter. (24 Op. Atty. Gen., 709, June 26, 1903.)

In the matter of retirement, officers of the Marine Corps with creditable records who served during the Civil War are governed entirely by the act of April 27, 1904 (33 Stat., 324, 349), which provides that they shall be retired "in like manner and under the same conditions as provided for officers of the Navy who served during the Civil War." To this extent that act alters and amends section 1622, Revised Statutes. (25 Op. Atty. Gen., 262.)

By act of April 23, 1904 (33 Stat., 259, 264), provision was made for the advancement on the retired list of Army officers who served during the Civil War. By act of April 27, 1904 (33 Stat., 324, 349), passed four days later, special provision was made for the retirement of officers of the Marine Corps who served during the Civil War, in accordance with Navy laws. Held, that the Army act of April 23, 1904, has no application by virtue of section 1622, Revised Statutes, to officers of the Marine Corps who served during the Civil War. (25 Op. Atty. Gen., 262.)

That Congress never intended the Army act of April 23, 1904, to apply to the Marine Corps is shown by its incorporation in the Navy act, passed four days later, of a provision specifically dealing with the retirement of officers of the Marine Corps with creditable records who served during the Civil War. This practically contemporaneous legislative interpretation of the former act must be held to be conclusive. (25 Op. Atty. Gen., 262.)

**Retirement for disability not incident to the service.**—A board of officers duly constituted was convened by order of the Secretary of the Navy July 30, 1874, to inquire into and determine whether a lieutenant of marines was incapacitated for active service. The board found him so incapacitated, and that the cause of his incapacity was not an incident of the service. The President, August 18, 1874, endorsed on the proceedings and findings of the board: "I concur in opinion with the retiring board in the case of \* \* \*. Let him be retired on furlough pay." Held, first, that the action of the President amounted to an approval of the finding of the board and to a retirement of the officer from active service within section 1252, Revised Statutes, and that he was retired in conformity with the law applicable to officers of the Marine Corps; and second, that the officer thereby became entitled to receive pay according to the rates established by law for retired officers of the Army, viz, 75 per centum of the pay of the actual rank held by him at the date of retirement, notwithstanding



a different rate of pay, viz, furlough pay, was named by the President in retiring him. (15 Op. Atty. Gen., 442.)

For officers of the Marine Corps who are retired from active service, as for officers of the Army who are so retired, there is but one rate of pay established by law, viz, 75 per centum of the pay of the rank upon which they are retired (sec. 1274, R. S.); and it is not competent to the President to place these retired officers on a different rate of pay than that which the law has fixed. (15 Op. Atty. Gen., 442.)

The first sentence of the endorsement of the President upon the record of the proceedings of the board (above quoted) admits of no other construction than that it was meant to express his approval of the finding of the board. Having thus approved the finding, it rested entirely in his discretion whether the officer should be retired from active service or be wholly retired from the service (sec. 1252, R. S.); but it was necessary that one or the other be done, as the law is imperative that when the decision of the board is approved by the President the officer "shall be retired," etc. The direction given in the last sentence of the endorsement clearly indicates that it was the determination of the President that the officer be retired from "active service" simply. The compensation of an officer thus retired being fixed by statute and not left to be determined by the President, in so far as that direction limits the officer's pay on the retired list it must be treated as of no effect. (15 Op. Atty. Gen., 442.)

Sections 1454 and 1593 Revised Statutes, as to the retirement of naval officers on furlough pay for disability not incident to the service, do not apply to officers of the Marine Corps, for that corps different legislation is provided. (15 Op. Atty. Gen., 442. See secs. 1454 and 1593, R. S. and notes thereto.)

**Retirement for length of service.**—The act of June 30, 1882 (22 Stat., 118), referring to the retirement of officers of the Army who have served 40 years "in the regular or volunteer service, or both," was intended by the use of the words, "volunteer service," to refer to the volunteer service in the Civil War, and did not intend to anticipate a new volunteer service such as that authorized under the act of April 22, 1898. (22 Op. Atty. Gen., 199.)

Under the Army reorganization act of June 4, 1920 (41 Stat., 761), the service which by existing law is held to be the equivalent of Army service in counting length of service for increase of pay or for retirement is service in the Marine Corps and service in the Navy. (27 Comp. Dec., 170, citing acts of Feb. 24, 1881, 21 Stat., 346; Sept. 30, 1890, 26 Stat., 504; and June 22, 1906 and Mar. 2, 1907, 34 Stat., 451 and 1217.)

**Retirement for age.**—The Army act of June 30, 1882 (22 Stat., 118), relative to retirement, applies to an officer of the regular Army who is 64 years of age, temporarily serving under a volunteer commission, but his retirement thereunder does not affect his status in the volunteer service. (22 Op. Atty. Gen., 199.)

The said act of June 30, 1882, does not apply to a volunteer officer who is 64 years of age

and who does not at the same time hold a commission in the regular Army. (22 Op. Atty. Gen., 199.)

An officer of the regular Army who at the same time holds a commission in the volunteer Army may continue to hold and exercise his latter commission after having been placed upon the retired list of the regular Army by reason of the age limit. (22 Op. Atty. Gen., 199.)

The Army retired lists apply to the regular Army alone, with due credit given for the time of volunteer service of officers of the regular Army in the Civil War. (22 Op. Atty. Gen., 199.)

**Status of retired officer.**—An officer of the Marine Corps retired from active service only, and not wholly retired from service, is an officer in the employ of the Government and so within the prohibition of section 1782 of the Revised Statutes prohibiting compensation to "any officer or clerk in the employ of the Government" for rendering services in relation to any claim or other matter in which the United States is a party, before any department, court-martial, bureau, officer, or any civil, military, or naval commission. (29 Op. Atty. Gen., 397.)

In determining the status of a retired officer of the Marine Corps, as to whether or not he is an officer of the Government, the Marine Corps must, under section 1622, Revised Statutes, be considered as part of the Army. (29 Op. Atty. Gen., 397, 400.)

**Retired enlisted men.**—Officers on the retired list are a part of the Army; they may be assigned to duty and wear the uniform and continue to be borne on the Army Register, and are subject to trial by court-martial; enlisted men after retirement are not a part of the Army. (Murphy v. U. S., 38 Ct. Cls., 511.)

Section 1094, Revised Statutes, in express terms declares that "the officers of the Army on the retired list" are a part of the Army. By act of March 2, 1899, section 7 (30 Stat., 979), the President was authorized to employ retired officers of the Army on active duty in time of war. This act is a recognition by Congress that, though retired officers of the Army were in express terms declared to be a part of the Army, they were not theretofore subject to active military duty. There are no such laws with respect to enlisted men on the retired list. There is no statute declaring them to be a part of the Army, nor is there any statute subjecting them to military duty. When he is retired, an enlisted man thereby severs his connection with the Army to go on the retired list, and can not thereafter be said to be a component part of the Army. (Murphy v. U. S., 38 Ct. Cls., 511.)

It is no answer to say that enlisted men on the retired list are a part of the Army because subject to court-martial; if that were true, which the court does not concede, they nevertheless could not be assigned to military duty. Their retired pay is given them, not for services to be rendered in the future, but for services which they have faithfully rendered prior to their retirement. (Murphy v. U. S., 38 Ct. Cls., 511.)

On reconsideration, the decision affirmed that retired enlisted men are not entitled to

the additional pay for length of service given by section 1284, Revised Statutes, because they do not "remain continuously in the Army" within the intent of the statute; notwithstanding the existence of statutes (overlooked in the former decision) wherein it is expressly provided that "the Army of the United States shall consist of \* \* \* the officers and enlisted men of the Army on the retired list." Under these statutes the Army consists in part of enlisted men on the retired list, and to that extent, therefore, the court was in error in certain statements contained in the previous decision. But those acts do not make enlisted men on the retired list a part of the organization of the Army, subject to military duty as enlisted men on the active list; on the contrary, it is conceded that such retired enlisted men are not subject to military duty, even at the command of the President. If not subject to military duty, then in what way and for what purpose can it be said that enlisted men on the retired list are a part of the Army? (*Murphy v. U. S.*, 39 Ct. Cls., 178.)

Retired enlisted men en route to their homes after retirement are not "troops of the United States" (as used in the land grant acts relating to transportation for the Government). They travel for their own purposes. Congress has declared that such retired enlisted men shall for certain purposes be deemed a part of the Army (act Feb. 2, 1901, 31 Stat., 748); but they may be employed only after Congress has authorized the raising of volunteer forces; and not even then for field duty (act Apr. 25, 1914, sec. 11, 38 Stat., 347, 350). The Army Regulations for 1913 make no provision requiring any service from retired enlisted men. Practically they have retired from, and not simply into, a different branch of, the Army. The fact that they may thereafter be called into the Army does not make them "troops of the United States." Any male citizen may at some time be called into the service. (*U. S. v. Union Pac. R. Co.*, 249 U. S., 354, 360, affirming 52 Ct. Cls., 226.)

There is no statute specifically providing that retired enlisted men shall constitute a part of the Navy or that retired enlisted men of the Navy shall be amenable to trial by naval court-martial, although it is provided by statute that retired officers of the Navy shall be amenable to

trial by court-martial. (File 26251-22500, Mar. 9, 1920.)

Under present laws it is very doubtful whether an enlisted man on the retired list of the Navy, who is not employed on active duty, is subject to trial by naval court-martial. However, a trial having taken place in such a case, and the accused acquitted, the proceedings, findings, and acquittal were approved, instead of being set aside for lack of jurisdiction, as the latter action would have exposed the accused to trial by the civil authorities of the United States for the same offense. (File 26251-22500, Mar. 9, 1920.)

As to retired pay of enlisted men in the Marine Band, see note to section 1613, Revised Statutes.

The provision in the act of July 1, 1918, relating to promotion of retired enlisted men of the Navy and Marine Corps ordered into active service (quoted above under this section), authorizes the promotion of such retired enlisted men to higher enlisted ranks and ratings on the retired list; and does not authorize the appointment of retired enlisted men to warrant or commissioned rank either on the active or retired lists. (File 7657-634:1, Aug. 30, 1918, citing 7657-634, Aug. 12, 1918.)

It is lawful to appoint retired enlisted men as temporary warrant and temporary commissioned officers on the active list, under the act of May 22, 1917 (40 Stat., 84). (File 7657-634:1, Aug. 30, 1918, citing 27321-103, July 17, 1917.)

There is no doubt that retired enlisted men may be permanently appointed as warrant or commissioned officers on the active list, if properly qualified. (File 7657-634:1, Aug. 30, 1918.)

If appointed a temporary commissioned or warrant officer on the active list under the act of May 22, 1917, on the termination of such appointment a retired enlisted man would revert to the rating held by him on the retired list at the time of his appointment. If appointed a permanent commissioned or warrant officer on the active list, he would not revert, nor should he be relieved from active duty, as such an appointment takes him off the retired list and destroys his status as an enlisted man. (File 7657-634:1, Aug. 30, 1918.)

**Retirement of Major General Commandant.**—See note to section 1601, Revised Statutes.

**Sec. 1623. [Retiring board, how composed.]** In case of an officer of the Marine Corps, the retiring board shall be selected by the Secretary of the Navy, under the direction of the President. Two-fifths of the board shall be selected from the Medical Corps of the Navy, and the remainder shall be selected from officers of the Marine Corps, senior in rank, so far as may be, to the officer whose disability is to be inquired of.—(3 Aug., 1861, c. 42, s. 17, v. 12, p. 289.)

See note to section 1622, Revised Statutes, and particularly section 1246, R. S., noted thereunder, as to composition of Army retiring boards.

**Membership of retiring board.**—The act of August 3, 1861 (sec. 1623, R. S.), does not authorize the Secretary of War or the Secretary of the Navy to assemble a mixed board of Army

and Marine officers for inquiry into the cases of disabled officers of the Army and of the Marine Corps. (10 Op. Att'y. Gen., 116.)

The act of August 3, 1861, providing for the better organization of the Military Establishment, authorized the creation of boards to determine the disabilities of officers of the Army and Marine Corps. Section 16 provided that



if any commissioned officer of the Army or Marine Corps shall become incapable of performing the duties of his office, he shall be placed upon the retired list, etc.; section 17 enacted that in order to carry out the provisions of the act the Secretary of War or Secretary of the Navy, as the case might be, under the direction and approval of the President of the United States, shall, from time to time as occasion may require, assemble a board of not more than nine nor less than five commissioned officers, two-fifths of whom shall be of the medical staff; the board, except those taken from the medical staff, to be composed, as far as may be, of his seniors in rank. *Held*, that the intent of the act was to cause disabled officers to be retired by a board composed of commissioned officers of their own branch of the service; that it authorized no joint action of the Secretary of War and Secretary of the Navy in forming a retiring board; nor did it give either Secretary the power to convene a mixed board composed in part of officers not under his control. (10 Op. Atty. Gen., 116.)

An officer of one branch of the service can not with accuracy be called senior in rank to an officer of another branch; a major in the Army is no more senior to a captain of marines than he is to a captain in the Navy. The term in its military sense is applicable only to relatively higher grades of the same service. Its use otherwise would create confusion. (10 Op. Atty. Gen., 116.)

Under the act of August 3, 1861, section 17, for the better organization of the Military Establishment, the Secretary of the Navy has discretionary power to select for the retirement of officers of the Marine Corps such commissioned officers subject to his control and orders as he may deem proper. (10 Op. Atty. Gen., 129.)

The act of August 3, 1861, section 17, authorizing the Secretary of the Navy to assemble boards for the retirement of marine officers, does not provide that the board shall consist of officers of that corps, but simply that it shall consist of commissioned officers. That the section did not contemplate a board composed exclusively of marine officers is clear, because it provides that two-fifths of the board shall be of the medical staff; and there being no medical staff attached to the Marine Corps this requirement of the statute could only be fulfilled by placing on the board naval surgeons. (10 Op. Atty. Gen., 129, 130.)

There being no provision in the law which directs the Secretary of the Navy to organize these boards for the retirement of marine officers from the officers of the Marine Corps, and this being a law for the government of the Navy within the meaning of the act of 1834 (sec. 1621, R. S.), *held* that the Secretary of the Navy, under the President, has full power to organize boards for the retirement of marine officers of the Navy of senior rank, under section 17 of said act of August 3, 1861. (10 Op. Atty. Gen., 129, 130.)

**Retiring board illegally constituted.**—The proceedings of a board constituted without authority and in violation of the act of August 3, 1861, section 17 (embodied in sec. 1623, R. S.), would be open to future question as to their validity. (10 Op. Atty. Gen., 116.)

The action of a retiring board can only be valid as it accords with the law of its creation. From that law alone it must draw the breath of life. If, therefore, it is constituted without the direct authority of that law, or in violation of its provisions, the validity of its action would be open to very serious future question. (10 Op. Atty. Gen., 116, 119.)

## CHAPTER TEN.

### ARTICLES FOR THE GOVERNMENT OF THE NAVY.

[FOR DECISIONS OF THE NAVY DEPARTMENT CONSTRUING AND APPLYING THE ARTICLES FOR THE GOVERNMENT OF THE NAVY, SEE NAVAL DIGEST, 1916, AND SUPPLEMENTS THERETO.]

Sec.

1624. Persons amenable to articles.

Art.

1. Commander's duty of example and correction.
2. Divine service.
3. Irreverent behavior.
4. Offenses punishable by death.
  1. Mutiny.
  2. Disobedience of orders.
  3. Striking superior officer.
  4. Intercourse with an enemy.
  5. Messages from an enemy.
  6. Desertion in time of war.
  7. Deserting trust.
  8. Sleeping on watch.
  9. Leaving station.
  10. Willful stranding or injury of vessel.
  11. Unlawful destruction of public property.
  12. Striking flag or treacherously yielding.
  13. Cowardice in battle.
  14. Deserting duty in battle.
  15. Neglecting orders to prepare for battle.
  16. Neglecting to clear for action.
  17. Neglecting to join on signal for battle.
  18. Failing to encourage the men to fight.
  19. Failing to seek encounter.
  20. Failing to afford relief in battle.
5. Spies, etc.
6. Murder.
7. Imprisonment in penitentiary.
8. Offenses punishable at discretion of court-martial:
  1. Profanity, falsehood, etc.
  2. Cruelty.
  3. Quarreling.
  4. Fomenting quarrels.
  5. Duels.
  6. Contempt of superior officer.
  7. Combinations against superior officer.
  8. Mutinous words.
  9. Neglect of orders.
10. Preventing destruction of public property.
11. Negligent stranding.
12. Negligence in convoy service.
13. Receiving articles for freight.
14. False muster.
15. Waste of public property, etc.
16. Plundering on shore.
17. Refusing to apprehend offenders.
18. Refusing to receive prisoners.
19. Absence from duty without leave.
20. Violating general orders or regulations.
21. Desertion in time of peace.
22. Harboring deserters.

Art.

9. Reduction of officers to enlisted rating.
10. Desertion by resignation.
11. Dealing in supplies.
12. Importing dutiable goods.
13. Distilled spirits only as medical stores.
14. Fraud against United States; embezzlement, etc.
15. List of persons claiming prize-money.
16. Removing property from prize.
17. Maltreating persons on prize.
18. Returning fugitives from service.
19. Enlisting deserters, minors, etc.
20. Duties of commanding officers:
  1. Men received on board.
  2. List of officers, men, and passengers.
  3. Deaths and desertions.
  4. Property of deceased persons.
  5. Accounts of men received.
  6. Accounts of men sent from the ship.
  7. Inspection of provisions.
  8. Health of the crew.
  9. Attendance at final payment of the crew.
10. Articles for the government of the Navy. Punishment for offending against this article.
21. Authority of officers after loss of vessel.
22. Offenses not specified.
23. Offenses committed on shore.
24. Punishments by order of commander.
25. Punishment by officer temporarily commanding.
26. Summary courts-martial; convening authority.
27. Constitution of summary courts-martial.
28. Oaths of members and recorder.
29. Testimony before summary courts-martial.
30. Punishments by summary courts.
31. Disrating for incompetency.
32. Execution of summary court sentence.
33. Remission of summary court sentence.
34. Proceedings and record of summary court.
35. Same punishments by general court-martial.
36. Dismissal of officers.
37. Dismissed officer may demand trial.
38. General courts-martial; convening authority.
39. General courts; constitution of.
40. Oaths of members and judge-advocate.
41. Oath of witness.
42. Evidence; witnesses; perjury; contempt.
43. Charges and specifications; arrest of accused.
44. Duty of officer arrested.
45. Proceedings of general courts-martial.
46. Absence of members.
47. Return of absent member; witnesses recalled.
48. Suspension of pay.



Art.

49. Prohibited punishments.
50. Sentences, how determined.
51. Adequate punishment; recommendation to mercy.
52. Authentication of judgment.
53. Confirmation of sentence.
54. Remission and mitigation of sentence.
55. Courts of inquiry, by whom ordered.
56. Courts of inquiry, constitution of.

Art.

57. Courts of inquiry, powers of.
58. Oaths of members and judge-advocate.
59. Rights of party inquired of.
60. Proceedings, how authenticated; use in other cases.
61. Limitation of trials; general offenses.
62. Limitation of trials; desertion in time of peace.
63. Limitation of punishments; time of peace.

**Sec. 1624. [Persons amenable to articles.]** The Navy of the United States shall be governed by the following articles.—(17 July, 1862, c. 204, s. 1, v. 12, p. 600.)

**General rule.**—Everyone connected with the military or naval service of the United States is amenable to the jurisdiction which Congress has created for their government, and while thus serving surrenders his right to be tried by the civil courts. (In re Davison, 21 Fed. Rep., 618.)

The discipline necessary to the efficiency of the Army and Navy required other and swifter modes of trial than are furnished by the common-law courts; and in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial and the manner in which they shall be conducted for offenses committed while the party is in the military or naval service. Everyone connected with those branches of the public service is amenable to the jurisdiction which Congress has created for their government, and while thus serving surrenders his right to be tried by the civil courts. All other persons, citizens of states where the courts are open, if charged with crime are guaranteed the inestimable privilege of trial by jury. (Ex parte Milligan, 4 Wall., 2, 123.)

By the articles of war “any person in the military service of the United States” may be tried by court-martial for the offenses described in those articles. But the words, “in the military service” there used are not to be taken in so general a sense as to include all who are employed in connection with that service in any capacity whatever. They must be construed with the provision by which the articles are preceded, and which declares that the latter shall govern “the armies of the United States.” So construed, they properly include only such as belong to and serve in the Army fixed by law. Hence, the question of the amenability of an individual to court-martial jurisdiction under the above-quoted provision is not to be determined according to the nature of his employment; that is to say, whether it is military or not, but solely according to the circumstance of his belonging or not belonging to the military establishment as defined by law. (16 Op. Att’y. Gen., 13, 16.)

To have the effect of subjecting to trial by court-martial a person not otherwise subject to such jurisdiction an act of Congress ought to be clear and unambiguous. (14 Op. Att’y. Gen., 268, 274.)

In passing upon the question whether a clerk in the Army is subject to court-martial, it is proper to inquire at the outset whether he belongs to any of those classes of persons who

are, by the terms of the statutes in force, made liable to military law, as the inclusion of an individual in some one of such classes is essential to bring him under court-martial jurisdiction. (16 Op. Att’y. Gen., 13, 14.)

In every instance in which Congress has impressed a military character on any body of men whom they intended to divest of the civil right of a trial by jury, besides the impressment of a military character they have uniformly and expressly declared that they should be subject to the rules and articles of war. A course of legislation so long continued and so uniform marks the sacred respect in which Congress have ever regarded the right of trial by jury, and will justify us in assuming it as their sense that this right is never to be taken away by implication, never by the mere impressment of a military character on a body, never without a positive provision to that effect. (1 Op. Att’y. Gen., 276.)

**Civilians.**—The right to trial by jury is preserved to everyone accused of crime who is not attached to the Army or Navy, or militia in actual service. (Ex parte Milligan, 4 Wall., 2, 123.)

A statutory provision that any person who shall contract to furnish supplies of any kind or description in the Army or Navy shall be deemed and taken as a part of the land or naval forces of the United States for which he shall contract to furnish said supplies is unconstitutional in so far as it would operate to subject a contractor to trial by court-martial. Congress may, no doubt, under their power to raise armies, declare who shall be soldiers; that is, what citizens shall be liable to perform military duty, but they can not by mere enactment place a man in the Army who is not. If they could, then they might, by a simple declaration, place every person in the United States in the Army, no matter what his pursuits actually continued to be, and subject him to trial by court-martial; a proposition so monstrous that it is believed no one would be found so hardy as to maintain it. (Ex parte Henderson, 11 Fed. Cas. No. 6349; compare *Holmes v. Sheridan*, 12 Fed. Cas. No. 6644; see also note to Art. 63, A. G. N., as to cruel and unusual punishments.)

A quartermaster’s clerk in the Army, that is, a civilian employed in that capacity, is not amenable to the jurisdiction of a court-martial; nor are superintendents of national cemeteries, appointed under sections 4873 and 4874, Revised Statutes. (16 Op. Att’y. Gen.,

13; see also, 16 Op. Atty. Gen., 48; compare decisions noted below as to paymasters' clerks in the Navy.)

In this country military tribunals, whether courts-martial or military commissions, can not constitutionally be granted jurisdiction to try persons charged with acts or offenses committed outside of the field of military operations or territory under martial law or other peculiarly military territory, except members of the military or naval forces or those immediately attached to the forces, such as camp followers. (31 Op. Atty. Gen., 356, 361; compare note to art. 5, A. G. N.)

Military jurisdiction is of two kinds—first, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offenses under the statute must be tried in the manner therein directed, but military offenses which do not come within the statute must be tried and punished under the common law of war. The first is exercised by courts-martial—while the latter are tried by military commissions. (Ex parte Vallandigham, 1 Wall., 243, 249.)

The Supreme Court of the United States has no power to review by certiorari the proceedings of a military commission ordered by a general officer of the United States Army commanding a military department. (Ex parte Vallandigham, 1 Wall., 243.)

The clause in the Constitution providing that "the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may from time to time ordain and establish," refers only to courts of the United States, which military courts are not. (Mechanics, etc., Bank v. Union Bank, 22 Wall., 276, 295.)

A military commission is not a court within the meaning of the Fourteenth section of the judiciary act of 1789. (Ex parte Vallandigham, 1 Wall., 243, 251.)

The Constitution did not prohibit the creation by military authority of courts for the trial of civil causes during the Civil War in conquered portions of the insurgent States. The establishment of such courts is but the exercise of the ordinary rights of conquest. Though called in the order establishing it a "provost court," a larger jurisdiction than one over minor criminal offenses might, in fact, have validly been given to it by the power which constituted it. (Mechanics, etc., Bank v. Union Bank, 22 Wall., 276, 296.)

As to military commissions and their jurisdiction over civilians, see generally note to Constitution, Art. I, sec. 8, clause 11.

**Persons discharged from the Navy.**—See article 14, A. G. N., and note thereto; and see notes to articles 61 and 62, A. G. N.

Whether, when an officer while under charge of a military offense is dismissed from the service by the President, he may afterwards be arrested and tried by court-martial for the offense, dubitatur. (8 Op. Atty. Gen., 328.)

In this case the officer was placed under arrest on charges of breaking arrest, killing his commanding officer, and desertion. For the homicide involved in killing his commanding officer he had been indicted for murder, and tried and acquitted before a civil court of the

State. Afterwards he was dropped from the rolls for absence without leave. The question presented was whether a dismissed officer can be tried by court-martial for a military offense committed by him prior to his dismissal. This question not decided, but remarked that there is no express provision in the statutes to settle the question definitely, one way or the other; nor is there any authoritative adjudication on the subject, at least in the United States; and that the case of a seaman whose enlistment expires while he is under charges is very different from that of an officer who in the same circumstances is dismissed by the President. (8 Op. Atty. Gen., 328.)

Contingencies will undoubtedly arise in which it becomes desirable to drop from the rolls a deserting officer in order to supply his place by promotion; where, still due regard to the principles of justice and the discipline of the service unite to call for the exemplary punishment of the offender. Can it be inflicted without authority of statute? That is the doubt. (8 Op. Atty. Gen., 328, 332.)

Charges and specifications were preferred against an officer of the Navy who deserted, at the time of desertion, and sent to a permanent general court-martial for trial, where they were held pending apprehension of the deserter. Held, that the removal of said officer from the Navy by filling his place and grade by the appointment of a successor, with the advice and consent of the Senate, does not divest the jurisdiction of a naval court-martial to try him upon the charge which had been previously preferred; that the statute of limitations is not involved in the case, inasmuch as the charges and specifications were preferred by the Secretary of the Navy and sent to the general court-martial in ample time to assure his trial whenever apprehended. (Naval Dig., 1916, p. 177, citing file 26251-6278, Aug. 17, 1915.)

A charge of desertion was preferred against an officer of the Navy on May 31, 1912, and was tried by general court-martial April 9, 1917, the said officer having in the meantime been dropped from the Navy and superseded by the appointment of a successor by the President of the United States with the advice and consent of the Senate. He was found guilty of the charge, the specification of which was "proved by plea"; and was sentenced "to be dismissed from the United States naval service." The proceedings and findings were approved by the Secretary of the Navy, who set aside the sentence, owing to the fact that the officer's connection with the service had already been terminated. (C. M. O. 26, 1917.)

A court-martial has no jurisdiction over an officer after he has left the service, although his offense was committed while in the service. (24 Op. Atty. Gen., 570; citing 5 Op. Atty. Gen., 55, 58.)

A person discharged from the naval service before proceedings are instituted against him for violations of the Articles for the Government of the Navy, excepting article 14, can not thereafter be brought to trial before a court-martial for such violations, though committed while he was in the service. However, in view of the unsatisfactory state of the authorities,



and of the grave objections on principle to this conclusion, *suggested* that there is no reason why jurisdiction should not be asserted by the Secretary of the Navy in such a case, in order to obtain, if possible, an authoritative judicial determination of the question. (31 Op. Att'y. Gen., 521.)

Article 14, paragraph 11, A. G. N., makes express provision for the trial of persons who have been discharged from the Navy; a proviso of somewhat similar import is inserted in article 62, fixing a period of limitation in cases of desertion, viz, "that said limitation shall not begin until the end of the term for which such person was enlisted in the service." These provisions, extending the jurisdiction after severance from the service in certain cases only, seem to indicate, on well-known principles of construction, that Congress did not intend so to extend the jurisdiction in other cases. (31 Op. Att'y. Gen., 521, 527; compare notes to arts. 61 and 62, A. G. N.)

An enlisted man of the Army furloughed for the unexpired portion of his enlistment, *held*, not thereby discharged from the Army. (In re Markun, 232 Fed. Rep., 1018.)

**Where jurisdiction attached prior to discharge.**—The principle that where jurisdiction has attached it can not be divested by mere subsequent change of status, has been applied as justifying the trial and sentence of an enlisted man after the expiration of the term of enlistment, and the execution of a sentence after the lapse of many years and the severance of all connection with the Army. (*Carter v. McLaughry*, 183 U. S., 365, 383; citing *Barrett v. Hopkins*, 7 Fed. Rep., 312; *Coleman v. Tennessee*, 97 U. S., 509; and 16 Op. Att'y. Gen., 349.)

It appears to be well settled that where jurisdiction has once attached it can not be divested by mere subsequent change of status; and this principle justifies the trial and sentence of a person out of the service, where jurisdiction has attached while he was in the service. (31 Op. Att'y. Gen., 521, 528; citing *Carter v. McLaughry*, 183 U. S., 365, 383; *Coleman v. Tenn.*, 97 U. S., 509; 16 Op. Att'y. Gen., 349, 352; *Barrett v. Hopkins*, 7 Fed. Rep., 312; in re *Walker*, 3 Am. Jurist, 281; in re *Bird*, 2 Sawyer, 33; in re *Dew*, 25 Law Reporter, 538, 540; *U. S. v. Reaves*, 126 Fed. Rep., 127, 131; *Winth. Mil. L.*, p. 120, etc.)

A soldier in the Army, sentenced in 1865 to be hanged, but who made his escape, and some years later was dishonorably discharged from the Army, may nevertheless be legally executed in 1879, pursuant to the sentence of the court, his status as a military prisoner awaiting execution of sentence not having been altered by his discharge. But *recommended* that the sentence be commuted to imprisonment for life or for such term of years as the President may in his discretion determine. (16 Op. Att'y. Gen., 349.)

Where the jurisdiction of the military court has attached in respect of an officer of the Army, this includes not only the power to hear and determine the case but the power to execute and enforce the sentence. The different provisions of the sentence (dismissal, fine, and imprisonment) took effect concurrently, while the

accused was under the control of the military authorities of the United States as a commissioned officer of the Army; the date of the order of dismissal, of the infliction of the fine, and of the beginning of the imprisonment, were the same date. The accused was proceeded against as an officer of the Army, and jurisdiction attached in respect of him as such; having been sentenced, his status was that of a military prisoner held by the authority of the United States as an offender against its laws. He was a military prisoner, though he had ceased by execution of the sentence of dismissal to be a soldier. Where jurisdiction has attached, it can not be divested by mere subsequent change of status. (*Carter v. McLaughry*, 183 U. S., 365, 382.)

**Where discharge revoked as illegal.**—

Where by sentence of a court-martial a soldier is discharged from the Army before the expiration of his term of enlistment, and such sentence is afterwards set aside as null and void, the status of the soldier is not affected in any way by such sentence, and he is deemed to have been in the service all the time between the sentence and the order setting it aside. While in fact discharged from the Army, but before the expiration of his term of enlistment, the said soldier committed a homicide: *Held*, that he might be arrested and tried for such homicide by the military authorities, the discharge being in the meantime set aside as null and void, and the accused being at the time a soldier de jure. (In re *Bird*, 3 Fed. Cas. No. 1,428.)

A naval prisoner made a bogus confession, claiming that he had committed a murder for which he was wanted by the civil authorities; he was thereupon discharged from the Navy and delivered to the civil authorities in accordance with their request: *Held*, that the Secretary of the Navy has authority to revoke the discharge so granted, being the result of fraudulent representations made by said enlisted man, and thereupon to reinstate him in his former status in the Navy and to bring him to trial by court-martial for his misconduct. (28 Op. Att'y. Gen., 170.)

An honorable discharge granted to a soldier, based on certain statements made by him and afterwards discovered to be false, may legally be revoked on the ground that it was given under a misapprehension of the facts, caused by the false statements aforesaid; such discharge must be treated as a nullity, having been obtained by the grossest falsehood and perjury. (16 Op. Att'y. Gen., 349.)

See also notes to articles 32 and 54, A. G. N.

**Where enlistment expired but not discharged.**—Where the enlistment of a marine has expired, and there is no legal authority for retaining him in the service, he is in point of law entirely discharged from the Marine Corps, and can not be prevented from leaving. If he choose to remain and perform military service until obtaining a regular discharge, although not a soldier he would be liable in a limited degree to the regulations necessary to the peace and subordination of a military garrison. (*U. S. v. Travers*, 28 Fed. Cas. No. 16537; see note to Constitution, Art. I, sec. 8, clause 14, under "IV. Jurisdiction of courts-

martial," subheading, "Persons not subject to jurisdiction of Federal courts-martial;" and see below, "Court-martial prisoners in confinement after discharge."")

The jurisdiction of a court-martial over an enlisted man for offenses committed during the period of enlistment extends after the termination of said period, whether or not he has in the meantime been arrested or other steps taken to enforce the jurisdiction; he continues in the naval service and amenable to court-martial until there has been some further action, such as a discharge, to terminate the status created by his contract of service. (Op. Atty. Gen., Feb. 27, 1922, file 26251-26615: 8; see note to Art. 61, A. G. N.; and note to Constitution, Art. I, sec. 8, clause 14, under "IV. Jurisdiction of courts-martial.")

**Court-martial prisoners in confinement after discharge.**—Section 1361, Revised Statutes, relating to the Army, providing that "all prisoners under confinement in said military prisons, undergoing sentence of courts-martial, shall be liable to trial and imprisonment by courts-martial under the Rules and Articles of War, for offenses committed during the said confinement," is intended to confer jurisdiction in the cases of "all" such prisoners, including those who were discharged from the Army by the same sentence which condemned them to imprisonment; a prisoner, though thus discharged from the Army, is subject to trial by court-martial for offenses committed while serving sentence; and section 1361, as thus construed, is not liable to constitutional objection. Under the power to make rules for "the government and regulation of the land and naval forces," Congress has provided that cases of this kind, arising in the Army, shall be tried by court-martial. (16 Op. Atty. Gen., 293, 295.)

Section 1361, Revised Statutes, providing that prisoners under confinement in military prisons, undergoing sentences of Army courts-martial, shall be liable to trial and punishment by courts-martial, etc., is not in conflict with the fifth amendment to the Constitution, as applied to a prisoner undergoing confinement imposed by sentence of court-martial, pursuant to which sentence he had been dismissed from the Army. (Ex parte Wildman, 29 Fed. Cas. No. 17,653a.)

An act of Congress providing that prisoners confined in military prisons under sentence of court-martial shall be liable to trial and punishment by court-martial for offenses committed during said confinement is not in conflict with the Constitution providing for trial by jury; and said statute is applicable to one confined in a military prison, though at the time of his sentence to such confinement he was likewise sentenced to be discharged from the service, and that part of the sentence had been executed. (In re Craig, 70 Fed. Rep., 969.)

A person held as a military prisoner for punishment for a military offense of which he has been convicted is subject to military law, and to trial by court-martial for offenses committed during such imprisonment, even if the prior sentence resulted in his discharge as a soldier. (Kahn v. Anderson, 255 U. S., 1, citing Carter v. McClaughry, 183 U. S., 365,

383; 16 Op. Atty. Gen., 292; in re Craig, 70 Fed. Rep., 969; ex parte Wildman, Fed. Cas. No. 17,653a; see also art. 22, par. e, A. W., June 4, 1920, 41 Stat., 787.)

A general court-martial prisoner in the Navy may be tried by summary court-martial or deck court prior to the expiration of his period of enlistment, and may afterwards be held to serve out the sentence imposed by such court, irrespective of whether or not his enlistment expires in the meantime (file 26504-100, Dec. 21, 1910); as to trial by court-martial of naval prisoners for offenses committed after expiration of enlistment, see file 26509-259, March 12, 1918, recommending legislation similar to that above cited with respect to the Army.

See also note above, under "Where enlistment expired but not discharged."

**Naval reservists released from active duty.**—An enrolled member of the Naval Reserve Force can not be tried by a naval court-martial for an offense alleged to have been committed while in active service after he has been released from active service and entered civil life, no charges or specifications having been preferred against him prior to his release from active duty, and the offense not being governed by article 14, A. G. N. (U. S. v. Warden or Keeper of Naval Prison, 265 Fed. Rep., 787.)

Under the act of August 29, 1916 (39 Stat., 587), subjecting enrolled members of the Naval Reserve Force to the laws governing the Navy only during such time as they may by law be required to serve in the Navy, held that such enrolled member of said force can not be arrested and tried by court-martial after release from active service for an offense committed while in active service; nor can he be recalled to active duty, even in time of war, where the motive of the order recalling him is to make him subject to naval discipline. (U. S. v. MacDonald, 265 Fed. Rep., 695. See note to art. 24, A. G. N.)

Such member can be recalled into active service only in conformity with the laws and regulations on that subject, and can not be recalled to give the naval court-martial jurisdiction to try him for an offense committed while he was in active service. (U. S. v. Warden or Keeper of Naval Prison, 265 Fed. Rep., 787.)

A person discharged from the naval service can be prosecuted under the criminal laws of the United States for any act during the period of his active duty, made a crime under the general laws of the United States, unless he has been previously placed in jeopardy. (U. S. v. MacDonald, 265 Fed. Rep., 695.)

See note below, under "Naval Reserve Force."

**Void enlistment.**—While a minor between certain ages is eligible for enlistment with the consent of his parents or guardians, and in such cases his enlistment without their consent is not void but voidable, held that the enlistment of a minor below the minimum age of enlistment, and who belongs to one of the classes whose enlistment is prohibited by statute, is not merely voidable but void; and in such a case, as the minor never became a soldier sub-



ject to military law, he could not be a deserter under the Articles of War and so is not amenable to the jurisdiction of a court-martial for that offense. (*Hoskins v. Pell*, 239 Fed. Rep., 279; *L. R. A.*, 1917 D, 1053, construing sec. 1118, R. S., relating to enlistments in the Army, corresponding to sec. 1420, R. S., relating to enlistments in the Navy.)

The enlistment of such a minor is peremptorily forbidden by statute, without regard to the consent of his parent or guardian; his enlistment is as invalid as the enlistment of an insane or intoxicated person. (*Hoskins v. Pell*, 239 Fed. Rep., 279; *L. R. A.*, 1917 D, 1053; see also *ex parte Rush*, 246 Fed. Rep., 172, 174; *ex parte Beaver*, 271 Fed. Rep., 493, 496.)

If the enlistment of a person in the Navy was void, then there is no right to discipline him at any period of his service, even though he was not undertaking to escape it. If his enlistment was void (which means that he was never in the service), then for any act by any person claiming to be in authority over him, whereby any of the natural rights of the alleged enlisted man were denied him, as, for instance, if he had been imprisoned for an hour, or a day, or a week, because of some infraction of the rules, a civil action for damages would lie in his favor against the particular individuals who were responsible for such punishment. No rule of law can be cited that will ever protect a public officer from the consequences of any act which he may imagine he is performing as a public officer, but which involves an exercise of authority by him as to some person over whom he is absolutely without authority. (*Ex parte Rock*, 171 Fed. Rep., 240, 242.)

For other cases, see note to section 1420, Revised Statutes.

**Voidable enlistment.**—An enlisted soldier can not avoid a charge of desertion by showing that at the time when he voluntarily enlisted he had passed the age at which the law allows enlisting officers to enlist recruits. (*In re Grimley*, 137 U. S., 147.)

Under section 1624, Revised Statutes, article 8, providing for punishment for desertion, where a minor between the ages of 14 and 18 years, without the consent of his father, then living, enlisted in the Navy and received the usual pay from the date of his enlistment until he deserted, was arrested and detained as a deserter, *held* that he could not be discharged from the custody of the naval authorities on a writ of habeas corpus sued out by his father, although the latter was entitled to demand his son's discharge from the Navy as soon as he had answered and satisfied the charge for desertion then pending against him. (*U. S. v. Reeves*, 126 Fed. Rep., 127.)

For other cases, see notes to sections 761 and 1419, Revised Statutes, and see note to article 22, A. G. N.

**Detailed to duties other than military.**—Where a military officer detailed for duty in the Freedmen's Bureau has been guilty of misappropriation of money or any violation of the rules and regulations governing disbursing officers of the Army, he may be tried by court-martial in the same manner as any other such Army officer. (14 Op. Atty. Gen., 268, 269.)

Regularly enlisted men of the Navy employed on vessels in the Coast and Geodetic Survey, pursuant to section 4685, Revised Statutes, would be governed by the Articles for the Government of the Navy just as if serving on a vessel of war. (19 Op. Atty. Gen., 182, 183.)

Officers of the Army are in the eye of the law on military duty although employed as such officer under statutes of the United States in the public service on duties not in themselves pertaining to the Army; the status of such an officer was not changed by his detail to such duties, and he was still subject to the military jurisdiction. (*Carter v. McClaughry*, 183 U. S., 365, 399-400.)

**Consent of accused.**—Conceded, that the possession by the accused of a status essential to the exercise by the court-martial of its power was jurisdictional, and therefore may not be held to have existed merely because of an estoppel. (*Givens v. Zerst*, 255 U. S., 11, 19, affirming *ex parte Givins*, 262 Fed. Rep., 702.)

**Chiefs of bureaus in the Navy Department.**—The chief of the Bureau of Medicine and Surgery in the Navy Department is amenable to the jurisdiction of a naval court-martial upon charges and specifications preferred against him for acts done as such chief. (18 Op. Atty. Gen., 176.)

A naval court-martial has jurisdiction to try the Paymaster General of the Navy and sentence him to be dismissed from the position of chief of bureau, and to be suspended from rank and duty as pay inspector. Though chief of a bureau in the Navy Department, he is not a civil officer. (*Smith v. U. S.*, 26 Ct. Cls., 143.)

A writ of prohibition will not be issued to prohibit a naval court-martial from trying a naval officer, being Paymaster General and chief of a bureau in the Navy Department, upon a charge of "scandalous conduct tending to the destruction of good morals," with specifications alleging that as such chief of bureau he made contracts and payments in disregard of the interests of the Government, and to promote the interests of contractors, in violation of law and to the great scandal and disgrace of the service and injury of the United States; and upon the additional charge of "culpable inefficiency in the performance of duty," with specifications setting forth acts similar to those specified under the first charge. (*Smith v. Whitney*, 116 U. S., 167.)

An offense committed by a naval officer serving as chief of a bureau in the Navy Department, relating to the duties of his office as bureau chief, is a case arising in the naval forces and therefore punishable by court-martial under the articles and regulations made or approved by Congress in the exercise of the powers conferred upon it by the Constitution. (*Smith v. Whitney*, 116 U. S., 167, 186.)

See also note to section 421, Revised Statutes; and see *Wales v. Whitney* (114 U. S., 564), and *Swain v. United States* (165 U. S., 553), the latter case referring to the trial of the Judge Advocate General of the Army.

**Paymasters' clerks.**—See note to section 1386, Revised Statutes, as to status of paymasters' clerks appointed pursuant thereto, and for amendatory statutes abolishing paymasters' clerks and substituting the grades of acting pay clerk, pay clerk, and chief pay clerk.

A paymaster's clerk on duty in the Navy is a person "in the naval forces of the United States" within the meaning of those terms as used in the act of March 2, 1863 (12 Stat., 696, sec. 1; art. 14, A. G. N.), and amenable to the jurisdiction of a court-martial as provided for in that act. (In re Bogart, 3 Fed. Cas. No. 1596; see also in re Reed, 20 Fed. Cas. No. 11636; U. S. v. Bogart, 24 Fed. Cas. No. 14616; ex parte Reed, 100 U. S., 13.)

A paymaster's clerk in the Navy, regularly appointed and assigned to duty on a receiving ship, is a person in the naval service of the United States, subject to be tried and convicted and sentenced to imprisonment by a general court-martial for a violation of section 1624, Revised Statutes. (Johnson v. Sayre, 158 U. S. 109.)

**Civil engineers.**—See "historical note" to section 1413, Revised Statutes, as to status of civil engineers in the Navy.

Civil engineers in the Navy are subject to jurisdiction of naval courts-martial. (15 Op. Atty. Gen., 597; see note to art. 36, A. G. N.)

**Marine Corps.**—See section 1621, Revised Statutes, and note thereto, as to laws and regulations governing the Marine Corps and members of the Medical Department serving therewith, and the discipline of its officers and enlisted men.

Whether a naval court-martial ordered under the authority of the Secretary of the Navy has jurisdiction to try a lieutenant colonel of the Marine Corps will depend upon whether the alleged misconduct of the accused took place while he was employed in the land service or in the naval service. (5 Op. Atty. Gen., 706, construing act of July 11, 1798, sec. 4; see later laws and decisions noted under sec. 1621, R. S.)

**Naval Reserve Force.**—"Men transferred to the Fleet Naval Reserve shall be governed by the laws and regulations for the government of the Navy \* \* \*." (Act Aug. 29, 1916, 39 Stat., 591.)

"Enrolled members of the Naval Reserve Force when in active service shall be subject to the laws, regulations, and orders for the government of the Regular Navy, and the Secretary of the Navy may, in his discretion, permit the members of the Naval Reserve Force to wear the uniform of their respective ranks, grades, or ratings while not in active service, and such members shall, for any act committed by them while wearing the uniform of their respective ranks, grades, or ratings, be subject to the laws, regulations, and orders for the government of the Regular Navy." (Act July 1, 1918, 40 Stat., 712.)

See note above, under "Naval reservists released from active duty."

**Coast Guard.**—"Whenever, in time of war, the Coast Guard operates as a part of the Navy in accordance with law, the personnel of that service shall be subject to the laws prescribed for the government of the Navy: *Provided*, That in the initiation, prosecution, and completion of disciplinary action, including remission and mitigation of punishments for any offense committed by any officer or enlisted man of the Coast Guard, the jurisdiction shall hereafter depend upon and be in accordance with the laws and regulations of the department having jurisdiction of the person of such offender at the various stages of such action: *Provided further*, That any punishment imposed and executed in accordance with the provisions of this section shall not exceed that to which the offender was liable at the time of the commission of his offense." (Act Aug. 29, 1916, 39 Stat., 600.)

**Lighthouse Service.**—"That any of the personnel of the Lighthouse Service who may be transferred as herein provided shall, while under the jurisdiction of the Navy Department or War Department, be subject to the laws, regulations, and orders for the government of the Navy or Army, as the case may be, in so far as the same may be applicable to persons whose retention permanently in the military service of the United States is not contemplated by law." (Act Aug. 29, 1916, 39 Stat., 602.)

**Coast and Geodetic Survey.**—"That any of the personnel of the Coast and Geodetic Survey who may be transferred as herein provided shall, while under the jurisdiction of the War Department or Navy Department, have proper military status and shall be subject to the laws, regulations, and orders for the government of the Army or Navy, as the case may be, in so far as the same may be applicable to persons whose retention permanently in the military service of the United States is not contemplated by law." (Act May 22, 1917, sec. 16, 40 Stat., 88.)

**Public Health Service.**—"When officers of the United States Public Health Service are serving on Coast Guard vessels in time of war, or are detailed in time of war for duty with the Army or Navy in accordance with law, they \* \* \* shall be subject to the laws prescribed for the government of the service to which they are respectively detailed." (Act July 9, 1917, 40 Stat., 242.)

**For other cases,** see note to article 5, A. G. N., as to jurisdiction over civilians acting as spies; article 6, A. G. N., as to jurisdiction of murder by civilian on naval hospital ship; article 22, as to concurrent jurisdiction of civil authorities; articles 32 and 53, as to revocation of illegal discharge; section 1422, Revised Statutes, as to men detained after expiration of enlistment; section 1519, Revised Statutes, as to court-martial of midshipmen; and see, generally, notes to articles 61, 62, and 63, A. G. N., and to the Constitution, Article I, section 8, clauses 11, 13, and 14.

**Article 1. [Commander's duty of example and correction.]** The commanders of all fleets, squadrons, naval stations, and vessels belonging to the Navy, are required to show in themselves a good example of virtue, honor, patriotism,



and subordination; to be vigilant in inspecting the conduct of all persons who are placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Navy, all persons who are guilty of them; and any such commander who offends against this article shall be punished as a court-martial may direct.—(17 July, 1862, c. 204, s. 1, v. 12, p. 601, art. 1.)

**Art. 2. [Divine service.]** The commanders of vessels and naval stations to which chaplains are attached shall cause divine service to be performed on Sunday, whenever the weather and other circumstances allow it to be done; and it is earnestly recommended to all officers, seamen, and others in the naval service diligently to attend at every performance of the worship of Almighty God.—(17 July, 1862, c. 204, s. 1, v. 12, p. 601, art. 2.)

**Art. 3. [Irreverent behavior.]** Any irreverent or unbecoming behavior during divine service shall be punished as a general or summary court-martial may direct.—(17 July, 1862, c. 204, s. 1, v. 12, p. 601, art. 2.)

As to deck courts and their power to punish,  
see note to article 24, A. G. N.

As to limitations of punishment which may be  
adjudged by courts-martial, see note to  
article 63, A. G. N.

**Art. 4. [Offenses punishable by death.]** The punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person in the naval service—(17 July, 1862, c. 204, s. 1, v. 12, p. 601, art. 3.)

**FIRST. [MUTINY.]** Who makes, or attempts to make, or unites with any mutiny or mutinous assembly, or, being witness to or present at any mutiny, does not do his utmost to suppress it; or, knowing of any mutinous assembly or of any intended mutiny, does not immediately communicate his knowledge to his superior or commanding officer;

**SECOND. [DISOBEDIENCE OF ORDERS.]** Or disobeys the lawful orders of his superior officer;

**THIRD. [STRIKING SUPERIOR OFFICER.]** Or strikes or assaults, or attempts or threatens to strike or assault, his superior officer while in the execution of the duties of his office;

**FOURTH. [INTERCOURSE WITH AN ENEMY.]** Or gives any intelligence to, or holds or entertains any intercourse with, an enemy or rebel, without leave from the President, the Secretary of the Navy, the commander-in-chief of the fleet, the commander of the squadron, or, in case of a vessel acting singly, from his commanding officer;

**FIFTH. [MESSAGES FROM AN ENEMY.]** Or receives any message or letter from an enemy or rebel, or, being aware of the unlawful reception of such message or letter, fails to take the earliest opportunity to inform his superior or commanding officer thereof;

**SIXTH. [DESERTION IN TIME OF WAR.]** Or, in time of war, deserts or entices others to desert; [See §§ 1996, 1998.]—(23 April, 1800, c. 33, art. 17, v. 2, p. 47.)

**SEVENTH. [DESERTING TRUST.]** Or, in time of war, deserts or betrays his trust, or entices or aids others to desert or betray their trust;

**EIGHTH. [SLEEPING ON WATCH.]** Or sleeps upon his watch;

**NINTH. [LEAVING STATION.]** Or leaves his station before being regularly relieved;

**TENTH. [WILLFUL STRANDING OR INJURY OF VESSEL.]** Or intentionally or willfully suffers any vessel of the Navy to be stranded, or run upon rocks or shoals or improperly hazarded; or maliciously or willfully injures any vessel of the Navy, or any part of her tackle, armament, or equipment, whereby the safety of the vessel is hazarded or the lives of the crew exposed to danger;

**ELEVENTH. [UNLAWFUL DESTRUCTION OF PUBLIC PROPERTY.]** Or unlawfully sets on fire, or otherwise unlawfully destroys, any public property not at the time in possession of an enemy, pirate, or rebel;

**TWELFTH. [STRIKING FLAG OR TREACHEROUSLY YIELDING.]** Or strikes or attempts to strike the flag to an enemy or rebel, without proper authority, or, when engaged in battle, treacherously yields or pusillanimously cries for quarters;

**THIRTEENTH. [COWARDICE IN BATTLE.]** Or, in time of battle, displays cowardice, negligence, or disaffection, or withdraws from or keeps out of danger to which he should expose himself;

**FOURTEENTH. [DESERTING DUTY IN BATTLE.]** Or, in time of battle, deserts his duty or station, or entices others to do so;

**FIFTEENTH. [NEGLECTING ORDERS TO PREPARE FOR BATTLE.]** Or does not properly observe the orders of his commanding officer, and use his utmost exertions to carry them into execution, when ordered to prepare for or join in, or when actually engaged in, battle, or while in sight of an enemy;

**SIXTEENTH. [NEGLECTING TO CLEAR FOR ACTION.]** Or, being in command of a fleet, squadron, or vessel acting singly, neglects, when an engagement is probable, or when an armed vessel of an enemy or rebel is in sight, to prepare and clear his ship or ships for action;

**SEVENTEENTH. [NEGLECTING TO JOIN ON SIGNAL FOR BATTLE.]** Or does not, upon signal for battle, use his utmost exertions to join in battle;

**EIGHTEENTH. [FAILING TO ENCOURAGE THE MEN TO FIGHT.]** Or fails to encourage, in his own person, his inferior officers and men to fight courageously;

**NINETEENTH. [FAILING TO SEEK ENCOUNTER.]** Or does not do his utmost to overtake and capture or destroy any vessel which it is his duty to encounter;

**TWENTIETH. [FAILING TO AFFORD RELIEF IN BATTLE.]** Or does not afford all practicable relief and assistance to vessels belonging to the United States or their allies when engaged in battle.

**"Such other punishment" construed.**—See note to article 63, A. G. N., under "Cruel and unusual punishments."

**Imprisonment in penitentiary.**—See article 7, A. G. N.

**"Superior officer" construed.**—The article of war which prescribes the punishment of an officer or soldier who offers violence to or disobeys the command of his superior officer does not apply as between an undergraduate cadet at the Military Academy and a fellow undergraduate, whatever may be their relative rank in the academic organization; the rank of cadets within the academy, as commissioned officers, noncommissioned officers, and privates, is not rank in the Army. (7 Op. Atty. Gen., 332, 333.)

See note to section 1623, Revised Statutes, as to construction of "senior in rank"; and see note to article 8, A. G. N.

**Mutiny.**—See note to article 6, A. G. N., as to officers charged with murder for execution of seaman for mutinous conduct.

**Disobedience of orders.**—Question whether disobedience of orders is such conduct as may be punished under the provision of the law relating to "scandalous conduct tending to the destruction of good morals," discussed but not decided. (Wilkes v. Dinsman, 7 How., 89, 127; see note to art. 8, A. G. N.)

It sometimes happens that a prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. While subordinate officers or soldiers are pausing to consider whether they ought to obey or are scrupulously weighing the evidence of the facts upon which the commander in chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. (Wilkes v. Dinsman, 7 How., 89, 130.)



A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases every delay and every obstacle to an efficient and immediate compliance necessarily tends to jeopardize the public interests. (*Martin v. Mott*, 12 Wheat., 19, 30.)

If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit in which his defense must finally rest upon his ability to establish the facts by competent evidence. Such a course would be subversive of all discipline and expose the best disposed officers to the chances of ruinous litigation. (*Martin v. Mott*, 12 Wheat., 19, 30.)

The belief of a subordinate as to his rights does not furnish any justification for his disobedience of orders. For there would be an end of all discipline if the seamen and marines on board a ship of war on a distant service were permitted to act upon their own opinion of their rights, and to throw off the authority of the commander whenever they supposed it to be unlawfully exercised. (*Dinsman v. Wilkes*, 12 How., 390, 403.)

For other cases, as to duty of obeying orders and whether illegal order is a defense to a civil suit against the subordinate obeying same, see note to Constitution, Article I, section 8, clause 13, under "Responsibility of military authorities for illegal acts."

**Assault and battery.**—An "assault" is an attempt which, if consummated, would result in a battery. It is essential to a battery that some force shall be actually applied, not merely threatened or attempted to be applied, to the person of another, or to some article so closely connected with his person as to be regarded as a part of it. And the conduct of a soldier in shooting at another, without hitting him, does not constitute an assault and battery. (*Anderson v. Crawford*, 265 Fed. Rep., 504.)

While a battery always includes an assault, assaults often fall short of a battery. (*Anderson v. Crawford*, 265 Fed. Rep., 504.)

The definition of an assault is an offer or attempt by force to do a corporal injury to another,

as if one person strikes at another with his hands or with a stick and misses him; for if the other be stricken, it is a battery which is an offense of a higher grade. (*Anderson v. Crawford*, 265 Fed. Rep., 504.)

See note to article 43, A. G. N., as to charges and specifications.

**Desertion in time of war.**—See section 1998, Revised Statutes, as amended by act of August 22, 1912 (37 Stat., 356), providing for disabilities to be suffered by persons who desert in time of war, including the forfeiture of the rights of citizenship and incapacity to hold office under the United States. See also article 19, A. G. N., as amended by said act of August 22, 1912, as to reenlistment of war-time deserters.

The provisions of sections 1996 and 1998, Revised Statutes, which subject persons deserting the military service of the United States to additional penalties, can only take effect upon conviction by a court-martial. (*Kurtz v. Moffitt*, 115 U. S., 487, 501. As to effect of pardon, see note to Constitution, Art. II, sec. 2, clause 1, under "III. Power to pardon offenses against United States," subheading, "The effect of the pardon is prospective.")

See note to article 8, A. G. N., as to definition of desertion, etc. See articles 61 and 62, A. G. N. and notes thereto, as to statute of limitations.

**"Time of war" construed.**—Whether a condition of war exists within the articles of war relating to the trial of certain offenses committed by soldiers is within the exclusive jurisdiction of the political department of the Government. (*Hamilton v. McClaughry*, 136 Fed. Rep., 445.)

The "Boxer uprising" in China in June, 1900, during which the United States assembled an army of 15,000 men, over 5,000 of whom were ordered to and did proceed to China to assist the forces of the allied nations in quelling the uprising and to release the accredited representatives of the United States then imprisoned within the city of Pekin, during which the pay of officers and men in the United States military service was increased to a war basis, constituted a "time of war," within the articles of war providing for the trial of certain offenses by military court-martial. (*Hamilton v. McClaughry*, 136 Fed. Rep., 445.)

**Art. 5. [Spies, etc.]** All persons who, in time of war, or of rebellion against the supreme authority of the United States, come or are found in the capacity of spies, or who bring or deliver any seducing letter or message from an enemy or rebel, or endeavor to corrupt any person in the Navy to betray his trust, shall suffer death, or such other punishment as a court-martial may adjudge.—(17 July, 1862, c. 204, s. 1, v. 12, p. 602, art. 4. 13 Feb., 1862, c. 25, s. 4, v. 12, p. 340. 3 Mar., 1863, c. 75, s. 38, v. 12, p. 737.)

- "Time of war" construed.—See note to article 4, A. G. N.

"Such other punishment" construed.—See note to article 63, A. G. N., under "Cruel and unusual punishments."

**Imprisonment in penitentiary.**—See article 7, A. G. N.

**Punishment of persons not belonging to Navy.**—In time of war or rebellion the military jurisdiction is extended over "all

persons" found lurking or acting as spies. Persons who do not belong to the military establishment, who are not a part of the Army, are not subject to military jurisdiction except in the cases specifically provided for by law, as, for example, where they come within the description of this statute. (16 Op. Atty. Gen., 13, 15, referring to sec. 1343, R. S., relating to the Army.)

Certain offenses committed by persons not belonging to the Army, and which affect the safety, the government, and discipline of the Army, are by statute punishable by court-martial, as, for example, section 1343, Revised Statutes, by which spies are made amenable to military justice. (16 Op. Atty. Gen., 292, 294.)

The articles of war denounce penalties only against officers and soldiers, with the exception of a few provisions respecting sutlers, retainers to the camp, and persons serving with the armies in the field, and one provision respecting spies. (Ex parte Henderson, 11 Fed. Cas. No. 6,349.)

**Endeavor to corrupt person in Marine Corps.**—The accused, a corporal of marines, was charged with endeavoring to corrupt two privates belonging to a marine guard on board a steamer conveying state prisoners to Fort Lafayette, by offering them a large pecuniary reward if they would assist him in effecting the escape of certain of the prisoners. The prisoner was convicted of one of the gravest offenses enumerated in the calendar of naval crimes. (10 Op. Atty. Gen., 158.)

**Spy outside field of operations.**—A person apprehended upon United States territory not under martial law, who had not entered any camp, fortification, or other military premises of the United States, and who had not come through the fighting lines or field of military operations, can not be tried as a spy by an Army court-martial, and to such a case section 1343, Revised Statutes, and article 82 of the Articles of War, can not be applied. (31 Op. Atty. Gen., 356.)

**German spy amenable to naval court-martial.**—Under article 5, A. G. N., the jurisdiction of a naval court-martial to punish a German spy who entered the United States under a false name and on a forged passport, and who was arrested in New York City, can not be denied on the ground that the port of New York was outside the field of active operations and outside the theater of war. (U. S. v. MacDonald, 265 Fed. Rep., 754.)

**Art. 6. [Murder.]** If any person belonging to any public vessel of the United States commits the crime of murder without the territorial jurisdiction thereof, he may be tried by court-martial and punished with death.—(17 July, 1862, c. 204, s. 1, v. 12, p. 602, art. 5.)

**Jurisdiction of manslaughter.**—See note to article 22, A. G. N.

Under a charge of murder, courts-martial as well as criminal courts of law may convict the accused of manslaughter. (U. S. v. Mackenzie, 30 Fed. Cas. No. 18313.)

**Execution of subordinate without trial.**—Upon allegation that officers of the U. S. Brig Somers in 1812 had committed the crime of

Military authorities should have power to try spies wherever found; otherwise they may not be subject to trial for that offense. (U. S. v. MacDonald, 265 Fed. Rep., 754.)

In the recent World War the field of operations which existed after the United States entered the war, and especially in regard to naval operations, brought the port of New York within the field of active operations. With the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations. Great numbers of troops were being sent abroad, and in large numbers sailing from the port of New York; vessels loaded with ammunition and supplies for the Army were daily leaving this port; German submarines were landing, unheralded and unaware, in our ports before the United States entered the war; ships were being destroyed within easy distance of the Atlantic coast; there was the constant threat of airships above the harbor and city of New York on missions of destruction. A spy of the enemy might well have aided these hostile operations. It is not necessary that it be said of the accused that he entered forts or armed encampments for the purposes of his mission; it is sufficient if he was here on the mission of a spy and communicated his intelligence or information to the enemy. (U. S. v. MacDonald, 265 Fed. Rep., 754.)

Under international law, spying is not a crime, and the offense against the laws of war consists of being found during the war in the capacity of a spy. The guaranties of the Constitution apply only where a crime is charged, and a "crime" means an offense against the Government as understood when the Constitution was adopted, which does not include the offense of being a spy. (U. S. v. MacDonald, 265 Fed. Rep., 754.)

This article is applicable to all persons acting as spies, whether citizens of the United States or not. (U. S. v. MacDonald, 265 Fed. Rep., 754.)

Spies who were present in our midst were dangerous agencies of war, and it is proper that the naval authorities deal with them as the act of Congress provides that courts-martial might. Whatever may be the right of an alien to protection of the law in this country, he surrenders his right to constitutional protection when he joins the armed forces of an alien enemy, assuming duties as a spy. (U. S. v. MacDonald, 265 Fed. Rep., 754.)

murder on the high seas, it appeared in their defense that they arrested a member of the crew on a charge of mutinous conspiracy with others of the crew to murder the officers and piratically possess themselves of the vessel; that after detaining the prisoner for several days they ordered him to be put to death under apprehension of his rescue by his confederates and in the belief that there was no other means



of saving the ship and the lives of the officers; *held* that the setting up of an accusation of this character against the deceased, under whatever solemnity of asseveration, most certainly can not be received as a justification for employing the last extreme of power by the accused; that the watchful solicitude of the law over life and personal security can not be so quieted or satisfied; that the necessity of the case must be made apparent beyond any fair ground to doubt before any functionary, under whatever plenitude of power, can on his own mandate take the life of a citizen. Nevertheless, *held further* that a civil court of the United States will not grant a warrant to arrest the aforesaid officers pending completion of proceedings before a court of inquiry, which had been ordered by the Secretary of the Navy, of which court the United States attorney for the district was judge advocate, even though the offense were one within the jurisdiction of the civil courts to punish. (*U. S. v. Mackenzie*, 26 Fed. Cas. No. 15690; see also *U. S. v. Mackenzie*, 30 Fed. Cas. No. 18313; and see note to Constitution, Art. I, sec. 8, cl. 14, under "V. Jurisdiction of civil courts.")

**Jurisdiction of civil courts.**—The civil courts of the United States are without jurisdiction to try the commanding officer of a naval vessel on a charge of murder or manslaughter, growing out of his conduct in executing certain subordinates on board the U. S. Brig *Somers* in 1842, the jurisdiction of a naval court-martial in such case being exclusive under the existing legislation of Congress. (*U. S. v. Mackenzie*, 30 Fed. Cas. No. 18313; see note to Constitution, Art. I, sec. 8, cl. 14, under "V. Jurisdiction of civil courts.")

In the case of Commander Mackenzie, the charge of Mr. Justice Betts is legal authority to the point that a court-martial having lawfully entered upon the cognizance of a case, the civil magistrate can not lawfully interrupt

or disturb its jurisdiction and right of complete and final action. (6 Op. Atty. Gen., 426, 427.)

**Concurrent jurisdiction of civil and naval courts.**—Article 6, A. G. N., does not vest exclusive jurisdiction in a naval court-martial of the crime of murder. The general rule is that jurisdiction of civil courts is concurrent as to offenses triable before courts-martial. Accordingly, *held* that homicide committed on a naval hospital ship at Olongapo, P. I., by a member of the civilian crew may be tried by a Federal court in the first judicial district of the United States to which the offender is brought. Courts of the Philippine Islands did not have jurisdiction in this case, as the offense, if any, was against the United States and the Philippine courts only have jurisdiction of offenses against the Philippine Government. It does not appear upon what grounds the assumption rests that a naval court-martial has not jurisdiction under article 8, A. G. N. But since there is reasonable doubt as to the applicability of this article to the offense, such doubt should be resolved against a trial before a court-martial which is a court of limited jurisdiction. (28 Op. Atty. Gen., 24. NOTE.—According to regulations then in force, the master and crew of naval hospital ships and naval auxiliaries were civilians, and in practice were held not subject to the Articles for the Government of the Navy, or to trial by court-martial.)

**Naval court-martial without jurisdiction.**—Naval courts-martial may not try and punish murder which they suppose to have been committed on board a frigate at Norfolk. Jurisdiction in such cases belongs to the civil tribunals. (5 Op. Atty. Gen., 698; compare note to Constitution, Art. I, sec. 8, cl. 14, under "V. Jurisdiction of civil courts," as to jurisdiction of civil authorities of the crime of murder committed on board a naval vessel.)

**Art. 7. [Imprisonment in penitentiary.]** A naval court-martial may adjudge the punishment of imprisonment for life, or for a stated term, at hard labor, in any case where it is authorized to adjudge the punishment of death; and such sentences of imprisonment and hard labor may be carried into execution in any prison or penitentiary under the control of the United States, or which the United States may be allowed, by the legislature of any State, to use; and persons so imprisoned in the prison or penitentiary of any State or Territory shall be subject, in all respects, to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which the same may be situated.—(17 July, 1862, c. 204, s. 1, v. 12, p. 602, art. 6.)

**Imprisonment in cases not punishable by death.**—A naval court-martial, upon conviction of an offense not capital, may sentence to imprisonment at hard labor. (12 Op. Atty. Gen., 510.)

The right to impose imprisonment at hard labor is not limited to cases of conviction of offenses which may be punished capitally, notwithstanding that the construction given to this law by the Navy Department from the time of its enactment has been that punishment by imprisonment at hard labor in a penitentiary

under sentence of a naval court-martial could be inflicted only in the case expressed in the law; that is, a case where a naval court-martial is authorized to adjudge the punishment of death. (12 Op. Atty. Gen., 510.)

Article 7, section 1624, Revised Statutes, is the only statute now in force authorizing sentences to hard labor in a public penitentiary by a naval court-martial; therefore, such punishment can not be inflicted except in the cases punishable by death, enumerated in the 2) clauses of article 4. The expression of one

thing is the exclusion of another. (Ex parte Van Vranken, 47 Fed. Rep., 888; reversed in 163 U. S., 694, without opinion.)

Where a seaman was charged with deserting, and the court-martial found him guilty of attempting to desert, the court had jurisdiction over the subject matter, and an action of trespass for false imprisonment will not lie against the ministerial officer who executes the sentence of imprisonment in the penitentiary of the District of Columbia, at hard labor, for attempting to desert. (*Dynes v. Hoover*, 20 How., 65.)

Courts-martial, in cases within their lawful jurisdiction, may condemn persons to imprisonment at hard labor in the penitentiary of the District of Columbia in punishment of crime. This is too well settled to be now open to question. (10 Op. Atty. Gen., 248.)

**Miscellaneous.**—A naval court-martial may lawfully sentence a seaman to confinement at hard labor in the penitentiary in the District of Columbia for striking, disobeying, and treating with contempt his superior officer. (9 Op. Atty. Gen., 80.)

For an offense against article 12, act April 23, 1800 (2 Stat., 45; now art. 5, sec. 1624, R. S.), a marine general court-martial may legally sentence the prisoner to imprisonment in the

penitentiary of the District of Columbia at hard labor for a term of years, that punishment not being against the usages of the service. (10 Op. Atty. Gen., 158.)

For other cases, see note to article 14, A. G. N.

**Transportation to penitentiary.**—A prisoner sentenced by an Army court-martial to confinement in a penitentiary of the United States should not be turned over to a marshal, but should be conducted to the prison by the proper officers of the War Department. (21 Op. Atty. Gen., 204. But see *Dynes v. Hoover*, 20 How., 65, 78, where it appears that prisoner was turned over to the marshal for the District of Columbia, who received him and committed him to the keeper of the penitentiary, and it was held that the marshal was authorized to receive the prisoner and to turn him over to the keeper.)

A statute providing for the transportation of all United States prisoners sentenced to imprisonment in a United States penitentiary held applicable only to prisoners convicted by the civil courts of the United States. (21 Op. Atty. Gen., 204.)

**Transportation, clothing, and gratuity on discharge.**—See acts of February 16, 1909, section 13 (35 Stat., 622), and March 3, 1909 (35 Stat., 756).

**Art. 8. [Offenses punishable at discretion of court-martial.]** Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy—(17 July, 1862, c. 204, s. 1, v. 12, p. 602, art. 7.)

**FIRST. [PROFANITY, FALSEHOOD, &C.]** Who is guilty of profane swearing, falsehood, drunkenness, gambling, fraud, theft, or any other scandalous conduct tending to the destruction of good morals;

**SECOND. [CRUELTY.]** Or is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders;

**THIRD. [QUARRELING.]** Or quarrels with, strikes, or assaults, or uses provoking or reproachful words, gestures, or menaces toward, any person in the Navy;

**FOURTH. [FOMENTING QUARRELS.]** Or endeavors to foment quarrels between other persons in the Navy;

**FIFTH. [DUELS.]** Or sends or accepts a challenge to fight a duel or acts as a second in a duel;

**SIXTH. [CONTEMPT OF SUPERIOR OFFICER.]** Or treats his superior officer with contempt, or is disrespectful to him in language or deportment, while in the execution of his office;

**SEVENTH. [COMBINATIONS AGAINST COMMANDING OFFICER.]** Or joins in or abets any combination to weaken the lawful authority of, or lessen the respect due to, his commanding officer;

**EIGHTH. [MUTINIOUS WORDS.]** Or utters any seditious or mutinous words;—(23 April, 1800, c. 33, art. 13, v. 2, p. 47.)

**NINTH. [NEGLECT OF ORDERS.]** Or is negligent or careless in obeying orders, or culpably inefficient in the performance of duty;

**TENTH. [PREVENTING DESTRUCTION OF PUBLIC PROPERTY.]** Or does not use his best exertions to prevent the unlawful destruction of public property by others;—(23 April, 1800, c. 33, art. 25, v. 2, p. 48.)



ELEVENTH. [NEGLIGENT STRANDING.] Or, through inattention or negligence, suffers any vessel of the Navy to be stranded, or run upon a rock or shoal, or hazarded;

TWELFTH. [NEGIGENCE IN CONVOY SERVICE.] Or, when attached to any vessel appointed as convoy to any merchant or other vessels, fails diligently to perform his duty, or demands or exacts any compensation for his services, or maltreats the officers or crews of such merchant or other vessels;

THIRTEENTH. [RECEIVING ARTICLES FOR FREIGHT.] Or takes, receives, or permits to be received, on board the vessel to which he is attached, any goods or merchandise, for freight, sale, or traffic, except gold, silver, or jewels, for freight or safe-keeping; or demands or receives any compensation for the receipt or transportation of any other article than gold, silver, or jewels, without authority from the President or Secretary of the Navy;

FOURTEENTH. [FALSE MUSTER.] Or knowingly makes or signs, or aids, abets, directs, or procures the making or signing of, any false muster;

FIFTEENTH. [WASTE OF PUBLIC PROPERTY, &c.] Or wastes any ammunition, provisions, or other public property, or, having power to prevent it, knowingly permits such waste;

SIXTEENTH. [PLUNDERING ON SHORE.] Or, when on shore, plunders, abuses, or maltreats any inhabitant, or injures his property in any way;

SEVENTEENTH. [REFUSING TO APPREHEND OFFENDERS.] Or refuses, or fails to use, his utmost exertions to detect, apprehend, and bring to punishment all offenders, or to aid all persons appointed for that purpose;

EIGHTEENTH. [REFUSING TO RECEIVE PRISONERS.] Or, when rated or acting as master-at-arms, refuses to receive such prisoners as may be committed to his charge, or, having received them, suffers them to escape, or dismisses them without orders from the proper authority;

NINETEENTH. [ABSENCE FROM DUTY WITHOUT LEAVE.] Or is absent from his station or duty without leave, or after his leave has expired;

TWENTIETH. [VIOLATING GENERAL ORDERS OR REGULATIONS.] Or violates or refuses obedience to any lawful general order or regulation issued by the Secretary of the Navy;

TWENTY-FIRST. [DESERTION IN TIME OF PEACE.] Or, in time of peace, deserts or attempts to desert, or aids and entices others to desert; [See §§1996–1998.]

TWENTY-SECOND. [HARBORING DESERTERS.] Or receives or entertains any deserter from any other vessel of the Navy, knowing him to be such, and does not, with all convenient speed, give notice of such deserter to the commander of the vessel to which he belongs, or to the commander-in-chief, or to the commander of the squadron.—(23 April, 1800, c. 33, art. 17, v. 2, p. 47.)

**Discretionary punishment.**—For offenses defined by article 8, A. G. N., a court-martial may impose the sentence of forfeiture of pay, both due and to become due, though fines or forfeitures are not in terms authorized as a punishment by that article. (*Williams v. U. S.*, 24 Ct. Cls., 306.)

The fact that article 14, A. G. N., expressly authorizes fines for the punishment of the offenses therein enumerated, does not operate to

exclude forfeiture of pay for offenses enumerated in article 8. (*Williams v. U. S.*, 24 Ct. Cls., 306.)

See note to articles 7, A. G. N., as to imprisonment in penitentiary; note to article 48, A. G. N., as to forfeiture of pay; and note to article 63, as to limitations of punishment in time of peace.

**Drunkness.**—While drunkenness is not ordinarily considered as criminal, the intoxi-

cation of a naval officer, while on duty, is a gross breach of discipline and liable to be attended by very serious consequences. (*Bishop v. U. S.*, 197 U. S., 334, 343.)

An officer of the Army was charged with "habitual drunkenness"; found guilty of "conduct prejudicial to good order and military discipline in being drunk on various occasions." *Held*, that when it appears that an offense of which an officer was convicted is embraced in the one with which he was charged, it is a lesser offense of the same character and the conviction is authorized by the articles of war. (*Bankhead v. U. S.*, 20 Ct. Cls., 405.)

Various acts of drunkenness prejudicial to good order and military discipline may be found by a court-martial as a "partial verdict" within the decision of the Supreme Court in *Dynes v. Hoover* (20 How., 65), though the charge be habitual drunkenness. (*Bankhead v. U. S.*, 20 Ct. Cls., 405.)

**Falsehood.**—See note to article 22, A. G. N., as to conduct unbecoming an officer and a gentleman.

**Fraud.**—There are two broad classes of fraud under the Articles for the Government of the Navy, viz, fraud against the United States and fraud not against the United States. The first class is punishable under article 14, A. G. N., and the other under article 8, A. G. N. (*Naval Dig.*, 1916, p. 245; C. M. O. 4, 1916.)

To constitute fraud against a private person, in violation of article 8, A. G. N., the specification must show that such person had actually been defrauded by and parted with something of value in consequence of the false representations of the accused. If the accused had not actually defrauded the person concerned, the specification might be laid under a charge of "attempt to commit fraud." (*Nav. Dig.*, 1916, p. 245; C. M. O. 4, 1916.)

**Scandalous conduct tending to the destruction of good morals.**—See note to article 22, A. G. N., as to charge of scandalous conduct tending to the destruction of good morals, in violation of that article.

By the Articles for the Government of the Navy of April 23, 1800 (2 Stat., 45), it was provided in article 3 that officers or enlisted men guilty of "oppression, cruelty, fraud, profane swearing, drunkenness, or any other scandalous conduct tending to the destruction of good morals" should be punished as therein prescribed, viz, in the case of an enlisted man, that he be put in irons or flogged, at the discretion of the captain, not exceeding 12 lashes; or if the offense required severer punishment, that he be tried by a court-martial and suffer such punishment as said court should inflict. The question whether disobedience of orders was such conduct as covered by said article 3, discussed but not decided, as, if not punishable under said article, it was punishable under article 30, limiting the punishments to be inflicted by commanding officers of their own authority (see art. 24, sec. 1624, R. S.); and if not punishable under either of said articles, it was punishable under article 32, which provided that "all crimes committed by persons belonging to the Navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases

at sea." (*Wilkes v. Dinsman*, 7 How., 89, 127. **NOTE.**—Disobedience of orders was specifically provided for, to be punished by court-martial, by article 14 of the said act of 1800.)

A charge against an enlisted man of the Navy for scandalous conduct tending to the destruction of good morals, in that on one occasion he made an affidavit confessing certain frauds against the Government, while on another occasion he testified under oath, before a duly constituted court of inquiry, and denied the truth of his former statements, was sufficient under article 8, A. G. N., notwithstanding that the specification did not aver which of said statements was false, as required in a charge of perjury, but concluded by averring that the accused did, "by submitting the said written statement or confession, and by testifying as above shown, make statements inconsistent the one with the other, and one of which must have been, and was, known by him to be false and misleading, and intended to deceive and defeat the ends of justice." (*Ex parte Dickey*, 204 Fed. Rep., 322.)

Where the pleading upon which the accused was tried made a substantial charge of false swearing, although it did not set forth the charge with the clearness and definiteness required in a civil court, *held* that it was sufficient; that the pleadings did not attempt to charge the accused with "perjury," but alleged a lesser offense than "perjury," viz, "scandalous conduct tending to the destruction of good morals"; and that the specification was not objectionable in that it did not allege which statement was true or which was false. (*Ex parte Dickey*, 204 Fed. Rep., 322, 324; see also note to art. 43, A. G. N.)

The general charge of scandalous conduct tending to the destruction of good morals is well known in courts-martial, and authorized by article 8 of the Articles for the Government of the Navy. (*Ex parte Dickey*, 204 Fed. Rep., 322, 324.)

**Assaulting another person in the Navy.**—See note to article 4, A. G. N., as to definition of assault; and see note to article 22, A. G. N., under "Conduct to the prejudice of good order and discipline."

**Contempt of superior officer.**—See note to article 4, A. G. N., as to construction of "superior officer."

The term "superior officer" includes an officer of the line, senior in rank to another line officer of the same grade, although not associated on duty together with the right of command and requirement of obedience. The fact that the two officers may be "so nearly of the same seniority" is necessarily immaterial. (C. M. O. 5, 1917. In this case the officer was charged with conduct unbecoming an officer and a gentleman in writing and publishing a letter containing "abusive, disrespectful, and defamatory" language of and about a superior officer, in violation of article 22, A. G. N., and not with a violation of article 8, A. G. N.)

**Receiving articles for freight, etc.**—The wide discretion possessed by the commanding officer of a naval vessel concerning the receipt on board, for the protection of private rights, of gold, silver, or jewels, which it was the obvious purpose of this article



(par. 13) not to modify, since the power as to such articles was excepted from the additional limitation which the statute imposed as to other articles, affords no ground for the implication that contract obligations would automatically arise against the United States from the mere exercise by the commanding officer of his discretion. (*Cartas v. U. S.*, 250 U. S., 545, affirming 48 Ct. Cls., 161.)

The Secretary of the Navy can not deprive a commanding officer of his right to compensation for transportation of gold. (*Phillips v. U. S. Grain Corporation*, 279 Fed. Rep., 244.)

Paragraph 13 of article 8, A. G. N., recognizes and limits the preexisting discretion of commanding officers to receive property on board for the protection of private rights; and neither under this statute nor under the Navy Regulations, by which compensation for the permitted service is to be applied to the benefit of officers and men, does such a deposit of gold give rise to any contract with the United States. (*Cartas v. U. S.*, 250 U. S., 545, affirming 48 Ct. Cls., 161.)

The Government does not become a common carrier; the Navy Regulations negative any such assumption by providing that a captain who is to receive a part of the freight as compensation "shall be responsible." (*Cartas v. U. S.*, 48 Ct. Cls., 161.)

A suit can not be maintained against the United States to recover back the value of gold deposited with the commanding officer of a naval vessel for safe-keeping, and turned over by him to a party who, the captain of the vessel had good reason to believe, was entitled to receive it. The Government is not liable for the miscarriage of a naval officer under this law and the Navy regulation made pursuant thereto. (*Cartas v. U. S.*, 48 Ct. Cls., 161.)

**Maltreating inhabitants on shore.**—It is a matter well known that the march, even of an army not hostile, is often accompanied with acts of violence and pillage by straggling parties of soldiers which the most rigid discipline is hardly able to prevent. The act of March 3, 1863, section 30 (12 Stat., 736), was enacted to protect citizens not in the military service from the violence of soldiers. But said section did not make the jurisdiction of the military tribunals exclusive of that of the State courts. (*Coleman v. Tennessee*, 97 U. S., 509, 513.)

**Desertion defined.**—Desertion may in general be defined to be the willful abandonment of the military service by a soldier or officer duly enlisted or in the pay of the Government, without leave and without an intention to return. (15 Op. Atty. Gen., 152, 158.)

Under regulations of the Navy Department relating to the payment of rewards, a "deserter" is one who is absent without leave and with a manifest intention not to return, while a "straggler" is one absent without leave with the probability that he does not intend to desert, but, if his absence continues for 10 days, he becomes a deserter. (*Reed v. U. S.*, 252 Fed. Rep., 21.)

**Desertion exclusively a military offense.**—A court-martial has exclusive jurisdiction to try a party duly enlisted in the Army for the military offense of desertion. (*In re White*, 17 Fed. Rep., 723.)

From the very year of the Declaration of Independence Congress has dealt with desertion as exclusively a military crime, triable and punishable in time of peace, as well as in time of war, by court-martial only, and not by the civil tribunals. (*Kurtz v. Moffitt*, 115 U. S., 487, 501.)

**Attempting to desert.**—Where a seaman was charged with deserting, and the court-martial found him guilty of attempting to desert, the court had jurisdiction over the subject matter, and an action of trespass for false imprisonment would not lie against the ministerial officer who executed the sentence of imprisonment for attempting to desert. (*Dynes v. Hoover*, 20 How., 65. Note that "attempting to desert" is specifically provided for by par. 21 of art. 8, A. G. N.)

**Desertion by one illegally enlisted.**—See notes above, under preamble to section 1624, entitled "Void enlistment," and "Voidable enlistment."

**Apprehension of deserters.**—See note to Constitution, fourth amendment, under "Arrest of military offenders."

A police officer of a State or a private citizen has no authority as such, without any warrant or military order, to arrest and detain a deserter from the Army of the United States. Section 1014, Revised Statutes, which provides that "for any crime or offense against the United States" the offender may be arrested and imprisoned, etc., manifestly applies to proceedings before the civil courts only. (*Kurtz v. Moffitt*, 115 U. S., 487.)

The arrest of deserters from the Navy by civil officers is now provided for by act of February 16, 1909, section 15 (35 Stat., 622). A similar enactment for the Army was contained in act of June 18, 1898 (30 Stat., 484).

Under the Criminal Code, section 32 (act Mar. 4, 1909, 35 Stat., 1095), declaring that whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer acting under the authority of the United States, etc., shall be punished as therein provided, *held* that detectives engaged in arresting naval deserters and stragglers for the reward prescribed by the regulations must be deemed guilty of the offense denounced where they represented to enlisted men arrested as stragglers that they were naval officers. (*Reed v. U. S.*, 252 Fed. Rep., 21.)

**Making good time lost by absence.**—The article of war requiring enlisted men to make good time lost by desertion from the Army applies to a soldier who has been convicted of desertion, or having deserted is restored to duty without trial, which carries with it an acknowledgment on his part of the fact of desertion; but does not apply to a soldier who, after trial and conviction, has been ordered to duty after the sentence has been expressly disapproved by the proper reviewing officer. (26 Op. Atty. Gen., 239; see note to art. 53, A. G. N., as to

effect of disapproval; note to Constitution, Art. 1, sec. 9, cl. 3, as to bills of attainder; and notes to secs. 1418 and 1608, R. S., as to detention of men after expiration of enlistment.)

In the case of a naval deserter, in determining when the term for which he enlisted ends, the period of desertion must be deducted from the contract period of enlistment, and the latter accordingly extended until the enlisted man has fully served the term for which he contracted. His contract is to serve for a certain period; this contract can not be performed by desertion; nor can the status and obligation created thereby be dissolved at the will of the enlisted man. The obligation can only be ended by complete performance. (Op. Atty. Gen., Feb. 27, 1922, file 26251-26615:8; see notes to arts. 61 and 62, A. G. N.; and to sec. 1418, R. S., under "Detention of enlisted men after expiration of enlistment.")

**Effect of acquittal; desertion.**—An acquittal by a court-martial of the charge of desertion operates as an acquittal of any lesser offense included within that charge; and as desertion includes the lesser offense of absence without leave, acquittal thereof is also an acquittal of the latter offense. (13 Op. Atty. Gen., 459.)

**Effect of disapproval; desertion.**—Where the sentence of a court-martial which found a soldier guilty upon his plea of desertion was disapproved by the proper reviewing officer, being deemed inadequate, and the soldier ordered at his own expense to join his regiment, *held* that such disapproval operated as an acquittal of the charge; and as the term of enlistment had expired, there was no warrant for ordering said soldier to further duty; nor can he be again tried for that offense; he may plead the former proceedings as an acquittal in bar of a second trial. (26 Op. Atty. Gen., 239, distinguishing 12 Comp. Dec., 328, as to forfeiture of pay by deserter in such a case; see note to art. 53, A. G. N.)

**Art. 9. [Reduction of officer to enlisted rating.]** Any officer who absents himself from his command without leave, may, by the sentence of a court-martial, be reduced to the rating of an ordinary seaman.—(16 May, 1864, c. 86, s. 2, v. 13, p. 75.)

**Punishment not authorized for other offenses.**—The only provision of law authorizing the reduction of an officer to an enlisted rating is found in article 9, A. G. N., and it authorizes such punishment only in the case of an officer "who absents himself from his command without leave." *Held*, that such punishment is limited to the particular offense specified by this article, and can not be adjudged by a general court-martial for offenses under article 8, A. G. N. (C. M. O. 34-1918, citing precedents; see also C. M. O. 73-1918, 31-1919, and 279-1919.)

**President's approval of sentence.**—It is deemed advisable, as a matter of policy, although not specifically required by statute, to submit to the President for confirmation the sentence of a general court-martial reducing a warrant officer to the rating of ordinary seaman, inasmuch as such sentence deprives the

**Enticing or assisting others to desert.**—Under the act of Congress of 1855, section 11 (10 Stat., 628), making the enticing of a seaman who has enlisted to desert, an offense, *held* that a seaman who has passed the examination at the naval rendezvous merely, and has not been examined and passed on the receiving ship, is not enlisted, and a verdict of acquittal on the charge was proper. (U. S. v. Thompson, 28 Fed. Cas. No. 16,491; see also notes to secs. 1418 and 1608, R. S., as to when enlistment is complete.)

Section 5455, Revised Statutes (now sec. 42, Criminal Code, Mar. 4, 1909, 35 Stat., 1097), merely provides for the punishment of civilians not subject to the articles of war who are accessories to the crime of desertion by a soldier, or who do any of the acts specified tending to promote his commission of that crime. It has no application to the crime of the soldier himself. (Kurtz v. Moffit, 115 U. S., 487, 502.)

An attorney employed by the father of a soldier, 16 years old, who had enlisted without his father's consent, to obtain his release on the ground of nonage, and who advised the soldier, then a deserter, to remain away from the authorities until notified, *held* not to have "harbored, concealed, or assisted" the deserter, within section 42 of the Criminal Code (above cited), which requires, to constitute either of the offenses, some positive physical act, done with knowledge and intent to aid in the wrongful purpose of the deserter. (Firpo v. U. S., 261 Fed. Rep., 850.)

To "conceal," as used in section 42 of the Criminal Code (above cited), providing for punishment of anyone who shall harbor, conceal, protect, or assist any soldier who has deserted from service, means to hide, secrete, or keep out of sight. (Firpo v. U. S., 261 Fed. Rep., 850.)

To "harbor," as used in section 42 of the Criminal Code (above cited), means to lodge, to care for, after secreting the deserter. (Firpo v. U. S., 261 Fed. Rep., 850.)

accused of his position as a warrant officer in the Navy. (Naval Dig., 1916, p. 517; C. M. O. 11-1916; C. M. O. 185-1919; see art. 53, A. G. N.)

**Rating of ordinary seaman changed.** By act of August 29, 1916 (39 Stat., 575), the rating of "ordinary seaman" was changed to "seaman, second class." This change has been construed as authorizing the reduction of officers to the rating of seaman, second class, for the offense specified in this article. (See, e. g., C. M. O. 185-1919.)

**Reduction of officer to another office.**—The sentence of a court-martial reducing an officer to a lower grade and rank was disapproved by the President because it could not be carried into effect by the Executive alone, but would require a nomination by the President and confirmation by the Senate, and then only in the case of an existing vacancy. (See Swaim v. U. S., 165 U. S., 553, 563.)



**Art. 10. [Desertion by resignation.]** Any commissioned officer of the Navy or Marine Corps who, having tendered his resignation, quits his post or proper duties without leave, and with intent to remain permanently absent therefrom, prior to due notice of the acceptance of such resignation, shall be deemed and punished as a deserter.—(5 Aug., 1861, c. 54, s. 2, v. 12, pp. 316, 317.)

**Necessity of acceptance.**—"The resignation of an officer of the Navy is not effective until it has been duly accepted by the President, who possesses the power of compelling the officer to remain in the service by declining to accept such resignation." (File 26505-21 and 28, citing *Edwards v. U. S.*, 103 U. S., 471; file 26262-2146.)

**Implied resignation.**—"If any officer of the Navy accepts or holds an appointment in the diplomatic or consular service of the Government, he shall be considered as having resigned his place in the Navy, and it shall be filled as a vacancy." (Sec. 1440, R. S.)

If an officer is illegally dismissed from the service, it becomes his duty at once or within a reasonable time to appeal to the highest authority for revocation, modification, or correction of the illegal order. If he obeys and submits for an unreasonable length of time, he must be held to have abandoned all title and claim to the office and its emoluments, and to have waived his right to both. And it is immaterial that he may have submitted to the order because he was ignorant of the law. (*Ide v. U. S.*, 25 Ct. Cls., 401; affirmed on other grounds, 150 U. S., 517. See also *Armstrong v. U. S.*, 26 Ct. Cls., 387.)

The principle that an officer who acquiesces in his dismissal from the service for a long period of time has abandoned said office, which abandonment is equivalent to a resignation, does not apply to an officer on the retired list, who who owed no service to the Government, (*Fletcher v. U. S.*, 26 Ct. Cls., 541, 563.)

The doctrine of resignation by implication, applicable to civil officers, is not to be favored in the Army and Navy, where forms and regulations are prescribed and must be enforced.

A resignation by a naval officer is inoperative until accepted by the proper authority, and even if the acceptance of another office be held equivalent to the tender of his resignation as an officer of the Navy, he still remains an incumbent of the naval office until such implied resignation is accepted. (18 Op. Atty. Gen., 395.)

A cadet engineer who graduated from the Naval Academy and was honorably discharged from the service under an erroneous interpretation of the law by the Navy Department, and who thereupon accepted another and incompatible office under the United States, is entitled to be recognized as having continued in the service, notwithstanding his discharge, which was null and void; and under the circumstances which existed, and which were owing to the fault of the Government and not to fault of his, acceptance by him of an incompatible office was not tantamount to an implied resignation of his office in the Navy. (18 Op. Atty. Gen., 395; see also *Winchell v. U. S.*, 28 Ct. Cls., 30; and see art. 36, A. G. N.)

Certain cadet engineers who had graduated from the Naval Academy were honorably discharged under an erroneous interpretation by the Navy Department of an act approved August 5, 1882 (22 Stat., 285). Such discharges were held by the courts to be void (see *Perkins v. U. S.*, 20 Ct. Cls., 438; 116 U. S., 483). *Held*, that the fact such officers may have accepted pay on discharge as provided by said act of 1882, without protest, or in some cases protested against their discharge and subsequently accepted pay, is not tantamount to a resignation. Protests and acceptance of pay could not change the legal force of the statute, either for or against them. (18 Op. Atty. Gen., 373.)

**Art. 11. [Dealing in supplies.]** No person in the naval service shall procure stores or other articles or supplies for, and dispose thereof to, the officers or enlisted men on vessels of the Navy, or at navy yards or naval stations, for his own account or benefit.—(26 Aug., 1842, c. 206, s. 1, v. 5, p. 535.)

**Art. 12. [Importing dutiable goods.]** No person connected with the Navy shall, under any pretense, import in a public vessel any article which is liable to the payment of duty.—(30 July, 1846, c. 74, s. 10, v. 9, p. 44.)

**Art. 13. [Distilled spirits only as medical stores.]** Distilled spirits shall be admitted on board of vessels of war only upon the order and under the control of the medical officers of such vessels, and to be used only for medical purposes.—(14 July, 1862, c. 164, s. 4, v. 12, p. 565.)

The possession of alcoholic liquors by any person at any place under naval jurisdiction designated by the President, except as permitted by regulations for medicinal purposes, and the sale of such liquors to any person in the naval forces while in

uniform, were prohibited by act of May 18, 1917, section 12 (40 Stat., 82), as amended by act of October 6, 1917 (40 Stat., 393). See also national prohibition act of October 28, 1919, section 7 (41 Stat., 307).

**Art. 14. [Fraud against United States; embezzlement; etc.]** Fine and imprisonment, or such other punishment as a court-martial may adjudge, shall be inflicted upon any person in the naval service of the United States.—(2 Mar., 1863, c. 67, s. 1, v 12, p. 696.)

**[PRESENTING FALSE CLAIMS.]** Who presents or causes to be presented to any person in the civil, military, or naval service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

**[AGREEMENT TO OBTAIN PAYMENT OF FALSE CLAIM.]** Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

**[FALSE PAPERS.]** Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing, or other paper, knowing the same to contain any false or fraudulent statement; or

**[PERJURY.]** Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes, or procures or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or

**[FORGERY.]** Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures or advises the forging or counterfeiting of, any signature upon any writing or other paper, or uses, or procures or advises the use of, any such signature, knowing the same to be forged or counterfeited; or

**[DELIVERING LESS PROPERTY THAN RECEIPT CALLS FOR.]** Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the naval service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

**[GIVING RECEIPTS WITHOUT KNOWING TRUTH OF.]** Who, being authorized to make or deliver any paper certifying the receipt of any money or other property of the United States, furnished or intended for the naval service thereof, makes, or delivers to any person, such writing, without having full knowledge of the truth of the statements therein contained, and with intent to defraud the United States; or

**[STEALING, WRONGFULLY SELLING, &C.]** Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully and knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money or other property of the United States, furnished or intended for the military or naval service thereof; or

**[BUYING PUBLIC MILITARY PROPERTY.]** Who knowingly purchases, or receives in pledge for any obligation or indebtedness, from any other person who is a part of or employed in said service, any ordnance, arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such other person not having lawful right to sell or pledge the same; or



[ANY OTHER FRAUD AGAINST THE UNITED STATES.] Who executes, attempts, or countenances any other fraud against the United States.—(17 July, 1862, c. 204, art. 7, v. 12, p. 602.)

[TRIAL OF OFFENDER AFTER DISCHARGE.] And if any person, being guilty of any of the offenses described in this article while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.—(2 Mar., 1863, c. 67, s. 2, v. 12, p. 697.)

See sections 3617-3652, Revised Statutes, as to duties of disbursing officers; and see Criminal Code, act of March 4, 1909 (35 Stat., 1094, et seq.), sections 28-48, as to frauds, etc., upon the United States, and sections 36, 47, 86-97, as to embezzlement, etc.

**Article 14 not repealed by later legislation.**—Section 5438, Revised Statutes, provided for the punishment by civil courts of "every person" who committed offenses included by article 14, A. G. N. Said section 5438 was embodied in the Criminal Code (act Mar. 4, 1909, 35 Stat., 1095) as section 35 thereof. Said section 35 of the Criminal Code was reenacted, with amendments, by act of October 23, 1918 (40 Stat., 1015), applying to "whoever" shall do the acts therein described. *Held*, that the amendment of section 35 by said act of October 23, 1918, did not in any manner refer to or repeal the article of war (corresponding to art. 14, A. G. N.), and does not deprive courts-martial of their jurisdiction of persons in the military and naval service. (*U. S. v. Barry*, 260 Fed. Rep. 291.)

**Discretionary punishment.**—See note to article 63, A. G. N., as to limitations of punishment in time of peace; and note to article 8, as to discretionary punishments. See also note to article 22, A. G. N., as to punishment for embezzlement.

Offenses under the article of war (corresponding to this article) may be of greater or less gravity, and the necessity for the exercise of discretion in the matter of punishment is obvious. Conviction in some cases might deserve the punishment of fine, or of imprisonment, or of both, as well as of dismissal in addition to either or both; for others, lesser penalties might suffice. The word "or" was properly used to give play to discretion. In any event, fine might be inflicted for the commission of one of the offenses enumerated in this article, and imprisonment for the commission of another; and dismissal under another charge of conduct unbecoming an officer and a gentleman. (*Carter v. McLaughry*, 183 U. S., 365, 392; the article of war under consideration in this case read, "fine or imprisonment, or by such other punishment as a court-martial may adjudge.")

The word "imprisonment" as used in the article of war was not employed in a technical sense to signify imprisonment at a military post without hard labor, but has a broader significance and empowers an Army court-martial to sentence a person in the military service to imprisonment at hard labor, or to a penitentiary where hard labor is a part of the discipline,

where the offense of which he is convicted is one for which the civil tribunals could impose a like sentence. (*In re Langan*, 123 Fed. Rep., 132; see note to art. 7, A. G. N. The articles of war expressly prohibited confinement in a penitentiary, unless the offense was one so punishable by the civil courts.)

It is not probable that Congress intended to prescribe a different penalty for the theft or embezzlement of Government property, depending upon the tribunal before whom the accused happened to be tried. No reason is perceived why the sentence in one case should be less severe than in the other. The offense of stealing Government property or embezzling is quite as heinous when committed by a person in the military service as when committed by a civilian. It is not believed, therefore, that the omission of the word "hard labor" in the article of war is any evidence of a design not to subject persons in the military service to imprisonment at hard labor, provided that they commit offenses which would subject them to such punishment if they happened to be tried before a civil tribunal. (*In re Langan*, 123 Fed. Rep., 132.)

A person sentenced by Army court-martial to fine and imprisonment for presenting fraudulent claims to the United States may be punished by dismissal from the service for the same offense as conduct unbecoming an officer and a gentleman. (*Rose v. Roberts*, 99 Fed. Rep., 948. See note to art. 22, A. G. N.)

Under the article of war, providing that a person in the military service who shall be guilty of certain offenses shall on conviction thereof be punished by "fine or imprisonment, or by such other punishment as a court-martial may adjudge," a person convicted of two offenses named in said article may be punished by fine as to one, and by imprisonment as to the other. (*Rose v. Roberts*, 99 Fed. Rep., 948.)

Conspiring to defraud the United States, and causing false and fraudulent claims to be made against the United States, are separate and distinct offenses; and the fact that the charges related to and grew out of the same transaction made no difference. Accordingly, the military court was empowered to punish the accused, as to one, by fine, and as to the other, by imprisonment, and dismissal might have been added to fine and imprisonment as part of the punishment for either or both of the offenses. The accused was not twice put in jeopardy because the sentence was greater than the court-martial had jurisdiction to inflict on conviction of any

one of the offenses charged, taken singly, the offenses not being the same within the meaning of the constitutional provision. (*Carter v. McLaughry*, 183 U. S., 365.)

**Jurisdiction of civil authorities.**—A paymaster's clerk in the Navy is a "person in the naval forces of the United States" within the meaning of the act of March 2, 1863 (12 Stat., 696, now embodied in art. 14, A. G. N.), and if he embezzles funds of the United States he is not liable to the penalty provided in the third section of that act (now sec. 3490, R. S., relating to such offenses by persons not in the military or naval forces), but is liable in a civil suit against him by the United States for the amount embezzled. (*U. S. v. Bogart*, 24 Fed. Cas., No. 14,616.)

A district court of the United States has jurisdiction to try a person charged with having forged an obligation of the United States (a certificate of deposit issued by an Army paymaster to a soldier), with intent to defraud, which is made an offense by section 5414, Revised Statutes (now sec. 148, Criminal Code, act Mar. 4, 1909, 35 Stat., 1115), although he was at the time an officer of the Army and the alleged offense was committed at a military post and with intent to defraud the United States and an enlisted soldier, where the accused has since been discharged from the Army without any action against him having been taken by the military authorities, there being no provision, either constitutional or statutory, conferring exclusive jurisdiction on courts-martial to punish such offense. (*Neall v. U. S.*, 118 Fed. Rep., 699.)

The civil courts of the United States have concurrent jurisdiction with courts-martial to try an officer of the Army for conspiracy to defraud the United States. (*U. S. v. Hirsch*, 254 Fed. Rep., 109.)

The 60th (now 90th) article of war (corresponding to art. 14, A. G. N.) dealt solely with those in the military service; and section 5438, Revised Statutes (now sec. 35, Criminal Code, Mar. 4, 1909, 35 Stat., 1095, as amended Oct. 23, 1918, 40 Stat., 1015), dealt with any person, whether in civil life or in the military or naval service. Where an offense of this character was committed by both a civilian and a member of the military or naval service it might be highly important to try both accused before the same tribunal at the same time; hence Congress provided that members of the military and naval forces could be tried before civil courts of competent jurisdiction. (*U. S. v. Barry*, 260 Fed. Rep., 291.)

An officer of the Army is subject to trial by the civil courts of the United States for violation of section 5438, Revised Statutes (now sec. 35, Criminal Code, above cited). (*Franklin v. U. S.*, 216 U. S., 559.)

**Jurisdiction after discharge from the service.**—See cases noted above, under preamble to section 1624, as to jurisdiction over persons discharged from the Navy; see also note to article 61, A. G. N.

An offense committed by a party while actually in the naval service is a "case arising in the naval forces," within the meaning of this term as used in the fifth amendment to the Constitution; and Congress has power to

authorize the trial for such an offense by a court-martial upon proceedings commenced after the connection with the service of the party charged has been severed. (In re *Bogart*, 3 Fed. Cas., No. 1,596.)

Under this article, a party charged with embezzlement as therein provided, committed while employed in the naval service, and afterwards dismissed or discharged, is liable to be arrested and tried by a court-martial in the same manner as if he had not been dismissed or discharged. (In re *Bogart*, 3 Fed. Cas. No. 1,596.)

Where the charges against an enrolled member of the Naval Reserve Force were laid under article 22, his case does not come within the clause of article 14 providing for the trial of offenses after discharge of the accused from the service, notwithstanding that the specifications of the charge against him could be construed as working a fraud upon the United States in violation of article 14. (*U. S. v. MacDonald*, 265 Fed. Rep., 695.)

**Fraud against the United States.**—Where an enrolled member of the Naval Reserve Force attempted by the payment of money to bribe a chief boatswain's mate in the Navy to obtain illegally and unlawfully the transfer of a seaman from sea duty to shore duty, such conduct could be construed as working a fraud upon the United States under this article. (*U. S. v. MacDonald*, 265 Fed. Rep., 695, 698.)

A conspiracy to defraud the United States does not necessarily involve a direct pecuniary loss to the United States, but the statute includes any conspiracy to impair, obstruct, or defeat the lawful function of any department of the Government. (*Woog v. U. S.*, 48 Ct. Cls., 80, 89.)

The authorities will show that it is not essential to charge or prove an actual financial or property loss to the Government to make a case under the statute relating to conspiracies to defraud the United States. (*Woog v. U. S.*, 48 Ct. Cls., 80, 89, citing *Hyde v. Shine*, 199 U. S., 81; *U. S. v. Keitel*, 211 U. S., 394; *Curley v. U. S.*, 130 Fed. Rep., 1; *McGregor v. U. S.*, 134 Fed. Rep., 195; *Benson v. Henkel*, 198 U. S., 11; *U. S. v. Plyler*, 222 U. S., 15.)

Property rights of the Government are by no means all of its rights. Financial losses to the Government are but incidents to the discharge of those functions for which the Government was established. The proper discharge of these functions is of the utmost concern, regardless of the matter of financial loss to the Treasury of the United States. (*Woog v. U. S.*, 48 Ct. Cls., 80, 89.)

**Evidence in conspiracy cases.**—In conspiracy cases, proof of the acts and declarations of alleged conspirators is not properly admissible when community of intent and design has not been established; but if received, the error may be cured by the subsequent introduction of proof of the conspiracy existing at the time the alleged declarations were made. (22 Op. Atty. Gen., 589; see note to art. 45, A. G. N., as to evidence before courts-martial.)

Testimony tending to show such a relation or understanding between alleged conspirators as would be indicative of a purpose to defraud the Government by means of contracts for



public works to be given out and carried on under charge of the accused would be admissible before a court-martial even though it related to matters antedating the time of the particular conspiracy charged. (22 Op. Atty. Gen., 589.)

**Fraud not against the United States.**—See note to article 8, A. G. N.

**Embezzlement.**—See note to article 22, A. G. N., as to embezzlement of property not furnished or intended for the naval service of the United States; and see cases noted below, under this article.

The word “embezzlement” is not defined by article 14, A. G. N., and consequently it is necessary to look to the offense as defined in the penal statutes relating to United States officials who are charged with the duty of holding and disbursing funds belonging to the Government, in order to determine of what element the act consists. (28 Op. Atty. Gen., 286, citing secs. 86–92, Criminal Code, Mar. 4, 1909, 35 Stat., 1105.)

Where a common-law offense is named in an act of Congress without defining it, undoubtedly the courts will construe the statutes as applying to the offense as defined at common law; but embezzlement is not a common-law offense. No resort can be had to the definitions of embezzlement given in the laws of the several States, as there is no uniformity in the State statutes upon the subject. If embezzlement as defined in the Revised Statutes and now in the Criminal Code is not the offense referred to in article 14, A. G. N., what is the precise nature of the offense therein specified? (29 Op. Atty. Gen., 563, 569.)

Where an assistant paymaster in the Navy was charged with embezzlement in that he “did fail to safely keep and account for the sum” specified, *held* that this was sufficient to sustain the charge, although it was not proved that the money was actually appropriated by the accused or that he made any particular disposition of it. (28 Op. Atty. Gen., 286.)

An assistant paymaster in the Navy, charged with the duty of keeping safely money intrusted to his care, who was furnished a safe with combination locks on both the outer and inner doors for the safe-keeping of this money, and who, after removing the lock from the inner door of the safe and failing to lock the outer door, left the vessel, knowing the condition of the safe, and as a result a portion of the money was lost, is chargeable with negligence equivalent to a criminal intent, and is guilty of embezzlement under the provisions of article 14, A. G. N., and section 88 of the Criminal Code. (28 Op. Atty. Gen., 286.)

A general principle recognized by all the authorities is that there may be such character of negligence as will take the place of criminal intent. (28 Op. Atty. Gen., 286, 296; see note to art. 43, A. G. N., as to charges and specifications.)

The authorities are in sharp conflict and the question is not one definitely settled by the United States courts, but there is an apparent leaning in favor of the position that there must be knowledge of the act which constitutes the offense, and an intent to commit such act, although knowledge that the act will constitute

a criminal offense is not necessary, as the want of such knowledge would be only ignorance of the law. (28 Op. Atty. Gen., 286, 296.)

Neither section 87 nor section 89 of the Criminal Code requires an intent to defraud the Government, but only an intent to do the thing prohibited. (29 Op. Atty. Gen., 563, 566.)

The willful use of Government funds by a pay officer of the Navy for the purpose of cashing a certificate of deposit as an accommodation to a personal friend constitutes embezzlement under the provisions of article 14, A. G. N., and sections 87 and 89 of the Criminal Code (above cited). (29 Op. Atty. Gen., 563, 567.)

The overpayment by a pay officer of the Navy to himself from public funds, where the officer is guilty of such negligence or indifference as to indicate a willful disregard of the duties imposed upon him by law with respect to the safe-keeping of the moneys in his charge, is in violation of article 14, A. G. N., and sections 87 and 89 of the Criminal Code (above cited), although there may have been no criminal intent involved. (29 Op. Atty. Gen., 563, 568.)

The willful withdrawing of public funds by a pay officer of the Navy for his personal use while absent from his station of duty, even though there be no intent on his part to defraud the United States and the funds withdrawn are subsequently replaced, is a violation of the provisions of article 14, A. G. N., and sections 87 and 89 of the Criminal Code (above cited), against converting public funds to his own use except as authorized by law. (29 Op. Atty. Gen., 563, 568.)

**Embezzlement of property not furnished for naval service.**—See note to article 22, A. G. N.

Under the grant of jurisdiction to a court-martial conferred by the articles of war, providing that any person in the military service who misappropriates any money of the United States “furnished or intended for the military service thereof,” shall be punished, etc., such a court has no power under that provision to convict an officer of the Army of misappropriating money appropriated by Congress for the improvement of rivers and harbors. (In re Carter, 97 Fed. Rep., 496.)

Most of the enumerated classes of property in the articles of war are obviously military stores used for military purposes, and on the principle of *noscitur a sociis* all the classes designated fall into the same category; and this seems to be put beyond question by the words “furnished or intended for the military service thereof.” The military service as used in this connection means the land forces or the Army. The fact that money appropriated for river and harbor improvements is disbursed by an officer of the Army and the work supervised by the engineer force in the service of the Government does not make the moneys so appropriated moneys “furnished or intended for the military service” as the words are used in the articles of war concerning embezzlement. (Carter v. McLaughry, 183 U. S., 365, 399; see note to art. 22, A. G. N.)

**Punishment for embezzlement.**—Sentence requiring amount embezzled to be turned over to Government officer held legal: See note to article 22, A. G. N., under “Embezzlement.”

**Art. 15. [List of persons claiming prize money. Repealed.]**

This article reads as follows:

"Art. 15. The commanding officer of every vessel in the Navy entitled to or claiming an award of prize-money shall, as soon as it may be practicable after the capture, transmit to the Navy Department a complete list of the officers and men of his vessel entitled to share, stating therein the quality of each person rating; and every commanding officer who offends against this article shall be punished as a court-martial may direct." [See § 4615.](17 July, 1862, c. 204, s. 5, v. 12, p. 607.)

It was repealed by section 13 of the Navy personnel act approved March 3, 1899 (30 Stat., 1007), which contained the following clause:

"And all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed."

See, generally, on the subject of "Prize," sections 4613-4652, Revised Statutes.

**Art. 16. [Removing property from prize.]** No person in the Navy shall take out of a prize, or vessel seized as a prize, any money, plate, goods, or any part of her equipment, unless it be for the better preservation thereof, or unless such articles are absolutely needed for the use of any of the vessels or armed forces of the United States, before the same are adjudged lawful prize by a competent court; but the whole, without fraud, concealment, or embezzlement, shall be brought in, in order that judgment may be passed thereon; and every person who offends against this article shall be punished as a court-martial may direct.—(17 July, 1862, c. 204, s. 7, v. 12, p. 607.)

**Art. 17. [Maltreating persons on prize.]** If any person in the Navy strips off the clothes of, or pillages, or in any manner maltreats, any person taken on board a prize, he shall suffer such punishment as a court-martial may adjudge.—(17 July, 1862, c. 204, s. 8, v. 12, p. 607. Lively and Cargo, 1 Gallis, 314.)

**Civil liability.**—If captors wantonly injure the captured crew, the prize court will award damages for personal ill usage. (The Lively, 15 Fed. Cas. No. 8,403.)

**Art. 18. [Returning fugitives from service.]** If any officer or person in the naval service employs any of the forces under his command for the purpose of returning any fugitive from service or labor, he shall be dismissed from the service.—(13 Mar., 1862, c. 40, s. 1, v. 12, p. 354.)

**Art. 19. [Enlisting deserters, minors, etc.]** Any officer who knowingly enlists into the naval service any person who has deserted in time of war from the naval or military service of the United States, or any insane or intoxicated person, or any minor between the ages of fourteen and eighteen years, without the consent of his parents or guardian, or any minor under the age of fourteen years, shall be punished as a court-martial may direct.

This article was reenacted to read as above by act of August 22, 1912 (37 Stat., 356). As originally enacted it read as follows:

"ART. 19. Any officer who knowingly enlists into the naval service any deserter from the naval or military service of the United States, or any insane or intoxicated person, or any minor between the ages of sixteen and eighteen years, without the consent of his parents or guardian, or any minor under the age of sixteen years, shall be dishonorably dismissed from the service of the United States." [See. §§ 1418, 1419.](3 Mar., 1865, c. 79, s. 18, v. 13, p. 490.)

It had previously been amended by act of May 12, 1879 (21 Stat., 3), which reenacted said article, substituting the word "fifteen" for the word "sixteen" in the two places in which

the latter word appeared, and substituting the words, "punished as a court-martial may direct," for the words, "dishonorably dismissed from the service of the United States."

It was further amended, by implication, by the act of February 23, 1881, section 2 (21 Stat., 338), which changed the qualifications for enlistment in the Navy, as prescribed by sections 1418-1420, Revised Statutes, "by striking out the word 'fifteen' and inserting in its stead the word 'fourteen.'"

**Status of persons illegally enlisted.**—See notes to sections 761, 1418-1420, Revised Statutes, and see note above, under preamble to section 1624, subheadings, "Void enlistment" and "Voidable enlistment." See also note to article 22, A. G. N.



**Art. 20. [Duties of commanding officers.]** Every commanding officer of a vessel in the Navy shall obey the following rules:—(17 July, 1862, c. 204, s. 16, v. 12, p. 609.)

**FIRST. [MEN RECEIVED ON BOARD.]** Whenever a man enters on board, the commanding officer shall cause an accurate entry to be made in the ship's books, showing his name, the date, place, and term of his enlistment, the place or vessel from which he was received on board, his rating, his descriptive list, his age, place of birth, and citizenship, with such remarks as may be necessary.

**SECOND. [LIST OF OFFICERS, MEN, AND PASSENGERS.]** He shall, before sailing, transmit to the Secretary of the Navy a complete list of the rated men under his command, showing the particulars set forth in rule one, and a list of officers and passengers, showing the date of their entering. And he shall cause similar lists to be made out on the first day of every third month and transmitted to the Secretary of the Navy as opportunities occur, accounting therein for any casualty which may have happened since the last list.

**THIRD. [DEATHS AND DESERTION.]** He shall cause to be accurately minuted on the ship's books the names of any persons dying or deserting, and the times at which such death or desertion occurs.

**FOURTH. [PROPERTY OF DECEASED PERSONS.]** In case of the death of any officer, man, or passenger on said vessel, he shall take care that the paymaster secures all the property of the deceased, for the benefit of his legal representatives.

**FIFTH. [ACCOUNTS OF MEN RECEIVED.]** He shall not receive on board any man transferred from any other vessel or station to him, unless such man is furnished with an account, signed by the captain and paymaster of the vessel or station from which he came, specifying the date of his entry on said vessel or at said station, the period and term of his service, the sums paid him, the balance due him, the quality in which he was rated, and his descriptive list.

**SIXTH. [ACCOUNTS OF MEN SENT FROM THE SHIP.]** He shall, whenever officers or men are sent from his ship, for whatever cause, take care that each man is furnished with a complete statement of his account, specifying the date of his enlistment, the period and term of his service, and his descriptive list. Said account shall be signed by the commanding officer and paymaster.

**SEVENTH. [INSPECTION OF PROVISIONS.]** He shall cause frequent inspections to be made into the condition of the provisions on his ship, and use every precaution for their preservation.

**EIGHTH. [HEALTH OF CREW.]** He shall frequently consult with the surgeon in regard to the sanitary condition of his crew, and shall use all proper means to preserve their health. And he shall cause a convenient place to be set apart for sick or disabled men, to which he shall have them removed, with their hammocks and bedding, when the surgeon so advises, and shall direct that some of the crew attend them and keep the place clean.

**NINTH. [ATTENDANCE AT FINAL PAYMENT OF CREW.]** He shall attend in person, or appoint a proper officer to attend, when his crew is finally paid off, to see that justice is done to the men and to the United States in the settlement of the accounts

**TENTH. [ARTICLES FOR THE GOVERNMENT OF THE NAVY.]** He shall cause the articles for the government of the Navy to be hung up in some public part of the ship and read once a month to his ship's company.

**[PUNISHMENT FOR OFFENDING AGAINST THIS ARTICLE.]** Every commanding officer who offends against the provisions of this article shall be punished as a court-martial may direct.

**Effects of deceased persons.**—Disposition of money and other effects of deceased persons in the naval service is regulated by act of March 29, 1918 (40 Stat., 499).

Manner of settling accounts of deceased officers and enlisted men in the Navy, where amount due is less than \$500, is provided for by act of May 27, 1908 (35 Stat., 373).

Payment of arrears due deceased seamen: See section 274, Revised Statutes, and note thereto.

Accounts of pay officer of lost vessel, fixing date of loss of missing vessel, and accounts of

seamen on lost vessel: See sections 284, 286, and 287, Revised Statutes.

The regulations of the Navy concerning payments to administrators of balances due deceased seamen and marines, payments of arrearages claimed under wills, the wills of persons in actual service and the attestation of the same, etc., are not applicable to or binding upon the accounting officers of the Treasury Department in the settlement of naval accounts; they extend to and govern only those persons who are in the naval service. (16 Op. Atty. Gen., 494; see notes to sections 161 and 1547, Revised Statutes, as to regulations in general.)

**Art. 21. [Authority of officers after loss of vessel.]** When the crew of any vessel of the United States are separated from their vessel by means of her wreck, loss, or destruction, all the command and authority given to the officers of such vessel shall remain in full force until such ship's company shall be regularly discharged from or ordered again into service, or until a court-martial or court of inquiry shall be held to inquire into the loss of said vessel. And if any officer or man, after such wreck, loss, or destruction, acts contrary to the discipline of the Navy, he shall be punished as a court-martial may direct.—(17 July, 1862, c. 204, s. 14, v. 12, p. 608.)

**Lost or captured vessels.**—See sections 1574–1575, Revised Statutes, as to pay of crews of lost or captured vessels. See also sections 284, 286, and 287, Revised Statutes, as to accounts of pay officer of lost vessel, fixing date

of loss of missing vessel, and accounts of seamen on lost vessel. See also note to article 20, A. G. N., as to effects of deceased persons and settlement of their accounts.

**Art. 22. [Offenses not specified.]** All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court-martial may direct.—(17 July, 1862, c. 204, s. 1, v. 12, p. 603, art. 8.)

Amendment to this section was made by act of March 3, 1893 (27 Stat., 716), reading as follows: "And fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared an offense against naval disciplin(e) and made punishable by general court-martial, under article twenty-two of the articles for the government of the Navy; but this provision shall not take effect until sixty days after the passage of this act."

**Nature of offenses punishable under this article.**—Article 22, A. G. N., applies only to offenses "not specified in the foregoing articles," and which are recognized as military offenses by the usages of the naval service. (Smith v. Whitney, 116 U. S., 167, 183.)

This article is not intended to confer upon a court-martial general criminal jurisdiction, but only jurisdiction over those offenses (not specified in the preceding articles of the sec-

tion) which are injurious to the order and discipline of the Navy, the jurisdiction being given for the purpose of preserving that order and discipline. (16 Op. Atty. Gen., 578.)

The reference is to crimes created or made punishable by the common law, or by the statutes of the United States, when directly prejudicial to good order and military discipline. (Carter v. McClaughry, 183 U. S., 365, 397, construing article of war corresponding to art. 22, A. G. N.)

Where an offense is specifically provided for in any of the articles of war prior to the 62d (corresponding to article 22, A. G. N.), the grant of jurisdiction to a court-martial to try and punish such offenses is conferred by the particular article which mentions it, and not by the general language of the 62d article providing for the punishment of offenses, not capital, though not mentioned in the preceding articles. (In re Carter, 97 Fed. Rep., 496.)



A charge laid under article 22, A. G. N., would be of doubtful validity where the offense so charged is specifically provided for in one of the "foregoing articles," as in such case it could with much reason be urged that the offense is excluded by express language from article 22. (29 Op. Atty. Gen., 563, 570; see below, under "Embezzlement"; and see note to art. 43, A. G. N., as to charges and specifications in general.)

Under the article of war providing that all crimes not capital, etc., which officers and soldiers may be guilty of to the prejudice of good order and military discipline, "though not mentioned in the foregoing articles," are to be taken cognizance of by courts-martial and punished at the discretion of such court, the construction would not be unreasonable if it were held that the words, "though not mentioned in the foregoing articles of war," meant "notwithstanding they are not mentioned," and that the article was intended to cover all crimes, whether previously enumerated or not. It would be going much too far to say that if a court-martial so construed the words, and sentenced for a crime previously mentioned, the sentence, when made his own by the President by approval thereof, would be absolutely void. (*Carter v. McClaughry*, 183 U. S., 365, 397; see note to art. 53, A. G. N.)

Under every system of military law for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of the acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business. According to precedent, it includes acts having no relation to the public service, military or civil, except so far as they tend to bring disgrace and reproach upon the former, such as making an unfounded claim for the price of a horse, or attempting to seduce a brother officer's wife during his illness, or for not attempting to vindicate his honor and reputation when accused by fellow passengers of stealing property on board a vessel while traveling on leave of absence, regardless of whether such accusation was true. (*Smith v. Whitney*, 116 U. S., 167, 183.)

Courts-martial derive their jurisdiction and are regulated by an act of Congress in which the crimes which may be committed, the manner of charging the accused, and of the trial and the punishments which may be inflicted are expressed in terms; or they may get jurisdiction by a fair deduction, from the definition of the crime, that it comprehends, and that the legislature meant to subject to punishment one of a minor degree of a kindred character which has already been recognized to be such by the practice of courts-martial in the army and navy services of nations, and by those functionaries in different nations to whom has been confided a revising power over the sentences of courts-martial. And when offenses and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment such as contained in the articles for the government of the Navy, which

means that courts-martial have jurisdiction of such crimes as are not specified, but which have been recognized to be crimes and offenses by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea. Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are and how they are to be punished is well known by practical men in the Navy and Army, and by those who have studied the law of courts-martial and the offenses of which the different courts-martial have cognizance. (*Dynes v. Hoover*, 20 How., 65, 82; *Smith v. Whitney*, 116 U. S., 167, 182.)

A court-martial can take no cognizance of the validity of a contract. (1 Op. Atty. Gen., 177, 178.)

For other cases, see notes below, under this article.

**Embezzlement.**—The charge of embezzlement of public funds, furnished and intended for the naval service, by a disbursing officer of the Navy, should be formulated under paragraph 9 of article 14, A. G. N.; but there is no rule of practice which prohibits the formulation of the same charge under more than one article and as a matter of precaution it might be advisable to formulate the charge under both articles 14 and 22, A. G. N. (29 Op. Atty. Gen., 563, 568–570; see also note to art. 14, A. G. N.)

Under the 62d article of war (corresponding to art. 22, A. G. N.), and section 5488, Revised Statutes (now sec. 87, Criminal Code, Mar. 4, 1909, 35 Stat., 1105), providing for punishment of embezzlement by disbursing officers, *held* that where an officer of the Army has been found guilty by court-martial of willfully misappropriating money appropriated by Congress for the improvement of rivers and harbors, the court has authority to impose a penalty both by fine and imprisonment. (In re *Carter*, 97 Fed. Rep., 496; see note to art. 14, A. G. N.)

A charge of embezzlement in violation of the 62d article of war (corresponding to art. 22, A. G. N.), based on the action of the accused in applying to a purpose not prescribed by law large sums of public money intrusted to him for river and harbor purposes, was not the same offense as specified in article 60, subdivision 9 of the articles of war (corresponding to art. 14, par. 9, A. G. N.), because it was not embezzlement of money "furnished or intended for the military service." Such embezzlement would seem to be detrimental to the service within the intent and meaning of article 62, but it is enough that it was peculiarly for the court-martial to determine whether the crime charged was "to the prejudice of good order and military discipline." (*Carter v. McClaughry*, 183 U. S., 365, 396, citing *Swain v. U. S.*, 165 U. S., 553; *Smith v. Whitney*, 116 U. S., 178; *U. S. v. Fletcher*, 148 U. S., 84. See also note to art. 14, A. G. N.)

Where an officer of the Army was charged with embezzlement in violation of section 5488, Revised Statutes, in violation of the 62d article of war, *held* that the specified crime was not mentioned in the preceding articles, because the embezzlement charged was not of money "furnished or intended for the military

service." (*Carter v. McClaughry*, 183 U. S., 365.)

Where an officer of the Army without authority received sums of money paid by drafted men for the purpose of obtaining substitutes, such men paying the money to him in reliance upon his official station and duty as an officer of the Government, and he converted same to his own use, *held* that the subsequent action of the military authorities in seizing the money, followed by his court-martial for embezzlement thereof and execution of the sentence adjudged by the court, constituted ratification of his unauthorized act in receiving such money; and it can not be claimed that the money was paid to him in his private capacity and that the Government is required to return same to his estate. (*Colman v. U. S.*, 38 Ct. Cls., 315.)

An officer of the Army was convicted by court-martial of embezzlement and sentenced to be dismissed from the service, to forfeit all pay and allowances due or to become due, to be compelled to turn over to such officer as the commanding general should designate the sum of \$18,963 (being the amount he was found guilty of embezzling), to pay a fine of \$700 to the United States, and to be imprisoned for the period of seven months at such place as the commanding general shall designate, and thereafter until said fine is paid and said sum of money is turned over: *Held*, that the portion of said sentence that the money be turned over to the military authorities was not illegal. (*Colman v. U. S.*, 38 Ct. Cls., 315.)

**Manslaughter.**—See note to article 6, A. G. N., as to finding of manslaughter under charge of murder.

Where an assault was committed on board a steamer belonging to the Navy (the vessel being at the time under way in the Thames River opposite the city of New London, Conn.), by a coal heaver in the naval service upon a second-class fireman in the same service, from the effects of which the latter subsequently died: *Held*, that a naval general court-martial can, under article 22 of section 1624, Revised Statutes, take jurisdiction of the offense as manslaughter. (16 Op. Atty. Gen., 578.)

It requires no argument to show that an assault, of a character so serious as to result in the death of the person assaulted, who was also in the naval service, is an offense against the order and discipline of the Navy, especially when among the enumerated offenses is found that of "assault and battery." (16 Op. Atty. Gen., 578.)

The Articles for the Government of the Navy confer jurisdiction upon courts-martial of all crimes committed by persons belonging to the Navy which are not specified in the foregoing articles; manslaughter falls within the general denomination of a crime, and naval courts-martial have jurisdiction to punish the offense of manslaughter committed at sea on board of ships of war. (*U. S. v. Mackenzie*, 30 Fed. Cas. No. 18313.)

**Scandalous conduct tending to the destruction of good morals.**—Where an officer is charged with scandalous conduct tending to the destruction of good morals, it is not important to inquire whether by the rules that govern military courts the charge should be

considered as made under the concluding words of the first clause of article 8, A. G. N., or under article 22; for in either view it should, under the regulations of 1870, recognized and sanctioned by Congress, be charged as "scandalous conduct tending to the destruction of good morals." (*Smith v. Whitney*, 116 U. S., 167, 183.)

For other cases, see notes to article 8, A. G. N.; see also article 43, A. G. N., as to charges and specifications in general, and see note to article 14, A. G. N., under "Jurisdiction after discharge from the service."

**Conduct unbecoming an officer and a gentleman.**—See article 43, A. G. N., as to charges and specifications; and see notes to article 14, A. G. N., under "Discretionary punishment."

Unofficerlike and ungentlemanly conduct is one of the most indefinite and comprehensive of all the offenses mentioned in the articles of war. (7 Op. Atty. Gen., 601, 605.)

The court appreciates the high requirement and purpose of the article of war providing that an officer or cadet convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service; but confesses a lack of knowledge of its definite limitations and also admits a superior capacity in the military court over the civil to deal with it. The same comments and admission go to the general article of war relating to offenses not specified. (*McRae v. Henkes*, 273 Fed. Rep., 108, reversing *ex parte Henkes*, 267 Fed. Rep., 276.)

It must be confessed that in the affairs of civil life and under the rules and principles of municipal law, what we ordinarily know as fraud relates to the obtaining of a man's money and not to the refusal to pay it back. It is hard for the trained lawyer to conceive of an indictment or declaration which should allege that the defendant defrauded A or B by refusing to return to him the money which he had borrowed from him. Our legal training, the legal habit of mind as it is termed, inclines us to dissociate punishment from acts which the law does not define as offenses. That it is fraud to obtain a man's money by dishonest representations, but not a fraud to keep it afterwards by any amount of lying and deceit, is a distinction of statutory tracing. (*Fletcher v. U. S.*, 26 Ct. Cls., 541, 562; reversed on other grounds, *U. S. v. Fletcher*, 148 U. S., 84.)

In military life there is a higher code, termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code. (*Fletcher v. U. S.*, 26 Ct. Cls., 541, 562; reversed on other grounds, *U. S. v. Fletcher*, 148 U. S., 84.)

It may or may not be dishonorable for a retired officer not to pay his debts; but that may depend upon how he incurred them, and whether it is within his human possibilities to pay them. In this case, the specifications aver, in one instance, that the officer used his honorable military position to borrow money upon and assured his creditors of payment from the pay which the Government allows to officers on the retired list. Certainly the Government does not give officers the respectability of rank and the support of retired pay to enable them to



prey upon their fellow citizens. Remembering the honorable military record of the claimant, the court is averse to commenting upon the details of the specifications, especially as it is not at liberty to review the evidence, but at the same time can not hold that refusing to pay a debt may not be conduct unbecoming an officer and a gentleman. (*Fletcher v. U. S.*, 26 Ct. Cls., 541, 562; reversed on other grounds, *U. S. v. Fletcher*, 148 U. S., 84.)

An officer of the Army was tried for conduct unbecoming an officer and a gentleman; it was objected that the court-martial had no jurisdiction, because the charges and specifications stated no offense whatever within the rules and articles of war, or known to the military law and custom of the United States; the specifications related to the incurring by the accused of certain indebtedness; it was argued that nonpayment of debts does not justify conviction of the charge: *Held*, that the specifications went further than that, and contained the element that the circumstances under which the debts were contracted and not paid were such as to render the officer amenable to the charge; and as the specifications were not objected to, and the court-martial had jurisdiction, errors in its exercise, if any, can not be reviewed by the civil courts in a suit by the accused officer for the pay of the office from which he had been dismissed pursuant to sentence of the court-martial. (*U. S. v. Fletcher*, 148 U. S., 84.)

"Of course, the failure to pay debts and the circumstances under which the debts were contracted, when their payment is postponed or neglected, may constitute conduct unbecoming an officer. But here the debts have been paid; and they were not so great in amount or so many as to indicate utter recklessness when it is considered that Lieut. Burt is a married man and, necessarily, had the expense of a family upon him in addition to that attendant upon his sea service. I am bound to say that the specifications which were handed to me as to the immorality involved in his relation to debts seem to be, many of them, strained, and I can not think that it is just to eliminate him from the naval service for such delinquency." (Action of President Taft, case of Lieut. Charles P. Burt, *U. S. N.*, reported not morally qualified for promotion, file 26260-1392:15, Jan. 2, 1912; see note to sec. 1456, R. S.)

The charge of conduct unbecoming an officer and a gentleman specified in the articles of war is not properly limited to only offenses of the grossest and basest character, of such a nature as to render the guilty party a moral and social outlaw. It should not be necessary to prove that an individual is a moral monstrosity in order to demonstrate his unfitness to be a trusted officer of the Army. (18 Op. Atty. Gen., 113, 117.)

Undoubtedly, charges of mere indecorum should not be made the basis of prosecutions under the article of war specifying conduct unbecoming an officer and a gentleman. The punishment annexed to a conviction under that article clearly indicates that prosecutions should be limited to the more serious classes of offenses. But between the grossest offenses

of which an officer may be guilty and which are not specially enumerated in the articles of war, and those of a character simply prejudicial to good order and military discipline, such as are apparently contemplated by the 62d article of war (corresponding to art. 22, A. G. N.), there are intervening grades of offenses, many of which are in every proper sense of the words unbecoming an officer and a gentleman, and the commission of which by any person is a sure indication that he is unfitted to hold an office of trust and honor in the military service. (18 Op. Atty. Gen., 113, 118.)

Conduct unbecoming an officer and a gentleman is not the same offense as conspiring to defraud the United States, or causing false and fraudulent claims to be made against the United States, although to be guilty of the latter charges involves being guilty of the former. (*Carter v. McLaughry*, 183 U. S., 365, 395.)

The same conduct constituting an offense elsewhere provided for in the articles of war may also warrant a finding of guilty by a court-martial under the article providing that "any officer who shall be convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service." (In re *Carter*, 97 Fed. Rep., 496.)

It is not possible for an officer to do any act punishable by the known laws of the land, however foreign that act may be to his duties or immediate relations as a soldier, which shall not be cognizable by court-martial. To commit a crime of any sort is, to say the least of it, in general, unofficerlike and ungentlemanly conduct. (6 Op. Atty. Gen., 413, 415.)

The plea of *autrefois acquit*, averring a former trial and acquittal for manslaughter in the supreme court of a State, and that said charge was sustainable only by the same evidence as must be used to sustain the charge of unofficerlike or ungentlemanlike conduct, is not a bar to the proceedings before an Army court-martial to punish the accused for the latter offense. The two offenses are altogether different. (3 Op. Atty. Gen., 749.)

The fact that three specifications under the charge of violating the 95th article of war (conduct unbecoming an officer and a gentleman) were identical with those under the charge of violating the 96th article (offenses not specified) did not operate to put the accused twice in jeopardy for the same offense. As a question of pleading it is quite clear that the two charges are not one and the same offense. It was necessary to establish a fact under one charge not required under the other; conviction could not be had on the first charge unless it be proven that the accused was an officer; no such proof was needed under the general article. Furthermore, that was a question of procedure, not of jurisdiction, which the court-martial having obtained jurisdiction was competent to decide. (*McRae v. Henkes*, 273 Fed. Rep., 108.)

Where the court finds upon certain specifications that the accused was guilty of presenting to the Secretary of War a written indorsement containing certain specific statements which the accused knew to be false, and of making such statements for the purpose and with the intention of deceiving the Secretary of War,

it should have found him guilty of conduct unbecoming an officer and a gentleman, as charged, and not merely of conduct to the prejudice of good order and military discipline. Untruthful statements made by a high military officer to the official head of the War Department have not been regarded in the past as any less of an offense than one unbecoming an officer and a gentleman. (18 Op. Atty. Gen., 113; see art. 8, A. G. N., first paragraph.)

**Conduct to the prejudice of good order and discipline.**—See note above, under “Embezzlement”; and see note to article 8, A. G. N., under “Drunkness”; see also note below, under “Jurisdiction of courts-martial concurrent with civil courts.”

The offense committed by an enlisted man of the Army on guard duty at the United States jail in the District of Columbia, in maliciously and with intent to kill assaulting a civilian prisoner confined in said jail, was clearly one to the prejudice of good order and military discipline in violation of the 62d article of war. Shooting with intent to kill is a civil crime, but shooting by a soldier of the Army standing guard over a prison with intent to kill a prisoner confined therein is not only a crime against society but an atrocious breach of military discipline, although the prisoner who was shot at was not himself connected with the military service. The offense was not simply an assault with intent to kill, but an assault by a soldier on duty with intent to kill a prisoner confined in a jail over which he was standing guard, such shooting being in direct violation of orders under which he was acting. (Ex parte Mason, 105 U. S., 696.)

When the act charged as “conduct to the prejudice of good order and military discipline” is actually a crime against society which is punishable by imprisonment in the penitentiary, an Army court-martial is authorized to inflict that kind of punishment under the 97th article of war providing that “no person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offense of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory, or District in which such offense may be committed, or by the common law, as the same exists in such State, Territory, or District, subject such convict to such punishment.” The act done is a civil crime and the trial is for that act; the proceedings are had in a court-martial because the offender is personally amenable to that jurisdiction and what he did was not only criminal according to the laws of the land but prejudicial to the good order and discipline of the Army to which he belonged. (Ex parte Mason, 105 U. S., 696, 700.)

**Fraudulent enlistment.**—See notes to sections 761, 1418-1420, Revised Statutes; and see note above, under preamble to section 1624, subheadings “Void enlistment” and “Voidable enlistment”; and see article 19, A. G. N.

Where a minor under the required age did nothing but attempt to enlist, receiving no pay or allowances, he is not guilty of the offense of fraudulent enlistment denounced by the articles of war. (Hoskins v. Pell, 239 Fed. Rep., 279.)

Whether a minor charged with fraudulent enlistment is innocent of the charge made against him, or whether he, a boy less than 17 years old, should be punished for an offense possibly committed under impulses that were patriotic, are matters for the exclusive consideration and action of the court-martial. (Ex parte Foley, 243 Fed. Rep., 470.)

The civil courts should not interfere by habeas corpus to discharge a minor under 18 years of age who has been enlisted in the naval service without the consent of his parents or guardian if at the time of the presentation of the petition for the writ the minor is under arrest and held for trial by court-martial on a charge of desertion or fraudulent enlistment or other charge cognizable by a naval court. (Dillingham v. Booker, 163 Fed. Rep., 696.)

The crime of fraudulent enlistment is exclusively a military or naval offense, triable and punishable only by court-martial, and it has been found necessary so to legislate in order to maintain the discipline and efficiency of the military and naval establishments of the Government. (Dillingham v. Booker, 163 Fed. Rep., 696.)

A minor under 18 who fraudulently enlists in the Navy is nevertheless both de facto and de jure in the Navy until discharged therefrom by operation of law; and while he is such a seaman he is subject to the rules and regulations of the Navy and liable to be tried and punished for any infraction of the law relating thereto. (Dillingham v. Booker, 163 Fed. Rep., 696. But see Hoskins v. Pell, 239 Fed. Rep., 279, holding that the enlistment of a minor below the age at which he could legally be enlisted, even with the consent of his parents or guardian, was not merely voidable but void ab initio.)

Where a minor under 18 years of age who enlisted without the consent of his parents was, before they obtained his release on habeas corpus, arrested by the military authorities for fraudulent enlistment, the question whether he was so arrested before or after the issue and service of the writ is immaterial with respect to the right of the military authorities to punish him for such military offense; and the jurisdiction of the military authorities could not be displaced by the act of the court in issuing a writ of habeas corpus. (Ex parte Foley, 243 Fed. Rep., 470.)

The fact that a person was enlisted in the Navy before reaching the required age, and in violation of the statute requiring consent of his parents or guardian, does not render his enlistment void; and he is subject to arrest and punishment for desertion or other infraction of the rules and regulations of the Navy, and can not be discharged on writ of habeas corpus pending proceedings against him therefor. (Ex parte Rock, 171 Fed. Rep., 240. NOTE.—In this case the court considered the following provision in the annual naval appropriation act which had not been before the courts in prior cases: “No part of this appropriation shall be expended in recruiting seamen, ordinary seamen, or apprentice seamen, unless a certificate of birth or written evidence other than his own statement, satisfactory to the recruiting officer, showing the applicant to be of the age required by naval regulations, shall be presented with the application for enlistment,” which certi-



ificate or statement was not furnished by the applicant in this case.)

Where a minor who falsely stated his age when enlisting in the Army was arrested for fraudulent enlistment in violation of the articles of war, after service of a writ of habeas corpus sued out by his mother but before the hearing thereon, held that he would not be taken from the custody of the military authorities. (*U. S. v. Williford*, 220 Fed. Rep., 291.)

The civil courts will not, on habeas corpus brought by the parent of a minor over 16 and under 18 years of age to avoid his enlistment in the National Guard while in the service of the United States, command his immediate surrender by the military authorities where by reason of his enlistment he committed a military offense; but will allow his retention by the military authorities so that he may be punished by the proper military tribunal for the military offense. (*Hoskins v. Dickerson*, 239 Fed. Rep., 275.)

**Jurisdiction of courts-martial concurrent with civil courts.**—An officer may be tried by court-martial for the military relations of an act, after having been tried by the civil authorities of a state for the civil relations of the same act. In such case the offender is punishable both as a citizen, subject to the municipal law of the place, and also as a soldier or officer subject to the military law of the United States. Such double accountability to two different jurisdictions, and the different and double punishments for the same act, making two different offenses, is settled to be lawful by the decisions of the Supreme Court of the United States. (6 Op. Atty. Gen., 506, following 6 Op. Atty. Gen., 413, and citing *Moore v. Illinois*, 14 How., 20; *Fox v. Ohio*, 5 How., 434, 435; *U. S. v. Marigold*, 9 How., 569.)

The jurisdiction of military tribunals is not exclusive in time of peace and in territory where the supremacy of the United States is recognized and the relations between the local government and the National Government normal, and where the jurisdiction of the local civil courts is not disturbed. But when the armies of the United States are in hostile territory, and engaged in actual warfare, the jurisdiction of such tribunals over offenses by persons in the military service is exclusive; and this applies to the condition which existed in the Philippine Islands during the insurrection. (24 Op. Atty. Gen., 570, 574.)

Where a United States soldier killed a fellow soldier during a military encampment, and on being surrendered to the civil authorities of the State was prosecuted for murder and acquitted, such acquittal, though a final determination of his innocence of murder and of each lesser offense necessarily included therein, was no bar to his subsequent military arrest and trial by a general court-martial for "conduct to the prejudice of good order and military discipline" in violation of the articles of war, though based on the same act. (*In re Stubbs*, 133 Fed. Rep., 1012.)

Although the act prohibited in the specification of the charge upon which the soldier was brought to trial before a court-martial was identical with the act alleged in the information

for murder upon which he was acquitted by the State court, the elements constituting the offense charged are radically different. After having surrendered him to the civil authorities, his military superiors could not lawfully deal with him for murder, manslaughter, or a criminal assault, considered as a crime against society in general; but it is equally true that the civil court had no jurisdiction to adjudicate any question with respect to the soldier's conduct as a soldier. Although the same act was specified, the gist of the offense charged was unsoldierly conduct by a soldier, subversive of military discipline. For that offense the prisoner continued to be amenable to military law notwithstanding the acquittal by the State court. (*In re Stubbs*, 133 Fed. Rep., 1012.)

The surrender of the soldier to the civil authorities did not have the effect to absolve him from his obligation under the terms of his enlistment; nor to divest his superior military officers of their authority to proceed against him for the military offense. (*In re Stubbs*, 133 Fed. Rep., 1012.)

It is well settled that an acquittal or conviction in a State court is not a good defense in the courts of the United States; but the rule is different where both courts derive their power from the same sovereignty. (*U. S. v. Block*, 262 Fed. Rep., 205, holding that acquittal by court-martial is bar to trial in Federal civil court.)

An army general court-martial may take cognizance of all crimes not capital committed against public law by an officer or soldier of the Army, within the limits of the territory within which he is serving; and while this jurisdiction is not exclusive but only concurrent with that of the civil courts, if a court-martial first acquires jurisdiction its judgment can not be disregarded by the civil courts for mere error or for any reason not affecting the jurisdiction of the court rendering it. (*Grafton v. U. S.*, 206 U. S., 333, 348, holding that acquittal of a soldier by Army court-martial was a bar to his trial by the courts of the Philippine Islands for the same offense, though called by a different name, both courts having derived their jurisdiction from the same sovereignty.)

Any possible conflict as to jurisdiction between civil and military courts can be obviated, either by withholding from courts-martial all authority to try officers or soldiers for crimes prescribed by the civil power, leaving the civil tribunals to try such offenses, or by investing courts-martial with exclusive jurisdiction to try such officers and soldiers for all crimes not capital. (*Grafton v. U. S.*, 206 U. S., 333, 352.)

The 62d article of war (relating to offenses not specified) does not vest nor purport to vest exclusive jurisdiction in courts-martial; and civil courts have concurrent jurisdiction over all offenses committed by a military officer which may be punished under the provisions of that article. (*Franklin v. U. S.*, 216 U. S., 559.)

The articles of war contain no direct and clear expression of a purpose on the part of Congress, conceding for the sake of the argument that authority exists under the Constitution to do so, to bring about, as the mere result of a

declaration of war, the complete destruction of State authority and the extraordinary extension of military power which would be involved in making the jurisdiction of Army courts-martial exclusive of State authority in the case of murder and other offenses committed by persons in the military service. (*Caldwell v. Parker*, 252 U. S., 376, 385.)

It can not be disputed that the effect of this grant was to confer upon courts-martial, as to offenses inherently military, an exclusive authority to try and punish. In so far, however, as respects acts which were criminal under the State law, but which became subject to military authority because they could also be treated as prejudicial to good order and military discipline, a concurrent power necessarily arose. (*Caldwell v. Parker*, 252 U. S., 376, 381.)

Ships of war enjoy the full rights of extritoriality in foreign ports and territorial waters. (8 Op. Atty. Gen., 73.)

For other cases, see note to article 6, A. G. N., as to jurisdiction of murder; note to Constitution, Article I, section 8, clause 14, under "V. Jurisdiction of civil courts," and note to fifth amendment, under "11. Protection against double jeopardy"; see also note to article 14, A. G. N., under "Jurisdiction of civil authorities."

**Punishment for violation of article 22.**—See note above, under "Embezzlement"; and see note to article 14, A. G. N., under "Discretionary punishment"; see also notes to articles 8 and 63, A. G. N.

**Art. 23. [Offenses committed on shore.]** All offenses committed by persons belonging to the Navy while on shore shall be punished in the same manner as if they had been committed at sea.—(17 July, 1862, c. 204, s. 1, v. 12, p. 603, art. 9.)

**Art. 24. [Punishments by order of commander.]** No commander of a vessel shall inflict upon a commissioned or warrant officer any other punishment than private reprimand, suspension from duty, arrest, or confinement, and such suspension, arrest, or confinement shall not continue longer than ten days, unless a further period is necessary to bring the offender to trial by a court-martial; nor shall he inflict, or cause to be inflicted, upon any petty officer, or person of inferior rating, or marine, for a single offense, or at any one time, any other than one of the following punishments, namely:

First. Reduction of any rating established by himself.

Second. Confinement, with or without irons, single or double, not exceeding ten days, unless further confinement be necessary, in the case of a prisoner to be tried by court-martial.

Third. Solitary confinement, on bread and water, not exceeding five days.

Fourth. Solitary confinement not exceeding seven days.

Fifth. Deprivation of liberty on shore.

Sixth. Extra duties.

No other punishment shall be permitted on board of vessels belonging to the Navy, except by sentence of a general or summary court-martial. All punishments inflicted by the commander, or by his order, except reprimands, shall be fully entered upon the ship's log.—(17 July, 1862, c. 204, s. 1, v. 12, p. 603, art. 10. *Wilkes v. Dinsman*, 7 How., 89. *Dinsman v. Wilkes*, 12 How., 390.)

Deck courts for the punishment of minor offenses were authorized by act of February 16, 1909 (35 Stat., 621), amended by acts of August 29, 1916 (39 Stat., 586), and October 6, 1917 (40 Stat., 393).

"Hereafter all officers of the Navy and Marine Corps who are authorized to order either general or summary courts-martial \* \* \* shall have the same authority to inflict minor punishments as is conferred by law upon the commander of a naval vessel." (Act Aug. 29, 1916. 39 Stat., 586.)

"The use of irons, single or double, as a form of punishment in the Navy of the United States is hereby abolished, except for the

purposes of safe custody or when part of the sentence imposed by a general court-martial." (Act May 13, 1908, 35 Stat., 132.)

"The use of irons, single or double, is hereby abolished, except for the purpose of safe custody or when part of a sentence imposed by a general court-martial." (Act Feb. 16, 1909, sec. 8, 35 Stat., 621.)

"When \* \* \* empowered by the Secretary of the Navy to order summary courts-martial, the commanding officer of a naval hospital or hospital ship shall be empowered to \* \* \* inflict the punishments which the commander of a naval



vessel is authorized by law to inflict, upon all enlisted men of the naval service attached thereto, whether for duty or as patients." (Act Aug. 29, 1916, 39 Stat., 586.)

"When a force of marines is embarked on a naval vessel, or vessels, as a separate organization, not a part of the authorized complement thereof, the authority and powers of the officers of such separated organization of marines shall be the same as though such organization were serving at a navy yard on shore, but nothing herein shall be construed as impairing the paramount authority of the commanding officer of any naval vessel over the vessel under his command and all persons embarked thereon." (Act Aug. 29, 1916, 39 Stat., 586.)

**Necessity of commander's power.**—It is a matter of most common information that it is essential to the efficiency and discipline of the Navy that a commanding officer should have the right and the power, promptly, by arrest and otherwise, to enforce obedience to orders and fidelity to duty. To this end article 24, A. G. N., recognizes the right of such commander to reprimand, suspend from duty, arrest, or confine the delinquent inferior officer; and recognizing such right puts limitations thereon. That such a power in a commanding officer is essential is too plain for argument. (19 Op. Atty. Gen., 472, 474.)

**Civil liability for abuse of power.**—The almost despotic power with which the law clothes the commanding officer for the time being, and which is absolutely necessary for the safety and efficiency of the ship, make it more especially his duty not to abuse it. And if, from malice to an individual, or vindictive feeling, or a disposition to oppress, he inflicts punishment beyond that which in his sober judgment he would have thought necessary, he is liable to an action for damages. If the punishment inflicted was forbidden by law or beyond the power which the law confided to him, he would be liable whatever were his motives. (*Dinsman v. Wilkes*, 12 How., 390, 403.)

It is not to be lost sight of, that while the commanding officer is to be protected under mere errors of judgment in the discharge of his duties, yet he is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury, either from malice, cruelty, or any species of oppression founded on considerations independent of public ends. The humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong, as well as the highest in office. (*Wilkes v. Dinsman*, 7 How., 89, 123, 129.)

An action by a marine against his commanding officer for punishment inflicted upon him for refusing to do duty in a foreign port, upon the ground that the time of his enlistment had expired and that he was entitled to his discharge, is a case of much delicacy and importance as regards our naval service. For it is essential to its security and efficiency that the authority and command confided to the officer, when it has been exercised from proper motives, should be firmly supported in the courts of

justice as well as on shipboard. But at the same time it must be remembered that the nation would be equally dishonored if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer from malice or ill will, or the wantonness of power, without giving him redress in the courts of justice. (*Dinsman v. Wilkes*, 12 How., 390, 402.)

**Discretion of commander.**—The commanding officer, in causing punishments to be inflicted upon a seaman for disobedience of orders, was acting as a public officer invested with certain discretionary powers, and can not be made answerable by civil suit for any injury when acting within the scope of his authority and not influenced by malice, corruption, or cruelty. His position is quasi judicial. In order to hold him civilly liable for damages, it is not enough to show that he committed an error in judgment, but it must have been a willful and malicious error. (*Wilkes v. Dinsman*, 7 How., 89, 123, 129.)

The commanding officer is the judge of the degree of punishment necessary to suppress a spirit of disobedience and insubordination; and he is not liable to an action for a mere error in judgment, even if the jury suppose that milder measures would have accomplished his object. But at the same time he is bound never to inflict any severer punishment than he conscientiously believes to be necessary to maintain discipline and due subordination in his ships. (*Dinsman v. Wilkes*, 12 How., 390.)

As regards the degree of punishment, it was the duty of the commanding officer to maintain proper discipline and order among the officers and men under his command, and if a spirit of disobedience and insubordination manifested itself in the squadron, he was bound to suppress it; and he might use severe measures for that purpose, if he deemed such measures necessary. And if in his judgment the continued refusal of the plaintiff to do duty made it necessary to confine him on shore rather than on shipboard, in order to reduce him to obedience, or necessary to deter others from a like offense, he was justified in so doing; and while he acted honestly and from a sense of duty, and with a single idea to the welfare of the service in which he was engaged, the law protects him. He is not liable to an action for a mere error in judgment. (*Dinsman v. Wilkes*, 12 How., 390, 403.)

**Repeated disobedience of orders.**—By the Articles for the Government of the Navy the commanding officer is authorized to cause certain punishments to be inflicted upon an enlisted man for scandalous conduct without a court-martial. Every successive disobedience of orders is a fresh offense and subjects the offender to additional punishment. It has been settled in a penal prosecution that a like act when prohibited, if distinctly repeated even on the same day, constitutes a second offense and incurs an additional penalty. (*Wilkes v. Dinsman*, 7 How., 89, 128.)

The commanding officer has not only a right to cause corporal punishment to be inflicted but to resort to any reasonable measures necessary to insure submission. He had, therefore, a right to imprison the refractory party on shore, if

done without malice. (*Wilkes v. Dinsman*, 7 How., 89; see art. 49, A. G. N., as to prohibited punishments.)

**Suppression of mutiny.**—See note to article 6, A. G. N.

Commander Alexander Slidell Mackenzie, U. S. N., commanding the U. S. Brig *Somers*, was tried by court-martial and acquitted of the charge of murder, three specifications, alleging that he executed by hanging, "without form of law," Philip Spencer, acting midshipman; Samuel Cromwell, boatswain's mate; and Elisha Small, seaman, on board the said brig *Somers*, December 1, 1842. (Court-Martial Rec. No. 844, vol. 46, 1843, Navy Dept.)

The opinion of the court of inquiry in the same case was as follows:

"The court are therefore of opinion: That, a mutiny had been organized on board the United States brig *Somers*, to murder the officers, and take possession of the brig.

"That Midshipman Philip Spencer, Boat-swain's Mate Samuel Cromwell, and Seaman Elisha Small were concerned in, and guilty of, such mutiny.

"That, had not the execution taken place, an attempt would have been made to release the prisoners, murder the officers, and take command of the brig.

"That such attempt, had it been made in the night, or during a squall, would, in the judgment of the court, from the number and character of the crew, the small size of the brig, and the daily decreasing physical strength of the officers, occasioned by almost constant watching, and broken slumbers, have been successful.

"That Commander Mackenzie, under the circumstances, was not bound to risk the safety of his vessel, and jeopard the lives of the young officers and the loyal of his crew, in order to secure to the guilty the forms of trial, and that the immediate execution of the prisoners was demanded by duty, and justified by necessity.

"The court are further of opinion: That throughout all these painful occurrences, so well calculated to disturb the judgment, and try the energy, of the bravest and most experienced officer, the conduct of Commander Mackenzie and his officers was prudent, calm, and firm, and that he, and they, honorably performed their duty to the service and their country (Court-Martial Rec. No. 844, vol. 46, 1843, Navy Dept.)

**Reduction in rating.**—The act of March 2, 1855, establishing summary courts-martial in the Navy, did not interfere with the power of the commander of a vessel, as it existed prior to that act, to reduce seamen to inferior rate for incompetency. (10 Op. Atty. Gen., 168.)

The Articles for the Government of the Navy (Apr. 23, 1800, 2 Stat., 49, art. 30) forbade a commanding officer who had received any petty officer or man "turned over from any other vessel" to rate him in a lower or worse station than that in which he formerly served. That prohibition placed a limit on the authority of commanding officers to punish their seamen, but was a recognition by Congress of the general discretion of the commander to disrate petty officers and seamen not protected by the legislative prohibition referred to. (10 Op. Atty. Gen., 168.)

A seaman on board a vessel of the Navy, having received his rating under a former commander of that vessel, the actual commander, upon a report to him of the man's incompetency to perform the duties of a seaman, did not consider himself authorized to disrate him, but represented the case to the department, and by the authority of the department the man was reduced from the rate of seaman to that of ordinary seaman. It was contended in the latter's behalf that the law creating summary courts-martial and giving them authority to disrate as a punishment was intended to repeal and exclude any other authority to disrate. The conclusion of the Attorney General was as stated above. (10 Op. Atty. Gen., 168.)

See article 30, A. G. N., as to punishments by summary courts-martial, and article 31, A. G. N., as to disrating for incompetency.

**Reprimand.**—See note to section 417, Revised Statutes, under "Power of Secretary to reprimand subordinates."

A private reprimand administered by the commander in chief of a fleet to a naval officer in accordance with the recommendation of a court of inquiry, as a punishment for an offense such as neglect of duty, is no bar to a subsequent trial of such officer by a general court-martial for the same offense. (25 Op. Atty. Gen., 623.)

The fact that article 24, A. G. N., pro forma recognizes a private reprimand as a "punishment" does not affect the conclusion that a proceeding before a court of inquiry which recommended that a private reprimand be administered to an officer by the commander in chief of the fleet did not constitute a "trial" and did not expose the officer to the peril of punishment so as to bar subsequent trial of the officer by court-martial. Said reprimand was not real punishment. (25 Op. Atty. Gen., 623.)

The jeopardy of the law means a real peril, originally of life or limb, and always of substantial punishment or penalty. There must be a trial upon an indictment for an offense, or upon some equivalent charge and presentment, as by court-martial, submitting a definite issue and involving conviction or acquittal. (25 Op. Atty. Gen., 623.)

Disapproval of the conduct and censure by the Secretary of the Navy of a subordinate officer for misconduct will not prevent a court-martial proceeding upon the same charge. (28 Op. Atty. Gen., 622.)

The Secretary of the Navy may, within his discretion, when he believes it for the good of the service, send communications to subordinate officers which may be in the nature of a reprimand. This right is necessarily vested in him as the chief officer of that department; but such communications can not be regarded in the nature of a punishment as defined in the regulations. Regardless of whether a proceeding under the Navy Regulations constitutes a jeopardy within the meaning of the fifth amendment to the Constitution, it is apparent that the action of the Secretary of the Navy in writing a letter to an officer censuring him for misconduct can not be regarded as a jeopardy, there having been nothing more than a private investigation of the matter by the commandant of the navy yard, and a report thereon to the Secretary of



the Navy. (28 Op. Atty. Gen., 622. See note to Constitution, fifth amendment; and note to article 43, A. G. N.)

**Arrest not bar to subsequent trial.**—A plea before a court-martial of a former arrest and discharge is bad; a former trial only is a defense. A mere arrest, even in cases punishable in life or limb, is not considered as constituting the jeopardy intended by the fifth amendment to the Constitution. To give the accused the benefit of the common-law maxim from which is derived our constitutional amendment, it is necessary that a man shall have been actually acquitted or convicted on a former trial, and the record of this fact must be produced. (1 Op. Atty. Gen., 294.)

It is not free from legal censure to bring an officer to trial by court-martial after the charge against him has been knowingly passed over, although the officer in such case can not successfully plead in bar of trial the fact that he had been previously arrested for the same offense. (1 Op. Atty. Gen., 294.)

A naval court-martial loses jurisdiction to try for an offense committed by an enrolled member of the Naval Reserve Force during active service in the Navy, by discharging the offender from arrest without charges having been preferred against him, and by his subsequent release from active duty. (*U. S. v. Warden or Keeper of Naval Prison*, 265 Fed. Rep., 787; see note to preamble to section 1624 as to jurisdiction over Naval Reserve Force.)

An officer was placed under arrest on his vessel for drunkenness and neglect of duty. Later, on the same day, he was, by order of the rear admiral, restored to duty to await an opportunity to investigate the case. Subsequently he was placed under arrest for trial, and served with copy of charges and specifications, and a court-martial was convened. The accused proceeded to trial without objection; subsequently, he claimed the salary of his office on

the ground that he was illegally dismissed by sentence of said court, as his first arrest was an expiation of the offense and a bar to trial pursuant to existing regulations of the Navy: *Held*, that his first arrest and temporary confinement were not intended as a punishment, but as a reasonable precaution for maintenance of good order and discipline aboard, and did not bar his trial, notwithstanding the existing regulations which provided that the arrest and restoration to duty of a person in the Navy, for an offense, shall be a bar to further proceedings against him for that offense. (*Bishop v. U. S.*, 197 U. S., 334; 38 Ct. Cls., 473.)

See note to article 43, A. G. N., as to arrest for trial.

**Scandalous conduct.**—See note to article 8, A. G. N.

**Other punishments on naval vessels.**—See note to Constitution, Article I, section 8, clause 14, under "IV. Jurisdiction of courts-martial," subheading, "Courts-martial other than naval can not convene on vessels of regular Navy."

Under this article it was held that naval militia officers could not impose punishments on men belonging to their organization, while cruising on board a vessel of the regular Navy, nor could naval militia officers convene State courts-martial on such vessels. (File 3973-107, Feb. 16, 1915). Thereafter, by act of August 29, 1916 (39 Stat., 598), naval militia courts-martial were authorized to convene on board naval vessels; said enactment, however, was repealed by naval appropriation act of July 1, 1918 (40 Stat., 708), which latter act repealed all laws relating to the Naval Militia.

See note to Constitution, Article I, section 8, clause 16, as to authority of commanding officer of a naval vessel over members of the Naval Militia participating with the Regular Navy in cruises for the purpose of training and instruction.

**Art. 25. [Punishment by officer temporarily commanding.]** No officer who may command by accident, or in the absence of the commanding officer, except when such commanding officer is absent for a time by leave, shall inflict any other punishment than confinement.—(23 Apr., 1800, c. 33, s. 1, v. 2, p. 49, art. 30.)

**Art. 26. [Summary courts-martial; convening authority.]** Summary courts-martial may be ordered upon petty officers and persons of inferior ratings, by the commander of any vessel, or by the commandant of any navy-yard, naval station, or marine barracks to which they belong, for the trial of offenses which such officer may deem deserving of greater punishment than such commander or commandant is authorized to inflict, but not sufficient to require trial by a general court-martial.—(2 Mar., 1855, c. 136, s. 4, v. 10, p. 627. 15 July, 1870, c. 295, s. 14, v. 16, p. 334.)

By act of August 29, 1916 (39 Stat., 586), it was provided that "summary courts-martial may be ordered upon enlisted men in the naval service under his command by the commanding officer of any brigade, regiment, or separate or detached battalion, or other separate or detached command, and, when empowered by the Secretary of the

Navy, by the commanding officer or officer in charge of any command not specifically mentioned in the foregoing: *Provided*, That when so empowered by the Secretary of the Navy to order summary courts-martial, the commanding officer of a naval hospital or hospital ship shall be empowered to order such courts \* \* \*."

"Hereafter all officers of the Navy and Marine Corps who are authorized to order either general or summary courts-martial may order deck courts upon enlisted men under their command \* \* \* when so empowered by the Secretary of the Navy to order summary courts-martial, the commanding officer of a naval hospital or hospital ship shall be empowered to order \* \* \* deck courts \* \* \* upon all

enlisted men of the naval service attached thereto, whether for duty or as patients." (Act Aug. 29, 1916, 39 Stat., 586. Deck courts were created by act Feb. 16, 1909, 35 Stat., 621, amended by acts Aug. 29, 1916, 39 Stat., 586, and Oct. 6, 1917, 40 Stat., 393.)

See note to article 38, A. G. N., as to convening of general courts-martial.

**Art. 27. [Constitution of summary courts-martial.]** A summary court-martial shall consist of three officers not below the rank of ensign, as members, and of a recorder. The commander of a ship may order any officer under his command to act as such recorder.—(2 Mar., 1855, c. 136, s. 6, v. 10, p. 628.)

Commissioned officers of the Naval Reserve Force, Marine Corps Reserve, Coast Guard, Lighthouse Service, Coast and Geodetic Survey, and Public Health Service are empowered to serve on naval courts-martial when actively serving under the Navy

Department in time of war or emergency as part of the naval forces of the United States. (Act Oct. 6, 1917, 40 Stat., 393.)

See note to article 39, A. G. N., as to constitution of general courts-martial.

**Art. 28. [Oaths of members and recorder.]** Before proceeding to trial the members of a summary court-martial shall take the following oath or affirmation, which shall be administered by the recorder: "I, A B, do swear (or affirm) that I will well and truly try, without prejudice or partiality, the case now depending, according to the evidence which shall be adduced, the laws for the government of the Navy, and my own conscience." After which the recorder of the court shall take the following oath or affirmation, which shall be administered by the senior member of the court: "I, A B, do swear (or affirm) that I will keep a true record of the evidence which shall be given before this court and of the proceedings thereof."—(2 Mar., 1855, c. 136, s. 5, v. 10, p. 628.)

See note to article 40, A. G. N., as to oaths of general courts-martial.

**Art. 29. [Testimony before summary courts-martial.]** All testimony before a summary court-martial shall be given orally, upon oath or affirmation, administered by the senior member of the court.—(2 Mar., 1855, c. 136, s. 7, v. 10, p. 628.)

The use of depositions before naval courts was authorized by act of February 16, 1909, section 16 (35 Stat., 622).

See note to article 42, A. G. N., as to evidence before general courts-martial.

**Art. 30. [Punishments by summary courts.]** Summary courts-martial may sentence petty officers and persons of inferior ratings to any one of the following punishments, namely:

First. Discharge from the service with bad conduct discharge; but the sentence shall not be carried into effect in a foreign country.

Second. Solitary confinement, not exceeding thirty days, in irons, single or double, on bread and water, or on diminished rations.

Third. Solitary confinement in irons, single or double, not exceeding thirty days.

Fourth. Solitary confinement not exceeding thirty days.

Fifth. Confinement not exceeding two months.

Sixth. Reduction to next inferior rating.

Seventh. Deprivation of liberty on shore on foreign station.



Eighth. Extra police duties, and loss of pay, not to exceed three months, may be added to any of the above-mentioned punishments. (2 Mar., 1855, c. 136, s. 7, v. 10, p. 628.)

"The use of irons, single or double, as a form of punishment in the Navy of the United States is hereby abolished, except for the purposes of safe custody or when part of the sentence imposed by a general court-martial." (Act May 13, 1908, 35 Stat., 132.)

"The use of irons, single or double, is hereby abolished, except for the purpose of safe custody or when part of a sentence imposed by a general court-martial." (Act Feb. 16, 1909, sec. 8, 35 Stat., 621.)

"The courts authorized to impose the punishments prescribed by article thirty of the Articles for the Government of the Navy may adjudge either a part or the whole, as may be appropriate, of any one of the punishments therein enumerated." (Act Feb. 16, 1909, sec. 8, 35 Stat., 621.)

**Reduction in rating.**—See notes to articles 24 and 31, A. G. N.

The law of March 2, 1855, creating summary courts-martial, included among the punishments which they might inflict, "reduction to next inferior rating." The object of that act was to provide for the punishment of petty

offenders, and the reduction in rating therein mentioned is imposed as a penalty. It had no application whatever to seamen who were only incompetent, from physical or other causes, to perform the duties of their grades, but who were not offenders. Such persons could not be reduced to an inferior rating under the provisions of said act, nor was there any other law providing for their reduction by sentence of a court-martial. (10 Op. Atty. Gen., 168.)

Courts-martial sit for the trial and punishment of crimes of greater or less magnitude; and mere incompetency is not of itself a crime. Their sentence of reduction to an inferior grade is imposed as a punishment, but such reduction by a commanding officer for incompetency is not a punishment. A reduction in grade on the ground of incompetency is at worst a misfortune, importing no reflection on the character of the person reduced, and does not require a formal trial. (10 Op. Atty. Gen., 168.)

(The opinion of the Attorney General above noted was rendered to the Secretary of the Navy, January 16, 1862. The provision now embodied in article 31, A. G. N., as to disrating for incompetency, was enacted July 17, 1862.)

**Art. 31. [Disrating for incompetency.]** A summary court-martial may disrate any rated person for incompetency.—(17 July, 1862, c. 204, s. 1, art. 10, v. 12, p. 603.)

**Disrating not a punishment.**—See note to article 30, A. G. N., under "Reduction in rating"; see also note to article 24, A. G. N., under "Reduction in rating."

**Authority of commanding officer.**—See note to article 24, A. G. N.

If the appointments under which the men are serving are of a permanent nature, commanding officers of the Navy, who did not establish the ratings, have no authority to disrate them, either as punishment for offenses or for incompetency. Such men may be disrated by sentence of a general or summary court-martial or deck court as a punishment, or in accordance with article 31, A. G. N., by summary court-martial for incompetency. If they are serving under acting appointments, they can be disrated by any commanding officer of the Navy under whom they may be serving, for incom-

petency, but not as punishment for an offense. They may be disrated as a punishment in the same manner as though holding permanent appointments. (File 3973-190, June 4, 1917, as to authority of commanding officers of the Navy to disrate members of the National Naval Volunteers called into active service and subject to the laws and regulations governing the Navy.)

Article 24, A. G. N., authorizes commanding officers to punish a rated man by reduction in rank only if the rating was established by the commanding officer who inflicts the punishment; but any commanding officer may disrate a man holding under an acting appointment, for incompetency, whether the rating was established by himself or by another commanding officer. (File 7657-249; see also file 3973-190, June 4, 1917.)

**Art. 32. [Execution of summary court sentence.]** No sentence of a summary court-martial shall be carried into execution until the proceedings and sentence have been approved by the officer ordering the court and by the commander-in-chief, or, in his absence, by the senior officer present. And no sentence of such court which involves loss of pay shall be carried into execution until the proceedings and sentence have been approved by the Secretary of the Navy.—(2 Mar., 1855, c. 136, s. 8, v. 10, p. 628. 2 Mar., 1867, c. 174, s. 5, v. 14, p. 516.)

"That the Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court-martial convened by his

order or by that of any officer of the Navy or Marine Corps." (Act Feb. 16, 1909, sec. 9, 35 Stat., 621.)

"That all sentences of summary courts-martial may be carried into effect upon the approval of the senior officer present \* \* \*." (Act Feb. 16, 1909, sec. 17, 35 Stat., 623.)

"No sentence of a summary court-martial shall be carried into execution until the proceedings and sentence have been approved by the officer ordering the court, or his successor in office, and by his immediate superior in command: *Provided*, That if the officer ordering the court, or his successor in office, be the senior officer present, such sentence may be carried into execution upon his approval thereof." (Act Aug. 29, 1916, 39 Stat., 586.)

The Judge Advocate General of the Navy "shall, under the direction of the Secretary of the Navy, receive, revise, and have recorded the proceedings of all courts-martial \* \* \* in the naval service." (Act June 8, 1880, 21 Stat., 164.)

**Power of the Secretary of the Navy.**—The act of March 2, 1867 (embodied in art. 32, A. G. N.), gave the Secretary of the Navy power to approve or disapprove that part of any sentence of a summary court-martial which involved loss of pay. The act of February 16, 1909, purports to enlarge his power still further, by authorizing him to set aside the proceedings, or remit or mitigate, in whole or in part, the sentence imposed by any naval court-martial. Under the act of 1867 his power of review was very limited, being confined to sentences involving loss of pay, while under the act of 1909 his power is extended to all sentences. (U. S. ex rel. Harris v. Daniels, McDonald, et al., U. S. Circuit Court of Appeals, Second Circuit, Jan. 6, 1922, 279 Fed. Rep. 844.)

Previously to the act of February 16, 1909, sentences of summary courts-martial under section 1624, Revised Statutes, could not be carried into execution, if loss of pay was involved, until their proceedings in each instance had been approved by the Secretary of the Navy. As many courts were held on ships at long distances from the United States, the delay of months in the execution of the sentence imposed proved very vexatious and subverted the whole object of a summary court, that of prompt and summary punishment for minor offenses. Hence the desirability of section 17 of the act of 1909, allowing the sentences to be carried into effect upon the approval of the senior officer present at the trial. After the enactment of section 17 of that act the distinction between sentences of summary courts-martial which involved loss of pay and those which did not ceased to exist, so that both classes of sentences could be carried into execution without awaiting the approval of the Secretary of the Navy. All sentences of such courts-martial may be carried into effect upon the approval of the senior officer present. (U. S. ex rel. Harris v. Daniels, McDonald, et al., U. S. Circuit Court of Appeals, Second Circuit, Jan. 6, 1922, 279 Fed. Rep. 844.)

There is an apparent conflict between sections 9 and 17 of the act approved February 16, 1909 (above quoted); but it is not one in reality. In view of section 9, it does not seem that sentences imposed by any naval courts-

martial can be regarded as final until the Secretary of the Navy has acted. The sentence of every summary court-martial by section 9 is made conditional, being subject to the final action of the Secretary of the Navy. (U. S. ex rel. Harris v. Daniels, McDonald, et al., U. S. Circuit Court of Appeals, Second Circuit, Jan. 6, 1922, 279 Fed. Rep. 844.)

The situation is analogous to that of a man convicted and sentenced to imprisonment for a term of years. The sentence may have been carried into effect, and the man actually imprisoned under it; but if the appellate court decides the conviction was illegal and sets the proceedings aside because the trial court had no jurisdiction to try him on the indictment, his original status is restored. (U. S. ex rel. Harris v. Daniels, McDonald, et al., U. S. Circuit Court of Appeals, Second Circuit, Jan. 6, 1922, Navy Dept. file No. 26251-25651:13.)

Under section 17 of the act of 1909, the sentence may be carried into effect upon the approval of the senior officer present, as therein provided. But when so carried into effect, if it is thereafter set aside by the Secretary of the Navy, the status of an enlisted man whose discharge was only conditional is thereby restored and continues as it was before the sentence was imposed. (U. S. ex rel. Harris v. Daniels, McDonald, et al., U. S. Circuit Court of Appeals, Second Circuit, Jan. 6, 1922, 279 Fed. Rep. 844.)

**Discharge set aside as illegal.**—An enlisted man was discharged from the Navy pursuant to the sentence of a summary court-martial duly convened and approved by the convening authority and immediate superior in command; subsequently, the proceedings, findings, and sentence were disapproved by the Secretary of the Navy on the ground that the specification failed to state an offense, and the accused was ordered to return and resume his former status in the Navy, which he did under protest and surrendered his discharge to the naval authorities. After performing duty for several weeks, he left his station, returned home, and after an absence of more than two months surrendered himself to the naval authorities for the purpose of having his status adjudicated. He was immediately placed in custody and his trial by general court-martial ordered for unauthorized absence, copy of the charge was served upon him, and he was placed under arrest for trial. While awaiting trial upon this charge, he was ordered released from naval authority by habeas corpus proceedings; on appeal, *held* that as the Secretary of the Navy found in this case that the Naval summary court-martial which tried the accused was without jurisdiction because he was not legally charged with the commission of an offense, and set aside the proceedings, the sentence became a nullity; and it follows that the discharge of the accused from the service pursuant to such sentence was a nullity ab initio. The order of the court below directing his discharge from the naval custody and adjudging that the naval authorities are without jurisdiction to try him for any offense committed since the date of his supposed discharge, reversed. (U. S. ex rel. Harris v. Daniels, McDonald, et al., U. S.



Circuit Court of Appeals, Second Circuit, Jan. 6, 1922, 279 Fed. Rep. 844.

If the proceedings of the court-martial were declared by competent authority to be void, and its sentence set aside as a nullity, on the ground that he had been tried on a specification which failed to state an offense against him, it needs no argument to establish the fact that his status as an enlisted man was not changed in contemplation of law in any particular by reason

of the sentence which was imposed. A void sentence can no more affect the status of the person upon whom it is pronounced than a void judgment can affect the property against which it is rendered. (U. S. ex rel. Harris v. Daniels, McDonald, et al., U. S. Circuit Court of Appeals Second Circuit, Jan. 6, 1922, 279 Fed. Rep. 844, citing in re Bird, 3 Fed. Cas. No. 1428.)

For other cases, see note to article 53 A. G. N.

**Art. 33. [Remission of summary court sentence.]** The officer ordering a summary court-martial shall have power to remit, in part or altogether, but not to commute, the sentence of the court. And it shall be his duty either to remit any part or the whole of any sentence, the execution of which would, in the opinion of the surgeon or senior medical officer on board, given in writing, produce serious injury to the health of the person sentenced, or to submit the case again, without delay, to the same or to another summary court-martial which shall have power, upon the testimony already taken, to remit the former punishment and to assign some other of the authorized punishments in the place thereof.—(2 Mar., 1855, c. 136, s. 8, v. 10, p. 628.)

"That the Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court-martial convened by his order or by that of any officer of the Navy or Marine Corps." (Act Feb. 16, 1909, sec. 9, 35 Stat., 621.)

See note to article 54, A. G. N., as to sentences of general courts-martial; and see note above, under article 32, A. G. N., as to construction of act of February 16, 1909.

**Art. 34. [Proceedings and record of summary court.]** The proceedings of summary courts-martial shall be conducted with as much conciseness and precision as may be consistent with the ends of justice, and under such forms and rules as may be prescribed by the Secretary of the Navy, with the approval of the President, and all such proceedings shall be transmitted in the usual mode to the Navy Department, where they shall be kept on file for a period of two years from date of trial, after which time they may be destroyed in the discretion of the Secretary of the Navy.

This article was reenacted to read as above by act of February 16, 1909, section 14 (35 Stat. 622). As originally enacted it read as follows:

"ART. 34. The proceedings of summary courts-martial shall be conducted with as much conciseness and precision as may be consistent with the ends of justice, and under such forms and rules as may be prescribed by the Secretary of the Navy, with the approval of the President; and all such proceedings shall be transmitted, in the usual mode, to the Navy Department."—(2 Mar., 1855, c. 136, s. 9, v. 10, p. 628.)

The Judge Advocate General of the Navy "shall, under the direction of the Secretary of the Navy, receive, revise, and have recorded the proceedings of all courts-martial \* \* \* in the naval service." (Act June 8, 1880, 21 Stat., 164.)

**Proceedings as evidence in other cases.**—Where the law requires that a document or paper shall be kept on file in one of the departments at Washington, quære, whether a

civil court of the United States has the right to compel, by a subpoena duces tecum, the production in any part of the United States of any such document. If the department is compelled to produce it in court in New York or San Francisco, it certainly is not kept on the files of the department during the time required for its production and return. (Cohn v. U. S., 258 Fed. Rep., 355.)

Documents used as evidence in a naval court-martial, and required by statute to be transmitted to the Navy Department and there kept on file for two years, are "official documents" while so kept, and under section 882, Revised Statutes, authenticated copies of such documents are admissible in evidence equally with the originals, notwithstanding that the originals were on file in the office of the Judge Advocate General of the Navy, and that no evidence was introduced to show that it was impossible, or even difficult, to produce the originals or that a request had been made upon anyone to

produce them. Unauthenticated copies are inadmissible as secondary evidence. (*Cohn v. U. S.*, 258 Fed. Rep., 355.)

Section 882, Revised Statutes, was intended to apply, at least, to any document or paper which is by law required to be filed and kept in any of the executive departments of the Government; and is not limited to documents or

papers written or published by an officer in his official character or in the performance of an official duty. (*Cohn v. U. S.*, 258 Fed. Rep., 355.)

For other cases, see notes to articles 42 and 52, A. G. N.; and see section 882, Revised Statutes, and note thereto.

**Art. 35. [Same punishments by general courts-martial.]** Any punishment which a summary court-martial is authorized to inflict may be inflicted by a general court-martial.—(2 Mar., 1855, c. 136, s. 10, v. 10, p. 628.)

See article 63, A. G. N., and note thereto, as to limitations of punishment by general courts-martial.

**Art. 36. [Dismissal of officers.]** No officer shall be dismissed from the naval service except by the order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof.—(13 July, 1866, c. 176, s. 5, v. 14, p. 92.)

By act of April 2, 1918 (40 Stat., 501), the President was authorized "to drop from the rolls of the Navy or Marine Corps any officer thereof who is absent from duty without leave for a period of three months or more, or who, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a state or Federal penitentiary: *Provided*, That no officer so dropped shall be eligible for reappointment."

Similar provision to article 36, A. G. N., is contained in section 1229, Revised Statutes; see that section and historical note thereunder. See also article 37, below.

**What officers included.**—Civil engineers appointed under section 1413, Revised Statutes, are officers of the Navy within the meaning of articles 36 and 37 of section 1624, Revised Statutes. (15 Op. Atty. Gen., 165; see note to sec. 1413, R. S., as to status of civil engineers.)

Officers holding temporary appointments in the Navy are not either commissioned or warrant officers, as is recognized by the act of 1862, chapter 204 (sec. 1410, R. S.); therefore, legislation as to the manner in which such officers are to be cashiered, etc., does not apply to an acting master appointed by the Secretary of the Navy. (15 Op. Atty. Gen., 560. The grade of "master" has since been changed to lieutenant, junior grade; see note to sec. 1362, R. S.)

In October, 1861, S was appointed by the Secretary of the Navy "an acting master in the Navy, on temporary service," and was dismissed from the service by the Secretary in March, 1862. *Held*, that the dismissal was lawful; that in the absence of legislation the Secretary had power to determine the time at which an appointment expressly temporary should come to an end. (15 Op. Atty. Gen., 560. In this case the appointment was made by the Secretary of the Navy, under the act of July 24, 1861, 12 Stat., 272.)

In January, 1864, S was appointed by the Secretary of the Navy "an acting gunner on temporary service" in the Volunteer Navy, and in

July, 1865, was dismissed from the service by the Secretary. *Held*, that as an acting gunner he was liable to dismissal at the will of the Secretary. (15 Op. Atty. Gen., 564.)

An acting gunner is not, as such, even a petty officer (citing sec. 1410, R. S.). Articles 36 and 37, A. G. N., make provision as to the dismissal of "officers" from the naval service; therefore do not apply to the case of an acting gunner. (15 Op. Atty. Gen., 564.)

The provisions of article 36, A. G. N., do not extend to cadets at the Naval Academy; they may accordingly be dismissed from the academy and from the naval service for misconduct, without trial by court-martial. (15 Op. Atty. Gen., 634. The ruling in this opinion does not affect the question as to the status of cadets under other laws relating to "any officer of the Navy," but has reference only to the sense in which that word is used in art. 36, A. G. N. See 17 Op. Atty. Gen., 329, 332.)

The President has the power to dismiss a delinquent midshipman from the Naval Academy for violation of regulations; and that power is not restricted by the Revised Statutes, section 1624. (*Weller v. U. S.*, 41 Ct. Cls., 324.)

The statutes on the subject of hazing do not confer upon the Superintendent of the Naval Academy, or the Secretary of the Navy, or upon both conjointly, the power summarily to dismiss from the academy without trial by court-martial a midshipman guilty of that offense. (25 Op. Atty. Gen., 543.)

For other cases, see note to section 1512, Revised Statutes, as to the status of midshipmen; note to section 1519, Revised Statutes, as to court-martial of midshipmen and dismissal without court-martial; notes to articles 39 and 53, A. G. N., as to who are officers within the meaning of those articles; and note to Constitution, Article II, sec. 2, clause 2, under "VIII. Power of removal."

**"Time of peace" construed.**—The law assumes to control the President in the matter of dismissing officers from the military and naval service only in time of peace. Its purpose was, upon the declaration of peace, to suspend the broad power which he exercised



during the recent rebellion to dismiss an officer from the service whenever in his judgment the public interests would thereby be promoted. But peace was not inaugurated until August 20, 1866, on which date the President announced by proclamation that "peace, order, tranquillity, and civil authority" then existed "in and throughout the whole of the United States of America" (14 Stat., 814). Since peace in contemplation of law could not exist while rebellion against the National Government remained unsuppressed, the close of the rebellion and the complete restoration of the national authority as announced by the President and recognized by Congress must be accepted as the beginning of the "time of peace," during which the President was deprived of the power of summarily dismissing officers from the military and naval service. (*McElrath v. U. S.*, 102 U. S., 426, 438.)

The limitation, "except in time of peace," on the power of the President to summarily dismiss a military officer contemplates not a mere cessation of hostilities, but peace in the complete sense, officially proclaimed. (*Kahn v. Anderson*, 255 U. S., 1, 10, citing *McElrath v. U. S.*, 102 U. S., 426, 438. Compare, 32 Op. Atty. Gen., 505.)

**Dismissal by the President with the consent of the Senate.**—Where the President nominated A to the Senate to be a first lieutenant in the Marine Corps, vice B "dismissed," and the Senate advised and consented to the appointment agreeably to the nomination, and A was commissioned, *held* that such appointment, followed by a commission, operated to discharge B from the service as effectually as if he had been dismissed by the direct order of the President. (*McElrath v. U. S.*, 102 U. S., 426.)

This law may be construed as prohibiting the dismissal of officers of the Navy in time of peace under any circumstances or for any cause or by any authority whatever, except in pursuance of the sentence of a court-martial to that effect or in commutation thereof; or it may be construed as prohibiting their dismissal by the President alone, in time of peace, without the sentence of a court-martial or in commutation thereof. Although the question is not free from difficulty, *held*, that the latter is the true construction of the act. Whether the power of the President and Senate in this regard could be constitutionally subjected to restrictions by statute, *quaere*. (*Blake v. U. S.*, 103 U. S., 227, 235, 236; *Wallace v. U. S.*, 55 Ct. Cls., 396, 400.)

The President has the power to supersede or remove an officer of the Army or the Navy by the appointment, by and with the advice and consent of the Senate, of his successor. It was not the purpose of the fifth section of the act of July 13, 1866 (14 Stat., 92, now embodied in secs. 1229 and 1624, art. 36, R. S.), to withdraw that power. (*Blake v. U. S.*, 103 U. S., 227; *Keyes v. U. S.*, 109 U. S., 336.)

It is in substance and effect nothing more than a declaration that the power theretofore exercised by the President, without the concurrence of the Senate, in summarily dismissing or discharging officers of the Army or Navy whenever in his judgment the interest of the service required it to be done, shall not be

exercised in time of peace except in pursuance of the sentence of a court-martial or in commutation thereof. (*Blake v. U. S.*, 103 U. S., 227, 236.)

The President has power, by and with the advice and consent of the Senate, to displace an officer in the Army or Navy by the appointment of another person in his place. (*Mullan v. U. S.*, 140 U. S., 240, affirming and following *Blake v. U. S.*, 103 U. S., 227.)

It was competent to the President, if he deemed the further continuance of G, a civil engineer, in the service not advisable, to nominate W in his place; the confirmation and appointment of W operated to remove G, and the fact that the latter received no notice of his dismissal is unimportant. (16 Op. Atty. Gen., 203.)

For other cases, see note to Constitution article II, section 2, clause 2, under "VIII. Power of removal." See also act of March 3, 1883 (22 Stat., 530), "for the relief of Edward Bellows."

**Illegal dismissal revoked.**—Certain cadet engineers who had graduated from the Naval Academy were honorably discharged under an erroneous interpretation by the Navy Department of an act enacted August 5, 1882 (22 Stat., 285). Such discharges were held by the courts to be void. (See *Perkins v. U. S.*, 20 Ct. Cls., 438, 116 U. S., 483; see also *U. S. v. Redgrave*, 116 U. S., 474; *Harmon v. U. S.*, 23 Ct. Cls., 132.) In the meantime, others had been promoted to the vacancies in commissioned grades to which said cadet engineers would have been promoted but for their erroneous discharge: *Held*, that the promotions which were so made can not well be disturbed, but that said cadet engineers, erroneously discharged, should be recognized as in the immediate line of promotion in their proper order to fill the first vacancies that may occur in the office of assistant engineer. (18 Op. Atty. Gen., 373. See also note to art. 10, A. G. N., as to implied resignations; and note to art. 53, A. G. N., as to dismissal of officer pursuant to sentence of a court-martial which had not been confirmed by the President.)

**Power of Congress to reduce number of officers.**—An officer in the Army or Navy of the United States does not hold his office by contract but at the will of the sovereign power; and it is within the power of Congress to provide for the honorable discharge of officers not needed in the Navy. The country is not compelled, after the conclusion of a war, to maintain the entire official force of the Army and Navy and a host of sinecurists in full pay so long as they shall live. (*Crenshaw v. U. S.*, 134 U. S., 99, 107.)

Article 36, A. G. N., does not give officers of the Navy a contract right to hold their offices, nor deprive Congress of the power of enacting laws for the honorable discharge of officers. One legislature can not deprive its successor of the power of revocation. That article was not intended to place an officer beyond the power of Congress to make any provision for his removal, even by the executive who appointed him. (*Crenshaw v. U. S.*, 134 U. S., 99, 107.)

**Officers dropped from the rolls.**—See act of April 2, 1918, quoted above under this article; and see note to article 37, A. G. N.

By order of the President an officer was dropped from the rolls of the Army for unauthorized absence. The fact that the order may have been issued "under a misapprehension of the facts" could not change its legal effect; it still remains an authorized act of the Executive, even if prompted by an erroneous impression. The law does not provide for nor contemplate recourse to a court-martial, or other examination to ascertain the facts. His decision as to any officer having been made, the President is, as to the case of that individual, *functus officio*, the statute giving him no right to review, annul, affirm, or reverse his own adjudication. Certainly a succeeding administration has no power of review. The action of the President in such case is not merely discretionary, but quasi judicial. Action once had is final. (17 Op. Atty. Gen., 13.)

The statute did not contemplate any formal trial by the President, either through an "indictment" or a court-martial, before dropping an absent officer. No form of procedure was prescribed, but the means of discovering the facts was left to the sound judgment of the President, upon whom was conferred the power to act. It may well be inferred that it was anticipated

that recourse would be had to the records of the War Department to discover who were thus delinquent. (17 Op. Atty. Gen., 13.)

The law authorizing the President to drop officers of the Army from the rolls for unauthorized absence was intended to give to the President a fresh grant of power, to be exercised at that time independent of the laws prohibiting dismissal of officers without trial by court-martial, and making such dismissal void if the officer demanded a trial by court-martial and it was not granted. (*Newton v. U. S.*, 18 Ct. Cls., 435.)

Under the law authorizing the President to drop from the rolls of the Army an officer absent from duty three months without leave, the jurisdiction to find the fact of desertion was vested in the President alone, and his decision thereon can not be reviewed by the Court of Claims in an action by the officer for the pay of his office. Congress undoubtedly supposed that the Commander in Chief of the Army was capable of deciding this simple fact without mistake or bias. Right or wrong, the court must presume the fact to be as the President determined it. (*Newton v. U. S.*, 18 Ct. Cls., 435.)

**Art. 37. [Dismissed officer may demand trial.]** When any officer, dismissed by order of the President since 3d March, 1865, makes, in writing, an application for trial, setting forth, under oath that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial to try such officer on the charges on which he shall have been dismissed. And if such court-martial shall not be convened within six months from the presentation of such application for trial, or if such court, being convened, shall not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void.—(3 Mar., 1865, c. 79, s. 12, v. 13, p. 489.)

Amendment to this article was made by act of June 22, 1874, section 2 (18 Stat., 192), as follows: "The accounting officers of the Treasury be, and are hereby, prohibited from making any allowance to any officer of the Navy who has been, or may hereafter be, dismissed from the service and restored to the same under the provisions of the twelfth section of the act of March third, eighteen hundred and sixty-five, entitled 'An Act to amend the several acts heretofore passed to provide for the enrolling and calling out the national forces, and for other purposes,' [art. 37, A. G. N.] to exceed more than pay as on leave for six months from the date of dismissal, unless it shall appear that the officer demanded in writing, addressed to the Secretary of the Navy, and continued to demand as often as once in six months, a trial as provided for in said act."

**Enactment held constitutional.**—The twelfth section of the act of March 3, 1865 (13 Stat., 489; now art. 37, A. G. N.), providing in certain contingencies for the restoration of an officer dismissed from the military or naval service, is constitutional and imperative. It falls within the fourteenth clause of section 8 of

Article I of the Constitution, "to make rules for the government and regulation of the land and naval forces." (12 Op. Atty. Gen., 4.)

It does not seem to be obnoxious to the objection that it invades or frustrates the power of the President to dismiss an officer. On the contrary, it proceeds upon an admission that the power of dismissal belongs to the President. It is simply a regulation which is to follow dismissal, providing in certain contingencies for the restoration of the officer to the service, and leaving the dismissal in full force if those contingencies do not happen. (12 Op. Atty. Gen., 4. See note to art. 32, A. G. N., as to conditional discharge under summary court-martial sentence.)

**Not limited to time of peace.**—The terms of the act of March 3, 1865 (13 Stat., 489; art. 37, A. G. N.), do not confine it to time of peace. Its terms are general. (*Wallace v. U. S.*, 55 Ct. Cls., 396, 402.)

**Not a limitation on power of dismissal.**—It does not express any purpose to limit the President's power to dismiss. On the contrary, it recognizes that power and clearly imports, by its language, that there shall have been a dismissal before the officer can invoke its provisions. It does not speak of suspension, but



does mention dismissal. It is not to be presumed, nor does the language of the act indicate, that the power which Congress had "requested" the President to employ, to dismiss officers from the military service (act July 17, 1862, 12 Stat., 596), was intended to be taken away from him or limited in 1865, the war then continuing. (*Wallace v. U. S.*, 55 Ct. Cls., 396, 402.)

If it be said that the language of the act, though specific in its reference, does not imply that the officer is or can be dismissed by the President's order, but means that the order has the effect of only suspending him from duty, then the act provides no method of determining the status of the officer if he fails to demand a trial; nor does it provide, if a court-martial be convened, for any execution of its award. (*Wallace v. U. S.*, 55 Ct. Cls., 396, 404.)

**Meaning of law obscure.**—The language is not aptly chosen, and the meaning to be ascribed to it is obscure. (*Wallace v. U. S.*, 55 Ct. Cls., 396, 403.)

Whether the purpose of the law is fully met by a court-martial or some other body, authorized by order of the President, whose findings can go to the officer's record or make him eligible to reappointment, or whether a broader meaning should be accorded to it, not decided. (*Wallace v. U. S.*, 55 Ct. Cls., 396, 404.)

**Restoration requires new appointment.**—If it be assumed that it was not its intention to limit the power of dismissal (and its terms certainly import that it treats the dismissal as a fact), then the declaration that the order of dismissal shall be void, because of something subsequently occurring, could not be effective to restore the officer to his office. Let it once be admitted that the officer was dismissed from the service, and it must follow that the effect of the order dismissing him was to sever his relations with the Army. The vacancy so created could be filled only by a new and original appointment, to which, by the Constitution, the advice and consent of the Senate is necessary. (*Wallace v. U. S.*, 55 Ct. Cls., 396, 403, citing *U. S. v. Corson*, 114 U. S., 619, 622.)

Where a person has ceased to be an officer of the Army, he could not again become one except upon a new appointment, by and with the advice and consent of the Senate. (*Blake v. U. S.*, 103 U. S., 227, 237, citing *Mimmack v. U. S.*, 97 U. S., 426.)

The act of June 22, 1874, section 2 (quoted above, under this article), contains a reference to the act of March 3, 1865 (now art. 37, A. G. N.), but relates to the case of an officer of the Navy dismissed from the service and "restored" to the same. It does not appear how the restoration took place, and from the whole section it appears that the officer is not restored to office. (*Wallace v. U. S.*, 55 Ct. Cls., 396, 401.)

It can not be seriously questioned that if a vacancy in his office was created by an officer's dismissal, it could only be filled by a new appointment made by the Executive, with the consent of the Senate. It could not be filled by legislative enactment. (*Wallace v. U. S.*, 55 Ct. Cls., 396, 399, citing *Wood's Case*, 107 U. S., 414, 15 Ct. Cls., 151; *Mimmack Case*, 97 U. S., 426, 437; *Corson Case*, 114 U. S., 619, 622.)

See note to Constitution, Article I, section 7, clause 2, under "Veto of bill authorizing restoration of dismissed officer."

**Execution of court-martial sentence.**—While the language of the act justifies the conclusion that the power of dismissing an officer was not taken away, his reinstatement is not left to stand upon the action of a court-martial, because the order of dismissal, it is declared, shall be void if a court-martial be not convened. Nor does the act contemplate any execution of a sentence of a court-martial, if convened. It declares that the order of dismissal "shall be void" if the court-martial does not award dismissal or death, but implies that the President's order shall stand if the court-martial's sentence should call for severer punishment. In other words, the effect upon the order of dismissal is the same, whether the court-martial be not convened or, being convened, award a different punishment than mere dismissal. (*Wallace v. U. S.*, 55 Ct. Cls., 396, 403.)

**Article prospective only.**—The phrase in section 1230, Revised Statutes (corresponding to art. 37, A. G. N.), "any officer dismissed," is prospective only in its meaning, and an officer dismissed without court-martial in 1863, by order of the President, held not entitled to a trial upon his application therefor in 1878. (16 Op. Atty. Gen., 599.)

**Time for making application for trial.**—Though no time is limited in the act for making the application for a court-martial, the general rule of law would require the claim to be made within a reasonable time. It is not reasonable to wait until the statute of limitations has run against the offense, witnesses have disappeared, and memory failed; or until we may naturally expect these things to have occurred. (17 Op. Atty. Gen., 13, 20.)

When an officer of the Army claims that he has been illegally dismissed or dropped from the rolls, and seeks the benefit of section 1230, Revised Statutes (corresponding to art. 37, A. G. N.), he must make his application thereunder for trial by court-martial within a reasonable time after dismissal, or his acquiescence will be presumed. Long delay, by changes, promotions, and appointments, may work great confusion in the Army Register and great injury to many officers. Witnesses disappear, and facts are forgotten. A delay of nine years in asking for a trial was unreasonable, and the officer in such case must be presumed to have acquiesced in the order of the President. (*Newton v. U. S.*, 18 Ct. Cls., 435.)

**Officer dropped from the rolls.**—The act of March 3, 1865, section 12 (now art. 37, A. G. N.), was passed while the war was flagrant, and while the President had authority under the act of July 17, 1862, section 17 (12 Stat., 596), "to dismiss and discharge from the military service, either in the Army, Navy, Marine Corps, or volunteer force, in the United States service, any officer for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismissal would promote, the public service." Neither said act of March 3, 1865, nor that of July 13, 1866, section 5 (now art. 36, A. G. N.), applies to cases expressly and specifically provided for by subse-

quent legislation authorizing the President to drop from the rolls officers absent from duty without leave for three months. (17 Op. Atty. Gen., 13, 19; see note to art. 36, A. G. N.)

**Officer superseded by appointment of successor.**—Where an officer was dismissed by the President without trial, and his successor appointed, by and with the advice and consent of the Senate, the officer can not thereafter claim the pay of his office on the ground that the President failed to grant his request for trial by court-martial, except, possibly, for the short period elapsing between the date of the President's order of dismissal and the date of the new appointment. (*Wallace v. U. S.*, 55 Ct. Cls., 396, 401.)

**Pay of officer dismissed without trial.**—Since the restoration of an officer who has been lawfully dismissed from his office requires a new appointment, it would seem that the act (embodied in art. 37, A. G. N.) does not in any event affect the office that was held, or entitle him to its emoluments. (*Wallace v. U. S.*, 55 Ct. Cls., 396, 404.)

A retired naval officer was dismissed from the Navy by order of the President on December 30, 1865. In May, 1876, upon his application for trial by court-martial, made under section 12 of the act of March 3, 1865 (art. 37, A.

G. N.), a court was awarded which in June, 1876, pronounced him innocent of every charge and specification, and the dismissal being thereby annulled he was ordered, June 5, 1876, to be restored to the retired list. Between the date of his dismissal and the date of his restoration he had not demanded in writing from the Secretary of the Navy, as often as once in six months, a trial; but pay was claimed by him for that period. *Held*, that the right of the claimant to pay is governed by section 2 of the act of June 22, 1874, chapter 392 (quoted above under this article), under the provisions of which he is not entitled to more than "pay as on leave for six months from the date of dismissal." It was competent to Congress to modify, in the matter of pay, the effect of a restoration under the act of 1865. (15 Op. Atty. Gen., 569.)

**Similar law for Army repealed.**—The right of the President to dismiss an officer of the Army in time of war, in so far as it may have been limited by section 1230, Revised Statutes (corresponding to art. 37, A. G. N.), is now unimpaired, as the latter section has been superseded by the articles of war enacted August 29, 1916 (39 Stat., 651, 669). (*Wallace v. U. S.*, 55 Ct. Cls., 396.)

#### Art. 38. [General courts-martial; convening authority. Superseded.]

This article provided as follows:

"ART. 38. General courts-martial may be convened by the President, the Secretary of the Navy, or the commander-in-chief of a fleet or squadron; but no commander of a fleet or squadron in the waters of the United States shall convene such court without express authority from the President."—(17 July, 1862, c. 204, s. 1, art. 11, v. 12, p. 603.)

It was superseded by act of February 16, 1909, section 10 (35 Stat., 621), as follows: "That general courts-martial may be convened by the President, by the Secretary of the Navy, by the commander in chief of a fleet or squadron, and by the commanding officer of any naval station beyond the continental limits of the United States."

Further amendment was made by act of August 29, 1916 (39 Stat., 586), which provided as follows: "When empowered by the Secretary of the Navy, general courts-martial may be convened by the commanding officer of a squadron, of a division, of a flotilla, or of a larger naval force afloat, and of a brigade or larger force of the naval service on shore beyond the continental limits of the United States: *Provided*, That in time of war, if then so empowered by the Secretary of the Navy, general courts-martial may be convened by the commandant of any navy yard or naval station, and by the commanding officer of a brigade or larger force of the Navy or Marine Corps on shore not attached to a navy yard or naval station."

The act last cited further provided that "when a force of marines is embarked on a naval vessel, or vessels, as a separate organization, not a part of the authorized complement thereof, the authority and powers of the officers of such separate organization of marines shall be the same as though such organi-

zation were serving at a navy yard on shore, but nothing herein shall be construed as impairing the paramount authority of the commanding officer of any naval vessel over the vessel under this command and all persons embarked thereon."

It was also provided by the act last cited that "all officers of the Navy and Marine Corps who are authorized to order either general or summary courts-martial may order deck courts upon enlisted men under their command, and shall have the same authority to inflict minor punishments as is conferred by law upon the commander of a naval vessel." (See art. 24, A. G. N., as to punishments by commanding officers; and see act Feb. 16, 1909, 35 Stat., 621, as to deck courts.)

**Courts-martial for trial of midshipmen.**—See laws and decisions noted under section 1519, Revised Statutes.

**Statutory authority necessary to convene courts.**—It belongs exclusively to Congress to ordain or provide for courts-martial, to define their jurisdiction, to make their sentences final and conclusive or subject to some revisory power, to designate by whom they shall be convened and by whom their sentences shall be revised or confirmed, and generally to make such provision concerning them as they deem proper. It follows from the exclusive power of Congress over the subject that no one can have any authority, either to convene a court-martial or to affirm or disaffirm its decision, unless it can be shown that such authority has been delegated by Congress. (5 Op. Atty. Gen., 508.)

The objection that the officer who convened the court was not empowered by the President to do so, as required by the statute then in force, if well taken, is jurisdictional. (*U. S. v. Smith*,



197 U. S., 386, 392. See note to art. 53, A. G. N. as to effect of jurisdictional defects.)

Where an officer in 1865 was sentenced by court-martial, *inter alia*, to be dismissed from the service, and the sentence was approved and executed by order of the commanding general by whom the court was convened, *held* (in 1882) that the court was illegally constituted, and the findings and sentence therefore null and void, for the reason that the convening authority had no power to appoint said court if he were disqualified by the fact that he was himself the "accuser or prosecutor" who was forbidden by the articles of war to convene a court in such case. (17 Op. Atty. Gen., 436. See note to art. 39, A. G. N., as to courts illegally constituted; see note to art. 53, A. G. N., as to jurisdictional defects; and see note to art. 10, A. G. N., as to acquiescence in dismissal.)

**President's power not dependent on statute.**—It is within the power of the President, as Commander in Chief, to convene a general court-martial even in cases where he is not expressly authorized to do so by statute. (*Swaim v. U. S.*, 165 U. S., 553, 556.)

As Commander in Chief the President is authorized to give orders to his subordinates, and the convening of a court-martial is simply the giving of an order to certain officers to assemble as a court, and when so assembled to exercise certain powers conferred upon them by the articles of war. (*Swaim v. U. S.*, 165 U. S., 553, 556, citing *Runkle v. U. S.*, 19 Ct. Cls., 396, 409. See 15 Op. Atty. Gen., 297-303, for complete note on this subject.)

**Evidence of convening authority's power.**—A recital in the precept forming part of the record of a naval court-martial that it was convened by virtue of express authority vested in the officer convening the same by the President of the United States is sufficient evidence of such authority in habeas corpus proceedings. (*In re Crain*, 84 Fed. Rep., 788.)

The designation of an officer in the proceedings of a naval court-martial as "Commander in Chief, U. S. Naval Forces, North Atlantic Station," raises the presumption, under the Navy Regulations, that he was in command of a fleet or squadron and was therefore a proper officer to convene the court. (*In re Crain*, 84 Fed. Rep., 788.)

Under the law authorizing certain officers of the Army to convene courts-martial when empowered by the President, *held* that a general order of the President lodging this power in the commanders of designated military camps is judicially noticed as part of the law of the land, and the legality of a court-martial established under it is not affected by omission to refer to it in the order convening the court-martial. (*Givens v. Zerbst*, 255 U. S., 11, affirming *ex parte Givins*, 262 Fed. Rep., 702.)

See note to article 52, A. G. N., under "Omission of record to show jurisdictional facts."

**Changes in convening order.**—The original order directed the court to convene on board the U. S. S. *Maine* at 10 a. m., on Monday, January 11, 1897, or as soon thereafter as practicable; subsequently, on January 22, the convening authority issued a second order directing that the court convene on board the U. S. S. *Montgomery* as soon as practicable after her arrival at Hampton Roads. The court met on January 25, 1897. We are unable to discover any illegality or anything that was prejudicial to the accused in changing the date of trial. (*In re Crain*, 84 Fed. Rep., 789; see notes to arts. 39, 46, and 47, as to personnel of courts-martial.)

**Convening authority outside his command.**—In the absence of legislation or of orders from competent authority to the contrary, personal presence within the territorial limits of his command is not essential to the validity of an order given by an officer appointing a court-martial within such limits. He may appoint general courts-martial and act upon the record of proceedings of the same when outside the territorial limits of his command. Whether there may be exceptions to the foregoing, growing out of special circumstances attending absence, can be best determined when those circumstances arise. The ground of this opinion is that there is at present nothing else to indicate the will of the President or other superior authority that the functions of commanding officers should be so limited. (16 Op. Atty. Gen., 678.)

**When courts convened.**—This power may be exercised on information received by the officer invested with it from his own sense of official duty, or on the application of other persons accompanied by charges which such officer may deem sufficient to require a trial. (4 Op. Atty. Gen., 410.)

General courts-martial have been convened by the Secretary of the Navy upon resolution of the House of Representatives requesting the trial of designated officers. (See, e. g., G. O. 156, May 24, 1870, publishing case of Commander John H. Upshur, U. S. N.)

**"Waters of the United States" construed.**—The provision in article 38 of section 1624, Revised Statutes, that no commander of a fleet or squadron "in the waters of the United States" shall convene a general court-martial without express authority from the President, was enacted in 1862, and will be construed as intending to apply to waters within the continental limits of the United States, and not to waters in the territory beyond seas (Philippine Islands) acquired since the passage of that act, and the acquisition whereof was not contemplated at that time. (*U. S. v. Smith*, 197 U. S., 386.)

**Art. 39. [General courts; constitution of.]** A general court-martial shall consist of not more than thirteen nor less than five commissioned officers as members; and as many officers, not exceeding thirteen, as can be convened without injury to the service, shall be summoned on every such court. But in no case, where it can be avoided without injury to the service, shall more than

one-half, exclusive of the president, be junior to the officer to be tried. The senior officer shall always preside and the others shall take place according to their rank.—(17 July, 1862, c. 204, s. 1, art. 11, v. 12, p. 603. *Wise v. Withers*, 3 Cr., 337. *Dynes v. Hoover*, 20 How., 81, 84.)

Commissioned officers of the Naval Reserve Force, Marine Corps Reserve, Coast Guard, Lighthouse Service, Coast and Geodetic Survey, and Public Health Service are empowered to serve on naval courts-martial when actively serving under the Navy Department in time of war or emergency as part of the naval forces of the United States. (Act Oct. 6, 1917, 40 Stat., 393.)

Rank and precedence of officers associated together on duty: See sections 1485, 1486, and 1489, Revised Statutes.

**Number of members.**—The execution of a sentence of death is murder unless the court pronouncing it consisted of 13 commissioned officers, where that number could have been convened without manifest injury to the service. (1 Op. Att'y. Gen., 296.)

A court-martial which consisted of five members only was not a legal court if 13 could have been convened without manifest injury to the service. The language of the law does not provide that the court shall consist of 13 members where that number can be "conveniently" convened; but where they can be convened at all, not only without probable injury but without "manifest" injury to the service. (1 Op. Att'y. Gen., 296, construing Army law.)

It is difficult to conceive an emergency in time of peace so pressing as to disable the general officer who orders the court from convening 13 commissioned officers on a trial of life and death, "without manifest injury to the service." (1 Op. Att'y. Gen., 296.)

*Suggested*, that in every case of life and death, at least, the President ought to be satisfied of the manifest injury which the service would have sustained in convening a court of 13 before he gives his sanction to a sentence of death by a smaller number. (1 Op. Att'y. Gen., 296.)

Although naval courts-martial shall have been organized with five members only, under the orders appointing them, their sentences are not invalid for that reason. Although the Navy article, reading, "without injury to the service," is not in the same words as the article of war, they contain substantially the same provisions in relation to general courts-martial; and the discretion vested in the officer appointing the court to regulate the number by the exigencies of the public service is obviously of the same character in both cases. The Supreme Court have declared that the language used in the article of war is merely directory to the officer appointing the court, and his decision as to whether that number can be convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive. The discretion vested in the officer appointing a naval court-martial, being of the same character, his decision must be equally conclusive. (2 Op. Att'y. Gen., 534, citing *Martin v. Mott*, 12 Wheat., 34, 35.)

Objection to a naval court-martial, because consisting of only nine members, must be taken

during the trial as only involving the question of fact whether a greater number of officers could have been detailed without injury to the service, and not being a ground of nullity. (6 Op. Att'y. Gen., 369.)

This objection is matter, not of nullity in the face of the record but of possible error merely, depending on a question of fact, viz, what number of officers could have been summoned "without injury to the service"? That question of fact was required to be raised at the time, in order that the court or the President of the United States might judge and decide thereon, as they or he had the power to do. If raised at the time, the decision of the court, or certainly of the President in approving the sentence, would have been final and conclusive on the point. (6 Op. Att'y. Gen., 369; see note to art. 53, A. G. N., as to irregularities and fatal defects.)

The number of persons detailed to constitute a court-martial, provided it do not fall below the minimum number of five prescribed by the statute, is a matter of discretion within the lawful authority of the officers appointing the court. (6 Op. Att'y. Gen., 506.)

Article 39, A. G. N., which requires that as many officers not exceeding 13 as can be convened without injury to the service shall be summoned on every general court-martial was fully complied with in this case. Admiral Bunce in his letter to Capt. Wise designated eight officers who were to compose the court, and this communication expressly stated that no other officers could be summoned without manifest injury to the service. The order of Admiral Bunce to Capt. Wise designating the members of the court was a summons, within the meaning of the statute. The fact that Admiral Bunce subsequently, in another letter to Capt. Wise, substituted Lieut. Berry in place of Lieut. Comly as a member of the court-martial, is immaterial. (In re Crain, 84 Fed. Rep., 788.)

It is very clear that the article of war providing that general courts-martial shall "consist of not less than 13, where that number can be convened without manifest injury to the service," is merely directory to the officer appointing the court; and that his decision as to the number which can be convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive. (*Martin v. Mott*, 12 Wheat., 19, 35.)

It is a question for the officer convening the court to determine whether more members could be convened without injury to the service; and his action in this respect can not be attacked collaterally, and if the accused express satisfaction with the court-martial as constituted, it is a clear waiver of any objection to its personnel. (*Bishop v. U. S.*, 197 U. S., 334.)

The rank and number of members of a court-martial must necessarily be, and is, left somewhat to the discretion of the officer convening the



court. There is nothing in this case to indicate an abuse of discretion, or that a larger number of officers might have been convened without injury to the service, although if the accused had taken prompt advantage of the defect it might have been necessary to show that a larger number could have been obtained. His expressed satisfaction with the court as constituted was a clear waiver of any objection to its personnel. (*Bishop v. U. S.*, 197 U. S., 334, 340.)

Under the articles of war which provide that a court-martial shall be composed of not less than five officers and must be composed of 13, when so many may be convened without manifest injury to the service, *held* that the fixing of the number within those limits, with reference to the conditions of the service, is an act of executive discretion not subject to judicial review. (*Kahn v. Anderson*, 255 U. S., 1, citing *Martin v. Mott* and *Bishop v. U. S.*, above noted. The court in this case was composed of eight members, the order certifying that more than that number could not be convened without manifest injury to the service; and the legality of the organization of the court and its jurisdiction were at once challenged.)

See note to article 46, A. G. N., as to absence of members during the trial; note to article 38, A. G. N., as to fatal defect in convening court-martial; and note to article 53, A. G. N., as to irregularities not fatal.

**Supernumerary members.**—See note to article 47, A. G. N., under “Member absent at commencement of proceedings.”

**Rank of members.**—See note to article 45, A. G. N., as to absence of member resulting in more than one-half of the remaining members, exclusive of the president, being junior to the accused.

The fact that one of the officers composing a court-martial is junior in rank and another inferior in grade to the accused, does not of itself render either of them incompetent to sit. (17 Op. Atty. Gen., 397.)

When the commander in chief of a squadron not in the waters of the United States convenes a court-martial to try an officer attached to the squadron, more than one-half of whose members are junior in rank to the accused, the courts of the United States will assume, when his action in this respect is attacked collaterally, and nothing to the contrary appears on the face of the order convening the court, that he properly exercised his discretion and that the trial of the accused by such a court could not be avoided without inconvenience to the service. (*Mullan v. U. S.*, 140 U. S., 240. In the order convening the court in this case it was stated: “No other officers than those named can be assembled without manifest injury to the service.” When the court convened, the accused objected and protested to being tried by the court, because five of its seven members were his juniors. At the time of the organization of the court there were 12 naval officers superior in rank to the accused on waiting orders in the city of Washington. He was sentenced to dismissal and the sentence confirmed by the President. He brought suit two years after dismissal to recover pay on the ground that the action of the court-martial was void. Judgment was rendered against him.)

In detailing officers to compose a court-martial the presumption is that the convening authority acts in pursuance of the law; and the sentence of the court can not be collaterally attacked by going into an inquiry as to whether the trial by officers inferior in rank to the accused was or was not avoidable, even though the record does not affirmatively disclose that the appointment of officers inferior in rank to the accused was unavoidable by reason of some necessity of the service. Several considerations might have determined the selection of the members of the court, such as the health of the officers within convenient distance or the injury to the public interests by detaching officers from their stations. (*Swain v. U. S.*, 165 U. S., 553, 559.)

**What officers eligible as members.**—Undergraduates at the Military Academy, West Point, are in the eye of the law not commissioned officers, but warrant officers, and are not therefore eligible to sit as members of an Army court-martial. (7 Op. Atty. Gen., 323, 328.)

The legal condition of undergraduate cadets at the Military Academy appears from the law and regulations to be in some respects analogous to that of midshipmen in the Navy. (7 Op. Atty. Gen., 323, 329.)

Whether or not the words “commissioned officers,” as used in the articles of war relating to the constitution of courts-martial, include all commissioned officers, it is at least certain that they exclude all persons who are not commissioned officers. (7 Op. Atty. Gen., 323, 330.)

Chaplains, surgeons, pursers, and all other noncombatant officers are incompetent to officiate as members of naval courts-martial. (2 Op. Atty. Gen., 297.)

Under Army statutes a cadet graduated from the Military Academy, if no vacancy existed to which he could be appointed in a particular corps, was attached to such corps by brevet of the lowest grade, as a supernumerary officer, until a vacancy should happen, when he was to receive his line commission. When so brevetted as a second lieutenant and attached as a supernumerary officer to some corps of the Army, such graduated cadet, while in this intermediary state, was a “commissioned officer” within the meaning of the articles of war prescribing who shall be members of a general or regimental court-martial. (7 Op. Atty. Gen., 323, overruling 2 Op. Atty. Gen., 251. As to status of brevet officers, see note to sec. 1604, R. S.)

Volunteer naval officers appointed under the act of July 24, 1861, for the temporary increase of the Navy, were “commissioned officers” and competent to serve on general courts-martial. (10 Op. Atty. Gen., 522. The volunteer officers referred to were “acting” officers appointed by the Secretary of the Navy under the act of July 24, 1861, sec. 2, 12 Stat., 272, and were held by the Attorney General not to be “officers” within the meaning of art. 36, A. G. N.; see note to that article.)

The word “commissioned” is used in the Articles for the Government of the Navy only to indicate the rank of officers capable of serving on a general court-martial, and to

distinguish them from noncommissioned officers and petty officers, terms well understood in the Navy and the country. (10 Op. Att'y. Gen., 522.)

The appointment of an officer may, indeed, be temporary, but as long as it lasts he is, to all intents and purposes, an officer of the Navy; and he is as fully commissioned as any other officers of the Navy are to perform all naval services and duties appropriate to his rank. (10 Op. Att'y. Gen., 522.)

**Minority of member.**—The minority of some of the members of a court-martial is not available as an objection to the validity of its proceedings. Whatever effect minority of a junior would have at common law upon the verdict, it has nothing to do with the action of a court-martial which exists by virtue of statutes and regulations conformable thereto. (16 Op. Att'y. Gen., 550.)

**Retired officers.**—Retired officers and officers of the United States Guards are competent, under the articles of war, to sit on courts-martial as officers "in the military service of the United States"; the former because they are officers in the military service of the United States, and because the order assigning them to the court was within the authority conferred by the act of April 23, 1904 (33 Stat., 264), which provides that "the Secretary of War may assign retired officers of the Army, with their consent, to active duty \* \* \* upon courts-martial." The latter because, under sections 1 and 2 of the selective service act of May 18, 1917 (40 Stat., 77), and regulations of the President thereunder, the United States Guards were a part of the Army of the United States, and these officers were therefore competent to be assigned to court-martial duty. (*Kahn v. Anderson*, 255 U. S., 1; see note to art. 52, A. G. N., under "Omission of record to show jurisdictional facts.")

**Changes in membership by Bureau of Navigation.**—The conviction by a general court-martial can not be ratified or confirmed by the Secretary of the Navy where one member of the court was relieved, and another member substituted in his stead, by the Chief of the Bureau of Navigation, without authority of the Secretary of the Navy by whom the court was convened. Trial by a court-martial not legally constituted is not a trial which can be said to be "due process of law." (22 Op. Att'y. Gen., 137; see note to art. 53, A. G. N., as to irregularities and fatal defects.)

**New trial; former members ineligible.**—The officers who sat upon the first trial should all be excluded from the second trial. They have formed and expressed opinions upon the case which would disqualify them from service as jurors in a criminal case in a common-law court; and there is no reason why, under the same circumstances, officers should not be excluded from a court-martial and especially as they are the triers of the facts as well as the law. (3 Op. Att'y. Gen., 396.)

**Challenge of member.**—The decision of a court-martial in overruling an objection made by the accused to an officer sitting on the trial whom the accused in the performance of his official duty on several occasions severely criticised for official reports, and whose enmity and

dislike had been thereby incurred, could not be reviewed by the civil courts in a collateral action by the accused for the pay of his office. (*Swaim v. U. S.*, 165 U. S., 553, 560. See note below, under "Court illegally constituted"; and see note to art. 53, A. G. N., as to review of errors by civil courts.)

**Court illegally constituted.**—Where a court-martial is illegally constituted, all of the members thereof being incompetent by statute to sit thereon for the trial of the case before it, the invalidity of the court can be raised by habeas corpus. The judgment, even after approval of the officers provided by statute, is that of a court of limited jurisdiction only, whose judgments may be attacked collaterally. The question is one of jurisdiction simply. If the court-martial had jurisdiction over the subject matter of the charge and of the person of the accused, or if his consent gave such jurisdiction, the writ of habeas corpus will afford no relief, for generally in such case any error committed by a court-martial regularly organized and with full jurisdiction is not assailable before the civil courts. But where the court is illegally constituted, it has no jurisdiction over the person of the accused or of the subject matter of the charge against him, and his consent could confer none in opposition to the statutory requirement for members of a court-martial, convened to try him. (*McClaghry v. Deming*, 186 U. S., 49, 68, affirming 113 Fed. Rep., 639.)

The consent of the accused can not confer jurisdiction upon a court not possessing it by virtue of statutory authority. (22 Op. Att'y. Gen., 137.)

By the articles of war it was provided that "officers of the Regular Army shall not be competent to sit on courts-martial, to try the officers or soldiers of other forces," with an exception referring to officers of the Marine Corps detached for service with the Army: *Held*, that the trial of an officer of volunteers by a court-martial all the members of which were officers of the Regular Army was illegal, and the objection to it could be taken on habeas corpus. (*McClaghry v. Deming*, 186 U. S., 49, affirming 113 Fed. Rep., 639.)

A court-martial is the creature of statute, and must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction. As to the officer to be tried, there was no court. No challenge of the members was necessary, for there was no court to hear and dispose of the challenge. It is unlike an officer who might be subject to challenge as under some bias. A failure to challenge in such a case might very well be held to waive the defect and the officer could sit and the finding of the court-martial be legal. In this case it is an objection that the whole court as a court was illegally constituted, because in violation of the express provision of statute, and the challenge to the whole court is not provided for by the statute. (*McClaghry v. Deming*, 186 U. S., 49, affirming 113 Fed. Rep., 639.)

Where a court is illegally constituted, none of the members being competent to sit thereon, it can not be said that the defendant waived the question of invalidity by not objecting to being tried by it. His consent could no more give



jurisdiction to the court, either over the subject matter or over his person, than if it had been composed of a like number of civilians or of women or of privates. (*McLaughry v. Deming*, 186 U. S., 49, 66, affirming 113 Fed. Rep., 639.)

The articles of war provided that "officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces." A court-martial for the trial of a volunteer officer was composed of five members one of whom was an officer of the Regular Army who also held a commission as an officer of volunteers under which he was serving at the time, having been granted indefinite leave of absence from the Regular Army while so serving: *Held*, that the language of the article is peremptory; that the officer in question was not competent to sit on a court-martial to try a volunteer officer; and that, as without him there would have been an insufficient number, there was no court and the sentence of dismissal was void. (*U. S. v. Brown*, 206 U. S., 240, affirming 41 Ct. Cls., 275. Compare, *Brown v. Root*, 18 App. D. C., 239.)

**Member of court as witness.**—Where the accused was tried and convicted by a general court-martial on three distinct charges, one of which had been preferred by a member of the court who testified as a witness in support of the same and afterwards sat upon the trial, no objection being made thereto by the accused, and the sentence of the court was duly confirmed, *held*, that the fact that a member of the court sat upon the trial after testifying did not render its proceedings invalid or make its sentence void and inoperative. (15 Op. Atty. Gen., 432.)

The objection, where it is not distinctly waived by the accused, goes to the propriety of the member sitting after he had testified, not to his legal capacity to sit; and if seasonably made it would afford good grounds for disapproval of the proceedings by the reviewing officer, though not of itself sufficient to invalidate them. (15 Op. Atty. Gen., 432.)

For other cases see note to Constitution, sixth amendment, under "IV. Impartial trial"; and see *Keyes v. United States* (109 U. S., 336), cited in note to article 53, A. G. N., under "Jurisdiction of civil courts."

**Art. 40. [Oaths of members and judge-advocate.]** The president of the general court-martial shall administer the following oath or affirmation to the judge-advocate or person officiating as such:

"I, A B, do swear (or affirm) that I will keep a true record of the evidence given to and the proceedings of this court; that I will not divulge or by any means disclose the sentence of the court until it shall have been approved by the proper authority; and that I will not at any time divulge or disclose the vote or opinion of any particular member of the court, unless required so to do before a court of justice in due course of law."

This oath or affirmation being duly administered, each member of the court, before proceeding to trial, shall take the following oath or affirmation, which shall be administered by the judge-advocate or person officiating as such:

"I, A B, do swear (or affirm) that I will truly try without prejudice or partiality, the case now depending, according to the evidence which shall come before the court, the rules for the government of the Navy, and my own conscience; that I will not by any means divulge or disclose the sentence of the court until it shall have been approved by the proper authority; and that I will not at any time divulge or disclose the vote or opinion of any particular member of the court, unless required so to do before a court of justice in due course of law."—(17 July, 1862, c. 204, s. 1, art. 12, v. 12, pp. 603, 604.)

**Judge advocate.**—See notes to sections 189 and 362, Revised Statutes.

According to the law regulating courts-martial the judge advocate is the official prosecutor; and in cases arising in the Navy he is, by custom, either a naval officer specially designated or a lawyer employed for that purpose. However, *held*, that where the case before the court-martial is of such a character as to render it expedient that the proceeding be conducted by a lawyer, the Secretary of the Navy is not at liberty to employ counsel, but should call upon the Department of Justice to supply an officer for the service. (13 Op. Atty. Gen., 514.)

The head of the Navy Department can not, consistently with the provisions of section 17 of the act of June 22, 1870 (sec. 189, R. S.), employ an attorney or counsellor at law to conduct proceedings before a naval court-martial. (14 Op. Atty. Gen., 13, affirming 13 Op. Atty. Gen., 515.)

Special counsel may be employed by the Attorney General, at the request of the Secretary of the Navy, to assist the judge advocate in a trial by court-martial—the compensation of such counsel (in the absence of other provision) to be paid from the appropriation for the contingent expenses of the Navy. Such

counsel should be commissioned by the Attorney General under section 366, Revised Statutes. (18 Op. Atty. Gen., 135.)

A judge advocate need not be a professional person. His qualifications must, of course, be of the sort required by members of the bar, but there is no law limiting choice of judge advocates, or of their assistants when needed, to that class. Although there is no statutory provision in regard to naval judge advocates like that for those of the Army, to the effect that they shall belong to the Navy, yet in fact this is generally the case. Such assistants for judge advocates might be detailed from the same branch of the service, or, indeed, specially intelligent persons might be selected from any line of civil life. (18 Op. Atty. Gen., 135, 137.)

**Prosecutor; evidence; closing argument.**—As to the right of a private prosecutor, there is a diversity between military and naval courts-martial, the former allowing and the latter rejecting it. (2 Op. Atty. Gen., 286.)

The judge advocate has the right of a reply in a military trial, and so has the accuser when acting as prosecutor; but such reply ought to be a commentary on the evidence introduced by the prisoner, and on his remarks in enforcing it, or in arraigning the testimony offered in support of the prosecution. No new matter ought to be introduced at this stage of the trial without the special leave of the court, and then it should be supported by witnesses, and the prisoner should be allowed to rejoin and remark upon such new matter. Especially, the prosecutor ought not to be permitted, under color of replying to the prisoner's defense, to give additional testimony at this stage of the trial, and by a statement of the facts made when the prisoner has not the opportunity to cross-interrogate him and which he had not made when sworn as a witness, to attempt to explain or contradict what has been previously given in evidence. (2 Op. Atty. Gen., 286.)

After the officer upon whose information the charges and specifications were preferred has given his testimony before a naval court-martial, he may be permitted to remain in court as the prosecutor, to aid by his suggestions the judge advocate in bringing out the evidence. (3 Op. Atty. Gen., 714.)

There can be no doubt as to the competency of the evidence of the prosecutor. How far his credibility may be affected by the relation in which he stands toward the accused is a question of discretion for the court itself. (3 Op. Atty. Gen., 714.)

It is settled law in England that the prosecutor, after giving evidence, may remain in court to conduct the prosecution. This, in the absence of uniform practice to the contrary, is the rule to be followed by our courts-martial. (3 Op. Atty. Gen., 714.)

**Irregularity in administering oaths.**—Where at the organization of a naval court-martial each member of the court was first sworn by the judge advocate, who was then sworn by the president of the court, instead of the oath being first administered by the president to the judge advocate and then by the latter to each member of the court, as prescribed by the act of July 17, 1862 (12 Stat., 603, 604), which reversed the order required by

the previous act of April 23, 1800 (2 Stat., 50): *Held*, that notwithstanding the irregularity in the order of administering the oaths, the proceedings of the court must now be held valid. (13 Op. Atty. Gen., 374.)

No objection appears to have been made at the time. The accused submitted himself to the jurisdiction of the court. The sentence of dismissal was duly executed. The irregularity was not so material as to render the whole proceedings void, especially when no exception was taken at the time. There are many sorts of exceptions sustainable if taken at the time, but which come too late after the completion of the trial. Such is the case here. (13 Op. Atty. Gen., 374.)

See note to article 53, A. G. N., as to irregularities and fatal defects.

**Judge advocate not sworn.**—The objection that the judge advocate was not sworn goes to the construction and organization of the court. (3 Op. Atty. Gen., 396.)

Judge advocates of naval courts-martial are required to be sworn; and where the proceedings of such courts do not show that they were it may be properly considered that the fact does not exist and that they were not sworn; and that therefore the proceedings were illegal and void. (3 Op. Atty. Gen., 396; See note to art. 52, A. G. N., as to omissions in record.)

The duties of the judge advocate are very important; he is to keep the record of the evidence given and the proceedings of the court; and upon this evidence and the proceedings as recorded by him the fate of the accused is ultimately to be decided. His fidelity should be secured by at least the usual sanctions. In addition to which, Congress has given the form of oath to be administered by the president of the court to the judge advocate before proceeding to trial. (3 Op. Atty. Gen., 396.)

It is fatal error in proceedings before courts-martial for the president to omit an oath or affirmation to the judge advocate before proceeding to trial. (3 Op. Atty. Gen., 544.)

The articles for the government of the Navy distinctly require that the president of every court-martial shall administer a certain oath or affirmation therein set forth to the judge advocate before proceeding to trial. The justice and propriety of this, whether the prosecution of the accused or his defense is considered, are not less apparent than its necessity in point of law. There is nothing whatever in the record which gives reason to believe that this requisition was complied with in the present case. Accordingly, *held* that its omission is fatal. (3 Op. Atty. Gen., 544.)

Objections were made to the action of a court-martial in that, among other things, it permitted a person to act as judge advocate who was not appointed by the convening officer of the court-martial nor sworn to the faithful performance of his duty. *Held*, that such questions were merely those of procedure, and the court-martial having jurisdiction of the person accused and of the offense charged, and having acted within the scope of its lawful powers, its proceedings and sentence can not be reviewed or set aside by the civil courts. (*Swaim v. U. S.*, 165 U. S., 553, 561.)



See note to article 53, A. G. N., as to irregularities and fatal defects; and note to article 52, A. G. N., under "Omission of record to show jurisdictional facts."

**Whether oath should be repeated in each case.**—See note to article 58, A. G. N., as to courts of inquiry.

Where a general court-martial was convened for the trial, generally, of such persons as might be brought before it, but the warrant for the court was accompanied with a specification of certain persons who were to be tried, with a reference to the charges to be exhibited against them, a renewed administration of the oath was not necessary before the trial of an officer so specially named. As to others, if the action of the court in trying them without reswearing the court conformed to the general practice in the Navy, the proceedings may be considered legal on the ground of such precedents. If this practice is disapproved by the department, it may be controlled prospectively by an order enjoining the administration of the oath in each case. (2 Op. Atty. Gen., 297.)

In the absence of any practice or precedent upon the subject, it would appear that the words of the law imply that the oath is to be taken in every case; and the omission to do so would render the proceedings invalid and void. (2 Op. Atty. Gen., 460.)

If, however, it has been the usage of naval courts-martial to take the oath but once, and this practice has been sanctioned by the Gov-

ernment, such usage and practice should be regarded as sufficient evidence of the construction given to the law in question by the proper authorities, and that the oath directed to be taken was held by them to apply to all cases that should come before the court. The sentence, in that event, might be sustained on the ground that the law in question had in like cases received a construction to which the court conformed in their proceedings. (2 Op. Atty. Gen., 460.)

The whole question is one of form, and no injustice is done by either interpretation. For if the oath is in practice to be taken but once, it must be on the ground that it applies to all cases that may come before the court. The accused has, therefore, upon this construction, the same security and the same hold on the conscience of the court that he would have if the oath were taken in his particular case. (2 Op. Atty. Gen., 460.)

**Obligation of secrecy.**—The obligation assumed under oath by the members of a naval court-martial to keep secret the sentence of the court is entirely removed, by the very terms of the oath, when that sentence has been approved by the proper authority; and even the vote or opinion of any particular member of the court may be divulged without a violation of duty when the party is required to disclose it before a court of justice in due course of law. (11 Op. Atty. Gen., 137, 141.)

**Responsibility for correctness of record.**—See note to article 52, A. G. N.

**Art. 41. [Oath of witness.]** An oath or affirmation in the following form, shall be administered to all witnesses, before any court-martial, by the president thereof:

"You do solemnly swear (or affirm) that the evidence you shall give in the case now before this court shall be the truth, the whole truth, and nothing but the truth, and that you will state everything within your knowledge in relation to the charges. So help you God; (or 'this you do under the pains and penalties of perjury.')"—(17 July, 1862, c. 204, s. 1, art. 14, v. 12, p. 604.)

**Witness not properly sworn.**—See note to article 53, A. G. N., under "Irregularities and fatal defects."

**Compelling attendance of witnesses.**—See note to article 42, A. G. N.

**Art. 42. [Evidence; witnesses; perjury; contempt.]** Whenever any person refuses to give his evidence or to give it in the manner provided by these articles, or prevaricates, or behaves with contempt to the court, it shall be lawful for the court to imprison him for any time not exceeding two months.—(17 July, 1862, c. 204, s. 1, art. 13, v. 12, p. 604.)

Amendment to this article was made by act of February 16, 1909, sections 11 and 12 (35 Stat., 621, 622), as follows:

"SEC. 11. That a naval court-martial or court of inquiry shall have power to issue like process to compel witnesses to appear and testify which United States courts of criminal jurisdiction within the State, Territory, or District where such naval court shall be ordered to sit may lawfully issue.

"SEC. 12. That any person duly subpoenaed to appear as a witness before a general court-martial or court of inquiry of the Navy, who willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or produce documentary evidence which such person may have been legally subpoenaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the

United States; and it shall be the duty of the United States district attorney, on the certification of the facts to him by such naval court, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than five hundred dollars or imprisonment not to exceed six months, or both, at the discretion of the court: *Provided*, That this shall not apply to persons residing beyond the State, Territory, or District in which such naval court is held, and that the fees of such witnesses and his mileage at the rates provided for witnesses in the United States district court for said State, Territory, or District shall be duly paid or tendered said witness, such amounts to be paid by the Bureau of Supplies and Accounts out of the appropriation for compensation of witnesses: *Provided further*, That no witness shall be compelled to incriminate himself or to answer any question which may tend to incriminate or degrade him."

Perjury before naval general court-martial.—See section 1023, Revised Statutes. See also note to article 8, A. G. N., under "Scandalous conduct tending to the destruction of good morals."

The use of depositions before naval courts-martial was authorized by act of February 16, 1909, section 16 (35 Stat., 622).

Use of court of inquiry records in evidence before courts-martial; see article 60, A. G. N.

**Compelling attendance of civilian witnesses.**—There was no law in 1859 authorizing an Army court-martial to compel the attendance of witnesses who were not in the military service. (9 Op. Atty. Gen., 311.)

Section 25 of the sundry civil appropriation act of March 3, 1863 (12 Stat., 754), embodied in section 1202, Revised Statutes, authorized "every judge advocate of a court-martial or court of inquiry" to issue like process to compel witnesses to appear and testify which courts of criminal jurisdiction within the State, Territory, or District where such "military courts" shall be ordered to sit may lawfully issue. *Held*, that said enactment of 1863 did not apply to naval courts-martial. The use of the words "military courts" seems to limit the effect of the act to courts-martial in the Army. (19 Op. Atty. Gen., 501.)

Articles 42 and 57, A. G. N., do not apply to civilian witnesses. Nothing in the way of control by courts-martial over civilians is to be taken in its favor by implication. (19 Op. Atty. Gen., 501.)

A naval court-martial or judge advocate thereof has no power to compel a civilian witness, who is not subject to the Articles for the Government of the Navy, to appear and testify before such court. (19 Op. Atty. Gen., 501, Feb. 26, 1890.)

The act of March 3, 1863 (above noted), empowered the judge advocate of an Army court-martial to issue a writ of attachment, a perfect, complete, and effective writ, to compel the attendance of a civilian witness. An attachment is directed to a sheriff or marshal and commands him to have the party named therein before the court, and differs from a subpoena

which is simply a summons addressed to witnesses and may be served upon them by anyone who is interested in their attendance. In issuing an attachment to compel the attendance of a civilian witness, the judge advocate may direct such process to such officers as are, by practice of the service, ordinarily charged with the duty of performing the executive business of military courts. The process is not complete; it is no process at all, unless directed to some one by whom it is to be executed. (12 Op. Atty. Gen., 501.)

**Fees must be paid or tendered.**—See act of February 16, 1909, quoted above under this article.

The act of March 2, 1901 (31 Stat., 950), which provides that a person who, being duly subpoenaed to appear as a witness before a general court-martial of the Army, willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which he may have been legally subpoenaed to produce, shall be deemed guilty of a misdemeanor, for which he may be punished on information in the district court of the United States, requires that the legal fees of such witness shall be first duly paid or tendered to him at the time of service of the subpoena, in order to lay the foundation for a prosecution under that act. A mere statement in the subpoena, signed by the judge advocate of the court-martial, to the effect that the United States tenders or guarantees the payment of the authorized fees, is not a sufficient compliance with that act to support a prosecution thereunder. (23 Op. Atty. Gen., 424.)

As to witnesses' fees in general, see sections 848-851, Revised Statutes, and notes thereto.

**Refusal to testify or produce documents.**—Where a civilian witness was brought before a court-martial of the Army, but refused to testify, the court was not invested with any inherent power to punish the witness for contempt. Such power can only be exercised when given to it by the positive terms of some statute. The law (sec. 1202, R. S.) armed the court with authority to compel the witness to appear and testify, so far as this could be done by process; but in securing his testimony the court was restricted to the means which it was thus authorized to employ. It could not inflict any punishment where the power to impose it was not clearly conferred by Congress. (18 Op. Atty. Gen., 278.)

Where a civilian subpoenaed in accordance with statute as a witness before an Army court-martial was advised by competent counsel that certain questions asked of him, if answered, might subject him to a civil or criminal prosecution for libel; and for this reason he refused to answer on advice of counsel, and not from any evil intent or with legal malice, his refusal did not constitute a violation of the statute. (U. S. v. Praeger, 149 Fed. Rep., 474.)

Where a civilian witness refused to answer certain questions because the answer might tend to incriminate him, the decision of the court-martial that the questions were proper was not conclusive on the civil courts of the question whether the witness was guilty of contempt in refusing to answer. (U. S. v. Praeger, 149 Fed. Rep., 474.)



Under the articles of war providing that a court-martial may punish at its discretion any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder, such court has no final jurisdiction over a civilian subpoenaed to testify before it, or power to punish him for contempt for refusing to testify. (*U. S. v. Praeger*, 149 Fed. Rep., 474.)

Where a witness subpoenaed to produce certain documents before an Army court-martial testified that he had destroyed the documents before service of the process, his failure to produce did not constitute a willful refusal to produce such documents within the statute making such act a misdemeanor. (*U. S. v. Praeger*, 149 Fed. Rep., 474.)

**Member of Congress as witness.**—See cases noted under Constitution, Article I, section 6, clause 1.

**Self-incrimination; requiring witness to answer.**—See note above, under "Refusal to testify or produce documents"; and see note to Constitution, fifth amendment, under "III. Compelling person to be witness against himself."

A cadet at the Military Academy was tried by court-martial and found guilty of the offense charged. At the trial a witness objected to answering a question on the ground of self-incrimination; but the court required him to answer: *Held*, That if the court committed error in compelling the witness to answer, the error is not such as to require disapproval of the proceedings. Where the right of a witness is violated, it is for him to complain and not the defendant. (17 Op. Atty. Gen., 616; see note to art. 53, A. G. N., as to effect of irregularities.)

**Depositions.**—Witnesses who were not in military service could not be compelled in 1859 to make depositions to be used in evidence before courts-martial on the trial of cases not capital. (9 Op. Atty. Gen., 311.)

An officer about to be put upon trial before a naval court-martial consented that the deposition of witnesses abroad, taken upon interrogatories and cross-interrogatories, should be used on the trial. *Held*, That the rule of law that no evidence shall be given against a prisoner except in his presence is a personal privilege which he may waive; and that it was waived by the officer in this case; the point of time at which his consent was expressed will not affect the competency of the testimony; but suggested that it might be well to have such waiver in writing, after the arrest and after the order convening the court. (1 Op. Atty. Gen., 706.)

It would not be competent for an officer of the Navy, under arrest, and the Navy Department to dispense with the attendance of witnesses before a naval court-martial and by common consent to take depositions to be used on the trial, when objected to by the officer preferring the charges. (2 Op. Atty. Gen., 343.)

The 37th article of the Articles for the Government of the Navy (act Apr. 23, 1800, 2 Stat., 50), requiring that "all testimony given to a general court-martial shall be on oath or affirmation," etc., seems to contemplate exclusively the examination of witnesses before

the court. The articles of war, providing that under certain restrictions and in cases not capital depositions may be taken for use before Army courts, negatives their allowance in other cases; and the existence of the provision sufficiently proves that without it such testimony would not be competent even in those minor cases. (2 Op. Atty. Gen., 343. Compare note to art. 60, A. G. N.)

See note to Constitution, sixth amendment, under "VI. Confronting witnesses."

The use of depositions before naval courts in certain cases and under certain restrictions was authorized by act of February 16, 1909, section 16 (35 Stat., 622).

**Absent witness.**—See note to Constitution, sixth amendment, under "VI. Confronting witnesses;" and see note to article 57, A. G. N.

**Copies of papers in evidence.**—See section 882, Revised Statutes, and note thereto; see also note to art. 34, A. G. N.

The introduction in evidence of copies of letters on file in the Department of the Navy at Washington, and which are required by law to be kept there, and which were not authenticated under the seal of the department, was error. Copies so authenticated would have been as admissible as the originals; copies not so authenticated were not as admissible as the originals. (*Cohn v. U. S.*, 258 Fed. Rep., 355.)

It is not understood that copies of official papers on file in an executive department can be received in evidence only when they are authenticated under the seal of the department; but if copies not authenticated as provided by section 882, Revised Statutes, are to be introduced in evidence, it is certainly necessary that a proper foundation for their admission should be laid, having in mind the general rule that no evidence shall be received which presupposes that the party who offers it can obtain better evidence. (*Cohn v. U. S.*, 258 Fed. Rep., 355.)

**Papers illegally seized as evidence.**—See notes to Constitution, fourth amendment, and fifth amendment under "III. Compelling person to be witness against himself."

The fact that certain private papers belonging to the accused may have been illegally seized by the authorities and illegally retained against his protest would not render their use in evidence against him unlawful. (22 Op. Atty. Gen., 589, 597, 598.)

The admission in evidence over and against the objection of the accused of a paper belonging to him which was abstracted by the Government from his possession, without his knowledge or consent, compels him to be a witness against himself in violation of the fifth amendment to the Constitution. (*Gould v. U. S.*, 255 U. S., 298.)

Where in the progress of a criminal trial it becomes probable that there has been an unconstitutional seizure of papers of the accused, it is the duty of the trial court to entertain an objection to their admission in evidence against him, or a motion for their exclusion, and to decide the question as then presented, even where a motion to return the papers has been denied before trial and by another judge. (*Gould v. U. S.*, 255 U. S., 298.)

The seizure of documents belonging to an Army officer charged with an offense, from his desk, to which he voluntarily turned over the key, *held* not a violation of his constitutional rights, whether or not the documents were used on his trial by court-martial. (*U. S. v. Barry*, 260 Fed. Rep., 291.)

**Evidence of handwriting.**—By act of February 26, 1913 (37 Stat., 683), it is provided that "in any proceeding before a court or judicial officer of the United States where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness."

A knowledge of the handwriting of a defendant charged with forgery, by a witness who is not an expert, does not qualify such witness to state his opinion whether or not the forged signature, made in imitation of the handwriting of another, was written by defendant. (*Neall v. U. S.*, 118 Fed. Rep., 699.)

Evidence of handwriting by comparison of hands is inadmissible on a trial by court-martial, excepting where the writing acknowledged to be genuine is already in evidence in the case or the disputed writing is an ancient document. It was, therefore, error for the court-martial to admit in evidence a considerable number of papers which were not in evidence for any other purpose than to be used as such standards and which were so used by experts. In view of the error so made by the court, its sentence should be set aside on review of its proceedings by the Secretary of War. (17 Op. Atty. Gen., 310. But see act of Feb. 26, 1913, above quoted, which was enacted after this opinion.)

**General rules of evidence before courts-martial.**—English writers on this subject insist upon the propriety in trials before naval and military courts-martial of adhering to the rules of evidence established for the common-law courts of criminal jurisdiction. (2 Op. Atty. Gen., 343.)

General courts-martial are governed by the same rules of evidence which govern the ordinary courts of criminal jurisdiction. These rules, where not prescribed by statute, are supplied by the common law. (17 Op. Atty. Gen., 310.)

See below under "Character evidence"; see sections 859-906, Revised Statutes, and notes thereto, as to evidence in civil courts of the United States; and see notes to Constitution, fifth and sixth amendments.

**Character evidence.**—The "System of Orders and Instructions" for the Navy, issued by the President December 15, 1853, is without legal validity and in derogation of the powers of Congress. In this "System" articles appear on the subject of courts-martial which are in pari materia with provisions of the acts of Congress, and are in effect abrogatory or amendatory of the same as plainly as a new act of Congress could be. Again, one of the articles in the same chapter changes the whole theory of judicial procedure by forbidding the court to receive evidence of previous good character

and former services of the accused in mitigation of the punishment to be awarded. This provision, which is the more observable when compared with another article which allows evidence to be introduced of previous bad character, may or may not be wise; it is, at any rate, a very positive act of legislation beyond the power of the President. (6 Op. Atty. Gen., 10, 18. See note to art. 45, A. G. N., as to procedure of courts-martial; secs. 161 and 1547, R. S., as to regulations in general; and note to art. 43, A. G. N., under "Charging offenses not specifically provided for.")

**Evidence after plea of guilty.**—Courts-martial may, and it is their duty to, receive such testimony as the judge advocate may offer for the purpose of illustrating the actual degree of the offense, notwithstanding that the party accused shall have pleaded guilty, if the punishment shall be discretionary, and especially where the discretion includes a wide range and great variety of punishments, and if the specifications do not show all the circumstances. In all cases subject to a discretionary punishment a full knowledge of the circumstances attending the offense is essential to an enlightened exercise of discretion by the court measuring the punishment; and where a formal trial is rendered unnecessary by a plea of guilty, it is only by affidavits or other incidental evidence that they can obtain that knowledge. (2 Op. Atty. Gen., 636.)

In a case where several of the specifications were quite general and the punishment was not definitely prescribed, but, on the contrary, a wide discretion was allowed, *held* that, upon general principles and in reference to the analogies furnished by the proceedings in civil tribunals, the court-martial erred in excluding the evidence offered by the judge advocate after a plea of guilty; and as they proceeded to impose the highest penalty in their power this error involves a serious violation of principle. (2 Op. Atty. Gen., 636.)

**Admissibility of evidence; decision of court-martial.**—It is not the official duty of the Secretary of War to give to the judge advocate, and thus to the court-martial, an opinion as to the admissibility of certain evidence in the trial of a case before the court; nor as to the construction of a statute. Such questions should be left to the decision of the court-martial itself. (17 Op. Atty. Gen., 54.)

Objections were made to the action of a court-martial in that, among other things, it received oral and secondary evidence of an account, when books of original entry were available; received evidence to implicate the accused in signing false certificates relating to money which formed no part of the subject matter of the charges on trial; refused to permit evidence as to the bad character of a principal witness for the prosecution, and refused to hear the testimony of a material witness for the defense: *Held*, that the errors so assigned could not be reviewed collaterally in a civil suit by the accused for the pay of his office; such questions were merely those of procedure, and the court-martial, having jurisdiction of the person accused and of the offense charged, and having acted within the scope of its lawful powers, its proceedings and sentence can not be reviewed



or set aside by the civil courts. (*Swaim v. U. S.*, 165 U. S., 553, 561; see note to art. 53, A. G. N., as to irregularities and fatal defects.)

**Evidence in conspiracy cases.**—See note to article 14, A. G. N.

**False testimony before courts-martial.**—See note to article 8, A. G. N., under “Scandalous conduct tending to the destruction of good morals”; and see section 1023, Revised Statutes, as to prosecutions for perjury before naval general courts-martial.

**Expert witnesses.**—See notes to section 848, Revised Statutes; Constitution, sixth amendment, under “VII. Compulsory process for obtaining witnesses”; section 1451, Revised Statutes, under “Evidence in line of duty cases”; and article 59, A. G. N., under “Experts.”

A witness is one who may be compelled to testify concerning a transaction which he has fortuitously beheld; an expert is one who testifies as to his own self-acquired knowledge, which he can not be compelled to impart by the expedient of calling him as a witness. (*Smith v. U. S.*, 24 Ct. Cls., 209.)

The Government can not acquire the services, skill, or knowledge of an expert without his consent and without just compensation. (*Smith v. U. S.*, 24 Ct. Cls., 209.)

The employment of experts before a court-martial is within the legal and proper discretion of the Secretary of War; and his order to employ and pay them is official authority to an officer

who in the ordinary discharge of his duty makes such payments, and protects him from the summary remedy of having his pay stopped. (*Smith v. U. S.*, 24 Ct. Cls., 209.)

What are termed experts are not necessarily or properly witnesses. Their office may be simply to aid in the preparation of a case without being called to testify, and they are frequently employed to aid counsel in the cross-examination of witnesses. In the complexities of modern civilization they are constantly resorted to in all courts, civil and criminal. (*Smith v. U. S.*, 24 Ct. Cls., 209.)

All persons in the course of ordinary life are liable to witness transactions, or casualties, or crimes of their fellow men. In such cases, public necessity requires that they may be compelled to testify. The burden of doing so must be borne by him on whom it falls, and the chance is a chance which may fall upon any member of the community. A surgeon walking down the street and witnessing an accident or murder may describe the injuries of the victim more clearly than an ordinary beholder. But he is not an expert; he is merely the fortuitous witness of an occurrence concerning which he may be made to testify. (*Smith v. U. S.*, 24 Ct. Cls., 209.)

For other cases see note to article 45, A. G. N., as to receiving evidence while court is cleared, and as to evidence of insanity.

**Art. 43. [Charges and specifications; arrest of accused.]** The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; and no other charges than those so furnished shall be urged against him at the trial, unless it shall appear to the court that intelligence of such other charge had not reached the officer ordering the court when the accused was put under arrest, or that some witness material to the support of such charge was at that time absent and can be produced at the trial; in which case reasonable time shall be given to the accused to make his defense against such new charge.—(17 July, 1862, c. 204, s. 1, art. 15, v. 12, p. 604.)

**“Arrest” construed.**—Upon consideration of articles 24, 43, and 44, A. G. N., held that there may be two arrests, namely (1) an arrest in an emergency or upon discovery of the alleged wrongdoing, with a view to a preliminary examination, and, if necessary, the formulation and specification of charges; and (2) an arrest for trial. Held, further, that article 43, in the provision declaring that “the person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest,” has reference to the arrest for trial and not the arrest in the first instance. (19 Op. Atty. Gen., 472; see art. 44, A. G. N., referring in terms to the arrest “for trial.”)

Article 43, A. G. N., refers to the arrest of the accused for trial by court-martial, and not to any previous arrest, either by way of punishment or to await the action of a court of inquiry. If he is already in custody to await the result of a court of inquiry, this article is sufficiently

complied with by delivering a copy to him immediately after the Secretary of the Navy has informed him of that result and has ordered a court-martial to convene to try him. Being already in custody to await the result of a court of inquiry, he could not be considered as put under arrest for trial by court-martial before the Secretary of the Navy had informed him of the report of the court of inquiry and had ordered a court-martial to convene to try him. Immediately after that, and four days before the court-martial met, the accused in this case was furnished with a copy of the charge and specification on which he was to be tried. This was a sufficient compliance with the article in question. (*Johnson v. Sayre*, 158 U. S., 109, 117.)

Under the Articles for the Government of the Navy, the provision as to service of charges upon the accused at the time he is put under arrest refers not to the temporary arrest necessary for order and discipline at the time of the

commission of the offense, but to the subsequent arrest for trial by court-martial. (*Bishop v. U. S.*, 197 U. S., 334.)

The word "arrest" as employed in article 43 A. G. N., does not relate to the preliminary arrest or detention of an accused person awaiting the action of higher authority to frame charges and specifications and order a court-martial, but to the arrest resulting from preferring the charge by the proper authority and the convening of a court-martial. (*U. S. v. Smith*, 197 U. S., 386, approving, 19 Op. Atty. Gen., 472; *Johnson v. Sayre*, 158 U. S., 109; and *Bishop v. U. S.*, 197 U. S., 334.)

Both the spirit and the letter of the Articles for the Government of the Navy require that a copy of such charges and specifications be furnished within a reasonable time after the first arrest; and what would be such reasonable time would depend on the circumstances of each case. However, if they were not furnished within a reasonable time, or if the convening of the court-martial were too long delayed, such would seem to be objections going only to the regularity of the proceedings and not to the jurisdiction of the court. (19 Op. Atty. Gen., 472, 476.)

**Waiver of objection by the accused.**—Where the record of a court-martial shows that the accused stated at the beginning of the trial that he had received a copy of the charges and specifications against him, but it does not appear that such copy was served upon him at the time of his arrest, and no objection on that ground was made at the trial, it will be presumed that they were served as required by the statute. (In re Crain, 84 Fed. Rep., 789.)

It is at least doubtful whether the objection (that the accused did not receive a true copy of the charge and specification at the time he was put under arrest) did not come too late, after he had admitted before the court-martial that he had received a copy of the charge and specification, and after objections to the jurisdiction of the court, and to the form of the accusation, had been overruled and he had pleaded not guilty and the evidence of the United States had been introduced. (*Johnson v. Sayre*, 158 U. S., 109, 117.)

Whether an objection as to the lateness of service of specifications is jurisdictional and can be collaterally inquired into, where such objection was not made at the trial, not decided. (*U. S. v. Smith*, 197 U. S., 386, 391.)

Had the court been regularly and legally organized, the fact of its not appearing on the record that the prisoner had been furnished with a copy of charges or been asked if he had any objection to the members of the court might not be sufficient cause for setting aside the proceedings. If any injustice was done to the accused in these particulars, he should make the question before the court and in that way make it appear on the face of the proceedings. (3 Op. Atty. Gen., 396, holding the proceedings illegal in this case because the court was not legally organized.)

See note to article 53, A. G. N., as to irregularities and fatal defects; and note to article 52, A. G. N., under "Omission of record to show jurisdictional facts."

**Arrest of officer while on bail.**—Full power is possessed by the Secretary of the Navy to cause the arrest of any officer of the Navy charged with the commission of crime and to have him brought before a naval court-martial for trial. (21 Op. Atty. Gen., 504.)

Where a disbursing officer of the Navy has been arrested by the civil authorities of the United States for embezzlement and misappropriation of public funds, and released on bail, the Attorney General will not instruct a United States attorney, at the request of the Secretary of the Navy, to cause the arrest of the officer by the United States marshal, as it would be both unnecessary and improper to cause the arrest of the said naval officer by the civil officers of the Government in order that he might be tried before a naval court-martial, while adequate power resides in the Secretary of the Navy to arrest and confine him and bring him before such court-martial for trial. (21 Op. Atty. Gen., 504.)

See note to Constitution, fourth amendment, under "Arrest of military offenders"; and see note to Constitution, Article I, section 8, clause 14, under "Jurisdiction of courts-martial," subheading "Persons in constructive custody of civil courts."

**"Charge" and "specification" explained.**—In the American service the custom is to present a "charge" so called, in general terms indicative of the offense imputed, as "desertion," "disobedience of orders," "mutiny," or "conduct unbecoming an officer and a gentleman," and to subjoin a "specification" or "specifications," in which are set forth the particular facts which it is conceived by the party preferring the accusation, or by the authority ordering the trial, constitute the offense designated in the "charge." In the British service, on the other hand, there is no distinction between the "charge" as such and the "specification." Each separate fact or set of facts constituting the matter of accusation is set forth in a distinct charge, even though there should be a plurality of subjects of charge each one importing a variety of the same offense, and therefore susceptible of classification under general heads of charge. (7 Op. Atty. Gen., 601.)

Our practice has convenience in many cases. If the crime be of a genus which has but one species, as "sleeping on post," then the "charge" is in general but a title, as it were, to the "specification"; but even in such a case there may be a plurality of acts of the same offense, which it is proper to charge, although if proved to be followed by but one possible sentence for all the acts. (7 Op. Atty. Gen., 601.)

But where the offense is of a genus comprehending many species, the convenience of classification under general heads of charge is apparent. Still more is that convenience manifest when the accusation is of a plurality of offenses, as "disobedience of orders," "neglect of duty," and "mutiny," and there is a plurality of acts of each offense. Then it is clear to see how our practice tends not only to methodize the proceedings, but, what is more important, to methodize the elements of decision in the minds of the triers and of the supe-



rrior authority which is to approve or disapprove their final action. (7 Op. Atty. Gen., 601.)

The law governing Army courts-martial is found in the statutory enactments of Congress, particularly in the articles of war, in the Army regulations, and in the customary military law. According to military usage and practice, the charge is in effect divided into two parts, the first technically called the "charge" and the second the "specification." The charge proper designates the military offense of which the accused is alleged to be guilty; the specification sets forth the acts or omissions of the accused which form the legal constituents of the offense. (*Carter v. McClaughry*, 183 U. S., 365, 386.)

**Sufficiency of charges; technical averments.**—If the description of the offense is sufficiently clear to inform the accused of the military offense for which he is to be tried, and to enable him to prepare his defense, it is sufficient. Hence a charge which uses the word "inebriation" is sufficient under the articles of war which use the technical word "drunkenness," although it would certainly have been more formal to use the term which is used in the articles of war. (1 Op. Atty. Gen., 294.)

The writers on military law require minuteness and precision in specifying the time, "whenever it is possible to be thus particular"; but they all agree that this minuteness and precision are not always within the reach of the prosecutor; hence they allow him a latitude in the statement of the time, and examples cited by them permit a range of three months as to the laying of the time. This latitude is not allowable in courts of civil jurisdiction. (1 Op. Atty. Gen., 294.)

A specification of charge is good and will support the finding and sentence upon it, with or without descriptive designation of the quality of the imputed criminal act, provided it appear that the facts alleged and proved constitute in any point of view the offense charged. (7 Op. Atty. Gen., 601.)

Under a charge of "conduct unbecoming an officer and a gentleman," the specifications alleged that the accused did certain acts, and concluded, "all which was an abuse of his trust, a violation of his public duty, and was conduct unbecoming an officer and a gentleman." The court, in its findings upon the specifications, excepted the words quoted; but found the accused guilty upon the charge. *Held*, that what remained of each specification, after the exceptions made by the court, although less full and explicit than the whole original specification, yet plainly appears on careful inspection of the matter to be competent to justify the finding and to sustain the charge; that the words excepted were words of description, merely; and that the proceedings were therefore valid. *Held*, further, that while the words excepted by the court were not words of necessary insertion in specifications, neither were they words of necessary exclusion therefrom; that while a specification is maintainable without the words excepted, so it is with them; that the words were descriptive of the facts alleged; that the practice of including such words is well sustained by practice as by principle; that particularity of description would seem to be in

the interest of the party accused as well as the service. *Suggested*, that to prevent exception in future cases, the very words of the charge be employed as the concluding or commencing words of specifications, and that such expressions of qualification as the nature of the facts may require and justify be incorporated in the narrative part of the specification. (7 Op. Atty. Gen., 601.)

Certain it is that charges and specifications for trial by court-martial do not need to possess the technical nicety of indictments at common law. Trials by court-martial are governed by the nature of the service, which demands intelligible precision of language, but regards the substance of things rather than their form; which eschews looseness or confusion in all things, but reflects that military administration must be capable of working in peace, it is true, but more especially amid the privations and the dangers of war. Hence, undoubtedly, the most bald statement of the facts alleged as constituting the offense, provided the legal offense itself be distinctively and accurately described in such terms of precision as the rules of military jurisprudence require, will be tenable in court-martial proceedings and will be adequate ground work of conviction and sentence. (7 Op. Atty. Gen., 601.)

All the technicalities which have been applied to common-law indictments are not required in specifications in court-martial proceedings. Here it is sufficient if the facts constituting the offense be described with such certainty as to clearly inform the accused of his alleged misconduct and the offense with which he is charged. (28 Op. Atty. Gen., 286, 292.)

In cases where a fraudulent or criminal intention or knowledge upon the part of the accused may be necessary to constitute the offense, it would not be necessary to specifically declare their presence in the specification of a charge to be tried by a naval court-martial; their absence would be a matter of defense. (28 Op. Atty. Gen., 286, 292.)

A charge of assault with a rifle and the infliction of a mortal wound by accused upon a fellow soldier, with particulars of time and place clearly stated, sufficiently alleged an offense within the article of war providing for the trial and punishment of all crimes not specified in the foregoing articles (see art. 22, A. G. N.). The charge and specification did not accuse the prisoner of any willful or felonious act, but the facts alleged constituted an offense cognizable by court-martial. (*In re Stubbs*, 133 Fed. Rep., 1012.)

It would be extremely absurd to expect the same precision in a charge brought before a court-martial as is required to support a conviction by a justice of the peace. (See *Smith v. Whitney*, 116 U. S., 167, 185.)

The pleading need not possess the technical nicety of an indictment as at common law. (*Carter v. McClaughry*, 183 U. S., 365, 386, citing 7 Op. Atty. Gen., 604.)

See note to article 8, A. G. N., as to form of charge and specification for "scandalous conduct tending to the destruction of good morals."

See note to article 14, A. G. N., as to charge and specification for embezzlement.

**Charging offenses not specifically provided for.**—The “Orders, Regulations, and Instructions for the Administration of Law and Justice in the United States Navy,” issued by the Secretary of the Navy, under authority of the President, in 1870, provided, in section 126 thereof, that when a charge “comes directly under any enactment it should be set forth in the terms used therein”; and in section 127, that “when the offense is a disorder or neglect not specially provided for, it should be charged as ‘scandalous conduct tending to the destruction of good morals.’” Section 1547 of the Revised Statutes is a legislative recognition of the Navy Regulations of 1870, and “must be understood as giving to these regulations the sanction of the law.” (Smith v. Whitney, 116 U. S., 167, 180; see also notes to articles 8 and 22, A. G. N.; compare note to art. 42, A. G. N., under “Character evidence”; and see note to Art. 45, A. G. N.)

**Description of accused in charges.**—Where a naval court-martial tried a master-at-arms for desertion on a charge headed with a caption styling the accused, “master-at-arms,” and discharged him on the ground that since his arrest he had not been borne on the ship’s books as such, *held* that the decision was erroneous, and that the grounds stated were insufficient to deter the court from proceeding to judgment on the merits. (3 Op. Atty. Gen., 548.)

In this case the accused pleaded guilty to a charge of desertion. The court, notwithstanding the plea, proceeded to hear the evidence produced by the judge advocate. And the accused questioned both the witnesses in his behalf, offering no objection at any time to the proceedings. *Held*, (1) that the error in the designation of the accused was not made in the charge and specification on which he was tried, but merely in the general heading thereto; (2) that it was admitted that the accused was master-at-arms when the offense alleged in the charge was committed, and there was no conclusive proof that he had been dismissed from that rank when the charge was preferred; (3) that supposing this, however, to have been clearly established, yet the facts of his having pleaded to the charge, of his never having in any way made such an exception or defense, and of their being no dispute whatever as to the identity of the person, would have prevented the accused himself from taking advantage of the error at this stage of the case; and, of course, it afforded no ground for the court to refuse to proceed to judgment on the merits. (3 Op. Atty. Gen., 548.)

A midshipman was nominated and confirmed in March, 1868, to be an ensign, the promotion being made “subject to examination.” In July, 1868, having never been examined, he was tried by a naval court-martial as a midshipman and sentenced to dismissal from the service. *Held*, that under the circumstances he was properly tried as a midshipman. (16 Op. Atty. Gen., 550; see note to Art. 54, A. G. N., as to promotion of officer under charges.)

**Amendment of charges.**—In a trial by court-martial the charges can not be so amended after arraignment as to entirely obliterate the original specifications and insert

new ones describing wholly different offenses; hence, where the prisoner, pending his trial by court-martial, seeks relief from a civil court by habeas corpus, and the charges are found to be wholly insufficient to show jurisdiction in the court-martial, a discharge will be granted. (Ex parte Henderson, 11 Fed. Cas. No. 6349.)

**Sufficiency of charges question for court-martial.**—Where a charge against a person tried by a military court is within the court’s jurisdiction, and is authorized by the Army or Navy regulations, the manner of setting out the offense is a matter of pleading, rather than jurisdiction, the sufficiency of which is for the exclusive determination of the court-martial. (Ex parte Dickey, 204 Fed. Rep., 322.)

**Joinder of charges.**—There is no objection to the joinder of separate and incongruous charges in the same prosecution before a court-martial, as such is permitted by the military usage and procedure. (22 Op. Atty. Gen., 589.)

Unlike the ordinary criminal procedure, when but one indictment, setting forth in one or more counts a single offense or connected criminal transaction, is in general brought to trial at one time, the military usage and procedure permit of an indefinite number of offenses being charged and adjudicated together in one and the same proceeding. (22 Op. Atty. Gen., 589, 595.)

With a view to the summary and final action so important in military cases, whenever an officer or soldier has been apparently guilty of several or many offenses, whether of a similar character or distinct in their nature, charges and specifications covering them all should, if practicable, be preferred together and together brought to trial. (22 Op. Atty. Gen., 589, 595.)

An indefinite number of offenses may be adjudicated together in one proceeding by a court-martial and a single sentence rendered covering all the convictions. (Rose v. Roberts, 99 Fed. Rep., 948.)

Not only do military usage and procedure permit of an indefinite number of offenses being charged and adjudicated together in one and the same proceeding, but the rule is recognized that whenever an officer has been apparently guilty of several offenses, whether of similar character or distinct in their nature, charges and specifications covering them all should, if practicable, be preferred together and together brought to trial. (Carter v. McClaughry, 183 U. S., 365, 386.)

**Additional charges; trial by different courts.**—Specifications of charge known to the Secretary of the Navy, by whom a naval court-martial was ordered, when former charges against the accused were prepared by him before another and a distinct court upon a different and distinct matter, may be tried before a subsequent court-martial together with other charges not previously known. (4 Op. Atty. Gen., 410, construing art. 38, act Apr. 23, 1800, 2 Stat., 50.)

For reasons which are very manifest, incongruous charges may be tried by a court-martial which would vitiate an indictment. It is generally desirable that all charges against an



officer should be tried by one court; but there is no such restriction on the Secretary of the Navy, who may deem it his official duty to cause an officer to be tried. Considerations of the greatest importance to the interests of the service, of deference to the wishes of the accused himself, and the due execution of public justice, may induce and require him, without injustice to the accused, not to unite several different charges in one and the same prosecution. (4 Op. Atty. Gen., 410, 414.)

Consent on the part of the accused could not give jurisdiction if it did not exist by law. But where such jurisdiction exists, his wishes might very properly influence the department in its discretionary power in arranging the charges which it felt bound to prefer for trial. (4 Op. Atty. Gen., 410, 414.)

If this article had the effect of protecting the accused from conviction upon additional charges known to the convening authority when the former trial was ordered, it is well settled that the defense under it could be made only by plea in bar, or under the general issue of not guilty, and not by plea in abatement. (4 Op. Atty. Gen., 410, 413.)

Even under this restrictive article a new charge, in addition to those exhibited, may be submitted to the same court if some witness material to the support of the charge, who was absent, can be produced; but the court is not to proceed with this new charge without giving the accused time for his defense. Suppose that this witness can not be produced? Can it be supposed that this article was intended to bar any future prosecution of the offense? The charge is not before the court; no decision is made on it; no part of the trial involves it; and the finding of the court does not conclude it, but such new charge may be tried before an-

other and distinct court-martial. (4 Op. Atty. Gen., 410, 414.)

**Lesser offense included in charge.**—Where accused was found not guilty of the offense charged, but guilty of a lesser offense, such finding was what is known in the administration of criminal law as a partial verdict, in which the accused is acquitted of a part of the accusation against him and found guilty of the residue; as when there is an acquittal on one count and a verdict of guilty on another; or when the charge is of a higher degree, including one of a lesser, there may be a finding by a partial verdict of the latter; as upon the charge of burglary there may be a conviction for a larceny and an acquittal of the nocturnal entry; so upon an indictment for murder there may be a verdict of manslaughter, and robbery may be reduced to simply larceny, and a battery into an assault. (*Dynes v. Hoover*, 20 How., 65, 79; see also note to art. 8, A. G. N.)

**Charging same offense under two articles.**—See note to article 22, A. G. N.; and see note to article 14, A. G. N., under "Discretionary punishment," as to punishment on conviction of two charges based on the same transaction; see also note to article 63, A. G. N., as to limitations of punishment.

**Charging offense previously punished.**—See note to article 24, A. G. N., as to punishments by commanding officer or reprimand by Secretary of the Navy not being a bar to subsequent trial by court-martial; see also note to article 53, A. G. N., as to effect of disapproval of former trial.

**Absent witness.**—See note to Constitution, sixth amendment, under "VI. Confronting witnesses"; and see note to art. 57, A. G. N.

**Art. 44. [Duty of officer arrested.]** Every officer who is arrested for trial shall deliver up his sword to his commanding officer and confine himself to the limits assigned him, on pain of dismissal from the service.—(17 July, 1862, c. 204, s. 1, art. 15, v. 12, p. 604.)

See note to article 43, A. G. N., as to arrest of accused for trial.

**Nominal arrest of officer.**—An officer of the Navy against whom charges had been preferred for trial by court-martial was given the following order by the Secretary of the Navy: "You are placed under arrest and you will confine yourself to the limits of the city of Washington." The facts showed that he was not under "physical restraint" and that the above-mentioned order did not operate to restrain his movements any more than would

have been the case had it directed him to remain in Washington to serve as a member of the court-martial. *Held*, that there was no such "restraint of liberty" in this case as to justify the use of habeas corpus; and that the fear of being forcibly arrested and returned should he leave the city of Washington, if sufficient to keep the officer within the limits of the city, "is a moral restraint, which concerns his own convenience and in regard to which he exercises his own will." (*Wales v. Whitney*, 114 U. S., 564; see note to sec. 752, R. S.)

**Art. 45. [Proceedings of general court-martial.]** When the proceedings of any general court-martial have commenced, they shall not be suspended or delayed on account of the absence of any of the members, provided five or more are assembled; but the court is enjoined to sit from day to day, Sundays excepted, until sentence is given, unless temporarily adjourned by the authority which convened it.—(17 July, 1862, c. 204, s. 1, art. 16, v. 12, p. 604.)

See notes to articles 45 and 46, A. G. N., as to absence of members.

**Right to speedy trial.**—This article intends to secure to the accused a speedy and impartial trial when charged with offenses and put under arrest, and to give him protection against delays of justice and protracted arrest. It is enacted in the spirit of the sixth article of the amendments to the Constitution of the United States. (6 Op. Atty. Gen., 200, 207; see note to Constitution, sixth amendment.)

**Requirement directory only.**—The provisions of article 45, A. G. N., are directory only and not mandatory; hence the adjournment of a court-martial from Tuesday to Friday without permission from the convening authority, although an irregularity, did not invalidate the proceedings. (C. M. O. 27, 1898, pp. 1-2; Nav. Dig. 1916, p. 20.)

A general court-martial should not adjourn over a holiday or any other day during a trial, except Sunday, without permission being expressly granted, although such action would not necessarily invalidate the proceedings. (C. M. O. 51, 1914, p. 4; Nav. Digest, 1916, p. 20.)

**Procedure governed by regulations and usage.**—The "Regulations for the Administration of Law and Justice," established by the Secretary of the Navy with the approval of the President on April 15, 1870, regulating the procedure of courts-martial, have the force of law. (Ex parte Reed, 100 U. S., 13, 22, citing sec. 1547, R. S.; see note to art. 43, A. G. N., under "Charging offenses not specifically provided for," and note to art. 42, A. G. N., under "Character evidence.")

The law by which courts-martial are bound to execute their duties and to regulate their mode of proceeding in the absence of positive enactments is "the general usage of the military service or what may not unfittingly be called the customary military law." (Smith v. Whitney, 116 U. S., 167, 179, approving, Dykes v. Hoover, 20 How., 65, 82; see also note to art. 29, A. G. N., as to procedure of courts of inquiry.)

In the absence of a regulatory statute the proceedings of courts-martial are controlled by the usages and customs of the military service, otherwise called customary military law, and not by the common-law rules applicable to the proceedings of civil courts. (Kirkman v. McClaughry, 160 Fed. Rep., 436.)

**Evidence after court cleared.**—The accused, charged with disobedience of orders, declined to plead to the charges, but objected to the jurisdiction of the court on the ground that his term of service expired previous to the time mentioned in the specifications, and that his term of service commenced before the act of March 2, 1837 (sec. 1422, R. S.), and that therefore he was no longer amenable to the laws of the United States for the government of the Navy. To sustain this plea the accused offered no evidence whatever, nor was such evidence offered to the court in his presence or while the court was in public session. Instead, immediately after the plea was submitted, the record shows that the court was cleared to deliberate on said plea, and that the muster book and transfer roll of a certain vessel were produced by order of the court; and that, it appearing

therefrom that the prisoner entered the service previous to the act of March 2, 1837, and that his term of service expired on October 20, 1839, it was determined that the court was not invested with any legal authority over the person or property of the prisoner and could exercise no jurisdiction over him whatever. *Held*, that the proceedings of the court were irregular in receiving evidence after the court was cleared. (3 Op. Atty. Gen., 545.)

See below, "Public sessions."

**Presence of accused during trial.**—In cases where the prisoner's life or liberty is in peril, he must be present during the whole of the trial and until final judgment. If absent, there is a want of jurisdiction of the person, and the court can not proceed with the trial or receive the verdict or pronounce the final judgment. A prisoner in custody can not waive anything by his absence. In the case of a naval prisoner, it is even more important that he be present at his trial by court-martial. (Weirman v. U. S., 36 Ct. Cls., 236.)

But where the offense is trivial, and life or liberty is not in jeopardy, the rule is to be relaxed; accordingly, *held*, that the proceedings of a naval court-martial would not be declared invalid by reason of the absence of the accused where the offense and punishment were trivial. (Weirman v. U. S., 36 Ct. Cls., 236.)

See note to Constitution, fifth amendment, under "V. Presence of accused at trial."

**Public sessions.**—The statutes regulating the course of procedure in military courts show that, in contemplation of law, these courts stand on the same footing as other judicial tribunals of the country. Their sittings, for example, are free to the attendance of the public, like those of other courts, and, as if to guard against improper secrecy in the case of courts-martial held in the Army, the statute expressly provides that no proceedings or trials in such courts shall be carried on except between the hours of 8 in the morning and 3 in the afternoon, unless in cases which in the opinion of the officer appointing the court require immediate example. (11 Op. Atty. Gen., 137, 141.)

That a court-martial trying a petty officer of the Navy permitted the judge advocate to be present for a short time during a closed session of the court, in violation of the act of July 27, 1892 (27 Stat., 277), though a disregard of the defendant's legal rights, was nevertheless an error in procedure only, and was not, therefore, a ground for a writ of habeas corpus. (Ex parte Tucker, 212 Fed. Rep., 569. *NOTE.*—The act cited was entitled "An act to amend the Articles of War, and for other purposes," and did not relate to naval courts-martial. Similar provisions for the Navy was then contained in Navy regulations since embodied in "Naval Courts and Boards," and not in any statute.)

See above, "Evidence after court cleared."

**Defense of insanity.**—That a defendant on trial for desertion before a court-martial was shown to have been in a "haze" or "stupor" at the time in question, *held* insufficient under a plea of not guilty to raise the issue of insanity which would deprive the court of jurisdiction under regulations contained in the Army manual for courts-martial. (U. S. v. Hunt, 254 Fed. Rep., 365.)



"Irresistible impulse" is not a defense to crime where accused had mental capacity to distinguish between right and wrong, and to know that the particular act charged was wrong. (C. M. O. 24, 1914.)

If the court-martial is of opinion that accused is insane during his trial, its duty is to suspend proceedings and inform the convening authority of its opinion in order that, if the circumstances warrant, a board of medical survey may be ordered. When, instead of doing this, the court proceeds with the trial and records findings on the charges and specifications, it is the duty of the convening authority not to accept the court's findings; and the record should be returned to the court in order that such findings may be revoked, as there has been no legal trial, the accused has not been placed in jeopardy, and the status of his case is the same as though he had never been arraigned. (C.M.O. 24, 1914.)

**Absence of member as affecting rank of majority.**—An officer of the Navy was tried by a general court-martial composed of 13 members, six of whom were junior in rank to the accused and seven of them, including the president, were his seniors. After the trial commenced, one of the members who was senior to the accused became sick, and the court proceeded in his absence, more than one-half of the remaining members, exclusive of

the president, being junior to the accused. The absent member later returned, but was not permitted by the court to resume his seat as a member. The accused was sentenced to be dismissed, which sentence was duly executed. *Held*, that the court was organized and commenced its proceedings in strict conformity with the Articles for the Government of the Navy (art. 39, A. G. N.,) and had complete jurisdiction; and that under the said articles (art. 45, A. G. N.) it was required to continue its sessions notwithstanding the absence of any member so long as five remained. The court, therefore, had complete jurisdiction while the member in question was absent. It is doubtful whether the court had lawful authority to exclude him on his return, but such action did not invalidate the proceedings. The provision requiring a majority to be senior in rank to the accused is confined to the organization of the court, and does not extend to its subsequent proceedings. (7 Op. Atty. Gen., 98; see arts. 46 and 47, A. G. N., and notes thereto.)

**Court reduced below minimum.**—See note to article 46, A. G. N.

**Errors of procedure not fatal.**—See note to article 53, A. G. N., and see notes above under this article.

**Evidence before courts-martial.**—See note to article 42, A. G. N.

**Art. 46. [Absence of members.]** No member of a general court-martial shall, after the proceedings are begun, absent himself therefrom, except in case of sickness, or of an order to go on duty from a superior officer, on pain of being cashiered.—(17 July, 1862, c. 204, s. 1, art. 16, v. 12, p. 604.)

**Court reduced below minimum.**—If during the pendency of a trial before a court martial composed of five members, one of its members fall sick and be thereby disabled from sitting with the court for several days, the remaining four members may adjourn the court from day to day until he is able to attend with them again to complete the trial. Of course, the court would not consent to wait too long on account of the absence of a member; if the delay became inconveniently protracted, they would not fail to report it to the proper authority; or if death ensued, to consider the commission or warrant as at an end. (4 Op. Atty. Gen., 17.)

**Effect of unauthorized absence.**—The provision which forbids a member to absent himself except in case of sickness or in obedience to orders is one for the regulation of the conduct of the members themselves, and personally subjects them to censure; but it has no bearing upon the question of the jurisdiction of the court or the legality of its proceedings. (7 Op. Atty. Gen., 98.)

A member of the court may willfully absent himself and be tried and cashiered for it, without in the least affecting the legality of the proceedings of the court. (7 Op. Atty. Gen., 98.)

The Articles for the Government of the Navy (art. 45, A. G. N.) makes the trial valid if five members assemble. It is contemplated that members may be ordered elsewhere. The provision for this penalty shows that it was anticipated members might be absent for other

causes, upon which the law, instead of declaring the proceedings void in such case, make them valid and punishes the offending absentee (7 Op. Atty. Gen., 98.)

The cause of the absence, as distinguished from the absence itself, does not in any way affect the question of legality or jurisdiction. It certainly might when the absent member is called upon to justify his own acts, but not as between the accused and the law. (7 Op. Atty. Gen., 98.)

A member absent on account of sickness was not permitted by the court, upon his return, to resume his seat. This was error on the part of the court, but it does not follow from this that the court lost jurisdiction over the accused and that their subsequent proceedings were void. They may have acted irregularly or illegally toward their colleague without rendering their subsequent acts as to the accused void. (7 Op. Atty. Gen., 98.)

**Absence at revision of proceedings.**—It makes no difference whether the absence of a member or members happens pending the original proceedings or on the meeting for revision. In either contingency it is one and the same court with unbroken continuity of existence and unimpaired capacity as to the same subject matter. (7 Op. Atty. Gen., 338.)

Where a general court-martial duly organized by order of the Secretary of War was, after reporting, recalled by him to reassemble to revise its sentence and on reassembling two of the

original members were absent (for whatever cause), but a legal quorum of the court still remained, *held* that the absence of two members at the reassembling of the court did not impair its jurisdiction or otherwise affect its power to review the sentence; and that it still was the same continuous and competent court as when it first assembled under the order of the Secretary. (7 Op. Atty. Gen., 338.)

The law makes provision as to the number of officers to be ordered on a general court-martial, but none as to the number who must actually attend and participate in its proceedings beyond a fixed minimum. (7 Op. Atty. Gen., 338.)

See note to article 53, A. G. N., as to proceedings in revision.

**Art. 47. [Return of absent member; witness recalled.]** Whenever any member of a court-martial, from any legal cause, is absent from the court after the commencement of a case, all the witnesses who have been examined during his absence must, when he is ready to resume his seat, be recalled by the court, and the recorded testimony of each witness so examined must be read over to him, and such witness must acknowledge the same to be correct and be subject to such further examination as the said member may require. Without a compliance with this rule, and an entry thereof upon the record, a member who shall have been absent during the examination of a witness shall not be allowed to sit again in that particular case.—(17 July, 1862, c. 204, s. 1, art. 17, v. 12, p. 605.)

**Member absent at commencement of proceedings.**—Where a general court-martial has been ordered by the Secretary of the Navy and the names of officers and supernumeraries to compose it are set forth in the warrant, and, by reason of nonattendance of one of the officers on the first day a supernumerary takes his place and the court thus organized proceeds to business, the absent member can not properly thereafter be added to the court upon his arrival unless the case on trial has been disposed of, if at all. (1 Op. Atty. Gen., 698, construing articles of April 23, 1800, 2 Stat., 51. In this case the order convening the court provided that it was to consist of seven members named therein and three supernumeraries also named therein or any five or more of them.)

There is nothing in the acts of Congress on this subject nor in any of the analogies of the law in relation to civil tribunals, which authorizes a newly arrived member to be superadded at all to a court which has been once legally organized. (1 Op. Atty. Gen., 698.)

The 39th article of the Rules and Regulations for the Government of the Navy (act Apr. 23, 1800, 2 Stat., 51), seems to contemplate the unity and immutability of a general court-martial which shall have been once constituted and shall have commenced its session. The members whose absence is therein spoken of are the members who shall have qualified as members of the court, not those who shall merely have been named in the warrant as members. (1 Op. Atty. Gen., 698. The article referred to contained the same provisions as articles 45 and 46 of section 1624, R. S.)

**Importance of members hearing testimony.**—The rule that witnesses should be ex-

“Cashiered” and “dismissed” distinguished.—In Great Britain it seems that a distinction is recognized to exist between these terms, the one “cashiered,” including an incapacity for future service. (2 Op. Atty. Gen., 286.)

Where an article of war under which an accused was tried prescribed as the punishment of his offense that he shall be “dismissed from service,” the sentence that he be dismissed from the service, instead of that he be cashiered, was conformable to law, and in such case the distinction between the two terms is immaterial. (2 Op. Atty. Gen., 286.)

For other cases, see notes to articles 45 and 47, A. G. N.

amined in the presence of the judge is one that can not be safely departed from. The judgment which we form upon testimony is greatly dependent upon the conduct of the witness during the examination and upon the manner in which that testimony is delivered. It is the right of an accused person that the evidence in his case should be given in the presence of all his judges; and it is much more important to secure the correct administration of public justice in this regard than to enforce punishment in any particular cases. (2 Op. Atty. Gen., 414.)

**Could not resume seat in absence of legislation.**—As to whether a member of a naval court-martial who participated in the proceedings of the same at the commencement of its sitting, but who, from sickness, had been unable to attend during the trial of the whole case, which was concluded in his absence, could afterwards, on recovering his health, resume his seat again as a member of the court for the next trial without a new precept issued, should be decided according to the settled practice in such cases. As the practice has been to regard the member thus situated as disqualified, the executive department should be governed by the precedents so established. Certainly he could not be permitted to take his seat in a case already pending. (4 Op. Atty. Gen., 7.)

It is irregular for a member of a court-martial who has been absent during a portion of the trial, and who did not hear the witnesses testify, to take part in sentencing the accused. In this case the sentence was pronounced by five officers, one of whom had been absent from the court several days during the trial and during the examination of witnesses. The record of the



examination of these witnesses was read to him and his judgment was consequently founded upon the testimony of witnesses who had not been examined in his presence. If he was thus disqualified to sit in judgment upon the accused, there was no competent tribunal to award sentence against him: *Held*, that the officer was disqualified to pronounce judgment in this case; and that the sentence was illegal and void; that the accused is entitled to be restored to his rights as if such sentence had not been pronounced or approved. (2 Op. Atty. Gen., 414.)

**Error of court in excluding member on return.**—In practice it is unusual for members who have not heard the whole trial to participate in giving judgment; but there is no law to prohibit their doing so, or to compel them if they refuse. It is true that not having heard a portion of the witnesses testify, so as to judge of their credibility from their appearance and manner of testifying, a member who had been absent on account of sickness was without some of the means of proper judgment. The case might have turned upon the credibility of a witness examined when he was absent. The appearance and manner of the witness might have concluded that question. No mere subsequent reading of the evidence can supply full means of knowledge in this respect. However, *held*, that it was error for the court to exclude such member from resuming his seat, as the court is nowhere clothed with power to expel a fellow member; and that whether or not the absent member shall act upon his return must depend upon his own views of propriety

and not upon those of the court. (7 Op. Atty. Gen., 98; see note to art. 46, A. G. N.)

**Consent of accused.**—Where the question was raised as to the right of a member to resume his seat after being absent during a portion of the trial, it was considered so far doubtful as to induce the accused to tender his consent to waive all question as to this point, and the member was accordingly not permitted by the court to resume his seat. *Held*, that this action of the accused could neither confer power upon the member to resume his seat, nor affect the jurisdiction or authority of the court to proceed without him. These depended upon the law and not upon the act of the accused. (7 Op. Atty. Gen., 98, 102.)

**Irregularities not fatal.**—The absence of a member of the court during the trial of the accused, and the erroneous action of the remaining members in excluding him upon his return, if presented to the President as the ground of a new trial, might or might not have been worthy of consideration in that relation. It was a mere incidental irregularity in form, wholly independent of the merits of the case, and might then have been cured. But after the sentence of dismissal has been confirmed and executed, it is too late for the accused to raise the question of such irregularity, just as it is then too late for the Government to take lawful steps in the premises for the further investigation of the merits, which, if the question had been made prior to the discharge of the court and the approval of its sentence, might have been done. (7 Op. Atty. Gen., 98.)

**Art. 48. [Suspension of pay.]** Whenever a court-martial sentences an officer to be suspended, it may suspend his pay and emoluments for the whole or any part of the time of his suspension.—(17 July, 1862, c. 204, s. 1, art. 18, v. 12, p. 605.)

**When sentence effective.**—The effect of a sentence of a court-martial suspending from the service for three years "from this day," upon half pay, a lieutenant of the Marine Corps, and ordering a reprimand by the Secretary of the Navy, is to suspend half the officer's pay from the date of the confirmation of the sentence, forward, during the term of three years. Until the confirmation he is entitled to receive full pay as before trial. The authority of a naval court-martial to affect by its sentence the pay of an officer subject to its jurisdiction is conferred by the act of April 23, 1800, article 40 (2 Stat., 51; art. 48, sec. 1624, R. S.). The limitation imposed by this article is clear, and accurately defined. The power of a court to suspend the pay and emoluments of an officer does not extend beyond the time of his suspension from service. It is incident to that suspension from service, and can only be coextensive in point of time with the suspension. (4 Op. Atty. Gen., 323; see art. 53, A. G. N., as to confirmation of sentence.)

**Suspension with pay.**—A sentence of suspension, merely, by a naval court-martial does not deprive the party of pay and emoluments. (6 Op. Atty. Gen., 200.)

Officers and enlisted men in the naval service do not incur any forfeiture or loss of pay by confinement or suspension from duty under

sentence of a court-martial unless the forfeiture or loss be imposed by the sentence. (15 Op. Atty. Gen., 175.)

See note to article 54, A. G. N., as to remission of part of sentence.

**Forfeiture of allowances.**—When an officer in the Army is suspended from duty he is not entitled to allowances. In this case the officer was sentenced to be suspended from rank and duty for 12 years, and "to forfeit one-half of his monthly pay every month for the same period." (Swain v. U. S., 165 U. S., 553.)

**Extra pay on discharge.**—Where a volunteer officer in the military service of the United States was sentenced by a court-martial to suspension from rank and pay for a certain period, before the expiration of which he was mustered out of the service and discharged, *held* that the sentence did not work a forfeiture of the three months' extra pay provided by the act of March 3, 1865, section 4 (13 Stat., 497), for volunteer officers upon being mustered out of the service, but merely deprived the officer, during his continuance in service and while it remained in force, of his regular current pay. (13 Op. Atty. Gen., 16.)

**Suspension; continuing punishment; effect of promotion.**—See note to article 54, A. G. N.

**Art. 49. [Prohibited punishments.]** In no case shall punishment by flogging, or by branding, marking, or tattooing on the body be adjudged by any court-martial or be inflicted upon any person in the Navy.—(17 July, 1862, c. 204, s. 1, art. 8, v. 12, p. 603. 6 June, 1872, c. 316, s. 2, v. 17, p. 261.)

See note to article 30, A. G. N., as to restriction upon use of irons; and see note to

article 63, A. G. N., as to cruel and unusual punishments.

**Art. 50. [Sentences, how determined.]** No person shall be sentenced by a court-martial to suffer death, except by the concurrence of two-thirds of the members present, and in the cases where such punishment is expressly provided in these articles. All other sentences may be determined by a majority of votes.—(17 July, 1862, c. 204, s. 1, art. 19, v. 12, p. 605.)

**Art. 51. [Adequate punishment; recommendation to mercy.]** It shall be the duty of a court-martial, in all cases of conviction, to adjudge a punishment adequate to the nature of the offense; but the members thereof may recommend the person convicted as deserving of clemency, and state, on the record, the reasons for so doing.—(17 July, 1862, c. 204, s. 1, art. 21, v. 12, p. 605.)

**Art. 52. [Authentication of judgment.]** The judgment of every court-martial shall be authenticated by the signature of the president, and of every member who may be present when said judgment is pronounced, and also of the judge-advocate.—(17 July, 1862, c. 204, s. 1, art. 22, v. 12, p. 605.)

**Death of member before signing record.**—The death of one of the members of a general court-martial after sentence had been imposed but before he had appended his signature to the sentence as required by article 52, A. G. N., does not render the sentence void. It is sufficiently authenticated if attested by the other members of the court. (23 Op. Atty. Gen., 550.)

This provision concerning authentication is embraced in the British naval laws from which many of ours have been borrowed. The British article is as follows: "If the prisoner be found guilty of a breach of any of the articles of war established by law, the court shall consider and determine the punishment proper to be inflicted in accordance therewith. The judge advocate shall draw up the sentence accordingly, being careful to specify therein the charge, or substance of it; and the same shall be signed by every member of the court, by way of attestation, notwithstanding any difference of opinion there may have been among the members." (23 Op. Atty. Gen., 550.)

The purpose of the British and American articles is doubtless the same. They are intended to direct the officers of the court to sign the sentence, notwithstanding they may not have concurred in the decision, in order that the sentence may be known with certainty to have been correctly recorded. The article orders officers, under military discipline, to sign the sentence. It does not say that the fact that such sentence has been pronounced must be taken as nonexistent, however clearly it can be proved, if they or some of them are not in a position to sign as directed. It was not the intention that in a case like the present the trial and sentence should go for naught. (23 Op. Atty. Gen., 550.)

**Record should contain all the evidence.**—As no sentence of a naval court-martial can, under the Articles for the Government of the Navy, be carried into execution until confirmed by the commander of the fleet or by the officer ordering the court or in certain cases by the President of the United States (act Apr. 23, 1800, 2 Stat., 45), it is essential that the record should contain all the evidence; and in order to a confirmation such evidence should sustain, in the opinion of the superior officer, the finding of the court. The mere statement by the court of the inferences which it drew from the evidence, unaccompanied by the evidence itself, was a serious defect in the record, and the commanding officer was correct in not approving the judgment of the court. (3 Op. Atty. Gen., 545; compare note to Art. 53, A. G. N., under "Approval of sentence and not of whole proceedings required.")

**Responsibility of court and judge advocate.**—The court and judge advocate are required by law to keep a true record of the proceedings. This is not made the duty of any other officer or servant of the Government. The responsibility and the power both belong to these officers and not to any other. (23 Op. Atty. Gen., 23, 27.)

**Record must show jurisdictional facts.**—A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved. To give effect to its sentence it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with; and that



its sentence was conformable to law. There are no presumptions in its favor so far as these matters are concerned. It is not sufficient that jurisdiction may be inferred argumentatively from its averments. Their authority is statutory and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction and that their sentences were conformable to law must be stated positively; and it is not enough that they may be inferred argumentatively. (*Runkle v. U. S.*, 122 U. S., 543, 555.)

**Omission of record to show jurisdictional facts.**—Where the due convocation of a court-martial with jurisdiction to try offenses of the class in question is established on the face of its record, the existence of a particular fact not so shown, but acted upon by the court-martial and necessary to its jurisdiction over the particular case, may be proven in support of its judgment upon a collateral attack. Such evidence does not change the court-martial record, but simply meets the collateral attack by showing that at the time of trial the basis existed for the exertion by the court of the authority conferred upon it. General expressions found in some of the reported cases to the effect that, wherever a fact upon which the jurisdiction of a court of limited jurisdiction depends is questioned, it must appear in the record that such fact was established, should be limited in accordance with this ruling. (*Givens v. Zerbst*, 255 U. S. 11, 20, affirming *ex parte Givins*, 262 Fed. Rep., 702.)

The complete right to collaterally assail the existence of every fact which was essential to the exercise by a court-martial of its authority, whether appearing on the face of the record or not, is wholly incompatible with the conception that, when a collateral attack is made, the face of the record is conclusive. Such expressions as to the face of the record contemplate, not the record assailed by the collateral attack, but the record established as the result of the proof heard on such attack. (*Givens v. Zerbst*, 255 U. S., 11, 20, affirming *ex parte Givins*, 262 Fed. Rep., 702.)

In a habeas corpus proceeding evidence was admissible to prove the military status of the relator at the time of his trial and conviction by an Army court-martial, where the record of the court-martial was silent on the subject beyond showing that he was charged as a captain in the Army. (*Givens v. Zerbst*, 255 U. S. 11, affirming *ex parte Givins*, 262 Fed. Rep., 702.)

It is not necessary that every fact essential to the jurisdiction of a court-martial and the competency and qualifications of its members should be set out in the record in each case, but with respect to formal matters relating to the creation of the court, such as a recital that an order of the War Department was "by direction of the President," or the designation of the rank and official position of officers, regularity will be presumed. (*McRae v. Henkes*, 273 Fed. Rep., 108.)

That an order convening a court-martial was not signed personally by the department commander, but by a staff officer by his "command," and that the department of which he was in command did not appear below his personal signature, held not to render it invalid; the

objection related to a matter of form and not of substance. (*McRae v. Henkes*, 273 Fed. Rep., 108.)

That the record of the court-martial did not show that the retired officers who served as members had been regularly detailed to active duty with their consent or as otherwise provided by statute did not render the judgment and sentence void and subject to collateral attack. Indeed, such facts could not appropriately be made a part of the record no more than facts showing that the members of the court had been commissioned as officers. (*McRae v. Henkes*, 273 Fed. Rep., 108.)

Although it was necessary that each member of the court be fully competent to sit, the order convening the court and appointing the detail, and the resulting service and action taken by those detailed, raise the presumption that its members were competent and possessed all the necessary qualifications entitling them to sit as such. (*McRae v. Henkes*, 273 Fed. Rep., 108, reversing *ex parte Henkes*, 267 Fed. Rep., 276.)

Where the record of a trial before a court-martial is defective, in failing to show who was the originator or signer of the charges against the accused, and who is to be treated legally as the accuser or prosecutor, evidence aliunde is admissible to supply the information when the proceedings are attacked years later as null and void on the ground that the commanding general was legally incompetent to convene the court, because he had preferred the charges. In such case sworn statements of officers may be admitted in order not to impeach the validity of the proceedings, but to supply facts which the record fails to disclose. (16 Op. Atty. Gen., 106.)

For other cases, see notes to article 38, A. G. N., under "Evidence of convening authority's power"; article 40, A. G. N., under "Judge advocate not sworn"; and article 43, A. G. N., under "Waiver of objection by the accused."

**Correction of record.**—See above under "Omission of record to show jurisdictional facts"; and see below under "Conclusiveness of record."

The Secretary of War is without authority to correct, amend, or to take any action inconsistent with the record of a court-martial duly convened upon a proper and sufficient charge. This power is inherent in a court-martial; but such correction or amendment can be made only when the court-martial is in session, and when at least five of the members of the court who acted upon the trial are present, and then in the presence of the judge advocate. After the court has been dissolved, and the sentence approved and executed, such amendments or corrections can not be made. (23 Op. Atty. Gen., 23.)

**Conclusiveness of record.**—The record is that which the court certifies to have transpired on the trial and embodies the action of the court. The fact that the court, in due and legal form, announces that it did so and so, or that so and so transpired, makes that record and the fact, and no one except the court itself can lawfully alter that record. If it were to be held otherwise, there is not a record filed in the department that could not be subject to attack by *ex parte* affidavits, and that, too, at a time when

the officers of the court might be dead or scattered to the ends of the earth and unable to defend the solemn certificates which they made; and all the judgments of courts-martial as filed and acted on would be open to perpetual contradiction on subsequent assertions of interested parties which it would be impossible to meet or disprove. (23 Op. Atty. Gen., 23, 28.)

In this case the record was in every respect regular on its face. But after the sentence was carried into execution, the accused filed an affidavit of himself and also one made by one of the members of the court-martial, stating that a certain witness testified at the trial, whereas the record did not show that the person named in the affidavits was used as a witness in the case. It was contended by the accused that the reviewing authority never had jurisdiction to approve and execute the sentence, because he never had the whole record before him; and that his action was accordingly void. *Held*, that the record of a court of competent jurisdiction is, as against collateral attack, conclusive of its own verity; that this is settled and accepted law; and that the same doctrine as to conclusiveness is also applicable to courts-martial. (23 Op. Atty. Gen., 23.)

See above, under "Omission of record to show jurisdictional facts," and "Correction of record."

**Copies of records; rights of public; evidence in other cases.**—See note to section 882, Revised Statutes; and note to article 34, A. G. N.

Public justice and private right require that the Secretary of the Navy and his subordinates shall not withhold their testimony in regard to the contents of the record of a court-martial, after the proceedings have been consummated by the action of the proper revisory authority, when required to give it by the summons of a State court. (11 Op. Atty. Gen., 137.)

When the proceedings of a naval court-martial are at an end, through the action of the competent revisory power, the contents of the records of such proceedings are not State secrets; nor are the records of the courts to be regarded as the minutes of official, confidential transactions, within the meaning of the rule as to "privileged communications." (11 Op. Atty. Gen., 137.)

Any person having an interest in the record of a naval court-martial on file in the Navy Department is entitled to have an exemplified copy of it after the proceedings are consummated by the action of the proper revisory authority. (11 Op. Atty. Gen., 137.)

**Art. 53. [Confirmation of sentence.]** No sentence of a court-martial, extending to the loss of life, or to the dismissal of a commissioned or warrant officer, shall be carried into execution until confirmed by the President. All other sentences of a general court-martial may be carried into execution on confirmation of the commander of the fleet or officer ordering the court.—(17 July, 1862, c. 204, s. 1, art. 19, v. 12, p. 605.)

"The Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court-martial convened by his order or by that of any officer of the Navy or

The many instances in which court-martial records might be made available for the purposes of justice clearly show that any rule by which the right to inspect and receive copies of the records of the proceedings of military tribunals would be limited and restricted would operate to affect disastrously the administration of justice in cases in which the liberty, happiness, and life of the individual are often involved, and the safety of the State itself may be concerned. (11 Op. Atty. Gen., 137.)

The records of courts-martial should be regarded as standing upon the same footing, so far as the parties affected and the community at large are concerned, as the records of the ordinary tribunals of civil and criminal jurisdiction. The legislation of Congress shows that it was intended to guard against improper secrecy in the cases of courts-martial. (11 Op. Atty. Gen., 137.)

The head or an officer of a department may properly have the custody of records of courts-martial, but such custody does not involve any right of exclusive control over the documents, nor does it imply any right to withhold the contents of them. Such records, it is plain, must be deposited and remain somewhere. They can not stay in the possession of the courts-martial, because they have no existence after the trials. They are then dissolved *sine die*. The most appropriate place of custody is undoubtedly the archives of the department charged with the administration of the branch of the military service in which the courts were respectively convened. With respect to the records of naval courts-martial on file in the department, the Secretary of the Navy or the officer of the department in whose peculiar care they may be placed stands in relatively the same attitude as the clerk or prothonotary of a civil court with respect to the records of cases instituted and determined in the court of which he is an officer. (11 Op. Atty. Gen., 137, 143.)

A paper which must be kept on file in a designated office and which can not be removed therefrom pertains to that office and so becomes official within the meaning of section 882, Revised Statutes. (*Cohn v. U. S.*, 258 Fed. Rep., 355.)

If the departments at Washington can be compelled to produce in any part of the country the original of any documents or papers they may have on file, the greatest embarrassment and confusion to the department would be the consequence. (*Cohn v. U. S.*, 258 Fed. Rep., 355.)

Marine Corps." (Act Feb. 16, 1909, sec. 9, 35 Stat., 621.)  
The Judge Advocate General of the Navy "shall, under the direction of the Secretary of the Navy, receive, revise, and have



recorded the proceedings of all courts-martial \* \* \* in the naval service." (Act June 8, 1880, 21 Stat., 164.)

"Such finding and sentence shall be subject to review by the convening authority, and by the Secretary of the Navy, as in the cases of other courts-martial." (Act Apr. 9, 1906, sec. 3, 34 Stat., 104-105, relating to courts-martial for the trial of midshipmen at the Naval Academy.)

**Sentence inoperative until confirmed.**—

Under the laws of the United States, the sentence of a court-martial in case of death or dismissal is not perfected until it shall have received the approbation of the President. Without his sanction it is no more a perfect sentence than a bill which has passed both houses of the National Legislature but which has not yet received the approbation of the President is an act of Congress. In both cases his approbation is necessary to consummate the measure. (1 Op. Atty. Gen., 233, 241.)

According both to plain law and universal practice, the sentences of naval courts-martial are incomplete and can not lawfully be carried into effect until they have received the approval or confirmation of some revisory power. (5 Op. Atty. Gen., 508, 511.)

Without the confirmation of the sentence by the statutory reviewing authority it was a vain thing. (10 Op. Atty. Gen., 64.)

**Execution of sentence prior to confirmation.**—If at the time that the act was done by the War Department of actually dismissing the officer, the sentence had not been confirmed by the President, it does not admit of doubt that the sentence and thus the act done could be confirmed at a subsequent period by him, and this upon the well-settled principle that a subsequent ratification is equal to a prior command. Whether or not in the interval that ensued between the informal dismissal of the officer and the act done by the President which operated to confirm the sentence the officer is to be considered as having been an officer of the Army, not decided. (16 Op. Atty. Gen., 298.)

An officer was convicted by court-martial and sentenced to dismissal. The sentence not having been approved by the President, the Secretary of the Navy addressed a letter to the officer purporting to dismiss him from the naval service, not pursuant to the sentence of the court but because of facts disclosed by the record. *Held*, that such letter was an attempted dismissal of the officer otherwise than pursuant to the confirmed sentence of a court-martial, and that such power of dismissal did not exist in the President on that date. (16 Op. Atty. Gen., 312.)

Pursuant to the Attorney General's opinion above noted (16 Op. Atty. Gen., 312), the Secretary of the Navy addressed a letter to the officer 11 years after his supposed dismissal, declaring the order of dismissal to be illegal and void, and revoking and annulling same by direction of the President of the United States. The name of the officer was thereupon restored to the Navy Register in the original relative position held by him and to which he was entitled by virtue of his commission. *Held*, that the order of the President did not operate to restore the said officer to the Navy; he was

always there, although by error there was an omission of his name in the register and a failure for some years to recognize him as an officer of the Navy. The only rule that can be adopted is to treat him as having always been nominally, what he always was actually and really, an officer of the United States. If positions have been arranged in regard to the rank of other officers upon the theory that he was not an officer, those positions should, whenever possible, be altered so as to rectify the error committed by treating him as out of the service. Where an officer is illegally dropped he can only find his place again in the grade from which he was dropped, as it would not be in the power of the President alone to give him the rank of a higher grade. It is not necessary to consider in this case to what extent it would be possible to rectify such an error so far as higher grades are concerned. (17 Op. Atty. Gen., 21, 22, 24; see also act of Mar. 3, 1883, 22 stat., 530, "for the relief of Edward Bellows," the officer in whose case this opinion was rendered; and compare note to art. 36, A. G. N., under "Illegal dismissal revoked.")

Until the President has acted in the manner required by the articles of war, a sentence by Army court-martial of dismissal of a commissioned officer from service in time of peace is inoperative. Before then it is interlocutory and inchoate only. Accordingly, there being no sufficient evidence that the action of the court-martial which dismissed Maj. Runkle from the Army was approved by the President it follows that he was never legally cashiered or dismissed from the Army. (*Runkle v. U. S.*, 122 U. S., 543, 547, 559.)

**Approval of sentence and not of whole proceedings required.**—Under the articles of war it is the approval of the sentence and not of the whole proceedings that is the prerequisite to carrying the sentence into execution. (*Carter v. McLaughry*, 183 U. S., 365, 384; compare note to art. 52, A. G. N., under "Record should contain all the evidence"; and see note below as to form of President's action.)

**Effect of approval or disapproval.**—In the case of a court-martial sentence of death or dismissal, the President's disapproval annihilates it; the case stands as if there had been no trial, and is just as open to an order for a court-martial as it was in the first instance. (1 Op. Atty. Gen., 233, 242; see note below as to new trials.)

Where a soldier was tried by court-martial for theft and desertion, and having been convicted of both charges was sentenced by the court, but the proceedings, findings, and sentence were afterwards disapproved by the reviewing officer and the prisoner ordered to be released from confinement and restored to duty: *Held*, that the action of the reviewing officer was in effect an acquittal by the court; that the accused is in legal contemplation innocent of the charges mentioned; and that there is no authority for withholding his pay on account of the alleged desertion. (13 Op. Atty. Gen., 459. In this case, disapproval was for the reason that the court allowed so much of the examination of the only witness for the prosecution to be conducted by means

of leading questions as to destroy the value of the testimony. See note to art. 8, A. G. N., under "Effect of disapproval; desertion;" and see below under "Court-martial bar to trial in civil court.")

After the final sentence of the law is pronounced by the superior officers, the charge has passed conclusively into an offense beyond dispute, for the judgment of a court-martial is conclusive in its effect as to the truth of the charge and as a judicial decree is a bar to further proceeding. (19 Op. Atty. Gen., 106, 108.)

For other cases, see below, under "Irregularities and false defects."

**Disapproval of findings in part; effect on sentence.**—Where the sentence is rendered on findings of guilty of several charges with specifications thereunder, and the President, as the reviewing authority, has disapproved of the findings of guilty of some of the specifications, but approved the findings of guilty of a specification or specifications under each of the charges and of the charges, the President does not think proper to remand the case to the court-martial for revision, or to mitigate the sentence, or to pardon the accused, but approves the sentence, the judgment so rendered can not be disturbed on the ground that the disapproval of some of the specifications vitiated the sentence. The analogies of the criminal law bear out the procedure under military law. It can not be assumed that if the court-martial had acquitted on the disapproved findings, the sentence would have been less severe, and that the punishment was therefore increased by the action of the President. (*Carter v. McLaughry*, 183 U. S., 365, 385.)

It has been repeatedly ruled by the Judge Advocates General of the Army that a duly approved finding of guilty on one of several charges, a conviction upon which requires or authorizes the sentence adjudged, will give validity and effect to such sentence, although the similar findings on all the other charges are disapproved as not warranted by the testimony. (*Carter v. McLaughry*, 183 U. S., 365, 386.)

**Reconsideration of reviewing authority's action.**—Where several midshipmen had been dismissed by the sentence of a naval court-martial, which was approved by the President, who very shortly thereafter reconsidered his approval and announced his determination to annul his approval and restore the dismissed officers, but was prevented from doing so because of his sudden death a few days afterwards, *held* that it is within the competency and power of the present Executive to restore them to their former rank in the Navy, provided it can be done without increasing that class of officers beyond the number limited by law. (5 Op. Atty. Gen., 259. This opinion was expressly confined to the case presented and "its particular circumstances," and thus excludes all idea of introducing any new doctrine. See 6 Op. Atty. Gen., 369, 370.)

It can not be assumed, as a general proposition, either that the President has a power unlimited as to time or circumstances to restore an officer who has been dismissed from the public service, or that he is in all cases precluded

from so doing from the instant he signs his approval of a sentence of dismissal. It is not necessary on this occasion to attempt to discuss or define the extreme limits which restrain his power, on the one hand, or, on the other hand, to fix the limits within which it may be his right and duty to reconsider and annul executive acts. (5 Op. Atty. Gen., 259.)

A sentence of dismissal from the naval service, approved by the President, can not be annulled. The officer dismissed can be restored to the Navy only by a new nomination by the President, confirmation of the Senate, and all the requisites to constitute an original appointment to office. (4 Op. Atty. Gen., 274.)

An officer of marines was tried by court-martial and sentenced to be cashiered; the sentence was commuted to suspension for a limited period; thereafter the accused was appointed a lieutenant in the Army. *Held*, that his case can not, after the lapse of 16 years, be examined with reference to whether the court-martial by which he was tried was legally organized and competent to try him. (5 Op. Atty. Gen., 384.)

After the sentence of a court-martial dismissing an officer has been approved and acted on by the President, it can not be revised except for suggestion of absolute nullity in the proceedings as being absolutely void ab initio. The decision of the President in cases of this sort is that of the ultimate judge provided by the Constitution and laws. Like that of any other court in the last resort of law, it is final as to the subject matter. (6 Op. Atty. Gen., 369.)

After the trial and conviction of a commissioned or warrant officer of the Navy by a court-martial having jurisdiction of the case, and the approval by the President of the sentence dismissing him from the service, and such sentence has been carried into execution, the President can not reconsider his approval and revoke the sentence of the court. (11 Op. Atty. Gen., 19.)

Undoubtedly the President, in passing upon the sentence of a court-martial and giving to it the approval without which it can not be executed, acts judicially. The whole proceeding from its inception is judicial. The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice—rights which in the very nature of things can neither be exposed to danger nor entitled to protection from the uncontrolled will of any man but which must be adjudged according to law. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence can not be executed, is as much a part of this judgment according to law as is the trial or the sentence. When the President, then, performs this duty of approving the sentence of a court-martial dismissing an officer, his act has all the solemnity and significance of the judgment of a court of law. As it has to be performed under the same sanctions, so it draws with it the same consequences. One of these consequences is that where a



judgment has been regularly entered in a case properly within the judicial cognizance, from which no appeal has been provided or taken, and it has been followed by execution, it is final and conclusive upon the party against whom it is entered. And this effect attaches to the action of the President in approving the sentence of a court-martial dismissing an officer after that approval has been consummated by actual dismissal. (11 Op. Atty. Gen., 19, 21; see also *Runkle v. U. S.*, 122 U. S., 543, 557.)

No man would assert the power of the President to reverse his judicial decision afterwards to the prejudice of the accused. But why should that judgment be any less permanent because it establishes his guilt? It must be accepted as final and conclusive in the one case as in the other, because it is the judgment which the law authorizes to settle the rights in controversy, from which no appeal has been given. (11 Op. Atty. Gen., 19, 21, 22.)

Courts-martial are judicial tribunals constituted by statutory authority and organized in pursuance of statutory regulations for the administration of a great and important department of jurisprudence—the law military. They are, therefore, in the strictest sense courts of justice, having jurisdiction of a large and in some respects distinct community of our fellow citizens, and taking judicial cognizance of the duties and obligations which the citizen assumes when he enters, by enlistment or otherwise, into the military service of the country. Their judgments in cases committed for the consideration and determination are as final, conclusive, and authoritative as those of any judicial tribunal of the country. After the sentence has been approved and carried into effect, there is no revisory power by which it can be rescinded, annulled, or modified. It forever stands as the judgment of a court. (11 Op. Atty. Gen., 137.)

When the sentence of a court-martial dismissing a commissioned officer has been lawfully confirmed and executed, the proceedings in the case are no longer subject to review by the President; they have passed beyond his control and are at an end. (15 Op. Atty. Gen., 290.)

A commander in the Navy was tried and sentenced to dismissal from service by a naval court-martial. The record of the proceedings and sentence was submitted to the President, who, on June 5, 1874, approved the same. On June 9, 1874, the Secretary of the Navy addressed a letter to the officer, then in Boston, informing him of the approval of the sentence, and stating that from said date (June 9, 1874) he would "cease to be an officer of the Navy." On June 12, 1874, the Secretary addressed another letter to the officer, asking him to return the letter of dismissal. On December 8, 1874, the Secretary addressed a third letter to the officer, stating that the sentence of the court-martial "was, on the 9th day of June, 1874, mitigated to suspension from rank, and so forth, to date from that day." *Held*, (1) that the letter of the Secretary of the Navy of December 8 is satisfactory proof not only of the mitigation of the sentence by the President, but that it was mitigated by him on the 9th of June; (2) that the letter of dismissal in execu-

tion of the sentence, forwarded by the Secretary on the 9th of June (it being manifest that the complete execution of the sentence by means of that letter could not take place on that day), was then revocable; and the mitigation of the sentence was in effect a revocation of the letter; and (3) that it was competent to the President under the circumstances to mitigate the sentence when he did. (15 Op. Atty. Gen., 463; see *Quackenbush v. U. S.*, 177 U. S., 20.)

Where the sentence of a legally constituted court-martial in a case within its jurisdiction has been approved by the reviewing authority and carried into execution, it can not afterwards be revised and annulled, there being no fatal irregularity in its proceedings nor illegality in its sentence. The proceedings are then at an end, and the action thus had upon the sentence is, in contemplation of law, final. (17 Op. Atty. Gen., 297.)

If the sentence of a court-martial dismissing a commissioned officer of the Army has been legally approved by the President, the subsequent disapproval of the sentence by his successor would be a nullity and could not have the effect of restoring the officer to his position. (*Runkle v. U. S.*, 122 U. S., 543, 558.)

For other cases, see below, under "Irregularities and fatal defects."

**Relation of reviewing authority to court analogous to judge and jury.**—Courts-martial exhibit many points of analogy with juries, the appointing power having something of the same relation to the former that the judge *ad nisi prius* has to the latter, inasmuch as the court-martial, like the jury, finds all of the facts, and pronounces a sentence thereon which has to undergo the legal supervision of a superior authority. Questions have arisen where it was convenient to reason from this analogy; however, it is analogy only, and leaves unchanged the substantial nature of things. (7 Op. Atty. Gen., 338, 340.)

The reviewing authority, whose confirmation of the sentence is required before it becomes operative, occupies toward the court-martial and its proceedings a relation similar to that which the judge in a civil court occupies to a jury. (10 Op. Atty. Gen., 64.)

The verdict of a jury bears a close analogy to the judgment of a court-martial. The sentence pronounced on that verdict by the court bears a like analogy to the confirmation of the officer who ordered the court. (19 Op. Atty. Gen., 106, 107.)

While a court-martial can not be altogether likened to a civil court, in which the guilt of the accused is to be pronounced by a jury under the supervision of the judge, and the penalty is to be fixed by the judge within the prescribed limits, it is true that a court-martial acts only in response to the call of a superior authority, and the result of its deliberations is somewhat in the nature of a recommendation to that authority; is without effect unless approved by it; and until then is interlocutory and inchoate only. (In re *Brodie*, 128 Fed. Rep., 665, 668.)

The superior authority which orders a court-martial, and to which its conclusion must be submitted for approval or disapproval, is spoken of as the reviewing authority. Its

action being indispensable to a final conclusion or judgment, the reviewing authority is an essential component of the original tribunal and is not entirely a court of errors. (In re Brodie, 128 Fed. Rep., 665, 668.)

See note below, under "Reconvening of court for revision."

**"Officer ordering the court;" President and Secretary of the Navy.**—The sentence must be confirmed by the President, if he ordered the court; or by the Secretary of the Navy, if he was the officer who ordered it. (1 Op. Atty. Gen., 309.)

Under the phrase, "the officer ordering the court" in the articles of April 23, 1800 (2 Stat., 51), the President and Secretary of the Navy alone were included; because by said articles they were the only officers authorized to order a naval court-martial at home. (1 Op. Atty. Gen., 309.)

Where a general court-martial was convened by the Secretary of the Navy, he was the "officer" ordering the court within the meaning of the Articles for the Government of the Navy providing for the execution of sentences on confirmation of the officer ordering the court; the approval of the Secretary of the Navy was that confirmation. (4 Op. Atty. Gen., 323.)

The Secretary of the Navy has power to approve the sentence of a court-martial convened by him where the sentence of the court does not extend to loss of life or to the dismissal of a commissioned or warrant officer. (5 Op. Atty. Gen., 508.)

The Secretary of the Navy is an "officer" within the meaning of the act of April 23, 1800, article 41 (2 Stat., 51), providing that sentences of courts-martial in certain cases may be carried into execution "on confirmation of the commander of the fleet, or officer ordering the court." (5 Op. Atty. Gen., 508.)

To say that the term "officer" as here used is to be understood as meaning only a naval officer having command of a squadron is a construction not only narrow and arbitrary, but such as would defeat the declared purpose of this provision of law. The Secretary of the Navy is in fact and law an "officer" and in the act establishing the Navy Department (1 Stat., 553), he is denominated the "chief officer" of that department. (5 Op. Atty. Gen., 508.)

Where a court-martial for the trial of an officer of the Army was convened by the President, he was the reviewing authority and the court of last resort. (Carter v. McClaughry, 183 U. S., 365, 385.)

**Mitigating circumstances considered by reviewing authority.**—In exercising the revisory power over sentences of courts-martial, the President may consider the provocation, if any, which led to the offense and all the facts and circumstances which properly bear upon the justice, injustice, severity, or leniency of the sentence. (2 Op. Atty. Gen., 286.)

Provocation, according to its nature and degree, and according to the nature of the act committed in consequence of it, may justify or excuse that act or may be inadequate to either purpose. English writers on military law confirm the idea that extenuating circumstances may be properly considered by the officer to whom is intrusted the power of supervising the

sentence of a court-martial. It is indeed the right of the accused that all the circumstances of his case should be reviewed by the authority which decides finally on his case. (2 Op. Atty. Gen., 286.)

See note to article 52, A. G. N., under "Record should contain all the evidence."

**Personal action of reviewing authority required.**—The action of the President as to the confirmation of sentences in cases where such action is required by the articles of war is judicial in its character and in this respect differs from the administrative action considered in cases holding that the action of the head of a department is in legal contemplation the action of the President. The law implies that he is himself to consider the proceedings laid before him, and decide personally whether they ought to be carried into effect. Such a power he can not delegate. His personal judgment is required, as much so as it would have been in passing on the case if he had been one of the members of the court-martial itself. He may call others to his assistance in making his examinations and in informing himself as to what ought to be done; but his judgment when pronounced must be his own judgment and not that of another. And this because he is the person, and the only person, to whom has been committed the important judicial power of finally determining upon his examination of the whole proceedings of a court-martial whether an officer holding a commission in the Army shall be dismissed from service as a punishment for an offense. (Runkle v. U. S., 122 U. S., 543, 557.)

**Form of President's action; personal signature not necessary.**—It is not necessary that the President should attach his sign manual to the approval of a sentence rendered by a court-martial in time of peace cashiering a commissioned officer in order to make the sentence effectual. It is sufficient for this purpose if his approval of the sentence be signified through and attested by the Secretary of War in a statement signed by the latter. (15 Op. Atty. Gen., 290.)

A statement made and signed by the Secretary of War announcing the approval by the President of a court-martial sentence is sufficient authentication of the act of the President, without an express averment therein that it is made by direction of the President, the presumption being always that such direction was given. (15 Op. Atty. Gen., 290; for decision of the Supreme Court in this case, see Runkle v. U. S., noted below.)

Where an Army officer was sentenced to dismissal from the service, and the sentence, without having been approved by the President, was carried into effect under orders of the War Department, *held* that the subsequent recognition by the President of the vacancy thus occasioned, by making an appointment during a recess of the Senate or a nomination to that body (followed by the issuance of a commission with the consent of the Senate) of a person to fill the place of such officer, operates as a confirmation by him of the sentence and orders. (16 Op. Atty. Gen., 298; compare 15 Op. Atty. Gen., 463, 466.)

Whether a sentence of court-martial has been confirmed by the President is to be determined



by evidence, no specific form for this act having been provided by statute. (16 Op. Atty. Gen., 298.)

A paymaster in the Navy was sentenced by court-martial, *inter alia*, to be dismissed. The following letter was addressed to him by the Secretary of the Navy: "In consequence of the facts appearing upon the record of the naval general court-martial before which you were tried \* \* \*, you are dismissed from the naval service, and will from this date cease to be regarded as an officer in the United States Navy." *Held*, that this letter does not profess in direct terms nor inferentially to be the act of approval of the sentence of the court-martial; it is founded upon facts disclosed by the record, and does not state the act which the Secretary does to be the act of approval of the sentence. Its fair construction is that it is a dismissal from the service by reason of disclosures made by the record, and such power of dismissal, independently of court-martial, did not then exist, by virtue of article 36, A. G. N. (16 Op. Atty. Gen., 312; see also, 17 Op. Atty. Gen., 21, 22; and see note above, under "Execution of sentence prior to confirmation.")

Notice by the Secretary of the Navy of the approval by the President of a sentence dismissing a midshipman in 1868 was sufficient evidence both of approval and promulgation. (16 Op. Atty. Gen., 550.)

Where a paymaster in the Navy was sentenced to dismissal by court-martial, and it distinctly appeared by the order of the Secretary of the Navy that the President approved the finding of the court and directed the sentence to be carried into effect, *held* that the officer was legally dismissed from the naval service. (17 Op. Atty. Gen., 43, affirming 15 Op. Atty. Gen., 290.)

Where the approval of the proceedings, findings, and sentence of a court-martial by the President is attested by an entry on the record signed by the Secretary of War, this is sufficient evidence of such approval. (17 Op. Atty. Gen., 397. For decision of Court of Claims in this case, see *Armstrong v. U. S.*, 26 Ct. Cls., 387.)

The President's approval must be authenticated in a way to show, otherwise than argumentatively, that it is the result of his own judgment, and not a mere departmental order which may or may not have attracted his attention; and the fact that the order was his own must not be left to inference only. Not decided what the precise form of an order of the President approving the proceedings and sentence of a court-martial should be, or that his own signature should be affixed thereto. (*Runkle v. U. S.*, 122 U. S., 543.)

In this case the following order was issued by the Secretary of War: "The findings and sentence are approved. In view of the unanimous recommendation by the members of the court that accused shall receive executive clemency on account of his gallant services during the war, and of his former good character, and in consideration of evidence, by affidavits presented to the War Department since his trial, showing that accused is now, and was at the time when his offense was

committed, suffering under great infirmity in consequence of wounds received in battle, and credible representations having been made that he would be utterly unable to pay the fine imposed, the President is pleased to remit all of the sentence, except so much thereof as directs cashiering, which will be duly executed." This action is divided into two parts, one relating to the approval of the proceedings and sentence, and the other to the executive clemency which was invoked and exercised. The personal action of the President is nowhere mentioned, except in the remission of a part of the sentence. There is nothing which can have the effect of an affirmative statement that the whole proceeding had been laid before the President for action or that he personally approved the sentence. So far as it relates to approval of the sentence, it indicates on its face departmental action only. What follows does not clearly show the contrary. Under the circumstances, it can not be said that it positively and distinctly appears that the proceedings of the court-martial have ever in fact been approved or confirmed in whole or in part by the President of the United States. (*Runkle v. U. S.*, 122 U. S., 543, 547, 559, holding that the officer in this case was never legally cashiered or dismissed from the Army.)

The decision of the President confirming or disproving the sentence of a general court-martial in time of peace, extending to the loss of life or the dismissal of a commissioned officer, is a judicial act to be done by him personally, and is not an official act presumptively his; but it need not be attested by his sign manual in order to be effectual. (*U. S. v. Page*, 137 U. S., 673, citing 2 Op. Atty. Gen., 67; 7 Op. Atty. Gen., 473; 15 Op. Atty. Gen., 290; and distinguishing *Runkle v. U. S.*, 122 U. S., 543.)

The following action, signed by the Secretary of War, held to constitute sufficient evidence of approval by the President:

"In conformity with the 65th of the Rules and Articles of War, the proceedings of the general court-martial to the foregoing case have been forwarded to the Secretary of War, and by him submitted to the President.

"The proceedings and findings upon the second charge and specification, and upon the third charge under its second and third specifications, are approved.

"With regard to the other findings the remarks noted by Major General Hancock, who convened the court, are concurred in as follows: \* \* \*

"The sentence is approved.

"Second Lieut. Frank A. Page (retired) accordingly ceases to be an officer of the Army from the date of this order." (*U. S. v. Page*, 137 U. S., 673.)

The only possible conclusion to be drawn from the action signed by the Secretary of War in this case is that the approval was by the President, in whom alone reposed authority to act. Where the record discloses that the proceedings have been laid before the President for his orders in the case, the orders subsequently issued thereon are presumed to be his and not those of the Secretary, by whom they are authenticated; and this must be the result

where the approval follows the submission in the same order. (*U. S. v. Page*, 137 U. S., 673.)

In *Runkle v. United States* (above noted) the record failed to show the vital fact of the submission of the proceedings to the President. The inference that the President had personally acted could be properly drawn from the substantive fact of the submission of the proceedings to him, if that appeared, but presumption could not supply that fact, and then a presumption upon that presumption be availed of to make out that the approval was the President's personal action. This would leave the fact that the order was the President's to inference only. (*U. S. v. Page*, 137 U. S., 673.)

Reference to the case of *Runkle v. United States* (above noted) shows that the circumstances were so exceptional as to render it hardly a safe precedent in any other. (*U. S. v. Fletcher*, 148 U. S., 84, 90.)

The proceedings, findings, and sentence of a military court-martial being transmitted to the Secretary of War, that officer wrote upon the record the following order, dating it from the "War Department," and signing it with his name as "Secretary of War": "In conformity with the 65th of the Rules and Articles of War, the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War for the action of the President. The proceedings, findings, and sentence are approved, and the sentence will be duly executed." *Held*, that this was a sufficient authentication of the judgment of the President and that the order was not null and void on the ground that it did not appear that the President personally approved the proceedings and directed the execution of the sentence. (*U. S. v. Fletcher*, 148 U. S., 84; *Ide v. U. S.*, 150 U. S. 517.)

While the action of the President in respect of the proceedings and sentences of courts-martial is judicial, such action need not be evidenced under his own hand. There is nothing to indicate that the Secretary of War assumed to confirm or disapprove or issue orders in the case, and as his indorsement showed that he was proceeding under article 65, and that he had received the record for the purpose of being acted upon by the President, the approval and the direction for the execution of the sentence was manifestly the acts of the President. The presumption is that the Secretary and the President performed the duties devolved upon them respectively. While it is not said in this case that the proceedings were submitted to the President, from the statement that they had been forwarded to the Secretary of War for the action of the President followed by an approval which could only emanate from the President, the conclusion follows that the action taken was the action of the President. (*U. S. v. Fletcher*, 148 U. S., 84; *Ide v. U. S.*, 150 U. S., 517.)

The approval by the President sufficiently appears where the record shows that the sentence was submitted to the President, and his approval appears over his signature at the foot of a brief in the case, prepared in the Navy Department; and the Secretary of the Navy writes to the accused that the President has

approved the sentence. It is difficult to see how the personal approval of the President could appear more clearly than in this case. (*Bishop v. U. S.*, 197 U. S., 334.)

**Action by convening authority absent from his command.**—See note to article 38, A. G. N., under "Convening authority outside his command."

**Form of disapproval by convening authority.**—A paymaster in the Navy was sentenced, *inter alia*, to be dismissed upon a charge substantially of embezzlement. The convening authority forwarded the record of proceedings to the Navy Department with the following indorsement: "Respectfully forwarded, with the remark that the finding of the court is not sustained by the evidence, which fails to show that the accused received from the bank the amount of money he is charged with having lost." *Held*, that this indorsement can not be deemed to be a disapproval of the finding and sentence of the court; such disapproval should be distinctly expressed. (16 Op. Atty. Gen., 312; see also 17 Op. Atty. Gen., 21, 22.)

**Power of Secretary of the Navy over sentences of courts-martial.**—See note above, under "Officer ordering the court; President and Secretary of the Navy." See also note to article 32, A. G. N.

The act of June 8, 1880, which created the office of Judge Advocate General of the Navy, provided that "under the direction of the Secretary of the Navy" the Judge Advocate General shall "receive, revise, and have recorded the proceedings of all courts-martial," etc.; and prior to the act of February 16, 1909 (quoted above, under this article), it appears to have been the practice of the Secretary of the Navy, without any express statutory authority, actually to set aside the proceedings of courts-martial and to remit or mitigate any sentence imposed by such courts if such action seemed to him to be warranted after a careful review of the record of proceedings. In 1908 the Secretary recognized the desirability of specific legislation on this subject, and he strongly advocated the enactment of legislation previously recommended. The result was the passage of the act of February 16, 1909 (quoted above). (*U. S. ex rel. Harris v. Daniels, MacDonald, et al.*, U. S. Circuit Court of Appeals, Second Circuit, Jan. 6, 1922, 279 Fed. Rep., 844.) See act of Apr. 9, 1906, sec. 3, quoted above under this article, which recognized the Secretary's authority to review courts-martial.

Section 9 of the act of February 16, 1909 (quoted above under this article), makes the sentences of any naval courts-martial in a sense conditional upon the approval of the Secretary of the Navy, who is given power to set aside the proceedings and to remit or mitigate, in whole or in part, the sentence imposed. We are not now called upon to consider all possible questions and difficulties which might arise under this provision. (*U. S. ex rel. Harris v. Daniels, MacDonald, et al.*, U. S. Circuit Court of Appeals, Second Circuit, Jan. 6, 1922, 279 Fed. Rep., 844.)

Under the Articles for the Government of the Navy of July 17, 1862 (12 Stat., 600), neither the President nor the Secretary of the Navy had lawful authority to approve or disapprove the



sentence of dismissal in the case of an acting master's mate, who was not a commissioned or warrant officer, but the approval and confirmation of the commander of the fleet, being the officer who ordered the court, was all that was required to give validity to the execution of the sentence. The sentence in such a case having in fact been approved by the Secretary of the Navy, his approval was a nullity, and no occasion is presented for a review of the Secretary's action by the President with a view of setting aside the Secretary's order, after the sentence had been approved by the commander of the fleet who ordered the court and carried into execution. (11 Op. Atty. Gen., 251.)

That no one can lawfully act as reviewing authority unless expressly authorized by statute, see note to article 38, A. G. N., under "Statutory authority necessary to convene courts."

**Action by officer not empowered to confirm sentence.**—While an officer convening a court-martial may not have the power to confirm and execute the sentence, he has still absolute power to disapprove and annul it. (16 Op. Atty. Gen., 312, 314.)

It is undoubtedly the proper practice for the convening authority, in transmitting the proceedings to the authority having the power to execute the sentence, to subscribe a formal approval of the same, if he does not disapprove of it; but the failure to state such approval can not be construed as a disapproval. (16 Op. Atty. Gen., 312, 314.)

Under the Articles for the Government of the Navy, the rear admiral convening the court was not obliged to confirm the sentence of dismissal. As the sentence in this case extended to dismissal from the service, no confirmation was necessary by the convening authority, whose duty was discharged by forwarding the papers to the President. (*Bishop v. U. S.*, 197 U. S., 334, 341.)

**Action of Judge Advocate General.**—Section 1199, Revised Statutes, making it the duty of the Judge Advocate General of the Army to "receive, revise, and cause to be recorded the proceedings of all courts-martial," does not confer authority upon that officer to reverse the proceedings of courts-martial. (Ex parte Mason, 256 Fed. Rep., 384, 387.)

Applying the rule, "*noscitur a sociis*," the word "revise" is to be read in connection with the words that precede and follow it, and, thus read, the duty it imposes is analogous to the duty of receiving and recording the proceedings. The language employed is more appropriate to indicate the discharge of clerical duties than the power to affirm, reverse, or modify the proceedings of courts-martial. (Ex parte Mason, 256 Fed. Rep., 384, 387.)

It is not intended to intimate that it is not the province and the duty of the Judge Advocate General to revise the proceedings of courts-martial so far as may be necessary to rectify errors of form, and to point out errors of substance which, in his judgment, should be corrected by the proper authorities; nor is it doubted that, as to all such topics as are within the purview of his official scrutiny, his opinion is entitled to that respectful consideration which is due to the dignity and importance of

the position which he holds. (Ex parte Mason, 256 Fed. Rep., 384, 387.)

See act of June 8, 1880, quoted above, under this article, as to duties of Judge Advocate General of the Navy.

**Reconvening of court for revision of proceedings and sentence.**—The President may direct a naval court-martial to reconsider their judgment in cases where his previous sanction is necessary for the execution of such judgment; as to his power in other cases, no opinion expressed. (4 Op. Atty. Gen., 19.)

In military courts-martial, the power of the commander by whom they have been convened to direct them, in the event of disapproval, to revise their sentence and reconsider the proceedings, has never been doubted; and it is rested solely upon the ground that the sentences of such courts are not to be put in execution until approved by that commander. (4 Op. Atty. Gen., 19.)

The revival of a sentence by the same court which pronounced it is not, properly speaking, an appeal, which always implies the review by one court of judicature of the sentence of another. It is no more than the reconsideration of the case by the same tribunal on a remittal and recommendation of the commander, who is authorized to approve or suspend its sentences. (1 Op. Atty. Gen., 296.)

Where an officer of the Army was brought to trial before a court-martial for conduct unbecoming an officer and a gentleman, and he pleaded in bar of trial that he had been tried on the same facts in a State court upon the charge of manslaughter, and his plea in bar was sustained by the court-martial, whose judgment was properly disapproved by the commanding general; but the latter omitted to order a revival by the court: *Held*, that it would be clearly too late for his successor to order such a revival if the court had in the meantime been dissolved; and if not dissolved, the Attorney General would nevertheless be strongly inclined to think it too late to order a revival by the same court after a lapse of two years from the date of the original proceedings; but an examination of precedents may disclose that they have settled the practice the other way. (3 Op. Atty. Gen., 749.)

It is in the power of the Secretary or other authority appointing a court-martial to order the case back for revision, both in the Army and Navy. But this must be done before the court has actually been dissolved, or before it has adjourned without day, which is to all practical purposes the dissolution of a court-martial. (6 Op. Atty. Gen., 200.)

Where a court-martial, having passed sentence, adjourned without day, no question exists as to the legality of an order subsequently issued by the Secretary of War, who convened the court, ordering it to reassemble to revise its sentence, it being presumed that such adjournment was the act of the court only, which had no lawful power to terminate its own existence, and which adjourned without day to await the action of the department. If there had been some order of the Secretary of War, in whatever form of words, to operate as a dissolution of the court, then it would be necessary to say that it could not be convened anew as the same court,

and of course could not take up the proceedings for reconsideration. But the present appears to have been the case of a court, not then dissolved by the appointing power, and of course subject to be assembled for revising its record, as it was by the order of the department. (7 Op. Atty. Gen., 338.)

The power of the Secretary of War, or the Secretary of the Navy, or other lawful authority, to send back a case to the court-martial for revisal, is called a singularity in jurisprudence. On the other hand, its apparent singularity arises from not duly regarding the nature of a court-martial and its relation to the approving power. Unless the sentence of a court-martial has been approved or disapproved, it still remains sub judice. In fact, the analogy of a court-martial is that of a jury in the trial of a civil case, the approving power in the former occupying the relation of the judge in the latter. The judge remands the case to the jury for further consideration. The verdict must be accepted by the judge and judgment rendered accordingly, before the verdict can have its complete execution and effect, whether of conviction or acquittal. So in the corresponding case it must be with the proceedings of a court-martial as respects the approving power. (6 Op. Atty. Gen., 200, 206.)

Revisal by a court-martial is not a case of new trial. A new trial is a rehearing of the case. A court-martial on revisal does not rehear the case; it only reconsiders the record for the purpose of correcting or modifying any conclusions thereon. The true analogy of such a revisal, to take an example from the practice of civil courts, is the case of a jury sent out by the court to reconsider its verdict. Such is the whole current of authorities as well in the United States as in Great Britain. (6 Op. Atty. Gen., 200.)

If the jury, through mistake or evident partiality, deliver an improper or an informal or insensible verdict, they may be directed by the court to reconsider it and remanded for that purpose; but it is unheard of that after the dismissal of the jury and the adjournment of the court without day the judge shall at a subsequent time reassemble the jurors and call upon them to revise their verdict. This doctrine, which is reasonable in itself, must be applied to the question of revisal by courts-martial. (6 Op. Atty. Gen., 200.)

It is doubtful if the approving power in this country may send a court-martial back for revision any number of times. By law in England before the Revolution it was enacted that a revisal shall be ordered only once, and it is the general rule that English statutes passed before the Revolution and in amendment of the common law are to be assumed as part of the common law of the colonies. (6 Op. Atty. Gen., 200, 203, 204.)

The power of revisal is one which involves much contingent delay and consequent hardship to the officer on trial, and therefore is not one to be favored, or at least not to be maintained in violation of any principle of general right and justice appertaining to the government of the Army or Navy. (6 Op. Atty. Gen., 200, 208.)

Where the sentence of a court-martial was returned by the Secretary of the Navy for revision, and a new and more severe sentence substituted by the court, which latter sentence was mitigated by the President, and it was thereafter contended, on behalf of the accused, that the proceedings in revision were null and void and that the first sentence only should be executed: *Held*, that if the proceedings in revision were void, then all which went before is void; because the first sentence of the court has never been approved, and it is too late now to do it, the President having in the meantime remitted and pardoned so much of the second sentence as remained unexecuted. (6 Op. Atty. Gen., 200, 203.)

The officer convening a naval court-martial has authority to send back to the court the record of its proceedings in any trial, with the finding and sentence, for the reconsideration of such court as to revision of the sentence; and the court is authorized to take up the case and revise it, notwithstanding that it has in the meantime proceeded with another trial, and notwithstanding that one member of the court who participated in the original sentence had been detached during the succeeding trial and resumed his seat to participate in the revision of the original sentence; the substituted member, who took his place during the second case, withdrawing and not participating in the revision of the original sentence. (In re Reed, 20 Fed. Cas. No. 11636.)

Where, pursuant to regulations, a general court-martial is duly ordered, the officer clothed with the reviewing authority may, before it is dissolved, direct it to reconsider its proceedings and sentence; and if it, upon being reconvened, renders a more severe sentence, which he approves, such sentence can not be collaterally impeached for mere errors or irregularities, if any such were committed by the court while acting within the sphere of its authority. (Ex parte Reed, 100 U. S., 13.)

A naval court-martial which has returned its proceedings to the Secretary of the Navy and been adjourned by him until further order may be reconvened by him to reconsider those proceedings. (Smith v. Whitney, 116 U. S., 167.)

The action of the President in twice returning the proceedings of a court-martial convened by him, urging a more severe sentence, was authorized by law; and a sentence made after such action and in consequence of it was valid. (Swain v. U. S., 165 U. S., 553, 564.)

As to absence of members on revision, see note to article 46, A. G. N.

**Court reconvening of its own motion for revision of sentence.**—Courts-martial have power to reconsider any judgment and sentence rendered by them, during the term or sitting, and to change the judgment and sentence, even to death, where the former imposed only imprisonment. (1 Op. Atty. Gen., 296.)

In this case the court sentenced the accused to confinement at hard labor with a ball and chain attached to his leg for the remaining term of his enlistment, etc.; and having adjourned until the ensuing day, at the suggestion of one of the members of the court the sentence in the case was reconsidered, and after due deliberation



the court substituted the sentence that he, the accused, "be shot to death." (1 Op. Att'y. Gen., 296.)

The term of a court-martial continues from the time of its assemblage until its adjournment sine die. A general court-martial convened for general purposes, that is, for the trial of such prisoners as may be brought before it, continues a court with full powers while it has any business to do, of which it alone is the judge; and while it does so continue a court, its power of judicial deliberation and decision over all the subjects which may have been brought before it is as full on the last day of its sittings as on any preceding day. (1 Op. Att'y. Gen., 296.)

According to the authorities on military law, the court is not dissolved even by its own adjournment sine die; but can be finally dissolved only by the authority of the officer who called it, being, until such dissolution, subject to be reconvened by his order to reconsider the opinion they have expressed. (1 Op. Att'y. Gen., 296.)

**Dismissal; acting master's mate.**—An acting master's mate is not a warrant officer of the Navy. A sentence dismissing him from the service by a court-martial convened by the commander of a fleet may be lawfully executed on the confirmation of the officer ordering the court. (11 Op. Att'y. Gen., 251.)

**Reduction of officer to rating of seaman.**—It is deemed advisable, as a matter of policy, although not specifically required by statute, to submit to the President for confirmation the sentence of a general court-martial reducing a warrant officer to the rating of ordinary seaman (now seaman, second class), inasmuch as such sentence deprives the accused of his position as a warrant officer in the Navy. (Navy Dig., 1916, p. 517; C. M. O. 11-1916; C. M. O. 185-1919; see art. 9, A. G. N.)

**Promulgation of sentence.**—The promulgation of the sentence of a court-martial does not affect the validity of the sentence, which becomes final and operative when approved by proper authority. (*Lyon v. U. S.*, 48 Ct. Cls., 30.)

The promulgation of the sentence of a court-martial is for the information of the public, and particularly for the information of the military arm of the Government. (*Lyon v. U. S.*, 48 Ct. Cls., 30.)

If promulgation were essential, the lapse of time after approval would not operate either to nullify or modify the sentence, but would relate back and make effective such proceedings. (*Lyon v. U. S.*, 48 Ct. Cls., 30.)

**Judgment of court-martial as to law and facts.**—The court which hears the witnesses is best qualified to scrutinize and balance their testimony, possessing as it does the advantage of personal contact and observation so essential in reaching a just conclusion from lengthy and conflicting statements. (18 Op. Att'y. Gen., 113, 119.)

It is improper for the revising authority to make any decision in regard to the effect of a certain act of Congress in cases where the record is defective. (3 Op. Att'y. Gen., 545. In this case the question was presented as to the effect of the law contained in sec. 1422, R. S., as applied to one who enlisted prior to the date

thereof, and who was charged with disobedience of orders committed after the date his enlistment would have expired except for said act. See note to sec. 1422.)

When charges have been referred to a general court-martial which they have jurisdiction to try, the questions of what finding should be had upon them, whether the accused should be found guilty and sentenced to punishment, or whether for want of satisfactory proof or by reason of special circumstances attending it he is entitled by law to an acquittal and exemption from punishment, are questions to be disposed of by the court according to their judgment, acting under the solemn sanction of their oaths and obligations. In this respect their power is full. (4 Op. Att'y. Gen., 410, 412.)

In the absence of any such error of the court in the admission or rejection of testimony as would work or was liable to work injustice to the accused, there is no reason on these grounds to disturb the findings of the court. (22 Op. Att'y. Gen., 589.)

Of questions not depending upon the construction of statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law. (*Smith v. Whitney*, 116 U. S., 167, 178.)

See below, under "Jurisdiction of civil courts"; and see note to article 42, A. G. N., under "Admissibility of evidence; decision of court-martial."

**Objections to charges and specifications.**—An objection to the charges and specifications on technical grounds should be promptly taken by the accused, and comes too late after he proceeded to trial without objection and permitted the court to enter on an investigation into all the different specifications and himself brought forward his defense as to each of them. (22 Op. Att'y. Gen., 589, 595.)

**Irregularities and fatal defects.**—It is a vain conceit that because the proceedings are irregular, and fatally irregular (if the exception be taken in proper time), therefore the judgment once suffered to be entered up is void. There are many things in the summoning and constitution of juries and in the conduct of a trial that make the verdict void; yet if advantage be not taken of them by motion in arrest of judgment, no writ of error lies even where there is a competent court of errors. And it is very proper it should be so; the repose of society, the putting an end to controversy and litigation, are more desirable than mere accuracy of procedure, or even the justice of a particular case, not to mention that acquiescence implies consent, and consent cures error. (4 Op. Att'y. Gen., 170.)

Commodore Barron was tried by a competent court-martial whose sentence was approved by the President. After the lapse of 35 years it is impossible for the executive department to look into the particulars of the trial, on an allegation that it was irregular. If there were irregularities in the trial, they should have been alleged before the sentence was confirmed. (4 Op. Att'y. Gen., 170. In this case the question was attempted to be raised whether the fact that witnesses

were sworn by the judge advocate and not by the president of the court, there being no objection at the time, vitiated the proceedings.)

If a contrary precedent were set, the Navy Department and the office of the Attorney General would be turned into a permanent court of errors, to try over all the cases disposed of since the foundation of the Government. And if the present Secretary of the Navy can set aside a judgment of his predecessors, why shall not any of his successors for 50 years to come set aside his? (4 Op. Atty. Gen., 170.)

Even though it appear that the proceedings of a naval court-martial were exceedingly irregular, and the sentence peculiarly harsh and severe, after the sentence of dismissal has been pronounced, approved, and carried into effect there is no means of reviewing it; the judgment is thereafter irreversible, but the effect of the judgment may be removed in the exercise of the appointing power. (4 Op. Atty. Gen., 274.)

Where an officer was dismissed from the service pursuant to the sentence of a court-martial, which sentence was null and void because the court was illegally constituted, *held* that as it was competent to the President to perform this act independently of the sentence, it will be necessary, in order to restore him to his rights, to nominate him to the Senate with the condition that he shall take rank from the date of his former commission. (2 Op. Atty. Gen., 414; see also *Brown v. Root*, 18 App. D. C., 239; compare *U. S. v. Brown*, 206 U. S., 240.)

After the sentence of an officer of the Army by a court having jurisdiction has been approved and executed by one President, it can not be revised by his successor. (6 Op. Atty. Gen., 506.)

In the consideration of all questions of this class, the distinction to be remembered is that of things void and things voidable; null for want of jurisdiction, or erroneous only, for misjudgment of a tribunal having competent jurisdiction to hear and determine the case. If the court had not lawful cognizance of the matter, its sentence is void, it gives no right, it bars no right, it binds nobody, and all concerned in executing such a sentence are trespassers. If the court has jurisdiction, it may rightfully decide every question which occurs in the case, and the errors and irregularities, if any exist, are to be corrected by some direct proceeding before the same court to set them aside, or in an appellate court. (6 Op. Atty. Gen., 506.)

If the court erroneously overruled a plea in bar of trial based on the statute of limitations, it would be an erroneous decision only, not a void judgment, and the error would be subject to be reviewed and corrected only by the commanding general. (6 Op. Atty. Gen., 506.)

Where an officer of the Navy was tried by court-martial and sentenced to dismissal, which sentence was approved by the President of the United States and duly carried into effect by the Secretary of the Navy, *held* that the dismissal is a consummated fact, whether the sentence was lawful or not, and if the party be restored to the service it can only be by reappointment to the Senate and reappointment. (7 Op. Atty. Gen., 98.)

In the present stage of the case, no question on the proceedings of the court can be raised

save that of nullity of the sentence for want of jurisdiction. Such a question is one of pure and strict legal right in the consideration of which no collateral element can by possibility enter, whether of regard or of disregard for the dismissed officer. It must be dealt with in the same spirit as the solution of a problem of arithmetic or algebra. (7 Op. Atty. Gen., 98.)

There is a multitude of irregularities in the proceedings of courts, whether martial or others, which a party may avail himself of to his advantage at the proper time. Where the accused did not see fit to make any question of this nature at the proper time, it is too late for him to do so after the sentence has been duly confirmed and executed. (7 Op. Atty. Gen., 98.)

It is well settled that it is beyond the power of the President to annul or revoke the sentence of a court-martial which has been approved and executed under a former President, unless the record should show that from some cause the proceedings are absolutely null and void. The rule is not confined to cases in which by the articles of war the sentence of the court is required to be approved by the President. (10 Op. Atty. Gen., 64.)

If any irregularities occurred in the proceedings of the court-martial, it was the right and duty of the accused to have taken exception to them before they were approved and confirmed by the commanding officer. Having neglected to do so, he has no redress except by an appeal to the executive clemency. (10 Op. Atty. Gen., 64.)

The accused being a soldier in the United States service, and therefore amenable to a court-martial, and the court having been convened by the proper authority and composed of the proper officers, duly qualified to act, and therefore being lawfully constituted and having undoubted jurisdiction of the case, it is impossible that any subsequent irregularities could render their action a nullity when it was confirmed without objection by the commanding officer and carried into execution by the President of the United States. (10 Op. Atty. Gen., 64.)

The sentence of a military commission in a case in which it was without jurisdiction was null and void; the moneys and effects of the accused, seized by officers of the Government in execution of so much of the sentence as imposed a fine of \$10,000, should be restored to the accused, unless they have been covered into the Treasury of the United States and are thus beyond the control of the executive. (12 Op. Atty. Gen., 128.)

There must be jurisdiction to give the judgment rendered as well as to hear and determine the cause. If a magistrate having authority to fine for assault and battery should sentence the offender to be imprisoned in the penitentiary or to suffer the punishment prescribed for homicide, his judgment would be as much a nullity as if the preliminary jurisdiction to hear and determine had not existed. Every act of a court beyond its jurisdiction is void. (Ex parte Reed, 100 U. S., 13, 23.)

Where there is no law authorizing the court-martial, or where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized



by law to render the judgment. In such case the sentence of the court is absolutely void. (*Keyes v. U. S.*, 109 U. S., 336, 340.)

It is not always very easy to determine what matters go to the jurisdiction of a court, so as to make its action when erroneous a nullity; but the general rule is that when the court has jurisdiction by law of the offense charged and of the party who is charged, its judgments are not nullities. (*Carter v. McClaughry*, 183 U. S., 365, 390.)

An erroneous designation of the place for executing a sentence of imprisonment imposed by a court-martial does not go to the jurisdiction to sentence, and does not entitle the accused to his discharge on habeas corpus; but he should be retained in custody for a new designation. (*Givens v. Zerbst*, 255 U. S., 11, affirming *ex parte Givins*, 262 Fed. Rep., 702.)

Presence of the judge advocate in closed court: See note to article 45, A. G. N.

For other cases, see below under "Jurisdiction of civil courts"; and see notes to Articles 38, 39, 40, 42, 46, 47, and 52, A. G. N.

**New trial.**—The President of the United States has the power to order a new trial before a court-martial where, in his opinion, the court erred on the first trial in excluding proper testimony and where the party accused desired such new trial. (1 Op. Atty. Gen., 233.)

The plea of *autre fois acquit*, or convict, is the privilege of the accused, which he may use or waive at pleasure; if he does not choose to use it, courts-martial will not take notice of it so as to bar a trial. (1 Op. Atty. Gen., 233.)

Where the proceedings of a naval court-martial were irregular and void, because the judge advocate was not sworn, the accused may be legally and constitutionally put upon another trial; but not before the same officers who constituted the first court. (3 Op. Atty. Gen., 396; compare note to art. 40, A. G. N.)

He has not been tried by a tribunal legally competent to try and punish him. In our civil tribunals, if a party be convicted upon an insufficient indictment and judgment be arrested, the accused may be again put upon his trial; and this is not considered as an infraction of that injunction of the Constitution which forbids that any person be twice put in jeopardy for the same offense. (3 Op. Atty. Gen., 396.)

There can not be a new trial at the instance of the Government, although there may be a new trial by court-martial on application of the party. (6 Op. Atty. Gen., 200, 205.)

See note to Constitution, fifth amendment, under "II. Protection against double jeopardy."

**Court-martial bar to trial in civil court.**—

Where the accused was indicted in a civil court of the United States, duly arrested and brought into court to answer said indictment; whereupon, before his arraignment, at the request of the Department of Justice he was delivered to the military authorities to be dealt with in accordance with military law; and upon his trial by Army court-martial he was convicted and sentenced to imprisonment for 15 years, but the reviewing authority took the following action: "The sentence is disapproved. Private Block will be released from confinement and restored to duty"; and he was

thereafter arraigned in the civil court upon the pending indictment and pleaded former acquittal, setting forth the proceedings which had been had by the court-martial and the action of the reviewing authority above quoted: *Held*, that the plea sets forth a good defense and that the proceedings before the court-martial constitute a bar to his prosecution in the civil courts of the United States upon a charge based upon the same act. (*U. S. v. Block*, 262 Fed. Rep., 205. See note above, under "Effect of approval or disapproval.")

The judgment of a court-martial having jurisdiction to try an officer or soldier for a crime is entitled to the same finality and conclusiveness as to the issues involved as the judgment of a civil court in cases within its jurisdiction is entitled to. (*Grafton v. U. S.*, 206 U. S., 333, holding that a civil court of the Philippine Islands did not have jurisdiction to try a soldier for an offense for which he had previously been tried by Army court-martial.)

See note to Constitution, fifth amendment, under "II. Protection against double jeopardy."

**Jurisdiction of Congress to review courts-martial.**—The Attorney General ought not to express an official opinion to the Committee on Military Affairs on the question whether Congress has power to review the sentence of a general court-martial. It is for Congress itself to consider and decide upon the extent of its power over a matter of this description; and it would hardly be deemed to be within the legitimate scope of the duties of the Attorney General, who is a subordinate officer of the executive department, to attempt to mark out the limits of the legislative power. (2 Op. Atty. Gen., 499.)

See note to Constitution, Article I, section 7, clause 2, under "Veto of bill authorizing restoration of dismissed officer," and "Veto of bill to annul the finding and sentence of a court-martial."

**Competency as witness after conviction by court-martial.**—Conviction of a military offense by court-martial does not make a witness incompetent to testify in the civil courts in a criminal prosecution. (*Reed v. U. S.*, 252 Fed. Rep., 21.)

**Jurisdiction of civil courts.**—The power to hear and determine a cause is jurisdiction. There is a distinction between jurisdiction and its exercise. When it appears on the return to a writ of habeas corpus that a petitioner is held for trial by a naval court-martial for offenses charged to have been committed while in the naval service, the only questions to be determined by the civil court are, whether the court-martial has jurisdiction to try the petitioner for the offenses charged, and is it proceeding regularly in the exercise of that jurisdiction. (*In re Bogart*, 3 Fed. Cas. No. 1596.)

A court-martial is a lawful tribunal, existing under the Constitution and acts of Congress, and is supreme while acting within the sphere of its jurisdiction. (*In re Bogart*, 3 Fed. Cas. No. 1596.)

A former conviction and the statute of limitations are matters of defense on the merits, which must be investigated in the exercise of jurisdiction, and not facts upon which the jurisdiction to hear and determine the charge

depends. These matters can not be inquired into on a petition for discharge on habeas corpus. (In re Bogart, 3 Fed. Cas. No. 1596.)

Civil courts have no jurisdiction to interfere with the military tribunals while proceeding regularly in the exercise of their jurisdiction to try parties accused of desertion from the Army. (In re White, 17 Fed. Rep., 723.)

Courts-martial are lawful tribunals, existing by the same authority as civil courts of the United States, having the same plenary jurisdiction in offenses by the law military as the latter courts have in controversies within their cognizance; and in their special and more limited sphere are entitled to as untrammelled exercise of their powers. (In re Davison, 21 Fed. Rep., 618.)

Provided a court-martial has jurisdiction to hear and determine and to render the particular judgment or sentence imposed, however erroneous the proceedings may be, they can not be reviewed collaterally by the civil courts upon habeas corpus. (In re Davison, 21 Fed. Rep., 618.)

The military courts have jurisdiction to try all military offenses committed by parties enlisted in the military service of the United States, among which is the offense of desertion. The civil courts have no authority to review, control, or in any manner interfere with the action of the military tribunals while regularly engaged in the exercise of their appropriate jurisdiction. (In re Zimmerman, 30 Fed. Rep., 176.)

In habeas corpus proceedings to review the sentence of a naval court-martial, the only questions which can be inquired into are as to the jurisdiction of the court over the person of the accused and the offense charged, and whether it acted within the scope of its lawful powers. (In re Crain, 84 Fed. Rep., 788.)

It has been repeatedly held that where the charge against a person tried in a military court is within the jurisdiction of the court, and is authorized by Army or Navy regulations, that the manner of setting out the offense is a matter of pleading rather than of jurisdiction; that it is for the court having such jurisdiction to decide upon the validity of the pleadings necessary to bring that charge before the court; that the only question before the civil court is whether or not the military court had the right to try and determine the case; that the jurisdiction of the trial court can not depend upon its decision on the merits of the case, but upon the court's right to hear and decide it; that where a military or naval tribunal has the right to try the cause, even though a civil court had the concurrent right, the latter can not enter upon the consideration of the evidence adduced before the court-martial or of the question whether the accused was guilty of the offense over which the military court has jurisdiction; that if the military court had jurisdiction to impose sentence authorized by the regulations of the Army or Navy, the civil court can not pass upon the severity of such sentence; that errors in law, however numerous, committed by the trial court in a cause within its jurisdiction, can be revised only by appeal or writ of error in the court exercising supervisory jurisdiction; that it is only where the trial court is without jurisdiction of

the person or the cause, and the party is subjected to illegal imprisonment, that a writ of habeas corpus may be invoked and the party discharged from imprisonment; that civil courts are not courts of error to review the proceedings and sentence of a court-martial where such court-martial has jurisdiction of the offense and of the person of the accused, has complied with the statutory requirements governing the proceedings of the court, and acts within the scope of its lawful powers. (Ex parte Dickey, 204 Fed. Rep., 322, 325.)

The fact that power, wherever lodged, may be abused, furnishes no solid objection against its exercise, and no just inference against its existence. (In re Bogart, 3 Fed. Cas. No. 1,596.)

The Secretary of the Navy is the final reviewing authority provided by law to act upon records of courts-martial in cases which do not extend to the loss of life or to the dismissal of a commissioned or warrant officer; and where he approved a sentence of imprisonment imposed upon an enlisted man by a court-martial convened by the commander in chief of the Atlantic Fleet, who had also approved such sentence, the sentence could not be revised by the civil courts. (Ex parte Dickey, 204 Fed. Rep., 322, 326.)

The powers conferred on Congress by the Constitution to make rules for the government and regulation of the land and naval forces, and the power to create certain Federal courts, are independent of each other, and hence the determination of naval courts-martial within their jurisdiction are not reviewable by the civil courts. (Ex parte Dickey, 204 Fed. Rep., 322.)

Civil courts have no appellate jurisdiction to review the proceedings of courts-martial; and will not interfere with the judgments of courts-martial in habeas corpus proceedings if it appears that they have jurisdiction of the person and subject matter. Errors of procedure in military courts can be corrected only by the proper military authorities. (Ex parte Tucker, 212 Fed. Rep., 569.)

A civil court has no power to interfere with the conduct of a court-martial except where that court has exceeded its jurisdiction, and if it originally had jurisdiction it must be shown that at some point in the proceedings, under its governing law, it lost such jurisdiction. (U. S. v. Hunt, 254 Fed. Rep., 365.)

The suing out and service of a writ of habeas corpus by an Army officer after his trial by court-martial but before the service upon him of the order promulgating the sentence, involving dismissal, held, not to oust the court-martial of jurisdiction nor to affect the validity of the order subsequently served. (U. S. v. Barry, 260 Fed. Rep., 291.)

Where the offense charged is trivial, and the punishment is likewise trivial, a civil court should not be called upon to examine the legality of the sentence of a court-martial; and when so called upon is not required by substantial justice to apply a stricter rule than that which prevails in ordinary criminal cases. (Weirman v. U. S., 36 Ct. Cls., 236.)

Undoubtedly errors are committed by courts-martial which a civil tribunal would regard as sufficient ground for a reversal of their judgments if it were sitting as an appellate court. But there is always this radical difference be-



tween an appellate court sitting for the correction of errors and a civil court into which the record of a court-martial is collateral—in the former there is not a failure of justice; the appellate court may reverse a judgment or prescribe another or award a new trial; in the latter the court must either give full effect to the sentence or pronounce it wholly void. (*Swain v. U. S.*, 28 Ct. Cls., 217; affirmed, 165 U. S., 553.)

Where a court-martial had not jurisdiction over the subject matter, or having jurisdiction has failed to observe the rules prescribed by the statute for its exercise, all of the parties to such illegal trial are trespassers upon a party aggrieved by it, and he may recover damages from them on a proper suit in a civil court by the verdict of a jury. (*Dynes v. Hoover*, 20 How., 65, 81.)

If a court-martial has no jurisdiction over the subject matter of the charge it has been convened to try, or shall inflict a punishment forbidden by law, though its sentence shall be approved by the officers having a revisory power over it, civil courts may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction and give him redress. (*Dynes v. Hoover*, 20 How., 65, 82.)

Persons belonging to the Army and Navy are not subject to illegal or irresponsible courts-martial when the law for convening them and directing their proceedings of organization and for trial have been disregarded. In such cases everything which may be done is void, not voidable but void; and civil courts have never failed upon a proper suit to give a party redress who has been injured by a void process or void judgment. (*Dynes v. Hoover*, 20 How., 65, 81.)

It is only where a court has no jurisdiction over the subject matter, or having such jurisdiction is bound to adopt certain rules in its proceedings from which it deviates, whereby the proceedings are rendered *coram non iudice*, that an action will lie against the officer who executes its judgment. (*Dynes v. Hoover*, 20 How., 65.)

When we speak of proceedings in a cause, or for the organization of the court and for trials, we do not mean mere irregularity in practice on the trial or any mistaken rulings in respect to evidence or law, but of a disregard of the essentials required by the statute under which the court has been convened to try and to punish an offender for an imputed violation of the law. (*Dynes v. Hoover*, 20 How., 65, 81.)

The law is that an officer executing the process of a court which has acted without jurisdiction over the subject matter becomes a trespasser, it being better for the peace of society and its interests of every kind that the responsibility of determining whether the court has or has not jurisdiction should be upon the officer than that a void writ should be executed. But a United States marshal is not answerable for his mere ministerial execution of a sentence which a naval court-martial has passed in a case within its jurisdiction, which the Secretary of the Navy has approved, and which the President of the United States, as constitutional commander in chief, has directed the marshal to execute by receiving the pris-

oner from the naval officer then having him in custody to transfer him to the penitentiary in accordance with the sentence which the court had passed upon him. (*Dynes v. Hoover*, 20 How., 65, 80.)

An acquittal of the commanding officer by a court-martial, when tried for the same acts, by order of the Government, is not admissible evidence in a civil suit by an enlisted man against the commanding officer for damages, as the parties are not the same, although it would be a bar to subsequent indictment in courts of common law for the same offense, the parties then being the same. (*Wilkes v. Dinsman*, 7 How., 89. See note to art. 24, A. G. N.)

If the enlistment of a person in the Navy was void, then there is no right to discipline him at any period of his service, even though he was undertaking to escape it. If his enlistment was void, which means that he was never in the service, then any act by any person claiming to be in authority over him, whereby any of the natural rights of the alleged enlisted man were denied him, as, for instance, if he had been imprisoned for an hour or a day or a week, because of some infraction of the rules, will support a civil action for damages in his favor against the particular individuals who were responsible for such punishment. No rule of law can be cited that will ever protect a public officer from the consequences of any act which he may imagine he is performing as a public officer, but which involves an exercise of authority by him as to some person over whom he is absolutely without authority. (*Ex parte Rock*, 171 Fed. Rep., 240, 242.)

With the sentences of courts-martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom the duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts. (*Dynes v. Hoover*, 20 How., 65, 82.)

When the sentence of a naval court-martial in a case within its jurisdiction, and in which it has proceeded regularly, is confirmed by the proper authority, it becomes final and must be executed unless the President pardons the offender. It is in the nature of an appeal to the officer ordering the court, who is made by law the arbiter of the legality and propriety of the court's sentence. When confirmed it is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the subject matter or charge, or one in which, having jurisdiction over the subject matter, it has failed to observe the rules prescribed by the statute for its exercise. (*Dynes v. Hoover*, 20 How., 65, 81.)

Congress has power under the Constitution to provide for the trial and punishment of military and naval offenses in the manner

then and now practised by civilized nations; and the power to do so is given without any connection between it and the third article of the Constitution defining the judicial power of the United States. The two powers are entirely independent of each other. (*Dynes v. Hoover*, 20 How., 65, 79.)

Whatever was done by the court-martial that it could do under any circumstances, we must presume was properly done. If error was committed in the rightful exercise of authority, the civil courts can not correct it. (Ex parte Reed, 100 U. S., 13, 23.)

The court-martial had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings can not be collaterally impeached for any mere error or irregularity, if there were such committed within the sphere of its authority. Its judgment when approved as required rest on the same basis and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances. The exercise of discretion within authorized limits can not be assigned for error and made the subject of review by an appellate court. (Ex parte Reed, 100 U. S., 13, 23.)

Whether or not the Supreme Court has jurisdiction to issue a writ of habeas corpus in the case of an enlisted man of the Army serving sentence of general court-martial, not decided; but held that, if a writ may issue, there can be no discharge under it if the court-martial had jurisdiction to try the offender for the offense with which he was charged, and the sentence was one which the court could, under the law, pronounce. (Ex parte Mason, 105 U. S., 696, 697.)

Where a court-martial has cognizance of the charges made, and has jurisdiction of the person of the accused, its sentence is valid when questioned collaterally, although irregularities or errors are alleged to have occurred in its proceedings in that the prosecutor was a member of the court and a witness on the trial. No opinion expressed as to the propriety of such proceedings. (*Keyes v. U. S.*, 109 U. S., 336.)

Courts-martial form no part of the judicial system of the United States, and their proceedings within the limits of their jurisdiction can not be controlled or revised by the civil courts. (*Kurtz v. Moffitt*, 115 U. S., 487, 500.)

The Supreme Court has repeatedly recognized the general rule that the acts of a court-martial within the scope of its jurisdiction and duty can not be controlled or reviewed in the civil courts by writ of prohibition or otherwise. (*Smith v. Whitney*, 116 U. S., 167, 177.)

Whether the supreme court of the District of Columbia has power to issue a writ of prohibition to a court-martial, quære. (*Smith v. Whitney*, 116 U. S., 167.)

A writ of prohibition does not lie to the Secretary of the Navy convening a naval court-martial. Being an executive officer and not a member of the court-martial sought to be prohibited, it is quite clear that his acts can not

be the subject of a writ of prohibition. (*Smith v. Whitney*, 116 U. S., 167.)

A writ of prohibition does not lie to a court-martial to correct mistakes in the decision of questions of law or of fact within its jurisdiction. (*Smith v. Whitney*, 116 U. S., 167.)

A court-martial is regarded as one of those inferior courts of limited jurisdiction whose judgment may be questioned collaterally. (*Runkle v. U. S.*, 122 U. S., 543, 556, citing *Wise v. Withers*, 3 Cranch, 331, and ex parte *Watkins*, 3 Pet., 193, 207.)

Civil courts may inquire, under a writ of habeas corpus, into the jurisdiction of the court-martial over the party condemned, but can not inquire into or correct errors in its proceedings. (In re *Grimley*, 137 U. S., 147, 150.)

The single inquiry, the test, is jurisdiction. That being established, the habeas corpus must be denied and the petitioner remanded; that wanting, it must be sustained and the petitioner discharged. (In re *Grimley*, 137 U. S., 147, 150.)

The decision and sentence of a court-martial having jurisdiction of the person accused and of the offense charged, and acting within the scope of its lawful powers, can not be reviewed or set aside by writ of habeas corpus. (*Johnson v. Sayre*, 158 U. S., 109.)

When a court-martial has jurisdiction of the person accused and the offense charged, and acts within the scope of its lawful powers, its proceedings and sentence can not be set aside by the civil courts. If, as has been strenuously urged, the officer was harshly dealt with in this case, and a sentence of undue severity was finally imposed, the remedy must be found elsewhere than in the courts of law. (*Swaim v. U. S.*, 165 U. S., 553, 566.)

In this case it was urged that the charge was not established by the facts, and that the sentence should be held void by a civil court in an action by the accused for the pay of his office. If this position were well taken it would throw upon the civil courts the duty of considering all the evidence adduced before courts-martial and of determining whether the accused was guilty of conduct to the prejudice of good order and military discipline in violation of the articles of war. But this is the very matter that falls within the province of courts-martial and in respect to which their conclusions can not be controlled or reviewed by the civil courts. Of questions not depending upon the construction of statutes, but upon unwritten military law or usage within the jurisdiction of courts-martial, military or naval officers from their training and experience in the service are more competent judges than the courts of common law. (*Swaim v. U. S.*, 165 U. S., 553, 561, citing *Smith v. Whitney*, 116 U. S., 178, and *U. S. v. Fletcher*, 148 U. S., 84.)

Courts-martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced. (*Carter v. Roberts*, 177 U. S., 496.)



Where jurisdiction over the person is conceded, any inquiry into the innocence or guilt of the accused, on the ground that the evidence affirmatively showed that no crime whatever had been committed, is not permissible. (*Carter v. McClaughry*, 183 U. S., 365, 381.)

The question whether a person on trial before a civil court upon a criminal charge is thereby twice put in jeopardy for the same offense has been held to be a question for determination by the court, whose decision can not be reviewed on habeas corpus. It is difficult to see why the sentences of courts-martial, courts authorized by law in the enforcement of a system of government for a separate community recognized by the Constitution, are not within the rule. Its application would seem to be essential to the maintenance of that discipline which renders the Army efficient in war and morally progressive in peace, and which is secured by the military code and the decisions of military courts. (*Carter v. McClaughry*, 183 U. S., 365, 387-390.)

"We must not be understood by anything we have said as intending in the slightest degree to impair the salutary rule that the sentences of courts-martial, when affirmed by the military tribunal of last resort, can not be revised by the civil courts save only when void because of an absolute want of power, and not merely voidable because of the defective exercise of power

possessed." (*Carter v. McClaughry*, 183 U. S., 365, 401.)

The proceedings of the court-martial were conducted with a substantial, if not a literal, conformity to the law, and we must presume, at least, that there was sufficient evidence to support the sentence. (*Bishop v. U. S.*, 197 U. S., 334, 342.)

Civil courts are not courts of error to review sentences of legally organized courts-martial having jurisdiction of the person of the accused and of the offense. (*Mullan v. U. S.*, 212 U. S., 516.)

What is due process of law depends upon the circumstances. To those in the military or naval service of the United States, military law is due process; and the decision of a military tribunal acting within the scope of its lawful powers can not be reviewed or set aside by the courts. (*Reaves v. Ainsworth*, 219 U. S., 296, relating to examining boards for promotion.)

The judgment of a court-martial is open to collateral attack for want of jurisdiction, and to sustain such a judgment it must appear that the facts essential to the jurisdiction existed when the jurisdiction was exercised. (*Givens v. Zerbst*, 255 U. S., 11, affirming *ex parte Givins*, 262 Fed. Rep., 702.)

For other cases, see note to Constitution, Article I, section 8, clause 14; and note to section 753, Revised Statutes.

**Art. 54. [Remission and mitigation of sentence.]** Every officer who is authorized to convene a general court-martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm.—(17 July, 1862, c. 204, s. 1, art. 20, v. 12, p. 605.)

"The Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court-martial convened by his order or by that of any officer of the Navy or Marine Corps." (Act Feb. 16, 1909, sec. 9, 35 Stat., 621.)

**Officers authorized to convene general courts-martial.**—See article 38, A. G. N., and note thereto; see also note to article 53, A. G. N., under "Officer ordering the court; President and Secretary of the Navy."

**Power of Secretary of the Navy.**—See note to article 53, A. G. N., under "Power of Secretary of the Navy over sentences of courts-martial"; and see note to article 32, A. G. N.

**Implied remission of sentence.**—The honorable discharge of an officer after he has been sentenced by court-martial to forfeit a month's pay and the sentence has been approved does not remit the sentence or entitle him to recover the pay forfeited, whether or not the sentence had been promulgated prior to his discharge. (*Lyon v. U. S.*, 48 Ct. Cls., 30.)

It would seem that a sentence of suspension from rank and pay for a definite period, or loss of numbers, would be remitted by the permanent promotion of the accused to a higher grade while still undergoing such sentence, as the sentence operates only upon his rank and pay in the grade held by him when it was adjudged. But the temporary promotion of an

officer to a higher grade while under sentence would not have such effect. (31 Op. Atty. Gen., 419, 424-426, explaining and modifying 4 Op. Atty. Gen., 8.)

Where an officer lost numbers pursuant to the sentence of a court-martial, and subsequently was advanced by the President, with the advice and consent of the Senate, to the next higher grade and to his original relative position on the list, because of "eminent and conspicuous conduct in battle," held that this restoration to his former relative position had the effect of putting an end to the punishment, and a pardon subsequently issued by the President did not operate to advance the officer to a higher relative position than that which he had occupied prior to the sentence of the court. (24 Op. Atty. Gen., 606.)

See cases noted under Constitution, Article II, section 2, clause 1, under "III. Power to pardon offenses against the United States," subheading, "Constructive pardon."

**Reconsideration of action mitigating sentence.**—Where the President on March 3, 1869, reviewed the proceedings of a court martial on appeal by the accused, and thereupon issued an order to the Secretary of War as follows: "Let the disabilities be removed and an honorable discharge granted"; and on March 13, 1869, the foregoing order was rescinded by the President; held, that the said order being executory and in its nature revoca-

ble, and having remained unexecuted at the time of its rescission, was completely annulled thereby. (17 Op. Atty. Gen., 436.)

Where a sentence as mitigated was put in execution by a former administration, by which all questions in the premises must be presumed to have then been fully considered, advised that this action be now treated as a final determination of the matter as regards the status of the accused officer. (15 Op. Atty. Gen., 463.)

Where the mitigation of a sentence was obtained by fraud of the accused, who was discharged from the service pursuant to the mitigated sentence, such discharge may be revoked and the accused required to resume his former status as a court-martial prisoner. (28 Op. Atty. Gen., 170.)

**Sentence which officer not authorized to confirm.**—This article obviously extends only to such sentences as the convening officer is authorized to approve and confirm and has no application where the punishment of dismissal is imposed. (*Bishop v. U. S.*, 197 U. S., 334, 341.)

A lieutenant of marines on service with the Army in Mexico was sentenced to be cashiered by a court-martial held there; the general in chief, after approving the sentence, directed that it be commuted to 12 months' suspension from rank, command, and emoluments; the proceedings of the court-martial and the order of the general in chief thereunder had not been submitted to or acted upon by the President of the United States. The said officer continued in the service, in effect under suspension, until he, with other officers, was displaced by the President, not upon the above-mentioned sentence of the court, but in virtue of the act of Congress restoring the peace establishment of the Marine Corps. *Held*, that under the express provisions of the articles of war the commanding general in the field did not possess power to commute the sentence of cashiering, but only the power to execute the sentence or to suspend it pending determination by the President, to whom the record was in case of such suspension required to be immediately transmitted; and that, upon the facts stated, neither the sentence of cashiering nor the mitigated sentence ever took effect in this case. (6 Op. Atty. Gen., 123.)

**Remission of distinct part of sentence.**—Where forfeiture or loss of pay is made a part of the sentence of a court-martial, in addition to confinement or suspension from duty, the former may be remitted by the proper authority, in whole or in part, without also remitting the latter. (15 Op. Atty. Gen., 175.)

**Form of action mitigating sentence.**—An act of the President remitting part of a court-martial sentence may be authenticated in the same way in which his act confirming such sentence can be authenticated. Where partial remission is made at the time of confirmation, the two acts are in practice signified and attested together, in the same way. (15 Op. Atty. Gen., 290. See note to art. 53, A. G. N., as to form of President's action confirming sentence.)

**Remission of continuing punishment; suspension, etc.**—Where an officer is sentenced to loss of numbers in his grade, the punishment

imposed is a continuing one; since it is only by the continual operation of the sentence itself that the officer is thenceforth excluded from the place in his grade to which, under the law of the service, he would otherwise be entitled by date of his commission, and made to occupy another place therein. So long as the officer is thus excluded by operation of the sentence, in other words, whilst he is still undergoing the punishment thereby imposed, the sentence may be remitted and remission of it would necessarily carry with it the restoration of the officer to his preexisting right to occupy the place in his grade corresponding with the date of his commission, he losing such opportunities for promotion as may in the meantime have occurred. (17 Op. Atty. Gen. 656.)

An officer of the Navy was sentenced "to be suspended for two years from rank and duty, on furlough pay, and to retain his present number on the list of lieutenant commanders during that time"; the sentence was approved by the Secretary of the Navy, May 3, 1889. Between May 3 and December 14, 1889, the officer lost two numbers in his grade by promotion of two officers to the grade of commander and the consequent advancement above him in the grade of lieutenant commander of two officers who had been junior to him in that grade. On December 14, 1889, the Secretary of the Navy issued the following order to the officer under suspension: "The unexecuted portion of the sentence of the general court-martial before which you were tried at the navy yard, Washington, D. C., April 15, 1889, is hereby remitted." *Held*, that this remission did not have the effect of advancing the officer in question ahead of the two officers who had been passed over him in the grade of lieutenant commander. While an absolute pardon might reinstate the officer sentenced, an order of the Secretary of the Navy remitting the unexecuted portion of the sentence can not produce that result. That portion of the sentence which operated to place the two officers in question above the accused had been executed before the order for remission and was therefore not affected by the terms of that order. (20 Op. Atty. Gen., 243.)

Degradation from or diminution of relative rank and position is a continuing punishment and thus subject to revision by the President. (24 Op. Atty. Gen., 606.)

A lieutenant commander in the Navy was sentenced by court-martial to suspension for one year and to retain his then present number on the list of lieutenant commanders for that time. The sentence having been executed, he applied several years later to be restored to the number on said list which he thereby lost: *Held*, that the restoration could not be effected by the President otherwise than by pardon. The punishment imposed (loss of numbers) being a continuing one, is still subject to the pardoning power which, when exercised, would have the effect of restoring the officer to his former rank according to the date of his commission; the officer losing such opportunities for promotion as may in the meantime have occurred. (17 Op. Atty. Gen., 31.)



A pardon by the President will restore an officer whose rank has been reduced by sentence of a court-martial to his former relative rank, according to the date of his commission, the officer losing such opportunities for promotion as may in the meantime have occurred. Loss of numbers is a continuing penalty, which operates from day to day so long as the officer affected is excluded from enjoying his previous status. (12 Op. Atty. Gen., 547.)

Where an officer of the Army was sentenced by court-martial "to be cashiered and to be forever disqualified from holding any office of trust or profit under the Government of the United States," which sentence was duly approved and the officer dismissed, *held*, that the dismissal is an accomplished fact and so far the sentence is completely executed; but the disability is a continuing punishment, and in regard to that the sentence is being executed, and the latter portion of the sentence may be remitted by the pardoning power, but the former can not in any way be affected thereby. (17 Op. Atty. Gen., 297.)

The promotion of an officer completely executes a sentence of loss of numbers in his grade, and a pardon issued thereafter can not restore him to his original position. (File 26261-246:1, Mar. 18, 1914; 26262-1794:1, Dec. 21, 1916; but see *contra* file 1208, Mar. 31, 1905. And see note above under "Implied remission of sentence.")

For other cases see note to Constitution, Article II, section 2, clause 1, under "III. Power to pardon offenses against the United States"; and note to section 1441, Revised Statutes.

**Action to be taken on revision of court-martial proceedings.**—Officers of the naval service convening general courts-martial are not authorized to remit or mitigate the sentences imposed by such courts after having once acted thereupon. (Nav. Dig., 1916, pp. 115, 562, citing C. M. O. 17, 1910, pp. 5-6; C. M. O. 1, 1912, pp. 3-4; file 26262-1246:1, Dec. 29, 1911.)

An officer of the Army authorized to order a general court-martial has no power to pardon or mitigate the punishment adjudged by it after confirmation by him of the sentence. (19 Op. Atty. Gen., 106, reversing 17 Op. Atty. Gen., 656, upon this point.)

The Constitution forbids anyone but the President to pardon those who commit such offenses. Accordingly, the articles of war should be construed as referring to the punishment adjudged by the court and as empowering the convening authority to pardon or mitigate that judgment, and not as empowering him to pardon or mitigate the punishment of an offense finally adjudged and confirmed by himself. Before he shall confirm the action of the court the article permits him to mitigate the punishment or remit it; but after the final judgment of confirmation, which is the judgment of the law, shall have conclusively established the offense and the guilt of the offender, the law gives him power neither to mitigate nor remit. It is only the punishment, and not the offense, that he may mitigate or remit. (19 Op. Atty. Gen., 106.)

See note to Constitution, Article I, section 2, clause 1, under "III. Power to pardon offenses against the United States," subheading "Power of other officers."

**Discretionary action of reviewing authority.**—This article shows that Congress intended that the officer who is authorized to approve and confirm the sentence of a court-martial, in revising its proceedings, should act judicially; that is, that he should exercise the discretion confided to him within the limits of the law. (11 Op. Atty. Gen., 19, 20.)

**Mitigation of dismissal.**—As the sentence of a naval court-martial dismissing an officer from the service can not be executed except with the approbation of the President, and as he possesses the power to revise, to pardon, and to mitigate a sentence, he may substitute a milder punishment for that decreed by the court. (4 Op. Atty. Gen., 432.)

In mitigating a sentence of dismissal the President may commute it by substituting a suspension for a term of years without pay for an absolute dismissal from the service, as suspension is but an inferior degree of the same punishment. (4 Op. Atty. Gen., 432.)

A dismissal is a perpetual suspension without pay, and to limit suspension without pay is to substitute an inferior degree of the same punishment; the minor is contained in the major. (4 Op. Atty. Gen., 432.)

The President has ample power to mitigate the sentences of naval courts-martial by commuting sentences of dismissal from the service to suspension without pay or emoluments for a limited time. Hence an assistant surgeon in the Navy, who was sentenced to be dismissed by a naval court-martial, but whose sentence was commuted to suspension for 12 months without pay, is not entitled to pay during the period of such suspension. (5 Op. Atty. Gen., 43.)

As dismissal deprives the officer of his pay forever, the suspension of his office and his pay for one year only is an inferior and milder degree of the punishment decreed by the court. Opinions of former Attorneys General are not at variance with this advice. (5 Op. Atty. Gen., 43.)

Reduction by the President of the United States of the dismissal of an officer of the Navy from the service to loss of numbers and suspension from rank and duty on one-half sea pay for five years is a mitigation of the sentence within the meaning of article 54, A. G. N. (*Mullan v. U. S.*, 212 U. S., 516.)

**Commutation of sentence.**—Quaere, whether the power of mitigating a punishment includes the power of changing its species; whether it means anything more than lessening the quantity, preserving, nevertheless, the species of the punishment. (1 Op. Atty. Gen., 327.)

Had the phraseology of the law been, "to remit in part, or in whole, the punishment decreed by the sentence of a court-martial," it would have restricted the President to the simple matter of mitigation, that of lessening the quantity; but a power of mitigation, in general terms, leaves the manner of performing this act of mercy to himself; and if it can be performed in no other way than by changing its species, the President has the power of adopting this form of mitigation. (1 Op. Atty. Gen., 327.)

The authority of the President to mitigate the sentences of naval courts-martial, in cases

where he deems the punishment unnecessarily severe, does not extend to the substitution of another punishment for that decreed by the court; he can not suspend the pay of an officer under sentence of a court-martial whose pay was not suspended by the court. (4 Op. Atty. Gen., 444.)

Even though the executive may dismiss from the service without trial, or may suspend from duty by arrest, he has no power, while an officer retains his commission and is not sentenced by a court-martial to that effect, to take from him the pay which the law gives him. (4 Op. Atty. Gen., 444.)

An officer of the Navy was sentenced by court-martial to be suspended from all rank and command in the Navy for and during the period of five years. The sentence did not involve loss of pay, which the court was authorized to adjudge by the Articles for the Government of the Navy. Nor did it require confirmation by the President. The President ordered that the sentence "be commuted to a suspension of six months from this date, without pay." It does not appear that this commutation of the sentence was made at the officer's request, or that the condition was accepted by the officer, who afterwards claimed pay for the period of this suspension. A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It is clear, then, that the President in this case did not exercise the power of pardon. Nor was his action a mitigation of the sentence under the Articles for the Government of the Navy, and the officer is entitled to pay for the period of his suspension. (4 Op. Atty. Gen., 444.)

It may be conceded that there is a technical difference between the commutation of a sentence and the mitigation thereof. The first is a change of a punishment to which a person has been condemned into one less severe, substituting a less for a greater punishment by authority of law. To mitigate a sentence is to reduce or lessen the amount of the penalty or punishment. When the President otherwise confirmed the sentence from absolute discharge from the Navy to reduction in rank and duty for the period of five years on one-half sea pay, he did what in terms he undertook to do, and by the lessening of the severe penalty of dismissal from the Navy, reduced and diminished, and therefore mitigated, the sentence which he was authorized to approve and confirm against the appellant, or mitigate in his favor. (*Mullan v. U. S.*, 212 U. S., 516.)

See note above, under "Mitigation of dismissal"; and see below, under "Mitigation of death sentence."

**Power of President as reviewing authority.**—The President may mitigate a sentence of a naval court-martial, under the Articles for the Government of the Navy, without invoking his power of pardon. (1 Op. Atty. Gen., 327.)

The power of the President over a sentence is a power over the whole of it; and he may approve, reject, or mitigate the same at pleasure. The language of the article of war requires that, in cases extending to the dismissal of a commissioned officer, in time of peace, the whole proceedings be laid before the President "for

his confirmation or disapproval, and orders on the case." The terms indicate an unlimited discretion; and when it is considered that he is by the Constitution the depository of the pardoning power, it can not be doubted that he has authority to mitigate as well as to confirm or reject the sentence of a court-martial in the exercise of the supervisory power committed to him by the articles of war. (2 Op. Atty. Gen., 286.)

The power of the President to pardon, conferred by the Constitution, is plenary; and so far as he is concerned, its repetition in the Articles for the Government of the Navy was superogatory. (4 Op. Atty. Gen., 432.)

Where an officer was sentenced to dismissal from the Army, and to fine and imprisonment, the President might have exercised his constitutional power to pardon, or as the reviewing authority he might have pardoned or mitigated the punishment adjudged, except that of dismissal, although he had no power to add to the punishment. (*Carter v. McClaughry*, 183 U. S., 365, 387.)

Quære, whether article 54, A. G. N., applies to the action of the president; if it be conceded that it is applicable to the President, his action in this case did in fact mitigate the previous sentence of the court-martial as approved by the Secretary of the Navy. (*Mullan v. U. S.*, 212 U. S., 516.)

**Mitigation of death sentence.**—A sentence of death can not be mitigated in any other way than by changing the punishment. (1 Op. Atty. Gen., 327.)

The President may so far mitigate a sentence of death pronounced by a naval court-martial as to substitute a milder punishment in its stead. This he may do under the Articles for the Government of the Navy, and without invoking his power of pardon; and since the sentence of death can be mitigated only by changing it, he has the power to substitute the milder punishment which he proposes to do. (1 Op. Atty. Gen., 327.)

The power of pardoning the offense does not include the power of changing the punishment; but the power to mitigate the punishment decreed by a court-martial can not be fairly understood in any other sense than as meaning the power to substitute a milder punishment in the place of that decreed by the court-martial, in which sense it would justify the mitigation of a sentence of death to a sentence of "service and restraint for the space of one year; after which, to cause him to be drummed from the Marine Corps as a disgrace to it." (1 Op. Atty. Gen., 327.)

The exercise of the power of mitigation necessarily implies that there is substitution for a higher of an inferior punishment. A sentence of death for murder can be mitigated by substituting any punishment which the law would authorize the court to inflict for manslaughter. This is an inferior degree of the offense. The punishment substituted is not, in the nature of things, that which the court has decreed; it is one which the President substitutes. (4 Op. Atty. Gen., 432, 434.)

When an officer is brought to trial and is sentenced to be punished, the executive may mitigate the severity of that punishment; but the



mitigation must inflict a part of the punishment awarded by the judgment of the court, with the exception of those cases in which there is no degree, as where the whole punishment

must be inflicted or no part of it can be. Such is the case with a sentence of death. (4 Op. Atty. Gen., 444.)

**Art. 55. [Courts of inquiry, by whom ordered.]** Courts of inquiry may be ordered by the President, the Secretary of the Navy, or the commander of a fleet or squadron.—(17 July, 1862, c. 204, s. 1, art. 23, v. 12, p. 605.)

“Boards of inquiry” are to be ordered by the Secretary of the Navy in certain cases, before the dismissal of midshipmen from the Naval Academy without trial by court-martial. (Act Apr. 9, 1906, 34 Stat., 104. See note to sec. 1519, R. S.)

“Courts of inquiry may be convened by any officer of the naval service authorized by

law to convene general courts-martial.” (Act Aug. 29, 1916, 39 Stat., 586.)

See article 38, A. G. N., and note thereto, as to officers empowered to convene general courts-martial.

See section 183, Revised Statutes, as amended, and note thereto, respecting boards of investigation.

**Art. 56. [Courts of inquiry, constitution of.]** A court of inquiry shall consist of not more than three commissioned officers as members, and of a judge-advocate, or person officiating as such.—(17 July, 1862, c. 204, s. 1, art. 23, v. 12, p. 605.)

See article 39, A. G. N., and note thereto, as to constitution of general courts-martial.

**Art. 57. [Courts of inquiry, powers of.]** Courts of inquiry shall have power to summon witnesses, administer oaths, and punish contempts, in the same manner as courts-martial; but they shall only state facts, and shall not give their opinion, unless expressly required so to do in the order for convening.—(17 July, 1862, c. 204, s. 1, art. 23, v. 12, p. 605.)

Amendment to this article was made by act of February 16, 1909, sections 11 and 12 (35 Stat., 621, 622), relating to attendance of civilian witnesses. See note to article 42, A. G. N.

Oaths, when administered by officers of the Navy: See section 183, Revised Statutes, and laws noted thereunder.

The use of depositions before naval courts in certain cases and under certain restrictions was authorized by act of February 16, 1909, section 16 (35 Stat., 622).

**Absent witness.**—The court, on motion to postpone because of absent witnesses, may, as is usual in all courts, require the party making the motion to state what he expects or desires to prove, so that its materiality may be seen, and so also that the other party, if he see fit, may agree that the absent witness will so testify, and thus dispense with his attendance. In all such questions the judge advocate acts for the Government. (8 Op. Atty. Gen., 335, 363.)

**False swearing before court of inquiry.**—See note to article 8, A. G. N., under “Scandalous conduct tending to the destruction of good morals.”

**Depositions in evidence.**—See note to article 42, A. G. N.

**Objects of courts of inquiry.**—The object of a court of inquiry is not merely to exculpate some officer, the individual subject of the inquiry, but to ascertain facts for the information of superior authority. The subject of inquiry may be so broad and comprehensive in scope, and so general in its nature, that its relation to individuals becomes a matter of secondary

consideration. It may involve matters of public welfare and of the universal good of the service, of which personal interests are but a single and not the largest element. (8 Op. Atty. Gen., 335, 349.)

**Analogy to grand jury.**—With respect to inquiry into the conduct of an officer, with a view to determining whether to prefer charges or not, there is much resemblance between the relation of a grand jury to a traverse jury, and that of a court of inquiry to a court-martial. (8 Op. Atty. Gen., 335, 347.)

**Not a judicial tribunal.**—A naval court of inquiry is not a judicial tribunal; it is instituted solely for the purpose of investigation, as an assistance to the President, the head of the department, or the commanding officer, in determining whether or not any further proceeding, executive or judicial, ought to be taken in relation to the subject matter of the inquiry. There is no issue joined between parties, nor parties litigant. (The W. B. Chester's Owners v. U. S., 19 Ct. Cls., 681.)

**Proceedings not a trial.**—The proceedings of a board of inquest or a court of inquiry are in no sense a trial of an issue or of an accused person. These boards perform no real judicial function, but are convened only for the purpose of informing the department in a preliminary way as to the facts involved in the inquiry. (25 Op. Atty. Gen., 623; See note to art. 24, A. G. N.)

**Proceedings advisory only.**—The action of courts of inquiry, whether as to transactions or persons, is not decision, but advice only, for the information of the executive. (8 Op. Atty. Gen., 335, 336.)

**Jurisdiction of civil courts.**—See note to article 6, A. G. N., as to noninterference by civil courts with a naval court of inquiry investigating a charge of homicide.

**Statutes of limitation not applicable.**—The statute of limitations contained in the articles of war does not apply to courts of inquiry in the Army, for the objects of a court of inquiry are not confined to investigation as preparatory to a court-martial, but extend to the legal procurement of information of any sort material to the military service, or the discipline and government of the Army, and to guide the discretion of him who orders it in regard to a matter under inquiry. (6 Op. Atty. Gen., 239.)

It may happen that questions shall arise as to an offense alleged to have been committed by an officer more than two years ago, as to which he ought to be exculpated if innocent, or if guilty dismissed by the President, though not liable to be tried by court-martial. (6 Op. Atty. Gen., 239.)

**Art. 58. [Oaths of members and judge advocate.]** The judge-advocate, or person officiating as such, shall administer to the members the following oath or affirmation: "You do swear (or affirm) well and truly to examine and inquire, according to the evidence, into the matter now before you, without partiality." After which the president shall administer to the judge-advocate, or person officiating as such, the following oath or affirmation: "You do swear (or affirm) truly to record the proceedings of this court and the evidence to be given in the case in hearing."—(17 July, 1862, c. 204, s. 1, art. 25, v. 12, pp. 605, 606.)

See article 40, A. G. N., and note thereto, as to oaths of members and judge advocate of general courts-martial.

**Oaths repeated in each case.**—The court must be sworn separately and so report in each distinct case. (8 Op. Atty. Gen., 335, 341.)

**Art. 59. [Rights of party inquired of.]** The party whose conduct shall be the subject of inquiry, or his attorney, shall have the right to cross-examine all the witnesses.—(17 July, 1862, c. 204, s. 1, art. 23, v. 12, p. 605.)

**Whether court should be open or closed.**—Courts of inquiry are, by the general military law, open or closed as the authority ordering the court may determine; and to have them open is the exception, not the rule. (8 Op. Atty. Gen., 223, 229.)

Courts of inquiry are inherently closed courts, to which defendants generally, and auditors and spectators occasionally, have access by permission; not of right. (8 Op. Atty. Gen., 335, 346. See note to art. 45, A. G. N., as to procedure of general courts-martial.)

**Evidence; documentary.**—Official letters on file, contemporaneous with or a part of the incidents to which they relate, are competent evidence in a court of inquiry, both for and against a party, as are official letters which he may have received at the termination of a particular service, the same being, however, sub-

A court of inquiry may be needed for the very purpose of ascertaining whether an alleged offense was or was not committed within two years, and so informing the mind and guiding the discretion of the executive on the very point of the legality of a court-martial. (6 Op. Atty. Gen., 239.)

In the Articles for the Government of the Navy no limitation of time is expressed as to the matters liable to examination by courts of inquiry; nor in those articles is there any as to acts cognizable by court-martial. How this omission happened, whether accidentally or advisedly, does not appear. In this respect the Articles for the Government of the Navy differ from the articles of war. (8 Op. Atty. Gen., 335, 347, 348.)

See articles 61 and 62, A. G. N., and notes thereto.

**Proceedings and evidence.**—See note to article 59, A. G. N.

See note to article 40, A. G. N., under "Whether oath should be repeated in each case."

**Responsibility for true record.**—See note to article 52, A. G. N.

ject to explanations. But neither letters of recommendation, nor of condemnation, nor certificates prepared for the occasion, nor even ex parte affidavits, are competent evidence. (8 Op. Atty. Gen., 335, 336.)

**Experts.**—By the military as well as by the civil law, courts have authority to commission experts for the examination of all questions of mental or physical disability. (8 Op. Atty. Gen., 335, 336.)

See note to article 42, A. G. N., under "Expert witnesses."

**Rules of procedure.**—The constitution and the course of proceeding of courts of inquiry are to be governed by the general statutes and by the common law military as received and practiced in the Army and Navy. (8 Op. Atty. Gen., 335.)

**Art. 60. [Proceedings; how authenticated; use in other cases.]** The proceedings of courts of inquiry shall be authenticated by the signature of the president



of the court and of the judge-advocate, and shall, in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court-martial, provided oral testimony cannot be obtained.—(17 July, 1862, c. 204, s. 1, art. 24, v. 12, p. 605.)

**Admissibility in evidence by consent of accused.**—A commissioned officer of the Navy can waive the provisions of article 60, A. G. N., and allow proceedings of a court of inquiry to be evidence on a court-martial, the sentence of which may extend to his dismissal; and where, at the request of such an officer, the Secretary of the Navy convened a court-martial to try him on matter which had already been the subject of a court of inquiry, on condition that the proceedings of such court of inquiry be evidence, each party having the privilege, however, of introducing other evidence, the accused is not deprived of any substantial right, and the sentence of the court-martial is not invalidated. (*Mullan v. U. S.*, 212 U. S., 516; see C. M. O. 46-1917, pp. 13-19, for general note on subject of admissibility in evidence before courts-martial of the proceedings of courts of inquiry, boards of investigation, and boards of inquest.)

**Admissibility in civil suit.**—Testimony taken before a court of inquiry can not be put in evidence on a claim against the United States for damages and loss sustained by reason of a collision between a vessel of the Navy and a private vessel, unless it be for the purpose of showing that witnesses who have testified before the civil court have sworn differently before the court of inquiry. (*The W. B. Chester's Owners v. U. S.*, 19 Ct. Cls., 681.)

The claimant is a stranger to the proceedings, though the subject of the investigation was the destruction of his schooner by a naval vessel. Even if allowed to be present and take part in the examination of witnesses, it was by courtesy only. The evidence was *ex parte*, taken by the United States for their own private use. (*The W. B. Chester's Owners v. U. S.*, 19 Ct. Cls., 681.)

**Art. 61. [Limitation of trials; general offenses.]** No person shall be tried by court-martial or otherwise punished for any offense, except as provided in the following article, which appears to have been committed more than two years before the issuing of the order for such trial or punishment, unless by reason of having absented himself, or of some other manifest impediment he shall not have been amenable to justice within that period.

This article was added to the Articles for the Government of the Navy, as article 61 thereof, by act of February 25, 1895 (28 Stat., 680).

**Historical note.**—By article 138 of "Orders, Regulations, and Instructions for the Administration of Law and Justice in the United States Navy," approved by the Secretary of the Navy, April 15, 1870, it was provided that "No person in the Navy shall be liable to be tried and punished by a court-martial for any offense which shall appear to have been committed three years before the issuing of the order for such trial, unless the person, by reason of having absented himself or some other manifest impediment, shall not have been amenable to justice within that time."

The "Orders, Regulations, and Instructions for the Administration of Law and Justice in the United States Navy" were issued by the Secretary of the Navy, under the authority of the President, in 1870. Section 1547 of the Revised Statutes is a legislative recognition of the regulations of 1870, and "must be understood as giving to these regulations the sanction of the law." (*Smith v. Whitney*, 116 U. S., 167, 180.)

The said "Regulations for the Administration of Law and Justice," regulating the procedure of courts-martial, have the force of law. (*Ex parte Reed*, 100 U. S., 13, 22; compare note to art. 42, A. G. N., under "Character evidence.")

In the Articles for the Government of the Navy no limitation of time is expressed as to

acts cognizable by courts-martial. How this omission happened, whether accidentally or advisedly, does not appear. In this respect the Articles for the Government of the Navy differ from the Articles of War. (8 Op. Atty. Gen., 335, 347, 348, Jan. 31, 1857.)

Article 61, A. G. N., was first enacted by act of February 25, 1895, before which time there was no statute of limitations for violations of the Articles for the Government of the Navy. (31 Op. Atty. Gen., 521, 528.)

**Desertion in time of war.**—Article 61 applies to desertion from the Navy in time of war. In such case the two-year period of limitation commences to run from the date that the offender first absents himself without leave and with the intention of permanently abandoning the service. But he is amenable to trial by court-martial after the end of the term for which he enlisted, provided such trial is not barred by the statute of limitations. (Op. Atty. Gen., Feb. 27, 1922, file 26251-26615:8; see note below, under art. 62, A. G. N.)

If the offender has not been discharged or his status otherwise terminated, he may be tried after expiration of his enlistment, even though he had not in the meantime been arrested or other steps taken to enforce jurisdiction. (Op. Atty. Gen., Feb. 27, 1922, file 26251-26615:8.)

See note to section 1418, Revised Statutes, under "Detention of enlisted men after expiration of enlistment."

**View that statute of limitations can not be waived.**—The accused can not be tried by

court-martial for an offense of more than two years' standing previous to the order summoning the court, even on his own application, unless the prosecution can show that, by reason of absence or some other manifest impediment, the accused was not amenable to justice within the time limited by the Articles of War. The limitation was not intended solely for the benefit of persons accused, but its policy had a wider scope, viz, the prompt prosecution of offenses. (1 Op. Atty. Gen., 383; affirmed, 14 Op. Atty. Gen., 265.)

This limitation can not be waived by the accused, nor can he, even with his consent, be tried by a general court-martial after the time prescribed by the Articles of War. (6 Op. Atty. Gen., 239.)

The statute of limitations contained in the Articles of War is a limitation upon the jurisdiction of courts-martial, and presents an absolute bar to the trial (under certain exceptions therein stated), which can not be waived even by the accused. (13 Op. Atty. Gen., 462, 463; citing 1 Op. Atty. Gen., 383 and 6 Op. Atty. Gen., 240.)

When it appears by the record that the order for trial was issued more than two years before the commission of the offense, a plea of guilty is not to be taken as an admission by the accused of the existence of an exception withdrawing his case from the limitation. It is for the prosecution to show, as a matter of fact, in some way other than by the form of the pleadings, that by reason of having absented himself, or of some other manifest impediment, the accused was not amenable to justice within the two years. (16 Op. Atty. Gen., 170.)

As a matter of pleading, the plea of guilty admits the existence of the exceptions which take the case out of the general statute of limitations. However, it having been held in previous opinions of the Attorneys General that the limitation can not be waived by the accused, and no opinion being found which contradicts these, the rule thus established should be followed. (16 Op. Atty. Gen., 170.)

**View that statute of limitations is matter of defense.**—The limitation prescribed for the trial and punishment of the offense of desertion, by the Articles of War, is matter of defense, and the tribunal having jurisdiction to try the charge of desertion is the tribunal having jurisdiction to determine whether the bar of the statute has attached or not. (In re White, 17 Fed. Rep., 723.)

A desertion having taken place, whether the statute of limitations has run against it and barred punishment is matter of defense, and must be determined by the same tribunal which tries the charge. Should the case be tried before a court-martial duly organized, and the question whether the offense was barred by the statute of limitations decided against the accused, the civil courts would have no jurisdiction by habeas corpus or otherwise over such decision of the court-martial. (In re White, 17 Fed. Rep., 723.)

The article of war does not limit or qualify the jurisdiction of a military tribunal, but prescribes a rule of procedure for the benefit of the accused, to be considered and enforced upon the trial in the exercise of a jurisdiction already

conferred. The limitation is a matter of defense, which is to be entertained and determined like any other question involving an adjudication upon the merits of the case. (In re Davison, 21 Fed. Rep., 618.)

It is for the court-martial and not for a civil court of the United States to decide whether the statutory limitation can be invoked by a party accused of desertion to protect him from punishment. (In re Davison, 21 Fed. Rep., 618.)

The bar of the statute of limitations provided for in the Articles of War in the case of a party charged with desertion is a defense to be set up in the case, which the military court trying the charge has jurisdiction to determine for itself, without interference from the civil courts. It is the duty of courts-martial, in all cases within its terms, to give effect to the statute of limitations. (In re Zimmerman, 30 Fed. Rep., 176, 179.)

In the case presented it appears to the court that the prosecution is barred by the statute of limitations. An erroneous ruling by the military authorities upon this point would inflict a great wrong upon the citizen so tried and punished. However, if such wrong be inflicted, deliberately or otherwise, there is still no reviewing, controlling, or correcting power in the civil courts. Congress in such case must afford a remedy or the wrong must be endured. Had we the jurisdiction to do so, we should not hesitate to give full effect to the bar of the statute by discharging the prisoner on this ground. (In re Zimmerman, 30 Fed. Rep., 176, 179.)

A former conviction and the statute of limitations are matters of defense on the merits, which must be investigated in the exercise of jurisdiction, and not facts upon which the jurisdiction to hear and determine the charge depends. These matters can not be inquired into on a petition for discharge on habeas corpus. (In re Bogart, 3 Fed. Cas., No. 1, 596.)

See note to article 53, A. G. N., as to jurisdiction of civil courts; and see note to article 62, A. G. N.

**Effect of pleading statute of limitations; admits jurisdiction.**—The plea of the statute of limitations is not a plea to the jurisdiction of the court, but a plea in bar addressed to a court of competent jurisdiction. It confesses the jurisdiction of the court, and refers the matter to trial in that court to ascertain the truth of the facts and the law arising out of the facts. The plea of the statute of limitations admits the cognizance of the court to hear and determine the matters of offense. (6 Op. Atty. Gen., 506, 512.)

**Absence; not amenable to justice.**—The words, "by reason of having absented himself," certainly do not mean absence from the State or beyond seas as those terms are ordinarily used in statutes of limitation. Nor do they mean merely absence from the company in which or locality where the offender enlisted. The absence contemplated by the article is an absence from the reach of the jurisdiction of the military authorities. To avoid the limitation of the article, it would seem to be necessary that the accused should not only be absent but that he



should be where the military authorities by reasonable diligence could not make him amenable to justice. (14 Op. Atty. Gen., 265.)

Absence, in order to bring the accused within the exception, must be such as to render him "not amenable to justice." (15 Op. Atty. Gen., 152, 163.)

The general significance of the word "amenable" in its modern sense as a law term is "responsible, subject to answer in a court of justice, liable to punishment." As used in the above provision it would seem to mean, within the reach and power of the military authorities to bring to trial before a court-martial; that is, in a situation where the responsibility or liability to answer for the absence can be made effective, or within the jurisdiction of a court-martial. (15 Op. Atty. Gen., 152, 163.)

Unquestionably, absence in a foreign land would place the accused beyond the jurisdiction of a court-martial, and thus make him not amenable; so, it has been thought, would absence within the limits of this country, if he were where the military authorities by reasonable diligence could not discover him. (15 Op. Atty. Gen., 152, 163; see also C. M. O. 27, 1913, pp. 13-18; Naval Dig., 1916, pp. 589-592.)

It would be difficult, perhaps impossible, to lay down any general rule whereby to determine in all cases under what facts and circumstances the accused may be deemed to be beyond the reach and power of the military authorities to bring him to trial, or beyond the jurisdiction of a court-martial. This is a matter which must be left in each case to the judgment of the court itself, upon the particular facts and circumstances appearing therein, subject to revision by the proper authorities. (15 Op. Atty. Gen., 152, 163.)

The word "absence" in the article means absence from the jurisdiction of the military courts; that is, from the United States. (In re Davison, 4 Fed. Rep., 507; reversed on other grounds, 21 Fed. Rep., 618.)

For other cases, see note to article 62, A. G. N. **"Manifest impediment."**—Causes of delay in bringing an officer to trial can be arranged in three classes: First, those that are created or interposed by the act of the party; second, circumstances arising independently either of his action or that of the Government; and third, such as are controlled by the Government itself. The first class constitute manifest impediments within the meaning of the statute of limitations. It is a broad principle of law and of natural justice that no man can take advantage of his own wrong. Examples are, preventing witnesses appearing against him, or the like. (9 Op. Atty. Gen., 181; compare 14 Op. Atty. Gen., 265.)

Delay occasioned by the Government itself is not a manifest impediment. The accused has a right to a trial within two years. He can not be deprived of that right at the option of those who have power to try him. The dismissal of an officer under charges, if an impediment, is created by the Government itself. It was a voluntary, indefinite suspension, if not an abandonment, on the part of the Government of the charges then pending and is clearly no manifest impediment within the meaning of the Articles of War. (9 Op. Atty. Gen., 181.)

The concealment of an offense by the accused is not a "manifest impediment" to his prosecution within the meaning of the Articles of War and does not prevent the limitation from running in his favor. (14 Op. Atty. Gen., 52.)

The words, "other manifest impediment," must be construed in connection with the words immediately preceding, viz., "by reason of having absented himself," and, taken together, it is apparent that the impediment intended by the article is an impediment similar in kind to absence, and that it is one which renders it impossible for a prosecution to take place. It could not be extended so far as to include concealment of the offense. (14 Op. Atty. Gen., 52.)

Persons prosecuted for crime are not allowed to claim that the statute of limitations runs in their favor for and during the time they are absent from the State or beyond seas, or, in other words, beyond the jurisdiction of the court. But any concealment of the evidence of their guilt, or other like fraud on their part, while they remain in that jurisdiction, by which the prosecution is delayed until the time of the bar has run, does not deprive them of the benefit of the statute. (14 Op. Atty. Gen., 265, modifying 9 Op. Atty. Gen., 181, 183.)

"Manifest impediment," as used in the Articles of War, does not mean merely want of evidence or ignorance as to the offender or offense by the military authorities, but it means something akin to absence—want of power, or a physical inability to bring the party charged to trial. (14 Op. Atty. Gen., 265.)

"Other manifest impediment" means only such impediments as operate to prevent the military court from exercising its jurisdiction, as, for instance, his being continuously a prisoner in the hands of the enemy, or being imprisoned under the sentence of a civil court for a time, or the like. (In re Davison, 4 Fed. Rep., 507; reversed on other grounds, 21 Fed. Rep., 618.)

For other cases, see note to article 62, A. G. N.

**In custody of civil authorities.**—Where an officer charged with the commission of an offense in violation of both the State law and the Articles of War is delivered to the civil authorities for trial, the military authorities should take heed that the charges for violation of the Articles of War be put in due form and so remain suspended or adjourned merely, in order that the limitation of time provided by the Articles of War do not begin to run; and that, however much time be consumed in the civil proceedings, still, at the expiration of them, he may be duly tried by a court of his military peers. (6 Op. Atty. Gen., 413, 428.)

A prosecution of an officer before a court-martial having been instituted and the party arraigned, within the two years required by law, and the accused pleading the pendency of civil proceedings arising in the matter, whereupon the proceedings of the court-martial were suspended until reassembled by an order issued after the lapse of two years, *held* that the statute of limitations could not then be pleaded in the case. (6 Op. Atty. Gen., 506.)

**Officer dismissed and subsequently restored to the Army.**—Where charges were preferred against an officer in the Army for disobedience of orders in June, 1856, and in Septem-

ber following, for other reasons, he was dismissed the service by the President, no court-martial having been ordered to investigate the charges against him, *held* that on his being restored to the Army he could not be tried on the charges pending against him at the time of his dismissal, after the lapse of two years since the commission of the alleged offense. (9 Op. Atty. Gen., 181.)

The question whether an officer who has been dismissed from the service is liable to be tried by court-martial for offenses previously committed, examined; but no opinion given thereon. (9 Op. Atty. Gen., 181. See note above, under preamble to sec. 1624, R. S., as to jurisdiction of persons after discharge from the Navy, or after release from active duty in the Naval Reserve Force.)

**Jurisdiction after discharge.**—Under the article of war (corresponding to this article) it appears that a soldier may be arrested and tried after the expiration of his term of service for a military offense committed during such term of service, so that the order for the court-martial is issued within two years from the commission of the offense. In any view of the matter, a soldier may be held for trial after the term of his enlistment, if arrested for the offense before the expiration of the term. (In re Bird, 3 Fed. Cas. No. 1,428.)

The two years' limitation prescribed by the 88th article of war (similar to art. 61, A. G. N.) applies to all offenses triable and punishable by court-martial, including those which may be thus tried and punished under the act of March 2, 1863 (12 Stat., 696; see art. 14, A. G.

N.), punishing frauds upon the United States by persons in the land and naval forces; and providing that any person committing such offense who shall afterwards be discharged or dismissed shall, notwithstanding such discharge or dismissal, continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge or been dismissed. (14 Op. Atty. Gen., 52.)

Article 61, A. G. N., may, with some force, be said to provide by implication, affirmatively, viz, that any person committing an offense within two years before the issuing of the order for trial may be tried therefor, whether he has left the service or not. However, it is doubtful whether the mere fixing by Congress of a general period of limitation should be taken to indicate an intention to extend the basic jurisdiction over a class not subject to it theretofore. It is possible that the attention of Congress was not at all engaged with the subject of such basic jurisdiction. (31 Op. Atty. Gen., 521, 528.)

See note under preamble to section 1624, Revised Statutes, as to jurisdiction of persons discharged from the Navy, whose enlistment has expired, or who have been relieved from duty in the Naval Reserve Force; and see notes above, under "Manifest impediment," and "Desertion in time of war."

**No limitation in proceedings before courts of inquiry.**—See note to article 57, A. G. N.

**Art. 62. [Limitation of trials; desertion in time of peace.]** No person shall be tried by court-martial or otherwise punished for desertion in time of peace committed more than two years before the issuing of the order for such trial or punishment, unless he shall meanwhile have absented himself from the United States, or by reason of some other manifest impediment shall not have been amenable to justice within that period, in which case the time of his absence shall be excluded in computing the period of the limitation: *Provided*, That said limitation shall not begin until the end of the term for which said person was enlisted in the service.

This article was added to the Articles for the Government of the Navy, as article 62 thereof, by act of February 25, 1895 (28 Stat., 680). See historical note under article 61, A. G. N.

**Whether desertion is continuing offense; when statute begins to run.**—The general limitation provided by the Articles of War held applicable to the offense of desertion, no special provision being made for that offense. The limitation begins to run from the commission of the offense, except in a case where, by reason of "manifest impediment," the accused is not amenable to justice within two years from that time. In such case it begins to run from the removal of the impediment. (15 Op. Atty. Gen., 152.)

Desertion is a continuing offense; an offense which may endure (that is, be continually committed) from day to day after the period of

its completion. But the continuing commission thereof is limited by the obligation to serve imposed upon the deserter by his engagement. When that obligation ceases to exist, the commission of the offense necessarily terminates, and the limitation then begins to run in cases not excepted. (15 Op. Atty. Gen., 152; affirmed, 16 Op. Atty. Gen., 170, 396.)

Enlistments are required to be for a specified time. By his engagement the soldier is bound for a specific term of service, the last day of which is as much fixed by the contract as the first. With the last day of the term his engagement expires, and with the expiration of his engagement the obligation to serve, thereby imposed, is at an end. This results notwithstanding that there has been an infraction of the contract by desertion or otherwise, unless the soldier, before the term is up, consents to an extension. (15 Op. Atty. Gen., 152; affirmed, 16 Op. Atty. Gen., 170, 396.)



The provision in the Articles of War that a deserter shall be liable to serve for such period as necessary to make good time lost by his unauthorized absence is a penal provision, and operates only after conviction. (15 Op. Atty. Gen., 152; affirmed, 16 Op. Atty. Gen., 170, 396.)

For reasons above stated, *held*, in the case of an enlisted soldier, that (excepting where the offender has previously surrendered himself or been apprehended, or where by reason of manifest impediment he is not amenable to justice) the limitation begins to run from the last day of the term for which he enlisted, under the general article applicable to all offenses, and in the absence of any specific enactment applicable to desertion. (15 Op. Atty. Gen., 152; affirmed, 16 Op. Atty. Gen., 170, 396.)

In the case of desertion by a commissioned officer, whose engagement is an unlimited one, the limitation begins to run only from the date of apprehension or surrender. (15 Op. Atty. Gen., 152, 163; affirmed, 16 Op. Atty. Gen., 170, 396.)

It would certainly be a startling proposition that there is no limitation at all upon prosecutions for the offense of desertion; that one who has once been a deserter is subject during the whole of his natural life to be brought to trial before a military court and punished for this offense, even in extreme old age. With the single exception of the crime of murder, the almost universal policy of the criminal law is to prescribe a term within which the offender shall be brought to trial. (In re Davison, 4 Fed. Rep., 507; reversed on other grounds, 21 Fed. Rep., 618.)

The whole effect of the limitation can not be taken away on the theory that the desertion may be considered for some purposes to be a continuing offense. The offense was complete for the purpose of the limitation on the day that the accused deserted and which was charged against him as the date the offense was committed. (In re Davison, 4 Fed. Rep., 507; reversed on other grounds, 21 Fed. Rep., 618.)

Were the question properly before us, we should have no difficulty in reaching the same conclusion as to the effect of the statute of limitations as that attained in the Davison case (4 Fed. Rep., 507); but that question is not properly before us; as it is exclusively a question for the tribunal having jurisdiction to try a party charged with the offense of desertion, we are not authorized to consider the question at all. (In re White, 17 Fed. Rep., 723.)

A question has arisen whether desertion is a continuing offense in such sense that the statute does not begin to run until the expiration of the term of enlistment. A continuing civil or military obligation to serve until the expiration of the term of enlistment is one thing, and a continuing criminal offense, if such there can be, which is perfected and ripe for charges and trial at the moment it is "committed" for the purpose of barring a trial and punishment under the statute of limitations, is quite another. Some, however, maintain the affirmative of the proposition, notwithstanding the language of the statute is, after the offense "appears to have been committed." Although by no means satisfied with such view, *held* that the question whether the trial is barred by the statute of limitations is one for determination

by the court-martial. (In re Zimmerman, 30 Fed. Rep., 176, 179.)

The above cases reviewed, and *held* that desertion from the Navy is not a continuing offense; that it is committed and is complete at the moment the person absents himself with the requisite intent. (Op. Atty. Gen., Feb. 27, 1922, file 26251-266158.)

See note above, under article 61, A. G. N., as to desertion in time of war.

#### **Trial after expiration of enlistment.**—

The jurisdiction of a naval court-martial is, by the Articles for the Government of the Navy, confined to persons in the naval service, except for offenses set forth in article 14, A. G. N., and for the offense of desertion in time of peace as set forth in article 62, A. G. N. Hence, in the case of one who deserted from the Marine Corps in time of war, and whose enlistment expired while he was in desertion, *held* that a naval court-martial did not have jurisdiction to try him for such desertion after the date his enlistment expired; and the proceedings, findings, and sentence were accordingly disapproved. (C. M. O. 151, 1920, pp. 11, 12, case of George M. Runyan, citing 15 Op. Atty. Gen., 152, and 31 Op. Atty. Gen., 521. But see *ex parte* Clark, noted below.)

Opinion in case of George M. Runyan (C. M. O. 151, 1920, above noted), cited, and remarked with respect thereto: "If the effect thereof is that a man may desert, remain in hiding until the time of his enlistment expires, and then escape all responsibility, I can not agree with such a conclusion. The effect thereof upon the morale of the Army and Navy alike would be disastrous. While there is no obligation to serve after the period of enlistment it does not follow that conduct during that period may go unpunished for the reason assigned. If that were the law, it might be well urged that a court-martial has no power to imprison after the expiration of the enlistment." (*Ex parte* Clark, 271 Fed. Rep., 533.)

A marine deserted in Germany while detached for service with the Army; subsequently, and shortly after his term of enlistment would have expired, the French authorities surrendered him to the American Army at Paris; he was then delivered by the military authorities to the custody of the commandant of the navy yard at New York, and a naval court-martial was convened to try him for desertion. *Held*, first, that the naval court-martial had jurisdiction of the desertion committed by said marine in violation of the Articles of War [see sec. 1621, R. S., and note thereto]; second, that there is no merit in the contention that the naval authorities are without jurisdiction because his term of enlistment had expired. (*Ex parte* Clark, 271 Fed. Rep., 533.)

A deserter from the Army who has never been discharged from the service is still subject to the jurisdiction of a military tribunal, notwithstanding that his period of enlistment has expired; and while he may plead the statute of limitations as a defense to a prosecution for desertion, a civil court will not interfere with such a prosecution by a military tribunal before that court has acted on and decided the case. As he has not been discharged from the Army, he is subject to the jurisdiction of a mili-

tary tribunal. (In re Cadwallader, 127 Fed. Rep., 881.)

An enlisted man continues in the naval service after the expiration of his enlistment until there has been some act, such as a discharge, to terminate the status created by his contract of enlistment; and while so in the service he may be tried by court-martial for offenses committed during his period of enlistment, whether or not he has in the meantime been arrested or other steps taken to enforce the jurisdiction. (Op. Atty. Gen., Feb. 27, 1922, file 26251-26615:8; see note to art. 61, A. G. N., under "Desertion in time of war.")

A man enlisted in the Navy January 4, 1908, for a term of four years; his enlistment expired on January 3, 1912; in the meantime, he was declared a deserter on March 7, 1908; he surrendered to the naval authorities on September 20, 1913; the Bureau of Navigation directed removal of the mark of desertion from his record, October 8, 1913; he was tried by summary court-martial for absence without leave on October 20, 1913; was sentenced to solitary confinement for 30 days and extra police duties for 60 days; which said sentence was duly approved and executed. (20 Comp. Dec., 751.)

By an act approved January 29, 1813 (2 Stat., 796), it was provided that deserters from the Army should be liable to make good time lost by absence in desertion, "and that such soldier shall and may be tried by a court-martial and punished although the term of his enlistment may have elapsed previous to his being apprehended or tried." It may well be doubted whether, in the absence of this enactment, a soldier was triable by a court-martial organized after the expiration of his term of enlistment, for any offense committed during his term; but that act was designed for the punishment of the offense of desertion, although the term of enlistment may have elapsed previous to the apprehension and trial of the offender. But said act of 1813 was not intended to repeal the article of war limiting the time for trial of offenses, and to make a deserter liable to be tried at any time after the expiration of his enlistment; the limitation imposed by that article still remained. (13 Op. Atty. Gen., 462.)

**Trial void if in violation of statute of limitation.**—A man deserted from the Army on October 2, 1865; his enlistment would have expired on August 21, 1868; he was apprehended April 13, 1871. By act of April 10, 1806, article 88 (2 Stat., 369), it was declared that "no person shall be liable to be tried and punished by a general court-martial for any offense which shall appear to have been committed within two years before the issuing of the order for such trial, unless," etc. Said article of war applied to desertion as well as to other offenses. The accused in this case did not come within the exceptions contained in said article. *Held*, that the court-martial was

without jurisdiction. (13 Op. Atty. Gen., 462.)

Where a soldier enlisted on August 16, 1870, deserted from the Army on September 19, 1870, but in about one year afterwards reenlisted under an alias in another regiment and an order was issued on March 11, 1873, for his trial by court-martial for desertion, for which offense he was thereupon tried by the court, convicted, and sentenced to punishment, *held* that the prosecution was barred by the two years' limitation prescribed by the Articles of War, and that consequently the conviction and sentence are void. (14 Op. Atty. Gen., 265.)

See note to article 61, A. G. N., under "View that statute of limitations is matter of defense."

**Statute of limitations matter of defense.**—The judgment of a court-martial, regularly organized, convicting and sentencing a soldier for desertion, which judgment has been confirmed as provided in the Articles of War, is not subject to review by a civil court in habeas corpus proceedings on the ground that the prosecution was barred by limitation under the 103d article of war, such defense being one to the merits, to be determined by the court-martial, and not affecting its jurisdiction. (Ex parte Townsend, 133 Fed. Rep., 74; see note to art. 61, A. G. N.)

**Absence.**—See note to article 61, A. G. N.

Absence without leave is not per se sufficient to prevent the limitation from running. (15 Op. Atty. Gen., 152.)

The exception from the limitation contained in the 103d article of war does not produce any effect where the limitation itself would not otherwise run. Hence, absence without leave during the term of enlistment, in the case of a deserter, is unimportant, inasmuch as the offense of desertion, being a continuing one during such term, the limitation would not otherwise begin to run until the expiration thereof. (16 Op. Atty. Gen., 170.)

Where the absence of the deserter continues after his term of service has expired, no presumption of law arises that he was not amenable to justice during such absence, and that his case is accordingly within the exception. The facts must be shown by evidence submitted at the trial. (16 Op. Atty. Gen., 170. Compare cases noted under art. 61, A. G. N., and under this article, as to statute of limitations being matter of defense.)

**Manifest impediment.**—See note to article 61, A. G. N.

It is apparent that, as relator had deserted and could not be found during the period of his desertion, there was such a "manifest impediment" in the way of bringing him to justice as would justify excluding the period of his desertion from any computation of time within which a prosecution must be begun. (Ex parte Clark, 271 Fed. Rep., 533; see also C. M. O. 27, 1913, pp. 13-18; Naval Dig., 1916, pp. 589-592.)

**Art. 63. [Limitation of punishments; time of peace.]** Whenever, by any of the Articles for the Government of the Navy of the United States, the punishment on conviction of an offense is left to the discretion of the court-martial, the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe.



This article was added to the Articles for the Government of the Navy, as article 63 thereof, by act of February 27, 1895 (28 Stat., 689).

**Where no limitation prescribed by the President.**—Where the Articles of War provided that the punishment shall not, in time of peace, be in excess of a limit which the President may prescribe, and the President, in prescribing limitations of punishment, made same applicable in terms to enlisted men only, *held* that the sentence of a court-martial in the case of a commissioned officer, which was approved by the President, was valid, notwithstanding objection that such sentence was in excess of the limit which had been prescribed by the President; that the limitations so prescribed were applicable to enlisted men only; and that it is evident that a limit on discretion in punishment, to be imposed by the President, can have only such operation as he may affirmatively prescribe. (*Carter v. McClaughry*, 183 U. S., 365, 382.)

**Punishment for repeated offense.**—Every successive disobedience of orders is a fresh offense and subjects the offender to additional punishment. It has been settled in a penal prosecution that a like act when prohibited, if distinctly repeated even on the same day, constitutes a second offense and incurs an additional penalty. (*Wilkes v. Dinsman*, 7 How., 89, 128.)

**Single sentence for all offenses.**—The rule is established by military usage that the sentence of a court-martial shall be in every case an entirety; that is, that there shall be but a single sentence covering all the convictions and all the charges and specifications upon which the accused is found guilty, however separate and distinct may be the different offenses found, and however different may be the punishments called for by the offenses. Where, then, there is a conviction of several offenses, the sentence is warranted to the extent that such offenses are punishable, even where the offenses are in violation of the same article. Cumulative sentences are not cumulative punishments, and a single sentence for several offenses in excess of that prescribed for one offense may be authorized by statute; (*Carter v. McClaughry*, 183 U. S., 365, 393, 394; see also notes to arts. 14, 22, and 53, A. G. N.)

**Sentences cumulative.**—The customary military law and the Army Regulations unite in requiring that different sentences to imprisonment, imposed by separate courts-martial upon the same offender for distinct offenses, be regarded as cumulative and be executed consecutively, one upon the expiration of another, in the order of their imposition. (*Kirkman v. McClaughry*, 160 Fed. Rep., 436.)

**Cruel and unusual punishments.**—See article 49, A. G. N., as to prohibited punishments; and see note to Constitution, eighth amendment.

A sentence of dismissal in the case of an officer of the Marine Corps is not illegal, nor in conflict with the provision of the Constitution which declares that cruel and unusual punishments shall not be inflicted, although under the circumstances severe and harsh, it appearing that the milder punishment of reprimand or

suspension would have fully satisfied the most rigorous demands of justice. (3 Op. Atty. Gen., 631.)

The words, "such other punishment as a court-martial shall adjudge," are to be limited by the custom of the service, and authorize only such punishments as are usual. (10 Op. Atty. Gen., 158.)

It is certainly hard to mark the line where usual and proper punishments end and unusual and cruel ones begin; and the sentence pronounced under an authority so broad and general ought to be so far out of proportion to the offense committed as to shock the sense of justice before it is arrested as contrary to usage. If it bear a general relation to the crime, and be not entirely outside the circle of naval punishments, any interference with it on that ground could hardly be justified. (10 Op. Atty. Gen., 158.)

Section 16 of an act approved July 17, 1862 (12 Stat., 596), provided that any contractor for supplies for the Army or Navy found guilty by court-martial of fraud or willful neglect of duty "shall be punished by fine and imprisonment, or such other punishment as the court-martial shall adjudge"; and that any person contracting to furnish said supplies "shall be deemed and taken as a part of the land or naval forces of the United States, for which he shall contract to furnish said supplies, and be subject to the rules and regulations for the government of the land and naval forces of the United States." A contractor was sentenced by a naval general court-martial under this section to "be hereafter excluded from any further deliveries, either on contract or open purchase, for naval supplies." *Held*, that such sentence was unwarranted by the usage of the service, and was therefore illegal. (12 Op. Atty. Gen., 528. See note under preamble to section 1624, R. S., as to contractors not being amenable to court-martial.)

The discretion given the court-martial in the matter of inflicting punishment upon conviction is to be understood as controlled by the custom of the service and limited to the imposition of that kind of punishment only which has become usual. A sentence of incapacity or disability does not fall within the range of discretionary punishments allowable by the usage of the service, and is not within the power of a court-martial except where expressly authorized by law. (12 Op. Atty. Gen., 528.)

Not decided whether the confinement of the accused for a long term in a prison of narrow cells and limited appliances for comfort would be a punishment which the law regards as cruel and unusual, and forbidden by the Constitution, because the suggestion as to the character of the prison is unsupported by anything in the record, and no point of the kind was made at the argument in this court. (*Johnson v. Sayre*, 158 U. S., 109, 116.)

**Imprisonment until payment of fine.**—The sentence of a court-martial that the accused "be imprisoned in such place as the honorable Secretary of the Navy may designate for the term of two years; to lose all pay which may become due him during such confinement, except the sum of ten dollars per month, this loss amounting to one thousand nine hundred

and sixty-six dollars; to be fined in the sum of five hundred dollars, which fine must be paid before or at the end of the term of confinement; to be detained in confinement without pay until such fine be paid, and at the expiration of term of confinement to be dishonorably discharged from the naval service of the United States," which sentence was adjudged by the court on revision of its original sentence in the case, *held* not illegal. (In *re* Reed, 20 Fed. Cas. No. 11636; affirmed, *ex parte* Reed, 100 U. S., 13.)

**Imprisonment beyond term of enlistment.**—The President having fixed a term of 10 years as the maximum of imprisonment in cases prosecuted under the 62d article of war (corresponding to art. 22, A. G. N.), as authorized by Congress, a court-martial on convicting a soldier of conduct prejudicial to good order and military discipline in violation of such article had jurisdiction to sentence accused to a term of five years' imprisonment, though such term extended beyond the term of military service for which he had enlisted. (In *re* Stubbs, 133 Fed. Rep., 1012; see note to preamble of sec. 1624, R. S., under "Where jurisdiction attached prior to discharge.")

**Place of imprisonment designated by reviewing authority.**—There is nothing in the character of a court-martial which inherently precludes committing to the reviewing authority the determination of the character of imprisonment to be imposed within the prescribed limits. There is no statute which prevents the adoption of a rule or regulation committing the matter to the reviewing authority for determination of the place of imprisonment. (In *re* Brodie, 128 Fed. Rep., 665, 668.)

Where the judgment of a court-martial directed the kind and duration of his imprisonment, the place of his confinement may be later designated by the War Department and such designation on the commitment papers will be presumed to have been lawfully made. (*Ex parte* Givins, 262 Fed. Rep., 702; affirmed, *Givens v. Zerbst*, 255 U. S., 11.)

**Regulations as to imprisonment; effect of footnote.**—A manual issued by the Secretary of War providing in a footnote that in certain cases the words "in such place as the reviewing authority may direct," were to be used in the sentence of a court-martial with reference to the place of confinement, operated to qualify Army Regulations issued by the Secretary of War with the approval of the President. A footnote to a rule or regulation is not less authoritative than the principal text, where there is a single authorship. Accordingly, where the sentence in a proper case is in the form above quoted, such sentence is conclusive and not open to collateral attack. (In *re* Brodie, 128 Fed. Rep., 665.)

**Stoppage of pay.**—The amount of the reward paid for the apprehension of a deserter who, upon trial by a court-martial for desertion, has been convicted only of the offense of absence without leave, can not lawfully be stopped against his pay in a case where the sentence of the court does not impose such stoppage.

Stoppage of pay against a soldier is unauthorized unless made in execution of the sentence of a court-martial or in pursuance of a statute or in conformity to a regulation having the force of law. (16 Op. Atty. Gen., 474; see notes to secs. 1556 and 1569, R. S.)

**Certainty required.**—A sentence which declares "all pay and allowances now due or that may hereafter become due," to be forfeited, except certain amounts specially named fixes the amount of pay forfeited sufficiently within the intent of the Navy Regulations of 1870 (sec. 248), requiring that sentences including forfeiture of pay "fix the amount of the pay so forfeited, stating it in dollars and cents." (*Williams v. U. S.*, 24 Ct. Cls., 306.)

Judgments, whether of civil or military tribunals, should embrace the highest degree of certainty, "certainty to a certain intent in every particular." It is a sound maxim of the law that "that is sufficiently certain which can be made certain." The sum to be forfeited, although not fixed by the sentence, could be determined with accuracy by reference to other reliable data. To hold that the sentence was void for uncertainty, because the amount is not stated on the face of the sentence, would be a technical requirement not warranted. The objection being matter of form only, it does not vitiate the sentence as a judicial finding. (*Williams v. U. S.*, 24 Ct. Cls., 306.)

**"Cashiered" and "dismissed" construed.**—See note to article 46, A. G. N.

**Dismissal mandatory.**—See act of April 9, 1906, section 5 (34 Stat., 105), as to certain offenses of neglect of duty by officers of the Naval Academy.

**Coast Guard; limitation of punishments.**—"Whenever, in time of war, the Coast Guard operates as a part of the Navy in accordance with law, the personnel of that service shall be subject to the laws prescribed for the government of the Navy: *Provided*, That in the initiation, prosecution, and completion of disciplinary action, including remission and mitigation of punishments for any offense committed by any officer or enlisted man of the Coast Guard, the jurisdiction shall hereafter depend upon and be in accordance with the laws and regulations of the department having jurisdiction of the person of such offender at the various stages of such action: *Provided further*, That any punishment imposed and executed in accordance with the provisions of this section shall not exceed that to which the offender was liable at the time of the commission of his offense." (Act Aug. 29, 1916, 39 Stat., 600.)

**For other cases** see notes to articles 7, 8, 14, and 48, A. G. N.

**Perjury.**—As to punishment for, see article 42, A. G. N.

**Limitations of punishment prescribed by the President**, as modified from time to time, are published in "Naval Courts and Boards," issued by the Navy Department, office of the Judge Advocate General of the Navy.



## TITLE XIX.

### PROVISIONS APPLICABLE TO SEVERAL CLASSES OF OFFICERS.

Sec.  
1754. Preference of persons disabled in military or naval service.  
1755. Recommendation for employment in private industries.  
1757. Oath of office.  
1758. Who may administer oath.  
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Sec.  
1765. Extra allowances.  
1766. Officer in arrears; withholding pay.  
1773. Commissions.  
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1778. Oaths or acknowledgments; before whom taken.  
1779. Newspapers, books, etc.; restriction upon purchase.  
1784. Contributions, presents, etc., to superiors.

**Sec. 1754. [Preference of persons disabled in military or naval service.]** Persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty, shall be preferred for appointments to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices.—(3 Mar., 1865, Res. No. 27, s. 1, v. 13, p. 571.)

See laws and decisions noted under section 416, Revised Statutes, subheading, "Honorably discharged soldiers or sailors."

**Sec. 1755. [Recommendation for employment in private industries.]** In grateful recognition of the services, sacrifices, and sufferings of persons honorably discharged from the military and naval service of the country, by reason of wounds, disease, or the expiration of terms of enlistment, it is respectfully recommended to bankers, merchants, manufacturers, mechanics, farmers, and persons engaged in industrial pursuits, to give them the preference for appointments to remunerative situations and employments.—(3 Mar., 1865, Res. No. 27, s. 2, v. 13, p. 571.)

**Sec. 1757. [Oath of office.]** Whenever any person who is not rendered ineligible to office by the provisions of the fourteenth amendment to the Constitution is elected or appointed to any office of honor or trust under the Government of the United States, and is not able, on account of his participation in the late rebellion, to take the oath prescribed in the preceding section, he shall, before entering upon the duties of his office, take and subscribe in lieu of that oath the following oath: "I, A B, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same, that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."—(11 July, 1868, c. 139, v. 15, p. 85. 15 Feb., 1871, c. 53, v. 16, p. 412.)

Amendment to this section was made by act of May 13, 1884, section 2 (23 Stat., 22), as follows: "Section seventeen hundred and fifty-six of the Revised Statutes be, and the same is hereby, repealed; and hereafter the oath to be taken by any person elected or appointed to any office of honor or profit either in the civil, military, or naval service, except the President of the United States, shall be as prescribed in section seventeen hundred and fifty-seven of the Revised Statutes. But this repeal shall not affect the oaths prescribed by existing statutes in relation to the performance of duties in special or particular subordinate offices and employments."

As to special oath prescribed for employees in the postal service, and which is also required by law to be taken by Navy mail clerks and assistant Navy mail clerks, see sections 391 and 392, Revised Statutes, and notes thereto.

As to oath of allegiance required to be taken by enlisted men of the Navy and Marine Corps, see notes to sections 1418 and 1609, Revised Statutes.

As to commencement of pay of officers appointed to the Navy, see section 1560 and note to section 1383, Revised Statutes.

As to oath of allegiance required to be taken by persons prosecuting claims, see sections 3478 and 3479, Revised Statutes.

**Sec. 1758. [Who may administer oath.]** The oath of office required by either of the two preceding sections may be taken before any officer who is authorized either by the laws of the United States, or by the local municipal law, to administer oaths, in the State, Territory, or District where such oath may be administered.—(6 Aug., 1861, c. 64, s. 2, v. 12, p. 326. 18 April, 1876, c. 66, v. 19, p. 34.)

See note to section 416, Revised Statutes, under "Oath of office"; see also sections 183 and 392, Revised Statutes, and note thereto.

**Sec. 1759. [Custody of oath.]**—The oath of office taken by any person pursuant to the requirements of section seventeen hundred and fifty-six, or of section seventeen hundred and fifty-seven, shall be delivered in by him to be preserved among the files of the House of Congress, Department, or court to which the office in respect to which the oath is made may appertain.—(2 July, 1862, c. 128, v. 12, p. 502.)

Section 1756, Revised Statutes, referred to in this section, was repealed by act of May 13, 1884; quoted above, under section 1757.

**Sec. 1760. [Unauthorized office; no salary for.]** No money shall be paid from the Treasury to any person acting or assuming to act as an officer, civil, military, or naval, as salary, in any office when the office is not authorized by some previously existing law, unless such office is subsequently sanctioned by law.—(9 Feb., 1863, c. 25, s. 2, v. 12, p. 646.)

**Sec. 1761. [Salaries; recess appointments.]** No money shall be paid from the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate. (9 Feb., 1863, c. 25, s. 2, v. 12, p. 646.)

See note to Constitution, Article II, section 2, clause 3.

**Sec. 1763. [Double salaries.]** No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall receive compensation for discharging the duties of any other office, unless expressly authorized by law.—(31 Aug., 1852, c. 108, s. 18, v. 10, p. 100. 20 June, 1874, c. 328, v. 18, p. 109.—*Talbot's Case*, 10 C. Cls. 426.)

Other laws on the same general subject as this section and sections 1764 and 1765, set forth below, are the following:

*Act June 20, 1874*, section 3 (18 Stat., 109):  
"No civil officer of the Government shall hereafter receive any compensation or perquisites,



directly or indirectly, from the Treasury or property of the United States beyond his salary or compensation allowed by law: *Provided*, That this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys as now allowed by law for the performance of services not covered by their salaries or fees."

*Act July 31, 1894*, section 2 (28 Stat., 205): "No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the Army or Navy whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate."

*Act June 3, 1896*, section 7 (29 Stat., 235): "That section two of the act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes, approved July thirty-first, eighteen hundred and ninety-four, shall not be so construed as to prevent the employment of any retired officer of the Army or Navy to do work under the direction of the Chief of Engineers of the United States Army in connection with the improvement of rivers and harbors of the United States, or the payment by the proper officer of the Treasury of any amounts agreed upon as compensation for such employment."

*Act August 1, 1914*, section 12 (38 Stat., 680): "It shall not be lawful to pay to any person, employed in the service of the United States under any general or lump sum appropriation, any sum additional to the regular compensation received for or attached to any employment held prior to an appointment or designation as acting for or instead of an occupant of any

other office or employment. This provision shall not be construed as prohibiting regular and permanent appointments by promotion from lower to higher grades of employments."

*Act May 10, 1916*, section 6 (39 Stat., 120), as reenacted with amendments by act August 29, 1916 (39 Stat., 582): "That unless otherwise specially authorized by law, no money appropriated by this or any other act shall be available for payment to any person receiving more than one salary when the combined amount of said salaries exceeds the sum of \$2,000 per annum, but this shall not apply to retired officers or enlisted men of the Army, Navy, Marine Corps, or Coast Guard, or to officers and enlisted men of the Organized Militia and Naval Militia in the several States, Territories, and the District of Columbia: *Provided*, That no such retired officer, officer, or enlisted man shall be denied or deprived of any of his pay, salary, or compensation as such, or of any other salary or compensation for services heretofore rendered, by reason of any decision or construction of said section six."

*Act March 3, 1917* (39 Stat., 1106): Restricts payments to Government officers by private parties.

See section 1440, Revised Statutes, as to appointment of Navy officers in the diplomatic or consular service; section 1860, Revised Statutes, as to naval personnel holding civil offices in territories; and act June 10, 1896 (29 Stat., 361), as to officers of the Navy or Marine Corps holding employment with contractors furnishing naval supplies or war material to the Government.

See sections 170 and 182, Revised Statutes, and notes thereto, restricting extra compensation to clerks and officers in the executive departments.

See note to section 1765, Revised Statutes, for interpretation of sections 1763-1765, Revised Statutes, and laws above quoted.

**Sec. 1764 [Extra services.]** No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other Department; and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law.—(26 Aug., 1842, c. 202, s. 12, v. 5, p. 525.)

See later enactments quoted above, under section 1763, Revised Statutes; and see decisions noted below, under section 1765.

**Sec. 1765. [Extra allowances.]** No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service of duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.—(3 Mar., 1839, c. 82, s. 3, v. 5, p. 349. 23 Aug., 1842, c. 183, s. 2, v. 5, p. 510. 1 May, 1876, c. 88, v. 19, p. 45.)

See other enactments quoted above, under section 1763, Revised Statutes.

Cash rewards to civil employees of Navy Department are authorized by act of July 1, 1918 (40 Stat., 718.)

**Legality of officers accepting civil appointments.**—The legality of a retired officer of the Navy accepting civil office is a question which must be determined by such officer upon his own responsibility; as the Government does not become interested in the matter until an office has actually been accepted contrary to law. (File 9736-15, Mar. 28, 1910; 9736-18, June 25, 1910; 21 Op. Atty. Gen., 510. See note to sec. 1440, R. S.)

**Interpretation of sections 1763-1765, Revised Statutes.**—Taking these sections all together, *held*, that the purpose of the legislation was to prevent a person holding any office or appointment, for which the law provides a definite compensation by way of salary or otherwise, which is intended to cover all the services which, as such officer, he may be called upon to render, from receiving extra compensation, additional allowances, or pay for other services which may be required of him either by act of Congress or by order of the head of his department, or in any other mode, added to or connected with the regular duties of the place which he holds; but these sections have no application to the case of two distinct offices, places, or employments, each of which has its own duties and its own compensation, which offices may both be held by one person at the same time. In the latter case, he is in the eye of the law two officers, or holds two places or appointments, the functions of which are separate and distinct, and, according to all the decisions, he is in such case entitled to recover the two compensations. In the former case, he performs the added duties under his appointment to a single place, and the statute has provided that he shall receive no additional compensation for that class of duties unless it is so provided by special legislation. (*U. S. v. Saunders*, 120 U. S., 126; see also *Mullett v. U. S.*, 150 U. S., 566; but see act July 31, 1894, quoted above under sec. 1763, R. S.)

The legislature contemplated duties imposed by superior authority upon the officer as a part of his duty, and which the superior authority had in the emergency a right to impose, and the officer was bound to obey, although they were extra and additional to what had previously been required. But this legislation can by no fair interpretation be held to embrace an employment which has no affinity or connection, either in its character or by law or usage, with the line of his official duty, and where the service to be performed is of a different character and for a different place, and the amount of compensation regulated by law. (*Converse v. U. S.*, 21 How., 463.)

A receiver of public moneys in Kansas, who had been appointed agent for the sale of Indian trust lands under a treaty with an Indian tribe, was entitled to commissions on such sales in addition to the full compensation as receiver allowed him by law. While the exact amount of his compensation was not fixed, it was clearly inferred that such compensation as the law implies where labor is performed by one at the request of another, that is to say, a reasonable

compensation, would be paid. (*U. S. v. Brindle*, 110 U. S., 688.)

The case of *United States v. Brindle*, in which an Indian agent received large additional compensation for services connected with the sale of lands belonging to the Indians of his agency, was upon the ground that these additional services were performed for the benefit of the Indians, and the statute implied the payment of reasonable compensation for such services. (*U. S. v. Saunders*, 120 U. S., 126.)

A retired officer of the Army appointed by the Secretary of the Interior as supervisor of the erection of the Pension Bureau building was entitled to compensation for such services in addition to his pay. Sections 1764 and 1765, Revised Statutes, do not preclude an officer from receiving compensation other than his salary for services rendered the Government in an employment which has no affinity or connection with his official duty. (*Meigs v. U. S.*, 19 Ct. Cls., 497.)

The only difference between this case and those decided by the Supreme Court (*Converse v. U. S.* and *U. S. v. Brindle*, above cited) is that in each of the latter cases the party held an office with active duties to be performed, while the present claimant held one with no such duties, but this does not appear to affect the result. The point in each of them was, whether the party was entitled to compensation for services rendered in an employment which had no affinity or connection with the line of his official duty; and the Supreme Court held that he was. This disposes of the objections raised against the claimant's demand in this case. (*Meigs v. U. S.*, 19 Ct. Cls., 497.)

A retired Army officer may be employed by the War Department to supervise work, where he could not have been assigned to that duty by order of the Secretary of War, and sections 1763, 1764, and 1765, Revised Statutes, relating to double pay, do not apply to such a case. (*Yates v. U. S.*, 25 Ct. Cls., 296.)

An officer who has been appointed to and is fully invested with two distinct offices may receive the compensation appropriated for each. Sections 1763-1765, Revised Statutes, do not apply to such a case. (16 Op. Atty. Gen., 7.)

The construction which has been given to these sections, especially in the case of *Converse v. United States* (above noted), is that the intent and effect of them are to forbid officers holding one office from receiving compensation for the discharge of duties belonging to another, or additional pay, extra allowance, or compensation for such other services or duties, when they hold the commission of but a single office, and by virtue of that office, or in addition to the duties thereof, have assigned to them the duties of another office. According to that decision, however, if an officer holds two distinct commissions, and thus two distinct offices, he may receive a salary for each. The evil intended to be guarded against by these statutes was not so much plurality of offices as it was additional pay or compensation to an officer holding but one office for performing additional duties or the duties properly belonging to another. If he actually holds two commissions, and does the duties of two distinct offices, he may receive the salary which has been appropriated to each office. Sections



1763-1765 are condensations from statutes which were in existence at the time this decision was made and in conformity with it. (16 Op. Atty. Gen., 7; see also 12 Op. Atty. Gen., 459.)

**Holding two incompatible offices.**—It has been regarded as settled since the decision of the Supreme Court in *United States v. Saunders* (above noted) that a person may hold two offices and receive the salaries of both, notwithstanding the provisions of the Revised Statutes, provided they are distinct, each having its own duties and compensation, and are not incompatible. In this case the offices are distinct, and each has its own duties and compensation. The only question presented, therefore, is whether they are incompatible. (*Crosthwaite v. U. S.*, 30 Ct. Cls., 300.)

Two offices are incompatible when a performance of the duties of the one will prevent or conflict with a performance of the duties of the other, or when the holding of the two offices is contrary to the policy of the law. (*Crosthwaite v. U. S.*, 30 Ct. Cls., 300.)

The duties of an examiner in the Department of Justice and of special assistant attorneys appointed to assist in the prosecution of criminal business are distinct and different and are not incompatible. (*Crosthwaite v. U. S.*, 30 Ct. Cls., 300.)

Where two incompatible offices are held by the same person, to which are attached different salaries, he is not entitled to the compensation of both, but is entitled to the larger of the two. (*Webster v. U. S.*, 28 Ct. Cls., 25; *Winchell v. U. S.*, 28 Ct. Cls., 30.)

The offices of engineer in the Navy and paymaster are incompatible. (*Webster v. U. S.*, 28 Ct. Cls., 25.)

A cadet engineer in the Navy is not entitled to the salary of a draftsman in the Hydrographic Office in addition to his own, though he hold both offices. The office of draftsman in the Hydrographic Office is incompatible with that of cadet engineer. The Secretary of the Navy may detail a cadet engineer for service in the Hydrographic Office, but the detail will not entitle the officer to additional pay. (*Winchell v. U. S.*, 28 Ct. Cls., 30.)

The duties or nonduties of a retired officer are not incompatible with the duties of a chief clerk in an executive department. The duties of an officer beyond seas would be incompatible with those of a retired officer liable to be called at any time into active service. Congress have recognized the distinction by providing that a retired officer shall not receive his pay as such while holding a diplomatic or consular office beyond seas, but have left the right of a retired officer to hold a civil office within the country unimpaired. (*Geddes v. U. S.*, 38 Ct. Cls., 446.)

Incompatibility exists where the nature and duty of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to hold both. It does not necessarily arise when the incumbent places himself for the time being in a position where it may be impossible for him to discharge the duties of both offices. (22 Op. Atty. Gen., 238, citing cases.)

A retired officer of the Army is not prohibited by law from holding an office in an executive

department, nor from receiving the salary thereof in addition to his retired pay. (*Collins v. U. S.*, 15 Ct. Cls., 22. But see below as to interpretation of act of July 31, 1894.)

An assistant medical referee, appointed under Revised Statutes, section 4776, is not entitled, in addition to his salary, to the fees of an examining surgeon, while serving on an examining board under section 4775, Revised Statutes, as the duties of the two positions are not compatible; neither are they distinct offices. Payment for both services is, therefore, prohibited by Revised Statutes, sections 1763-1765. (*Graham v. U. S.*, 29 Ct. Cls., 404.)

**"Office," defined.**—See note to Constitution, Article II, section 2, clause 2.

"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. \* \* \* A Government office is different from a Government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other." (*U. S. v. Hartwell*, 6 Wall., 385, 393; see also *U. S. v. Germaine*, 99 U. S., 508; *Auffmordt v. Hedden*, 137 U. S., 310, 327.)

Civil surgeons appointed by the Commissioner of Pensions, under section 4777 of the Revised Statutes, are not officers of the United States. (*U. S. v. Germaine*, 99 U. S., 508.)

An acting paymaster, appointed by the senior officer present, is not an officer. He is not appointed as required by the Constitution, takes no oath of office, and gives no bond as paymaster. He is appointed to discharge the duties of an office which he does not hold, that of paymaster, and he is therefore prohibited from receiving compensation by sections 1763 and 1765, Revised Statutes. (*Webster v. U. S.*, 28 Ct. Cls., 25; see note to secs. 1381 and 1564, R. S.)

A midshipman appointed as acting master may hold such office in addition to his regular naval rank, acting masters not forming part of the regular and permanent Navy; and if appointed acting master, he is entitled to receive the pay of that grade. (10 Op. Atty. Gen., 111.)

An internal-revenue collector is undoubtedly an officer in a branch of the public service, with a salary fixed by law. (*Landram v. U. S.*, 16 Ct. Cls., 74.)

"A deputy collector of internal revenue, not being an employee of the Government (i. e., not in privity with it so as to be able to maintain an action for his pay), does not come within the provisions of the Revised Statutes, sections 1763, 1764, prohibiting officers and employees of the Government from receiving dual or extra compensation." (*Landram v. U. S.*, 16 Ct. Cls., 74.)

A special deputy marshal is not a public officer within the constitutional limitation as to appointment. (17 Op. Atty. Gen., 684.)

The offices referred to in the above sections of the Revised Statutes are officers under the Government of the United States, and an office under the government of the District of Colum-

bis is not included therein. (*Donovan v. U. S.*, 21 Ct. Cls., 120.)

The payment of Navy and privateer pensions under the orders of the Secretary of the Navy does not constitute the person paying them an officer of the United States; and if the person thus disbursing public money at the same time holds the office of Navy agent he can not be allowed any extra pay or emolument for making such disbursement. (*Browne v. U. S.*, 4 Fed. Cas. No. 2,036.)

**Interpretation of act approved July 31, 1894.**—See note to section 1763, Revised Statutes, for text of said act.

Only officers of the United States were in the mind of Congress in 1894 when enacting the provision as to holding of two offices. (22 Op. Atty. Gen., 184, 188.)

It would seem that the word "office" in the act of 1894 is to be presumed, in the absence of indications to the contrary, to embrace only what are called constitutional officers, i. e., those referred to in Article II, section 2, clause 2 of the Constitution. Under this construction, a circuit judge of the United States appointed as a commissioner under a convention with Great Britain is entitled to compensation additional to that of his salary, as the commissionership was established by treaty and was not an office "established by law" within the meaning of the Constitution. (22 Op. Atty. Gen., 184.)

The legal definitions of a public office have been many and various. The idea seems to prevail that it is an employment to exercise some delegated part of the sovereign power; and the Supreme Court appears to attach importance to the idea of "tenure, duration, emolument, and duties," and suggests that the last should be continuing or permanent, not occasional or temporary. (22 Op. Atty. Gen., 184.)

As for the popular language, it seems clear that a person employed solely as a sworn judge of a joint international commission would not be spoken of as an officer of either country, although, under a treaty requiring it, selected and sent to his post by one of them. (22 Op. Atty. Gen., 184.)

A general appraiser detailed by the Secretary of the Treasury, without additional compensation, as "an expert to represent the United States in the international commission for the conversion of the present Chinese tariff into specific rates," was not appointed to another office under the Government or engaged in other incompatible Government service. (24 Op. Atty. Gen., 12.)

An office is defined to be "a public charge or employment," and he who performs the duties of the office is an officer. If employed on the part of the United States, he is an officer of the United States. Although an office is an "employment," it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act or perform a service, without becoming an officer. But if a duty be a continuing one, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the

duties from an officer. (*U. S. v. Maurice*, 2 Brock., 96, quoted in 24 Op. Atty. Gen., 12.)

An appointment as special assistant to a United States attorney to aid in a certain case or set of cases is not an appointment to an office within the meaning of the act of 1894, as the essential element of "duration" is lacking. The attorney for the Court of Private Land Claims, receiving an annual salary of \$3,500, may, therefore, be allowed additional compensation as special assistant to a United States attorney for New Mexico. (2 Comp. Dec., 271.)

A chief of division in the office of the Supervising Architect of the Treasury at a salary of more than \$2,500 per annum may be paid compensation as a member of a commission appointed under the act of February 20, 1895, to select a site for a public building, service upon such commission not involving the holding of an office within the meaning of the act of 1894. (2 Comp. Dec., 467.)

The Secretary of the Navy is not precluded by the act of July 31, 1894, section 2, from employing a retired officer under the act of February 19, 1897, to supervise the completion of certain tables of planets. The said act of 1897 read as follows: "For services of a competent mathematician to supervise the completion of the tables of the planets, two thousand five hundred dollars, to be immediately available." This provision did not create an office, nor did it contemplate any of the formalities in the selection of such an employee as to distinguish his employment as an office. There is no permanency to the term; there is no requirement that the person employed shall either take an official oath or receive a commission. (21 Op. Atty. Gen., 507. See 2 Comp. Dec., 271, to the effect that "it does not follow that everyone who takes the oath of office is an officer"; in the latter case the special assistant to the United States attorney was required by law to take an oath.)

A retired officer of the Navy on active duty in time of war is entitled to an additional salary as meteorologist, to which position he was appointed by the Secretary of the Navy with salary payable from the appropriation "National defense," which appropriation was to be expended at the discretion of the President. The action of the Secretary of the Navy was the action of the President, and the power granted the latter by the appropriation for the national defense was intended to be the most adequate and comprehensive, reposing the largest discretion in the President, not subject to review. (*Hayden v. U. S.*, 38 Ct. Cls., 39.)

The chief clerk of the Department of Agriculture, at a salary of \$2,500 a year, was appointed a captain of Infantry on the retired list of the Army under authority of a special act of Congress approved June 6, 1900 (31 Stat., 554): *Held*, that his appointment as a retired officer having been specially authorized by Congress while he was holding an office with a salary attached thereto of \$2,500 per annum, the act of July 31, 1894, did not apply; and that a retired officer does not receive "compensation as an officer or employee of the Government" within the meaning of the following enactment



of March 3, 1885 (23 Stat., 356, sec. 2): "That no part of the money herein or hereafter appropriated for the Department of Agriculture shall be paid to any person, as additional salary or compensation, receiving at the same time other compensation as an officer or employee of the Government." (*Geddes v. U. S.*, 38 Ct. Cls., 428.)

There must be "compensation" received before there can be "additional compensation" prohibited; as a matter of fact, the pay of a retired officer is not compensation. (*Geddes v. U. S.*, 38 Ct. Cls., 428.) The pay of a retired officer appointed under a special act of Congress "is not given as compensation for discharging the duties of any office during the period for which it is to be paid, but rather as a bounty, and in the nature of a pension, for services to his country previously performed. (*Collins v. U. S.*, 15 Ct. Cls., 22, 40.) The pay of an officer on the retired list is "an honorable form of pension." (*Fletcher v. U. S.*, 26 Ct. Cls., 541, 563.)

It is well settled that an officer's reduced retired pay is but an honorary form of pension to be paid him when, having reached a certain age, it is presumed that he is no longer well fitted to render active service to the Government. (*Geddes v. U. S.*, 38 Ct. Cls., 428. But see 11 Comp. Dec., 422, and 29 Op. Atty. Gen., 397, 407, where this reasoning of the Court of Claims is not concurred in.)

The provision in the act of July 31, 1894, excepting from its operation retired officers of the Army and Navy, in certain specified cases, necessarily implies that such retired officers are included in the remaining portion of the enactment relating to offices having "annual salary or compensation attached thereto." (11 Comp. Dec., 422.)

A retired officer of the Army, whose retired pay was \$2,625 per annum, can not hold the position of clerk in the Treasury Department at \$1,400 per annum, as the holding of both offices is forbidden by the act of 1894. (11 Comp. Dec., 422.)

A retired officer of the Marine Corps, whose pay as such is \$1,980 per annum, can accept the position of cashier in the subtreasury at Philadelphia, Pa., at a salary of \$2,500 per annum, and continue to receive the aforementioned retired pay. (Comp. Dec., Sept. 26, 1910, file 26254-539, case of Capt. John G. Muir, U. S. M. C., following *Geddes v. U. S.*, above noted, and not citing 11 Comp. Dec., 422.)

A retired officer of the Navy whose retired pay amounts to \$2,500 per annum is within the prohibition of section 2 of the act of July 31, 1894, and is ineligible to hold office as clerk of class 3 under the United States Civil Service Commission. (29 Op. Atty. Gen., 503.)

It is clear, both on principle and according to the authorities, that a retired officer of the Navy holds an office with a salary or annual compensation attached, within the meaning of the enactment of 1894, even if the express language of the exception be not considered; this conclusion is rendered irresistible by the provision to that act excepting retired officers of

the Army or Navy in certain cases. (29 Op. Atty. Gen., 503.)

A notary public in the District of Columbia is an officer of the Government within the meaning of the act of July 31, 1894; and if he accepts an office, the salary of which is \$2,500, he is precluded by the statute from receiving any compensation for services rendered as notary to the Government. (*Pack v. U. S.*, 41 Ct. Cls., 414.)

The position of clerk of class 3 under the United States Civil Service Commission, the appointment thereto being authorized by the President, is an office within the meaning of the act of 1894. (29 Op. Atty. Gen., 503.)

Where appointment to two certain offices is claimed, and to so hold would involve a construction that the appointment was invalid under the act of 1894, the court must adopt the view that a legal appointment was contemplated, and hence that the claimant was not appointed to two offices. (*McMath v. U. S.*, 51 Ct. Cls., 356; affirmed, 248 U. S., 151.)

A retired naval officer whose compensation as such amounts to \$2,500 per annum is ineligible to appointment as a commercial attaché under the provisions of the act of July 16, 1914 (38 Stat., 500), making appropriations for the legislative, executive, and judicial expenses of the Government. (30 Op. Atty. Gen., 298.)

**Additional compensation allowed medical officer of the Navy.**—A medical officer in the Navy is entitled to compensation from appropriations under the control of the Department of Justice for professional services rendered by him to United States prisoners in a United States jail. (Comp. Dec., May 15, 1912, 45 MS. Comp. Dec., 300, following 18 Comp. Dec., 156; see note to sec. 1368, R. S., under "Medical attendance to persons not in the Navy.")

**Additional compensation not allowed naval officer detailed to War Department.**—Where a naval constructor was detailed by the Secretary of the Navy to perform duty under the War Department, in inspecting a vessel chartered as an Army transport, the officer is not burdened with services not incident to his office; the duties required of him were of the general nature performed by him in the Navy. Additional compensation for such inspection service is prohibited by section 1765, Revised Statutes. (*Stocker v. U. S.*, 39 Ct. Cls., 300; see notes to secs. 1404 and 1437, R. S.)

**For other cases,** see note to section 1440, Revised Statutes, as to appointment of Navy officers in the diplomatic or consular service; section 1860, Revised Statutes, as to naval personnel holding civil offices in territories; act June 10, 1896 (29 Stat., 361), as to officers of the Navy holding employment with private contractors; sections 170 and 182, Revised Statutes, as to clerks and officers in executive departments; and act March 4, 1909, sec. 113, 35 Stat., 1109, as to officers acting as attorneys for claimants, etc., in matters in which the United States is interested.

**Sec. 1766. [Officer in arrears; withholding pay.]** No money shall be paid to any person for his compensation who is in arrears to the United States, until he has accounted for and paid into the Treasury all sums for which he may be liable. In all cases where the pay or salary of any person is withheld in pursuance of this section, the accounting officers of the Treasury, if required to do so by the party, his agent or attorney, shall report forthwith to the Solicitor of the Treasury the balance due; and the Solicitor shall, within sixty days thereafter, order suit to be commenced against such delinquent and his sureties.—(25 Jan., 1828, c. 2, v. 4, p. 246. 20 May, 1836, c. 77, v. 5, p. 31.)

**Persons to whom applicable.**—Section 1766, Revised Statutes, does not apply to an ordinary clerk, who is a judgment debtor of the United States under judgment for a debt growing out of transactions wholly foreign to his employment, and having nothing to do with any advance of public money or any accounting therefor. In such case this section does not require the head of the department to withhold the salary of the clerk. Whether or not the Government has the right, on general principles, to do so, independently of section 1766, not decided. (26 Op. Atty. Gen., 77; see note to sec. 236, R. S.)

This section does not apply to mere indebtedness, but clearly applies to one who has received Government moneys to be disbursed or covered into the Treasury; to persons who are in a relation of trust to the Government and have in their hands sums or balances of public funds for which they are bound to render accounts

and to turn the balances into the Treasury. They would naturally be in "arrears" and be in a position to have a "balance due" found by the accounting officers. (26 Op. Atty. Gen., 77.)

The clause, "until he has accounted for and paid into the Treasury all sums for which he may be liable," is conclusive upon the point. This language is not appropriate to mere indebtedness. (26 Op. Atty. Gen., 77.)

The provision that suit shall be commenced against the delinquent "and his sureties" indicates that Congress was not regarding mere debtors but the class of persons who had sureties for the performance of their contracts or their other duties, chiefly, of course, the receipt and disbursement of public moneys. (26 Op. Atty. Gen., 77.)

**For other cases,** see note to section 236, Revised Statutes.

**Sec. 1773. [Commissions.]** The President is authorized to make out and deliver, after the adjournment of the Senate, commissions for all officers whose appointments have been advised and consented to by the Senate.—(2 Mar., 1867, c. 154, s. 6, v. 14, p. 431.)

The commissions of all officers under the direction and control of the Secretary of the Navy shall be made out and recorded in the Navy Department, and the department seal affixed thereto, any laws to the contrary notwithstanding; but such seal

shall not be affixed to any such commission before the same shall have been signed by the President of the United States. (Act Mar. 28, 1896, 29 Stat., 75.)

See note to Constitution, Article II, section 3, under "II. Duty to commission officers."

**Sec. 1774. [Recess appointments; accounting officers notified.]** Whenever the President, without the advice and consent of the Senate, designates, authorizes, or employs any person to perform the duties of any office, he shall forthwith notify the Secretary of the Treasury thereof, and the Secretary of the Treasury shall thereupon communicate such notice, to all the proper accounting and disbursing officers of his Department.—(2 Mar., 1867, c. 154, s. 8, v. 14, p. 431.)

**Sec. 1778. [Oaths or acknowledgments; before whom taken.]** In all cases in which, under the laws of the United States, oaths or acknowledgments may now be taken or made before any justice of the peace of any State or Territory, or in the District of Columbia, they may hereafter be also taken or made by or before any notary public duly appointed in any State, district, or Territory, or any of the commissioners of the circuit courts, and, when certified under the hand and official seal of such notary or commissioner, shall have the same force and effect as if taken or made by or before such justice of the peace.—(16



Sept., 1850, c. 52, v. 9, p. 458. 29 July, 1854, c. 159, s. 1, v. 10, p. 315. 22 June, 1874, c. 390, s. 20, v. 18, p. 186. 15 Aug., 1876, c. 304, v. 19, p. 206.)

Act of May 28, 1896, section 19 (29 Stat., 184), amended by act March 2, 1901 (31 Stat., 956), provided for the appointment of United States commissioners by the district court of each judicial district, who shall have the same powers and perform the same duties as commissioners of the circuit courts.

Act of March 3, 1911, section 289 (36 Stat., 1167), abolished circuit courts.

As to acknowledgment of deeds in Guam and Samoa, see act of June 28, 1906 (34 Stat., 552).

As to administration of oaths to expense accounts by chief clerks of the various executive departments or clerks designated by them for the purpose, see act of August 24, 1912, section 8 (37 Stat., 487).

See section 183, Revised Statutes, and note thereto.

**Sec. 1779.** [Newspapers, books, etc.; restriction upon purchase.] No executive officer, other than the heads of Departments, shall apply more than thirty dollars, annually, out of the contingent fund under his control, to pay for newspapers, pamphlets, periodicals, or other books or prints not necessary for the business of his office.—(3 Mar., 1839, c. 82, s. 3, v. 5, p. 349.)

See sections 192 and 193, Revised Statutes, and note thereto.

Expenditures for law books, books of reference, and periodicals are prohibited, un-

less specifically authorized by the appropriation. (Act Mar. 15, 1898, sec. 3, 30 Stat., 316.)

**Sec. 1784.** [Contributions, presents, etc., to superiors.] No officer, clerk, or employé in the United States Government employ shall at any time solicit contributions from other officers, clerks, or employés in the Government service for a gift or present to those in a superior official position; nor shall any such officials or clerical superiors receive any gift or present offered or presented to them as a contribution from persons in Government employ receiving a less salary than themselves; nor shall any officer or clerk make any donation as a gift or present to any official superior. Every person who violates this section shall be summarily discharged from the Government employ.—(1 Feb., 1870, c. 11, v. 16, p. 63.)

“**Superior official**” construed.—It is considered that an officer superior in rank is a superior official within the intent of the section 1784, Revised Statutes, and the Navy Regulations on the same subject. Accordingly, officers of the Corps of Civil Engineers in the

Navy could not legally present a testimonial to another member of that corps of higher rank in the Navy, notwithstanding that the latter's duty did not place him over and in charge of those contributing. (File 26806-33, Nov. 9, 1909; Naval Dig., 1916, pp. 621, 622.)





## TITLE XXIII.

### THE TERRITORIES.

**Sec. 1860. [Voting and holding office in the Territories.] \* \* \* Third.** No officer, soldier, seaman, mariner, or other person in the Army or Navy, or attached to the troops in the service of the United States, shall be allowed to vote in any Territory, by reason of being on service therein, unless such Territory is, and has been for the period of six months, his permanent domicile.—(25 Jan., 1867, c. 15, v. 14, p. 379.)

**Fourth.** No person belonging to the Army or Navy shall be elected to or hold any civil office or appointment in any Territory, except officers of the Army on the retired list.

The fourth clause of this section was expressly amended and reenacted to read as above by act of March 3, 1883 (22 Stat., 567), the amendment consisting in the addition, at the end of said clause, of the words "except officers of the Army on the retired list." The first and second clauses of this section are omitted, as having no application to the Navy.

See sections 1440, 1763-1765, Revised Statutes, and laws noted thereunder, as to restrictions upon civil employment by officers of the Navy.

**Virgin Islands.**—The Virgin Islands of the United States are neither organized nor incorporated territory, and therefore section 1860, Revised Statutes, does not preclude the President from nominating a naval officer for the position of judge therein. (31 Op. Atty. Gen., 118.)

Section 1860 applies only to organized territories, and is not applicable to a mere possession, such as the Virgin Islands, for which there has been no organic act. (31 Op. Atty. Gen., 118. Prior to this opinion the act of Mar. 3, 1917, 39 Stat., 1132, had been enacted, establishing a temporary government for the Virgin Islands.)

**Philippine Islands.**—A mere contribution by the Philippine Government to the performance of certain military functions, and intrusting the funds to an officer of the United States Army, who is held to military responsibility therefor by court-martial, does not make that officer a civil officer of the Philippine Government and amenable to trial in the civil courts for falsification of his accounts as a public official. (Carrington v. U. S., 208 U. S., 1.)

An office commonly requires something more than a single transitory act to call it into being. (Carrington v. U. S., 208 U. S., 1.)

The fact that an officer of the United States Army, intrusted with money by the Philippine Government to be expended in connection with his military command, signs his account, "Disbursing Officer," instead of by his military title, does not make him a civil officer of the Philippine Government. (Carrington v. U. S., 208 U. S., 1.)

**Porto Rico.**—This section applies to Porto Rico, which has been held to be a "territory" under its terms. (File 9736-18, June 25, 1910, citing file 1831-8, Apr. 18, 1917; 5381-1, Aug. 30, 1907; 11 Comp. Dec., 336, 339.)

A naval surgeon can not be appointed to the position of health officer of Culebra, Porto Rico. (File 1831-8, Apr. 18, 1907.)

An officer of the Marine Corps can not accept an appointment as a member of the military staff of the Governor of Porto Rico. (File 5381-1, Aug. 30, 1907.)

**Hawaiian Islands.**—This section has been held inapplicable to the Hawaiian Islands. (File 9736-18, June 25, 1910, citing Matter of Loucks, 13 Hawaii, 17.)

**Mayor of city.**—Section 1860 does not prohibit a retired officer of the Navy from accepting an office as mayor of the city in one of the States if duly elected thereto; in such case, however, a retired officer would be subject to recall to naval duty if the exigencies of the service should require in time of war. (File 5650-00, Sept. 21, 1900.)





## TITLE XXV.

### CITIZENSHIP.

**Sec. 1996. [Rights as citizens forfeited for desertion, &c.]** All persons who deserted the military or naval service of the United States and did not return thereto or report themselves to a provost-marshal within sixty days after the issuance of the proclamation by the President, dated the 11th day of March, 1865, are deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof.—(3 Mar., 1865, c. 79, s. 21, v. 13, p. 490.)

See section 1998, Revised Statutes, and note thereto.

**Sec. 1998. [Desertion in time of war; penalties and forfeitures.]** That every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six of the Revised Statutes of the United States: *Provided*, That the provisions of this section and said section nineteen hundred and ninety-six shall not apply to any person hereafter deserting the military or naval service of the United States in time of peace: *And provided further*, That the loss of rights of citizenship heretofore imposed by law upon deserters from the military or naval service may be mitigated or remitted by the President where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interests: *And provided further*, That the provisions of section eleven hundred and eighteen of the Revised Statutes of the United States that no deserter from the military service of the United States shall be enlisted or mustered into the military service, and the provisions of section two of the Act of Congress approved August first, eighteen hundred and ninety-four, entitled 'An Act to regulate enlistments in the Army of the United States,' shall not be construed to preclude the reenlistment or muster into the Army of any person who has deserted, or may hereafter desert, from the military service of the United States in time of peace, or of any soldier whose service during his last preceding term of enlistment has not been honest and faithful, whenever the reenlistment or muster into the military service of such person or soldier shall, in view of the good conduct of such person or soldier subsequent to such desertion or service, be authorized by the Secretary of War.

This section was expressly amended and reenacted to read as above by act of August 22, 1912 (37 Stat., 356), which also reenacted with amendments sections 1420 and 1624, article 19, of the Revised Statutes, relating to the enlistment of deserters in the Navy. As originally enacted, sections 1998 read as follows: "Every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six."—(3 Mar., 1865, c. 79, s. 21, v. 13, p. 490.)

**Effect of pardon.**—Section 1998, Revised Statutes, as amended by the act of August 22, 1912, prescribes disabilities, not merely inci-

dental to qualifications for service in the Navy, but in effect and by express avowal constituting punishment for offenses, which, as such, would of course be wiped out by an unconditional pardon. (31 Op. Atty. Gen., 225; for other cases, see note to Constitution, Art. II, sec. 2, clause 1, and see note to sec. 1441, R. S.)

**Penalties attach only upon conviction.**—Section 1998, Revised Statutes, is not void as a bill of attainder, because it contemplates trial by court-martial to enforce this penalty, as well as the other penalties for desertion. (*Gotcheus v. Matheson*, 58 Barb. (N. Y.), 153, 61 N. Y., 425; see also *State v. Symonds*, 57 Me., 148; *Holt v. Holt*, 59 Me., 464; *Severance v. Healy*, 50 N. H., 448; *Huber v. Reily*, 53 Pa. St., 112; *McCafferty v. Guyer*, 59 Pa. St., 110; *Kurtz v. Moffitt*, 115 U. S., 501.)

**For other cases,** see note to Constitution, Article I, section 9, clause 3. See also note to to Constitution, Article I, section 8, clause 4.



## TITLE XXVI.

### THE ELECTIVE FRANCHISE.

**Sec. 2003.** [Interference with elections; Army and Navy Officers.] No officer of the Army or Navy of the United States shall prescribe or fix, or attempt to prescribe or fix, by proclamation, order, or otherwise, the qualifications of voters in any State, or in any manner interfere with the freedom of any election in any State, or with the exercise of the free right of suffrage in any State.— (25 Feb., 1865, c. 52, s. 1, v. 13, p. 437.)

See Criminal Code, act March 4, 1909, sections 22–26 (35 Stat., 1092, 1093).





## TITLE XXIX.

### IMMIGRATION.

**Sec. 2163. [Examination of vessels.]** The President is empowered, in such way and at such time as he may judge proper, to direct the vessels of the United States, and the masters and commanders thereof, to examine all vessels navigated or owned in whole or in part by citizens of the United States, and registered, enrolled, or licensed under the laws thereof, whenever, in the judgment of such master or commanding officer, reasonable cause exists to believe that such vessel has on board any subjects of China, Japan, or other oriental country, known as "coolies;" and, upon sufficient proof that such vessel is employed in violation of the preceding provisions, to cause her to be carried, with her officers and crew, into any port or district within the United States, and delivered to the marshal of such district, to be held and disposed of according to law.—(19 Feb., 1862, c. 27, s. 6, v. 12, p. 341.)





## TITLE XXXII.

### THE PUBLIC LANDS.

Sec.	Sec.
2293. Affidavits; naval personnel; before whom made.	2458. Lands for supplying timber to the Navy.
2300. Minors, privileges of.	2459. Selection of live-oak and red-cedar tracts.
2304. Soldiers' and sailors' homestead.	2460. Protection of timber in Florida.
2305. Credit for time in military and naval service.	2461. Cutting or destroying timber reserved for Navy.
2308. Service in Navy equivalent to residence.	2462. Forfeiture of vessels.
2309. Entry by agent; requirements.	2463. Clearance of vessels; timber cut by consent of Navy Department.
2393. Military or other reservations.	

**Sec. 2293. [Affidavits; naval personnel; before whom made.]** In case of any person desirous of availing himself of the benefits of this chapter; but who, by reason of actual service in the military or naval service of the United States, is unable to do the personal preliminary acts at the district land-office which the preceding sections require; and whose family, or some member thereof, is residing on the land which he desires to enter, and upon which a bona-fide improvement and settlement have been made, such person may make the affidavit required by law before the officer commanding in the branch of the service in which the party is engaged, which affidavit shall be as binding in law, and with like penalties, as if taken before the register or receiver; and upon such affidavit being filed with the register by the wife or other representative of the party, the same shall become effective from the date of such filing, provided the application and affidavit are accompanied by the fee and commissions as required by law.—(21 Mar., 1864, c. 38, s. 4, v. 13, p. 35.)

The words "this chapter" in the above section refer to chapter 5, "Homesteads," of Title XXXII, "The Public Lands."

Amendment to this section was made by act of October 6, 1917 (40 Stat., 391), as follows: "That during the continuance of the present war with Germany, and until his discharge from service, any man serving in the armed forces of the United States, who, prior to the beginning of his services was a settler, an applicant, or entryman under the land laws of the United States, or who has, prior to enlistment, filed a contest, with the view of exercising preference right of entry therefor, may make any affidavit required by law or regulation of the department, affecting such application, entry, or con-

test, or necessary to the making of entry in the case of the successful termination of such contest awarding him preference right of entry, before his commanding officer as provided in section twenty-two hundred and ninety-three of the Revised Statutes of the United States, which affidavits shall be as binding in law and with like penalties as if taken before the Register of the United States Land Office."

Amendment to this section was also made by the Soldiers' and Sailors' Civil Relief Act of March 8, 1918, section 501 (40 Stat., 448), which act, however, by section 603 thereof (40 Stat., 449) was to remain in force only until the termination of the war and for six months thereafter.

**Sec. 2300. [Minors, privileges of.]** No person who has served, or may hereafter serve, for a period not less than fourteen days in the Army or Navy of the United States, either regular or volunteer, under the laws thereof, during the existence of an actual war, domestic or foreign, shall be deprived of the benefits of this chapter on account of not having attained the age of twenty-one years.—(20 May, 1862, c. 75, s. 6, v. 12, p. 393.)

The words "this chapter" in the above section refer to chapter 5, "Homesteads," of Title XXXII, "The Public Lands."

By act of August 31, 1918, section 8 (40 Stat., 957), it was provided "That any person, under the age of twenty-one, who has served or shall hereafter serve in the Army of the United States during the present emergency, shall be entitled to the same rights under the homestead and other land and mineral entry laws, general or special, as those over twenty-one years of age now

possess under said laws: *Provided*, That any requirements as to establishment of residence within a limited time shall be suspended as to entry by such person until six months after his discharge from military service: *Provided further*, That applications for entry may be verified before any officer in the United States, or any foreign country, authorized to administer oaths by the laws of the State or Territory in which the land may be situated."

**Sec. 2304. [Soldiers' and sailors' homesteads.]** Every private soldier and officer who has served in the Army of the United States during the recent rebellion for ninety days, and who was honorably discharged and has remained loyal to the Government, including the troops mustered into the service of the United States by virtue of the third section of an act approved February thirteenth, eighteen hundred and sixty-two, and every seaman, marine, and officer who has served in the Navy of the United States or in the Marine Corps during the rebellion for ninety days, and who was honorably discharged and has remained loyal to the Government, and every private soldier and officer who has served in the Army of the United States during the Spanish war, or who has served, is serving, or shall have served in the said Army during the suppression of the insurrection in the Philippines for ninety days, and who was or shall be honorably discharged; and every seaman, marine, and officer who has served in the Navy of the United States or in the Marine Corps during the Spanish war, or who has served, is serving, or shall have served in the said forces during the suppression of the insurrection in the Philippines for ninety days, and who was or shall be honorably discharged, shall, on compliance with the provisions of this chapter, as hereinafter modified, be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres, or one quarter section, to be taken in compact form, according to legal subdivisions, including the alternate reserved sections of public lands along the line of any railroad or other public work not otherwise reserved or appropriated, and other lands subject to entry under the homestead laws of the United States; but such homestead settler shall be allowed six months after locating his homestead and filing his declaratory statement within which to make his entry and commence his settlement and improvement.

This section was expressly amended and re-enacted to read as above by act of March 1, 1901 (31 Stat., 847).

By act of February 25, 1919 (40 Stat., 1161), it was provided "That subject to the conditions therein expressed, as to length of service and honorable discharge, the provisions of sections twenty-three hundred and four and twenty-three hundred and five, Revised Statutes of the United States, shall be applicable in all cases of military and naval service rendered in connection with the Mexican border operations or during the war with Germany and its allies as defined by public resolution numbered thirty-two, approved August twenty-ninth, nineteen hundred and sixteen (Thirty-ninth Statutes at Large, page six hundred and seventy-one), and the Act approved July twenty-eighth, nineteen hundred and

seventeen (Fortieth Statutes at Large, page two hundred and forty-eight." (See note to sec. 2308, R. S.)

By joint resolution of February 14, 1920 (41 Stat., 434-435), it was provided "That hereafter, for the period of two years following the passage of this Act, on the opening of public or Indian lands to entry, or the restoration to entry of public lands theretofore withdrawn from entry, such opening or restoration shall, in the order therefor, provide for a period of not less than sixty days before the general opening of such lands to disposal in which officers, soldiers, sailors, or marines who have served in the Army or Navy of the United States in the war with Germany and been honorably separated or discharged therefrom or placed in the Regular Army or Naval Reserve shall have a preferred right of



entry under the homestead or desert land laws, if qualified thereunder, except as against prior existing valid settlement rights and as against preference rights conferred by existing laws or equitable claims subject to allowance and confirmation: *Provided*, That the rights and benefits conferred by this Act shall not extend to any person who, having been drafted for serv-

ice under the provisions of the Selective Service Act, shall have refused to render such service or to wear the uniform of such service of the United States.

"SEC. 2. That the Secretary of the Interior is hereby authorized to make any and all regulations necessary to carry into full force and effect the provisions hereof."

**Sec. 2305. [Credit for time in military and naval service.]** The time which the homestead settler has served in the Army, Navy, or Marine Corps shall be deducted from the time heretofore required to perfect title, or if discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment shall be deducted from the time heretofore required to perfect title, without reference to the length of time he may have served; but no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements: *Provided*, That in every case in which a settler on the public land of the United States under the homestead laws died while actually engaged in the Army, Navy, or Marine Corps of the United States as private soldier, officer, seamen, or marine, during the war with Spain or the Philippine insurrection, his widow, if unmarried, or in the case of her death or marriage, then his minor orphan children or his or their legal representatives, may proceed forthwith to make final proof upon the land so held by the deceased soldier and settler, and that the death of such soldier while so engaged in the service of the United States shall in the administration of the homestead laws, be construed to be equivalent to a performance of all requirements as to residence and cultivation for the full period of five years, and shall entitle his widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, to make final proof upon and receive Government patent for said land; and that upon proof produced to the officers of the proper local land office by the widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, that the applicant for patent is the widow, if unmarried, or in case of her death or marriage, his orphan children or his or their legal representatives, and that such soldier, sailor, or marine died while in the service of the United States as hereinbefore described, the patent for such land shall issue.

This section was expressly amended and re-enacted to read as above by act of March 1, 1901 (31 Stat., 847).

See note to section 2304, Revised Statutes.

**Sec. 2308. [Service in Navy equivalent to residence.]** Where a party at the date of his entry of a tract of land under the homestead laws, or subsequently thereto, was actually enlisted and employed in the Army or Navy of the United States, his services therein shall, in the administration of such homestead laws, be construed to be equivalent, to all intents and purposes, to a residence for the same length of time upon the tract so entered. And if his entry has been canceled by reason of his absence from such tract while in the military or naval service of the United States, and such tract has not been disposed of, his entry shall be restored; but if such tract has been disposed of, the party may enter another tract subject to entry under the homestead laws, and his right to a

patent therefor may be determined by the proofs touching his residence and cultivation of the first tract and his absence therefrom in such service.—(8 June, 1872, c. 338, s. 4, v. 17, p. 333.)

*Act June 16, 1898* (30 Stat., 473).—"That in every case in which a settler on the public land of the United States under the homestead laws enlists or is actually engaged in the Army, Navy, or Marine Corps of the United States as private soldier, officer, seaman, or marine, during the existing war with Spain, or during any other war in which the United States may be engaged, his services therein shall, in the administration of the homestead laws, be construed to be equivalent to all intents and purposes to residence and cultivation for the same length of time upon the tract entered or settled upon; and hereafter no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained against any such settler, unless it shall be alleged in the preliminary affidavit or affidavits of contest, and proved at the hearing in cases hereafter initiated, that the settler's alleged absence from the land was not due to his employment in such service: *Provided*, That if such settler shall be discharged on account of wounds received or disability incurred in the line of duty, then the term of his enlistment shall be deducted from the required length of residence without reference to the time of actual service: *Provided further*, That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements."

*Joint resolution, August 29, 1916* (39 Stat., 671), provided that the above-quoted act of June 16, 1898 "shall be applicable in all cases of military service rendered in connection with operations in Mexico, or along the borders thereof, or in mobilization camps elsewhere, whether such service be in the military or naval organization of the United States or the National Guard of the several States now or hereafter in the service of the United States." (See act Feb. 25, 1919, quoted under sec. 2304, R. S.)

*Act July 28, 1917*, section 1 (40 Stat., 248).—"That any settler upon the public lands of the United States; or any entryman whose application has been allowed; or any person who has made application for public lands which thereafter may be allowed under the homestead laws, who, after such settlement, entry, or application, enlists or is actually engaged in the military or naval service of the United States as a private soldier, officer, seaman, marine, national guardsman, or member of any other organization for offense or defense authorized by Congress during any war in which the United States may be engaged, shall, in the administration of the homestead laws, have his services therein construed to be equivalent to all intents and purposes to residence and culti-

vation for the same length of time upon the tract entered or settled upon; and hereafter no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained against any such settler, entryman, or person unless it shall be alleged in the preliminary affidavit or affidavits of contest and proved at the hearing in cases hereafter initiated that the alleged absence from the land was not due to his employment in such military or naval service; that if he shall be discharged on account of wounds received or disability incurred in the line of duty, then the term of his enlistment shall be deducted from the required length of residence, without reference to the time of actual service: *Provided*, That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year." (See act Feb. 25, 1919, quoted under sec. 2304, R. S.)

The same act, section 2, provides as follows: "That any settler upon the public lands of the United States; or any entryman whose application has been allowed; or any person who has made application for public lands which thereafter may be allowed under the homestead laws, who dies while actually engaged in the military or naval service of the United States as a private soldier, officer, seaman, marine, national guardsman, or member of any other organization for offense or defense authorized by Congress during any war in which the United States may be engaged, then his widow, if unmarried, or in case of her death or marriage, his minor orphan children, or his or their legal representatives, may proceed forthwith to make final proof upon such entry or application thereafter allowed, and shall be entitled to receive Government patent for such land; and that the death of such soldier while so engaged in the service of the United States shall, in the administration of the homestead laws, be construed to be equivalent to a performance of all requirements as to residence and cultivation upon such homestead." (See act Feb. 25, 1919, quoted under sec. 2304, R. S.)

*Act September 29, 1919* (41 Stat., 288), made provision for granting leave of absence from their land to persons undergoing any course of vocational rehabilitation; such absence to be counted as constructive residence.

*Act March 1, 1921* (41 Stat., 1202), made provision for issuing patents to settlers or entrymen who enlisted in the Army, Navy, or Marine Corps prior to November 11, 1918, having previously made application, settlement, or entry, and who have been honorably discharged, but because of physical incapacities incurred in service are unable to return to the land.

**Sec. 2309. [Entry by agent; requirements.]** Every soldier, sailor, marine, officer, or other person coming within the provisions of section twenty-three hundred and four, may, as well by an agent as in person, enter upon such home-



stead by filing a declaratory statement, as in pre-emption cases; but such claimant in person shall within the time prescribed make his actual entry, commence settlements and improvements on the same, and thereafter fulfill all the requirements of law.—(8 June, 1872, c. 338, s. 5, v. 17, p. 334.)

*Act of August 7, 1917* (40 Stat., 250).—"That no desert-land entry made or held under the provisions of the Act of March third, eighteen hundred and seventy-seven, as amended by the Act of March third, eighteen hundred and ninety-one, by an officer or enlisted man in the Army, Navy, Marine Corps, or Organized Militia of the United States shall be subject to contest or cancellation for failure to make or expend the sum of \$1 per acre per year in improvements upon such claim, or to effect the reclamation thereof, during the period said entryman or his successor in interest is engaged in the military service of the United States during the present war with Germany, and until six months thereafter, and the time within which such entryman or claimant is required to make such expenditures and effect reclamation of the land shall be, exclusive of the time of his actual service in the Army, Navy, Marine Corps, or

Organized Militia of the United States: *Provided*, That said desert-land entry shall have been made by the said officer or enlisted man prior to his enlistment: *Provided further*, That each such entryman or claimant shall, within six months after the passage of this Act, or within six months after he is mustered into the service, file in the local land office of the district wherein his claim is situate a notice of his muster into the service of the United States and of his desire to hold said desert claim under this Act: *Provided further*, That the term 'enlisted man,' as used in this section shall include any person selected to serve in the military forces of the United States as provided by the Act entitled 'An Act authorizing the President to increase temporarily the Military Establishment of the United States,' approved May eighteenth, nineteen hundred and seventeen."

**Sec. 2393. [Military or other reservations.]** The provisions of this chapter shall not apply to military or other reservations heretofore made by the United States, nor to reservations for light-houses, custom-houses, mints, or such other public purposes as the interests of the United States may require, whether held under reservations through the Land-Office by title derived from the Crown of Spain, or otherwise.—(2 Mar., 1867, c. 177, v. 14, p. 541. 28 Feb., 1877, c. 74, v. 19, p. 264.)

The words "this chapter" in the above section refer to chapter 8, "Reservations and sale

of town sites on the public lands," Title XXXII, "The Public Lands."

**Sec. 2458. [Lands for supplying timber to the Navy.]** The Secretary of the Navy is authorized, under the direction of the President, to cause such vacant and unappropriated lands of the United States as produce the live-oak and red-cedar timbers to be explored, and selection to be made of such tracts or portions thereof, where the principal growth is of either of such timbers, as in his judgment may be necessary to furnish for the Navy a sufficient supply of the same.—(1 Mar., 1817, c. 22, s. 1, v. 3, p. 347. 15 May, 1820, c. 136, v. 3, p. 607. 3 Mar., 1827, c. 94, s. 3, v. 4, p. 242.)

See note to section 2459, Revised Statutes.

**Sec. 2459. [Selection of live-oak and red-cedar tracts.]** The President is authorized to appoint surveyors of public lands, who shall perform the duties prescribed in the preceding section, and report to him the tracts by them selected, with the boundaries ascertained and accurately designated by actual survey or water-courses; and the tracts of land thus selected with the approbation of the President shall be reserved, unless otherwise directed by law, from any future sale of the public lands, and be appropriated to the sole purpose of supplying timber for the Navy of the United States; but nothing in this section contained shall be construed to prejudice the prior rights of any person claiming lands, which may be reserved in the manner herein provided.—(1 Mar., 1817, c. 22, s. 1, v. 3, p. 347.)

*Transfer to Interior Department of lands in Florida.*—"That the Secretary of the Navy be, and he is hereby, authorized to cause an examination to be made of the condition of all lands in the State of Florida which have been set apart or reserved for naval purposes, excepting the reservation upon which the navy-yard at Pensacola is located, and to ascertain whether or not such reserved lands are or will be of any value to the Government of the United States for naval purposes.

"SEC. 2. That all of said lands which, in the judgment of the Secretary of the Navy, are no longer required for naval purposes shall, as soon as practicable, be certified by him to the Secretary of the Interior, and be subject to entry and sale in the same manner and under the same conditions as other public lands of the United States: *Provided*, That all persons who have, in good faith, made improvements on said reserved lands so certified at the time of the passage of this act, and who occupy the same, shall be entitled to purchase the part or parts so occupied or improved by them, not to exceed one hundred and sixty acres to any one person at one dollar and twenty-five cents per acre within such reasonable time as may be fixed by the Secretary of the Interior." (Act Mar. 3, 1879, 20 Stat., 470, 471.)

*Restoration to public domain of lands in Alabama and Mississippi.*—"That the Secretary of the Navy be, and he is hereby, authorized to cause to be certified to the Secretary of the Interior, for restoration to the public domain, the whole or such portion or portions of the several tracts of land in the States of Alabama and Mississippi heretofore set apart and reserved for naval uses as are no longer required for the purposes for which they were reserved, or for any purposes connected with the naval service; and upon such certification the tracts of land described therein shall be duly restored to and become a part of the public lands of the United States \* \* \*: *Provided*, That persons who enter under the homestead law shall pay for such lands not less than the value heretofore or hereafter determined by appraisement, nor less than the price of the land at the time of the entry; and such payment may, at the option of the purchaser, be made in five equal installments, at times and at rates of interest to be fixed by the Secretary of the Interior: *Provided*, That so much of the said lands as are situated on Back Bay, near the city of Biloxi, in the State of Mississippi, shall be disposed of under the town-site law and not as agricultural lands." (Act Mar. 2, 1895, 28 Stat., 814.)

**Sec. 2460 [Protection of timber in Florida.]** The President is authorized to employ so much of the land and naval forces of the United States as may be necessary to effectually prevent the felling, cutting down, or other destruction of the timber of the United States in Florida, and to prevent the transportation or carrying away any such timber as may be already felled or cut down; and to take such other and further measures as may be deemed advisable for the preservation of the timber of the United States in Florida.—(23 Feb., 1822, c. 9, v. 3, p. 651.)

See section 49, Criminal Code, act March 4, 1909 (35 Stat., 1098).

**Sec. 2461 [Cutting or destroying timber reserved for Navy.]** If any person shall cut, or cause or procure to be cut, or aid, assist, or be employed in cutting, or shall wantonly destroy, or cause or procure to be wantonly destroyed, or aid, assist, or be employed in wantonly destroying any live-oak or red-cedar trees, or other timber standing, growing, or being on any lands of the United States, which, in pursuance of any law passed, or hereafter to be passed, have been reserved or purchased for the use of the United States, for supplying or furnishing therefrom timber for the Navy of the United States; or if any person shall remove, or cause or procure to be removed, or aid, or assist, or be employed in removing from any such lands which have been reserved or purchased, any live-oak or red-cedar trees, or other timber, unless duly authorized so to do, by order, in writing, of a competent officer, and for the use of the Navy of the United States; or if any person shall cut, or cause or procure to be cut, or aid, or assist, or be employed in cutting any live-oak or red-cedar trees, or other timber on, or shall remove, or cause or procure to be removed, or aid, or assist, or be employed in removing any live-oak or red-cedar trees or other timber, from any other lands of the United States, acquired, or hereafter to be acquired, with intent to export, dispose of, use, or employ the same in any manner whatsoever, other than for



the use of the Navy of the United States; every such person shall pay a fine not less than triple the value of the trees or timber so cut, destroyed, or removed, and shall be imprisoned not exceeding twelve months.—(2 Mar., 1831, c. 66, s. 1, v. 4, p. 472.)

See section 49, Criminal Code, act March 4, 1909 (35 Stat., 1098); see also, act June 3, 1878, section 5 (20 Stat., 90), which expressly amended section 2461, revised Statutes as to prosecution for offenses in certain

States and Territories, and which was extended to other places by act of August 4, 1892 (27 Stat., 398). (*Morgan v. U. S.*, 148 Fed. Rep., 189, 192.)

**Sec. 2462. [Forfeiture of vessels.]** If the master, owner, or consignee of any vessel shall knowingly take on board any timber cut on lands which have been reserved or purchased as in the preceding section prescribed, without proper authority, and for the use of the Navy of the United States; or shall take on board any live-oak or red-cedar timber cut on any other lands of the United States, with intent to transport the same to any port or place within the United States, or to export the same to any foreign country, the vessel on board of which the same shall be taken, transported, or seized, shall, with her tackle, apparel, and furniture, be wholly forfeited to the United States, and the captain or master of such vessel wherein the same was exported to any foreign country against the provisions of this section shall forfeit and pay to the United States a sum not exceeding one thousand dollars.—(2 Mar., 1831, c. 66, s. 2, v. 4, p. 472.)

By act of April 30, 1878, section 2 (20 Stat., 46), it was provided that "if any timber cut on the public lands shall be exported from

the Territories of the United States, it shall be liable to seizure by United States authority wherever found."

**Sec. 2463. [Clearance of vessel; timber cut by consent of Navy Department.]** It shall be the duty of all collectors of the customs within the States of Alabama, Mississippi, Louisiana, and Florida, before allowing a clearance to any vessel laden in whole or in part with live-oak timber, to ascertain satisfactorily that such timber was cut from private lands, or, if from public ones, by consent of the Navy Department. And it is also made the duty of all officers of the customs, and of the land officers within those States, to cause prosecutions to be seasonably instituted against all persons known to be guilty of depredations on, or injuries to, the live oak growing on the public lands.—(2 Mar., 1833, c. 67, s. 3, v. 4, p. 647.)

See notes to sections 2459-2462, Revised Statutes; and see section 4205, Revised Statutes, on the same subject.





## TITLE XXXIV.

### COLLECTION OF DUTIES UPON IMPORTS.

**Sec. 2687.** [Apportionment of compensation for part of year's service.] Collectors and all other officers of the customs, serving for a less period than a year, shall not be paid for the entire year, but shall be allowed in no case a greater than a pro rata of the maximum compensation of such officers respectively for the time only which they actually serve as such collectors or officers, whether the same be under one or more appointments, or before or after confirmation. And no collector or other officer shall, in any case, receive for his services, either as fees, salary, fines, penalties, forfeitures, or otherwise, for the time he may be in service, beyond the maximum pro rata rate provided by law. And this section shall be applied and enforced in regard to all officers, agents, and employes of the United States whomsoever, as well those whose compensation is determined by a commission on disbursements, not to exceed an annual maximum, as those paid by salary or otherwise.—(11 Feb., 1846, c. 7, s. 1, v. 9, p. 3. 18 July, 1866, c. 201, s. 34, v. 14, p. 186.)

By act June 31, 1906, section 6 (34 Stat., 763),  
rules were prescribed for the computation  
of pay of persons in the service of the

United States receiving annual or monthly  
compensation.

**Sec. 2757.** [Revenue-cutters to cooperate with Navy.] The revenue-cutters shall, whenever the President so directs, co-operate with the Navy, during which time they shall be under the direction of the Secretary of the Navy, and the expenses thereof shall be defrayed by the Navy Department.—(2 Mar., 1799, c. 22, s. 98, v. 1, p. 699.)

By act of January 28, 1915 (38 Stat., 800), the Revenue-Cutter Service and the Life-Saving Service were consolidated and reestablished as the "Coast Guard," and it was provided that said organization "shall constitute a part of the military forces of the United States," and "shall operate under the Treasury Department in time of peace and operate as a part of the Navy, subject to the orders of the Secretary of the Navy, in time of war or when the President shall so direct." (See note to sec. 1492, R. S.)

By act of August 29, 1916 (39 Stat., 600), it was provided that "hereafter whenever, in accordance with law, the expenses of the Coast Guard are paid by the Navy Department, any naval appropriations from

which payments are so made shall be reimbursed from available appropriations made by Congress for the expenses of the Coast Guard." (By acts of June 15, 1917, 40 Stat., 212, and July 1, 1918, 40 Stat., 731, appropriations were made for the naval establishment, and it was provided that said appropriations "shall be available for similar expenses of the Coast Guard and Lighthouse Service while cooperating with the Navy in so far as the regular appropriations for these services are insufficient therefor; and, when expenditures are thus made, naval appropriations need not be reimbursed from the appropriations for the Coast Guard and Lighthouse Service.")





## TITLE XXXVI.

### DEBTS DUE BY OR TO THE UNITED STATES.

**Sec. 3477. [Assignment of claims against United States.]** All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgements of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgement, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.—(29 July, 1846, c. 66, v. 9, p. 41. 26 Feb., 1853, c. 81, s. 1, v. 10, p. 170.)

See sections 1430 and 1576, Revised Statutes,  
and note thereto, as to assignment of wages

by enlisted men of the Navy, and allotments of pay by officers of the Navy.

**Sec. 3478. [Oath by persons prosecuting claims.]** Any person prosecuting claims, either as attorney or on his own account, before any of the Departments or Bureaus of the United States, shall be required to take the oath of allegiance, and to support the Constitution of the United States, as required of persons in the civil service.—(17 July, 1862, c. 205, s. 1, v. 12, p. 610.)

See sections 190 and 1757, Revised Statutes.

**Sec. 3479. [Who may administer oath.]** The oath provided for in the preceding section may be taken before any justice of the peace, notary public, or other person who is legally authorized to administer an oath in the State or district where the same may be administered.—(17 July, 1862, c. 205, s. 2, v. 12, p. 610.)





## TITLE XL.

### THE PUBLIC MONEYS.

Sec.  
3614. Bond of special agents.  
3617. Moneys to be deposited without deduction.  
3618. Proceeds of sales; miscellaneous receipts.  
3619. Penalty for withholding money.  
3620. Duty of disbursing officers.  
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3622. Time allowed for rendering accounts.  
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Sec.  
3624. Suits to recover money from officers.  
3639. Duties of custodians of public moneys.  
3643. Entry of receipts, payments, and transfers.  
3646. Lost or stolen checks; duplicates.  
3647. Duplicate check; officer dead.  
3648. Advances of public moneys prohibited.  
3651. Exchange of funds restricted.  
3652. Premium on sales of public securities.

**Sec. 3614. [Bond of special agents.]** Whenever it becomes necessary for the head of any Department or office to employ special agents, other than officers of the Army or Navy, who may be charged with the disbursement of public moneys, such agents shall, before entering upon duty, give bond in such form and with such security as the head of the Department or office employing them may approve.—(4 Aug., 1854, c. 242, s. 14, v. 10, p. 573.)

See sections 1383 and 1550, Revised Statutes, and notes thereto.

**Sec. 3617. [Moneys to be deposited without deduction.]** The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided in the next section, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post-Office Department.—(3 Mar., 1849, c. 110, s. 1, v. 9, p. 398. 28 Sept., 1850, c. 78, s. 3, v. 9, p. 507.)

See sections 86–92, Criminal Code, act March 4, 1909 (35 Stat., 1105), and see section 1624, Revised Statutes, article 14, as to acts constituting embezzlement.

See section 3619, Revised Statutes, as to penalty for violating this section.

**Sec. 3618. [Proceeds of sales; miscellaneous receipts.]** All proceeds of sales of old material, condemned stores, supplies, or other public property of any kind, except the proceeds of the sale or leasing of marine hospitals, or of the sales of revenue-cutters, or of the sales of commissary stores to the officers and enlisted men of the Army, [or of materials, stores, or supplies sold to officers and soldiers of the Army] or of the sale of condemned Navy clothing, or of sales of materials, stores, or supplies to any exploring or surveying expedition authorized by law, shall be deposited and covered into the Treasury as miscellaneous receipts, on account of “proceeds of Government property,” and shall not be withdrawn or applied, except in consequence of a subsequent appropriation made by law.—(3 Mar., 1847, c. 48, s. 1, v. 9, p. 171. 20 April, 1866, c. 63, ss. 1, 2, v. 14, p. 40. 28 July, 1866, c. 299, s. 25, v. 14, p. 336. 3 May 1872, c. 140, s. 5, v. 17, p. 83. 8 June, 1872, c. 348, v. 17, p. 337. 22 June, 1874, c. 413, v. 18, p. 200. 27 Feb., 1877, c. 69, v. 19, p. 249.)

The words in brackets were inserted in this section (as reproduced above from the second edition of the Revised Statutes) by act of February 27, 1877 (19 Stat., 249).

Act June 8, 1896 (29 Stat., 268), provided that "from the proceeds of sales of old material, condemned stores, supplies, or other public property of any kind, before being deposited into the Treasury, either as miscellaneous receipts on account of 'proceeds of Government property' or to the credit of the appropriations to which such proceeds are by law authorized to be made, there may be paid the expenses of such sales, as approved by the accounting officers of the Treasury, so as to require

only the net proceeds of such sales to be deposited into the Treasury, either as miscellaneous receipts or to the credit of such appropriations, as the case may be."

See section 433, Revised Statutes, and note thereto, as to proceeds of sales of publications of the Hydrographic Office, Navy Department.

See sections 418, 1530, and 1541, Revised Statutes, and laws cited thereunder, as to sales of vessels and old materials belonging to the Navy.

See act of March 4, 1917 (39 Stat., 1175), quoted under section 4750, Revised Statutes, as to proceeds of sales in certain cases being credited to the Naval Pension Fund.

**Sec. 3619. [Penalty for withholding money.]** Every officer or agent who neglects or refuses to comply with the provisions of section thirty-six hundred and seventeen shall be subject to be removed from office, and to forfeit to the United States any share or part of the moneys withheld, to which he might otherwise be entitled.—(18 July, 1866, c. 201, s. 40, v. 14, p. 187.)

See sections 86-92, Criminal Code, act March 4, 1909 (35 Stat., 1105), and see section 1624,

Revised Statutes, article 14, as to acts constituting embezzlement.

**Sec. 3620. [Duty of disbursing officers.]** It shall be the duty of every disbursing officer having any public money intrusted to him for disbursement, to deposit the same with the Treasurer or some one of the assistant treasurers of the United States, and to draw for the same only as it may be required for payments to be made by him in pursuance of law [and draw for the same only in favor of the persons to whom payment is made;] and all transfers from the Treasurer of the United States to a disbursing officer shall be by draft or warrant on the Treasury or an assistant treasurer of the United States. In places, however, where there is no treasurer or assistant treasurer, the Secretary of the Treasury may, when he deems it essential to the public interest, specially authorize in writing the deposit of such public money in any other public depository, or, in writing, authorize the same to be kept in any other manner, and under such rules and regulations as he may deem most safe and effectual to facilitate the payments to public creditors.—(14 June, 1866, c. 122, s. 1, v. 14, p. 64. 27 Feb., 1877, c. 69, v. 19, p. 249.)

The words in brackets were inserted in this section (as reproduced above from the second edition of the Revised Statutes) by act of February 27, 1877 (19 Stat., 249).

See sections 86-92, Criminal Code, act March 4, 1909 (35 Stat., 1105), and see section 1624, Revised Statutes, article 14, as to acts constituting embezzlement.

**Sec. 3621. [Time allowed in which to deposit money.]** Every person who shall have moneys of the United States in his hands or possession, and disbursing officers having moneys in their possession not required for current expenditure, shall pay the same to the Treasurer, an Assistant Treasurer, or some public depository of the United States, without delay, and in all cases within thirty days of their receipt. And the Treasurer, the Assistant Treasurer, or the public depository shall issue duplicate receipts for the moneys so paid, transmitting forthwith the original to the Secretary of the Treasury, and delivering the duplicate to the depositor: *Provided*, That postal revenues and debts due to the Post-Office Department shall be paid into the Treasury in the manner now required by law.



This section was expressly amended and reenacted to read as above by the act of May 28, 1896, section 5 (29 Stat., 179.)  
Penalty for failure to deposit money, see sec-

tions 86-92, Criminal Code, act March 4, 1909 (35 Stat., 1105), and section 1624, Revised Statutes, article 14, as to acts constituting embezzlement.

**Sec. 3622. [Time allowed for rendering accounts.]** Every officer or agent of the United States who receives public money which he is not authorized to retain as salary, pay, or emolument, shall render his accounts monthly. Such accounts, with the vouchers necessary to the correct and prompt settlement thereof, shall be sent by mail, or otherwise, to the Bureau to which they pertain, within ten days after the expiration of each successive month, and, after examination there, shall be passed to the proper accounting officer of the Treasury for settlement. Disbursing officers of the Navy shall, however, render their accounts and vouchers direct to the proper accounting officer of the Treasury. In case of the non-receipt at the Treasury, or proper Bureau, of any accounts within a reasonable and proper time thereafter, the officer whose accounts are in default shall be required to furnish satisfactory evidence of having complied with the provisions of this section. The Secretary of the Treasury may, if in his opinion the circumstances of the case justify and require it, extend the time hereinbefore prescribed for the rendition of accounts. Nothing herein contained shall, however, be construed to restrain the heads of any of the Departments from requiring such other returns or reports from the officer or agent, subject to the control of such heads of [*Department*] [Departments], as the public interest may require.—(17 July 1862, c. 199 s. 1, v. 12, p. 593. 2 Mar., 1867, Res. 48, v. 14, p. 571. 15 July, 1870, c. 295, s. 15, v. 16, p. 334. 27 Feb., 1877, c. 69, v. 19, p. 249.)

This section is given above as it appears in the second edition of the Revised Statutes. The word "Department" was stricken from the original section and the word "Departments" substituted therefor (as indicated by brackets) by act of February 27, 1877 (19 Stat., 249).

Other amendments to this section were made by act of August 30, 1890, section 4 (26 Stat., 413), which provided that "hereafter all disbursing officers of the United States shall render their accounts quarterly; and the Secretary of the Senate shall render his accounts as heretofore; but the Secretary of the Treasury may direct any or all such accounts to be rendered more frequently when in his judgment the public interests may require"; and by act of July 31, 1894,

section 12 (28 Stat., 209), which expressly struck from this section the words "The Secretary of the Treasury may, if in his opinion the circumstances of the case justify and require it, extend the time hereinbefore prescribed for the rendition of accounts," being the next to the last sentence of this section as given above. The said act of 1894 contained other provisions as to the rendition of accounts and authorizing the Secretary of the Treasury to relax requirements and waive delinquency under specified conditions.

Penalty for failure to render accounts, see sections 86-92, Criminal Code, act March 4, 1909 (35 Stat., 1105), and section 1624, Revised Statutes, article 14, as to acts constituting embezzlement.

**Sec. 3623. [Distinct accounts required.]** All officers, agents, or other persons, receiving public moneys, shall render distinct accounts of the application thereof, according to the appropriation under which the same may have been advanced to them.—(3 Mar., 1809, c. 28, s. 1, v. 2, p. 535.)

**Sec. 3624. [Suits to recover money from officers.]** Whenever any person accountable for public money, neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States, upon the adjustment of his account, the First Comptroller of the Treasury shall institute suit for the recovery of the same, adding to the sum stated to be due on such account, the commissions of the delinquent, which shall be forfeited in every instance where suit is commenced and judgment obtained thereon, and an interest of six per

centum per annum, from the time of receiving the money until it shall be repaid into the Treasury.—(3 Mar., 1797, c. 20, s. 1, v. 1, p. 512. U. S. v. Gaussen, 19 Wall., 198.)

Amendment to this section was made by act of July 31, 1894, section 4 (28 Stat., 205), which provided that “the First Comptroller of the Treasury shall hereafter be known as the Comptroller of the Treasury.”

See notes to sections 346 and 356, Revised Statutes, as to jurisdiction of the Attorney General; and note to section 236, Revised Statutes, as to jurisdiction of Comptroller of the Treasury.

**Sec. 3639. [Duties of custodians of public moneys.]** The Treasurer of the United States, all assistant treasurers, and those performing the duties of assistant treasurer, all collectors of the customs, all surveyors of the customs, acting also as collectors, all receivers of public moneys at the several land-offices, all postmasters, and all public officers of whatsoever character, are required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as specially allowed by law, all the public money collected by them, or otherwise at any time placed in their possession and custody, till the same is ordered, by the proper Department or officer of the Government, to be transferred or paid out; and when such orders for transfer or payment are received, faithfully and promptly to make the same as directed, and to do and perform all other duties as fiscal agents of the Government which may be imposed by any law, or by any regulation of the Treasury Department made in conformity to law. The President is authorized, if in his opinion the interest of the United States requires the same, to regulate and increase the sums for which bonds are, or may be, required by law, of all district attorneys, collectors of customs, naval officers, and surveyors of customs, navy agents, receivers and registers of public lands, paymasters in the Army, commissary-general, and by all other officers employed in the disbursement of the public moneys, under the direction of the War or Navy Departments.—(6 Aug., 1846, c. 90, s. 6, v. 9, p. 60. 3 July, 1852, c. 54, s. 7, v. 10, p. 12. 3 Mar., 1857, c. 114, s. 2, v. 11, p. 249. 21 April, 1862, c. 59, s. 5, v. 12, p. 382. 3 Mar., 1863, c. 96, s. 5, v. 12, p. 770. 4 July, 1864, c. 24, s. 5, v. 13, p. 383. 18 Feb., 1869, c. 33, s. 4, v. 15, 271.)

See sections 86–92, Criminal Code, act March 4, 1909 (35 Stat., 1105), and section 1624, Revised Statutes, article 14, as to acts constituting embezzlement by public officers.

See sections 1383–1385, Revised Statutes, and notes thereto, as to bonds of disbursing officers.

**Sec. 3643. [Entry of receipts, payments, and transfers.]** All persons charged by law with the safe-keeping, transfer, and disbursement of the public moneys, other than those connected with the Post-Office Department, are required to keep an accurate entry of each sum received and of each payment or transfer.—(6 Aug., 1846, c. 90, s. 10, v. 9, p. 63.)

**Sec. 3646. [Lost or stolen checks; duplicates.]** That whenever any original check is lost, stolen, or destroyed disbursing officers and agents of the United States are authorized, within three years from the date of such check, to issue a duplicate check, under such regulations in regard to its issue and payment, and upon the execution of such bond, with sureties, to indemnify the United States, and proof of loss of original check, as the Secretary of the Treasury shall prescribe: *Provided*, That whenever any original check or warrant of the Post Office Department has been lost, stolen, or destroyed the



Postmaster General may authorize the issuance of a duplicate thereof, at any time within three years from the date of such original check or warrant, upon the execution by the owner thereof of such bond of indemnity as the Postmaster General may prescribe: *Provided further*, That when such original check or warrant does not exceed in amount the sum of \$50 and the payee or owner is, at the date of the application, an officer or employee in the service of the Post Office Department, whether by contract, designation, or appointment, the Postmaster General may, in lieu of an indemnity bond, authorize the issuance of a duplicate check or warrant upon such an affidavit as he may describe, to be made before any postmaster by the payee or owner of an original check or warrant."

This section was expressly amended and re-enacted to read as above by act of March 21, 1916 (39 Stat., 37).

See section 300, Revised Statutes, and note thereto, as to lost checks.

**Sec. 3647. [Duplicate check; officer dead.]** In case the disbursing officer or agent by whom such lost, destroyed, or stolen original check was issued is dead or no longer in the service of the United States it shall be the duty of the proper accounting officer, under such regulations as the Secretary of the Treasury may prescribe, to state an account in favor of the owner of such original check for the amount thereof and to charge such amount to the account of such officer or agent: *Provided*, That in case a check drawn by any officer or agent of the Post-Office Department is lost, stolen, or destroyed a duplicate thereof may be issued under regulations prescribed by the Postmaster-General, as set forth in section thirty-six hundred and forty-six.

This section was expressly amended and re-enacted by act of February 23, 1909 (35 Stat., 644).

See section 300, Revised Statutes, which is similar to the general provisions of this section.

**Sec. 3648. [Advances of public moneys prohibited.]** No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. It shall, however, be lawful, under the special direction of the President, to make such advances to the disbursing officers of the Government as may be necessary to the faithful and prompt discharge of their respective duties, and to the fulfillment of the public engagements. The President may also direct such advances as he may deem necessary and proper, to persons in the military and naval service employed on distant stations, where the discharge of the pay and emoluments to which they may be entitled cannot be regularly effected.—(31 Jan., 1823, c. 9, s. 1, v. 3, p. 723. *Williams v. U. S.*, 1 How., 290; *The Floyd Acceptances*, 7 Wall., 666; *U. S. v. Cutter*, 2 Curt., 617.)

See section 1563, Revised Statutes, and note thereto as to advances of public moneys to persons in the naval service.

Hereafter subscriptions for newspapers and periodicals for the naval service may be paid for in advance. (Act Mar. 3, 1915, 38 Stat., 929.)

Subscriptions for "periodicals" required for official use may be paid in advance. (Act

Mar. 4, 1915, 38 Stat., 1049.) See note to section 192, Revised Statutes.

Secretary of the Navy may purchase mileage books, commutation tickets, etc., and pay for same in advance of travel by officers and others on official business. (Act Apr. 27, 1904, 33 Stat., 403.)

Secretary of the Navy may make partial payments during progress of work on con-

tracts under the Navy Department for public purposes not in excess of value of work done. (Act Aug. 22, 1911, 37 Stat., 32.) By act of October 6, 1917, section 5 (40 Stat., 383), the Secretary of the Navy

was authorized "during the period of the existing emergency" to advance payments to contractors for supplies in amounts not exceeding 30 per centum of the contract price and upon adequate security.

**Sec. 3651. [Exchange of funds restricted.]** No exchange of funds shall be made by any disbursing officer or agent of the Government, of any grade or denomination whatsoever, or connected with any branch of the public service, other than an exchange for gold, silver, United States notes, and national-bank notes; and every such disbursing officer, when the means for his disbursements are furnished to him in gold, silver, United States notes, or national-bank notes, shall make his payments in the moneys so furnished; or when they are furnished to him in drafts, shall cause those drafts to be presented at their place of payment, and properly paid according to law, and shall make his payments in the money so received for the drafts furnished, unless, in either case, he can exchange the means in his hands for gold and silver at par. And it shall be the duty of the head of the proper Department immediately to suspend from duty any disbursing officer or agent who violates the provisions of this section, and forthwith to report the name of the officer or agent to the President, with the fact of the violation, and all the circumstances accompanying the same, and within the knowledge of the Secretary, to the end that such officer or agent may be promptly removed from office, or restored to his trust and the performance of his duties, as the President may deem just and proper.—(6 Aug., 1846, c. 90, s. 20, v. 9, p. 64. 22 Feb., 1862, c. 33, s. 1, v. 12, p. 345. 11 July, 1862, c. 142, s. 1, v. 12, p. 532. 3 Mar., 1863, c. 73, s. 3, v. 12, p. 710. 3 June, 1864, c. 106, s. 23, v. 13, p. 106. U. S. v. City Bank, 6 McLean, 130.)

See sections 86-92, Criminal Code, act March 4, 1909 (35 Stat., 1105), and section 1624,

Revised Statutes, article 14, as to acts constituting embezzlement by public officers.

**Sec. 3652. [Premium on sales of public securities.]** No officer of the United States shall, either directly or indirectly, sell or dispose of to any person, for a premium, any Treasury note, draft, warrant, or other public security, not his private property, or sell or dispose of the avails or proceeds of such note, draft, warrant, or security, in his hands for disbursement, without making return of such premium, and accounting therefor by charging the same in his accounts to the credit of the United States; and any officer violating this section shall be forthwith dismissed from office.—(6 Aug., 1846, c. 90, s. 21, v. 9, p. 65.)



## TITLE XLI.

### APPROPRIATIONS.

<p><i>Sec.</i>  3660. Manner of communicating estimates.  3661. Estimates for printing and binding.  3662. Estimates for salaries.  3663. Estimates for public works.  3664. Explanation of estimates.  3665. Amount of outstanding appropriations to be designated.  3666. Estimates for Navy Department.  3667. Estimates of claims on naval pension fund.  3669. Estimates submitted through Secretary of the Treasury.  3672. Proceeds of sales.  3673. Money requisitions for War and Navy Departments.  3676. Appropriations for the Navy, how controlled.</p>	<p><i>Sec.</i>  3678. Application of moneys appropriated.  3679. No expenditures beyond appropriations; voluntary services prohibited.  3681. Expenses of commissions and inquiries.  3682. Contingent funds; clerical services.  3683. Contingent funds; purchases from.  3686. Appropriations for foreign hydrographic surveys.  3689. Permanent indefinite appropriations.  3690. Expenditure of balances of appropriations.  3691. Disposal of balances after two years.  3692. Proceeds of sales, condemned clothing, etc.</p>
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**Sec. 3660. [Manner of communicating estimates.]** The heads of Departments, in communicating estimates of expenditures and appropriations to Congress, or to any of the committees thereof, shall specify, as nearly as may be convenient, the sources from which such estimates are derived, and the calculations upon which they are founded, and shall discriminate between such estimates as are conjectural in their character and such as are framed upon actual information and applications from disbursing officers. They shall also give references to any law or treaty by which the proposed expenditures are, respectively, authorized, specifying the date of each, and the volume and page of the Statutes at Large, or of the Revised Statutes, as the case may be, and the section of the act in which the authority is to be found.—(26 Aug., 1842, c. 202, s. 14, v. 5, p. 525. 3 Mar., 1875, c. 129, s. 3, v. 18, p. 370.)

See sections 429 and 430, Revised Statutes, and laws noted thereunder.

**Sec. 3661. [Estimates for printing and binding.]** The head of each of the Executive Departments, and every other public officer who is authorized to have printing and binding done at the Congressional Printing-Office for the use of his Department or public office, shall include in his annual estimate for appropriations for the next fiscal year such sum or sums as may to him seem necessary “for printing and binding, to be executed under the direction of the Congressional Printer.”—(8 May, 1872, c. 140, s. 2, v. 17, p. 82.)

The designation of the “Congressional Printer” was changed to “Public Printer” by act of June 20, 1874 (18 Stat., 88); and he was to “take charge of and manage the Gov-

ernment Printing Office” by act of July 31, 1876 (19 Stat., 105).  
See sections 429 and 430, Revised Statutes, and laws noted thereunder.

**Sec. 3662. [Estimates for salaries.]** All estimates for the compensation of officers authorized by law to be employed shall be founded upon the express

provisions of law, and not upon the authority of executive distribution.—(3 Mar., 1855, c. 175, s. 8, v. 10, p. 670.)

See sections 429 and 430, Revised Statutes, and laws noted thereunder.

**Sec. 3663. [Estimates for public works.]** Whenever any estimate submitted to Congress by the head of a Department asks an appropriation for any new specific expenditure, such as the erection of a public building, or the construction of any public work, requiring a plan before the building or work can be properly completed, such estimate shall be accompanied by full [*plan*] [plans] and detailed estimates of the cost of the whole work. All subsequent estimates for any such work shall state the original estimated cost, the aggregate amount theretofore appropriated for the same, and the amount actually expended thereupon, as well as the amount asked for the current year for which such estimate is made. And if the amount asked is in excess of the original estimate, the full reasons for the excess, and the extent of the anticipated excess, shall be also stated.—(17 June, 1844, c. 105, s. 2, v. 5, p. 693. 3 Mar., 1855, c. 175, s. 8, v. 10, p. 670. 27 Feb., 1877, c. 69, v. 19, p. 249.)

This section is reproduced above as it appears in the second edition of the Revised Statutes. The word "plan" was stricken from the original section and the word "plans" substituted therefor, as indicated by

brackets, by act of February 27, 1877 (19 Stat., 249).

See sections 429 and 430, Revised Statutes, and laws noted thereunder; see also section 3734, Revised Statutes.

**Sec. 3664. [Explanation of estimates.]** Whenever the head of a Department, being about to submit to Congress the annual estimates of expenditures required for the coming year, finds that the usual items of such estimates vary materially in amount from the appropriation ordinarily asked for the object named, and especially from the appropriation granted for the same objects for the preceding year, and whenever new items not theretofore usual are introduced into such estimates for any year, he shall accompany the estimates by minute and full explanations of all such variations and new items, showing the reasons and grounds upon which the amounts are required, and the different items added.—(17 June, 1844, c. 105, s. 2, v. 5, p. 693. 3 Mar., 1855, c. 175, s. 8, v. 10, p. 670.)

See sections 429 and 430, Revised Statutes, and laws noted thereunder.

**Sec. 3665. [Amount of outstanding appropriations to be designated.]** The head of each Department, in submitting to Congress his estimates of expenditures required in his Department during the year then approaching, shall designate not only the amount required to be appropriated for the next fiscal year, but also the amount of the outstanding appropriation, if there be any, which will probably be required for each particular item of expenditure.—(2 June, 1858, c. 82, s. 2, v. 11, p. 308.)

See sections 429 and 430, Revised Statutes, and laws noted thereunder.

**Sec. 3666. [Estimates for Navy Department.]** The estimates for expenditures required by the Department of the Navy for the following purposes shall be given in detail, and the expenditures made under appropriations therefor shall be accounted for so as to show the disbursements of each Bureau under each respective appropriation:

First. Freight and transportation.

Second. Printing and stationery.



Third. Advertising in newspapers.

Fourth. Books, maps, models, and drawings.

Fifth. Purchase and repair of fire-engines and machinery.

Sixth. Repairs of and attending to steam-engines in navy-yards.

Seventh. Purchase and maintenance of horses and oxen, and driving teams.

Eighth. Carts, timber-wheels, and the purchase and repair of workmen's tools.

Ninth. Postage of public letters.

Tenth. Fuel, oil, and candles for navy-yards and shore stations.

Eleventh. Pay of watchmen and incidental labor not chargeable to any other appropriation.

Twelfth. Transportation to, and labor attending the delivery of provisions and stores on foreign stations.

Thirteenth. Wharfage, dockage, and rent.

Fourteenth. Traveling expenses of officers and others under orders.

Fifteenth. Funeral expenses.

Sixteenth. Store and office rent, fuel, commissions, and pay of clerks to navy-agents and store-keepers.

Seventeenth. Flags, awnings, and packing-boxes.

Eighteenth. Premiums and other expenses of recruiting.

Nineteenth. Apprehending deserters.

Twentieth. Per-diem pay to persons attending courts-martial, courts of inquiry, and other services authorized by law.

Twenty-first. Pilotage and towage of vessels, and assistance to vessels in distress.

Twenty-second. Bills of health and quarantine expenses of vessels of the United States Navy in foreign ports.—(22 June, 1860, c. 181, s. 1, v. 12, p. 81.)

See sections 429 and 430, Revised Statutes, and laws noted thereunder.

**Sec. 3667. [Estimates of claims on naval pension fund.]** The Secretary of the Navy shall annually submit to Congress estimates of the claims and demands chargeable upon and payable out of the naval pension fund.—(17 July, 1870, c. 238, v. 16, p. 222.)

See sections 4647, 4750–4757, Revised Statutes, | See sections 429 and 430, Revised Statutes,  
as to naval pension fund. | and laws noted thereunder.

**Sec. 3669. [Estimates submitted through Secretary of the Treasury.]** All annual estimates for the public service shall be submitted to Congress through the Secretary of the Treasury, and shall be included in the book of estimates prepared under his direction.—(2 Sept., 1789, c. 12, s. 2, v. 1, p. 65. 10 Mar., 1800, c. 58, v. 2, pp. 79, 80. 7 Jan., 1846, Res. 2, v. 9, p. 108. 4 Aug., 1854, c. 242, s. 15, v. 10, p. 573. 18 May, 1865, c. 85, s. 4, v. 14, p. 49. 20 June, 1874, c. 328, v. 18, pp. 96, 109, 111. 3 Mar., 1875, c. 129, v. 18, pp. 355, 370. 15 Aug., 1876, c. 289, s. 4, v. 19, p. 200.)

See sections 429 and 430, Revised Statutes, and laws noted thereunder.

**Sec. 3672. [Proceeds of sales.]** A detailed statement of the proceeds of all sales of old material, condemned stores, supplies, or other public property of any kind [except materials, stores, or supplies sold to officers and soldiers

of the Army, or to exploring or surveying expeditions authorized by law] shall be included in the appendix to the book of estimates.—(8 May, 1872, c. 140, s. 5, v. 17, p. 83. 27 Feb., 1877, c. 69, v. 19, p. 249.)

This section is reproduced above as it appears in the second edition of the Revised Statutes. The words enclosed in brackets were inserted in the original section by act of February 27, 1877 (19 Stat., 249).

See sections 429 and 430, Revised Statutes, and laws noted thereunder.

**Sec. 3673. [Money requisitions for War and Navy Departments.]** All moneys appropriated for the use of the War and Navy Departments shall be drawn from the Treasury, by warrants of the Secretary of the Treasury, upon the requisitions of the Secretaries of those Departments, respectively, countersigned by the Second Comptroller of the Treasury, and registered by the proper Auditor.—(3 Mar., 1817, c. 45, ss. 5, 9, v. 3, p. 367. 7 May, 1822, c. 90, s. 3, v. 3, p. 689. 4 Mar., 1874, c. 44, v. 18, p. 19.)

Amendment to this section was made by act of July 31, 1894, section 4 (28 Stat., 205), which abolished the office of Second Comptroller of the Treasury and created the office of Comptroller of the Treasury.

By act of June 19, 1878 (20 Stat., 167-168), the Secretary of the Navy was authorized to

issue requisitions for advances to disbursing officers under a "General account of advances," not to exceed the total appropriation for the Navy, the amount so advanced to be charged to the proper appropriation and to be returned to "General account of advances" by pay and counter-warrant.

**Sec. 3676. [Appropriations for the Navy, how controlled.]** All appropriations for specific, general, and contingent expenses of the Navy Department shall be under the control and expended by the direction of the Secretary of the Navy, and the appropriation for each Bureau shall be kept separate in the Treasury.—(5 July, 1862, c. 134, s. 5, v. 12, p. 511.)

When one bureau of the War or Navy Departments procures materials or performs services for another bureau of such Departments, the funds of the bureau or Department for which the materials are to be procured or the service performed, may be placed subject to the requisition of the bureau or Department making the procurement or per-

forming the service for direct expenditure by it. (Act Mar. 4, 1915, 38 Stat., 1084.)

See note to section 3673, Revised Statutes, as to "General account of advances," and note to section 3689, as to "Naval supply account fund."

See note to section 419, Revised Statutes, under "Duties of the various bureaus."

**Sec. 3678. [Application of moneys appropriated.]** All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.—(3 Mar., 1809, c. 28, s. 1, v. 2, p. 535. 12 Feb., 1868, c. 8, s. 2, v. 15, p. 36.)

"Pay of the Navy" shall hereafter be used only for its legitimate purpose, as provided by law. (Act June 19, 1878, 20 Stat., 167.)

**Sec. 3679. [No expenditures beyond appropriations; voluntary services prohibited.]** No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. Nor shall any Department or any officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency, involving the loss of human life or the destruction of property. All appropriations made for contingent expenses or other general purposes, except appropriations made in fulfillment of contract



obligations expressly authorized by law, or for objects required or authorized by law without reference to the amounts annually appropriated therefor, shall, on or before the beginning of each fiscal year, be so apportioned by monthly or other allotments as to prevent expenditures in one portion of the year which may necessitate deficiency or additional appropriations to complete the service of the fiscal year for which said appropriations are made; and all such apportionments shall be adhered to and shall not be waived or modified except upon the happening of some extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such apportionment, but this provision shall not apply to the contingent appropriations of the Senate or House of Representatives; and in case said apportionments are waived or modified as herein provided, the same shall be waived or modified in writing by the head of such Executive Department or other Government establishment having control of the expenditure, and the reasons therefor shall be fully set forth in each particular case and communicated to Congress in connection with estimates for any additional appropriations required on account thereof. Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than one hundred dollars or by imprisonment for not less than one month.

This section was expressly amended and reenacted to read as above by act of February 27, 1906, section 3 (34 Stat., 49).

See act August 23, 1912, section 6 (37 Stat., 414), as to apportionment of contingent funds of Departments, which expressly modifies cer-

tain provisions of the act of February 27, 1906 (34 Stat., 49), by which section 3679 was reenacted to read as above set forth.

See sections 3732 and 3733, Revised Statutes, and act March 4, 1909, section 98 (35 Stat., 1106).

**Sec. 3681. [Expenses of commissions and inquiries.]** No accounting or disbursing officer of the Government shall allow or pay any account or charge whatever, growing out of, or in any way connected with, any commission or inquiry, except courts-martial or courts of inquiry in the military or naval service of the United States, until special appropriations shall have been made by law to pay such accounts and charges. This section, however, shall not extend to the contingent fund connected with the foreign intercourse of the Government, placed at the disposal of the President.—(26 Aug., 1842, c. 202, s. 25, v. 5, p. 533.)

See act of March 4, 1909 (35 Stat., 1027), as to payment of compensation or expenses of any commission, council, board, or other similar body, unless authorized by law.

See section 1624, Revised Statutes (Articles for the Government of the Navy), as to courts-martial and courts of inquiry in the naval service.

**Sec. 3682. [Contingent funds; clerical services.]** No moneys appropriated for contingent, incidental, or miscellaneous purposes shall be expended or paid for official or clerical compensation.—(12 July, 1870, c. 251, s. 3, v. 16, p. 250.)

See act of August 5, 1882, section 4 (22 Stat., 255), as to use of contingent funds for clerical services; and act of August 23, 1912, section 5 (37 Stat., 414), as to penalty for violation of the former act.

See notes to sections 169 and 416, Revised Statutes.

**Sec. 3683. [Contingent funds; purchases from.]** No part of the contingent fund appropriated to any Department, Bureau, or office, shall be applied to the purchase of any articles except such as the head of the Department shall deem necessary and proper to carry on the business of the Department, Bureau, or

office, and shall, by written order, direct to be procured.—(26 Aug., 1842, c. 202, s. 19, v. 5, p. 527.)

**Sec. 3686. [Appropriations for foreign hydrographic surveys.]** All appropriations made for the preparation or publication of foreign hydrographic surveys shall only be applicable to their object, upon the approval by the Secretary of the Navy, after a report from three competent naval officers, to the effect that the original data for proposed charts are such as to justify their publication; and it is hereby made the duty of the Secretary of the Navy to order a board of three naval officers to examine and report upon the data, before he shall approve of any application of money to the preparation or publication of such charts or hydrographic surveys.—(21 Feb., 1861, c. 49, s. 7, v. 12, p. 150.)

A provision substantially identical with this section was embodied in the public printing and binding act of January 12, 1895, section 78 (28 Stat., 621).

See sections 431–433, Revised Statutes, and notes thereto.

**Sec. 3689. [Permanent indefinite appropriations.]** There are appropriated, out of any moneys in the Treasury not otherwise appropriated, for the purposes hereinafter specified, such sums as may be necessary for the same respectively; and such appropriations shall be deemed permanent annual appropriations.

\* \* \* \* \*

UNDER THE NAVY DEPARTMENT.

Indemnity to seamen and marines for lost clothing:

To allow and pay to each person, not an officer, employed on a vessel of the United States, sunk or otherwise destroyed, and whose personal effects have been lost, a sum not exceeding sixty dollars. In the event of the death of the person, this sum is to be paid to his proper legal representatives.—(4 July, 1864, c. 248, ss. 2, 3, v. 13, p. 390.)

Prize-money to captors:

For one moiety of the proceeds of prizes captured by vessels of the United States, to be distributed to the officers and crews thereof, in conformity to the provisions of Title “PRIZE;” also, the proceeds of derelict and salvage cases adjudged by the courts of the United States to salvors.—(30 June, 1864, c. 174, s. 16, v. 13, p. 311.)

\* \* \* \* \*

The omitted portions of this section do not relate to the Navy Department.

**Indemnity for seamen and marines, lost clothing.**—The provision of this section for indemnity to seamen and marines for lost clothing was to provide reimbursement in the cases authorized by section 288, Revised Statutes. That section was expressly repealed (see note thereunder) by act of October 6, 1917 (40 Stat., 390), which act also provided that “in cases involving persons in the Navy reimbursement in money shall be made from the appropriation ‘Pay of the Navy,’ and reimbursement in kind shall be made from the appropriation ‘outfits on first enlistment,’ and in cases involving persons in the Marine Corps reimbursement in money shall be made from the appropriation ‘Pay, Marine Corps,’ and reimbursement in kind shall be made from the appro-

priation ‘Clothing, Marine Corps,’ respectively, current at the time the claim covering such loss, damage, or destruction is paid.”

**Prize money to captors.**—The provision of this section to cover payment of prize money to captors was superseded by the naval personnel act of March 3, 1899, section 13 (30 Stat., 1007), which repealed “all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize.”

**Naval hospital fund.**—By sections 1614, 4808, and 4809, Revised Statutes, and act of June 7, 1900 (31 Stat., 697), provision was made for a fund for the maintenance of naval hospitals, known as the “Naval hospital fund.”

**Expenses of discharged naval prisoners.**—By act of March 3, 1909 (35 Stat., 756),



provision was made for payment of expenses of discharged naval prisoners from fines and forfeitures imposed by naval courts-martial, modifying the laws above quoted with respect to the naval hospital fund, as such fines and forfeitures had previously gone in their entirety to the latter fund.

**Profits on sales from ships' stores.**—By act of June 24, 1910 (36 Stat., 619), it was provided that profits on sales from ships' stores in the Navy may be expended in the discretion of the Secretary of the Navy for the amusement, comfort, and contentment of the enlisted force.

**Receipts from post laundries, Marine Corps.**—See act of July 11, 1919 (41 Stat., 155-156).

**Clothing and small stores.**—By acts of February 14, 1879 (20 Stat., 288), and June 30, 1890 (26 Stat., 197), a "clothing and small stores fund" was credited for the Navy, to be credited with the value of issues of clothing and small stores, the resources of the fund to be used in the purchases of supplies of clothing and small stores for issue. This fund was increased by acts of June 8, 1898 (30 Stat., 439), and January 5, 1899 (30 Stat., 781).

By naval appropriation act of June 4, 1920 (41 Stat., 815), it was provided that "during the fiscal year ending June 30, 1921, the clothing and small stores fund shall be charged with

the value of all issues of clothing and small stores made to enlisted men and apprentice seamen required as outfits on first enlistment, not to exceed \$100 each, and for civilian clothing not to exceed \$15 per man to men given discharges for bad conduct, undesirability, or inaptitude, and the uniform gratuity paid to officers of the Naval Reserve Force."

See also section 3692, Revised Statutes, as amended.

**Naval supply account fund** shall be charged with the cost of all stores procured for and credited with the value of all issues or sales made from the naval supply account. (Act Mar. 1, 1921, 41 Stat., 1169; see also acts June 25, 1910, 36 Stat., 792; Mar. 4, 1911, 36 Stat., 1279; June 30, 1914, 38 Stat., 405.)

**Naval pension fund.**—See section 4750, Revised Statutes, and note thereto.

**Navy petroleum fund.**—See act of August 25, 1914 (38 Stat., 709).

**Permanent appropriations defined.**—As to what appropriations are to be construed as permanent, or available continuously without reference to a fiscal year, see act of August 24, 1912, section 7 (37 Stat., 487).

**Reserve material, Navy.**—See acts of March 4, 1917 (39 Stat., 1183), and June 15, 1917 (40 Stat., 211).

**Sec. 3690. [Expenditure of balances of appropriations.]** All balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year, and remaining unexpended at the expiration of such fiscal year, shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year; and balances not needed for such purposes shall be carried to the surplus fund. This section, however, shall not apply to appropriations known as permanent or indefinite appropriations.—(12 July, 1870, c. 251, s. 5, v. 16, p. 251.)

See note to section 3691, Revised Statutes.

**Sec. 3691. [Disposal of balances after two years.]** All balances of appropriations which shall have remained on the books of the Treasury, without being drawn against in the settlement of accounts, for two years from the date of the last appropriation made by law, shall be reported by the Secretary of the Treasury to the Auditor of the Treasury, whose duty it is to settle accounts thereunder, and the Auditor shall examine the books of his Office, and certify to the Secretary whether such balances will be required in the settlement of any accounts pending in his office; and if it appears that such balances will not be required for this purpose, then the Secretary may include such balances in his surplus-fund warrant, whether the head of the proper Department shall have certified that it may be carried into the general Treasury or not. But no appropriation for the payment of the interest or principal of the public debt, or to which a longer duration is given by law, shall be thus treated.—(Ibid., s. 6. 20 June, 1874, c. 328, v. 18, p. 110.)

Other provisions as to the disposition of unexpended balances of appropriations are contained in acts of June 20, 1874, section

5 (18 Stat., 110), July 26, 1886, section 2 (24 Stat., 157), and August 24, 1912, section 7 (37 Stat., 487).

The reappropriation and diversion of the unexpended balance of any appropriation to a purpose other than that for which it was originally made shall be construed

and accounted as a new appropriation, and the unexpended balance shall be reduced by the sum proposed to be so diverted. (Act Mar. 4, 1915, sec. 4, 38 Stat., 1161.)

**Sec. 3692. [Proceeds of sales, condemned clothing, etc.]** All moneys received from the leasing or sale of marine hospitals, or the sale of revenue-cutters, or from the sale of commissary stores to the officers and enlisted men of the Army, [or from the sale of materials, stores, or supplies sold to officers and soldiers of the Army,] or from sales of condemned clothing of the Navy, or from sales of materials, stores, or supplies to any exploring or surveying expedition authorized by law, shall respectively revert to that appropriation out of which they were originally expended, and shall be applied to the purposes for which they are appropriated by law.—(3 Mar., 1847, c. 48, s. 1, v. 9, p. 171. 20 April, 1866, c. 63, ss. 1, 2, v. 14, p. 40. 28 July, 1866, c. 299, s. 25, v. 14, p. 336. 8 May, 1872, c. 140, s. 5, v. 17, p. 83. 8 June, 1872, c. 348, v. 17, p. 337. 3 Mar., 1875, c. 130, v. 18, p. 388. 3 Mar., 1875, c. 131, v. 18, p. 410. 27 Feb., 1877, c. 69, v. 19, p. 249.)

This section is reproduced above as it appears in the second edition of the Revised Statutes. The words inclosed in brackets

were inserted in the original section by act of February 27, 1877 (19 Stat., 249). See note to section 3689, Revised Statutes.



## TITLE XLIII.

### PUBLIC CONTRACTS.

Sec.		
3709.	Advertisements for proposals.	3731. Name of contractor to appear on supplies.
3710.	Opening bids.	3732. Unauthorized contracts; inadequate appropriation; exceptions.
3711.	Inspection of fuel in the District of Columbia.	3733. Erection, repair, or furnishing of buildings and improvements; specific appropriation required.
3712.	Appointments to be notified to accounting officer.	3734. Restrictions on new buildings.
3713.	No payment without certificate.	3735. Contracts limited to one year.
3714.	Contracts for military or naval service.	3736. Restriction on purchases of land.
3718.	Naval supplies; advertisements; lowest bidder; security.	3737. No transfer of contract.
3719.	Guarantee of bid; delinquent bidder; new contract.	3738. Eight hours to be day's work.
3720.	Delinquent contractor; penalty.	3739. Members of Congress not to be interested in contracts.
3721.	Purchases without advertisement.	3740. What interest Members of Congress may have.
3722.	Rejection of bids; not manufacturers or regular dealers; etc. Opening bids.	3741. Stipulation that no Member of Congress has an interest.
3723.	Contracts for foreign supplies; advertisement, etc.	3742. Officer making contract with Member of Congress; penalty.
3724.	Rejection of excessive bids.	3743. Contracts to be filed with Auditors.
3725.	Hemp; American growth or manufacture.	3744. Contracts to be in writing; copy filed in Returns Office.
3726.	Preserved meats; butter; etc.	3745. Oath to copy of contract.
3727.	Flour and bread.	3746. Penalty for omitting returns.
3728.	Home manufactures preferred; purchase of fuel.	3747. Instructions to officers making contracts.
3729.	Bunting.	
3730.	Relinquishment of reservations on deliveries.	

**Sec. 3709. [Advertisements for proposals.]** All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals.—(2 Mar., 1861, c. 84, s. 10, v. 12, p. 220. 22 June, 1874, c. 389, v. 18, p. 177.)

This section was expressly amended by act of January 27, 1891 (28 Stat., 33), by adding thereto the following: "And the advertisement for such proposals shall be made by all the Executive Departments, including the Department of Labor, the United States Fish Commission, the Interstate Commerce Commission, the Smithsonian Institution, the Government Printing Office, the government of the District of Columbia, and the superintendent of the State, War, and Navy building, except for paper and materials for use of the Government Printing Office, and materials used in the work of the Bureau of Engraving and Printing,

which shall continue to be advertised for and purchased as now provided by law, on the same days and shall each designate two o'clock post meridian of such days for the opening of all such proposals in each Department and other Government establishments in the city of Washington; and the Secretary of the Treasury shall designate the day or days in each year for the opening of such proposals and give due notice thereof to the other Departments and Government establishments. Such proposals shall be opened in the usual way and schedules thereof duly prepared and, together with the statement of the proposed action of

each Department and Government establishment thereon, shall be submitted to a board, consisting of one of the Assistant Secretaries of the Treasury and Interior Departments and one of the Assistant Postmasters General, who shall be designated by the heads of said Departments and the Postmaster General, respectively, at a meeting to be called by the official of the Treasury Department, who shall be chairman thereof, and said board shall carefully examine and compare all the proposals so submitted and recommend the acceptance or rejection of any or all of said proposals. And if any or all of such proposals shall be rejected, advertisements for proposals shall again be invited and proceeded with in the same manner."

Further amendment was made by act of April 21, 1894, section 2 (28 Stat., 62), which provided that said amendatory act of January 27, 1894, above quoted, "be, and the same is hereby, so amended that the provisions thereof shall apply only to adver-

tisements for proposals for fuel, ice, stationery and other miscellaneous supplies to be purchased at Washington for the use of the Executive Departments and other Government establishments therein named; and no advertisements made or contract awarded or to be awarded thereon since January twenty-seven, eighteen hundred and ninety-four, in accordance with the laws in force prior to said date, shall be declared to be illegal or invalid for non-compliance with said law of January twenty-seventh, eighteen hundred and ninety-four."

Section 3709, Revised Statutes, as thus amended, was expressly modified by act of June 17, 1910, section 4 (36 Stat., 531), which contained new provisions as to the procurement of supplies for the Executive Departments and other Government establishments in Washington.

As to publication of advertisements in newspapers, etc., see sections 3718, 3826, and 3828, Revised Statutes.

**Sec. 3710. [Opening bids.]** Whenever proposals for supplies have been solicited, the parties responding to such solicitation shall be duly notified of the time and place of opening the bids, and be permitted to be present either in person or by attorney, and a record of each bid shall then and there be made.—(31 Jan., 1868, Res. 8, v. 15, p. 246.)

See sections 3718 and 3722, Revised Statutes.

**Sec. 3711. [Inspection of fuel in the District of Columbia.]** It shall not be lawful for any officer or person in the civil, military, or naval service of the United States in the District of Columbia to purchase anthracite or bituminous coal or wood for the public service except on condition that the same shall, before delivery, be inspected and weighed or measured by some competent person, to be appointed by the head of the department or chief of the branch of the service for which the purchase is made from among the persons authorized to be employed in such department or branch of the service. The person appointed under this section shall ascertain that each ton of coal weighed by him shall consist of two thousand two hundred and forty pounds, and that each cord of wood to be so measured shall be of the standard measure of one hundred and twenty-eight cubic feet. Each load or parcel of wood or coal weighed and measured by him shall be accompanied by his certificate of the number of tons or pounds of coal and the number of cords or parts of cords of wood in each load or parcel.

This section was expressly amended and reenacted to read as above by act of March 15, 1898, section 6 (30 Stat., 316).

See section 3728, Revised Statutes, and acts of May 28, 1908, section 2 (35 Stat., 424), and October 20, 1914 (38 Stat., 741), as to coal for the Navy.

**Sec. 3712. [Appointments to be notified to accounting officer.]** The proper accounting officer of the Treasury shall be furnished with a copy of the appointment of each inspector, weigher, and measurer appointed under the preceding section.—(Ibid., s. 2.)

**Sec. 3713. [No payment without certificate.]** It shall not be lawful for any accounting officer to pass or allow to the credit of any disbursing officer in the



District of Columbia any money paid by him for purchase of anthracite or bituminous coal or for wood, unless the voucher therefor is accompanied by a certificate of the proper inspector, weigher, and measurer that the quantity paid for has been determined by such officer.—(Ibid.)

**Sec. 3714. [Contracts for military or naval service.]** All purchases and contracts for supplies or services for the military and naval service shall be made by or under the direction of the chief officers of the Departments of War and of the Navy, respectively. [And all agents or contractors for supplies or service as aforesaid shall render their accounts for settlement to the accountant of the proper department for which such supplies or services are required, subject, nevertheless, to the inspection and revision of the officers of the Treasury in the manner before prescribed.]—(16 July, 1798, c. 85, s. 3, v. 1, p. 610. 27 Feb., 1877, c. 69, v. 19, p. 249. U. S. v. Adams, 7 Wall., 463; Parish v. U. S., 8 Wall., 489.)

This section is reproduced above as it appears in the second edition of the Revised Statutes. The words enclosed in brackets were added to the original section by act of February 27, 1877 (19 Stat., 249).

See sections 512-515, and 3744-3747, Revised Statutes, as to filing of copies of contracts in the Returns Office of the Interior Department.

See section 3743, Revised Statutes, as amended, with respect to filing of contracts in the Treasury Department.

See generally section 418, Revised Statutes, and note thereto.

See act of March 4, 1917 (39 Stat., 1193), and note to act of August 3, 1886 (24 Stat., 215), as to changes in contracts.

**Sec. 3718. [Naval supplies; advertisements; lowest bidder; security.]** All provisions, clothing, hemp, and other materials of every name and nature, for the use of the Navy, and the transportation thereof, when time will permit, shall be furnished by contract, by the lowest bidder, as follows: In the case of provisions, clothing, hemp, and other materials, the Secretary of the Navy shall advertise, once a week, for at least four weeks, in one or more of the principal papers published in the place where such articles are to be furnished, for sealed proposals for furnishing the same, or the whole of any particular class thereof, specifying the classes of materials and referring bidders to the several chiefs of Bureaus, who will furnish them with printed schedules, giving a full description of each and every article, with dates of delivery, and so forth. In the case of transportation of such articles, he shall advertise for a period of not less than five days. All such proposals shall be kept sealed until the day specified in such advertisement for opening the same, when they shall be opened by or under the direction of the officer making such advertisement, in the presence of at least two persons. The person offering to furnish any class of such articles, and giving satisfactory security for the performance thereof, under a forfeiture not exceeding twice the contract price in case of failure, shall receive a contract for furnishing the same.—(3 Mar., 1843, c. 83, v. 5, p. 617. 28 Sept., 1850, c. 80, s. 1, v. 9, p. 513. 5 Aug., 1854, c. 268, s. 1, v. 10, p. 585. 17 April, 1866, c. 45, s. 4, v. 14, p. 38.)

Amendment to this section was made by act of June 30, 1890 (26 Stat., 197), which provided that said section "is hereby amended by striking out the words 'once a week for four weeks' and inserting in lieu thereof the words 'twice a week for two weeks or longer, not to exceed four weeks, in the discretion of the Secretary of the Navy.'" It was again amended by act of July 19,

1892 (27 Stat., 243), which provided that this section, as amended by the act of June 30, 1890, is hereby amended so as to read, "twice a week for two weeks or longer, not to exceed four weeks, or once a week for four weeks, in the discretion of the Secretary of the Navy." It was further amended by act of March 3, 1893 (27 Stat., 724), which provided that said section 3718,

Revised Statutes, as amended by the act of July 19, 1892, is hereby amended so as to read, "twice a week for two weeks or longer, not to exceed four weeks, or once a week for two weeks or longer, not to exceed four weeks, in the discretion of the Secretary of the Navy."

Advertising in newspapers: See sections 3709, 3826, and 3828, Revised Statutes.

Advertising not required in certain cases: See section 3721, Revised Statutes, and note thereto.

Exchange of typewriters, adding machines, and other similar labor-saving devices in part payment for new machines used for the same purpose, was authorized by act of March 4, 1915, section 5 (38 Stat., 1161).

Lowest bidder: See sections 3721, 3722, and 3724, Revised Statutes, and notes there-to.

Naval Supply Account shall govern the charging, crediting, receipt, purchase, transfer, manufacture, repair, issue, and consumption of all stores for the naval establishment, with certain exceptions. (Acts June 25, 1910, 36 Stat., 792; Mar. 4, 1911, 36 Stat., 1279; June 30, 1914, 38 Stat., 405.)

Naval Supply Account Fund shall be charged with the cost of all stores procured for, and credited with the value of all issues or sales made from, the Naval Supply Account. (Act Mar. 1, 1921, 41 Stat., 1169.)

Officers of the Navy or Marine Corps on the active or retired list are forbidden to hold employment with any person or company furnishing naval supplies or war material to the Government. (See act June 10, 1896, 29 Stat., 361.) See sections 3739-3742, Revised Statutes, and notes thereto, as to Members of Congress interested in contracts.

Opening bids.—See sections 3710 and 3722, Revised Statutes.

Open-market purchases for all branches of the naval service, without formal contract or bond are authorized where amount does not exceed \$500. (Act Mar. 2, 1907, 34 Stat., 1193.) See also sections 3709 and 3729, Revised Statutes.

Proposals for manufactured articles shall specify standardized screw threads. (Act July 18, 1918, sec. 2, 40 Stat., 913.)

Purchases of supplies shall be deemed to be for the Navy, and not for any bureau thereof,

and they shall be classified and issued accordingly. (Act Mar. 2, 1891, 26 Stat., 807; act June 30, 1890, 26 Stat., 205.)

Regulations for the purchase, preservation, and disposition of naval supplies are to be made by the President. (Sec. 1549, R. S.; see also secs. 161 and 1547, R. S.)

Reserve material.—"To prevent deterioration materials purchased under the reserve material Navy fund shall be used as required in time of peace, and when so used reimbursement shall be made to this appropriation from current naval appropriations in order that additional stocks may be procured. (Act June 15, 1917, 40 Stat., 211.) (This was a proviso to an appropriation of two million dollars made in the urgent deficiency appropriation act of June 15, 1917 (40 Stat., 182, 211), under "Bureau of Supplies and Accounts," subheading, "Reserve material, Navy," as follows: "For procuring apparatus and materials (other than ordnance materials and medical stores), as a war reserve necessary to be carried in the supply departments for the purpose of fitting out vessels of the fleet and merchant auxiliaries in time of war or when, in the opinion of the President, a national emergency exists.")

Transfer of supplies between bureaus of the Navy Department was authorized by act of March 2, 1889 (25 Stat., 818); see also act of March 4, 1915 (38 Stat., 1084).

Transfer of supplies between War and Navy Departments: See acts March 4, 1915 (38 Stat., 1084); February 25, 1919 (40 Stat., 1174); and July 11, 1919 (41 Stat., 132); see also section 1135, Revised Statutes.

Transportation of supplies for the Navy is required to be in vessels of the United States, except where freight charges are excessive and unreasonable. (See act Apr. 28, 1904, 33 Stat., 518.)

Transportation of fuel for the Navy; President authorized to purchase vessels for such transportation when charter prices are excessive. (See act June 15, 1917, 40 Stat., 211; see also, act Mar. 3, 1915, 38 Stat., 944.)

Transportation of naval supplies by Army transports; see act March 2, 1907 (34 Stat., 1170).

**Sec. 3719. (Guarantee of bid; delinquent bidder; new contract.)** Every proposal for naval supplies invited by the Secretary of the Navy, under the preceding section, shall be accompanied by a written guarantee, signed by one or more responsible persons, to the effect that he or they undertake that the bidder, if his bid is accepted, will, at such time as may be prescribed by the Secretary of the Navy, give bond, with good and sufficient sureties, to furnish the supplies proposed; and no proposal shall be considered, unless accompanied by such guarantee. If, after the acceptance of a proposal, and a notification thereof to the bidder, he fails to give such bond within the time prescribed by the Secretary of the Navy, the Secretary shall proceed to contract with some other person for furnishing the supplies; and shall forthwith cause the difference between the amount contained in the proposal so guaranteed and the amount for which he may have contracted for furnishing the



supplies, for the whole period of the proposal, to be charged up against the bidder and his guarantor; and the same may be immediately recovered by the United States, for the use of the Navy Department, in an action of debt against either or all of such persons.—(10 Aug., 1846, c. 176, s. 6, v. 9, p. 101.)

This section was expressly amended by act of May 25, 1896 (29 Stat., 136), which added at the end of said section, the following: “*Provided*, That the Secretary of the Navy may, in his discretion, accept, in lieu of the written guaranty required to accompany a proposal for naval supplies, and in lieu of the bond required for the faithful performance of a contract for furnishing such supplies, a certified check, payable to the order of the Secretary of the Navy, for the full amount of such proposal or contract, the check to be held by the Secretary of the Navy until the requirements of the proposal or contract shall be complied with and as a guaranty for compliance with the same.”

Further amendment to this section, but without express reference thereto, was made by act of December 11, 1906 (34 Stat., 841), reading as follows: “That the Secretary of the Navy may, in his discretion, accept, in lieu of the written guaranty required to accompany a proposal for naval supplies, and in lieu of the bond required for the faithful performance of a contract for furnishing such supplies, a certified check, payable to the order of the Secretary of the Navy, for from twenty-five to fifty per centum of the amount of such proposal or contract, the check to be held by the Secretary of the Navy until the requirements of the proposal or contract shall be complied with and as a guaranty for compliance with the same.”

**Sec. 3720. [Delinquent contractor; penalty.]** All such proposals for naval supplies shall be preserved and recorded, and reported by the Secretary of the Navy to Congress at the commencement of every regular session. The report shall contain a schedule embracing the offers by classes, indicating such as have been accepted. In case of a failure to supply the articles or to perform the work by the person entering into such contract, he and his sureties shall be liable for the forfeiture specified in such contract, as liquidated damages, to be sued for in the name of the United States.—(3 Mar., 1843, c. 83, v. 5, p. 617.)

Amendment to this section (and to sec. 429, R. S.), was made by act of June 22, 1910 (36 Stat., 591), as follows: “That the second clause of section four hundred and twenty-nine of the Revised Statutes of the United States and the following words in section thirty-seven hundred and twenty of the

Revised Statutes of the United States: ‘and reported by the Secretary of the Navy to Congress at the commencement of every regular session. The report shall contain a schedule embracing the offers by classes, indicating such as have been accepted,’ be, and the same are hereby, repealed.”

**Sec. 3721. [Purchases without advertisement.]** The provisions which require that supplies shall be purchased by the Secretary of the Navy from the lowest bidder, after advertisement, shall not apply to ordnance, gunpowder, or medicines, or the supplies which it may be necessary to purchase out of the United States for vessels on foreign stations, or bunting delivered for the use of the Navy, or tobacco, or butter or cheese destined for the use of the Navy, or things contraband of war. Contracts for butter and cheese for the use of the Navy may be made for periods longer than one year, if, in the opinion of the Secretary of the Navy, economy and the quality of the ration will be promoted thereby. The Secretary of the Navy may enter into contracts for tobacco, from time to time, as the service requires, for a period not exceeding four years; and in making such contracts he shall not be restricted to the lowest bidder, unless, in his opinion, economy and the best interests of the service will be thereby promoted.—(3 Mar., 1845, c. 77, s. 3, v. 5, p. 794. 3 Mar., 1847, c. 48, s. 2, v. 9, p. 172. 3 Aug., 1848, c. 121, s. 11, v. 9, p. 272. 2 Mar., 1865, c. 74, s. 7, v. 13, p. 467.)

See section 3718, Revised Statutes, and laws noted thereunder; and see section 3729, as to purchases of bunting; see also section 3735, as to contracts being limited to periods of one year.

Gun steel or armor for the Navy, purchase of, without public competition, prohibited by act of March 3, 1893 (27 Stat., 732).

Material for steam boilers, may be purchased without advertising for bids. (Res. June 14, 1878, 20 Stat., 253).

Shells or projectiles, except for experimental purposes, are not to be purchased without bids. (Act Mar. 4, 1913, 37 Stat., 896; act June 30, 1914, 38 Stat., 398.)

Tobacco for the Navy is to be purchased after advertisement, in the same manner as other supplies. (Act June 10, 1896, 29 Stat., 370.)

See act of June 3, 1916, section 120 (39 Stat., 213), and laws noted thereunder, as to procurement of material under exceptional conditions.

**Sec. 3722. [Rejection of bids; not manufacturers or regular dealers; etc. Opening bids.]** The chief of any Bureau of the Navy Department, in contracting for naval supplies, shall be at liberty to reject the offer of any person who, as principal or surety, has been a defaulter in any previous contract with the Navy Department. Parties who have made default as principals or sureties in any former contract shall not be received as sureties on other contracts; nor shall the copartners of any firm be received as sureties for such firm or for each other; nor, in contracts with the same Bureau, shall one contractor be received as surety for another. Every contract shall require the delivery of a specified quantity, and no bids having nominal or fictitious prices shall be considered. If more than one bid be offered by any one party, by or in the name of his or their clerk, partner, or other person, all such bids may be rejected; and no person shall be received as a contractor who is not a manufacturer of, or regular dealer in, the articles which he offers to supply. All persons offering bids shall have the right to be present when the bids are opened and inspect the same.

See Bureau of Supplies and Accounts' file No. 385-PD, 385-10, March 12, 1919; and 385 PC, June 15, 1919; see also annual report, Paymaster General, 1920, page 20.

Opening bids.—See sections 3710 and 3718, Revised Statutes.

**Sec. 3723. [Contracts for foreign supplies; advertisement, etc.]** No chief of a Bureau shall make any contract for supplies for the Navy, to be executed in a foreign country, except it be on first advertising for at least thirty days in two daily newspapers of the city of New York, inviting sealed bids for furnishing the supplies desired; which bids shall be opened in the presence of the Secretary of the Navy and the heads of two Bureaus; and contracts shall in all cases be awarded to the lowest bidder; and paymasters for the Navy on foreign stations shall render, when practicable, with their accounts, an official certificate from the resident consul, or commercial or consular agent of the United States, if there be one, to be furnished gratuitously, vouching that all purchases and expenditures made by the paymasters were made at the ruling market-prices of the place at the time of purchase or expenditure.—(3 Mar., 1871, c. 117, s. 3, v. 16, p. 535.)

See note to section 3728, Revised Statutes.

**Sec. 3724. [Rejection of excessive bids.]** Where articles are advertised and bid for in classes, and in the judgment of the Secretary of the Navy any one or more articles appear to be bid for at excessive or unreasonable prices, exceeding ten per centum above their fair market-value, he shall be authorized to reject such bid.—(4 July, 1864, c. 252, s. 7, v. 13, p. 394.)



Amendment to this section, but without express reference thereto, was made by act of March 4, 1913 (37 Stat., 904), as follows: "From and after the passage of this Act

all awards of contracts for provisions for the Navy shall be made by individual items; the contract for each item being awarded to the lowest responsible bidder."

**Sec. 3725. [Hemp; American growth or manufacture.]** All hemp, or preparations of hemp, used for naval purposes by the Government of the United States, shall be of American growth or manufacture, when the same can be obtained of as good quality and at as low a price as foreign hemp.—(14 July, 1862, c. 163, s. 11, v. 12, p. 554.)

See section 3718, and note to section 3728, Revised Statutes.

**Sec. 3726. [Preserved meats; butter; etc.]** The Secretary of the Navy is authorized to procure the preserved meats, pickles, butter, and desiccated vegetables, in such manner and under such restrictions and guarantees as in his opinion will best insure the good quality of said articles.—(18 July, 1861, c. 7, s. 7, v. 12, p. 265.)

See section 3721, Revised Statutes, as to contracts for butter.

**Sec. 3727. [Flour and bread.]** The Secretary of the Navy is authorized to purchase, in such manner as he shall deem most advantageous to the Government, the flour required for naval use; and to have the bread for the Navy baked from this flour by special contract under naval inspection.—(3 Mar., 1863, c. 118, s. 4, v. 12, p. 818.)

**Sec. 3728. [Home manufactures preferred; purchase of fuel.]** The Secretary of the Navy, in making contracts and purchases of articles for naval purposes, shall give the preference, all other things, including price and quality, being equal, to articles of the growth, production, and manufacture of the United States. In purchasing fuel for the Navy, or for naval stations and yards, the Secretary of the Navy shall have power to discriminate and purchase, in such manner as he may deem proper, that kind of fuel which is best adapted to the purpose for which it is to be used.—(28 Sept., 1850, c. 80, s. 1, v. 9, pp. 513, 515.)

See section 3723 as to contracts for foreign supplies; section 3711, as to purchase of coal; section 3732, as to purchase of fuel beyond appropriations; act April 28, 1904 (33 Stat., 518), and section 3718, Revised Statutes, as to transportation; act of June 15, 1917 (40 Stat., 211), as to transportation of fuel for the Navy.

Domestic steel material to be used in construction of naval vessels. (Act Aug. 3, 1886,

sec. 2, 24 Stat., 215, as amended by act May 4, 1898, 30 Stat., 390.)

Foreign war material may be purchased in emergencies and imported free of duty. (Act Mar. 4, 1913, 37 Stat., 896; see also act June 30, 1914, 38 Stat., 399.)

Foreign materials for construction or repair and equipment of naval vessels may be imported without duty. (Act Oct. 3, 1913, sec. IV, J, subsecs. 5, 6, 38 Stat., 196.)

**Sec. 3729. [Bunting.]** The Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury may enter into contract, in open market, for bunting of American manufacture, as their respective services require, for a period not exceeding one year, and at a price not exceeding that at which an article of equal quality can be imported.—(2 Mar., 1865, c. 74, s. 7, v. 13, p. 467.)

See section 3709 and note to section 3718, Revised Statutes, as to open-market purchases.

See section 3721, Revised Statutes, as to purchase of bunting without advertisement.

**Sec. 3730. [Relinquishment of reservations on deliveries.]** The Secretary of the Navy may relinquish and pay all reservations of the ten per centum upon deliveries made under contracts with the Navy Department, where these reservations have arisen and the contracts have been afterward extended, or

where the contracts have been completed after the time of delivery, by and with the consent of the Department, or where the contracts have been dissolved by the like consent, or have been terminated, or an extension thereof has been prevented by operation of law, where no injury has been sustained by the public service.—(17 June, 1844, c. 107, s. 5, v. 5, p. 703.)

Contractors may be paid partial payments | 1911, 37 Stat., 32; see also sec. 3648, R. S.,  
during progress of work (see act Aug. 22, | and note thereto).

**Sec. 3731. [Name of contractor to appear on supplies.]** Every person who shall furnish supplies of any kind to the Army or Navy shall be required to mark and distinguish the same with the name of the contractor furnishing such supplies, in such manner as the Secretary of War and the Secretary of the Navy may, respectively, direct; and no supplies of any kind shall be received, unless so marked and distinguished.—(17 July, 1862, c. 200, s. 15, v. 12, p. 596.)

**Sec. 3732. [Unauthorized contracts; inadequate appropriation; exceptions. Superseded.]**

**This section read as follows:**

"Sec. 3732. No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year."—(2 Mar., 1861, c. 84, s. 10, v. 12, p. 220. The Floyd Acceptances, 7 Wall., 666; Harvey v. U. S., 8 C. Cls., 501.)

It was superseded by the following pro-

vision in the Army appropriation act of June 12, 1906 (34 Stat., 240, 255):

"That no contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year."

See also section 3679, Revised Statutes, and note thereto.

**Sec. 3733. [Erection, repair, or furnishing of buildings and improvements; specific appropriation required.]** No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose.—(25 July, 1868, c. 233, s. 3, v. 15, p. 177.)

See sections 355, 3663, and 3679, Revised Statutes, and Criminal Code, act March 4, 1909, section 98 (35 Stat., 1106).

**Sec. 3734. [Restrictions on new buildings.]** And hereafter no money shall be paid nor contracts made for payment for any site for a public building in excess of the amount specifically appropriated therefor; and no money shall be expended upon any public building until after sketch plans showing the tentative design and arrangement of such building, together with outline description and detailed estimates of the cost thereof shall have been made by the Supervising Architect of the Treasury Department (except when otherwise authorized by law) and said sketch plans and estimates shall have been approved by the Secretary of the Treasury and the head of each executive department who will have officials located in such building; but such approval shall not prevent subsequent changes in the design, arrangement, materials, or methods of construction or cost which may be found necessary or advantageous: *Provided*, That no such changes shall be made involving an expense in excess of the limit of cost fixed or extended by Congress, and all appropriations made for the construction of such building shall be expended within the limit of cost so fixed or extended.



This section was expressly amended and reenacted to read as above by act of June 25, 1910, section 33 (36 Stat., 699) relating to public buildings under the control of the Secretary of the Treasury.

By act of July 1, 1898 (30 Stat., 614), it was provided that "All courthouses, customhouses, post offices, appraiser's stores, barge offices, subtreasuries, and other public buildings outside of the District of Columbia and outside of military reservations \* \* \* erected or purchased out of any appropriation under the control of the Treasury Department, together with the site or sites thereof, are hereby expressly declared to be under the exclusive jurisdiction and control and in the custody of the Secretary of the

Treasury, who shall have full power to take possession of and assign and reassign rooms therein to such Federal officials, clerks, and employees as in his judgment and discretion should be furnished with offices or rooms therein."

That the word "military" has been used in other connections to include things pertaining to the Navy, see act July 17, 1862, section 17 (12 Stat., 596); section 1488, Revised Statutes; act April 12, 1902, section 2 (32 Stat., 100); 31 Op. Atty. Gen., 445; 7 Op. Atty. Gen., 162; *United States v. North* (112 U. S., 510); *Stocker v. United States* (39 Ct. Cls., 300).

See section 3663, Revised Statutes, as to estimates for public works.

**Sec. 3735. [Contracts limited to one year.]** It shall not be lawful for any of the Executive Departments to make contracts for stationery or other supplies for a longer term than one year from the time the contract is made.—(31 Jan., 1868, Res. No. 8, v. 15, p. 246. 24 Mar., 1874, Res. No. 6, v. 18, p. 286.)

See section 3721, Revised Statutes, as to contracts for the Navy for periods exceeding one year.

**Sec. 3736. [Restrictions on purchases of land.]** No land shall be purchased on account of the United States, except under a law authorizing such purchase.—(1 May, 1820, c. 52, s. 7, v. 3, p. 568.—*Neilson v. Lagow*, 12 How., 98.)

See section 355, Revised Statutes, and note thereto.

**Sec. 3737. [No transfer of contract.]** No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.—(17 July, 1862, c. 200, s. 14, v. 12, p. 596. *Wheelan v. U. S.*, 5 C. Cls., 504; *McCord's Case*, 9 C. Cls., 155; *Francis's Case*, 11 C. Cls., 638.)

**Sec. 3738. [Eight hours to be day's work.]** Eight hours shall constitute a day's work for all laborers, workmen, and mechanics who may be employed by or on behalf of the Government of the United States.—(28 June, 1808, c. 72, v. 15, p. 77. *U. S. v. Martin*, 94 U. S., 40; *Martin's Case*, 10 C. Cls., 276.)

See acts August 1, 1892 (27 Stat., 340); June 19, 1912 (37 Stat., 137); March 3, 1913 (37 Stat., 726); and March 4, 1917 (39 Stat.,

1192), as to hours of labor and contract provisions relating thereto.

**Sec. 3739. [Members of Congress not to be interested in contracts. Repealed.]**

This section provided as follows:

"SEC. 3739. No member of or Delegate to Congress shall directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement made or entered into in behalf of the United States, by any officer or person authorized to make contracts on behalf of the United States. Every person who violates this section shall be deemed guilty of a misdemeanor, and shall be fined three thousand dollars. All contracts or agreements made in violation of this section shall be void; and whenever any sum of money is advanced on the part of the United States, in consideration of

any such contract or agreement, it shall be forthwith repaid; and in case of refusal or delay to repay the same, when demanded, by the proper officer of the Department under whose authority such contract or agreement shall have been made or entered into, every person so refusing or delaying, together with his surety or sureties, shall be forthwith prosecuted at law for the recovery of any such sum of money so advanced."—(21 Apr., 1868, c. 48, s. 1, v. 2, p. 484. 22 June, 1874, c. 389, v. 18, p. 177.)

It was expressly repealed by Criminal Code, Act March 4, 1909, section 341 (35 Stat., 1153), and similar provisions were embodied in said act, section 114 (35 Stat., 1109).

**Sec. 3740. [What interest Members of Congress may have. Repealed.]**

This section provided as follows:

"Sec. 3740. Nothing contained in the preceding section shall extend, or be construed to extend, to any contract or agreement, made or entered into, or accepted, by any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company: nor to the purchase or sale of bills of exchange or other property by any member of [or delegate to] Congress, where the

same are ready for delivery, and payment therefor is made, at the time of making or entering into the contract or agreement."—(21 Apr., 1808, c. 48, s. 2, v. 2, p. 484. 27 Feb., 1877, c. 69, v. 19, p. 249.)

It was expressly repealed by Criminal Code, act March 4, 1909, section 341 (35 Stat., 1153), and similar provisions were embodied in said act, section 116 (35 Stat., 1109).

**Sec. 3741. [Stipulation that no Member of Congress has an interest.]**

In every such contract or agreement to be made or entered into, or accepted by or on behalf of the United States, there shall be inserted an express condition that no member of [or delegate to] Congress shall be admitted to any share or part of such contract or agreement, or to any benefit to arise thereupon.—(21 Apr., 1808, c. 48, s. 3, v. 2, p. 484. 27 Feb., 1877, c. 69, v. 19, p. 249.)

This section is reproduced above as it appears in the second edition of the Revised Statutes. The words inclosed in brackets

were inserted in the original section by act of February 27, 1877 (19 Stat., 249).

**Sec. 3742. [Officer making contract with Member of Congress; penalty. Repealed.]**

This section provided as follows:

"Sec. 3742. Every officer who, on behalf of the United States, directly or indirectly makes or enters into any contract, bargain, or agreement in writing or otherwise, other than such as are hereinbefore excepted, with any member of [or delegate to] Congress, shall be deemed guilty of a misdemeanor, and shall be fined

three thousand dollars."—(21 Apr., 1808, c. 48, s. 4, v. 2, p. 484. 27 Feb., 1877, c. 69, v. 19, p. 249.)

It was expressly repealed by Criminal Code, act March 4, 1909, section 341 (35 Stat., 1153), and similar provisions were embodied in said act, section 115 (35 Stat., 1109).

**Sec. 3743. [Contracts to be filed with Auditors.]** All contracts to be made, by virtue of any law, and requiring the advance of money, or in any manner connected with the settlement of public accounts, shall be deposited promptly in the offices of the Auditors of the Treasury, according to the nature of the contracts: *Provided*, That this section shall not apply to the existing laws in regard to the contingent funds of Congress.

This section was expressly amended and reenacted to read as above by act of July 31, 1894, section 18 (28 Stat., 210).

Copies of contracts are required to be filed in the Returns Office of the Interior Department by sections 512-515, and 3744-3747 Revised Statutes.

Secretary of the Navy is charged with the custody of all records appertaining to the Navy Department by section 418, Revised Statutes.

**Sec. 3744. [Contracts to be in writing; copy filed in Returns Office.]** It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and



marked by numbers in regular order, according to the number of papers composing the whole return.—(2 June, 1862, c. 93, s. 1, v. 12, p. 411. *Lindsley v. U. S.*, 4 C. Cls., 359; *Burchiel v. U. S.*, 4 C. Cls., 549; *Bernheimer v. U. S.*, 5 C. Cls., 65; *Salamon v. U. S.*, 19 Wall., 17; *Jones's Case*, 11 C. Cls., 733.)

This section was expressly amended by the urgent deficiency appropriation act of June 15, 1917 (40 Stat., 198), by adding at the end thereof the following: "*Provided*, That the Secretary of War or the Secretary of the Navy may extend the time for filing such contracts in the returns office of the

Department of the Interior to ninety days whenever in their opinion it would be to the interest of the United States to follow such a course."

See sections 512-515, Revised Statutes, and notes thereto, as to the Returns Office.

**Sec. 3745. [Oath to copy of contract.]** It shall be the further duty of the officer, before making his return, according to the preceding section, to affix to the same his affidavit in the following form, sworn to before some magistrate having authority to administer oaths: "I do solemnly swear (or affirm) that the copy of contract hereto annexed is an exact copy of a contract made by me personally with ———; that I made the same fairly without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said ———, or any other person: and that the papers accompanying include all those relating to the said contract, as required by the statute in such case made and provided."—(*Ibid.*, s. 2.)

See sections 512-515, Revised Statutes, and notes thereto.

**Sec. 3746. [Penalty for omitting returns.]** Every officer who makes any contract, and fails or neglects to make return of the same, according to the provisions of the two preceding sections, unless from unavoidable accident or causes not within his control, shall be deemed guilty of a misdemeanor, and shall be fined not less than one hundred dollars nor more than five hundred, and imprisoned not more than six months.—(*Ibid.*, s. 3.)

See sections 512-515, Revised Statutes, and notes thereto.

**Sec. 3747. [Instructions to officers making contracts.]** It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to furnish every officer appointed by them with authority to make contracts on behalf of the Government with a printed letter of instructions, setting forth the duties of such officer, under the two preceding sections, and also to furnish therewith forms, printed in blank, of contracts to be made, and the affidavit of returns required to be affixed thereto, so that all the instruments may be as nearly uniform as possible.—(*Ibid.*, s. 5.)





## TITLE XLIV.

### THE PUBLIC PROPERTY.

**Sec. 3748.** [Uniforms and equipments, not to be sold, etc.] The clothes, arms, military outfits, and accouterments furnished by the United States to any soldier shall not be sold, bartered, exchanged, pledged, loaned, or given away; and no person not a soldier, or duly authorized officer of the United States, who has possession of any such clothes, arms, military outfits, or accouterments, so furnished, and which have been the subjects of any such sale, barter, exchange, pledge, loan, or gift, shall have any right, title, or interest therein; but the same may be seized and taken wherever found by any officer of the United States, civil or military, and shall thereupon be delivered to any quartermaster, or other officer authorized to receive the same. The possession of any such clothes, arms, military outfits, or accouterments by any person not a soldier or officer of the United States shall be presumptive evidence of such a sale, barter, exchange, pledge, loan, or gift.—(3 Mar., 1863, c. 75, s. 23, v. 12, p. 735.)

See Criminal Code, act March 4, 1909, section 35 (35 Stat., 1095), as amended by act October 23, 1918 (40 Stat., 1016).

**Sec. 3752.** [Purchase of lands; releases to United States.] Whenever any lands have been or shall be conveyed to individuals or officers, for the use or benefit of the United States, the President is authorized to obtain from such person a release of his interest to the United States.—(28 April, 1828, c. 41, s. 3, v. 4, p. 264.)

See section 355, Revised Statutes, and note thereto.





## TITLE XLV.

### PUBLIC PRINTING, ADVERTISEMENTS, AND PUBLIC DOCUMENTS.

Sec. 3826. [Advertisements in Washington, D. C.] All advertisements, notices, and proposals for contracts for all the Executive Departments of the Government, and the laws passed by Congress and executive proclamations and treaties to be published in the District of Columbia, Maryland, and Virginia, shall hereafter be advertised by publication in the three daily papers published in the District of Columbia having the largest circulation, one of which shall be selected by the Clerk of the House of Representatives, and in no others. The charges for such publications shall not be higher than such as are paid by individuals for advertising in said papers, and the same publications shall be made in each of the said papers equally as to frequency: *Provided*, That no advertisement to any State, district, or Territory, other than the District of Columbia, Maryland, or Virginia, shall be published in the papers designated, unless at the direction first made of the proper head of a Department: *And provided further*, That this section shall not be construed to allow a greater compensation for the publication of the laws passed by Congress and executive proclamations and treaties in the papers of the District of Columbia than is provided by law for such publications in other papers.—(2 Mar., 1867, c. 167, s. 10, v. 14, p. 467. 29 Mar., 1867, c. 13, s. 2, v. 15, p. 7. 20 July, 1868, c. 176, ss. 2, 4, v. 15, p. 110. 18 Feb., 1875, c. 18, v. 18, p. 316. *Repealed in part by stat. 3 Mar., 1875, c. 128, v. 18, p. 342. 31 July, 1876, c. 246, v. 19, p. 105.*)

“So much of section three thousand eight hundred and twenty-six of the Revised Statutes of the United States as refers to the publication of advertisements in newspapers be, and the same is hereby, repealed.” (Act Mar. 3, 1875, 18 Stat., 342.)

“After the fourth day of March, eighteen hundred and seventy-five, the publication of the laws in newspapers shall cease.” (Sec. 79, R. S., as amended by act Feb. 18, 1875, 18 Stat., 317.)

“That all executive proclamations, & all treaties required by law to be published, shall be published in only one newspaper, the same to be printed and published in the District of Columbia and to be designated by the Secretary of State and in no case of advertisement for contracts for the public service shall the same be published in any newspaper published and printed in the District of Columbia, unless the supplies or labor covered by such advertisements are to be furnished or performed in said District of Columbia.” (Sundry civil act, July 31, 1876, 19 Stat., 105.)

“Hereafter all advertisements, notices, proposals for contracts, and all forms of advertising required by law for the several departments of the government may be paid for at

a price not to exceed the commercial rates charged to private individuals, with the usual discounts; such rates to be ascertained from sworn statements to be furnished by the proprietors or publishers of the newspapers proposing so to advertise: *Provided*, That \* \* \* the heads of the several departments may secure lower terms at special rates whenever the public interest requires it.” (Act June 20, 1878, 20 Stat., 216.)

“All advertising required by existing laws to be done in the District of Columbia by any of the departments of the government shall be given to one daily and one weekly newspaper of each of the two principal political parties and to one daily and one weekly neutral newspaper: *Provided*, That the rates of compensation for such service shall in no case exceed the regular commercial rate of the newspapers selected; nor shall any advertisement be paid for unless published in accordance with section thirty-eight hundred and twenty-eight of the Revised Statutes.” (Act Jan. 21, 1881, 21 Stat., 317.)

See sections 3709 3718, 3721, and 3828, Revised Statutes.

Sec. 3828. [Newspaper advertising; written authority required.] No advertisement, notice, or proposal for any Executive Department of the Government, or for any Bureau thereof, or for any office therewith connected, shall be published in any newspaper whatever, except in pursuance of a written authority for such publication from the head of such Department; and no bill for any advertising, or publication, shall be paid, unless there be presented, with such bill, a copy of such written authority.—(15 July, 1870, c. 292, s. 2, v. 16, p. 308.)

See sections 3709, 3718, 3721, and 3826, Revised Statutes.



## TITLE XLVIII.

### COMMERCE AND NAVIGATION.

Sec.  
4205. Clearance of vessels laden with live-oak.  
4233. Rules for preventing collisions on the Red River of the North, and rivers emptying into the Gulf of Mexico, and their tributaries.  
4237. No discrimination in pilotage rates.

Sec.  
4293. Public vessels to suppress piracy.  
4294. Seizure of piratical vessels.  
4296. Condemnation of piratical vessels.  
4297. Seizure of vessels fitted out for piracy.  
4298. What vessels authorized to seize pirates.

**Sec. 4205. [Clearance of vessels laden with live-oak.]** Collectors of the collection-districts within the States of Florida, Alabama, Mississippi, and Louisiana, before allowing a clearance to any vessel laden in whole or in part with live-oak timber, shall ascertain satisfactorily that such timber was cut from private lands, or, if from public lands, by consent of the Department of the Navy.—(3 Mar., 1833, c. 67, s. 3, v. 4, p. 647.)

**Sec. 4233. [Rules for preventing collisions on the Red River of the North and rivers emptying into the Gulf of Mexico, and their tributaries.]** The following rules for preventing collisions on the water, shall be followed in the navigation of vessels of the Navy and of the mercantile marine of the United States:

This section has been superseded and repealed by subsequent enactments, except in so far as concerns navigation on the Red River of the North and rivers emptying into the Gulf of Mexico, and their tributaries. (See also sec. 4412, R. S., and note thereto, as to executive regulations applicable to the waters mentioned.) The laws prescribing rules for preventing collisions at sea and upon the Great Lakes, harbors, rivers, and inland waters of the United States, except the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries are cited below, as follows:

**Rules for preventing collisions at sea.**—See act of August 19, 1890 (26 Stat., 320), providing that the regulations therein prescribed “for preventing collisions at sea shall be followed by all public and private vessels of the United States upon the high seas and in all waters connected therewith, navigable by seagoing vessels.” Section 2 of said act (26 Stat., 328) provided that “all laws or parts of laws inconsistent with the foregoing regulations for preventing collisions at sea for the navigation of all public and private vessels of the United States upon the high seas, and in all waters connected therewith navigable by sea-going vessels, are hereby repealed.”

**Rules for the Great Lakes and their connecting and tributary waters as far east as Montreal.**—See act of February 8, 1895 (28 Stat., 645), providing that the rules therein prescribed for preventing collisions “shall be followed in the navigation of all public and

private vessels of the United States upon the Great Lakes and their connecting and tributary waters as far east as Montreal.” Section 4 of said act (28 Stat., 650) provided “that all laws or parts of laws, so far as applicable to the navigation of the Great Lakes and their connecting and tributary waters as far east as Montreal, inconsistent with the foregoing rules are hereby repealed.”

**Rules for harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal, and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries.**—See act of June 7, 1897 (30 Stat., 96), providing that the regulations therein prescribed for preventing collision “shall be followed by all vessels navigating all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, and are hereby declared special rules duly made by local authority.” Section 5 of said act (30 Stat., 103) provided that section 4233, and certain other sections of the Revised Statutes and certain laws subsequent to the Revised Statutes, and all amendments thereto, “are hereby repealed so far as the harbors, rivers, and inland waters aforesaid (except the Great Lakes and their connecting and tributary waters as far east as Montreal and

the Red River of the North and rivers emptying into the Gulf of Mexico, and their tributaries) are concerned."

Rules for motor boats.—By act of June 9, 1910 (36 Stat., 462), special rules were prescribed for motor boats on the navigable waters of the United States.

Rules for regattas.—Regulations to promote the safety of life on navigable waters during regattas or marine parades are made and enforced pursuant to act April 28, 1908 (35 Stat., 69).

See act of February 19, 1895 (28 Stat., 672), and note thereto; see also acts of September 7, 1916, section 12 (39 Stat., 732), and July 9, 1918, (40 Stat., 893).

#### STEAM AND SAIL VESSELS.

Rule 1. Every steam vessel which is under sail and not under steam shall be considered a sail vessel; and every steam vessel which is under steam, whether under sail or not, shall be considered a steam vessel. The words steam vessel shall include any vessel propelled by machinery.

This rule was expressly reenacted to read as above by act of March 3, 1905 (33 Stat., 1032).

#### LIGHTS.

Rule two. The lights mentioned in the following rules, and no others, shall be carried in all weathers, between sunset and sunrise.

Rule three. All ocean-going steamers, and steamers carrying sail, shall, when under way, carry—

(A) At the foremast head, a bright white light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, and so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side.

(B) On the starboard side, a green light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side.

(C) On the port side, a red light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on the port side.

The green and red lights shall be fitted with inboard screens, projecting at least three feet forward from the lights, so as to prevent them from being seen across the bow.

Rule four. Steam-vessels, when towing other vessels, shall carry two bright white mast-head lights vertically, in addition to their side-lights, so as to distinguish them from other steam-vessels. Each of these mast-head lights shall be of the same character and construction as the mast-head lights prescribed by Rule three.

Rule five. All steam-vessels, other than ocean-going steamers and steamers carrying sail, shall, when under way, carry on the starboard and port sides lights of the same character and construction and in the same position as are prescribed for side-lights by Rule three, except in the case provided in Rule six.

Rule six. River-steamers navigating waters flowing into the Gulf of Mexico, and their tributaries, shall carry the following lights, namely: One



red light on the outboard side of the port smoke-pipe, and one green light on the outboard side of the starboard smoke-pipe. Such lights shall show both forward and abeam on their respective sides.

Rule seven. All coasting steam-vessels, and steam-vessels other than ferry-boats and vessels otherwise expressly provided for, navigating the bays, lakes, rivers, or other inland waters of the United States, except those mentioned in Rule six, shall carry the red and green lights, as prescribed for ocean-going steamers; and, in addition thereto, a central range of two white lights; the after-light being carried at an elevation of at least fifteen feet above the light at the head of the vessel. The head-light shall be so constructed as to show a good light through twenty points of the compass, namely: from right ahead to two points abaft the beam on either side of the vessel; and the after-light so as to show all around the horizon. The lights for ferryboats, barges and canal boats when in tow of steam vessels, shall be regulated by such rules as the Board of Supervising Inspectors of Steam Vessels shall prescribe.

This rule was expressly amended to read as above by act of March 3, 1893 (27 Stat., 557).

Rule eight. Sail-vessels, under way or being towed, shall carry the same lights as steam-vessels under way, with the exception of the white mast-head lights, which they shall never carry.

Rule nine. Whenever, as in case of small vessels during bad weather, the green and red lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for instant exhibition, and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side. To make the use of these portable lights more certain and easy, they shall each be painted outside with the color of the light they respectively contain, and shall be provided with suitable screens.

Rule ten. All vessels, whether steam-vessels or sail-vessels, when at anchor in roadsteads or fairways, shall, between sunset and sunrise, exhibit where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light, visible all around the horizon, and at a distance of at least one mile.

Rule eleven. Sailing pilot-vessels shall not carry the lights required for other sailing-vessels, but shall carry a white light at the mast-head, visible all around the horizon, and shall also exhibit a flare-up light every fifteen minutes.

Steam pilot boats shall, in addition to the masthead light and green and red side lights required for ocean steam vessels, carry a red light hung vertically from three to five feet above the foremast headlight, for the purpose of distinguishing such steam pilot boats from other steam vessels.

This rule was expressly amended to read as above by act of March 3, 1897, section 5 (29 Stat., 589), which added thereto the second paragraph as above set forth.

Rule twelve. Coal-boats, trading-boats, produce-boats, canal-boats, oyster-boats, fishing-boats, rafts, or other water-craft, navigating any bay, harbor,

or river, by hand-power, horse-power, sail, or by the current of the river, or which shall be anchored or moored in or near the channel or fairway of any bay, harbor, or river, shall carry one or more good white lights, which shall be placed in such manner as shall be prescribed by the board of supervising inspectors of steam-vessels.

Rule thirteen. Open boats shall not be required to carry the side-lights required for other vessels, but shall, if they do not carry such lights, carry a lantern having a green slide on one side and a red slide on the other side; and, on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, and in such a manner that the green light shall not be seen on the port side, nor the red light on the starboard side. Open boats, when at anchor or stationary, shall exhibit a bright white light. They shall not, however, be prevented from using a flare-up, in addition, if considered expedient.

Rule fourteen. The exhibition of any light on board of a vessel of war of the United States may be suspended whenever, in the opinion of the Secretary of the Navy, the commander in chief of a squadron, or the commander of a vessel acting singly, the special character of the service may require it. The exhibition of any light on board of a revenue cutter of the United States may be suspended whenever, in the opinion of the commander of the vessel, the special character of the service may require it.

This rule was expressly reenacted to read as above by act of March 3, 1897, section 12 (29 Stat., 690).

#### FOG SIGNALS.

Rule fifteen. (a) Whenever there is a fog, or thick weather, whether by day or night, fog signals shall be used as follows: Steam vessels under way shall sound a steam whistle placed before the funnel, not less than eight feet from the deck, at intervals of not more than one minute. Steam vessels, when towing, shall sound three blasts of quick succession repeated at intervals of not more than one minute. (b) Sail vessels under way shall sound a foghorn at intervals of not more than one minute. (c) Steam vessels and sail vessels, when not under way, shall sound a bell at intervals of not more than two minutes.

(D) Coal-boats, trading-boats, produce-boats, canal-boats, oyster-boats, fishing-boats, rafts, or other water-craft, navigating any bay, harbor, or river, by hand-power, horse-power, sail, or by the current of the river, or anchored or moored in or near the channel or fairway of any bay, harbor, or river, and not in any port, shall sound a fog-horn, or equivalent signal, which shall make a sound equal to a steam-whistle, at intervals of not more than two minutes.

This section was expressly amended by act of March 3, 1897, section 12 (29 Stat., 690), which reenacted clauses (a), (b), and (c),	to read as above, and made no modification in clause (D).
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#### STEERING AND SAILING RULES.

Rule 16. Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change such risk should be deemed to exist.

This section was expressly reenacted to read as above by act of March 3, 1897, section 12 (29 Stat., 690).



Rule 17. When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, namely:

(a) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(b) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d) When both vessels are running free, with the wind on the same side, the vessel which is to the windward shall keep out of the way of the vessel which is to the leeward.

(e) A vessel which has the wind aft shall keep out of the way of the other vessel.

This section was expressly reenacted to read as above by act of March 3, 1897, section 12 (29 Stat., 690).

Rule eighteen. If two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

Rule nineteen. If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

Rule twenty. If two vessels, one of which is a sail-vessel and the other a steam-vessel, are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sail-vessel.

Rule twenty-one. Every steam-vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam-vessel shall, when in a fog, go at a moderate speed.

Rule twenty-two. Every vessel overtaking any other vessel shall keep out of the way of the last-mentioned vessel.

Rule twenty-three. Where, by Rules seventeen, nineteen, twenty, and twenty-two, one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of Rule twenty-four.

Rule twenty-four. In construing and obeying these rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger.

Rule twenty-five. A sail vessel which is being overtaken by another vessel during the night shall show from her stern to such last-mentioned vessel a torch or a flare-up light.

This rule was added to section 4233, Revised Statutes, as Rule twenty-five thereof, by act of March 3, 1897, section 13 (29 Stat., 690).

Rule twenty-six. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neg-

lect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.

This rule was added to section 4233, Revised Statutes, as Rule twenty-six thereof, by act of March 3, 1897, section 13 (29 Stat., 690).

**Sec. 4237. [No discrimination in pilotage rates.]** No regulations or provisions shall be adopted by any State which shall make any discrimination in the rate of pilotage or half-pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated.—(13 July, 1866, c. 177, v. 14, p. 93.)

See note to Constitution, Article I, section 8, clause 13, under "II. Freedom from State interference," subheading, "Exemption

from State laws requiring employment of pilots."

**Sec. 4293. [Public vessels to suppress piracy.]** The President is authorized to employ so many of the public armed vessels as in his judgment the service may require, with suitable instructions to the commanders thereof, in protecting the merchant-vessels of the United States and their crews from piratical aggressions and depredations.—(3 Mar., 1819, c. 77, s. 1, v. 3, p. 510. 30 Jan., 1823, c. 7, v. 3, p. 721.)

**Sec. 4294. [Seizure of piratical vessels.]** The President is authorized to instruct the commanders of the public armed vessels of the United States to subdue, seize, take, and send into any port of the United States, any armed vessel or boat, or any vessel or boat the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel; and also to retake any vessel of the United States, or its citizens, which may have been unlawfully captured upon the high seas.—(3 Mar., 1819, c. 77, s. 2, v. 3, p. 512. 30 Jan., 1823, c. 7, v. 3, p. 721. The Marianna Flora, 11 Wh., 1; The Palmyra, 12 Wh., 1.)

**Sec. 4296. [Condemnation of piratical vessels.]** Whenever any vessel, which shall have been built, purchased, fitted out in whole or in part, or held for the purpose of being employed in the commission of any piratical aggression, search, restraint, depredation, or seizure, or in the commission of any other act of piracy as defined by the law of nations, or from which any piratical aggression, search, restraint, depredation, or seizure shall have been first attempted or made, is captured and brought into or captured in any port of the United States, the same shall be adjudged and condemned to their use, and that of the captors after due process and trial in any court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought; and the same court shall thereupon order a sale and distribution thereof accordingly, and at its discretion.—(3 Mar., 1819, c. 77, s. 4, v. 3, p. 513. 30 Jan., 1823, c. 7, v. 3, p. 721. 5 Aug., 1861, c. 48, s. 1, v. 12, p. 314.)

By the Navy personnel act of March 3, 1899, section 13 (30 Stat., 1007), "all provisions of law authorizing the distribution among captors of the whole or any portion of the

proceeds of vessels, or any property hereafter captured, condemned as prize," were repealed.



**Sec. 4297. [Seizure of vessels fitted out for piracy.]** Any vessel built, purchased, fitted out in whole or in part, or held for the purpose of being employed in the commission of any piratical aggression, search, restraint, depredation, or seizure, or in the commission of any other act of piracy, as defined by the law of nations, shall be liable to be captured and brought into any port of the United States if found upon the high seas, or to be seized if found in any port or place within the United States, whether the same shall have actually sailed upon any piratical expedition or not, and whether any act of piracy shall have been committed or attempted upon or from such vessel or not; and any such vessel may be adjudged and condemned, if captured by a vessel authorized as hereinafter mentioned, to the use of the United States and to that of the captors, and if seized by a collector, surveyor, or marshal, then to the use of the United States.—(5 Aug., 1861, c. 48, s. 1, v. 12, p. 314.)

See note to section 4296, Revised Statutes.

**Sec. 4298. [What vessels authorized to seize pirates.]** The President is authorized to instruct the commanders of the public armed vessels of the United States, and to authorize the commanders of any other armed vessels sailing under the authority of any letters of marque and reprisal granted by Congress, or the commanders of any other suitable vessels, to subdue, seize, take, and, if on the high seas, to send into any port of the United States, any vessel or boat built, purchased, fitted out, or held as mentioned in the preceding section.—(5 Aug., 1861, c. 48, s. 2, v. 12, p. 315.)





## TITLE LI.

### REGULATION OF FISHERIES

**Sec. 4397.** [Executive Departments to aid investigations.] The heads of the several Executive Departments shall cause to be rendered all necessary and practicable aid to the commissioner in the prosecution of his investigations and inquiries.—(9 Feb., 1871, Res. No. 22, s. 3, v. 16, p. 594.)

The “commissioner” referred to in this section is the Commissioner of Fish and Fisheries, chief of the Bureau of Fisheries, Department of Commerce.

By act of May 31, 1880 (21 Stat., 151), the Secretary of the Navy was directed to place

the vessels of the United States Fish Commission on the same footing with the Navy Department as those of the United States Coast and Geodetic Survey. (See sections 4684, 4686-4688, Revised Statutes, as to Coast and Geodetic Survey.)





## TITLE LII.

### REGULATION OF STEAM-VESSELS.

**Sec. 4400.** [What vessels are subject to the provisions of this title.] All steam vessels navigating any waters of the United States which are common highways of commerce or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this title. \* \* \*

This section was reenacted to read as above  
by act of March 17, 1906 (34 Stat., 68).

The omitted portion of the reenacted section does not relate to the Navy.

**Sec. 4412.** [Regulations as to steamers passing each other.] The board of supervising inspectors shall establish such regulations to be observed by all steam-vessels in passing each other, as they shall from time to time deem necessary for safety; two printed copies of such regulations, signed by them, shall be furnished to each of such vessels, and shall at all times be kept posted up in conspicuous places in such vessels.—(Ibid., s. 29, p. 470.)

By act of June 7, 1897, section 5 (30 Stat., 103), it was provided that sections 4233 and 4412, Revised Statutes, "(with the regulations made in pursuance thereof, except the rules and regulations for the government of pilots of steamers navigating the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, and except the rules for the Great Lakes and their connecting and tributary waters as far east as Montreal)," and certain other statutory enactments, and all amendments thereto, "are hereby repealed so far as the harbors, rivers, and inland waters aforesaid (except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico, and their tributaries) are concerned."

By act of January 18, 1897 (29 Stat., 489), it was provided that all vessels "propelled by gas, fluid, naphtha, or electric motors,"

without regard to tonnage or use, shall be subject to the provisions of section 4412 of the Revised Statutes.

By act of June 9, 1910 (36 Stat., 462), special rules were prescribed for motor boats on the navigable waters of the United States. See note to preamble of section 4233, Revised Statutes; and see acts of February 19, 1895 (28 Stat., 672), and July 9, 1918 (40 Stat., 893).

For rules published in accordance with section 4412, Revised Statutes, signed by the members of the Board of Supervising Inspectors, "for the government of pilots of vessels propelled by steam, gas, fluid, naphtha, or electric motors and of other vessels propelled by machinery, navigating the Red River of the North, the Mississippi River, and other rivers emptying into the Gulf of Mexico, and their tributaries," see Navy Regulations, 1920, page 814.

**Sec. 4413.** [Penalty for violation of regulations.] Every pilot, engineer, mate, or master of any steam vessel who neglects or willfully refuses to observe the regulations established in pursuance of the preceding section, shall be liable to a penalty of fifty dollars, and for all damages sustained by any passenger, in his person or baggage, by such neglect or refusal.—(Ibid.)

See note to section 4412, Revised Statutes.

**Sec. 4438.** [Licenses of officers by inspectors.] The boards of local inspectors shall license and classify the masters, chief mates, and second and third mates, if in charge of a watch, engineers, and pilots of all steam vessels, and the masters of sail vessels of over seven hundred gross tons, and all other vessels of over one

hundred gross tons carrying passengers for hire. It shall be unlawful to employ any person or for any person to serve as a master, chief mate, engineer, or pilot of any steamer or as master of any sail vessel of over seven hundred gross tons or of any other vessel of over one hundred gross tons carrying passengers for hire who is not licensed by the inspectors; and anyone violating this section shall be liable to a penalty of one hundred dollars for each offense.

This section was expressly amended and reenacted to read as above by act of May 23, 1908, section 2 (35 Stat., 425.)

A naval officer can not lawfully serve as master of a private steam vessel in the merchant service without having previously obtained

the license required by section 4438, Revised Statutes, although he may be eligible, by virtue of his commission, to take command of a steam vessel of the United States in the naval service. (15 Op. Atty. Gen., 61, Oct. 26, 1875.)



## TITLE LIV.

### PRIZE.

Sec.

- 4613. Application of provisions of Title.
- 4614. "Vessels of the Navy" defined.
- 4615. Duties of commanding officer upon making capture.
- 4616. Statement of claim to share in prize.
- 4617. Duties of prize-master.
- 4618. Libel and proceedings by district attorney.
- 4619. Duties of district attorneys; claim for damages against captors.
- 4621. Appointment of prize-commissioners; retired naval officer.
- 4622. Duties of prize-commissioners.
- 4623. Duties of marshal.
- 4624. Appraisal, &c., of property taken for Government.
- 4625. Proceedings for adjudication; property not sent in.
- 4626. Delivery of property on stipulation.
- 4627. When property may be sold.
- 4628. Mode of making sale.
- 4629. Transfer of property to another district for sale.

Sec.

- 4630. Share of captors.
- 4631. Distribution of proceeds to captors.
- 4632. What vessels entitled to share.
- 4633. What officers entitled to share.
- 4634. Determination of shares.
- 4636. Appeals and amendments in prize-cases.
- 4637. Powers of district court after appeal.
- 4638. Security for costs.
- 4639. Costs and expenses.
- 4640. Payment of expenses from prize-fund.
- 4641. Payment of prize-money.
- 4642. Distribution of salvage, &c.
- 4644. Clerks of district courts; accounts.
- 4645. Marshals; commissions allowed.
- 4646. District attorney and prize-commissioners; compensation.
- 4647. District attorney and prize-commissioners; accounts.
- 4650. Auctioneers; commissions.
- 4651. Witnesses' fees.
- 4652. Recaptures; salvage.

**Sec. 4613. [Application of provisions of Title.]** The provisions of this Title shall apply to all captures made as prize by authority of the United States, or adopted and ratified by the President of the United States.—(30 June, 1864, c. 174, s. 33, v. 13, p. 315. *Mrs. Alexander's Cotton*, 2 Wall., 404; *The Cotton Plant*, 10 Wall., 577.)

See sections 5310–5311, Revised Statutes. as to captures on inland waters of the United States.

**Sec. 4614. ["Vessels of the Navy," defined.]** The term "vessels of the Navy," as used in this Title, shall include all armed vessels officered and manned by the United States, and under the control of the Department of the Navy.—(*Ibid.*, s. 32. *The Siren*, 1 Low., 280.)

**Sec. 4615. [Duties of commanding officer upon making capture.]** The commanding officer of any vessel making a capture shall secure the documents of the ship and cargo, including the log-book, with all other documents, letters, and other papers found on board, and make an inventory of the same, and seal them up, and send them, with the inventory, to the court in which proceedings are to be had, with a written statement that they are all the papers found, and are in the condition in which they were found; or explaining the absence of any documents or papers, or any change in their condition. He shall also send to such court, as witnesses, the master, one or more of the other officers, the supercargo, purser, or agent of the prize, and any person found on board whom he may suppose to be interested in, or to have knowledge respecting, the title, national character, or destination of the prize. He shall send

the prize, with the documents, papers, and witnesses, under charge of a competent prize-master and prize-crew, into port for adjudication, explaining the absence of any usual witnesses; and in the absence of instructions from superior authority as to the port to which it shall be sent, he shall select such port as he shall deem most convenient, in view of the interests of probable claimants, as well as of the captors. If the captured vessel, or any part of the captured property, is not in condition to be sent in for adjudication, a survey shall be had thereon and an appraisalment made by persons as competent and impartial as can be obtained, and their reports shall be sent to the court in which proceedings are to be had; and such property, unless appropriated for the use of the Government, shall be sold by the authority of the commanding officer present, and the proceeds deposited with the assistant treasurer of the United States most accessible to such court, and subject to its order in the cause.—(Ibid., s. 1, p. 306. *The Sally Magee*, 3 Wall., 451; *The Sir William Peel*, 5 Wall., 517.)

See "Instructions for the Navy of the United States governing Maritime Warfare," Navy Department, June, 1917; see also sections

4294-4299, and 5310-5311, Revised Statutes; and see article 15 of section 1624, Revised Statutes.

**Sec. 4616. [Statement of claim to share in prize.]** If any vessel of the United States shall claim to share in a prize, either as having made the capture, or as having been within signal distance of the vessel or vessels making the capture, the commanding officer of such vessel shall make out a written statement of his claim, with the grounds on which it is founded, the principal facts tending to show what vessels made the capture, and what vessels were within signal distance of those making the capture, with reasonable particularity as to times, distances, localities, and signals made, seen, or answered; and such statement of claim shall be signed by him and sent to the court in which proceedings shall be had, and shall be filed in the cause.—(Ibid., s. 2, p. 307.)

By Navy personnel act of March 3, 1899, section 13 (30 Stat., 1007), it was provided that "all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the

payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed."

See section 1624, Revised Statutes, articles 16 and 17; and see sections 5310 and 5311, Revised Statutes.

**Sec. 4617. [Duties of prize-master.]** The prize-master shall make his way diligently to the selected port, and there immediately deliver to a prize-commissioner the documents and papers, and the inventory thereof, and make affidavit that they are the same, and are in the same condition as delivered to him, or explaining any absence or change of condition therein, and that the prize-property is in the same condition as delivered to him, or explaining any loss or damage thereto; and he shall further report to the district attorney and give to him all the information in his possession respecting the prize and her capture; and he shall deliver over the persons sent as witnesses to the custody of the marshal, and shall retain the prize in his custody until it shall be taken therefrom by process from the prize-court.—(Ibid., s. 3.)

See "Instructions for the Navy of the United States governing Maritime Warfare," Navy Department, June, 1917.



**Sec. 4618. [Libel and proceedings by district attorney.]** Upon receiving the report of the prize-master directed by the preceding section, the attorney of the United States for the district shall immediately file a libel against such prize property, and shall forthwith obtain a warrant from the court, directing the marshal to take it into his custody, and shall proceed diligently to obtain a condemnation and distribution thereof; and to that end shall see that the proper preparatory evidence is taken by the prize-commissioners, and that the prize-commissioners also take the depositions *de bene esse* of the prize-crew, and of other transient persons cognizant of any facts bearing on condemnation or distribution.—(Ibid., s. 4.)

**Sec. 4619. [Duties of district attorneys; claim for damages against captors.]** The district attorneys of the several judicial districts shall represent the interests of the United States in all prize-causes, and shall not act as separate counsel for the captors on any private retainer or compensation from them, unless in a question between the claimants and the captors, on a demand for damages. They shall examine all fees, costs, and expenses, sought to be charged on any prize-fund, and protect the interest of the captors and of the United States. The district attorneys of all districts in which any prize-causes are or may be pending shall, as often as once in three months, send to the Secretary of the Navy a statement of the condition of all prize-causes pending in their districts, in such form and embracing such particulars as the Secretary of the Navy shall require.—(Ibid.)

By section 970, Revised Statutes, it is provided that "When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall

the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: *Provided*, That the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent."

See note to Constitution, Article I, section 8, clause 13, under "IV. Responsibility of military authorities for illegal acts"; see also articles 16 and 17, section 1624, Revised Statutes.

**Sec. 4621. [Appointment of prize-commissioners; retired naval officer.]** Any district court may appoint prize-commissioners, not exceeding three in number; of whom one shall be a retired naval officer, approved by the Secretary of the Navy, who shall receive no other compensation than his pay in the Navy, and who shall protect the interests of the captors and of the Department of the Navy in the prize-property; and at least one of the others shall be a member of the bar of the court, of not less than three years' standing, and acquainted with the taking of depositions.—(30 June, 1864, c. 174, s. 5, v. 13, p. 307.)

**Sec. 4622. [Duties of prize-commissioners.]** The prize-commissioners, or one of them, shall receive from the prize-master the documents and papers, and inventory thereof, and shall take the affidavit of the prize-master required by section forty-six hundred and seventeen, and shall forthwith take the testimony of the witnesses sent in, separate from each other, on interrogatories prescribed by the court, in the manner usual in prize-courts; and the witnesses shall not be permitted to see the interrogatories, documents, or papers, or to consult with counsel, or with any persons interested, without special authority

from the court; and witnesses who have the rights of neutrals shall be discharged as soon as practicable. The prize-commissioners shall also take depositions *de bene esse* of the prize-crew and others, at the request of the district attorney, on interrogatories prescribed by the court. They shall also, as soon as any prize-property comes within the district for adjudication, examine the same, and make an inventory thereof, founded on an actual examination, and report to the court whether any part of it is in a condition requiring immediate sale for the interests of all parties, and notify the district attorney thereof; and if it be necessary to the examination or making of the inventory that the cargo be unladen, they shall apply to the court for an order to the marshal to unlade the same, and shall, from time to time, report to the court anything relating to the condition of the property, or its custody or disposal, which may require any action by the court, but the custody of the property shall be in the marshal only. They shall also seasonably return into court, sealed and secured from inspection, the documents and papers which shall come to their hands, duly scheduled and numbered, and the other preparatory evidence, and the evidence taken *de bene esse*, and their own inventory of the prize-property; and if the captured vessel, or any of its cargo or stores, are such as in their judgment may be useful to the United States in war, they shall report the same to the Secretary of the Navy.—(Ibid., s. 6, p. 308.)

**Sec. 4623. [Duties of marshal.]** The marshal shall safely keep all prize-property under warrant from the court, and shall report to the court any cargo or other property that he thinks requires to be unladen and stored, or to be sold. He shall insure prize-property, if in his judgment it is for the interest of all concerned. He shall keep in his custody all persons found on board a prize and sent in as witnesses, until they are released by the prize-commissioners or the court. If a sale of property is ordered, he shall sell the same in the manner required by the court, and collect the purchase-money, and forthwith deposit the gross proceeds of the sales with the assistant treasurer of the United States nearest the place of sale, subject to the order of the court in the particular cause; and each marshal shall forward to the Secretary of the Navy, whenever and as often as the Secretary of the Navy may require it, a full statement of the condition of each prize and of the disposal made thereof.—(Ibid., s. 7.)

**Sec. 4624. [Appraisal, etc., of property taken for Government.]** Whenever any captured vessel, arms, munitions, or other material are taken for the use of the United States before it comes into the custody of the prize court, it shall be surveyed, appraised, and inventoried, by persons as competent and impartial as can be obtained, and the survey, appraisement, and inventory shall be sent to the court in which proceedings are to be had; and if taken afterward, sufficient notice shall first be given to enable the court to have the property appraised for the protection of the rights of the claimants and captors. In all cases of prize-property taken for or appropriated to the use of the Government, the Department for whose use it is taken or appropriated shall deposit the value thereof with the assistant treasurer of the United States nearest to the place of the session of the court, subject to the order of the court in the cause.—(Ibid., s. 27, p. 314.)

See "Instructions for the Navy of the United States governing Maritime Warfare," Navy Department, June 1917.



**Sec. 4625. [Proceedings for adjudication; property not sent in.]** If by reason of the condition of the captured property, or if because the whole has been appropriated to the use of the United States, no part of it has been or can be sent in for adjudication, or if the property has been entirely lost or destroyed, proceedings for adjudication may be commenced in any district the Secretary of the Navy may designate; and in any such case the proceeds of anything sold, or the value of anything taken or appropriated for the use of the United States, shall be deposited with the assistant treasurer in or nearest to that district, subject to the order of the court in the cause. If, when no property can be sent in for adjudication, the Secretary of the Navy shall not, within three months after any capture, designate a district for the institution of proceedings, the captors may institute proceedings for adjudication in any district. And if in any case of capture no proceedings for adjudication are commenced within a reasonable time, any parties claiming the captured property may, in any district court as a court of prize, move for a monition to show cause why such proceedings shall not be commenced, or institute an original suit in such court for restitution, and the monition issued in either case shall be served on the attorney of the United States for the district, and on the Secretary of the Navy, as well as on such other persons as the court shall order to be notified.—(30 June, 1864, c. 174, s. 28, v. 13, p. 314.)

See "Instructions for the Navy of the United States governing Maritime Warfare," Navy Department, June 1917.

**Sec. 4626. [Delivery of property on stipulation.]** No prize-property shall be delivered to the claimants on stipulation, deposit, or other security, except where there has been a decree of restitution and the captors have appealed therefrom, or where the court, after a full hearing on the preparatory proofs, has refused to condemn the property on those proofs, and has given the captors leave to take further proofs, or where the claimant of any property shall satisfy the court that the same has a peculiar and intrinsic value to him, independent of its market-value. In any of these cases, the court may deliver the property on stipulation or deposit of its value, if satisfied that the rights and interests of the United States and captors, or of other claimants, will not be prejudiced thereby; but a satisfactory appraisement shall be first made, and an opportunity given to the district attorney and naval prize-commissioner to be heard as to the appointment of appraisers. Any money deposited in lieu of stipulation, and all money collected on a stipulation, not being costs, shall be deposited with the assistant treasurer, in the same manner as proceeds of a sale.—(Ibid., s. 26, p. 313.)

**Sec. 4627. [When property may be sold.]** Whenever any prize-property is condemned, or at any stage of the proceedings is found by the court to be perishing, perishable, or liable to deteriorate or depreciate, or whenever the costs of keeping the same are disproportionate to its value, the court shall order a sale of such property; and whenever, after the return-day on the libel, all the parties in interest who have appeared in the cause agree thereto, the court may make such order; and no appeal shall operate to prevent the making or execution of such order.—(Ibid., s. 8, p. 308.)

**Sec. 4628. [Mode of making sale.]** Upon a sale of any prize-property by order of the court, the Secretary of the Navy shall employ an auctioneer of

known skill in the branch of business to which any sale pertains, to make the sale, but the sale shall be conducted under the supervision of the marshal, and the collecting and depositing of the gross proceeds shall be by the auctioneer or his agent. Before any sale the marshal shall cause full catalogues and schedules to be prepared and circulated, and a copy of each shall be returned by the marshal to the court in each cause. The marshal shall cause all sales to be advertised fully and conspicuously in newspapers ordered by the court, and by posters, and he shall, at least five days before the sale, serve notice thereof upon the naval prize-commissioner, and the goods shall be open to inspection at least three days before the sale.—(Ibid.)

**Sec. 4629. [Transfer of property to another district for sale.]** Whenever it appears to the court, in the case of any prize-property ordered to be sold, that it will be for the interest of all parties to have it sold in another district, the court may direct the marshal to transfer the same to the district selected by the court for the sale, and to insure the same, with proper orders as to the time and manner of selling the same. It shall be the duty of the marshal so to transfer the property, and keep and sell the same in like manner as if the property were in his own district; and he shall deposit the gross proceeds of the sale with the assistant treasurer nearest to the place of sale, subject to the order of the court in which the adjudication thereon is pending. The necessary expenses attending the insuring, transferring, receiving, keeping, and selling the property shall be a charge upon it and upon the proceeds thereof; and whenever any such expense is paid in advance by the marshal, and he is not repaid from the proceeds, any amount not so repaid shall be allowed to him, as in case of expenses incurred in suits in which the United States is a party. The Secretary of the Navy may, in like manner, either by a general regulation or by special direction in any cause, require a marshal to transfer any prize-property from the district in which the judicial proceedings are pending, to any other district for sale; and the same proceedings shall be had as if such transfer had been made by order of the court.—(Ibid., s. 30, p. 315.)

**Sec. 4630. [Share of captors.]** The net proceeds of all property condemned as prize, shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one-half shall be decreed to the United States and the other half to the captors, except that in case of privateers and letters of marque, the whole shall be decreed to the captors, unless it shall be otherwise provided in the commissions issued to such vessels.—(Ibid., s. 10, p. 309.)

See act of March 3, 1899, quoted under section 4616, Revised Statutes; and see sections 5310 and 5311, Revised Statutes.

**Sec. 4631. [Distribution of proceeds to captors.]** All prize-money adjudged to the captors shall be distributed in the following proportions:

First. To the commanding officer of a fleet or squadron, one-twentieth part of all prize money awarded to any vessel or vessels under his immediate command.

Second. To the commanding officer of a division of a fleet or squadron, on duty under the orders of the commander-in-chief of such fleet or squadron, a sum equal to one-fiftieth part of any prize-money awarded to a vessel of



such division for a capture made while under his command, such fiftieth part to be deducted from the moiety due to the United States, if there be such moiety, otherwise from the amount awarded to the captors; but such fiftieth part shall not be in addition to any share which may be due to the commander of the division, and which he may elect to receive, as commander of a single ship making or assisting in the capture.

Third. To the fleet-captain, one-hundredth part of all prize-money awarded to any vessel or vessels of the fleet or squadron in which he is serving, except in a case where the capture is made by the vessel on board of which he is serving at the time of such capture; and in such case he shall share, in proportion to his pay, with the other officers and men on board such vessel.

Fourth. To the commander of a single vessel, one-tenth part of all the prize-money awarded to the vessel under his command, if such vessel at the time of the capture was under the command of the commanding officer of a fleet or squadron, or a division, and three-twentieths if his vessel was acting independently of such superior officer.

Fifth. After the foregoing deductions, the residue shall be distributed and proportioned among all others doing duty on board, including the fleet-captain, and borne upon the books of the ship, in proportion to their respective rates of pay in the service.—(Ibid. 8 June, 1874, c. 256, v. 18, p. 63.)

See act of March 3, 1899, quoted under section 4616, Revised Statutes; and see sections 4642 and 4652, Revised Statutes, as to

distribution of salvage, etc.; see also sections 5310 and 5311, Revised Statutes.

**Sec. 4632. [What vessels entitled to share.]** All vessels of the Navy within signal-distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid, if required, shall share in the prize; and in case of vessels not in the Navy, none shall be entitled to share except the vessel or vessels making the capture; in which term shall be included vessels present at and rendering actual assistance in the capture.—(30 June, 1864, c. 174, s. 10, v. 13, p. 309.)

See act of March 3, 1899, quoted under section 4616, Revised Statutes; and see sections

4642 and 4652, Revised Statutes, as to distribution of salvage, etc.

**Sec. 4633. [What officers entitled to share.]** No commanding officer of a fleet or squadron shall be entitled to receive any share of prizes captured by any vessel or vessels not under his command, nor of such prizes as may have been captured by any vessels intended to be placed under his command, before they have acted under his orders. Nor shall the commanding officer of a fleet or squadron, leaving the station where he had command, have any share in the prizes taken by ships left on such station after he has gone out of the limits of his command, nor after he has transferred his command to his successor. No officer or other person who shall have been temporarily absent on duty from a vessel on the books of which he continued to be borne, while so absent, shall be deprived, in consequence of such absence, of any prize-money to which he would otherwise be entitled. And he shall continue to share in the captures of the vessels to which he is attached, until regularly discharged therefrom.—(30 June, 1864, c. 174, s. 10, v. 13, c. 309.)

See act of March 3, 1899, quoted under section 4616, Revised Statutes; and see sections

4642 and 4652, Revised Statutes, as to distribution of salvage, etc.

**Sec. 4634. [Determination of shares.]** Whenever a decree of condemnation is rendered, the court shall consider the claims of all vessels to participate in the proceeds, and for that purpose shall, at as early a stage of the cause as possible, order testimony to be taken tending to show what part should be awarded to the captors, and what vessels are entitled to share; and such testimony may be sworn to before any judge or commissioner of the courts of the United States, consul or commercial agent of the United States, or notary public, or any officer of the Navy highest in rank, reasonably accessible to the deponent. The court shall make a decree of distribution, determining what vessels are entitled to share in the prize, and whether the prize was of superior, equal, or inferior force to the vessel or vessels making the capture. The decree shall recite the amount of the gross proceeds of the prize subject to the order of the court, and the amount deducted therefrom for costs and expenses, and the amount remaining for distribution, and whether the whole of such residue is to go to the captors, or one-half to the captors, and one-half to the United States.—(Ibid., s. 9.)

See act of March 3, 1899, quoted under section 4616, Revised Statutes; and see sections

4642 and 4652, Revised Statutes, as to distribution of salvage, etc.

**Sec. 4636. [Appeals and amendments in prize cases.]** The Supreme Court may, if, in its judgment, the purposes of justice require it, allow any amendment, either in form or substance, of any appeal in prize cases, or allow a prize appeal therein, if it appears that any notice of appeal or of intention to appeal was filed with the clerk of the district court within thirty days next after the rendition of the final decree therein.—(3 Mar., 1873, c. 230, s. 2, v. 17, p. 556.)

**Sec. 4637. [Powers of district court after appeal.]** Notwithstanding any appeal to the Supreme Court, the district court may make and execute all necessary orders for the custody and disposal of the prize-property; and in case of appeal from a decree of condemnation, may still proceed to make a decree of distribution so far as to determine what share of the prize shall go to the captors, and what vessels are entitled to participate therein.—(30 June, 1864, c. 174, s. 13, v. 13, p. 310.)

See act of March 3, 1899, quoted under section 4616, Revised Statutes.

**Sec. 4638. [Security for costs.]** The court may require any party, at any stage of the cause, and on claiming an appeal, to give security for costs.—(Ibid., s. 15, p. 311.)

**Sec. 4639. [Costs and expenses.]** All costs and all expenses incident to the bringing in, custody, preservation, insurance, sale, or other disposal of prize-property, when allowed by the court, shall be a charge upon such property, and shall be paid from the proceeds thereof, unless the court shall decree restitution free from such charge.—(Ibid., s. 14.)

**Sec. 4640. [Payment of expenses from prize-fund.]** No payments shall be made for any prize-fund, except upon the order of the court. All charges for work and labor, materials furnished, or money paid, shall be supported by affidavit or vouchers. The court may, at any time, order the payment, from the deposit made with the assistant treasurer in the cause, of any costs or charges accrued and allowed. When the cause is finally disposed of, the court shall make its order or orders on the assistant treasurer to pay the costs and charges



allowed and unpaid; and in case the final decree shall be for restitution, or in case there shall be no money subject to the order of the court in the cause, any costs or charges allowed by the court, and not paid by the claimants, shall be a charge upon, and be paid out of, the fund for defraying the expenses of suits in which the United States is a party or interested.—(Ibid.)

**Sec. 4641. [Payment of prize money.]** The net amount decreed for distribution to the United States, or to vessels of the Navy, shall be ordered by the court to be paid into the Treasury of the United States, to be distributed according to the decree of the court. The Treasury Department shall credit the Navy Department with each amount received to be distributed to vessels of the Navy; and the persons entitled to share therein shall be severally credited in their accounts with the Navy Department with the amounts to which they are respectively entitled. In case of vessels not of the Navy, and not controlled by any Department of the Government, the distribution shall be made by the court to the several parties entitled thereto, and the amounts decreed to them shall be divided between the owners and the ship's company, according to any written agreement between them, and in the absence of such agreement, one-half to the owners and one-half to the ship's company, according to their respective rates of pay on board; and the court may appoint a commissioner to make such distribution, subject to the control of the court, who shall make due return of his doings, with proof of actual payments by him, and who shall receive no other compensation, directly or indirectly, than such as shall be allowed him by the court. In case of vessels not of the Navy, but controlled by either Executive Department, the whole amount decreed to the captors shall be divided among the ship's company.—(Ibid., s. 16.)

See act of March 3, 1899, quoted under section 4616, Revised Statutes.

**Sec. 4642. [Distribution of salvage, etc.]** All ransom-money, salvage, bounty, or proceeds of condemned property, accruing or awarded to any vessel of the Navy, shall be distributed and paid to the officers and men entitled thereto in the same manner as prize-money, under the direction of the Secretary of the Navy.—(Ibid., s. 11, p. 310.)

See act of March 3, 1899, noted under section 4616, Revised Statutes.

By act of July 1, 1918 (40 Stat., 705), it was provided "that hereafter the Secretary of the Navy is authorized to cause vessels under his control adapted to the purpose, to afford salvage service to public or private vessels in distress: *Provided*, That when

such salvage service is rendered by a vessel specially equipped for the purpose or by a tug, the Secretary of the Navy may determine and collect reasonable compensation therefor."

See act of March 9, 1920, sections 10 and 11 (41 Stat., 528), relating to suits for salvage.

**Sec. 4644. [Clerks of district courts; accounts.]** The clerk of each district court shall render, to the Secretary of the Treasury and the Secretary of the Navy, a semi-annual statement of all the sums allowed by the court, and ordered to be paid, within the previous half-year, to the district attorney and prize-commissioners for services, and to marshals for fees and commissions; and he shall, in all prize-causes in the district, for the purpose of the final decree of distribution, ascertain and keep an account of the amount deposited with the assistant treasurer, subject to the order of the court, in each prize-cause, and the amounts ordered to be paid therefrom as costs and charges, and the residue for distribution; and shall send copies of all final decrees of distribution to the

Secretary of the Treasury and the Secretary of the Navy; and shall draw the orders of the court for the payment of all costs and allowances, and for the distribution of the residue. For these services he shall be entitled to receive the sum of twenty-five dollars in each prize-cause, which shall be in full for the services required by this action.—(Ibid., s. 17, p. 312.)

**Sec. 4645. [Marshals; commissions allowed.]** The marshal shall be allowed his actual and necessary expenses for the custody, care, preservation, insurance, sale, or other disposal of the prize-property, and for executing any order of the court respecting the same, and shall have a commission of one-quarter of one per centum on vessels, and of one-half of one per centum on all other prize-property, calculated on the gross proceeds of each sale; and if, after he has had any prize-property in his custody, and has actually performed labor and incurred responsibility for the care and preservation thereof, the same is taken by the United States for its own use without a sale, or if it is delivered on stipulation to the claimants, he shall, in case the same is condemned, be entitled to one-half the above commissions on the amount deposited by the United States to the order of the courts, or collected upon the stipulation. No charges of the marshal for expenses or disbursements shall be allowed, except upon his oath that the same have been actually and necessarily incurred for the purpose stated.—(Ibid., s. 18.)

**Sec. 4646. [District attorney and prize-commissioners; compensation.]** The district attorney and prize-commissioners, except the naval officer, shall be allowed a just and suitable compensation for their respective services in each prize-cause, to be adjusted and determined by the court, and to be paid as costs in the cause.—(Ibid., s. 20.)

See section 3667, Revised Statutes, and note thereto, as to naval pension fund.

**Sec. 4647. [District attorney and prize-commissioners; accounts.]** Each district attorney and prize-commissioner, except the naval officer, shall render to the Attorney-General an annual account of all sums he shall have received for all services in prize-causes within the previous year; and the district attorney shall be allowed to retain therefrom a sum not exceeding three thousand dollars a year, in addition to the maximum compensation allowed to be retained by him; under the provisions of Title XIII, "THE JUDICIARY," or in addition to any salary he may receive in lieu of such maximum compensation; and each such prize-commissioner shall be allowed to retain a sum not exceeding three thousand dollars a year, which shall be in full for all his official services in prize-causes; and any excess over those respective amounts shall be paid by the officer receiving the same into the Treasury of the United States, and shall be credited to the fund for paying naval pensions.—(30 June, 1864, c. 174, s. 21, v. 13, p. 312. 22 June, 1870, c. 150, s. 15, v. 16, p. 164.)

**Sec. 4650. [Auctioneers; commissions.]** The auctioneers employed to make sales of prize-property shall be entitled to receive commissions by a scale to be established by the Secretary of the Navy, not to exceed, in any case, one-half of one per centum on any sum exceeding ten thousand dollars on vessels, nor one per centum on that sum on other prize-property, which shall be in full for expenses, as well as for services; and in case no such scale shall be established, they shall be entitled to receive such compensation as the court shall deem just under the circumstances of each case.—(Ibid., s. 22.)



**Sec. 4651. [Witnesses' fees.]** Whenever the court shall allow fees to any witness in a prize-cause, or fees for taking evidence out of the district in which the court sits, and there is no money subject to its order in the cause, the same shall be paid by the marshal, and shall be repaid to him from any money deposited to the order of the court in the cause; and any amount not so repaid the marshal shall be allowed as witness-fees paid by him in cases in which the United States is a party.—(30 June, 1864, c. 174, s. 25, v. 13, p. 313.)

**Sec. 4652. [Recaptures; salvage.]** When any vessel or other property shall have been captured by any force hostile to the United States, and shall be recaptured, and it shall appear to the court that the same had not been condemned as prize before its recapture, by any competent authority, the court shall award a meet and competent sum as salvage, according to the circumstances of each case. If the captured property belonged to the United States, it shall be restored to the United States, and there shall be paid from the Treasury of the United States the salvage, costs, and expenses ordered by the court. If the recaptured property belonged to persons residing within or under the protection of the United States, the court shall adjudge the property to be restored to its owners, upon their claim, on the payment of such sum as the court may award as salvage, costs, and expenses. If the recaptured property belonged to any person permanently resident within the territory and under the protection of any foreign prince, government, or state in amity with the United States, and by the law or usage of such prince, government, or state, the property of a citizen of the United States would be restored under like circumstances of recapture, it shall be adjudged to be restored to such owner, upon his claim, upon such terms as by the law or usage of such prince, government, or state would be required of a citizen of the United States under like circumstances of recapture; or when no such law or usage shall be known, it shall be adjudged to be restored upon the payment of such salvage, costs, and expenses as the court shall order. The whole amount awarded as salvage shall be decreed to the captors, and no part to the United States, and shall be distributed as in the case of proceeds of property condemned as prize. Nothing in this Title shall be construed to contravene any treaty of the United States.—(Ibid., s. 29, p. 314.)

See section 4642, Revised Statutes, and note thereto, as to distribution of salvage.





## TITLE LV.

### LIGHTS AND BUOYS.

**Sec. 4679.** [Light-House Board; no additional compensation to officers.] No additional salary shall be allowed to any civil, military, or naval officer on account of his being employed on the Light-House Board, or being in any manner attached to the light-house service.—(31 Aug., 1852, c. 112, s. 17, v. 10, p. 120.)

By act of June 17, 1910, section 4 (36 Stat., 537), a bureau of light-houses was established in the Department of Commerce and Labor (now the Department of Commerce); and by section 5 of the same act it was provided that "all employees of or in the Light-House Board or the Light-House Establishment are hereby transferred to the bureau of light-houses, excepting, however, Army and Navy officers."

"Hereafter officers of the Army and Navy detailed for service in connection with the Light-House Establishment shall be paid their actual traveling expenses when traveling under orders on official duty to and from points which can not be conveniently reached by vessel or railroad." (Act Feb. 26, 1907, sec. 6, 34 Stat., 997; see also sec. 1566, R. S., and notes thereto, as to mileage and actual expenses of naval officers traveling on duty.)

By section 4671, Revised Statutes, it was provided that "an officer of the Army or Navy shall be assigned to each district as a light-house inspector, subject to the orders of the Light-House Board;" etc. Said section was expressly repealed by the act of June 17, 1910, section 13 (36 Stat., 539), which said act, section 11 (36 Stat., 538, 539) provided that "the President may, for a period not exceeding three years from the taking effect of this section, assign Army and Navy officers to act in lieu of the appointment of civilian light-house inspectors, but such Army and Navy officers shall not receive any salary or compensation in addition to the salary or compensation they are entitled to as such Army or Navy officers."





## TITLE LVI.

### THE COAST SURVEY.

**Sec. 4684.** [Employment of officers of Army and Navy.] The President shall carry into effect the plan of the board, as agreed upon by a majority of its members; and shall cause to be employed as many officers of the Army and Navy of the United States as will be compatible with the successful prosecution of the work; the officers of the Navy to be employed on the hydrographical parts, and the officers of the Army on the topographical parts of the work; and no officer of the Army or Navy shall receive any extra pay out of any appropriations for surveys.—(Ibid.)

The "board" referred to in this section is that provided for in section 4683, Revised Statutes, as follows: "All appropriations made for the work of surveying the coast of the United States shall be expended in accordance with the plan of reorganizing

the mode of executing the survey which has been submitted to the President by a board of officers organized under the act of March three, eighteen hundred and forty-three, chapter one hundred."

**Sec. 4686.** [Power to employ vessels.] The President is authorized, for any of the purposes of surveying the coast of the United States, to cause to be employed such of the public vessels in actual service as he deems it expedient to employ, and to give such instructions for regulating their conduct as he deems proper, according to the tenor of this Title.—(10 Feb., 1807, c. 8, s. 3, v. 2, p. 414. 14 April, 1818, c. 58, s. 1, v. 3, p. 425.)

**Sec. 4687.** [Officers of the Army and Navy; manner of employment.] Officers of the Army and Navy shall, as far as practicable, be employed in the work of surveying the coast of the United States, whenever and in the manner required by the Department having charge thereof.—(17 June, 1844, c. 105, s. 1, v. 5, pp. 681, 691.)

**Sec. 4688.** [Allowance for subsistence.] The Secretary of the Treasury may make such allowances to the officers and men of the Army and Navy, while employed on Coast Survey service, for subsistence, in addition to their compensation, as he may deem necessary, not exceeding the sum authorized by the Treasury regulation of the eleventh day of May, eighteen hundred and forty-four.—(12 June, 1858, c. 154, s. 1, v. 11, pp. 319, 320.)

For restriction upon allowance to officers of Army and Navy attached to the Coast and

Geodetic Survey, see act August 30, 1890 (26 Stat., 382.)





## TITLE LVII.

### PENSIONS.

[BY ACT OF OCTOBER 6, 1917, AS AMENDED BY ACT OF JUNE 25, 1918, SECTION 17, IT WAS ENACTED IN SECTION 312 THEREOF (40 STAT., 408, 613), THAT "THE LAWS PROVIDING FOR GRATUITIES OR PAYMENTS IN THE EVENT OF DEATH IN THE SERVICE AND EXISTING PENSION LAWS SHALL NOT BE APPLICABLE AFTER THE ENACTMENT OF THIS AMENDMENT TO ANY PERSON IN THE ACTIVE MILITARY OR NAVAL SERVICE ON THE SIXTH DAY OF OCTOBER, NINETEEN HUNDRED AND SEVENTEEN, OR WHO THEREAFTER ENTERED THE ACTIVE MILITARY OR NAVAL SERVICE, OR TO THEIR WIDOWS, CHILDREN, OR THEIR DEPENDENTS, EXCEPT IN SO FAR AS RIGHTS UNDER ANY SUCH LAW HAVE HERETOFORE ACCRUED."]

Sec.

4750. Navy pension fund, Secretary of the Navy trustee.  
4752. Navy pension fund, prize money accruing to United States.  
4753. Navy pension fund, how invested.  
4754. Navy pension fund, rate of interest  
4755. Navy pensions payable from fund.  
4756. Disabled enlisted men, twenty years' service.

Sec.

4757. Disabled enlisted men, ten years' service.  
4787. Artificial limbs.  
4788. Commutation for artificial limbs.  
4789. Commutation paid by Commissioner of Pensions.  
4790. Commutation to those who can not use artificial limb.  
4791. Transportation to persons receiving artificial limbs.

**Sec. 4750. [Navy pension-fund, Secretary of the Navy trustee.]** The Secretary of the Navy shall be trustee of the Navy pension-fund.—(10 July, 1832, c. 194, s. 1, v. 4, p. 572.)

See sections 3667, 3689, 4647, and 4752–4757, Revised Statutes.

**Maintenance of Naval Home.**—The annual naval appropriation act, in appropriating for the maintenance of the Naval Home, Philadelphia, Pa., provides that the sum so appropriated "shall be paid out of the income of the naval pension fund" (e. g., act June 4, 1920, 41 Stat., 818).

**Payment of naval pensions.**—The annual act making appropriation for Army and Navy pensions provides that the sum so appropriated for Navy pensions "shall be paid from the income of the Navy pension fund, so far as the same shall be sufficient for that purpose" (e. g., act. Feb. 16, 1921, 41 Stat., 1104). See also section 4755, Revised Statutes.

**History of naval pension fund.**—See "Manual for the Medical Department of the United

States Navy," 1917, paragraphs 3761–3784.

"All moneys derived from the sale of material at the Naval Home, which was originally purchased from moneys appropriated from the income from the naval pension fund, and all moneys derived from the rental of Naval Home property, shall hereafter be turned into the naval pension fund." (Act Mar. 4, 1917, 39 Stat., 1175.)

**Pensions of deceased inmates of the Naval Home** are to escheat to the naval pension fund in certain cases. (See act June 30, 1914, 38 Stat., 398, quoted under sec. 4813, R. S.)

**Money belonging to deceased inmates of the Naval Home** is to be credited to the naval pension fund in certain cases. (See act June 30, 1914, 38 Stat., 398.)

**Sec. 4752. [Navy pension-fund, prize money accruing to United States.]** All money accruing or which has already accrued to the United States from sale of prizes shall be and remain forever a fund for the payment of pensions to the officers, seamen, and marines who may be entitled to receive the same; and if such fund be insufficient for the purpose, the public faith is pledged to make up the deficiency; but if it should be more than sufficient, the surplus shall be

applied to the making of further provision for the comfort of the disabled officers, seamen, and marines.—(17 July, 1862, c. 201, s. 11, v. 12, p. 607.)

See note to section 4750, Revised Statutes; and see sections 4613–4652, Revised Statutes, as to capture and sale of prizes.

**Sec. 4753. [Navy pension-fund, how invested.]** The Secretary of the Navy, as trustee of the naval pension-fund, is directed to cause to be invested in the registered securities of the United States, on the first day of January and the first day of July of each year, so much of such fund then in the Treasury of the United States as may not be required for the payment of naval pensions for the then current fiscal year; and upon the requisition of the Secretary, so much of the fund as may not be required for such payment of pensions accruing during the current fiscal year shall be held in the Treasury on the days above named in each year, subject to his order, for the purpose of such immediate investment; and the interest payable in coin upon the securities in which the fund may be invested, shall be so paid, when due, to the order of the Secretary of the Navy, and he is authorized and directed to exchange the amount of such interest when paid in coin, for so much of the legal currency of the United States as may be obtained therefor at the current rates of premium on gold, and to deposit the interest so converted in the Treasury to the credit of the naval pension-fund; but nothing herein contained shall be construed to interfere with the payment of naval pensions under the supervision of the Secretary of the Interior, as regulated by law.—(1 July, 1864, Res. No. 62, v. 13, p. 414.)

See note to section 4750, Revised Statutes.

**Sec. 4754. [Navy pension-fund, rate of interest.]** The interest on the naval pension-fund shall hereafter be at the rate of three per centum per annum in lawful money.—(23 July, 1868, c. 229, s. 2, v. 15, p. 170.)

See note to section 4750, Revised Statutes.

**Sec. 4755. [Navy pensions payable from fund.]** The Navy pensions shall be paid from the Navy pension-fund, but no payments shall be made therefrom except upon appropriations authorized by Congress.—(23 July, 1868, c. 229, s. 2, v. 15, p. 170. 11 July, 1870, c. 238, v. 16, p. 222. 20 June, 1874, c. 335, v. 18, p. 115. 23 Mar., 1876, c. 30, v. 19, p. 8. 19 Jan., 1877, c. 27, v. 19, p. 224.)

See note to section 4750, Revised Statutes.

**Sec. 4756. [Disabled enlisted men, twenty years' service.]** There shall be paid out of the naval pension-fund to every person who, from age or infirmity, is disabled from sea-service, but who has served as an enlisted person or as an appointed petty officer, or both, in the Navy or Marine Corps for the period of twenty years, and not been discharged for misconduct, in lieu of being provided with a home in the Naval Asylum, Philadelphia, if he so elects, a sum equal to one-half the pay of his rating at the time he was discharged, to be paid to him quarterly, under the direction of the Commissioner of Pensions; and applications for such pension shall be made to the Secretary of the Navy, who, upon being satisfied that the applicant comes within the provisions of this section, shall certify the same to the Commissioner of Pensions, and such certificate shall be his warrant for making payment as herein authorized.—(2 Mar., 1867, c. 174, s. 6, v. 14, p. 516.)



This section was expressly amended to read as above by act of December 23, 1886 (24 Stat., 353), the amendment consisting of inserting therein the words, "or as an appointed petty officer, or both," after the words, "as an enlisted person."

"The laws providing for gratuities or payments in the event of death in the service and existing pension laws shall not be applicable after the enactment of this amendment to any person in the active military or naval service on the sixth day of October, nineteen hundred and seventeen, or who thereafter entered the active military or naval service, or to their widows, children, or their dependents, except in so far as rights under any such law have heretofore accrued." (Act Oct. 6, 1917, sec. 312, 40 Stat., 408, as amended by act of June 25, 1918, sec. 17, 40 Stat., 613.)

"The pensions of beneficiaries of the Naval Home shall be disposed of in the same manner as prescribed for inmates of the Soldiers' Home, \* \* \* under such regulations as the Secretary of the Navy may prescribe." (Act June 30, 1914, 38 Stat., 398.) See note to section 4813, Revised Statutes.

**Jurisdiction of the Secretary of the Navy.**—The Secretary of the Navy has exclusive jurisdiction to determine who are entitled to the money benefits granted by section 4756 of the Revised Statutes, and after that official has issued a certificate allowing same, the Commissioner of Pensions, in making payment of said money benefits, acts only in a ministerial capacity. (31 Op. Atty. Gen., 127; affirmed, Op. Atty. Gen., Nov. 7, 1917, file 26510-1022: 11; see C. M. O. 37-1918, p. 20.)

See note to section 471, Revised Statutes, as to jurisdiction of the Secretary of the Navy and the Commissioner of Pensions.

**Effect of War Risk Insurance Act.**—Section 4756, Revised Statutes, is, under the established practice of the Navy Department, to be regarded as one of the "existing pension laws" referred to in section 312 of the War Risk Insurance Act of October 6, 1917 (quoted above). Payments under section 4756 can not, therefore, be any longer made except so far as rights under the said section had accrued on October 6, 1917. (31 Op. Atty. Gen., 296.)

A sergeant in the Marine Corps who, prior to the enactment of the War Risk Insurance Act of October 6, 1917 (above quoted), had served in the corps for more than 21 years, and who had become "disabled from sea service" by a

wound received in action in June 1916, but who, though entitled to honorable discharge from the service on October 6, 1917, did not actually receive his discharge until November 5, 1917, is entitled both to the benefits of section 4756, Revised Statutes, and also to whatever allowance he may be otherwise entitled to under the provisions of the War Risk Insurance Act. (31 Op. Atty. Gen., 296.)

In this case the rights of the sergeant under section 4756 had "accrued" on October 6, 1917, and the fact that he did not actually receive his discharge until November 5, 1917, is immaterial. (31 Op. Atty. Gen., 296.)

**Allowance in addition to pension.**—Allowances under sections 4756 and 4757, Revised Statutes, do not fall within the prohibition of section 4715, Revised Statutes (prohibiting the allowance of more than one pension at the same time), and may therefore be paid in addition to a pension under the general pension laws. (31 Op. Atty. Gen., 268.)

**Allowance in addition to War Risk compensation.**—Assuming that the provisions of the War Risk Insurance Act, providing compensation for injuries, are to be regarded as constituting a general pension law, nevertheless the prohibition of section 4715, Revised Statutes, against the allowance of more than one pension at the same time to the same person does not affect the case of allowances under section 4756, Revised Statutes. (31 Op. Atty. Gen., 296, citing 31 Op. Atty. Gen., 268.)

See note above, under "Effect of War Risk Insurance Act."

**Allowance to inmates of Naval Home.**—The money benefits provided for in section 4756 of the Revised Statutes are "pensions" within the purview of section 4813 of the Revised Statutes and the pertinent provision of the act of June 30, 1914 (quoted above), and such money benefits inure to the grantees concurrently with maintenance in the Naval Home. (31 Op. Atty. Gen., 268. See secs. 4757 and 4813, R. S., and notes thereto.)

**Allowance to inmates of St. Elizabeths Hospital.**—Allowances under sections 4756 and 4757, Revised Statutes, which accrue to inmates of St. Elizabeths Hospital, should be paid to the superintendent of the hospital, notwithstanding such inmates are represented by a legal guardian or committee. (31 Op. Atty. Gen., 354.) See sections 1551, 4838, and 4839, Revised Statutes.

For other cases, see note to section 4757, Revised Statutes.

**Sec. 4757. [Disabled enlisted men, ten years' service.]** Every disabled person who has served in the Navy or Marine Corps as an enlisted man or as an appointed petty officer, or both, for a period not less than ten years, and not been discharged for misconduct, may apply to the Secretary of the Navy for aid from the surplus income of the naval pension-fund; and the Secretary of the Navy is authorized to convene a board of not less than three naval officers, one of whom shall be a surgeon, to examine into the condition of the applicant, and to recommend a suitable amount for his relief, and for a specified time, and upon the approval of such recommendation by the Secretary of the Navy,

and certificate thereof to the Commissioner of Pensions, the amount shall be paid in the same manner as is provided in the preceding section for the payment to persons disabled by long service in the Navy; but no allowance so made shall exceed the rate of a pension for full disability corresponding to the grade of the applicant, nor, if in addition to a pension, exceed one-fourth the rate of such pension.—(2 Mar., 1867, c. 174, s. 6, v. 14, p. 516.)

This section was expressly amended to read as above by act of December 23, 1886 (24 Stat., 353), the amendment consisting of inserting the words, "or as an appointed petty officer, or both," after the words, "as an enlisted man."

See note to section 4756, Revised Statutes.

**Allowance to inmates of Naval Home.**—Allowances under section 4757, Revised Statutes, are "pensions" within the meaning of

section 4813 of the Revised Statutes and the act of June 30, 1914 (33 Stat., 398), and should therefore be disposed of, in cases where the beneficiaries are inmates of the Naval Home, in the manner prescribed by that act, that is, paid to the governor of the Naval Home for the use of the grantees. (31 Op. Atty. Gen., 268.)

See note to section 4756, Revised Statutes; and see section 4813, Revised Statutes, and note thereto.

**Sec. 4787. [Artificial limbs.]** Every officer, soldier, seaman, and marine, who was disabled, during the war for the suppression of the rebellion, in the military or naval service, and in the line of duty, or in consequence of wounds received or disease contracted therein, and who was furnished by the War Department, since the seventeenth day of June, eighteen hundred and seventy, with an artificial limb or apparatus for resection, or who was entitled to receive such limb or apparatus since said date, shall be entitled to receive a new limb or apparatus at the expiration of every five years thereafter, under such regulations as have been or may be prescribed by the Surgeon-General of the Army. [The provisions of this section shall apply to all officers, non-commissioned officers, enlisted and hired men of the land and naval forces of the United States, who, in the line of their duty as such, shall have lost limbs or sustained bodily injuries depriving them of the use of any of their limbs, to be determined by the Surgeon-General of the Army; and the term of five years herein specified shall be held to commence in each case with the filing of the application for the benefits of this section.]—(27 July, 1868, c. 264, s. 14, v. 15, p. 237. 17 June, 1870, c. 132, s. 1, v. 16, p. 153. 30 June, 1870, c. 179, v. 16, p. 174. 23 Mar., 1876, c. 30, v. 19, p. 8. 27 Feb., 1877, c. 69, v. 19, p. 252.)

This section is reproduced above as it appears in the second edition of the Revised Statutes. The portion thereof in brackets was added to the original section by act of February 27, 1877 (19 Stat., 252).

By act of August 15, 1876 (19 Stat., 203-204), provision was made for furnishing artificial limbs or appliances or commutation therefor to "every officer, soldier, seaman and marine, who, in the line of duty, in the military or naval service of the United States, shall have lost a limb, or sustained bodily injuries, depriving him of the use of any of his limbs." (See act cited.)

By act of March 3, 1891 (26 Stat., 1103), it was provided "That section forty-seven hundred and eighty-seven of the Revised Statutes of the United States be amended by striking out the word 'five' where it occurs therein, and inserting in lieu thereof

the word "three" so that when amended said section will read as follows: Every officer, soldier, seaman, and marine who was disabled during the war for the suppression of the rebellion, in the military or naval service, and in the line of duty, or in consequence of wounds received or disease contracted therein, and who was furnished by the War Department since the seventeenth day of June, eighteen hundred and seventy, with an artificial limb or apparatus for resection, who was entitled to receive such limb or apparatus since said date, shall be entitled to receive a new limb or apparatus at the expiration of every three years thereafter, under such regulations as have been or may be prescribed by the Surgeon-General of the Army.

See note to section 1176, Revised Statutes.

**Sec. 4788. [Commutation for artificial limbs.]** Every person entitled to the benefits of the preceding section may, if he so elects, receive, instead of such



limb or apparatus, the money value thereof, at the following rates, namely: For artificial legs, seventy-five dollars; for arms, fifty dollars; for feet, fifty dollars; for apparatus for resection, fifty dollars.—(17 June, 1870, c. 132, s. 1, v. 16, p. 153. 15 Aug., 1876, c. 300, v. 19, p. 203.)

See act of August 15, 1876 (19 Stat., 203–204), and note to section 1176, Revised Statutes.

**Sec. 4789. [Commutation paid by Commissioner of Pensions.]** The Surgeon-General shall certify to the Commissioner of Pensions a list of all soldiers who elect to receive money commutation instead of limbs or apparatus, with the amount due to each, and the Commissioner of Pensions shall cause the same to be paid to such soldiers in the same manner as pensions are paid.—(17 June, 1870, c. 132, s. 2, v. 16, p. 153.)

See act of August 15, 1876 (19 Stat., 203–204), and note to section 1176, Revised Statutes; see also act of March 3, 1891 (26 Stat., 979).

**Sec. 4790. [Commutation to those who can not use artificial limb.]** Every person in the military or naval service who lost a limb during the war of the rebellion, [or is entitled to the benefits of section forty-seven hundred and eighty-seven,] but from the nature of his injury is not able to use an artificial limb, shall be entitled to the benefits of section forty-seven hundred and eighty-eight, and shall receive money commutation as therein provided.—(Ibid., s. 3. 27 Feb., 1877, c. 69, v. 19, p. 252.)

This section was amended to read as above by act of February 27, 1877 (19 Stat., 252), which inserted therein the words inclosed in brackets.

**Sec. 4791. [Transportation to persons receiving artificial limbs.]** The Secretary of War is authorized and directed to furnish to the persons embraced by the provisions of section forty-seven hundred and eighty-seven, transportation to and from their homes and the place where they may be required to go to obtain artificial limbs provided for them under authority of law. [The transportation allowed for having artificial limbs fitted shall be furnished by the Quartermaster-General of the Army, the cost of which shall be refunded from the appropriations for invalid pensions.]—(28 July, 1866, c. 305, v. 14, p. 342. 23 Mar., 1876, c. 30, v. 19, p. 8. 15 Aug., 1876, c. 300, s. 2, v. 19, p. 204. 27 Feb., 1877, c. 69, v. 19, p. 252.)

This section was amended to read as above by act of February 27, 1877 (19 Stat., 252), which added thereto the words inclosed in brackets.





## TITLE LIX.

### HOSPITALS, ASYLUMS, AND CEMETERIES.

Sec.	Sec.
4807. Superintendence of Navy hospitals.	4838. Saint Elizabeth Hospital.
4808. Navy hospital fund.	4839. Superintendent; money and pensions of inmates.
4809. Appropriation of fines.	4843. Admission of insane persons of Navy, Marine Corps, etc.
4810. Purchase and erection of Navy hospitals and naval home.	4878. Burial in national cemeteries.
4811. Naval Home, government of.	
4812. Allowance of rations to Navy hospitals.	
4813. Allowance from pensions to Navy hospitals.	

**Sec. 4807. [Superintendence of Navy hospitals.]** The Secretary of the Navy shall have the general charge and superintendence of Navy hospitals.—(26 Feb., 1811, c. 26, s. 1, v. 2, p. 650. 10 July, 1832, c. 194, s. 5, v. 4, p. 573.)

See note to section 4810, Revised Statutes.

**Sec. 4808. [Navy hospital fund.]** The Secretary of the Navy shall deduct from the pay due each officer, seaman and marine, in the Navy, at the rate of twenty cents per month for each person, to be applied to the fund for Navy hospitals.—(2 Mar., 1799, c. 36, s. 2, v. 1, p. 729. 26 Feb., 1811, c. 26, s. 1, v. 2, p. 650.)

See sections 1614 and 1586, Revised Statutes. For history of naval hospital fund, and information relating thereto, see "Manual for the Medical Department of the United States Navy," 1917, paragraphs 3631-3671.

Other sources of income to naval hospital fund: See sections 4809, 4812, and 4813, Revised Statutes, and note thereto. Restrictions upon use of naval hospital fund for erection of hospitals: See section 4810, Revised Statutes.

**Sec. 4809. [Appropriation of fines.]** All fines imposed on navy officers, seamen, and marines shall be paid to the Secretary of the Navy, for the maintenance of Navy hospitals.—(26 Feb., 1811., c. 26, s. 2, v. 2, p. 650. 10 July, 1832, c. 194, s. 5, v. 4, p. 573.)

By act of June 7, 1900 (31 Stat., 697), it was provided that "all forfeitures on account of desertion shall be passed to the credit of the naval hospital fund."

By act of March 3, 1909 (35 Stat., 756), provision was made for payment of expenses of

discharged naval prisoners from fines and forfeitures imposed by naval courts-martial, thereby modifying section 4809, Revised Statutes, under which such fines and forfeitures had previously gone in their entirety to the naval hospital fund.

**Sec. 4810. [Purchase and erection of Navy hospitals and naval home.]** The Secretary of the Navy shall procure at suitable places proper sites for Navy hospitals, and if the necessary buildings are not procured with the site, shall cause such to be erected, having due regard to economy, and giving preference to such plans as with most convenience and least cost will admit of subsequent additions, when the funds permit and circumstances require; and shall provide, at one of the establishments, a permanent asylum for disabled and decrepit Navy officers, seamen, and marines: *Provided*, That hereafter no sites shall be procured or hospital buildings erected or extensions to existing hospitals made unless hereafter authorized by Congress: *Provided*, That the sum of

\$70,000 is appropriated, to be paid out of any money in the Treasury not otherwise appropriated, for the building of a new power plant at the Naval Hospital, Chelsea, Massachusetts, said sum of money to be paid into the Treasury from the proceeds of sale of land authorized by the naval Act of June twenty-ninth, nineteen hundred and six.

This section was expressly amended and reenacted to read as above by act of March 4, 1913 (37 Stat., 902).

As to Naval Home (formerly known as Naval Asylum) at Philadelphia, see sections 4750, 4756, 4757, 4811-4813, Revised Statutes, and notes thereto.

As to maintenance of the Naval Home from the income of the naval pension fund, and the crediting to that fund of proceeds of certain sales and rentals of Naval Home property, and the pensions and money effects of deceased seamen in certain cases, see notes to section 4750, Revised Statutes.

By act of June 30, 1882 (22 Stat., 121), provision was made for the erection of an Army and Navy hospital at Hot Springs, Ark., and by the act of March 3, 1909 (35 Stat., 748), it was provided that "all persons" admitted to treatment in said hospital shall, while patients therein, "be subject to the rules and articles for the government of the armies of the United States."

By act of June 12, 1906 (34 Stat., 255), it was provided that "all persons" admitted to treatment in the general hospital at Fort Bayard, New Mexico, shall, while patients therein, "be subject to the rules and articles for the government of the armies of the United States;" and by the act of

March 2, 1907 (34 Stat., 1172), it was provided that the hospital at Fort Bayard, New Mexico, for the treatment of tuberculosis, "shall be opened to the treatment of the officers and men of the Navy and Marine Corps." (See notes to secs. 1342, 1621, and 1624, R. S., as to persons subject to military law.)

By act of March 3, 1919, section 2 (40 Stat., 1302), there were permanently transferred to the Treasury Department for the use of the Public Health Service, "such hospitals, with other necessary buildings, hereafter vacated by the War Department, as may be required and found suitable for the needs of the Public Health Service for hospital or sanatoria purposes;" and by the same act, section 3 (40 Stat., 1303), it was provided that "the President is authorized to direct the transfer to the Treasury Department of the United States of such lands or parts of lands, buildings, fixtures, appliances, furnishings, or furniture under the control of any other department of the Government not required for the purposes of such department and suitable for the uses of the Public Health Service."

Saint Elizabeths Hospital, for treatment of the insane: See sections 1551 and 4838, Revised Statutes.

**Sec. 4811. [Naval Home, government of.]** The asylum for disabled and decrepit Navy officers, seamen, and marines shall be governed in accordance with the rules and regulations prescribed by the Secretary of the Navy.—(26 Feb., 1811, c. 26, s. 4, v. 2, p. 650.)

See section 4810, Revised Statutes, and note thereto

**Sec. 4812. [Allowance of rations to Navy hospitals.]** For every Navy officer, seaman, or marine admitted into a Navy hospital, the institution shall be allowed one ration per day during his continuance therein, to be deducted from the account of the United States with such officer, seaman, or marine.—(Ibid., s. 5.)

As to rations allowed in Navy and Marine Corps see sections 1577-1585 and 1615, Revised Statutes, and notes thereto.

As to medicines and medical attendance allowed persons in the Navy, see section 1586, Revised Statutes.

**Sec. 4813. [Allowance from pensions to Navy hospitals.]** Whenever any Navy officer, seaman, or marine, entitled to a pension, is admitted to a Navy hospital, the pension, during his continuance in the hospital, shall be paid to the Secretary of the Navy and deducted from the account of such pensioner.—(Ibid.)

Amendment to this section was made by act of May 4, 1898 (30 Stat., 377), which provided that "whenever any officer, seaman, or marine entitled to a pension is admitted to the Naval Home at Philadelphia, or to a

naval hospital, his pension, while he remains there, shall be deducted from his accounts and paid to the Secretary of the Navy for the benefit of the fund from which such home or hospital, respectively, is



maintained; and section forty-eight hundred and thirteen of the Revised Statutes of the United States is hereby amended accordingly." This amendment was repeated in identical language in the naval appropriation act of March 3, 1899 (30 Stat., 1027).

By act of June 30, 1914 (38 Stat., 398), it was provided that "the pensions of beneficiaries of the Naval Home shall be disposed of in the same manner as prescribed for inmates of the Soldiers' Home, as provided for in section four of the Act approved March third, eighteen hundred and eighty-three, under such regulations as the Secretary of the Navy may prescribe, except that in the case of death of any beneficiary leaving no heirs at law nor next of kin any pension due him shall, subject to the foregoing provisions, escheat to the naval pension fund."

By act of March 3, 1883, section 4 (22 Stat., 564), relating to the Soldiers' Home, and which was extended to the Naval Home, with certain modifications, by the act of June 30, 1914, above-quoted, it was provided that "Any inmate of the Home who is receiving a pension from the government, and who has a child, wife, or parent living, shall be entitled, by filing with the pension agent from whom he receives his money a written direction to

that effect, to have his pension, or any part of it, paid to such child, wife, or parent. The pensions of all who now are or shall hereafter become inmates of the Home, except such as shall be assigned as aforesaid, shall be paid to the treasurer of the Home. The money thus derived shall not become a part of the funds of the Home, but shall be held by the treasurer in trust for the pensioner to whom it would otherwise have been paid, and such part of it as shall not sooner have been paid to him shall be paid to him on his discharge from the institution. The board of commissioners may from time to time pay over to any inmate such part of his pension-money as they think best for his interest and consistent with the discipline and good order of the Home, but such pensioner shall not be entitled to demand or have the same so long as he remains an inmate of the Home. In case of the death of any pensioner, any pension money due him and remaining in the hands of the treasurer shall be paid to his legal heirs, if demand is made within three years; otherwise the same shall escheat to the Home."

**Disposition of pensions; inmates Naval Home.**—See notes to sections 4756 and 4757, Revised Statutes.

**Sec. 4838. [Saint Elizabeths Hospital.]** There shall be in the District of Columbia a Government Hospital for the Insane, and its object shall be the most humane care and enlightened curative treatment of the insane of the Army and Navy of the United States and of the District of Columbia.—(3 Mar., 1855, c. 199, s. 1, v. 10, p. 682.)

Amendment to this section, but without direct reference thereto, was made by act of July 1, 1916 (39 Stat., 309), which provided that "the Government Hospital for the Insane shall be known and designated as Saint Elizabeths Hospital."

See section 1551, Revised Statutes, and note thereto; see also note to section 4756, Revised Statutes.

**Sec. 4839. [Superintendent; money and pensions of inmates.]** The chief executive officer of the Government Hospital for the Insane shall be a superintendent, who shall be appointed by the Secretary of the Interior, \* \* \* and shall give bond for the faithful performance of his duties in such sum and with such securities as may be required by the Secretary of the Interior. The superintendent shall be a well-educated physician, possessing competent experience in the care and treatment of the insane; he shall reside on the premises and devote his whole time to the welfare of the institution; he shall, subject to the approval of the board of visitors, appoint a responsible disbursing agent for the institution, who shall give a bond satisfactory to the Secretary of the Interior, and the said superintendent shall engage and discharge all needful and useful employees in the care of the insane and all laborers on the farm and determine their wages and duties; he shall also be an ex officio secretary of the board of visitors. The said disbursing agent, under the direction of the superintendent, shall have the custody of and pay out all moneys appropriated by Congress for the Government Hospital for the Insane, or otherwise received for the purposes of the hospital, and all moneys received by the superintendent in behalf of the hospital or its patients, and keep an accurate account or accounts

thereof. The said disbursing agent shall deposit in the Treasury of the United States, under the direction of the superintendent, all funds now in the hands of the superintendent or which may hereafter be intrusted to him by or for the use of patients, which shall be kept in a separate account; and the said disbursing agent is authorized to draw therefrom, under the direction of the said superintendent, from time to time, under such regulations as the Secretary of the Interior may prescribe, for the use of such patients, but not to exceed for any one patient the amount intrusted to the superintendent on account of such patient. During the time that any pensioner shall be an inmate of the Government Hospital for the Insane, all money due or becoming due upon his or her pension shall be paid by the pension agent to the superintendent or disbursing agent of the hospital, upon a certificate by such superintendent that the pensioner is an inmate of the hospital and is living, and such pension money shall be by said superintendent or disbursing agent disbursed and used, under regulations to be prescribed by the Secretary of the Interior, for the benefit of the pensioner, and, in case of a male pensioner, his wife, minor children, and dependent parents, or, if a female pensioner, her minor children, if any, in the order named, and to pay his or her board and maintenance in the hospital, the remainder of such pension money, if any, to be placed to the credit of the pensioner and to be paid to the pensioner or the guardian of the pensioner in the event of his or her discharge from the hospital; or, in the event of the death of said pensioner while an inmate of said hospital, shall, if a female pensioner, be paid to her minor children, and, in the case of a male pensioner, be paid to his wife, if living; if no wife survives him, then to his minor children; and in case there is no wife nor minor children, then the said unexpended balance to his or her credit shall be applied to the general uses of said hospital: *Provided*, That in the case of any pensioner transferred to the hospital from the National Home for Disabled Volunteer Soldiers any pension money to his credit at said Home at the time of his said transfer shall be transferred with him to said hospital and placed to his credit therein, to be expended as hereinbefore provided, and in case of his return from said hospital to the Home any balance to his credit at said hospital shall in like manner be transferred to said Home, to be expended in accordance with the rules established in regard thereto, \* \* \*.

This section was expressly amended and reenacted to read as above by act of February 2, 1909 (35 Stat., 592).

See note to section 4838 as to change of designation to "Saint Elizabeths Hospital."

See note to section 4756, as to pensions of inmates of Saint Elizabeths Hospital.

See note to section 1551, Revised Statutes, as to allotments, etc., of inmates.

**Sec. 4843. [Admission of insane persons of Navy, Marine Corps, etc.]** The superintendent, upon the order of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Treasury, respectively, shall receive, and keep in custody until they are cured, or removed by the same authority which ordered their reception, insane persons of the following descriptions:

First. Insane persons belonging to the Army, Navy, Marine Corps, and revenue-cutter service.

Second. Civilians employed in the Quartermaster's and Subsistence Departments of the Army who may be, or may hereafter become, insane while in such employment.



Third. Men who, while in the service of the United States, in the Army Navy, or Marine Corps, have been admitted to the hospital, and have been thereafter discharged from it on the supposition that they have recovered their reason, and have, within three years after such discharge, become again insane from causes existing at the time of such discharge, and have no adequate means of support.

Fourth. Indigent insane persons who have been in either of the said services and been discharged therefrom on account of disability arising from such insanity.

Fifth. Indigent insane persons who have become insane within three years after their discharge from such service, from causes which arose during and were produced by said service.—(15 June, 1860, c. 66, s. 1, v. 12, p. 23. 13 July, 1866, c. 179, ss. 1, 2, v. 14, pp. 93, 94. 3 Mar., 1875, c. 156, s. 5, v. 18, p. 486.)

The Revenue-Cutter Service and the Life-Saving Service were consolidated and re-established as the "Coast Guard" by act of January 28, 1915 (38 Stat., 800). See notes to sections 1492 and 2757, Revised Statutes.

By act of August 29, 1916 (39 Stat., 558), it was provided that "hereafter interned persons and prisoners of war, under the jurisdiction of the Navy Department, who are or may become insane, shall be entitled to admission for treatment to the Government Hospital for the Insane" (now designated as Saint Elizabeths Hospital). A similar provision was contained in the act

of October 6, 1917 (40 Stat., 373), with reference to interned persons and prisoners of war under the jurisdiction of the War Department.

Other statutes relating to admissions to this hospital do not relate to the Navy and are not noted.

With reference to habeas corpus proceedings in the cases of persons in the naval service committed to Saint Elizabeths Hospital, see note to section 761, Revised Statutes, under "appeal from decision of the court or justice granting writ," and "arrest of petitioner after discharge."

**Sec. 4878. [Burial in national cemeteries.]** All soldiers, sailors, or marines dying in the service of the United States, or dying in a destitute condition after having been honorably discharged from the service, or who served, or hereafter shall have served, during any war in which the United States has been, or may hereafter be engaged, and, with the consent of the Secretary of War, any citizen of the United States who served in the Army or Navy of any government at war with Germany or Austria during the World War and who died while in such service or after honorable discharge therefrom, may be buried in any national cemetery free of cost. The production of the honorable discharge of a deceased man in the former case, and a duly executed permit of the Secretary of War in the latter case, shall be sufficient authority for the superintendent of any cemetery to permit the interment. Army nurses honorably discharged from their service as such may be buried in any national cemetery, and, if in a destitute condition, free of cost. The Secretary of War is authorized to issue certificates to those Army nurses entitled to such burial.

This section was expressly amended and re-enacted to read as above by act of April 15, 1920 (41 Stat., 552). See act of March

4, 1921 (41 Stat., 1440), as to entombments in Arlington Memorial Amphitheater.





## TITLE LX.

### PATENTS, TRADE-MARKS, AND COPYRIGHTS.

**Sec. 4894.** [Applications for patents; Government interested.] All applications for patents shall be completed and prepared for examination within one year after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within one year after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable: *Provided, however,* That no application shall be regarded as abandoned which has become the property of the Government of the United States and with respect to which the head of any department of the Government shall have certified to the Commissioner of Patents, within a period of three years, that the invention disclosed therein is important to the armament or defense of the United States: *Provided further,* That within ninety days, and not less than thirty days, before the expiration of any such three-year period the Commissioner of Patents shall, in writing, notify the head of the department interested in any pending application for patent, of the approaching expiration of the three-year period within which any application for patent shall have been pending.

This section was expressly amended and reenacted to read as above by act of July 6, 1916 (39 Stat., 348).

Issuance of patents to Government officers without payment of fee, in certain case.—See act March 3, 1883 (22 Stat., 625).

Requests by heads of departments to expedite issuance of patents.—See act March 3, 1897 (29 Stat., 694).

Unauthorized use of patent by United States; suit in Court of Claims authorized in cer-

tain cases.—See act of July 1, 1918 (40 Stat., 705), amending and reenacting act of June 25, 1910 (36 Stat., 851), on the same subject.

Withholding of patents during war, if disclosure of invention would be detrimental to the public safety or defense.—See act of October 6, 1917 (40 Stat., 394).

See note to Constitution, Article I, section 8, clause 8.





## TITLE LXVI.

### EXTRADITION.

**Sec. 5275.** [Use of naval forces for protection of accused.] Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused.—(3 Mar., 1869, c. 141. s. 1, v. 15. p. 337.)





## TITLE LXIX.

### INSURRECTION.

Sec.	Sec.
5297. Insurrection against State.	5311. Condemnation proceedings; property seized.
5298. Insurrection against United States.	5313. Trading in captured or abandoned property; punishment.
5299. Domestic violence in violation of civil rights.	5314. Collection of duties; insurrection.
5300. Proclamation to insurgents to disperse.	5315. Removal of customhouse.
5306. Trading without license; embezzlement; other offenses.	5316. Enforcement of preceding sections; use of Navy.
5310. Property taken on inland waters.	

**Sec. 5297. [Insurrection against State.]** In case of an insurrection in any State against the government thereof, it shall be lawful for the President, on application of the legislature of such State, or of the executive, when the legislature cannot be convened, to call forth such number of the militia of any other State or States, which may be applied for, as he deems sufficient to suppress such insurrection; or, on like application, to employ, for the same purposes, such part of the land or naval forces of the United States as he deems necessary.—(28 Feb., 1795, c. 36, s. 1, v. 1, p. 424. 3 Mar., 1807, c. 39, v. 2, p. 443.)

See note to Constitution, Article I, section 8, clause 11, as to war power.

**Sec. 5298. [Insurrection against United States.]** Whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory, it shall be lawful for the President to call forth the militia of any or all the States, and to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion, in whatever State or Territory thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed.—(29 July, 1861, c. 25, s. 1, v. 12, p. 281.)

**Sec. 5299. [Domestic violence in violation of civil rights.]** Whenever insurrection, domestic violence, unlawful combinations, or conspiracies in any State so obstructs or hinders the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by the laws for the protection of such rights, privileges, or immunities, and the constituted authorities of such State are unable to protect, or, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States; and in all such cases, or whenever any such insurrection, violence, unlawful combination, or conspiracy, opposes or obstructs the laws of the United States,

or the due execution thereof, or impedes or obstructs the due course of justice under the same, it shall be lawful for the President, and it shall be his duty, to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary, for the suppression of such insurrection, domestic violence, or combinations.—(20 April, 1871, c. 22, s. 3, v. 17, p. 14.)

**Sec. 5300. [Proclamation to insurgents to disperse.]** Whenever, in the judgment of the President, it becomes necessary to use the military forces under this Title, the President shall forthwith, by proclamation, command the insurgents to disperse and retire peaceably to their respective abodes, within a limited time.—(29 July, 1861, c. 25, s. 2, v. 12, p. 282.)

**Sec. 5306. [Trading without license; embezzlement; other offenses.]** Every officer of the United States, civil, military, or naval, and every sutler, soldier, marine, or other person, who takes, or causes to be taken into a State declared to be in insurrection, or to any other point to be thence taken into such State, or who transports or sells, or otherwise disposes of therein, any goods, wares, or merchandise whatsoever, except in pursuance of license and authority of the President, as provided in this Title, or who makes any false statement or representation upon which license and authority is granted for such transportation, sale, or other disposition, or who, under any license or authority obtained, willfully and knowingly transports, sells, or otherwise disposes of any other goods, wares, or merchandise than such as are in good faith so licensed and authorized, or who willfully and knowingly transports, sells, or disposes of the same, or any portion thereof, in violation of the terms of such license or authority, or of any rule or regulation prescribed by the Secretary of the Treasury concerning the same, or who is guilty of any act of embezzlement, of willful misappropriation of public or private money or property, of keeping false accounts, or of willfully making any false returns, shall be deemed guilty of a misdemeanor, and shall be fined not more than five thousand dollars, and imprisoned in the penitentiary not more than three years. Violations of this section shall be cognizable before any court, civil or military, competent to try the same.—(2 July, 1864, c. 225, s. 10, v. 13, p. 377.)

**Sec. 5310. [Property taken on inland waters.]** No property seized or taken upon any of the inland waters of the United States by the naval forces thereof shall be regarded as maritime prize; but all property so seized or taken shall be promptly delivered to the proper officers of the courts.—(2 July, 1864, c. 225, s. 7, v. 13, p. 377.)

See sections 4613–4652, Revised Statutes, and notes thereto, on subject of prize.

**Sec. 5311. [Condemnation proceedings; property seized.]** The Attorney-General, or the attorney of the United States for any judicial district in which such property may at the time be, may institute the proceedings of condemnation, and in such case they shall be wholly for the benefit of the United States; or any person may file an information with such attorney, in which case the proceedings shall be for the use of such informer and the United States in equal parts.—(6 Aug., 1861, c. 68, s. 3, v. 12, p. 319.)

**Sec. 5313. [Trading in captured or abandoned property; punishment.]** All persons in the military or naval service of the United States are prohibited



from buying or selling, trading, or in any way dealing in captured or abandoned property, whereby they shall receive or expect any profit, benefit, or advantage to themselves, or any other person, directly or indirectly connected with them; and it shall be the duty of such person whenever such property comes into his possession or custody, or within his control, to give notice thereof to some agent, appointed by virtue of this Title, and to turn the same over to such agent without delay. Any officer of the United States, civil, military, or naval, or any sutler, soldier, or marine, or other person who shall violate any provision of this section, shall be deemed guilty of a misdemeanor, and shall be fined not more than five thousand dollars, and imprisoned in the penitentiary not more than three years. Violations of this section shall be cognizable before any court, civil or military, competent to try the same.—(2 July, 1864, c. 225, s. 10, v. 13, p. 377.)

**Sec. 5314. [Collection of duties; insurrection.]** Whenever the President shall deem it impracticable, by reason of unlawful combinations of persons in opposition to the laws of the United States, to collect the duties on imports in the ordinary way, at any port of entry in any collection-district, he may cause such duties to be collected at any port of delivery in the district until such obstruction ceases; in such case the surveyor at such port of delivery shall have the powers and be subject to all the obligations of a collector at a port of entry. The Secretary of the Treasury, with the approval of the President, shall also appoint such weighers, gaugers, measurers, inspectors, appraisers, and clerks, as he may deem necessary, for the faithful execution of the revenue laws at such port of delivery, and shall establish the limits within which such port of delivery is constituted a port of entry. And all the provisions of law regulating the issue of marine papers, the coasting-trade, the warehousing of imports, and the collection of duties, shall apply to the ports of entry thus constituted, in the same manner as they do to ports of entry established by law.—(13 July, 1861, c. 3, s. 1, v. 12, p. 255.)

**Sec. 5315. [Removal of custom-house.]** Whenever, at any port of entry, the duties on imports can not, in the judgment of the President, be collected in the ordinary way, or by the course provided in the preceding section, by reason of the cause mentioned therein, he may direct that the custom-house for the district be established in any secure place within the district, either on land or on board any vessel in the district, or at sea near the coast; and in such case the collector shall reside at such place, or on shipboard, as the case may be, and there detain all vessels and cargoes arriving within or approaching the district, until the duties imposed by law on such vessels and their cargoes are paid in cash. But if the owner or consignee of the cargo on board any vessel thus detained, or the master of the vessel, desires to enter a port of entry in any other district where no such obstructions to the execution of the laws exist, the master may be permitted so to change the destination of the vessel and cargo in his manifest; whereupon the collector shall deliver him a written permit to proceed to the port so designated. And the Secretary of the Treasury, with the approval of the President, shall make proper regulations for the enforcement on shipboard of such provisions of the laws regulating the assessment and collection of duties as in his judgment may be necessary and practicable.—(Ibid., s. 2, p. 256. 3 Mar., 1875, c. 136, s. 2, v. 18, p. 469.)

Sec. 5316. [Enforcement of preceding sections; use of Navy.] It shall be unlawful to take any vessel or cargo detained under the preceding section from the custody of the proper officers of the customs, unless by process of some court of the United States; and in case of any attempt otherwise to take such vessel or cargo by any force, or combination, or assemblage of persons too great to be overcome by the officers of the customs, the President, or such person as he shall have empowered for that purpose, may employ such part of the Army or Navy or militia of the United States, or such force of citizen volunteers as may be necessary, to prevent the removal of such vessel or cargo, and to protect the officers of the customs in retaining the custody thereof.— (12 July, 1861, c. 3, s 3, v. 12, p. 256.)



## TITLE LXXIV.

### REPEAL PROVISIONS.

Sec.  
5595. What Revised Statutes embrace.  
5596. Repeal of acts embraced in revision.  
5600. Arrangement and classification of sections.

Sec.  
5601. Acts passed since December 1, 1873, not affected.

**Sec. 5595. [What Revised Statutes embrace.]** The foregoing seventy-three titles embrace the statutes of the United States general and permanent in their nature, in force on the 1st day of December one thousand eight hundred and seventy-three, as revised and consolidated by commissioners appointed under an act of Congress, and the same shall be designated and cited, as The Revised Statutes of the United States.—(20 *June*, 1874, *c.* 333, *v.* 18, *p.* 113. 28 *Dec.*, 1874, *c.* 9, *v.* 18, *p.* 293.)

See “Introduction,” under “II. The Revised Statutes.”

**Sec. 5596. [Repeal of acts embraced in revision.]** All acts of Congress passed prior to said first day of December one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision, having been repealed or superseded by subsequent acts, or not being general and permanent in their nature: *Provided*, That the incorporation into said revision of any general and permanent provision, taken from an act making appropriations, or from an act containing other provisions of a private, local, or temporary character, shall not repeal, or in any way affect any appropriation, or any provision of a private, local or temporary character, contained in any of said acts, but the same shall remain in force; and all acts of Congress passed prior to said last-named day no part of which are embraced in said revision, shall not be affected or changed by its enactment.—(U. S. *v.* Jordan, 2 Low., 537.)

See “Introduction,” under VI, E, “Construction of particular statutes,” subheading, “Revised Statutes.”

**Sec. 5600. [Arrangement and classification of sections.]** The arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the Title, under which any particular section is placed.

**Sec. 5601. [Acts passed since Dec. 1, 1873, not affected.]** The enactment of the said revision is not to affect or repeal any act of Congress passed since the 1st day of December one thousand eight hundred and seventy-three, and all acts passed since that date are to have full effect as if passed after the enactment of this revision, and so far as such acts vary from, or conflict with any provision contained in said revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith.—(18 *Feb.*, 1875, *c.* 84, *v.* 18, *p.* 329. 3 *Mar.*, 1875, *c.* 130, *s.* 9, *v.* 18, *p.* 401.)

Approved, June 22, 1874.





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## **PART 3.**

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**THE UNITED STATES STATUTES AT LARGE.**

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[1850, Sept. 28. Pay of Superintendent, Naval Academy.] And the pay of the superintendent of the naval school at Annapolis shall be at the rate allowed to an officer of his rank, when in service at sea.—(9 Stat., 515, chap. 80.)

See note to section 1556, Revised Statutes, under "Additional pay for special duty."

[1862, July 16. Wages at navy yards, how fixed.] That section eight of an act to further promote the efficiency of the navy, approved December twenty-first, eighteen hundred and sixty-one, be amended so as to read as follows: That the hours of labor and the rate of wages of the employees in the navy yards shall conform, as nearly as is consistent with the public interest, with those of private establishments in the immediate vicinity of the respective yards, to be determined by the commandants of the navy yards, subject to the approval and revision of the Secretary of the Navy.—(12 Stat., 587, chap. 184.)

No part of this act was embraced in any section of the Revised Statutes, although portions of the act of December 21, 1861 (12 Stat., 330), of which it was amendatory, were carried into the revision. (See sec. 5596, R. S., as to the repeal of prior acts by the revision.)

See note to section 1545, Revised Statutes, as to wages of navy yard employees; and as to hours of labor, see act of August 1, 1892 (27 Stat., 340), as amended by act of March 3, 1913 (37 Stat., 726.)

By Navy Regulations and Naval Instructions, 1913 (Art. I. 371), it was provided that "the rates of wages of employees shall conform to the standard of private establishments in the immediate vicinity of the respective navy yards as provided by the act of July 16, 1862 \* \* \*."

See note to act of March 3, 1909 (35 Stat., 754-755), for a similar statutory provision relating to compensation of employees at navy yards and stations.

[1863, Mar. 3. Commandant, Mare Island navy yard, pay.] That the pay of the officer of the navy assigned to the command of the navy yard at Mare Island, California, shall be the sea pay of his grade.—(12 Stat., 825, Res. No. 25.)

See note to section 1556, Revised Statutes, under "Additional pay for special duty."

[1874, June 20, sec. 3. Extra compensation to civil officers prohibited.] That no civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly, from the treasury or property of the United States beyond his salary or compensation allowed by law: *Provided*, That this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys as now allowed by law for the performance of services not covered by their salaries or fees.—(18 Stat, 109, chap. 328.)

See sections 1763-1765, Revised Statutes, and notes thereto.

[1874, June 20, sec. 5. Unexpended balances of appropriations.] That from and after the first day of July, eighteen hundred and seventy-four, and of each year thereafter, the Secretary of the Treasury shall cause all unexpended balances of appropriations which shall have remained upon the books of the Treasury for two fiscal years to be carried to the surplus fund and covered into

the Treasury: *Provided*, That this provision shall not apply to permanent specific appropriations, appropriations for rivers and harbors, light-houses, fortifications, public buildings, or the pay of the navy and marine corps; but the appropriations named in this proviso shall continue available until otherwise ordered by Congress.—(18 Stat., 110, chap. 328.)

As to unexpended balances of appropriations, see section 3691, Revised Statutes, and act of July 26, 1886, section 2 (24 Stat., 157).  
As to permanent specific appropriations, see section 3689, Revised Statutes, and act of August 24, 1912, section 7 (37 Stat., 487).

As to report to Congress of amounts found due claimants, see act of June 14, 1878, section 4 (20 Stat., 130), which repealed a clause omitted from this provision, and act of July 7, 1884 (23 Stat., 254).

[1874, June 22. Pay on promotion.] That on and after the passage of this act, any officer of the Navy who may be promoted in course to fill a vacancy in the next higher grade shall be entitled to the pay of the grade to which promoted from the date he takes rank therein, if it be subsequent to the vacancy he is appointed to fill.—(18 Stat., 191, chap. 392.)

See note to section 1561, Revised Statutes, and see act of March 4, 1913 (37 Stat., 892).

[1874, June 22, sec. 2. Pay of officers dismissed and restored.] That the accounting officers of the Treasury be, and are hereby, prohibited from making any allowance to any officer of the Navy who has been, or may hereafter be, dismissed from the service and restored to the same under the provisions of the twelfth section of the act of March third, eighteen hundred and sixty-five, entitled "An act to amend the several acts heretofore passed to provide for the enrolling and calling out the national forces, and for other purposes," to exceed more than pay as on leave for six months from the date of dismissal, unless it shall appear that the officer demanded in writing, addressed to the Secretary of the Navy, and continued to demand as often as once in six months, a trial as provided for in said act.—(18 Stat., 192, chap. 392.)

See section 1624, Revised Statutes, article 37, and note thereto.

The provisions of the act of March 3, 1865, section 12, referred to above, are incorporated into section 1624, Revised Statutes, article 37.

[1874, June 23. Hazing at Naval Academy.] That in all cases when it shall come to the knowledge of the superintendent of the Naval Academy, at Annapolis, that any cadet-midshipman or cadet-engineer has been guilty of the offense commonly known as hazing, it shall be the duty of said superintendent to order a court-martial, composed of not less than three commissioned officers, who shall minutely examine into all the facts and circumstances of the case and make a finding thereon; and any cadet-midshipman or cadet-engineer found guilty of said offense by said court shall, upon recommendation of said court be dismissed; and such finding, when approved by said superintendent, shall be final; and the cadet so dismissed from said Naval Academy shall be forever ineligible to re-appointment to said Naval Academy.—(18 Stat., 203–204, chap. 453.)

See notes to section 1519, Revised Statutes, for later laws relating to hazing and the court-martial of midshipmen.

See notes to section 1512, Revised Statutes, as to change in title of cadet midshipmen and cadet engineers.

See act of April 9, 1906, section 2 (34 Stat., 104, 105), for partial repeal of this enactment.



[1875, Jan. 18. Traveling expenses, approval of Secretary.] For expenses and transportation of officers traveling under orders, \* \* \* *Provided*, That no allowance shall be made in the settlement of any account for traveling expenses unless the same be incurred on the order of the Secretary of the Navy, or the allowance be approved by him.—(18 Stat., 297, chap. 18.)

See note to section 1566, Revised Statutes, as to mileage and traveling expenses.

**1875, Mar. 3, sec. 3. Estimates, time for furnishing; explanations accompanying.]** That it shall be the duty of the heads of the several Executive Departments, and of other officers authorized or required to make estimates, to furnish to the Secretary of the Treasury, on or before the first day of October of each year, their annual estimates for the public service, to be included in the Book of Estimates prepared by law under his direction; and the Secretary of the Treasury shall submit, as a part of the appendix to the Book of Estimates, such extracts from the annual reports of the several heads of Departments and Bureaus as relate to estimates for appropriations, and the necessities therefor.—(18 Stat., 370, chap. 129.)

As to time of furnishing estimates, see act of March 3, 1901, section 5 (31 Stat., 1009); and see note to section 430, Revised Statutes.

See, generally, sections 429, 430, and 3666, Revised Statutes, and laws noted thereunder.

**[1875, Mar. 3. Land grant railroads.]** That no money shall hereafter be paid to any railroad company for the transportation of any property or troops of the United States over any railroad which in whole or in part was constructed by the aid of a grant of public land on the condition that such railroad should be a public highway for the use of the Government of the United States free from toll or other charge, or upon any other conditions for the use of such road, for such transportation; nor shall any allowance be made for the transportation of officers of the Army over any such road when on duty and under orders as military officers of the United States. But nothing herein contained shall be construed as preventing any such railroad from bringing a suit in the Court of Claims for the charges for such transportation, and recovering for the same if found entitled thereto by virtue of the laws in force prior to the passage of this act; provided that the claim for such charges shall not have been barred by the statute of limitations at the time of bringing the suit, and either party shall have the right of appeal to the Supreme Court of the United States; *And provided further*, That the foregoing provision shall not apply for the current fiscal year, nor thereafter, to roads where the sole condition of transportation is that the company shall not charge the Government higher rates than they do individuals for like transportation, and when the Quartermaster-General shall be satisfied that this condition has been faithfully complied with.—(18 Stat., 453–454, chap. 133.)

Most of the acts of Congress which granted lands in aid of railroads provide that they shall be “free from toll or other charge upon the transportation of any property or troops of the United States.” A few of the acts granting lands in aid of railroads provide that the grant is “subject to such regulations as Congress may impose restricting the charges for \* \* \* Government transportation.” (E. g., act July

27, 1866, sec. 11, 14 Stat., 292, 297). (U. S. v. Union Pac. R. Co., 249 U. S., 354, affirming 52 Ct. Cls., 226.)

By act of February 28, 1920, section 208 (41 Stat., 464), it was provided that “any land grant railroad organized under the Act of July 28, 1866 (chapter 300) [14 Stat., 338], shall receive the same compensation for transportation of property and troops of the United States

as is paid to land grant railroads organized under the Land Grant Act of March 3, 1863 [12 Stat., 772], and the Act of July 27, 1866 (chapter 278) [14 Stat., 292]."

The term "troops of the United States" as used in land-grant acts in relation to transportation for the Government does not embrace any of the following classes of persons, when traveling separately and not as part of a moving

body or detachment of soldiers, viz., discharged soldiers, discharged military prisoners, and rejected applicants for enlistment; applicants for enlistment, provisionally accepted, but subject to final examination and not sworn in; retired enlisted men; and furloughed soldiers en route back to their stations. (*United States v. Union Pac. R. Co.*, 249 U. S., 354, affirming 52 Ct. Cls., 226.)

[1876, June 30. Mileage of Navy officers.] And so much of the act of June sixteenth, one thousand eight hundred and seventy-four, making appropriations for the support of the Army for the fiscal year ending June thirtieth, one thousand eight hundred and seventy-five, and for other purposes, as provides that only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States while engaged on public business, as is applicable to officers of the Navy so engaged, is hereby repealed; and the sum of eight cents per mile shall be allowed such officers while so engaged, in lieu of their actual expenses.—(19 Stat., 65, chap. 159.)

See note to section 1566, Revised Statutes.

[1876, June 30. Increase of force at navy yards before elections.] And no increase of the force at any navy-yard shall be made at any time within sixty days next before any election to take place for President of the United States, or member of Congress, except when the Secretary of the Navy shall certify that the needs of the public service make such increase necessary at that time which certificate shall be immediately published when made.—(19 Stat., 69–70, chap. 159.)

See note to section 1546, Revised Statutes.

[1876, Aug. 15, sec. 3. Changes in grades of clerks; honorably discharged soldiers and sailors.] That whenever, in the judgment of the head of any department, the duties assigned to a clerk of one class can be as well performed by a clerk of a lower class or by a female clerk, it shall be lawful for him to diminish the number of clerks of the higher grade and increase the number of the clerks of the lower grade within the limit of the total appropriation for such clerical service: *Provided*, That in making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors.—(19 Stat., 169, chap. 287.)

See note to section 166, Revised Statutes, under "Increasing and diminishing clerks of different grades"; and see note to sec-

tion 416, Revised Statutes, under "Honorably discharged soldiers or sailors"; see also section 1754, Revised Statutes.

[1876, Aug. 15, sec. 5. Employing clerks beyond legal allowance.] That the executive officers of the Government are hereby prohibited from employing any clerk, agent, engineer, draughtsman messenger watchman, laborer, or other employee, in any of the executive departments in the city of Washington, or elsewhere beyond provision made by law.—(19 Stat., 169, chap. 287.)

See act of August 5, 1882, section 4 (22 Stat., 255); and see section 3679, Revised Statutes, as to acceptance of voluntary services by the Government.

[1876, Aug. 15, sec. 6. Political contributions; offenses.] That all executive officers or employees of the United States not appointed by the President,



with the advice and consent of the Senate, are prohibited from requesting, giving to, or receiving from, any other officer or employee of the Government, any money or property or other thing of value for political purposes; and any such officer or employee, who shall offend against the provisions of this section shall be at once discharged from the service of the United States; and he shall also be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not exceeding five hundred dollars.—(19 Stat., 169, chap. 287.)

See section 1546, Revised Statutes, and laws noted thereunder.

[1876, Aug. 15. **Artificial limbs to soldiers and sailors.**] That every officer, soldier, seaman and marine, who, in the line of duty, in the military or naval service of the United States, shall have lost a limb, or sustained bodily injuries, depriving him of the use of any of his limbs, shall receive once every five years an artificial limb or appliance, or commutation therefor, as provided and limited by existing laws, under such regulations as the Surgeon-General of the Army may prescribe; and the period of five years shall be held to commence with the filing of the first application after the seventeenth day of June, in the year eighteen hundred and seventy.

SEC. 2. That necessary transportation to have artificial limbs fitted shall be furnished by the Quartermaster-General of the Army, the cost of which shall be refunded out of any money appropriated for the purchase of artificial limbs.—(19 Stat., 203–204, chap. 300.)

See note to section 1176, Revised Statutes.

[1877, Mar. 3, sec. 5. **Mail matter, official business, free of postage.**] That it shall be lawful to transmit through the mail, free of postage, any letters, packages, or other matters relating exclusively to the business of the Government of the United States: *Provided*, That every such letter or package to entitle it to pass free shall bear over the words “Official business” an endorsement showing also the name of the Department, and, if from a bureau or office, the names of the Department and bureau or office, as the case may be, whence transmitted.—(19 Stat., 335–336, chap. 103.)

A further provision of this section, relating to punishment for unlawful use of official envelopes, was expressly repealed by the Criminal Code, act of March 4, 1909, section 341 (35 Stat., 1153), and other pro-

visions on the subject were embodied in section 227 of the same act (35 Stat., 1134). See notes to sections 388 and 398, Revised Statutes; and see note to next section of this act, set forth below.

[1877, Mar. 3, sec. 6. **Endorsement on official envelopes.**] That for the purpose of carrying this act into effect, it shall be the duty of each of the Executive Departments of the United States to provide for itself and its subordinate offices the necessary envelopes: and in addition to the endorsement designating the Department in which they are to be used, the penalty for the unlawful use of these envelopes shall be stated thereon.—(19 Stat., 336, chap. 103.)

See note to preceding section, set forth above. This and the preceding section were extended to all officers of the United States, except Members of Congress, by act of March 3, 1879, section 29 (20 Stat., 362), as amended and reenacted by act of July 5, 1884,

section 3 (23 Stat., 158), which acts also contained other provisions on the subject of penalty envelopes. See also act of June 26, 1906 (34 Stat., 477), and see notes to sections 388 and 398, Revised Statutes.

[1877, Mar. 3. **Rent of buildings, District of Columbia.**] Hereafter no contract shall be made for the rent of any building, or part of any building,

to be used for the purposes of the Government in the District of Columbia, until an appropriation therefor shall have been made in terms by Congress, and that this clause be regarded as notice to all contractors or lessors of any such building or any part of building.—(19 Stat., 370, chap. 106.)

See acts of August 5, 1882 (22 Stat., 241), and March 3, 1883 (22 Stat., 552); and see section 3679, Revised Statutes.

A somewhat similar provision was contained in act of June 22, 1874 (18 Stat., 144).

[1878, May 4. Secretaries and clerks at sea.] That on and after the first day of July, eighteen hundred and seventy-eight, there shall be no appointments made from civil life of secretaries or clerks to the Admiral, or Vice-Admiral, when on sea service, commanders of squadrons, or of clerks to commanders of vessels; and an officer not above the grade of lieutenant shall be detailed to perform the duties of secretary to the Admiral or Vice-Admiral, when on sea service, and one not above the grade of master to perform the duties of clerk to a rear-admiral or commander, and one not above the grade of ensign to perform the duties of clerk to a captain, commander, or lieutenant-commander when afloat.—(20 Stat., 50, chap. 91.)

See notes to sections 1367 and 1556, Revised Statutes.

Grade of master is now lieutenant (junior grade). See note to section 1362, Revised Statutes.

[1878, May 4. Sale of charts.] That all charts hereafter furnished to mariners or others not in the government service shall be paid for at the cost price of paper and printing paid by the government.—(20 Stat., 51, chap. 91.)

See sections 432 and 433, Revised Statutes, and notes thereto.

This provision was repeated in act of February 14, 1879, chapter 68 (20 Stat., 286).

[1878, June 14, sec. 4. Claims under exhausted appropriations, report to Congress.] That so much of section five of the act approved June twentieth, eighteen hundred and seventy-four, as directs the Secretary of the Treasury at the beginning of each session to report to Congress with his annual estimates any balances of appropriations for specific objects affected by said section that may need to be reappropriated, be, and hereby is, repealed. And it shall be the duty of the several accounting-officers of the Treasury to continue to receive, examine, and consider the justice and validity of all claims under appropriations the balances of which have been exhausted or carried to the surplus fund under the provisions of said section that may be brought before them within a period of five years. And the Secretary of the Treasury shall report the amount due each claimant, at the commencement of each session, to the Speaker of the House of Representatives, who shall lay the same before Congress for consideration: *Provided*, That nothing in this act shall be construed to authorize the re-examination and payment of any claim or account which has been once examined and rejected, unless reopened in accordance with existing law.—(20 Stat., 130, chap. 191.)

See acts of June 20, 1874, section 5 (18 Stat., 110), and July 7, 1884 (23 Stat., 254). See also section 236, Revised Statutes, and note thereto.

[1878, June 14. Purchase of material for steam boilers.] That on and after the passage of this act, the Secretary of the Navy be, and he is hereby authorized to purchase at the lowest market price, such plate iron and other material as may enter into the construction of steam boilers for the Navy, without advertising for bids to furnish the same: *Provided*, That he shall cause to



be sent to the principal dealers and manufacturers of iron and such other materials as may be required specifications of the quality description and character of such iron and materials so required: *And provided further*, That such plate iron and materials shall be subjected to the same tests and inspection as now provided for and which inspection and tests shall be made publicly and in presence of such bidders or their authorized agents as may choose to attend at the making thereof.—(20 Stat., 253–254, Res. No. 30.)

See sections 3718 and 3721, Revised Statutes, and notes thereto.

The reference to “this act” in the above resolution was evidently intended to be “this resolution.”

By act of March 3, 1875, section 4 (18 Stat., 399), provision was made for the appointment of a board, consisting of officers of the Army and Navy, and three civilian experts, for

the purpose of testing the strength and value of iron, steel, and other metals, for constructive and mechanical purposes.

Tests for steamboat boiler plates in such manner as prescribed by the Board of Supervising Inspectors and approved by the Secretary of the Treasury, were provided for by section 4430, Revised Statutes.

[1878, June 18. **Examinations for promotion; facts once determined.**] That hereafter in the examination of officers in the Navy for promotion no fact which occurred prior to the last examination of the candidate whereby he was promoted, which has been enquired into and decided upon, shall be again enquired into, but such previous examination, if approved, shall be conclusive, unless such fact continuing shows the unfitness of the officer to perform all his duties at sea.

SEC. 2. The President of the United States may in cases wherein the rule herein prescribed has been violated order and direct the re-examination of the same.—(20 Stat., 165–166, chap. 267.)

See note to section 1499, Revised Statutes.

[1878, June 19. **Expenditures in naval service; report of.**] That from and after the passage of this act, it shall be the duty of the Secretary of the Treasury to transmit to Congress, annually, a tabular statement showing in detail the receipts and expenditures in the Naval service under each appropriation, as made up and determined by the proper officers of the Treasury Department, upon the accounts of disbursing-officers rendered for settlement.

SEC. 2. There shall be appended to this statement an account of balances in the hands of disbursing agents at the close of each fiscal year, and a report of any amounts lost or unaccounted for by voucher.—(20 Stat., 167, chap. 311.)

See note to section 429, Revised Statutes.

[1878, June 19. **“General account of advances;” use of “Pay of the Navy.”**] That the Secretary of the Navy be, and he is hereby, authorized to issue his requisitions for advances to disbursing officers and agents of the Navy under a “General account of advances”, not to exceed the total appropriation for the Navy, the amount so advanced to be exclusively used to pay current obligations upon proper vouchers and that “Pay of the Navy” shall hereafter be used only for its legitimate purpose, as provided by law.

SEC. 2. That the amount so advanced be charged to the proper appropriations, and returned to “General account of advances” by pay and counter warrant; the said charge, however, to particular appropriations, shall be limited to the amount appropriated to each.

**SEC. 3.** That the Fourth Auditor shall declare the sums due from the several special appropriations upon complete vouchers, as heretofore, according to law; and he shall adjust the said liabilities with the "General account of advances."—(20 Stat., 167-168, chap. 312.)

See note to section 276, Revised Statutes; and see section 3678, Revised Statutes.

[1878, June 20. **Rates of advertising.**] That hereafter all advertisements, notices, proposals for contracts, and all forms of advertising required by law for the several departments of the government may be paid for at a price not to exceed the commercial rates charged to private individuals, with the usual discounts; such rates to be ascertained from sworn statements to be furnished by the proprietors or publishers of the newspapers proposing so to advertise: \* \* \* but the heads of the several departments may secure lower terms at special rates whenever the public interest requires it.—(20 Stat., 216, chap. 359.)

See sections 3826 and 3828, Revised Statutes; and see act of January 21, 1881 (21 Stat., 317).	The clause omitted from this enactment was a temporary provision relating to past transactions.
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[1879, Feb. 14. **Sale of charts to persons not in government service.**] That all charts hereafter furnished to mariners or others not in the government service shall be paid for at the cost price of paper and printing paid by the government.—(20 Stat., 286, chap. 68.)

See sections 432 and 433, Revised Statutes, and notes thereto, as to sale of charts to navigators; see also act of January 12, 1895, section 77 (28 Stat., 621).	Similar provision was contained in act of May 4, 1878 (20 Stat., 51).
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[1879, Feb. 14. **"Small-stores fund."**] That from and after the first day of April, eighteen hundred and seventy-nine, the value of issues of small-stores shall be credited to a fund to be designated as the "small-stores fund", in the same manner as the value of the issues of clothing is now credited to the "clothing fund"; the resources of the fund to be used hereafter in the purchase of supplies of small-stores for issue.—(20 Stat., 288, chap. 68.)

See act June 30, 1890 (26 Stat., 197), creating the "clothing and small-stores fund" in the Navy.	See note to section 3689, Revised Statutes.
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[1879, Feb. 15, sec. 2. **Acting assistant surgeons.**] That from and after the passage of this act the Secretary of the Navy shall not appoint acting assistant surgeons for temporary service, as authorized by section fourteen hundred and eleven, Revised Statutes, except in case of war.—(20 Stat., 295, chap. 83.)

See section 1411, Revised Statutes, and note thereto.

[1879, Feb. 26. **Details to educational institutions.**] That for the purpose of promoting a knowledge of steam-engineering and iron-ship building among the young men of the United States, the President may, upon the application of an established scientific school or college within the United States, detail an officer from the Engineer Corps of the Navy as professor in such school or college: *Provided*, That the number of officers so detailed shall not at any time exceed twenty-five, and such details shall be governed by rules to be



prescribed from time to time by the President: *And provided further*, That such details may be withheld or withdrawn whenever, in the judgment of the President, the interests of the public service shall so require.—(20 Stat., 322–323, chap. 105.)

See note to section 1225, Revised Statutes.  
The Engineer Corps of the Navy was abolished,  
and the personnel thereof (on the active

list) transferred to the line of the Navy by  
act of March 3, 1899 (30 Stat., 1004). See  
note to section 1390, Revised Statutes.

[1879, Mar. 3. Trusses for soldiers and sailors.] That section one of the act entitled “An act to provide for furnishing trusses to disabled soldiers”, approved May twenty-eighth, eighteen hundred and seventy two, be, and the same is hereby, amended so that said section shall read as follows:

That every soldier of the Union Army, or petty-officer, seaman, or marine in the naval service, who was ruptured while in the line of duty during the late war for the suppression of the rebellion, or who shall be so ruptured thereafter in any war, shall be entitled to receive a single or double truss of such style as may be designated by the Surgeon-General of the United States Army as best suited for such disability; and whenever the said truss or trusses so furnished shall become useless from wear, destruction, or loss, such soldier, petty-officer, seaman, or marine shall be supplied with another truss on making a like application as provided for in section two of the original act of which this is an amendment: *Provided*, That such application shall not be made more than once in two years and six months: *And provided further*, That sections two and three of the said act of May twenty-eighth, eighteen hundred and seventy-two, shall be construed so as to apply to petty-officers, seamen, and marines of the naval service, as well as to soldiers of the Army.—(20 Stat., 353, chap. 173.)

Section one of the act of May 28, 1872, referred  
to above, was incorporated in the Revised  
Statutes as section 1176.

Sections 2 and 3 of the act of May 28, 1872,  
referred to above, were incorporated in the  
Revised Statutes as sections 1177 and 1178.

See sections 1176–1178, Revised Statutes, and  
notes thereto.

[1879, Mar. 3, sec. 29. Penalty envelopes, authority to use; endorsements on; registered mail.] The provisions of the fifth and sixth section of the act entitled “An act establishing post-routes, and for other purposes” approved March third, eighteen hundred and seventy-seven, for the transmission of official mail-matter, be, and they are hereby, extended to all officers of the United States Government, not including members of Congress, the envelopes of such matter in all cases to bear appropriate indorsements containing the proper designation of the office from which or officer from whom the same is transmitted, with a statement of the penalty for their misuse. And the provisions of said fifth and sixth sections are hereby likewise extended and made applicable to all official mail-matter of the Smithsonian Institution: *Provided*, That any Department or officer authorized to use the penalty envelopes may inclose them with return address to any person or persons from or through whom official information is desired, the same to be used only to cover such official information, and indorsements relating thereto: *Provided further*, That any letter or packet to be registered by either of the Executive Departments, or Bureaus thereof, or by the Agricultural Department, or by the Public Printer, may be registered without the payment of any registry fee;

and any part-paid letter or packet addressed to either of said Departments or Bureaus may be delivered free; but where there is good reason to believe the omission to prepay the full postage thereon was intentional, such letter or packet shall be returned to the sender: *Provided further*, That this act shall not extend or apply to pension agents or other officers who receive a fixed allowance as compensation for their services, including expenses of postages. And section thirty-nine hundred and fifteen of the Revised Statutes of the United States, so far as the same relates to stamps and stamped envelopes for official purposes, is hereby repealed.—(20 Stat., 362, chap. 180; 23 Stat., 158, chap. 234.)

This section was expressly amended and re-enacted to read as above by act of July 5, 1884, section 3 (23 Stat., 158).

See act of March 3, 1877, sections 5 and 6, (19 Stat., 335-336), and notes thereto; see

also notes to sections 388 and 398, Revised Statutes, and Criminal Code, act of March 4, 1909, section 227 (35 Stat., 1134).

See act of March 3, 1883, section 2 (22 Stat., 563), and note thereto.

[1879, June 14. **Vessels for quarantine.**] That the Secretary of the Navy be, and he is hereby, authorized, in his discretion, at the request of the National Board of Health, to place gratuitously, at the disposal of the commissioners of quarantine, or the proper authorities at any of the ports of the United States, to be used by them temporarily for quarantine purposes, such vessels or hulks belonging to the United States as are not required for other uses of the national government, subject to such restrictions and regulations as the said Secretary may deem necessary to impose for the preservation thereof.—(21 Stat., 50, Res. No. 6.)

The act of March 3, 1879 (20 Stat., 484), which established the "National Board of Health," was repealed by act of February 15, 1893, section 9 (27 Stat., 452), "granting addi-

tional quarantine powers and imposing additional duties upon the Marine Hospital Service," now "Public Health Service."

[1880, May 31. **Vessels of Fish Commission.**] And the Secretary of the Navy is hereby directed to place the vessels of the United States Fish Commission on the same footing with the Navy Department as those of the United States Coast and Geodetic Survey.—(21 Stat., 151, chap. 113.)

See sections 4397, 4684-4688, Revised Statutes. By act of July 7, 1884 (23 Stat., 239), it was enacted that the above provision "shall be construed as having given to the United States Commissioner of Fish and Fisheries, to July first, eighteen hundred and eighty-four, but no longer, the same authority in regard to allowances for subsistence to officers and men of the Navy serving in the operations of the United States Commis-

sioner of Fish and Fisheries as is given to the Secretary of the Treasury in regard to service of officers and men of the Navy in the Coast Survey by section forty-six hundred and eighty-eight of the Revised Statutes of the United States."

As to the authorized number of enlisted men in the Navy, including those serving in the Fish Commission, see laws noted under section 1417, Revised Statutes.

[1880, June 8. **Judge Advocate General.**] That the President of the United States be, and he is hereby, authorized to appoint, for the term of four years, by and with the advice and consent of the Senate, from the officers of the Navy or the Marine Corps, a judge-advocate-general of the Navy, with the rank, pay, and allowances of a captain in the Navy or a colonel in the Marine Corps, as the case may be. And the office of the said judge-advocate-general shall be in the Navy Department, where he shall, under the direction of the Secretary of the Navy, receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for the examination of officers for retirement and promotion in the naval service, and perform such other duties as



have heretofore been performed by the solicitor and naval judge-advocate-general.—(21 Stat., 164, chap. 129.)

This act was amended by act of June 5, 1896 (29 Stat., 251), by inserting therein, in lieu of the words, "with the rank, pay, and allowances of a captain in the Navy, or a colonel in the Marine Corps, as the case may be," the words "with the rank and highest pay of a captain [in] the Navy, or the rank, pay, and allowances of a colonel in the Marine Corps, as the case may be," with a proviso that said amendment shall take effect from July 19, 1892, "the date on which the present incumbent entered on duty."

It was again amended by act of July 1, 1918 (40 Stat., 717), under which the Judge Advocate General is to have the same rank, pay and allowances as the Judge Advocate General of the Army.

As to the duties of the Judge Advocate General, see act of February 16, 1909, section 6 (35 Stat., 621), and section 1624, Revised Statutes, article 53, under "Action of the Judge Advocate General."

See note to sections 349, 419, and 421, Revised Statutes.

[1881, Jan. 21. Advertising in District of Columbia.] That all advertising required by existing laws to be done in the District of Columbia by any of the departments of the government shall be given to one daily and one weekly newspaper of each of the two principal political parties and to one daily and one weekly neutral newspaper: *Provided*, That the rates of compensation for such service shall in no case exceed the regular commercial rate of the newspapers selected; nor shall any advertisement be paid for unless published in accordance with section thirty-eight hundred and twenty-eight of the Revised Statutes.

SEC. 2. All laws or parts of laws inconsistent herewith are hereby repealed.—(21 Stat., 317, chap. 25.)

See sections 3826 and 3828, Revised Statutes, and act of June 20, 1878 (20 Stat., 216).

[1881, Jan. 31, sec. 2. Foreign decorations, etc., not to be worn.] That no decoration, or other thing, the acceptance of which is authorized by this act, and no decoration heretofore accepted, or which may hereafter be accepted, by consent of Congress, by any officer of the United States, from any foreign government, shall be publicly shown or exposed upon the person of the officer so receiving the same.—(21 Stat., 604, chap. 32.)

[1881, Jan. 31, sec. 3. Foreign decorations, etc., tendered through State Department.] That hereafter any present, decoration, or other thing, which shall be conferred or presented by any foreign government to any officer of the United States, civil, naval, or military, shall be tendered through the Department of State, and not to the individual in person, but such present, decoration, or other thing shall not be delivered by the Department of State unless so authorized by act of Congress.—(21 Stat., 604, chap. 32.)

The first section of this act authorized certain officers, designated by name, to accept particular decorations and presents from foreign governments.

See Constitution, Article I, section 9, clause 8, and note thereto; see also, act of July 9, 1918 (40 Stat., 872).

[1882, Aug. 5. Rent of buildings, District of Columbia.] And where buildings are rented for public use in the District of Columbia, the executive departments are authorized, whenever it shall be advantageous to the public interest, to rent others in their stead: *Provided*, That no increase in the number of buildings now in use, nor in the amounts paid for rents, shall result therefrom.—(22 Stat., 241, chap. 389.)

See acts of March 3, 1877 (19 Stat., 370), and March 3, 1883 (22 Stat., 552); and see section 3679, Revised Statutes.

[1882, Aug. 5, sec. 4. Number and pay of employees limited; use of contingent appropriations; details from outside of District of Columbia.] That no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employee shall after the first day of October next be employed in any of the executive departments, or subordinate bureaus or offices thereof at the seat of government, except only at such rates and in such numbers, respectively, as may be specifically appropriated for by Congress for such clerical and other personal services for each fiscal year; and no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employee shall hereafter be employed at the seat of government in any executive department or subordinate bureau or office thereof or be paid from any appropriation made for contingent expenses, or for any specific or general purpose, unless such employment is authorized and payment therefor specifically provided in the law granting the appropriation, and then only for services actually rendered in connection with and for the purposes of the appropriation from which payment is made, and at the rate of compensation usual and proper for such services, and after the first day of October next section one hundred and seventy-two of the Revised Statutes, and all other laws and parts of laws inconsistent with the provisions of this act, and all laws and parts of laws authorizing the employment of officers, clerks, draughtsmen, copyists, messengers, assistant messengers, mechanics, watchmen, laborers, or other employees at a different rate of pay or in excess of the numbers authorized by appropriations made by Congress, be and they are hereby, repealed; and thereafter all details of civil officers, clerks, or other subordinate employees from places outside of the District of Columbia for duty within the District of Columbia, except temporary details for duty connected with their respective offices, be, and are hereby, prohibited; and thereafter all moneys accruing from lapsed salaries, or from unused appropriations for salaries, shall be covered into the Treasury: \* \* \* and nothing herein shall be construed to repeal or modify section one hundred and sixty-six of the Revised Statutes of the United States.—(22 Stat., 255–256, chap. 389.)

The portion omitted from this section consisted of temporary provisos.

See sections 166, 169, 172, 416, and 3682, Revised Statutes; see also acts of August 15, 1876, section 5 (19 Stat., 169), and May 30, 1908 (35 Stat., 505).

Punishment for violation of this section was prescribed by act of August 23, 1912, section 5 (37 Stat., 414).

Restrictions on details to departments from outside of the District are contained in act of June 22, 1906, section 6 (34 Stat., 449).

[1882, Aug. 5. Naval cadets; appointed on graduation; discharge of surplus graduates; special course of training.] That hereafter there shall be no appointments of cadet-midshipmen or cadet-engineers at the Naval Academy, but in lieu thereof naval cadets shall be appointed from each Congressional district and at large, as now provided by law for cadet-midshipmen, and all the undergraduates at the Naval Academy shall hereafter be designated and called “naval cadets;” and from those who successfully complete the six years’ course appointments shall hereafter be made as it is necessary to fill vacancies in the lower grades of the line and Engineer Corps of the Navy and of the Marine Corps: \* \* \* and if there be a surplus of graduates, those who do not receive such appointment shall be given a certificate of graduation, an honorable discharge, and one year’s sea-pay, as now provided by law for



cadet-midshipmen; and so much of section fifteen hundred and twenty-one of the Revised Statutes as is inconsistent herewith is hereby repealed.

That any cadet whose position in his class entitles him to be retained in the service may, upon his own application, be honorably discharged at the end of four years' course at the Naval Academy, with a proper certificate of graduation.

That the Secretary of the Navy may prescribe a special course of study and training at home or abroad for any naval cadet.—(22 Stat., 285, chap. 391.)

See generally sections 1512-1528, Revised Statutes, and notes thereto.

As to change in designation of naval cadets, see note to section 1512, Revised Statutes.

As to appointments on graduation, see note to section 1521, Revised Statutes.

As to academic course, see section 1520, Revised Statutes, and note thereto.

As to discharge of surplus graduates, see note to section 1521, Revised Statutes.

[1882, Aug. 5. No promotion on retired list.] Hereafter there shall be no promotion or increase of pay in the retired list of the Navy but the rank and pay of officers on the retired list shall be the same that they are when such officers shall be retired.—(22 Stat., 286, chap. 391.)

See notes to sections 1461, 1481, 1588, and 1591, Revised Statutes.

[1882, Aug. 5. Officers morally unfit for promotion.] That whenever on an inquiry had pursuant to law, concerning the fitness of an officer of the Navy for promotion, it shall appear that such officer is unfit to perform at sea the duties of the place to which it is proposed to promote him, by reason of drunkenness, or from any cause arising from his own misconduct, and having been informed of and heard upon the charges against him, he shall not be placed on the retired-list of the Navy, and if the finding of the board be approved by the President, he shall be discharged with not more than one year's pay.—(22 Stat., 286, chap. 391.)

See note to section 1456, Revised Statutes.

[1882, Aug. 5. Expenses of officers traveling abroad.] And officers of the Navy traveling abroad under orders hereafter issued shall travel by the most direct route, the occasion and necessity for such order to be certified by the officer issuing the same; and shall receive, in lieu of the mileage now allowed by law, only their actual and reasonable expenses, certified under their own signatures and approved by the Secretary of the Navy.—(22 Stat., 286-287, chap. 391.)

See note to section 1566, Revised Statutes.

[1882, Aug. 5. Navy yard at Washington; use as a manufacturing yard.] That the navy-yard at Washington, District of Columbia, may, at the discretion of the Secretary of the Navy, be maintained as a manufacturing yard for the Bureaus of Equipment and Recruiting and Ordnance, and that work may be continued in the rope-walk in the Boston navy-yard: *And provided further*, That nothing herein shall be held to interfere with the permanent improvement of any navy-yard as now authorized by law, or the expenditure for such purpose of any money appropriated by Congress therefor.—(22 Stat., 289, chap. 391.)

See note to section 419, Revised Statutes, as to changes in designation and duties of bureaus in the Navy Department.

The above were provisos following require-

ments as to suspension of work at navy-yards during the then current fiscal year, and the closing of yards if necessary to prevent deficiencies during said year.

[1882, Aug. 5, sec. 2. **Old material to be used; if not useful, to be sold; annual report to Congress.**] And no old material of the Navy shall hereafter be sold or exchanged by the Secretary of the Navy, or by any officer of the Navy, which can be profitably used by reworking or otherwise in the construction or repair of vessels, their machinery, armor, armament, or equipment; but the same shall be stored and preserved for future use. And when any such old material can not be profitably used as aforesaid, the same shall be appraised and sold at public auction after public notice and advertisement shall have been given according to law under such rules and regulations and in such manner as the said Secretary may direct. The net proceeds arising from the sales of such old materials shall be paid into the Treasury. It shall be the duty of the Secretary of the Navy annually to report in detail to Congress, in his annual report, the proceeds of all sales of materials, stores, and supplies, made under the provisions of this act, and the expenses attending such sales.—(22 Stat., 296, chap. 391.)

See sections 1541, 3618, and 3692, Revised Statutes; see also, acts of June 30, 1890 (26 Stat., 194), and March 2, 1905 (33 Stat., 841).

[1882, Aug. 5, sec. 2. **Examination of vessels; names stricken from Register; report to Congress.**] It shall also be the duty of the Secretary of the Navy, as soon as may be after the passage of this act, to cause to be examined by competent boards of officers of the Navy, to be designated by him for that duty, all vessels belonging to the Navy not in actual service at sea, and vessels at sea as soon as practicable after they shall return to the United States, and hereafter all vessels on their return from foreign stations, and all vessels in the United States as often as once in three years, when practicable; and said boards shall ascertain and report to the Secretary of the Navy, in writing, which of said vessels are unfit for further service, or, if the same are unfinished in any navy-yard, those which can not be finished without great and disproportionate expense, and shall in such report state fully the grounds and reasons for their opinion. And it shall be the duty of the Secretary of the Navy, if he shall concur in opinion with said report, to strike the name of such vessel or vessels from the Navy Register and report the same to Congress.—(22 Stat., 296–297, chap. 391.)

See act of March 3, 1883, section 5 (22 Stat., 599–600), as to sale of vessels stricken from the Navy Register.

See also section 1541, Revised Statutes, and note thereto.

[1883, Mar. 3. **Masters to be junior grade of lieutenants.**] For the pay of \* \* \* one hundred masters, the title of which grade is hereby changed to that of lieutenants, and the masters now on the list shall constitute a junior grade of, and be commissioned as, lieutenants, having the same rank and pay as now provided by law for masters, but promotion to and from said grade shall be by examination as provided by law for promotion to and from the grade of master.—(22 Stat., 472, chap. 97.)

See note to section 1362, Revised Statutes.

[1883, Mar. 3. **Midshipmen to be junior grade of ensigns.**] Ninety-one midshipmen, the title of which grade is hereby changed to that of ensign, and the midshipman now on the list shall constitute a junior grade of, and be



commissioned as, ensigns, having the same rank and pay as now provided by law for midshipmen, but promotions to and from said grade shall be under the same regulations and requirements as now provided by law for promotion to and from the grade of midshipmen.—(22 Stat., 472, chap. 97.)

See note to section 1362, Revised Statutes, and see act of June 26, 1884 (23 Stat., 60).

[1883, Mar. 3. Credit for all service in Army and Navy.] And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular Navy in the lowest grade having graduated pay held by such officer since last entering the service: *Provided*, That nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers: *Provided further*, That nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in the volunteer army or navy.—(22 Stat., 473, chap. 97.)

See notes to sections 1443, 1556, and 1600, Revised Statutes; and see act of June 10, 1896 (29 Stat., 361). | A somewhat similar provision was contained in act of August 5, 1882 (22 Stat., 287).

[1883, Mar. 3. Life saving dress, use in the Navy.] The Secretary of the Navy is authorized and empowered, within his discretion, to constitute and introduce, as a portion of the equipment of the Navy, the life saving dress adopted and approved by the Life Saving Service of the United States.—(22 Stat., 475, chap. 97.)

[1883, Mar. 3, sec. 2. Employment on shore duty.] That hereafter no officer of the Navy shall be employed on any shore duty, except in cases specially provided by law, unless the Secretary of the Navy shall determine that the employment of an officer on such duty is required by the public interests, and he shall so state in the order of employment, and also the duration of such service, beyond which time it shall not continue.—(22 Stat., 481, chap. 97.)

This provision is expressly modified by act of July 19, 1892 (27 Stat., 245). | A similar provision was contained in act of August 5, 1882, section 3 (22 Stat., 297).  
See note to section 1571, Revised Statutes, as to sea service.

[1883, Mar. 3. Rented buildings, report to Congress.] It shall be the duty of the heads of the several executive departments to submit to Congress each year, in the annual estimates of appropriations, a statement of the number of buildings rented by their respective departments, the purposes for which rented, and the annual rental of each.—(22 Stat., 552, chap. 128.)

See acts of March 3, 1877 (19 Stat., 370), and July 16, 1892 (27 Stat., 199), as amended by act of May 1, 1913, section 3 (38 Stat., 3). | See also sections 429 and 430, Revised Statutes, and note thereto.

[1883, Mar. 3, Sec. 2. Penalty envelopes to be inclosed with letters to Members of Congress, etc.] And it shall be the duty of the respective departments to inclose to Senators, Representatives and Delegates in Congress, in all official communications requiring answers, or to be forwarded to others, penalty envelopes, addressed as far as practicable, for forwarding or answering such official correspondence.—(22 Stat., 563, chap. 128.)

See act of March 3, 1879, section 29 (20 Stat., 362), and note thereto, as to use of penalty envelopes by all officers of the Government, "not including Members of Congress." By act of April 28, 1904, section 7 (33 Stat., 441), Members of Congress were given the privilege of transmitting correspondence free of postage.

A portion of this section, omitted above, provided for requisitions to be made upon the Postmaster General by heads of departments for the necessary amount of official postage stamps for the use of their departments.

[1883, Mar. 3, sec. 5. **Sale of vessels.**] It shall be the duty of the Secretary of the Navy to cause to be appraised, in such manner as may seem best, all vessels of the Navy which have been stricken from the Navy Register under the provisions of the act making appropriations for the naval service for the fiscal year ending June thirtieth, eighteen hundred and eighty-three, and for other purposes, approved August fifth, eighteen hundred and eighty-two. And if the said Secretary shall deem it for the best interest of the United States to sell any such vessel or vessels, he shall, after such appraisal, advertise for sealed proposals for the purchase of the same, for a period not less than three months, in such newspapers as other naval advertisements are published, setting forth the name and location and the appraised value of such vessel, and that the same will be sold, for cash, to the person or persons or corporation or corporations offering the highest price therefor above the appraised value thereof; and such proposals shall be opened on a day and hour and at a place named in said advertisement, and record thereof shall be made. The Secretary of the Navy shall require to accompany each bid or proposal a deposit in cash of not less than ten per centum of the amount of the offer or proposal, and also a bond, with two or more sureties to be approved by him, conditioned for the payment of the remaining ninety per centum of the amount of such offer or proposal within the time fixed in the advertisement. And in case default is made in the payment of the remaining ninety per centum, or any part thereof, the Secretary, within the prescribed time thereof, shall advertise and resell said vessel under the provisions of this act. And in that event said cash deposit of ten per centum shall be considered as forfeited to the government, and shall be applied, first, to the payment of all costs and expenditures attending the advertisement and resale of said vessel; second, to the payment of the difference, if any, between the first and last sale of said vessel; and the balance, if any, shall be covered into the Treasury: *Provided, however,* That nothing herein contained shall be construed to prevent a suit upon said bond for breach of any of its conditions. Any vessel sold under the foregoing provisions shall be delivered to the purchaser upon the full payment to the Secretary of the Navy of the amount of such proposal or offer; and the net proceeds of such sale shall be covered into the Treasury. But no vessel of the Navy shall hereafter be sold in any other manner than herein provided, or for less than such appraised value, unless the President of the United States shall otherwise direct in writing.—(22 Stat., 599-600, chap. 141.)

See act of August 5, 1882, section 2 (22 Stat., 296-297); see also, section 1541, Revised Statutes, and note thereto.

[1883, Mar. 3. **Patents to officers of United States.**] The Secretary of the Interior and the Commissioner of Patents are authorized to grant any officer of the government, except officers and employees of the Patent Office, a patent for any invention of the classes mentioned in section forty eight hundred and



eighty six of the Revised Statutes, when such invention is used or to be used in the public service, without the payment of any fee: *Provided*, That the applicant in his application shall state that the invention described therein, if patented, may be used by the government or any of its officers or employees in the prosecution of work for the government, or by any other person in the United States, without the payment to him of any royalty thereon, which stipulation shall be included in the patent.—(22 Stat., 625, chap. 143.)

See section 4894, Revised Statutes, and note thereto.

[1884, June 26. **Ensigns commissioned from graduates of Naval Academy; grade of junior ensign abolished.**] That from and after the passage of this act all graduates of the Naval Academy who are assigned to the line of the Navy, on the successful completion of the six years course, shall be commissioned ensigns in the Navy.

SEC. 2. That the grade of junior ensign in the Navy is hereby abolished and the junior ensigns now on the list shall be commissioned ensigns in the Navy: *Provided*, That nothing in this act shall be so construed as to increase the number of officers in the Navy now allowed by law.

SEC. 3. That all acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed.—(23 Stat., 60, chap. 122.)

See note to section 1521, Revised Statutes, as to appointments to graduates of Naval Academy.

See act of Mar. 3, 1883 (22 Stat., 472), and note to section 1362, Revised Statutes, as to grade of junior ensign.

[1884, July 5, Sec. 3. **Sale of smooth-bore cannon for experimental purposes.**] That the Secretary of War and the Secretary of the Navy are hereby authorized to sell to projectors of methods of conversion, for experimental purposes only, any smooth-bore cannon on hand required by them, at prices which shall not be less than have been received from auction sales for such articles, and deliver the same, at the cost of the Government, at the nearest convenient place for shipment or public transportation; the cost of delivery to be deducted from the proceeds of sales, and the balance to be covered into the Treasury of the United States.—(23 Stat., 159, chap. 235.)

See notes to sections 161, 418, and 1541, Revised Statutes.

[1884, July 7. **Report to Congress of claims allowed.**] That the Secretary of the Treasury shall, at the commencement of each session of Congress, report the amount due each claimant whose claim has been allowed in whole or in part to the Speaker of the House of Representatives and the presiding officer of the Senate, who shall lay the same before their respective Houses for consideration.—(23 Stat., 254, chap. 334.)

See acts of June 20, 1874, section 5 (18 Stat., 110), and June 14, 1878, section 4 (20 Stat., 130).

[1884, July 7. **Estimates, how submitted to Congress.**] And hereafter all estimates of appropriations and estimates of deficiencies in appropriations intended for the consideration and seeking the action of any of the committees of Congress shall be transmitted to Congress through the Secretary of the Treasury, and in no other manner; and the said Secretary shall first cause the same to be properly classified, compiled, indexed, and printed, under the

supervision of the chief of the division of warrants, estimates, and appropriations of his Department.—(23 Stat., 254, chap. 334.)

See sections 430 and 3669, Revised Statutes, and notes thereto.

[1885, Jan. 6. **Holidays, per diem employees.**] That the employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days.—(23 Stat., 516, Res. No. 5.)

See note to section 1545, Revised Statutes.

[1885, Jan. 30. **Rations, enlisted men and naval cadets.**] That all enlisted men and boys in the Navy, attached to any United States vessel or station and doing duty thereon, and naval cadets, shall be allowed a ration, or commutation thereof in money, under such limitations and regulations as the Secretary of the Navy may prescribe.—(23 Stat., 291, chap. 43.)

See sections 1577-1579, Revised Statutes, and notes thereto, relating to rations.

See section 1512, Revised Statutes, and note thereto, as to change in designation of "naval cadets."

[1885, Jan. 30. **Commutation for forage.**] Marine Corps. \* \* \* That no commutation for forage shall be paid.—(23 Stat., 294, chap. 43.)

See section 1612, Revised Statutes, and note thereto.

[1885, Jan. 30, **Sec. 3. Civilians employed on clerical duty under naval appropriations; annual report and estimates.**] That the Secretary of the Navy is hereby directed to report to Congress, at its next and each regular session thereafter, the amount expended during the prior fiscal year, from the appropriations for the pay of the Navy, Bureaus of Navigation, Ordinance, Equipment and Recruiting, Yards and Docks, Medicine and Surgery, Provisions and Clothing, Construction and Repair, and Steam-Engineering, for civilians employed on clerical duty, or in any other capacity than as ordinary mechanics and workmen, and to submit, under the estimates for pay of the Navy and for the respective Bureaus enumerated above, specific estimates for such civilian employees for the fiscal year eighteen hundred and eighty-seven, and each fiscal year thereafter.—(23 Stat., 295, chap. 43.)

See notes to sections 416, 429, and 430, Revised Statutes.

See note to section 419, Revised Statutes, as to changes in designation of bureaus in the Navy Department.

[1886, May 20. **Naval Academy, instructions as to nature and effects of alcoholic drinks, etc.**] That the nature of alcoholic drinks and narcotics, and special instructions as to their effects upon the human system, in connection with the several divisions of the subject of physiology and hygiene, shall be included in the branches of study taught in the common or public schools, and in the Military and Naval Schools, and shall be studied and taught as thoroughly and in the same manner as other like required branches are in said schools, by the use of text-books in the hands of pupils where other branches are thus studied in said schools, and by all pupils in all said schools throughout



the Territories, in the Military and Naval Academies of the United States, and in the District of Columbia, and in all Indian and colored schools in the Territories of the United States.

SEC. 2. That it shall be the duty of the proper officers in control of any school described in the foregoing section to enforce the provisions of this act; and any such officer, school director, committee, superintendent, or teacher who shall refuse or neglect to comply with the requirements of this act, or shall neglect or fail to make proper provisions for the instruction required and in the manner specified by the first section of this act, for all pupils in each and every school under his jurisdiction, shall be removed from office, and the vacancy filled as in other cases.—(24 Stat., 69, chap. 362.)

See sections 1511–1528, Revised Statutes, as to Naval Academy.

[1886, July 26. Tests of cannon for the Navy.] One or more rifled cannon of each type constructed at the cost of the United States for the Navy shall be publicly subjected to the proper test for endurance including such rapid firing as a like gun would be subjected to in battle. This test shall be under the direction and to the satisfaction of the Secretary of the Navy, and if such guns do not prove satisfactory, the type they represent shall not be put in use in the naval service.—(24 Stat., 151, chap. 781.)

A similar provision with relation to the Army, [ (23 Stat., 159), was repealed by act of March 3, 1921, section 7 (41 Stat., 1352). ]

[1886, July 26, sec. 2. Unexpended balances of appropriations.] All balances of moneys appropriated for the pay of the Navy or pay of the Marine Corps, for any year existing after the accounts for said year shall have been settled shall be covered into the Treasury.—(24 Stat., 157, chap. 781.)

See sections 250, 3689–3691, Revised Statutes, [ 1874, section 5 (18 Stat., 110), and August 24, 1912, section 7 (37 Stat., 487). ] and notes thereto; see also acts of June 20.

[1886, Aug. 3, sec. 2. Naval construction; steel of domestic manufacture to be used; etc.] That in the construction of all naval vessels the steel material shall be of domestic manufacture, and of the quality and characteristics best adapted to the various purposes for which it may be used, in accordance with specifications approved by the Secretary of the Navy.—(24 Stat., 215, chap. 849; 30 Stat., 390, chap. 234.)

See section 3728, Revised Statutes.

This section was expressly amended and reenacted to read as above by act of May 4, 1898 (30 Stat., 390). As originally enacted, this section and the other sections of said act of August 3, 1886 (24 Stat., 215–217), read as follows:

“That the President is hereby authorized to have constructed, as hereinafter provided—

“First. Two sea-going double-bottomed armored vessels of about six thousand tons displacement, designed for a speed of at least sixteen knots an hour, with engines having all necessary appliances for working under forced draught, and costing, including engines and machinery and excluding armament, not more than two million five hundred thousand dollars each. Said vessels shall have each a complete torpedo outfit and be armed in the most effective manner.

“Second. One protected double-bottomed cruiser of not less than three thousand five hun-

dred nor more than five thousand tons displacement, designed to have the highest practicable speed and furnished with the best type of modern engines, furnished with necessary appliances for working under forced draught. Said vessel shall cost, including engines and machinery and excluding armament, not exceeding one million five hundred thousand dollars.

“Third. One first class torpedo-boat, costing in the aggregate not more than one hundred thousand dollars.

“Sec. 2. That the vessels hereinbefore authorized to be constructed shall be built of steel of domestic manufacture, having a tensile strength of not less than sixty thousand pounds per square inch, and an elongation in eight inches of not less than twenty-five per centum.

“Sec. 3. That the President is hereby authorized to direct the completion, as hereinafter provided, of the double-turreted monitors Puritan, Amphitrite, Monadnock, and Monitor, at a total cost, exclusive of armament, not to exceed

three million one hundred and seventy-eight thousand and forty-six dollars.

"SEC. 4. That the armor used in constructing said armored vessels and for completing said monitors shall be of the best obtainable quality and of domestic manufacture, provided contracts for furnishing the same in a reasonable time, at a reasonable price, and of the required quality can be made with responsible parties. Such armor shall be accepted only after passing such tests as shall be prescribed by the Secretary of the Navy and inserted in the contracts.

"SEC. 5. That the Secretary of the Navy shall cause one or more of the new vessels hereinbefore provided for to be constructed and one or more of the said monitors to be completed in one or more of the navy-yards of the United States; and if he shall be unable to contract with responsible parties to construct or complete, at reasonable prices, all or any of the vessels hereinbefore provided for, he shall cause the same to be constructed or completed in such of the navy-yards of the United States as may be best adapted thereto.

"SEC. 6. That the engines, boilers, and machinery of all the new vessels provided for by this act shall be of domestic manufacture and procured by contract, unless the Secretary of the Navy shall be unable to obtain the same at fair prices, in which case he may construct the same, or any portion thereof, in the navy-yards of the United States: *Provided*, That the Secretary of the Navy may purchase abroad only such shafting as it may be impossible to obtain in the United States in time for use in the construction of the vessels herein provided for.

"SEC. 7. That the Secretary of the Navy shall not contract for the construction or completion of any of said vessels, or of their engines, machinery, or boilers, until drawings and specifications of the same shall have been provided or adopted by him; and after said drawings and specifications shall have been provided, adopted, and approved as aforesaid, and work shall have been commenced on any contract made therefor, such plans and specifications shall not be changed in any respect when the cost of such change in the execution of the work exceeds five hundred dollars, except upon the written order of the Secretary or Acting Secretary of the Navy; and if changes are thus made, the actual cost thereof and the damage caused thereby shall be ascertained, estimated, and determined by a board of naval officers to be provided for in the contract; and in any contract made pursuant to this act it shall be provided in the terms thereof that the contractor shall be bound by the determination of said board, or a majority thereof, as to the amount of increase or diminished compensation said contractor shall be entitled to receive, if any, in consequence of such change or changes. In every contract to be made under this act there shall be prescribed a period within which the work provided for in said contract, or specified portions thereof, shall be completed, and the completion of such work within the periods prescribed shall be insured by penal provisions. For the construction or completion of such vessels hereinbefore provided for as the Secretary of the Navy shall propose to have constructed or completed by contract, as well as also for the engines, boilers,

and machinery hereinbefore provided for, he shall invite proposals from every American shipbuilder and other person who shall show to the satisfaction of the Secretary of the Navy that within three months from the date of the contract he will be possessed of the necessary plant for the performance of the work in the United States which he shall offer to undertake, and such contract shall be let to the lowest and best responsible bidder or bidders, after at least sixty days' advertisement, published in five leading papers of the United States, inviting proposals for the work proposed, which work shall be subject to all such rules, regulations, superintendence by naval officers during construction, and provisions as to bonds and security for the quality and due completion of the work as the Secretary of the Navy shall prescribe; and no vessel, boiler, engine, machinery, or portion thereof shall be accepted unless completed in strict conformity with the contract; and the authority given hereby shall take effect at once. The Secretary of the Navy shall have the power to reject any or all bids made under the provisions of this act.

"SEC. 8. That the sum of one million dollars is hereby appropriated towards the armament of the vessels authorized by the act of March third, eighteen hundred and eighty-five, of the vessels authorized by section one of this act, and of the unfinished monitors hereinbefore mentioned, and of the Miantonomoh; and the Secretary of the Navy is hereby authorized to direct the application of such portions of this sum as may be necessary to the manufacture or purchase of such tools and machinery or the erection of such structures as may be required for use in the manufacture of such armament, or any part thereof: *Provided*, That the Secretary of the Navy may contract with domestic manufacturers for the construction of such portion of the heavy guns herein provided for as may not be built by the Government.

"SEC. 9. That the Secretary of the Navy is hereby authorized to contract with the Pneumatic Dynamite-Gun Company of New York for one dynamite-gun cruiser, as follow: Said cruiser to be not less than two hundred and thirty feet long, twenty-six feet breadth of beam, seven and one-half feet draught, three thousand two hundred horse-power, and guaranteed to attain a speed of twenty knots an hour, and to be equipped with three pneumatic dynamite-guns of ten and one-half inch caliber, and guaranteed to throw shells containing two hundred pounds of dynamite or other high explosives at least one mile, each gun to be capable of being discharged once in two minutes, at a price not to exceed three hundred and fifty thousand dollars; said contract to be made only on condition that there shall be a favorable report made by the existing Naval Board on the system; to be paid for as the work progresses, and upon the report of such board or boards of inspectors as the Secretary of the Navy may for that purpose appoint, reserving thirty per centum on all such payments until the whole work is completed and accepted by the Secretary of the Navy.

"The Pneumatic Dynamite-Gun Company shall furnish bonds satisfactory to the Secretary of the Navy for the faithful performance of its



contract, and for the refunding of the money paid hereunder in case of the nonperformance of the same, and shall further agree with the Secretary of the Navy upon a limit of price which shall not be exceeded in any future contracts which the Government may desire to enter into for the purchase of the company's guns.

"SEC. 10. That towards the construction and completion of the vessels hereinbefore mentioned, including the vessel and guns mentioned in section nine, the sum of two million five hundred thousand dollars is hereby appropriated, of which not more than seventy-five thousand dollars may be expended in manufacturing, purchasing, and experimenting with torpedoes of domestic manufacture and not exceeding one hundred and fifty thousand dollars may be expended, under the direction of the Secretary of the Navy, in improving the plant of such of the navy-yards as he may select."

The provisions contained in the foregoing act of August 3, 1886, relating to the construction of the particular vessels therein specified, were applied to the construction of other vessels thereafter authorized by appropriations under "Increase of the Navy" in annual naval appropriation acts, to and including the act of June 24, 1910 (36 Stat., 628), the language of which act with respect thereto being as follows:

"In the construction of all of said vessels the provisions of the act of August third, eighteen hundred and eighty-six, entitled 'An act to increase the naval establishment,' as to materials for said vessels, their engines, boilers, and machinery, the contracts under which they are built, the notice of any proposals for the same; the plans, drawings, specifications therefor, and the method of executing said contracts shall be observed and followed, and, subject to the provisions of this act, except that the Secretary of the Navy may accept, in lieu of an indemnity bond, the deposit by contractors of United States Government or State bonds, under such conditions and in such manner as the Secretary may prescribe, having due regard for the rights and protection of the United States, all said vessels shall be built in compliance with the terms of said act, and in all their parts shall be of domestic manufacture; and the steel materials shall be of domestic manufacture, and of the quality and characteristics

best adapted to the various purposes for which it may be used, in accordance with specifications approved by the Secretary of the Navy, provided contracts for furnishing the same in a reasonable time, at a reasonable price, and of the required quality can be made with responsible parties."

In the appropriations for new vessels subsequent to the above-quoted act of June 24, 1910, no reference has been made to the act of August 3, 1886.

**Changes in contracts.**—Prior to 1911 contracts for the construction of naval vessels contained stipulations as to changes therein, in accordance with section 7 of the act of August 3, 1886, made applicable to such new construction by specific clauses in the annual naval appropriation acts under "Increase of the Navy." Since 1910 similar provisions as to changes have been embodied in such contracts, although no longer required by law. This practice is based on an opinion of the Attorney General of December 21, 1911 (29 Op. Atty. Gen., 285), which held that "the Secretary of the Navy may insert in the contracts for vessels constructed under authority of the act of March 4, 1911 (36 Stat., 1265), a provision for making changes in said contracts and for determining the amount of increased or diminished compensation arising therefrom, whether such compensation be of the nature of liquidated or unliquidated damages." (File 22724-51, Apr. 7, 1921.)

From an examination of the cases it is clear that changes in public contracts may be made without specific authority therefor; but it is also clear that contract provisions relating to such changes must be strictly observed. (File 22724-51, Apr. 7, 1921, citing 29 Op. Atty. Gen., 285; 18 Op. Atty. Gen., 101; 28 Op. Atty. Gen., 121; 21 Op. Atty. Gen., 207; Corliss Steam Eng. Co. v. U. S., 10 Ct. Cls., 494, 91 U. S., 321; Hawkins v. U. S., 96 U. S., 689; Ferris v. U. S., 28 Ct. Cls., 332; Williams Eng. and Cont. Co. v. U. S., 55 Ct. Cls., 349; 2 Comp. Dec., 182, 185; 4 Comp. Dec., 38; 3 Comp. Dec., 54; 5 Comp. Dec., 83; 7 Comp. Dec., 92; 9 Op. Atty. Gen., 80, 103; 10 Op. Atty. Gen., 476; 15 Op. Atty. Gen., 481; 12 Op. Atty. Gen., 112; Satterlee v. U. S., 30 Ct. Cls., 31.)

See act of March 4, 1917 (39 Stat., 1193), as to changes in contracts during war.

[1886, Aug. 4. Printing and engraving, Hydrographic office.] That all printing and engraving for the Geological Survey, the Coast and Geodetic Survey, the Hydrographic Office of the Navy Department, and the Signal Service shall hereafter be estimated for separately and in detail, and appropriated for separately for each of said Bureaus.—(24 Stat., 255, chap. 902.)

See sections 430 and 431, Revised Statutes, and notes thereto; see also act of January 12, 1895, section 27 (28 Stat., 604).

[1886, Aug. 4. Intoxicating liquors, Board of Visitors, Naval Academy.] Naval Academy. \* \* \* That no part of this sum, or of any other appropriation by Congress for expenses of the Board of Visitors, shall be used to pay for intoxicating liquors.—(24 Stat., 268, chap. 903.)

See note to section 1511, Revised Statutes.

[1887, Feb. 4, sec. 6. Transportation of troops and war material, etc.] That in time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given over all other traffic for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned.—(24 Stat., 380, chap. 104; 39 Stat., 604, chap. 417.)

The above was an amendment and reactment, by act of August 29, 1916 (39 Stat., 604), of a portion of section 6 of an act approved February 4, 1887 (24 Stat., 380-382), as previously amended by acts of March 2,

1889 (25 Stat., 855), and June 29, 1906, section 2 (34 Stat., 586-589).  
See also act of August 29, 1916 (39 Stat., 645, chap. 418).

[1887, Feb. 23. United States prisoners, hiring out labor of.] That it shall not be lawful for any officer, agent, or servant of the Government of the United States to contract with any person or corporation, or permit any warden, agent, or official of any State prison, penitentiary, jail, or house of correction where criminals of the United States may be incarcerated to hire or contract out the labor of said criminals, or any part of them, who may hereafter be confined in any prison, jail, or other place of incarceration for violation of any laws of the Government of the United States of America.

SEC. 2. That any person who shall offend against the provisions of this act shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be imprisoned for a term not less than one year nor more than three years, at the discretion of the court, or shall be fined not less than five hundred dollars nor more than one thousand dollars for each offense.

SEC. 3. That all acts or parts of acts inconsistent with the provisions of this act are hereby repealed; and this act shall take effect and be in force from and after its passage.—(24 Stat., 411, chap. 213.)

[1887, Feb. 23. Holidays, per diem employees.] That all per diem employees of the Government, on duty at Washington or elsewhere in the United States, shall be allowed the day of each year, which is celebrated as "Memorial" or "Decoration Day" and the fourth of July of each year, as holiday, and shall receive the same pay as on other days.—(24 Stat., 644, Res. No. 6.)

See note to section 1545, Revised Statutes.

[1888, June 29, sec. 5. Supervisor of New York Harbor.] That a line officer of the Navy shall be designated by the President of the United States as supervisor of the harbor, to act under the direction of the Secretary of War in enforcing the provisions of this act, and in detecting offenders against the same. This officer shall receive the sea-pay of his grade, and shall have personal charge and supervision under the Secretary of War, and shall direct the patrol boats and other means to detect and bring to punishment offenders against the provisions of this act.—(25 Stat., 210, chap. 496.)



The "harbor" referred to in this section is the harbor of New York City.

Sea-pay of naval officers, see notes to sections 1556 and 1571, Revised Statutes.

War Department, officers of the Navy detailed to duty under direction of, see sections 1437 and 1621, Revised Statutes, and notes thereto.

Duties of the supervisor of the harbor of New York, appointed as provided above, and his powers as to appointment of deputies, making arrests and seizures, etc., were prescribed by act of May 28, 1908 (35 Stat., 427).

[1888, Aug. 1. **Condemnation of lands.**] That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States circuit or district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice.

SEC. 2. The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding.—(25 Stat., 357, chap. 728.)

See act of July 9, 1918 (40 Stat., 888); and see section 355, Revised Statutes, and note thereto.

Circuit courts of the United States were abolished by act of March 3, 1911, section 289 (36 Stat., 1167).

[1888, Aug. 8. **Bonded officers, delinquency, notice to sureties, time for bringing suit.**] That hereafter, whenever any deficiency shall be discovered in the accounts of any official of the United States, or of any officer disbursing or chargeable with public money, it shall be the duty of the accounting officers making such discovery to at once notify the head of the Department having control over the affairs of said officer of the nature and amount of said deficiency, and it shall be the immediate duty of said head of Department to at once notify all obligors upon the bond or bonds of such official of the nature of such deficiency and the amount thereof. Said notification shall be deemed sufficient if mailed at the post-office in the city of Washington, District of Columbia, addressed to said sureties respectively, and directed to the respective post-offices where said obligors may reside, if known; but a failure to give or mail such notice shall not discharge the surety or sureties upon such bond.

SEC. 2. That if, upon the statement of the account of any official of the United States, or of any officer disbursing or chargeable with public money, by the accounting officers of the Treasury, it shall thereby appear that he is indebted to the United States, and suit therefor shall not be instituted within five years after such statement of said account, the sureties on his bond shall not be liable for such indebtedness.—(25 Stat., 387, chap. 787.)

See sections 1383-1385, Revised Statutes, and notes thereto; see also act of February 24, 1919, section 1320 (40 Stat., 1148).

[1888, Aug. 14. Civil War cases; removal of charge of desertion, issuance of discharge certificate, etc.] That the charge of desertion now standing on the rolls and records of the Navy or Marine Corps against any appointed or enlisted man of the Navy or Marine Corps who served in the late war may in the discretion of the Secretary of the Navy be removed in all cases where it shall be made to appear to the satisfaction of the Secretary of the Navy from such rolls and records or from other satisfactory evidence, that any such appointed or enlisted man served faithfully until the expiration of his term of enlistment, or until the first day of May anno Domini eighteen hundred and sixty-five, having previously served six months or more, or was prevented from completing his term of service by reason of wounds received or disease contracted in the line of duty, but who, by reason of absence from his command at the time he became entitled to his discharge, failed to be mustered out and to receive a discharge from the service: *Provided*, That no such appointed or enlisted man shall be relieved under this section who, not being sick or wounded, left his command, without proper authority, while the same was in presence of the enemy.

SEC. 2. That the Secretary of the Navy is hereby authorized to remove the charge of desertion standing on the rolls or records of the Navy or Marine Corps against any appointed or enlisted man of the Navy or Marine Corps who served in the late war, in all cases where it shall be made to appear, to the satisfaction of the Secretary of the Navy, from such rolls or from other satisfactory evidence, that such appointed or enlisted man charged with desertion or with absence without leave, after such charge of desertion or absence without leave, and within a reasonable time thereafter, voluntarily returned to and served in the line of his duty until he was mustered out of the service, and received a certificate of discharge therefrom, or, while so absent, and before the expiration of his term of enlistment, died from wounds, injury, or disease received or contracted in the service and in the line of duty.

SEC. 3. That the charge of desertion now standing on the rolls or records of the Navy or Marine Corps against any appointed or enlisted man of the Navy or Marine Corps who served in the late war, by reason of his having enlisted at any station or on board of any vessel of the Navy without having first received a discharge from the station or vessel in which he had previously served, shall be removed in all cases wherein it shall be made to appear to the satisfaction of the Secretary of the Navy from such rolls and records, or from other satisfactory testimony, that such re-enlistment was not made for the purpose of securing bounty or other gratuity that he would not have been entitled to, had he remained under his original term of enlistment: *Provided*, That no appointed or enlisted man shall be relieved under this act who, not being sick or wounded, left his command without proper authority while the same was in presence of the enemy, or who, at the time of leaving his command, was in arrest or under charges, or in whose case the period of absence from the service exceeded three months.

SEC. 4. That in all cases where the charge of desertion shall be removed under the provisions of this act from the record of any appointed or enlisted man of the Navy or Marine Corps who has not received a certificate of discharge it shall be the duty of the Secretary of the Navy to issue to such appointed or



enlisted man, or in case of his death, to his heirs or legal representatives, a certificate of discharge.

SEC. 5. That when the charge of desertion shall be removed under the provisions of this act from the record of any appointed or enlisted man of the Navy or Marine Corps, such man, or, in case of his death, the heirs or legal representatives of such man, shall receive all pay and bounty which may have been withheld on account of such charge of desertion or absence without leave: *Provided, however,* That this act shall not be so construed as to give to any such man as may be entitled to relief under the provisions of this act, or, in case of his death, to the heirs or legal representatives of any such man, the right to receive pay and bounty for any period of time during which such man was absent from his command without leave of absence: *And provided further,* That no appointed or enlisted man, nor the heirs or legal representatives of any such man, who served in the Navy or Marine Corps a period of less than six months shall be entitled to the benefit of the provisions of this act: *And provided further,* That all applications for relief under this act shall be made to and filed with the Secretary of the Navy within the period of five years from and after its passage, and all applications not so made and filed within the said term of five years shall be forever barred, and shall not be received or considered.

SEC. 6. That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.—(25 Stat., 442-443, chap. 890.)

See act of May 24, 1900 (31 Stat., 183), which "revived and reenacted" this act, and removed the limitation of time contained in section 5 thereof.

See note to Constitution, Article I, section 7, clause 2, under "Veto of bill to alter military records."

[1888, Oct. 19, sec. 3. **Loan of scientific instruments.**] That the Secretary of the Navy be, and he is hereby, authorized, in his discretion, to loan any scientific instruments in the possession of any of the bureaus under his charge, and not in use, to persons taking observations, or making investigations in connection with, or for the use of, the Signal Service under such regulations as he may prescribe, taking such security for the safe-keeping and return of such instruments on demand as he may deem necessary.—(25 Stat., 600, chap. 1210.)

The civilian duties of the Signal Corps were, by act of October 1, 1890 (26 Stat., 653), transferred to the Weather Bureau, established in the Department of Agriculture by said act.

See section 418, Revised Statutes, and note thereto, as to property of the Navy Department.

[1889, Feb. 8. **Home on receiving ships, men honorably discharged.**] That the Secretary of the Navy be, and he is hereby, authorized to permit any person receiving the honorable discharge authorized by section fourteen hundred and twenty-nine of the Revised Statutes to elect a home on board of any of the United States receiving-ships, during any portion of the three months granted by law as the limit of time within which to receive the pecuniary benefit of such discharge, the men so choosing a home to be entitled to one ration per day for their keeping while furnished with such home, but not to pay, other than that authorized by section fifteen hundred and seventy-three of the Revised Statutes of the United States upon re-enlistment: *Provided,* That the persons so furnished with a home shall be amenable to such regula-

tions as may be prescribed by the Secretary of the Navy or other competent authority.—(25 Stat., 657, chap. 115.)

See notes to sections 1426, 1429, and 1573, Revised Statutes; see also note to section 1624, Revised Statutes, as to persons

amenable to jurisdiction of naval courts-martial.

[1889, Feb. 9. **Deposit of savings, enlisted men of the Navy.**] That any enlisted man or appointed petty officer of the Navy may deposit his savings, in sums not less than five dollars, with the paymaster upon whose books his account is borne; and he shall be furnished with a deposit-book, in which the said paymaster shall note, over his signature, the amount, date, and place of such deposit. The money so deposited shall be accounted for in the same manner as other public funds, and shall pass to the credit of the appropriation for "Pay for the Navy," and shall not be subject to forfeiture by sentence of court-martial, but shall be forfeited by desertion, and shall not be permitted to be paid until final payment on discharge, or to the heirs or representatives of a deceased sailor, and that such deposit be exempt from liability for such sailor's debts: *Provided*, That the Government shall be liable for the amount deposited to the person so depositing the same.

SEC. 2. That for any sums not less than five dollars so deposited for the period of six months or longer, the sailor, on his final discharge, shall be paid interest at the rate of four per centum per annum.

SEC. 3. That the system of deposits herein established, shall be carried into execution under such regulations as may be established by the Secretary of the Navy.—(25 Stat., 657-658, chap. 119.)

See act of June 29, 1906 (34 Stat., 579), as to deposit of savings by enlisted men of the

Marine Corps; see also notes to sections 1569, 1612, and 1621, Revised Statutes.

[1889, Feb. 16. **Useless papers, disposition of; report to Congress.**] That whenever there shall be in any one of the Executive Departments of the Government an accumulation of files of papers, which are not needed or useful in the transaction of the current business of such Department and have no permanent value or historical interest, it shall be the duty of the head of such Department to submit to Congress a report of that fact, accompanied by a concise statement of the condition and character of such papers. And upon the submission of such report, it shall be the duty of the presiding officer of the Senate to appoint two Senators, and of the Speaker of the House of Representatives to appoint two Representatives, and the Senators and Representatives so appointed shall constitute a joint committee, to which shall be referred such report, with the accompanying statement of the condition and character of such papers, and such joint committee shall meet and examine such report and statement and the papers therein described, and submit to the Senate and House, respectively, a report of such examination and their recommendation. And if they report that such files of papers, or any part thereof, are not needed or useful in the transaction of the current business of such Department, and have no permanent value or historical interest, then it shall be the duty of such head of the Department to sell as waste paper, or otherwise dispose of such files of papers upon the best obtainable terms after due publication of notice inviting proposals therefor, and receive and pay the



proceeds thereof into the Treasury of the United States, and make report thereof to Congress.—(25 Stat., 672, chap. 171.)

See acts of March 2, 1895 (28 Stat., 933), February 16, 1909, section 14 (35 Stat., 622), August 22, 1912 (37 Stat., 329-330), and

March 3, 1915 (38 Stat., 929). See also note to section 418, Revised Statutes.

[1889, Mar. 1. **Outfits on first enlistment.**] That in order to encourage the enlistment of boys as apprentices in the United States Navy, the Secretary of the Navy is hereby authorized to furnish as a bounty to each of said apprentices after his enlistment, and when first received on board of a training-ship, an outfit of clothing not to exceed in value the sum of forty-five dollars.—(25 Stat., 781, chap. 331.)

See notes to sections 1418, 1569, and 3689 Revised Statutes; and see act of March 3, 1915 (38 Stat., 932), and note thereto.

See note to section 1556, Revised Statutes, as to uniform gratuity of the Naval Reserve Force.

**Furnishing of bounty held mandatory.**—The language used by Congress in this act is to be construed as imposing upon the Secretary

of the Navy an imperative obligation and not merely discretionary power. The whole purpose of the act is to "encourage the enlistment of boys as apprentices in the United States Navy," and upon the Secretary of the Navy is imposed the duty of executing the provisions of the statute. (25 Op. Atty. Gen., 270, 273. See note to act of June 29, 1906, 34 Stat., 553, as to refund of enlistment bounty.)

[1889, Mar. 2. **Supplies on hand; report to Congress.**] It shall be the duty of the Bureau of Provisions and Clothing to cause property accounts to be kept of all the supplies pertaining to the naval establishment, and to report annually to Congress the money values of the supplies on hand at the various stations at the beginning of the fiscal year, the dispositions thereof, and of the purchases, and the expenditures of supplies for the year, and the balances remaining on hand at the end thereof.—(25 Stat., 817-818, chap. 371.)

See note to section 419, Revised Statutes, as to change in designation of the Bureau of Provisions and Clothing, and as to the duties of that bureau.

See note to section 429, Revised Statutes, as to annual reports to Congress.

See acts of June 25, 1910 (36 Stat., 792), March 4, 1911 (36 Stat., 1279), June 30, 1914 (38 Stat., 405), and March 1, 1921 (41 Stat., 1169), as to the "Naval supply account" and "Naval supply account fund."

[1889, Mar. 2. **Transfer of accumulated supplies.**] And for the purpose of utilizing accumulated naval supplies, the transfer is authorized, after requisition upon the Paymaster-General of the Navy, of any supplies belonging to one bureau and available for the use of another without reimbursement therefor by the bureau receiving the supplies so transferred: *Provided*, That supplies obtained for a specific object and still needed therefor, and supplies bought within the fiscal year in which the requisition is made, and provisions, clothing, and small stores shall not be subject to transfer without charge under the terms of this act.—(25 Stat., 818, chap. 371.)

See act of March 2, 1891 (26 Stat., 807), and note to section 418, Revised Statutes; see also acts of June 25, 1910 (36 Stat., 792), March 4, 1911 (36 Stat., 1279), June 30, 1914 (38 Stat., 405), and March 1, 1921 (41 Stat., 1169), as

to the "Naval supply account" and "Naval supply account fund." See also section 3718, Revised Statutes, as to purchase of supplies.

[1890, Feb. 7. **Certificates in lieu of lost discharges.**] That from and after the passage of this act, whenever satisfactory proof is furnished at the Navy Department that any commissioned officer, regular or volunteer, appointed or enlisted man who served in the Navy or the Marine Corps of the United States in the war of eighteen hundred and twelve, the Mexican war, or the war of the re-

bellion, has lost his certificate of discharge, or the same has been destroyed without his privity or procurement, the Secretary of the Navy shall be authorized to furnish to such commissioned officer, regular or volunteer, appointed or enlisted man, a certificate of discharge in lieu thereof. *Provided*, That such certificate shall not be accepted as a voucher for the payment of any claim against the United States for pay, bounty, or any other allowance, or as evidence in any other case.—(26 Stat., 6, chap. 8.)

See notes to sections 1426 and 1427, Revised Statutes.

[1890, Apr. 30, sec. 3. Acquisition of collections for National Zoological Park.] That the heads of executive departments of the Government are hereby authorized and directed to cause to be rendered all necessary and practicable aid to the said regents in the acquisition of collections for the Zoological Park.—(26 Stat., 78 chap. 173.)

The words "said regents" refer to the regents of the Smithsonian Institution.

[1890, June 30. Sale of condemned Naval Supplies, etc.] The Secretary of the Navy is hereby authorized to sell, after advertisement of the sale for such time as in his judgment the public interests may require, condemned naval supplies, stores, and materials, either by public auction or by advertisement for sealed proposals for the purchase of the same.—(26 Stat., 194, chap. 640.)

See sections 1541, 3618, and 3692, Revised Statutes, and notes thereto; see also acts of August 5, 1882, section 2 (22 Stat., 296), and March 2, 1905 (33 Stat., 41).

[1890, June 30. Clothing and small stores fund.] Bureau of provisions and clothing. \* \* \* And the clothing fund and small stores fund shall be hereafter consolidated and administered as a fund to be known as the clothing and small stores fund.—(26 Stat., 197, chap. 640.)

See act of February 14, 1879 (20 Stat., 288), and note to section 3689, Revised Statutes.

See note to section 419, Revised Statutes, as to change in designation of the Bureau of Provisions and Clothing in the Navy Department.

[1890, July 11. Assistant Secretary of the Navy.] For an assistant Secretary of the Navy, to be appointed, from civil life, by the President, by and with the advice and consent of the Senate \* \* \*.—(26 Stat., 254, chap. 667.)

See act of March 3, 1891 (26 Stat., 934), and see note to section 415, Revised Statutes.

[1890, July 11, Sec. 2. Inefficient employees, report to Congress.] That hereafter it shall be the duty of the heads of the several executive departments of the Government to report to Congress each year in the annual estimates the number of employees in each bureau and office and the salaries of each who are below a fair standard of efficiency.—(26 Stat., 268, chap. 667.)

See sections 429 and 430, Revised Statutes, and notes thereto.

[1890, Aug. 19. Regulations for preventing collisions at sea.] That the following regulations for preventing collisions at sea shall be followed by all public and private vessels of the United States upon the high seas and in all waters connected therewith, navigable by sea-going vessels.—(26 Stat., 320, chap. 802.)

The act of February 8, 1895 (28 Stat., 645), establishing rules "to regulate navigation on the Great Lakes and their connecting and tributary waters," repealed in section 4 thereof (28 Stat., 650), "all laws or parts

of laws, so far as applicable to the navigation of the Great Lakes and their connecting and tributary waters as far east as Montreal, inconsistent with the foregoing rules."



Navigation on the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries: See sections 4233 and 4412, Revised Statutes, and notes thereto.

Navigation on the Great Lakes and their connecting and tributary waters as far east as Montreal: See act of February 8, 1895 (28 Stat., 645), and notes thereto.

Navigation on all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal, and except the Red River of the North and

rivers emptying into the Gulf of Mexico and their tributaries: See act of June 7, 1897 (30 Stat., 96).

Navigation, Pearl Harbor, Hawaii: See act of August 22, 1912 (37 Stat., 341).

Rules governing motor boats: See act of June 9, 1910 (36 Stat., 462).

See, generally, notes to sections 4233 and 4412, Revised Statutes; and Navy Regulations, 1920 (chapter 55), quoting laws, and regulations of the Department of Commerce, "for preventing collisions," etc.

#### PRELIMINARY.

In the following rules every steam-vessel which is under sail and not under steam is to be considered a sailing-vessel, and every vessel under steam, whether under sail or not, is to be considered a steam-vessel.

The word "steam-vessel" shall include any vessel propelled by machinery.

A vessel is "under way" within the meaning of these rules when she is not at anchor, or made fast to the shore, or aground.—(26 Stat., 320–321, chap. 802.)

#### RULES CONCERNING LIGHTS, AND SO FORTH.

The word "visible" in these rules when applied to lights shall mean visible on a dark night with a clear atmosphere.

ARTICLE 1. The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed light shall be exhibited.—(26 Stat., 321, chap. 802.)

ART. 2.—A steam-vessel when under way shall carry—(a) On or in front of the foremast, or if a vessel without a foremast, then in the fore part of the vessel, at a height above the hull of not less than twenty feet, and if the breadth of the vessel exceeds twenty feet, then at a height above the hull not less than such breadth, so, however, that the light need not be carried at a greater height above the hull than forty feet, a bright white light, so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least five miles.

(b) On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles.

(c) On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles.

(d) The said green and red side-lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

(e) A steam-vessel when under way may carry an additional white light similar in construction to the light mentioned in subdivision (a). These two lights shall be so placed in line with the keel that one shall be at least fifteen feet higher than the other, and in such a position with reference to each other that the lower light shall be forward of the upper one. The vertical distance between these lights shall be less than the horizontal distance.—(26 Stat., 321, chap. 802.)

ART. 3. A steam-vessel when towing another vessel shall, in addition to her side-lights, carry two bright white lights in a vertical line one over the other, not less than six feet apart, and when towing more than one vessel shall carry an additional bright white light six feet above or below such light, if the length of the tow measuring from the stern of the towing vessel to the stern of the last vessel towed exceeds six hundred feet. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light mentioned in article two (a), excepting the additional light, which may be carried at a height of not less than fourteen feet above the hull.

Such steam-vessel may carry a small white light abaft the funnel or aftermast for the vessel towed to steer by, but such light shall not be visible forward of the beam.—(26 Stat., 321, chap. 802.)

ART. 4. (a) A vessel which from any accident is not under command shall carry at the same height as a white light mentioned in article two (a), where they can best be seen, and if a steam-vessel in lieu of that light, two red lights, in a vertical line one over the other, not less than six feet apart, and of such a character as to be visible all around the horizon at a distance of at least two miles; and shall by day carry in a vertical line one over the other, not less than six feet apart, where they can best be seen, two black balls or shapes, each two feet in diameter.

(b) A vessel employed in laying or in picking up a telegraph cable shall carry in the same position as the white light mentioned in article two (a), and if a steam-vessel in lieu of that light, three lights in a vertical line one over the other not less than six feet apart. The highest and lowest of these lights shall be red, and the middle light shall be white, and they shall be of such a character as to be visible all around the horizon, at a distance of at least two miles. By day she shall carry in a vertical line, one over the other, not less than six feet apart, where they can best be seen, three shapes not less than two feet in diameter, of which the highest and lowest shall be globular in shape and red in color, and the middle one diamond in shape and white.

(c) The vessels referred to in this article, when not making way through the water, shall not carry the side-lights, but when making way shall carry them.

(d) The lights and shapes required to be shown by this article are to be taken by other vessels as signals that the vessel showing them is not under command and can not therefore get out of the way.

These signals are not signals of vessels in distress and requiring assistance. Such signals are contained in article thirty-one.—(26 Stat., 322, chap. 802.)

ART. 5. A sailing-vessel under way and any vessel being towed shall carry the same lights as are prescribed by article two for a steam-vessel under



way, with the exception of the white lights mentioned therein, which they shall never carry.—(26 Stat., 322, chap. 802.)

ART. 6. Whenever, as in the case of small vessels under way during bad weather, the green and red side-lights can not be fixed, these lights shall be kept at hand, lighted and ready for use; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side nor the red light on the starboard side, nor, if practicable, more than two points abaft the beam on their respective sides.

To make the use of these portable lights more certain and easy the lanterns containing them shall each be painted outside with the color of the light they respectively contain, and shall be provided with proper screens.—(26 Stat., 322, chap. 802.)

ART. 7. Steam vessels of less than forty, and vessels under oars or sails of less than twenty tons gross tonnage, respectively, and rowing boats, when under way, shall not be required to carry the lights mentioned in article two (a), (b), and (c), but if they do not carry them they shall be provided with the following lights:

“First. Steam vessels of less than forty tons shall carry—

“(a) In the fore part of the vessel, or on or in front of the funnel, where it can best be seen, and at a height above the gunwale of not less than nine feet, a bright white light constructed and fixed as prescribed in article two (a), and of such a character as to be visible at a distance of at least two miles.

“(b) Green and red side-lights constructed and fixed as prescribed in article two (b) and (c), and of such a character as to be visible at a distance of at least one mile, or a combined lantern showing a green light and a red light from right ahead of two points abaft the beam on their respective sides. Such lanterns shall be carried not less than three feet below the white light.

“Second. Small steamboats, such as are carried by seagoing vessels, may carry the white light at a less height than nine feet above the gunwale, but it shall be carried above the combined lantern mentioned in subdivision one (b).

“Third. Vessels under oars or sails of less than twenty tons shall have ready at hand a lantern with a green glass on one side and a red glass on the other, which, on the approach of or to other vessels, shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

“Fourth. Rowing boats, whether under oars or sail, shall have ready at hand a lantern showing a white light which shall be temporarily exhibited in sufficient time to prevent collision.

“The vessels referred to in this article shall not be obliged to carry the lights prescribed by article four (a) and article eleven, last paragraph.—(26 Stat., 322–323, chap. 802; 28 Stat., 82–83, chap. 83.)

This article was expressly amended and reenacted to read as above, by act of May 28, 1894. (28 Stat., 82–83.)

ART. 8. Pilot vessels when engaged on their station on pilotage duty shall not show the lights required for other vessels, but shall carry a white

light at the masthead, visible all around the horizon, and shall also exhibit a flare-up light at short intervals, which shall never exceed fifteen minutes.

On the near approach of or to other vessels they shall have their side lights lighted, ready for use, and shall flash or show them at short intervals, to indicate the direction in which they are heading, but the green light shall not be shown on the port side, nor the red light on the starboard side.

A pilot-vessel of such a class as to be obliged to go alongside of a vessel to put a pilot on board may show the white light instead of carrying it at the masthead, and may, instead of the colored lights above mentioned, have at hand, ready for use, a lantern with a green glass on the one side and a red glass on the other, to be used as prescribed above.

Pilot-vessels when not engaged on their station on pilotage duty shall carry lights similar to those of other vessels of their tonnage.—(26 Stat., 323, chap. 802.)

By act of February 19, 1900 (31 Stat., 30-31), which was expressly "supplementary" to this article, it was provided: "That a steam pilot vessel, when engaged on her station on pilotage duty and in waters of the United States, and not at anchor, shall, in addition to the lights required for all pilot boats, carry at a distance of eight feet below her white masthead light a red light, visible all around the horizon and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles, and also the colored side lights required to be carried by vessels when under way.

"When engaged on her station on pilotage duty and in waters of the United States, and at anchor, she shall carry in addition to the

lights required for all pilot boats the red light above mentioned, but not the colored side lights.

"When not engaged on her station on pilotage duty, she shall carry the same lights as other steam vessels.

"SEC. 2. That this Act shall be construed as supplementary to article eight of the Act approved June seventh, eighteen hundred and ninety-seven, entitled 'An Act to adopt regulations for preventing collisions upon certain harbors, rivers, and inland waters of the United States,' and to article eight of an Act approved August nineteenth, eighteen hundred and ninety, entitled 'An Act to adopt regulations for preventing collisions at sea.'"

ARTICLE 9. Fishing vessels and fishing boats, when under way and when not required by this article to carry or show the lights hereinafter specified, shall carry or show the lights prescribed for vessels of their tonnage under way.

(a) Open boats, by which is to be understood boats not protected from the entry of sea water by means of a continuous deck, when engaged in any fishing at night, with outlying tackle extending not more than one hundred and fifty feet horizontally from the boat into the seaway, shall carry one all-round white light.

Open boats, when fishing at night, with outlying tackle extending more than one hundred and fifty feet horizontally from the boat into the seaway, shall carry one all-round white light, and in addition, on approaching or being approached by other vessels, shall show a second white light at least three feet below the first light and at a horizontal distance of at least five feet away from it in the direction in which the outlying tackle is attached.

(b) Vessels and boats, except open boats as defined in subdivision (a), when fishing with drift nets, shall, so long as the nets are wholly or partly in the water, carry two white lights where they can best be seen. Such lights shall be placed so that the vertical distance between them shall be not less than six feet and not more than fifteen feet, and so that the horizontal distance between them, measured in a line with the keel, shall be not less than five feet and not more than ten feet. The lower of these two lights shall be in the direction of the



nets, and both of them shall be of such a character as to show all around the horizon, and to be visible at a distance of not less than three miles.

Within the Mediterranean Sea and in the seas bordering the coasts of Japan and Korea sailing fishing vessels of less than twenty tons gross tonnage shall not be obliged to carry the lower of these two lights. Should they, however, not carry it, they shall show in the same position (in the direction of the net or gear) a white light, visible at a distance of not less than one sea mile, on the approach of or to other vessels.

(c) Vessels and boats, except open boats as defined in subdivision (a) when line fishing with their lines out and attached to or hauling their lines, and when not at anchor or stationary within the meaning of subdivision (h), shall carry the same lights as vessels fishing with drift nets. When shooting lines, or fishing with towing lines, they shall carry the lights prescribed for a steam or sailing vessel under way, respectively.

Within the Mediterranean Sea and in the seas bordering the coasts of Japan and Korea sailing fishing vessels of less than twenty tons gross tonnage shall not be obliged to carry the lower of these two lights. Should they, however, not carry it, they shall show in the same position (in the direction of the lines) a white light, visible at a distance of not less than one sea mile on the approach of or to other vessels.

(d) Vessels when engaged in trawling, by which is meant the dragging of an apparatus along the bottom of the sea—

First. If steam vessels, shall carry in the same position as the the white light mentioned in article two (a) a tri-colored lantern so constructed and fixed as to show a white light from right ahead to two points on each bow, and a green light and a red light over an arc of the horizon from two points on each bow to two points abaft the beam on the starboard and port sides, respectively; and not less than six nor more than twelve feet below the tri-colored lantern a white light in a lantern, so constructed as to show a clear, uniform, and unbroken light all around the horizon.

Second. If sailing vessels, shall carry a white light in a lantern, so constructed as to show a clear, uniform, and unbroken light all around the horizon, and shall also, on the approach of or to other vessels, show where it can best be seen a white flare-up light or torch in sufficient time to prevent collision.

All lights mentioned in subdivision (d) first and second shall be visible at a distance of at least two miles.

(e) Oyster dredgers and other vessels fishing with dredge nets shall carry and show the same lights as trawlers.

(f) Fishing vessels and fishing boats may at any time use a flare-up light in addition to the lights which they are by this article required to carry and show, and they may also use working lights.

(g) Every fishing vessel and every fishing boat under one hundred and fifty feet in length, when at anchor, shall exhibit a white light visible all around the horizon at a distance of at least one mile.

Every fishing vessel of one hundred and fifty feet in length or upward, when at anchor, shall exhibit a white light visible all around the horizon at a distance of at least one mile, and shall exhibit a second light as provided for vessels of such length by article eleven.

Should any such vessel, whether under one hundred and fifty feet in length or of one hundred and fifty feet in length or upward, be attached to a net or other fishing gear, she shall on the approach of other vessels show an additional white light at least three feet below the anchor light, and at a horizontal distance of at least five feet away from it in the direction of the net or gear.

(h) If a vessel or boat when fishing becomes stationary in consequence of her gear getting fast to a rock or other obstruction, she shall in daytime haul down the day signal required by subdivision (k); at night show the light or lights prescribed for a vessel at anchor; and during fog, mist, falling snow, or heavy rain storms make the signal prescribed for a vessel at anchor. (See subdivision (d) and the last paragraph of article fifteen.)

(i) In fog, mist, falling snow, or heavy rain storms drift-net vessels attached to their nets, and vessels when trawling, dredging, or fishing with any kind of a drag net, and vessels line fishing with their lines out, shall, if of twenty tons gross tonnage or upward, respectively, at intervals of not more than one minute make a blast; if steam vessels, with the whistle or siren, and if sailing vessels, with the fog-horn, each blast to be followed by ringing the bell. Fishing vessels and boats of less than twenty tons gross tonnage shall not be obliged to give the above-mentioned signals; but if they do not, they shall make some other efficient sound signal at intervals of not more than one minute.

(k) All vessels or boats fishing with nets or lines or trawls, when under way, shall in daytime indicate their occupation to an approaching vessel by displaying a basket or other efficient signal where it can best be seen. If vessels or boats at anchor have their gear out, they shall, on the approach of other vessels, show the same signal on the side on which those vessels can pass.

The vessels required by this article to carry or show the lights hereinbefore specified shall not be obliged to carry the lights prescribed by article four (a) and the last paragraph of article eleven.—(26 Stat., 323–324, chap. 802; 28 Stat., 83, chap. 83; 34 Stat., 850–852, chap. 300.)

The original article 9 of this act was expressly repealed by act of May 28, 1894 (28 Stat., 83); and the article given above was ex-

pressly inserted in the original act of August 19, 1890, as article 9 thereof, by act of January 19, 1907 (34 Stat., 850–852).

ART. 10. A vessel which is being overtaken by another shall show from her stern to such last-mentioned vessel a white light or a flare-up light.

The white light required to be shown by this article may be fixed and carried in a lantern, but in such case the lantern shall be so constructed, fitted, and screened that it shall throw an unbroken light over an arc of the horizon of twelve points of the compass, namely, for six points from right aft on each side of the vessel so as to be visible at a distance of at least one mile. Such light shall be carried as nearly as practicable on the same level as the side-lights. (26 Stat., 324, chap. 802.)

ART. 11. A vessel under one hundred and fifty feet in length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light visible all around the horizon at a distance of at least one mile.



A vessel of one hundred and fifty feet or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than twenty and not exceeding forty feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than fifteen feet lower than the forward light, another such light.

The length of a vessel shall be deemed to be the length appearing in her certificate of registry.

A vessel aground in or near a fair-way shall carry the above light or lights and the two red lights prescribed by article four (a).—(26 Stat., 324–325, chap. 802.)

ART. 12. Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that can not be mistaken for a distress signal.—(26 Stat., 325, chap. 802.)

ART. 13. Nothing in these rules shall interfere with the operation of any special rules made by the Government of any nation with respect to additional station and signal-lights for two or more ships of war or for vessels sailing under convoy, or with the exhibition of recognition signals adopted by ship owners, which have been authorized by their respective Governments and duly registered and published.—(26 Stat., 325, chap. 802.)

ART. 14. A steam-vessel proceeding under sail only but having her funnel up, shall carry in day-time, forward, where it can best be seen, one black ball or shape two feet in diameter.—(26 Stat., 325, chap. 802.)

#### SOUND SIGNALS FOR FOG, AND SO FORTH.

ART. 15. All signals prescribed by this article for vessels under way shall be given:

First. By “steam vessels” on the whistle or siren.

Second. By “sailing vessels” and “vessels towed” on the fog horn.

The words “prolonged blast” used in this article shall mean a blast of from four to six seconds duration.

A steam vessel shall be provided with an efficient whistle or siren, sounded by steam or by some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog horn, to be sounded by mechanical means, and also with an efficient bell. (In all cases where the rules require a bell to be used a drum may be substituted on board Turkish vessels, or a gong where such articles are used on board small seagoing vessels.) A sailing vessel of twenty tons gross tonnage or upward shall be provided with a similar fog horn and bell.

In fog, mist, falling snow, or heavy rainstorms, whether by day or night, the signals described in this article shall be used as follows, namely:

(a) A steam vessel having way upon her shall sound, at intervals of not more than two minutes, a prolonged blast.

(b) A steam vessel under way, but stopped, and having no way upon her, shall sound, at intervals of not more than two minutes, two prolonged blasts, with an interval of about one second between.

(c) A sailing vessel under way shall sound, at intervals of not more than one minute, when on the starboard tack, one blast; when on the port tack, two

blasts in succession, and when with the wind abaft the beam, three blasts in succession.

(d) A vessel when at anchor shall, at intervals of not more than one minute, ring the bell rapidly for about five seconds.

(e) A vessel when towing, a vessel employed in laying or in picking up a telegraph cable, and a vessel under way, which is unable to get out of the way of an approaching vessel through being not under command, or unable to maneuver as required by the rules, shall, instead of the signals prescribed in subdivisions (a) and (c) of this article, at intervals of not more than two minutes, sound three blasts in succession, namely: One prolonged blast followed by two short blasts. A vessel towed may give this signal and she shall not give any other.

Sailing vessels and boats of less than twenty tons gross tonnage shall not be obliged to give the above-mentioned signals, but, if they do not, they shall make some other efficient sound signal at intervals of not more than one minute.—(26 Stat., 325–326, chap. 802; 29 Stat., 381, chap. 401.)

This article was expressly amended and reenacted to read as above by act of June 10, 1896 (29 Stat., 381).

#### SPEED OF SHIPS TO BE MODERATE IN FOG, AND SO FORTH.

ART. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.—(26 Stat., 326, chap. 802.)

#### STEERING AND SAILING RULES.

##### PRELIMINARY—RISK OF COLLISION.

Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.

ART. 17. When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, namely:

(a) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(b) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d) When both are running free, with the wind on the same side, the vessel which is to the windward shall keep out of the way of the vessel which is to leeward.

(e) A vessel which has the wind aft shall keep out of the way of the other vessel.—(26 Stat., 326, chap. 802.)



ART. 18. When two steam-vessels are meeting end on, or nearly end on, so as to involve the risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

This article only applies to cases where vessels are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two vessels which must, if both keep on their respective courses, pass clear of each other.

The only cases to which it does apply are when each of the two vessels is end on, or nearly end on, to the other; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own; and by night, to cases in which each vessel is in such a position as to see both the side lights of the other.

It does not apply by day to cases in which a vessel sees another ahead crossing her own course; or by night, to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.—(26 Stat., 326–327, chap. 802.)

ART. 19. When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.—(26 Stat., 327, chap. 802.)

ART. 20. When a steam-vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sailing-vessel.—(26 Stat., 327, chap. 802.)

Article twenty-one. Where, by any of these rules, one of two vessels is to keep out of the way the other shall keep her course and speed.

NOTE.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision can not be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision. (See articles twenty-seven and twenty-nine.)—(26 Stat., 327, chap. 802; 28 Stat., 83, chap. 83.)

This article was expressly amended and reenacted to read as above by act of May 28, 1894 (28 Stat., 83).

ART. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.—(26 Stat., 327, chap. 802.)

ART. 23. Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.—(26 Stat., 327, chap. 802.)

ART. 24. Notwithstanding anything contained in these rules every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

Every vessel coming up with another vessel from any direction more than two points abaft her beam, that is in such a position, with reference to the vessel which she is overtaking that at night she would be unable to see either of that vessel's side-lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve

her of the duty of keeping clear of the overtaken vessel until she is finally passed and clear.

As by day the overtaking vessel can not always know with certainty whether she is forward of or abaft this direction from the other vessel she should, if in doubt, assume that she is an overtaking vessel and keep out of the way.—(26 Stat., 327, chap. 802.)

ART. 25. In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel.—(26 Stat., 327, chap. 802.)

ART. 26. Sailing vessels under way shall keep out of the way of sailing vessels or boats fishing with nets, or lines, or trawls. This rule shall not give to any vessel or boat engaged in fishing the right of obstructing a fair-way used by vessels other than fishing vessels or boats.—(26 Stat., 327, chap. 802.)

ART. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.—(26 Stat., 327, chap. 802.)

#### SOUND-SIGNALS FOR VESSELS IN SIGHT OF ONE ANOTHER.

ART. 28. The words "short blast" used in this article shall mean a blast of about one second's duration.

When vessels are in sight of one another, a steam-vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, namely:

One short blast to mean, "I am directing my course to starboard."

Two short blasts to mean, "I am directing my course to port."

Three short blasts to mean, "My engines are going at full speed astern."—(26 Stat., 328, chap. 802.)

#### NO VESSEL, UNDER ANY CIRCUMSTANCES, TO NEGLECT PROPER PRECAUTIONS.

ART. 29. Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.—(26 Stat., 328, chap. 802.)

#### RESERVATION OF RULES FOR HARBORS AND INLAND NAVIGATION.

ART. 30. Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbor, river, or inland waters.—(26 Stat., 328, chap. 802.)

#### DISTRESS SIGNALS.

Article thirty-one. When a vessel is in distress and requires assistance from other vessels or from the shore the following shall be the signals to be used or displayed by her, either together or separately, namely:

In the daytime—

First. A gun or other explosive signal fired at intervals of about a minute.

Second. The international code signal of distress indicated by N C.



Third. The distance signal, consisting of a square flag, having either above or below it a ball or anything resembling a ball.

Fourth. A continuous sounding with any fog-signal apparatus.

At night—

First. A gun or other explosive signal fired at intervals of about a minute.

Second. Flames on the vessel (as from a burning tar barrél, oil barrel, and so forth).

Third. Rockets or shells throwing stars of any color or description, fired one at a time, at short intervals.

Fourth. A continuous sounding with any fog-signal apparatus.—(26 Stat., 328, chap. 802; 28 Stat., 83, chap. 83.)

This article was expressly amended and reenacted to read as above by act of May 28, 1894 (28 Stat., 83).

[1890, Aug. 29. Chief clerks to administer oaths of office.] And the Chief Clerks of the several Executive Departments and of the various bureaus and offices thereof in Washington, District of Columbia, are hereby authorized and directed, on application and without compensation therefor, to administer oaths of office to employees required to be taken on their appointment or promotion.—(26 Stat., 371, chap. 820.)

See section 183, Revised Statutes, and note thereto.

[1890, Aug. 30. Subsistence of officers detailed to Coast and Geodetic Survey.] Nor shall there hereafter be made any allowance for subsistence to officers of the Navy attached to the Coast and Geodetic Survey, except that when officers are detached to do work away from their vessels under circumstances involving them in extra expenditures, the Superintendent may allow to any such officer subsistence at a rate not exceeding one dollar per day for the period actually covered by such duty away from such vessel.—(26 Stat., 382, chap. 837.)

See sections 264 and 4688, Revised Statutes, and notes thereto.

[1890, Aug. 30, sec. 4. Quarterly accounts to be rendered; exceptions.] That hereafter all disbursing officers of the United States shall render their accounts quarterly; and the Secretary of the Senate shall render his accounts as heretofore; but the Secretary of the Treasury may direct any or all such accounts to be rendered more frequently when in his judgment the public interests may require.—(26 Stat. 413, chap. 837.)

See section 3622, Revised Statutes, and note thereto.

[1890, Sept. 4. Collisions; duty of master; penalty.] That in every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without serious danger to his own vessel, crew, and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew, and passengers (if any) such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision, and also to give to the master or person in charge of the other vessel the name of his own vessel and her port of registry, or the port or place to which she belongs, and also the name of the ports and

places from which and to which she is bound. If he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default.

SEC. 2. That every master or person in charge of a United States vessel who fails, without reasonable cause, to render such assistance or give such information as aforesaid shall be deemed guilty of a misdemeanor, and shall be liable to a penalty of one thousand dollars, or imprisonment for a term not exceeding two years; and for the above sum the vessel shall be liable and may be seized and proceeded against by process in any district court of the United States by any person; one-half such sum to be payable to the informer and the other half to the United States.—(26 Stat., 425, chap. 875.)

[1890, Sept. 25. Badges, military societies.] That the distinctive badges adopted by military societies of men who served in the armies and navies of the United States in the war of the Revolution, the war of eighteen hundred and twelve, the Mexican war, and the war of the rebellion respectively, may be worn upon all occasions of ceremony by officers and enlisted men of the Army and Navy of the United States, who are members of said organizations in their own right.—(26 Stat., 681, Res. No. 50.)

See note to section 1407, Revised Statutes.

[1891, Mar. 2. Purchase and issue of naval supplies.] All supplies hereafter purchased with moneys appropriated for any branch of the naval establishment shall be purchased, classified, and issued for consumption or use subject to the provisions contained in the act making appropriations for the naval service, approved June thirtieth, eighteen hundred and ninety, in reference to supplies therein provided for and on hand.—(26 Stat., 807, chap. 494.)

The provisions contained in the act of June 30, 1890 (26 Stat., 205), referred to above, are as follows: "All supplies purchased with moneys appropriated by this act shall be deemed to be purchased for the Navy and not for any bureau thereof, and these supplies, together with all supplies now on hand, shall be arranged, classified, consolidated, and catalogued, and issued for consumption or use, under such regu-

lations as the Secretary may prescribe, without regard to the bureau for which they were purchased."

See act of March 2, 1889 (25 Stat., 818), and sections 418, 3676, 3689, and 3718, Revised Statutes, and notes to said act and sections; see also act of March 4, 1911 (36 Stat., 1279), and note thereto, as to naval supply account.

[1891, Mar. 3, sec. 4. Ocean mail vessels, construction of, approval by Secretary of the Navy.] That all steam-ships of the first, second, and third classes employed as above and hereafter built shall be constructed with particular reference to prompt and economical conversion into auxiliary naval cruisers, and according to plans and specifications to be agreed upon by and between the owners and the Secretary of the Navy, and they shall be of sufficient strength and stability to carry and sustain the working and operation of at least four effective rifled cannon of a caliber of not less than six inches, and shall be of the highest rating known to maritime commerce. And all vessels of said three classes heretofore built and so employed shall, before they are accepted for the mail service herein provided for, be thoroughly inspected by a competent naval officer or constructor detailed for that service by the Secretary of the Navy; and such officer shall report, in writing, to the Secretary of the Navy, who shall transmit said report to the Postmaster-General;



and no such vessel not approved by the Secretary of the Navy as suitable for the service required shall be employed by the Postmaster-General as provided for in this act.—(26 Stat., 831-832, chap. 519.)

See note to section 388, Revised Statutes; and see act of June 5, 1920 (41 Stat., 988).

[1891, Mar. 3, sec. 7. **Ocean mail vessels, naval officers serving on.**] That officers of the United States Navy may volunteer for service on said mail vessels, and when accepted by the contractor or contractors may be assigned to such duty by the Secretary of the Navy whenever in his opinion such assignment can be made without detriment to the service, and while in said employment they shall receive furlough pay from the Government, and such other compensation from the contractor or contractors as may be agreed upon by the parties: *Provided*, That they shall only be required to perform such duties as appertain to the merchant service.—(26 Stat., 832, chap. 519.)

See sections 1442 and 1557, Revised Statutes, as to furlough of naval officers.

[1891, Mar. 3, sec. 9. **Ocean mail vessels, use of as transports or cruisers.**] That such steamers may be taken and used by the United States as transports or cruisers, upon payment to the owners of the fair actual value of the same at the time of the taking, and if there shall be a disagreement as to the fair actual value of the same at the time of the taking, and if there shall be a disagreement as to the fair actual between the United States and the owners, then the same shall be determined by two impartial appraisers, one to be appointed by each of said parties, they at the same time selecting a third, who shall act in said appraisement in case the two shall fail to agree.—(26 Stat., 832, chap. 519.)

See act of May 10, 1892, section 4 (27 Stat., 28).

[1891, Mar. 3. **Assistant Secretary of the Navy.**] For compensation of \* \* \* Assistant Secretary of the Navy, who shall hereafter perform such duties as may be prescribed by the Secretary of the Navy or required by law, \* \* \*.—(26 Stat., 934, chap. 541.)

See act of July 11, 1890 (26 Stat., 254), and note to section 415, Revised Statutes.

[1891, Mar. 3. **Artificial limbs; commutation.**] Artificial limbs: For furnishing artificial limbs and apparatus, or commutation therefor, \* \* \* and hereafter in case of commutation the money shall be paid directly to the soldier, sailor, or marine, and no fee or compensation shall be allowed or paid to any agent or attorney.—(26 Stat., 979, chap. 542.)

See note to section 1176, Revised Statutes.

[1891, Mar. 3. **Enlistment of indigent boys in Navy.**] The register of wills shall prepare papers in connection with appointment of guardians to enable indigent boys to enlist in the United States Navy as provided by law, without making any charge therefor.—(26 Stat., 1063, chap. 546.)

See note to section 1419, Revised Statutes, and note thereto.

The above provision is contained in the District of Columbia appropriation act, and refers to the Register of Wills in the District of Columbia.

[1891, Mar. 3. **Pensions not allowed persons in naval service.**] That hereafter no pension shall be allowed or paid to any officer, non commissioned

officer, or private in the Army, Navy, or Marine Corps of the United States, either on the active or retired list.—(26 Stat., 1082, chap. 548.)

[1892, Apr. 12. **Naval Observatory, facilities allowed students, etc.**] The facilities for research and illustration in the following and any other Governmental collections now existing or hereafter to be established in the city of Washington for the promotion of knowledge shall be accessible, under such rules and restrictions as the officers in charge of each collection may prescribe, subject to such authority as is now or may hereafter be permitted by law, to the scientific investigators and to students of any institution of higher education now incorporated or hereafter to be incorporated under the laws of Congress or of the District of Columbia, to wit:

\*                      \*                      \*                      \*                      \*                      \*

Twelve. Of the Naval Observatory.—(27 Stat., 395, Res. No. 8.)

See act of March 3, 1901 (31 Stat., 1039).

[1892, May 10, sec. 4. **Merchant vessels, use of as transports or cruisers.**] That any steamships so registered under the provisions of this act may be taken and used by the United States as cruisers or transports upon payment to the owners of the fair actual value of the same at the time of the taking, and if there shall be a disagreement as to the fair actual value at the time of taking between the United States and the owners, then the same shall be determined by two impartial appraisers, one to be appointed by each of said parties, who, in case of disagreement, shall select a third, the award of any two of the three so chosen to be final and conclusive.—(27 Stat., 28, chap. 63.)

This section was part of an act providing for American registry of certain foreign-built steamships "now" engaged in freight and passenger business.

See acts of March 3, 1891, section 9 (26 Stat., 832), and September 7, 1916, section 10 (39 Stat., 731).

[1892, July 16. **Buildings rented in District of Columbia; report to Congress.**] That hereafter it shall be the duty of the Secretary of the Treasury to cause to be prepared and submitted to Congress each year, in the annual Book of Estimates of Appropriations, a statement of the buildings rented within the District of Columbia for the use of the Government, the purposes for which rented, and the annual rental of each.—(27 Stat., 199, chap. 196.)

See act of May 1, 1913, section 3 (38 Stat., 3); see also acts of March 3, 1877 (19 Stat., 370), August 5, 1882 (22 Stat., 241), and March 3,

1883 (22 Stat., 552); and notes to sections 415, 429, and 430, Revised Statutes.

[1892, July 19. **Change in name of Bureau.**] Bureau of Provisions and Clothing, hereafter to be called Bureau of Supplies and Accounts.—(27 Stat., 243, chap. 206.)

See section 419, Revised Statutes, and note thereto.

[1892, July 19. **Bureau of Supplies and Accounts; duties.**] All laws now in force relating to the Bureau of Provisions and Clothing shall now and hereafter apply to the Bureau of Supplies and Accounts.—(27 Stat., 245, chap. 206.)

See section 419, Revised Statutes, and note thereto.

[1892, July 19. **Employment on shore duty.**] And the provisions of section two of the naval appropriation act approved March third, eighteen hundred and eighty-three, shall be so modified that hereafter orders of the Secretary of



the Navy employing officers on shore duty shall state that such employment is required by the public interests, but need not state the duration of such service.—(27 Stat., 245, chap. 206.)

See act of March 3, 1883, section 2 (22 Stat., 481); and see note to section 1571, Revised Statutes.

[1892, July 28. Promotions, commissioned officers of Marine Corps.] That hereafter promotions to every grade of commissioned officers in the Marine Corps below the grade of commandant shall be made in the same manner and under the same conditions as now are or may hereafter be prescribed, in pursuance of law, for commissioned officers of the Army: *Provided*, That examining boards which may be organized under the provisions of this act to determine the fitness of officers of the Marine Corps for promotion shall in all cases consist of not less than five officers, three of whom shall, if practicable, be officers of the Marine Corps, senior to the officer to be examined, and two of whom shall be medical officers of the Navy: *Provided further*, That when not practicable to detail officers of the Marine Corps as members of such examining boards, officers of the line in the Navy shall be so detailed.—(27 Stat., 321, chap. 315.)

See sections 1599, 1605–1607, Revised Statutes, and notes thereto.

[1892, Aug. 1. Eight-hour law, Government work.] SECTION 1. That the service and employment of all laborers and mechanics who are now, or may hereafter, be employed by the Government of the United States or the District of Columbia, or by any contractor or subcontractor, upon a public work of the United States or of the District of Columbia, and of all persons who are now, or may hereafter be, employed by the Government of the United States or the District of Columbia, or any contractor or subcontractor, to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, is hereby limited and restricted to eight hours in any one calendar day; and it shall be unlawful for any officer of the United States Government or of the District of Columbia, or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics or of such persons employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to require or permit any such laborer or mechanic or any such person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to work more than eight hours in any calendar day, except in case of extraordinary emergency: *Provided*, That nothing in this Act shall apply or be construed to apply to persons employed in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia while not directly operating dredging or rock excavating machinery or tools, nor to persons engaged in construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable rivers of the United States.

## VIOLATION OF ACT BY OFFICER OR CONTRACTOR PUNISHABLE.

SEC. 2. That any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon a public work of the United States or of the District of Columbia, or any person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, who shall intentionally violate any provision of this Act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be punished by a fine not to exceed one thousand dollars, or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof.

## EXISTING CONTRACTS NOT AFFECTED BY ACT.

SEC. 3. That the provisions of this Act shall not be so construed as to in any manner apply to or affect contractors or subcontractors, or to limit the hours of daily service of laborers or mechanics engaged upon a public work of the United States or of the District of Columbia, or persons employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, for which contracts have been entered into prior to the passing of this Act or may be entered into under the provisions of appropriation Acts approved prior to the passage of this Act.—(27 Stat., 340, chap. 352; 37 Stat., 726–727, chap. 106.)

This act was expressly amended and reenacted to read as above by act of March 3, 1913 (37 Stat., 726–727).

See act of June 19, 1912 (37 Stat., 137), which prescribed contract provisions relating to hours of labor.

Hours of labor were previously fixed by section 3738, Revised Statutes.

Suspension of eight-hour law in case of national emergency: See act March 4, 1917 (39 Stat., 1192).

[1893, Mar. 3. Detective agencies, employment of, restricted.] That hereafter no employee of the Pinkerton Detective Agency, or similar agency, shall be employed in any Government service or by any officer of the District of Columbia.—(27 Stat., 591, chap. 208.)

See note to Constitution, fourth amendment, under "Arrest of military offenders."

[1893, Mar. 3, sec. 3. Draping public buildings in mourning.] That hereafter no building owned, or used for public purposes, by the Government of the United States, shall be draped in mourning and no part of the public fund shall be used for such purpose.—(27 Stat., 715, chap. 211.)

[1893, Mar. 3, sec. 4. Closing Departments for deceased ex-officials.] That hereafter the Executive Departments of the Government shall not be closed as a mark to the memory of any deceased ex-official of the United States.—(27 Stat., 715, chap. 211.)

[1893, Mar. 3, sec. 5. Hours of labor; leaves of absence; condition of business, reports of.] Hereafter it shall be the duty of the heads of the several Executive Departments, in the interest of the public service, to require of all clerks and other employees, of whatever grade or class, in their respective



Departments, not less than seven hours of labor each day, except Sundays and days declared public holidays by law or Executive order: *Provided*, That the heads of the Departments may, by special order, stating the reason, further extend the hours of any clerk or employee in their Departments, respectively; but in case of an extension it shall be without additional compensation: *Provided further*, That the head of any Department may grant thirty days' annual leave with pay in any one year to each clerk or employee: *And provided further*, That where some member of the immediate family of a clerk or employee is afflicted with a contagious disease and requires the care and attendance of such employee, or where his or her presence in the Department would jeopardize the health of fellow-clerks, and in exceptional and meritorious cases, where a clerk or employee is personally ill, and where to limit the annual leave to thirty days in any one calendar year would work peculiar hardship, it may be extended, in the discretion of the head of the Department, with pay, not exceeding thirty days in any one case or in any one calendar year.

This section shall not be construed to mean that so long as a clerk or employee is borne upon the rolls of the Department in excess of the time herein provided for or granted that he or she shall be entitled to pay during the period of such excessive absence, but that the pay shall stop upon the expiration of the granted leave.

Hereafter it shall be the duty of the head of each Executive Department to require monthly reports to be made to him as to the condition of the public business in the several bureaus or offices of his Department at Washington; and in each case where such reports disclose that the public business is in arrears, the head of the Department in which such arrears exist shall require, as provided herein, an extension of the hours of service to such clerks or employees as may be necessary to bring up such arrears of public business.

Hereafter it shall be the duty of the head of each Executive Department, or other Government establishment at the seat of government, not under an Executive Department, to make at the expiration of each quarter of the fiscal year a written report to the President as to the condition of the public business in his Executive Department or Government establishment, and whether any branch thereof is in arrears.—(27 Stat., 715, chap. 211; 30 Stat., 316–317, chap. 68.)

This section was expressly amended and re-enacted to read as above by act of March 15, 1898 (30 Stat., 316–317, section 7). Previously, the hours of labor and leaves of absence of employees in the Executive Departments had been fixed by act of March 3, 1883, section 4 (22 Stat., 563). See also section 162, Revised Statutes, and notes thereto.

The above section was modified by acts of July 7, 1898 (30 Stat., 653), and February 24, 1899, section 4 (30 Stat., 890), relating to leaves of absence.

As to holidays, see notes to sections 162 and 1545, Revised Statutes.

As to leaves of absence, employees at navy yards and stations, see note to section 1545, Revised Statutes.

As to arrears of work, see sections 174–175, Revised Statutes.

As to reports required to be made by heads of departments, see section 429, Revised Statutes, and note thereto.

[1893, Mar. 3. Commencement of pay, officers commissioned from graduates of the Naval Academy.] And every naval cadet or cadet engineer who has heretofore graduated or may hereafter graduate from the Naval Academy, and who has been or may hereafter be commissioned, within six months after such

graduation, an officer in the Navy or Marine Corps of the United States, under the laws appointing such graduate to the Navy or Marine Corps, shall be allowed the pay of the grade in which he may be so commissioned from the date he takes rank as stated in his commission to the date of qualification and acceptance of his commission.—(27 Stat., 716, chap. 212.)

A slightly different provision in the act of July 19, 1892 (27 Stat., 236), was superseded by this enactment.

As to commencement of pay of officers of the Navy, see sections 1560—1562. Revised Statutes, and notes thereto.

As to change in title of students at the Naval Academy, see note to section 1512, Revised Statutes; and see note to section 1522, Revised Statutes, as to cadet engineers.

As to appointment of graduates to commissioned grades in the Navy and Marine Corps, see note to section 1521, Revised Statutes.

[1893, Mar. 3. Chief of Bureau of Construction and Repair.] Any Naval Constructor having the rank of Captain, Commander or Lieutenant Commander shall be eligible as Chief of the Bureau of Construction and Repair.—(27 Stat., 716, chap. 212.)

See note to section 423, Revised Statutes.

[1893, Mar. 3. Credits to "Pay miscellaneous."] Hereafter the accounting officers of the Treasury are hereby authorized to credit appropriation "Pay miscellaneous," with all receipts for interest on the account of the Navy Department with the London fiscal agents, premiums arising from sales of bills of exchange, and from any appreciation in the value of foreign coin.—(27 Stat., 716, chap. 212.)

[1893, Mar. 3. Fraudulent enlistment.] And fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared an offense against naval discipline and made punishable by general court-martial, under article twenty-two of the articles for the government of the Navy; but this provision shall not take effect until sixty days after the passage of this act.—(27 Stat., 716, chap. 212.)

See note to section 1624, article 22, Revised Statutes.

[1893, Mar. 3. Assistant to chief, Bureau of Navigation.] That an officer of the Navy not below the rank of commander may be detailed as assistant to the Chief of the Bureau of Navigation in the Navy Department, and such officer shall receive the highest pay of his grade, and, in case of the death, resignation, absence, or sickness of the Chief of the Bureau, shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine of the Revised Statutes, perform the duties of such Chief until his successor is appointed or such absence or sickness shall cease.—(27 Stat., 717, chap. 212.)

See sections 177—182, and 421, Revised Statutes, and notes thereto.

[1893, Mar. 3. Purchase of discharge.] In time of peace the President may in his discretion, and under such rules and upon such conditions as he may prescribe, permit any enlisted man to purchase his discharge from the Navy or Marine Corps, the amounts received therefrom to be covered into the Treasury.—(27 Stat., 717, chap. 212.)

Furlough without pay, under the same conditions and in lieu of discharge by purchase, was authorized by act of August 29, 1916 (39 Stat., 580.)

See note to section 1418, Revised Statutes, as to refund of enlistment bounty.



[1893, Mar. 3. Gun steel and armor to be advertised for.] That no contract for the purchase of gun steel or armor for the Navy shall hereafter be made until the subject-matter of the same shall have been submitted to public competition by the Department by advertisement.—(27 Stat., 732, chap. 212.)

Identical provisions were contained in acts of March 2, 1891 (26 Stat., 815), and July 19, 1892 (27 Stat., 251).  
See sections 3718 and 3721, Revised Statutes, and notes thereto, as to purchases for the Navy.

The Secretary of the Navy was authorized and directed to provide for the erection or purchase of a factory for the manufacture of armor for naval vessels, by act of August 29, 1916 (39 Stat., 563).

[1893, Oct. 31. Derelicts, etc., marking and removal of.] That the President of the United States be, and he is hereby, authorized to make with the several governments interested in the navigation of the North Atlantic Ocean an international agreement providing for the reporting, marking, and removal of dangerous wrecks, derelicts, and other menaces to navigation in the North Atlantic Ocean outside the coast waters of the respective countries bordering thereon.—(28 Stat., 13, Res. No. 13.)

See act of March 3, 1905 (33 Stat., 1164), and see notes to sections 1529 and 1536, Revised Statutes.

[1894, Mar. 29. Property returns.] That instead of forwarding to the accounting officers of the Treasury Department returns of public property entrusted to the possession of officers or agents, the Quartermaster-General, the Commissary-General of Subsistence, the Surgeon-General, the Chief of Engineers, the Chief of Ordnance, the Chief Signal Officer, the Paymaster-General of the Navy, the Commissioner of Indian Affairs, or other like chief officers in any Department, by, through, or under whom stores, supplies, and other public property are received for distribution, or whose duty it is to receive or examine returns of such property, shall certify to the proper accounting officer of the Treasury Department, for debiting on the proper account, any charge against any officer or agent intrusted with public property, arising from any loss, accruing by his fault, to the Government as to the property so intrusted to him.

SEC. 2. That said certificate shall set forth the condition of such officer's or agent's property returns, that it includes all charges made up to its date and not previously certified, that he has had a reasonable opportunity to be heard and has not been relieved of responsibility; the effect of such certificate, when received, shall be the same as if the facts therein set forth had been ascertained by the accounting officers of the Treasury Department in accounting.

SEC. 3. That the manner of making property returns to or in any administrative bureau or department, or of ascertaining liability for property, under existing laws and regulations, shall not be affected by this Act, except as provided in section one; but in all cases arising as to such property so intrusted the officer or agent shall have an opportunity to relieve himself from liability.

SEC. 4. That the heads of the several Departments are hereby empowered to make and enforce regulations to carry out the provisions of this Act.

SEC. 5. That all laws or parts of laws inconsistent with the provisions of this Act are hereby repealed.—(28 Stat., 47, chap. 49.)

See note to section 236, Revised Statutes, under "III. Limitations upon jurisdiction," and note to section 1549, Revised Statutes.

[1894, May 11. Wearing of badges, military societies.] That the distinctive badge adopted by the Regular Army and Navy Union of the United States may be worn, in their own right, upon all public occasions of ceremony by officers and enlisted men of the Army and Navy of the United States who are members of said organization.—(28 Stat., 583, Res. No. 26.)

See note to section 1407, Revised Statutes.

[1894, June 28. Public holidays.] That the first Monday of September in each year, being the day celebrated and known as Labor's Holiday, is hereby made a legal public holiday, to all intents and purposes, in the same manner as Christmas, the first day of January, the twenty-second day of February, the thirtieth day of May, and the fourth day of July are now made by law public holidays.—(28 Stat., 96, chap. 118.)

See note to section 1545, Revised Statutes.

[1894, July 26. Assistant to Chief, Bureau of Supplies and Accounts.] That an officer of the pay corps of the Navy may be detailed as assistant to the Chief of the Bureau of Supplies and Accounts in the Navy Department, and that such officer shall, in case of the death, resignation, absence, or sickness of the Chief of the Bureau, unless otherwise directed by the President, as provided by section one hundred and seventy-nine of the Revised Statutes, perform the duties of such chief until his successor is appointed or such absence or sickness shall cease.—(28 Stat., 132, chap. 165.)

See acts of March 3, 1899 (30 Stat., 1038), and February 25, 1903 (32 Stat., 890); see also, sections 177-182, and 421, Revised Statutes, and notes thereto.

The designation of the "Pay Corps" was changed to "Supply Corps" by an act of July 11, 1919 (41 Stat., 147).

[1894, July 31, sec. 5. Comptroller of the Treasury, to prescribe forms of keeping accounts, etc.] The Comptroller of the Treasury shall, under the direction of the Secretary of the Treasury, prescribe the forms of keeping and rendering all public accounts, except those relating to the postal revenues and expenditures therefrom.—(28 Stat., 206, chap. 174.)

See sections 236-310, Revised Statutes, and notes thereto.

[1894, July 31, sec. 7. Auditor for the Navy Department, duties of.] The Auditor for the Navy Department shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of the Navy, and of all bureaus and offices under his direction, all accounts relating to the Naval Establishment, Marine Corps, Naval Academy, and to all other business within the jurisdiction of the Department of the Navy, and certify the balances arising thereon to the Division of Bookkeeping and Warrants, and send forthwith a copy of each certificate to the Secretary of the Navy.—(28 Stat., 207, chap. 174.)

See sections 236-310, Revised Statutes, and notes thereto.

[1894, July 31, sec. 8. Auditor's settlements conclusive, unless revised by Comptroller.] The balances which may from time to time be certified by the Auditors to the Division of Bookkeeping and Warrants, or to the Postmaster General, upon the settlements of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or of



the board, commission, or establishment not under the jurisdiction of an Executive Department to which the account pertains, or the Comptroller of the Treasury, may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government: *Provided*, That the Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the re-examination of any account.—(28 Stat., 207, chap. 174.)

See sections 236–310, Revised Statutes, and notes thereto.

[1894, July 31, sec. 8. **Effect of accepting payment; suspension of items in accounts.**] Any person accepting payment under a settlement by an Auditor shall be thereby precluded from obtaining a revision of such settlement as to any items upon which payment is accepted; but nothing in this Act shall prevent an Auditor from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement. When suspended items are finally settled a revision may be had as in the case of the original settlement. Action upon any account or business shall not be delayed awaiting applications for revision: *Provided*, That the Secretary of the Treasury shall make regulations fixing the time which shall expire before a warrant is issued in payment of an account certified as provided in sections seven and eight of this Act.—(28 Stat., 208, chap. 174.)

See sections 236–310, Revised Statutes, and notes thereto.

[1894, July 31, sec. 8. **Auditors to submit decisions to Comptroller for approval, etc.**] All decisions by Auditors making an original construction or modifying an existing construction of statutes shall be forthwith reported to the Comptroller of the Treasury, and items in any account affected by such decisions shall be suspended and payment thereof withheld until the Comptroller of the Treasury shall approve, disapprove, or modify such decisions and certify his actions to the Auditor. All decisions made by the Comptroller of the Treasury under this Act shall be forthwith transmitted to the Auditor or Auditors whose duties are affected thereby.—(28 Stat., 208, chap. 174.)

[1894, July 31, sec. 8. **Advance decisions of Comptroller; effect of.**] Disbursing officers, or the head of any Executive Department, or other establishment not under any of the Executive Departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement.—(28 Stat., 208, chap. 174.)

See notes to sections 236, 285, 286, and 356, Revised Statutes.

[1894, July 31, sec. 11. **Requisitions for advances of money.**] Every requisition for an advance of money, before being acted on by the Secretary of the Treasury, shall be sent to the proper Auditor for action thereon as required by section twelve of this act.—(28 Stat., 209, chap. 174.)

[1894, July 31, sec. 12. **Time for rendering accounts; delinquency; requisitions for advances disapproved.**] All monthly accounts shall be mailed or otherwise sent to the proper officer at Washington within ten days after the end of the month to which they relate, and quarterly and other accounts within

twenty days after the period to which they relate, and shall be transmitted to and received by the Auditors within twenty days of their actual receipt at the proper office in Washington in the case of monthly, and sixty days in the case of quarterly and other accounts. Should there be any delinquency in this regard at the time of the receipt by the Auditor of a requisition for an advance of money, he shall disapprove the requisition, which he may also do for other reasons arising out of the condition of the officer's accounts for whom the advance is requested; but the Secretary of the Treasury may overrule the Auditor's decision as to the sufficiency of these latter reasons: *Provided*, That the Secretary of the Treasury shall prescribe suitable rules and regulations, and may make orders in particular cases, relaxing the requirement of mailing or otherwise sending accounts, as aforesaid, within ten or twenty days, or waiving delinquency, in such cases only in which there is, or is likely to be, a manifest physical difficulty in complying with the same, it being the purpose of this provision to require the prompt rendition of accounts without regard to the mere convenience of the officers, and to forbid the advance of money to those delinquent in rendering them.—(28 Stat., 209, chap. 174.)

See section 3622, Revised Statutes, and note thereto.

[1894, July 31, sec. 12. Delay by administrative department in forwarding accounts; effect on requisitions.] That should there be a delay by the administrative Departments beyond the aforesaid twenty or sixty days in transmitting accounts, an order of the President, or, in the event of the absence from the seat of Government or sickness of the President, an order of the Secretary of the Treasury, in the particular case, shall be necessary to authorize the advance of money requested.—(28 Stat., 209, chap. 174; 28 Stat., 807, chap. 177.)

This clause was expressly amended and reenacted to read as above by act of March 2, 1895, section 4 (28 Stat., 807.)	By section 3622, Revised Statutes, accounts of Navy disbursing officers are to be rendered to the accounting officers direct.
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[1894, July 31, sec. 12. Report of delinquency to be made to Congress.] The Secretary of the Treasury shall, on the first Monday of January in each year, make report to Congress of such officers and administrative departments and offices of the Government as were, respectively, at any time during the last preceding fiscal year delinquent in rendering or transmitting accounts to the proper offices in Washington and the cause therefor, and in each case indicating whether the delinquency was waived, together with such officers, including postmasters and officers of the Post Office Department, as were found upon final settlement of their accounts to have been indebted to the Government, with the amount of such indebtedness in each case, and who, at the date of making report, had failed to pay the same into the Treasury of the United States.—(28 Stat., 209, chap. 174; 29 Stat., 179, chap. 252.)

This provision was expressly amended and reenacted to read as above by act of May 28, 1896, section 4 (29 Stat., 179).	See notes to sections 176, 236-310, and 1376, Revised Statutes.
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[1894, July 31, sec. 14. Claims not administratively examined.] In the case of claims presented to an Auditor which have not had an administrative examination, the Auditor shall cause them to be examined by two of his subordinates independently of each other.—(28 Stat., 210, chap. 174.)

See section 3622, Revised Statutes, excepting accounts of Navy disbursing officers from administrative examination.



[1894, July 31, sec. 22. Regulations requiring administrative examination of accounts.] It shall also be the duty of the heads of the several Executive Departments and of the proper officers of other Government establishments, not within the jurisdiction of any Executive Department, to make appropriate rules and regulations to secure a proper administrative examination of all accounts sent to them, as required by section twelve of this Act, before their transmission to the Auditors, and for the execution of other requirements of this Act in so far as the same relate to the several Departments or establishments.—(28 Stat., 211, chap. 174.)

See section 3622, Revised Statutes, excepting accounts of Navy disbursing officers from administrative examination.

By act of August 23, 1912 (37 Stat., 375), it was provided that "Hereafter the administrative examination of all public accounts, preliminary to their audit by the accounting officers of the Treasury, shall be made as contemplated by the so-called Dockery Act, approved July thirty-first, eighteen hundred and ninety-four, and all vouchers and pay rolls shall be prepared and exam-

ined by and through the administrative heads of divisions and bureaus in the executive departments and not by the disbursing clerks of said departments, except those vouchers heretofore prepared outside of Washington may continue to be so prepared and the disbursing officers shall make only such examination of vouchers as may be necessary to ascertain whether they represent legal claims against the United States."

[1894, Aug. 13. Contractors on public works, protection of laborers and material men.] That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the circuit court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for

his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided*, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided further*, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further*, That in all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.—(28 Stat., 278, chap. 280; 33 Stat., 811–812, chap. 778.)

This act was expressly amended and reenacted to read as above by act of February 24, 1905 (33 Stat., 811–812); see also act of February 24, 1919, section 1320 (40 Stat., 1148), for further modification of this act with respect

to acceptance of Liberty or other United States bonds; and see note to section 1383, Revised Statutes, on general subject of bonds.

[1894, Aug. 13. Bonds, surety companies, when accepted.] That whenever any recognizance, stipulation, bond, or undertaking conditioned for the faithful performance of any duty, or for doing or refraining from doing anything in such recognizance, stipulation, bond, or undertaking specified, is by the laws of the United States required or permitted to be given with one surety or with two or more sureties, the execution of the same or the guaranteeing of the performance of the condition thereof shall be sufficient when executed or guaranteed solely by a corporation incorporated under the laws of the United States, or of any State having power to guarantee the fidelity of persons holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judicial proceedings: *Provided*, That such recognizance, stipulation, bond, or undertaking be approved by the head of department, court, judge, officer, board, or body executive, legislative, or judicial required to approve or accept the same. But no officer or person having the approval of any bond shall exact that it shall be furnished by a guarantee company or by any particular guarantee company.—(28 Stat., 279, chap. 282.)

SEC. 2. That no such company shall do business under the provisions of this Act beyond the limits of the State or Territory under whose laws it was incorporated and in which its principal office is located, nor beyond the limits



of the District of Columbia, when such company was incorporated under its laws or the laws of the United States and its principal office is located in said District, until it shall by a written power of attorney appoint some person residing within the jurisdiction of the court for the judicial district wherein such suretyship is to be undertaken, who shall be a citizen of the State, Territory, or District of Columbia, wherein such court is held, as its agent, upon whom may be served all lawful process against such company, and who shall be authorized to enter an appearance in its behalf. A copy of such power of attorney, duly certified and authenticated, shall be filed with the clerk of the district court of the United States for such district at each place where a term of such court is or may be held, which copy, or a certified copy thereof, shall be legal evidence in all controversies arising under this Act. If any such agent shall be removed, resign, or die, become insane, or otherwise incapable of acting, it shall be the duty of such company to appoint another agent in his place as hereinbefore prescribed, and until such appointment shall have been made, or during the absence of any agent of such company from such district, service of process may be upon the clerk of the court wherein such suit is brought, with like effect as upon an agent appointed by the company. The officer executing such process upon such clerk shall immediately transmit a copy thereof by mail to the company, and state such fact in his return. A judgment, decree, or order of a court entered or made after service of process as aforesaid shall be as valid and binding on such company as if served with process in said district.—(28 Stat., 279, chap. 282.)

SEC. 3. That every company, before transacting any business under this Act, shall deposit with the Secretary of the Treasury of the United States a copy of its charter or articles of incorporation, and a statement, signed and sworn to by its president and secretary, showing its assets and liabilities. If the said Secretary of the Treasury shall be satisfied that such company has authority under its charter to do the business provided for in this Act, and that it has a paid-up capital of not less than two hundred and fifty thousand dollars, in cash or its equivalent, and is able to keep and perform its contracts, he shall grant authority in writing to such company to do business under this Act.—(28 Stat., 279, chap. 282; 36 Stat., 241, chap. 109.)

This section was expressly amended and reenacted to read as above by act of March 23, 1910 (36 Stat., 241).

SEC. 4. That every such company shall, in the months of January, April, July, and October of each year, file with the said Secretary of the Treasury a statement, signed and sworn to by its president and secretary, showing its assets and liabilities, as is required by section three of this Act. And the said Secretary of the Treasury shall have the power, and it shall be his duty, to revoke the authority of any such company to transact any new business under this Act whenever in his judgment such company is not solvent or is conducting its business in violation of this Act. He may institute inquiry at any time into the solvency of said company and may require that additional security be given at any time by any principal when he deems such company no longer sufficient security.—(28 Stat., 279–280, chap. 282; 36 Stat., 241, chap. 109.)

This section was expressly amended and reenacted to read as above by act of March 23, 1910 (36 Stat., 241).

SEC. 5. That any surety company doing business under the provisions of this Act may be sued in respect thereof in any court of the United States which has now or hereafter may have jurisdiction of actions or suits upon such recognizance, stipulation, bond, or undertaking, in the district in which such recognizance, stipulation, bond, or undertaking was made or guaranteed, or in the district in which the principal office of such company is located. And for the purposes of this Act such recognizance, stipulation, bond, or undertaking shall be treated as made or guaranteed in the district in which the office is located, to which it is returnable, or in which it is filed, or in the district in which the principal in such recognizance, stipulation, bond, or undertaking resided when it was made or guaranteed.—(28 Stat., 280, chap. 282.)

SEC. 6. That if any such company shall neglect or refuse to pay any final judgment or decree rendered against it upon any such recognizance, stipulation, bond, or undertaking made or guaranteed by it under the provisions of this Act, from which no appeal, writ of error, or supersedeas has been taken, for thirty days after the rendition of such judgment or decree, it shall forfeit all right to do business under this Act.—(28 Stat., 280, chap. 282.)

SEC. 7. That any company which shall execute or guarantee any recognizance, stipulation, bond, or undertaking under the provisions of this Act shall be estopped in any proceeding to enforce the liability which it shall have assumed to incur, to deny its corporate power to execute or guarantee such instrument or assume such liability.—(28 Stat., 280, chap. 282.)

SEC. 8. That any company doing business under the provisions of this Act which shall fail to comply with any of its provisions shall forfeit to the United States for every such failure not less than five hundred dollars nor more than five thousand dollars, to be recovered by suit in the name of the United States in the same courts in which suit may be brought against such company under the provisions of this Act, and such failure shall not affect the validity of any contract entered into by such company.—(28 Stat., 280, chap. 282.)

See sections 1383–1385, Revised Statutes, and notes thereto; see also act of February 24, 1919, section 1320 (40 Stat., 1148).

[1895, Jan. 12, sec. 1. **Public printing; Joint Congressional Committee.**] There shall be a Joint Committee on Printing, consisting of three Members of the Senate and three Members of the House of Representatives, who shall have the powers hereinafter stated.—(28 Stat., 601, chap. 23.)

[1895, Jan. 12, sec. 2. **Neglect or delay in printing; estimates required with order to print documents.**] PARAGRAPH 1. That the Joint Committee on Printing shall have power to adopt such measures as may be deemed necessary to remedy any neglect or delay in the execution of the public printing and binding. \* \* \*

PAR. 6. Either House may order the printing of a document not already provided for by existing law, but only when the same shall be accompanied by an estimate from the Public Printer as to the probable cost thereof. Any Executive Department, bureau, board, or independent office of the Government submitting reports or documents in response to inquiries from Congress shall submit therewith an estimate of the probable cost of printing to the usual number. Nothing in this paragraph relating to estimates shall apply to reports



or documents not exceeding fifty pages. \* \* \*.—(28 Stat., 601, chap. 23; 34 Stat., 1012, 1013, chap. 2284.)

This section was expressly amended and re-enacted to read as above by act of March 1, 1907, section 1 (34 Stat., 1012, 1013).

Paragraph 1, as above set forth, was further amended, but without express reference thereto, by the following clause in the act of March 1, 1919, section 11 (40 Stat., 1270): "The Joint Committee on Printing shall

have power to adopt and employ such measures as, in its discretion, may be deemed necessary to remedy any neglect, delay, duplication, or waste in the public printing and binding and the distribution of Government publications." See also section 80 of this act, set forth below.

[1895, Jan. 12, sec. 18. **Printing and binding at Government Printing Office; duties of Public Printer.**] It shall be the duty of the Public Printer to purchase all materials and machinery which may be necessary for the Government Printing Office; to take charge of all matter which is to be printed, engraved, lithographed, or bound; to keep an account thereof in the order in which it is received, and to cause the work to be promptly executed; to superintend all printing and binding done at the Government Printing Office, and to see that the sheets or volumes are promptly delivered to the officer who is authorized to receive them. The receipt of such officer shall be a sufficient voucher for their delivery.—(28 Stat., 603, chap. 23.)

All printing, binding, and blank-book work is required to be done at Government Printing Office, with certain exceptions: See act of March 1, 1919, section 11 (40 Stat., 1270); and see section 87 of this act, set forth below.

Distribution of documents for executive departments, etc., is to be done by Public Printer and not by such departments, with certain exceptions: See act of August 23, 1912, section 8 (37 Stat., 414).

Supplies for executive departments, such as

manifold blanks, forms, filing devices, etc., may be procured by Public Printer: See act of June 28, 1902, section 1 (32 Stat., 481).

Time for furnishing copy for annual reports to Public Printer: See note to section 196, Revised Statutes.

Restriction in detail of employees of Government Printing Office to duties not pertaining to work of printing and binding in any department: See act of June 25, 1910, (36 Stat., 770).

[1895, Jan. 12, sec. 19. **Annual report of printing and binding for Departments.**] The Public Printer shall make annual report to Congress, and in it specify the number of copies of each Department report and document printed upon requisition by the head of the Department for which the printing was done, and he shall also specify in said report the exact number of copies of books, giving the titles of the books, bound upon requisition for Senators, Representatives, Delegates, and other officers of the Government and the cost thereof.—(28 Stat., 603, chap. 23.)

See notes to sections 429–430, Revised Statutes; see also act of June 5, 1920 (41 Stat., 1037), as to reports required to be made to Con-

gress by heads of departments concerning publications printed, etc.

[1895, Jan. 12, sec. 22. **Annual report of accounts with Departments, detailed statement of work done, etc.**] The Public Printer shall, on the first day of each regular session, report to Congress the exact condition and the quantity and cost of all printing, binding, lithographing, and engraving; the quantity and cost of all paper purchased for the same; a detailed statement of all proposals and contracts entered into for the purchase of paper and other materials, and for lithographing and engraving; of all payments made, during the preceding year, under his direction; of the quantity of work ordered and done, with a general classification thereof, for each Department, and a detailed statement of each account with the Departments or public officers; a classified

detailed statement of the number of hands employed and the sums paid to each; and such other information touching all matters connected with the Printing Office as may be in his possession.—(28 Stat., 604, chap. 23.)

See note above, under section 19 of this act.

[1895, Jan. 12, sec. 25. **Stereotyping.**] The Public Printer shall cause to be stereotyped or electrotyped all matter when there is a reason to believe that it will be needed a second time.—(28 Stat., 604, chap. 23.)

[1895, Jan. 12, sec. 27. **Estimates submitted by Public Printer.**] He shall prepare and submit to the Secretary of the Treasury, annually, in time to have the same embraced in the estimates from that department, detailed estimates of the sums which will be required for salaries, wages, printing, engraving, lithographing, binding, materials, and other necessary expenses of said Printing Office for the ensuing fiscal year.—(28 Stat., 604, chap. 23.)

See sections 430 and 3661, Revised Statutes, and acts of March 2, 1895 (28 Stat., 961), and June 30, 1906, section 2 (34 Stat., 762).

Printing and engraving for the Hydrographic Office are to be estimated for separately and in detail, and appropriated for separately. (Act Aug. 4, 1886, 24 Stat., 255.)

[1895, Jan. 12, sec. 42. **Printing documents for sale to applicants.**] The Public Printer shall furnish to all applicants giving notice before the matter is put to press, not exceeding two hundred and fifty to any one applicant, copies of bills, reports, and documents, said applicants paying in advance the cost of such printing with ten per centum added: *Provided*, That the printing of such work for private parties shall not interfere with the printing for the Government.—(28 Stat., 607, chap. 23.)

See sections 52, 61, and 67 of this act, set forth below.

[1895, Jan. 12, sec. 51. **Style of printing and binding.**] The forms and style in which the printing or binding ordered by any of the Departments shall be executed, and the material and the size of type to be used, shall be determined by the Public Printer, having proper regard to economy, workmanship, and the purposes for which the work is needed.—(28 Stat., 608, chap. 23.)

See sections 86 and 91 of this act, set forth below.

[1895, Jan. 12, sec. 52. **No Government publication to be copyrighted.**] The Public Printer shall sell, under such regulations as the Joint Committee on Printing may prescribe, to any person or persons who may apply additional or duplicate stereotype or electrotype plates from which any Government publication is printed, at a price not to exceed the cost of composition, the metal and making to the Government and ten per centum added: *Provided*, That the full amount of the price shall be paid when the order is filed: *And provided further*, That no publication reprinted from such stereotype or electrotype plates and no other Government publication shall be copyrighted.—(28 Stat., 608, chap. 23.)

See sections 42, 61, and 67 of this act as to sale of publications.

[1895, Jan. 12, sec. 54. **"Usual number" of documents.**] Whenever any document or report shall be ordered printed by Congress, such order to print shall signify the "usual number" of copies for binding and distribution among those entitled to receive them. No greater number shall be printed unless ordered by either House, or as hereinafter provided. When a special number



of a document or report is ordered printed, the usual number shall also be printed, unless already ordered. The usual number of documents and reports shall be one thousand six hundred and eighty-two copies, which shall be distributed as follows: \* \* \*.—(28 Stat., 608, chap. 23.)

See section 73 of this act, and note thereto; see also Joint Resolution of January 15, 1908 (35 Stat., 565).

[1895, Jan. 12, sec. 58. Departmental publications, distribution to libraries.]

Whenever printing not bearing a Congressional number shall be done for any department or officer of the Government, except confidential matter, blank forms, and circular letters not of a public character, or shall be done for use of Congressional committees, not of a confidential character, two copies shall be sent, unless withheld by order of the committee, by the Public Printer to the Senate and House Libraries, respectively, and one copy each to the document rooms of the Senate and House, for reference; and these copies shall not be removed; and of all publications of the Executive Departments not intended for their especial use, but made for distribution, five hundred copies shall be at once delivered to the superintendent of documents for distribution to designated depositories and State and Territorial libraries.—(28 Stat., 610, chap. 23.)

Departmental publications printed elsewhere  
than at Government Printing Office, 62 or  
more copies shall be supplied to the Li-

brary of Congress. (See Joint Res., Mar. 2,  
1901, sec. 3, 31 Stat., 1465).

[1895, Jan. 12, sec. 61. Superintendent of documents; sales by; other duties.] The Public Printer shall appoint a competent person to act as superintendent of documents, and shall fix his salary. The superintendent of documents so designated and appointed is hereby authorized to sell at cost any public document in his charge, the distribution of which is not herein specifically directed, said cost to be estimated by the Public Printer and based upon printing from stereotyped plates; but only one copy of any document shall be sold to the same person, excepting libraries or schools by which additional copies are desired for separate departments thereof, and members of Congress; and whenever any officer of the Government having in his charge documents published for sale shall desire to be relieved of the same, he is hereby authorized to turn them over to the superintendent of documents, who shall receive and sell them under the provisions of this section. All moneys received from the sale of documents shall be returned to the Public Printer on the first day of each month and be by him covered into the Treasury monthly, and the superintendent of documents shall report annually the number of copies of each and every document sold by him, and the price of the same. He shall also report monthly to the Public Printer the number of documents received by him and the disposition made of the same. He shall have general supervision of the distribution of all public documents, and to his custody shall be committed all documents subject to distribution, excepting those printed for the special official use of the Executive Departments, which shall be delivered to said Departments, and those printed for the use of the two Houses of Congress, which shall be delivered to the folding rooms of said Houses and distributed or delivered ready for distribution to Members and Delegates upon their order by the superintendents of the folding rooms of the Senate and House of Representatives.—(28 Stat., 610, chap. 23.)

See sections 42, 52, and 67 of this act, and Joint Resolution of March 28, 1904 (33 Stat., 584), as to sale of documents.

See act of August 23, 1912, section 8 (37 Stat., 414), as to distribution of departmental documents by Public Printer.

[1895, Jan. 12, sec. 62. **Departmental publications furnished superintendent of documents; index of documents to be published.**] The superintendent of documents shall, at the close of each regular session of Congress, prepare and publish a comprehensive index of public documents, beginning with the Fifty-third Congress, upon such plan as shall be approved by the Joint Committee on Printing; and the Public Printer shall, immediately upon its publication, deliver to him a copy of each and every document printed by the Government Printing Office; and the head of each of the Executive Departments, bureaus, and offices of the Government shall deliver to him a copy of each and every document issued or published by such Department, bureau, or office not confidential in its character. He shall also prepare and print in one volume a consolidated index of Congressional documents, and shall index such single volumes of documents as the Joint Committee on Printing shall direct. Of the comprehensive index and of the consolidated index two thousand copies each shall be printed and bound in addition to the usual number, two hundred copies for the use of the Senate, eight hundred copies for the use of the House, and one thousand copies for distribution by the superintendent of documents.—(28 Stat., 610–611, chap. 23.)

See section 69 of this act, set forth below.

1895, Jan. 12, sec. 67. **Disposal of accumulated documents.**] All documents at present remaining in charge of the several Executive Departments, bureaus, and offices of the Government not required for official use shall be delivered to the superintendent of documents, and hereafter all public documents accumulating in said Departments, bureaus, and offices not needed for official use shall be annually turned over to the superintendent of documents for distribution or sale.—(28 Stat., 611–612, chap. 23.)

See sections 42, 52, and 61 of this act, as to sale of documents; see also Joint Resolution of March 28, 1904 (33 Stat., 584).

[1895, Jan. 12, sec. 69. **Catalogue of Government publications.**] A catalogue of Government publications shall be prepared by the superintendent of documents on the first day of each month, which shall show the documents printed during the preceding month, where obtainable, and the price thereof. Two thousand copies of such catalogue shall be printed in pamphlet form for distribution.—(28 Stat., 612, chap. 23.)

See section 62 of this act, set forth above.

[1895, Jan. 12, sec. 73. **Extra copies of certain documents to be printed.**] Extra copies of documents and reports shall be printed promptly when the same shall be ready for publication, and shall be bound in paper or cloth as directed by the Joint Committee on Printing, and shall be of the number following in addition to the usual number: \* \* \*.—(28 Stat., 612, chap. 23.)

Of the Ephemeris and Nautical Almanac and of the papers supplementary thereto, one thousand five hundred copies; one hundred copies for the Senate, four hundred for the House, and one thousand for distribution or sale by the Navy Department. The five hundred copies printed for Congress and the usual number shall be for the calendar year next following, and those for the



Navy Department for the third year following. The Secretary of the Navy is also authorized to cause additional copies of the Ephemeris, and of the Nautical Almanacs extracted therefrom, to be printed for the public service and for sale to navigators and others: *Provided*, That all moneys received from sales of the Ephemeris and of the Nautical Almanacs shall be deposited in the Treasury and placed to the credit of the general fund for public printing.—(28 Stat., 613, chap. 23.)

See joint resolution of May 13, 1902 (32 Stat., 740), and act of July 1, 1902 (32 Stat., 678); see also note to section 436, Revised Statutes.

Of the Observations of the Naval Observatory, one thousand eight hundred copies; three hundred for the Senate, seven hundred for the House, and eight hundred for distribution by the Naval Observatory, and of the astronomical appendixes to the above observations, one thousand two hundred separate copies, and of the meteorological and magnetic observations one thousand separate copies for distribution by the Naval Observatory. \* \* \*.—(28 Stat., 613, chap. 23.)

The Secretary of State shall cause to be edited, printed, published, and distributed pamphlet copies of the statutes of the present and each future session of Congress to the officers and persons hereinafter provided for; said distribution shall be made at the close of every session of Congress, as follows: \* \* \* to the Navy Department, one hundred copies. \* \* \*.—(28 Stat., 614, chap. 23.)

After the close of each Congress the Secretary of State shall have edited, printed, and bound a sufficient number of the volumes containing the Statutes at Large enacted by that Congress to enable him to distribute copies, or as many thereof as may be needed, as follows: \* \* \* to the Navy Department, seventy-five copies. \* \* \*.—(28 Stat., 615, chap. 23.)

Of the Registers of the Army and Navy, fifteen hundred copies of each; five hundred for the Senate and one thousand for the House. \* \* \*.—(28 Stat., 616, chap. 23.)

There shall be prepared under the direction of the Joint Committee on Printing a Congressional Directory, of which there shall be three editions during each long session and two editions during each short session of Congress. The first edition shall be distributed to Senators, Representatives, Delegates, the principal officers of Congress, and heads of departments on the first day of the session, and shall be ready for distribution to others within one week thereafter. The number and distribution of such Directory shall be under the control of the Joint Committee on Printing. \* \* \*.—(28 Stat., 617, chap. 23.)

The Public Printer shall furnish the Congressional Record as follows and shall furnish gratuitously no others in addition thereto: \* \* \*

To the library of each of the \* \* \* Executive Departments, and to the Naval Observatory, \* \* \* one bound copy. \* \* \*.—(28 Stat., 617, 618, chap. 23.)

To enable the officer charged with the duty of preparing the Official Register of the United States to publish the same, the Secretary of the Senate, the Clerk of the House of Representatives, the head of each Executive Department of the Government, and the chief of each and every bureau, office, commission, or institution not embraced in an Executive Department, in connec-

tion with which salaries are paid from the Treasury of the United States, shall, on the first day of July in each year in which a new Congress is to assemble, cause to be filed with the Secretary of the Interior a full and complete list of all officers, agents, clerks, and other employees of said Department, bureau, office, commission, or institution connected with the legislative, executive, or judicial service of the Government, or paid from the United States Treasury, including military and naval officers of the United States, cadets, and midshipmen.

Said lists shall exhibit the salary, compensation, and emoluments allowed to each of said officers, agents, clerks, and other employees, the State or country in which he was born, the State or Territory and Congressional district and county of which he is a resident and from which he was appointed to office, and where employed.

A list of the names, force, and condition of all ships and vessels belonging to the United States, and when and where built, shall also be filed with the Secretary of the Interior by the heads of the Departments having supervision of such ships and vessels, for incorporation in the Official Register. \* \* \*.—(28 Stat., 618, chap. 23.)

By act of October 22, 1913 (38 Stat., 224), the last paragraph above quoted, as to ships and vessels, was repealed.

The Director of the Census has been substituted for the Secretary of the Interior in the above enactment. (See note to sec. 198, R. S.)

Of the Official Register three thousand copies shall be printed and bound, which shall be distributed as follows: \* \* \* to the Navy Department, twenty copies \* \* \*.—(28 Stat., 619, chap. 23.)

No report, document, or publication of any kind distributed by or from an Executive Department or bureau of the Government shall contain any notice that the same is sent with "the compliments" of an officer of the Government, or with any special notice that it is so sent, except that notice that it has been sent, with a request for an acknowledgment of its receipt, may be given.—(28 Stat., 620, chap. 23.)

See note to section 429, Revised Statutes.

[1895, Jan. 12, sec. 74. **Government publications, ownership.**] Government publications furnished to judicial and executive officers of the United States for their official use shall not become the property of these officers, but on the expiration of their official term shall be by them delivered to their successors in office and all Government publications delivered to designated depositories or other libraries shall be for public use without charge.—(28 Stat., 620, chap. 23.)

[1895, Jan. 12, sec. 77. **Hydrographic Office, publications, sale of.**] The Secretary of the Navy is authorized to cause to be prepared at the Hydrographic Office attached to the Bureau of Navigation, in the Navy Department, maps, charts, and nautical books relating to and required in navigation, and to publish and furnish them to navigators at the cost of printing and paper, and to purchase the plates and copyrights of such existing maps, charts, navigators' sailing directions and instructions as he may consider necessary and when he may deem it expedient to do so, and under such regulations and instructions as he may prescribe.



All moneys which may be received from the sale of maps, charts, and nautical books shall be paid by the Secretary of the Navy into the Treasury of the United States, to be used in the further preparation and publication of maps, charts, navigators' sailing directions, and instructions for the use of seamen, to be sold at the cost of printing and paper.—(28 Stat., 621, chap. 23.)

See sections 431-433, Revised Statutes, and act of May 29, 1920 (41 Stat., 665); see also section 89 of this act, set forth below; and

see act of February 14, 1879 (20 Stat., 286), as to sale of charts to mariners and others.

[1895, Jan. 12, sec. 78. **Foreign hydrographic surveys.**] All appropriations made for the preparation or publication of foreign hydrographic surveys shall only be applicable to their object, upon the approval by the Secretary of the Navy, after a report from three competent naval officers to the effect that the original data for proposed charts are such as to justify their publication; and it is hereby made the duty of the Secretary of the Navy to order a board of three naval officers to examine and report upon the data before he shall approve of any application of moneys to the preparation or publication of such charts or hydrographic surveys.—(28 Stat., 621, chap. 23.)

See sections 431-433, and 3686, Revised Statutes, and notes thereto.

[1895, Jan. 12, sec. 80. **Time for furnishing copy and illustrations to Public Printer.**] No document or report to be illustrated or accompanied by maps shall be printed by the Public Printer until the illustrations or maps designed therefor shall be ready for publication; and no order for public printing shall be acted upon by the Public Printer after the expiration of one year, unless the entire copy and illustrations for the work shall have been furnished within that period: *Provided*, This section shall not apply to orders heretofore made for the printing of a series of volumes on one subject.—(28 Stat., 621, chap. 23.)

See section 196, Revised Statutes, and note thereto, as to time for furnishing copy of annual reports to printer; and see section 2 of this act, set forth above.

[1895, Jan. 12, sec. 86. **Authority of law for work; style of binding.**] No printing or binding shall be done at the Government Printing Office unless authorized by law. Binding for the Departments of the Government shall be done in plain sheep or cloth, except that record and account books may be bound in Russia leather, sheep fleshers, and skivers, when authorized by the head of a Department: *Provided*, The libraries of the several Departments, the Library of Congress, the libraries of the Surgeon-General's Office, the Patent Office, and the Naval Observatory may have books for the exclusive use of said libraries bound in half Turkey, or material no more expensive.—(28 Stat., 622, chap. 23.)

See section 94 of this act, and act of March 3, 1905 (33 Stat., 1249) for restrictions on printing for Executive Departments; see

also section 51 of this act, set forth above, as to style of binding.

[1895, Jan. 12, sec. 87. **Printing, etc., to be done at Government Printing Office.**] All printing, binding, and blank books for the Senate or House of Representatives and for the Executive and Judicial Departments shall be done at the Government Printing Office, except in cases otherwise provided by law.—(28 Stat., 622, chap. 23.)

See act of March 1, 1919, section 11 (40 Stat., 1270).

By act of May 12, 1917 (40 Stat., 74 and 75), this section was expressly amended to authorize work for the Army "or other military forces," to be procured from other

printing establishments, by the Secretary of War, "in time of actual hostilities."

See note to section 159, Revised Statutes, for definition of "Executive and Judicial Departments."

[1895, Jan. 12, sec. 89. Requisition for printing; number of copies; annual reports; publications of Hydrographic Office.] No printing shall be done for the Executive Departments in any fiscal year in excess of the amount of the appropriation, and none shall be done without a special requisition, signed by the chief of the Department and filed with the Public Printer.

No report, publication, or document shall be printed in excess of the number of one thousand of each in any one fiscal year without authorization therefor by Congress, except that of the annual report of the head of the Department without appendices there may be printed in any one fiscal year not to exceed five thousand copies, bound in pamphlet form; and of the reports of chiefs of bureaus without appendices there may be printed in any one fiscal year not to exceed two thousand five hundred copies, bound in pamphlet form: \* \* \* and the Secretary of the Navy may authorize the printing of the charts, maps, notices to mariners, tide tables, light lists, sailing directions, bulletins, and other special publications of the Hydrographic Office in such editions as the interests of the Government and of the public may require.

Heads of Executive Departments shall direct whether reports made to them by bureau chiefs and chiefs of divisions shall be printed or not.—(28 Stat., 622–623, chap. 23.)

See joint resolution of March 21, 1900 (31 Stat., 713), as to Naval Intelligence publications; and see joint resolution of March 30, 1906 (34 Stat., 826), as to printing of documents for Executive Departments in two or more editions.

See section 77 of this act, set forth above, and references thereunder, as to publications of the Hydrographic Office.

See sections 196 and 429, Revised Statutes, and notes thereto, and sections 91 and 94 of this act, as to printing of annual reports.

See section 93 of this act, below, as to requisitions for printing and binding.

[1895, Jan. 12, sec. 90. Congressional Record, daily examination of; documents, bills, etc., to be ordered by Departments.] The heads of Executive Departments, and such executive officers as are not connected with the Departments, respectively, shall cause daily examination of the Congressional Record for the purpose of noting documents, reports, and other publications of interest to their Departments, and shall cause an immediate order to be sent to the Public Printer for the number of copies of such publications required for official use, not to exceed, however, the number of bureaus in the Department and divisions in the office of the head thereof. The Public Printer shall send to each Executive Department and to each executive office not connected with the Departments, as soon as printed, five copies of all bills and resolutions, except the State Department, to which shall be sent ten copies of bills and resolutions. When the head of a Department desires a greater number of any class of bills or resolutions for official use, they shall be furnished by the Public Printer on requisition promptly made.—(28 Stat., 623, chap. 23.)

[1895, Jan. 12, sec. 91. Annual reports, style of printing.] The annual reports of executive officers shall be printed in the same type and form as the report of the head of the Department which it accompanies, unless otherwise ordered by the Joint Committee on Printing.—(28 Stat., 623, chap. 23.)

See section 51 of this act, set forth above, as to style of printing and binding.

See section 89 of this act, set forth above, and sections 196 and 429, Revised Statutes, and notes thereto, as to printing of annual reports.



[1895, Jan. 12, sec. 92. **Distribution of Government publications.**] Government publications printed for or received by the Executive Departments, whether for official use or for distribution, shall be distributed by a competent person detailed to such duty in each Department by the head thereof. He shall keep an account in detail of all publications received and distributed by him. He shall prevent duplication, and make detailed report to the head of the Department, who shall transmit the same annually to Congress.—(28 Stat., 623, chap. 23.)

See act of August 23, 1912, section 8 (37 Stat., 414-415), as to distribution of documents for Executive Departments to be done by the Public Printer, with certain exceptions.

Not to be distributed with "the compliments" of any officer: See section 73, last paragraph, of this act, set forth above; and see note to section 429, Revised Statutes.

[1895, Jan. 12, sec. 93. **Requisitions for work; estimate of cost; appropriation charged.**] When any Department, the Supreme Court, the Court of Claims, or the Library of Congress shall require printing or binding to be done it shall be on certificate that such work be necessary for the public service; whereupon the Public Printer shall furnish an estimate of the cost by the principal items for such printing or binding so called for, after which requisitions shall be made upon him therefor by the head of such Department, the Clerk of the Supreme Court, Chief Justice of the Court of Claims, or the Librarian of Congress; and the Public Printer shall place the cost thereof to the debit of such Department in its annual appropriation for printing and binding.—(28 Stat., 623, chap. 23.)

See section 89 of this act, set forth above; and see joint resolution of March 30, 1906 (34 Stat., 825), as to charges against printing allotments.

[1895, Jan. 12, sec. 94. **Authority of law for printing; restrictions upon annual reports.**] No head of any Executive Department, or of any bureau, branch, or office of the Government, shall cause to be printed, nor shall the Public Printer print, any document or matter except that which is authorized by law and necessary to the public business; and executive officers, before transmitting their annual reports, shall carefully examine the same and all accompanying documents, and exclude therefrom all matter, including engravings, maps, drawings, and illustrations, except such as they shall certify in their letters transmitting such reports are necessary and relate entirely to the transaction of the public business.—(28 Stat., 623, chap. 23.)

See section 86 of this act and act of March 3, 1905 (33 Stat., 1249), for restrictions on printing and binding.

See section 89 of this act, and sections 196 and 429, Revised Statutes, and notes thereto, as to printing of annual reports.

See act of March 3, 1905 (33 Stat., 1213), as to illustrations in reports, etc.

[1895, Jan. 12, sec. 95. **Exchange of documents and books.**] Heads of Departments are authorized to exchange surplus documents for such other documents and books as may be required by them, when the same can be done to the advantage of the public service.—(28 Stat., 623, chap. 23.)

[1895, Jan. 12, sec. 96. **Official envelopes procured by Postmaster-General.**] The Postmaster-General shall contract for all envelopes, stamped or otherwise, designed for sale to the public, or for use by his own or other Departments, and may contract for them to be plain or with such printed matter as may be prescribed by the Department making requisition therefor: *Provided*, That

no envelope furnished by the Government shall contain any business address or advertisement.—(28 Stat., 624, chap. 23.)

See act of June 26, 1906 (34 Stat., 476), which | express reference thereto; and see act of  
amended this section, although without | June 30, 1906, section 2 (34 Stat., 762).

[1895, Jan. 12, sec. 98. Libraries of Departments, etc., designated depositories of Government publications.] The libraries of the \* \* \* Executive Departments, of the United States Military Academy, and United States Naval Academy are hereby constituted designated depositories of the Government publications, and the superintendent of documents shall supply one copy of said publications, in the same form as supplied to other depositories, to each of said libraries.—(28 Stat., 624, chap. 23.)

[1895, Jan. 25. Oaths, officers of the Navy, Marine Corps, etc., may administer.] That judges advocate of naval general courts-martial and courts of inquiry, and all commanders in chief of naval squadrons, commandants of navy yards and stations, officers commanding vessels of the Navy, and recruiting officers of the Navy, and the adjutant and inspector, assistants adjutant and inspector, commanding officers, recruiting officers of the Marine Corps, and such other officers of the Regular Navy and Marine Corps, of the Naval Reserve Force, of the Marine Corps Reserve, and of the National Naval Volunteers as may be hereafter designated by the Secretary of the Navy, be, and they are hereby, authorized to administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration.—(28 Stat., 639–640, chap. 45; 31 Stat., 1086, chap. 834; 39 Stat., 1171, chap. 180.)

This act was expressly amended and reenacted to read as above by act of March 4, 1917 (39 Stat., 1171); it had previously been amended and reenacted by act of March 3, 1901 (31 Stat., 1086).

The National Naval Volunteers, created by act of August 29, 1916 (39 Stat., 595), was abolished by act of July 1, 1918 (40 Stat., 708),

which authorized transfer of the members of that organization to the Naval Reserve Force or Marine Corps Reserve.

See section 183, Revised Statutes, and note thereto, for reference to other laws relating to the administration of oaths by persons in the naval service.

[1895, Feb. 8. Navigation on the Great Lakes and their connecting and tributary waters as far east as Montreal.] That the following rules for preventing collisions shall be followed in the navigation of all public and private vessels of the United States upon the Great Lakes and their connecting and tributary waters as far east as Montreal.—(28 Stat., 645, chap. 64.)

Regulations for preventing collisions at sea: See act of August 19, 1890 (26 Stat., 320), and amendments thereto.

Navigation on the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries: See sections 4233 and 4412, Revised Statutes, and notes thereto.

Navigation on all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal, and except the Red River of the North and

rivers emptying into the Gulf of Mexico and their tributaries: See act of June 7, 1897 (30 Stat., 96).

Navigation, Pearl Harbor, Hawaii: See act of August 22, 1912 (37 Stat., 341).

Rules governing motor boats: See act of June 9, 1910 (36 Stat., 462).

See, generally, notes to sections 4233 and 4412, Revised Statutes; and Navy Regulations, 1920 (chap. 55), quoting laws, and regulations of the Department of Commerce "for preventing collisions," etc.

#### STEAM AND SAIL VESSELS.

RULE 1. Every steam vessel which is under sail and not under steam, shall be considered a sail vessel; and every steam vessel which is under steam, whether under sail or not, shall be considered a steam vessel. The word steam



vessel shall include any vessel propelled by machinery. A vessel is under way within the meaning of these rules when she is not at anchor or made fast to the shore or aground.—(28 Stat., 645, chap. 64.)

#### LIGHTS.

RULE 2. The lights mentioned in the following rules and no others shall be carried in all weathers from sunset to sunrise. The word visible in these rules when applied to lights shall mean visible on a dark night with a clear atmosphere.—(28 Stat., 645, chap. 64.)

RULE 3. Except in the cases hereinafter expressly provided for, a steam vessel when under way shall carry:

(a) On or in front of the foremast, or if a vessel without a foremast, then in the forepart of the vessel, at a height above the hull of not less than twenty feet, and if the beam of the vessel exceeds twenty feet, then at a height above the hull not less than such beam, so, however, that such height need not exceed forty feet, a bright white light so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such character as to be visible at a distance of at least five miles.

(b) On the starboard side, a green light, so constructed as to throw an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles.

(c) On the port side, a red light, so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles.

(d) The said green and red lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

(e) A steamer of over one hundred and fifty feet register length shall also carry when under way an additional bright light similar in construction to that mentioned in subdivision (a), so fixed as to throw the light all around the horizon and of such character as to be visible at a distance of at least three miles. Such additional light shall be placed in line with the keel at least fifteen feet higher from the deck and more than seventy-five feet abaft the light mentioned in subdivision (a).—(28 Stat., 645-646, chap. 64.)

#### VESSELS TOWING.

RULE 4. A steam vessel having a tow other than a raft shall in addition to the forward bright light mentioned in subdivision (a) of rule three carry in a vertical line not less than six feet above or below that light a second bright light of the same construction and character and fixed and carried in the same manner as the forward bright light mentioned in said subdivision (a) of rule three. Such steamer shall also carry a small bright light abaft the funnel

or after mast for the tow to steer by, but such light shall not be visible forward of the beam.—(28 Stat., 646, chap. 64.)

RULE 5. A steam vessel having a raft in tow shall, instead of the forward lights mentioned in rule four, carry on or in front of the foremast, or if a vessel without a foremast then in the fore part of the vessel, at a height above the hull of not less than twenty feet, and if the beam of the vessel exceeds twenty feet then at a height above the hull not less than such beam, so however that such height need not exceed forty feet, two bright lights in a horizontal line athwartships and not less than eight feet apart, each so fixed as to throw the light all around the horizon and of such character as to be visible at a distance of at least five miles. Such steamer shall also carry the small bright steering light aft, of the character and fixed as required in rule four.—(28 Stat., 646, chap. 64.)

RULE 6. A sailing vessel under way and any vessel being towed shall carry the side lights mentioned in rule three.

A vessel in tow shall also carry a small bright light aft, but such light shall not be visible forward of the beam.—(28 Stat., 646, chap. 64.)

RULE 7. The lights for tugs under thirty tons register whose principal business is harbor towing, and for boats navigating only on the River Saint Lawrence, also ferryboats, rafts, and canal boats, shall be regulated by rules which have been or may hereafter be prescribed by the Board of Supervising Inspectors of Steam Vessels.—(28 Stat., 646, chap. 64.)

RULE 8. Whenever, as in the case of small vessels under way during bad weather, the green and red side lights can not be fixed, these lights shall be kept at hand lighted and ready for use, and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side, nor, if practicable, more than two points abaft the beam on their respective sides. To make the use of these portable lights more certain and easy, they shall each be painted outside with the color of the light they respectively contain, and shall be provided with suitable screens.—(28 Stat., 646-647, chap. 64.)

RULE 9. A vessel under one hundred and fifty feet register length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a lantern constructed so as to show a clear, uniform, and unbroken light, visible all around the horizon, at a distance of at least one mile.

A vessel of one hundred and fifty feet or upward in register length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than twenty and not exceeding forty feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than fifteen feet lower than the forward light, another such light.—(28 Stat., 647, chap. 64.)

RULE 10. Produce boats, canal boats, fishing boats, rafts, or other water craft navigating any bay, harbor, or river by hand power, horse power, sail, or by the current of the river, or which shall be anchored or moored in or near the channel or fairway of any bay, harbor, or river, and not otherwise provided for in these rules, shall carry one or more good white lights, which shall be placed



in such manner as shall be prescribed by the Board of Supervising Inspectors of Steam Vessels.—(28 Stat., 647, chap. 64.)

RULE 11. Open boats shall not be obliged to carry the side lights required for other vessels, but shall, if they do not carry such lights, carry a lantern having a green slide on one side and a red slide on the other side; and on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, and in such a manner that the green light shall not be seen on the port side, nor the red light on the starboard side. Open boats, when at anchor or stationary, shall exhibit a bright white light. They shall not, however, be prevented from using a flare-up in addition if considered expedient.—(28 Stat., 647, chap. 64.)

RULE 12. Sailing vessels shall at all times, on the approach of any steamer during the nighttime, show a lighted torch upon that point or quarter to which such steamer shall be approaching.—(28 Stat., 647, chap. 64.)

RULE 13. The exhibition of any light on board of a vessel of war or revenue cutter of the United States may be suspended whenever, in the opinion of the Secretary of the Navy, the commander in chief of a squadron, or the commander of a vessel acting singly, the special character of the service may require it.—(28 Stat., 647, chap. 64.)

#### FOG SIGNALS.

RULE 14. A steam vessel shall be provided with an efficient whistle, sounded by steam or by some substitute for steam, placed before the funnel not less than eight feet from the deck, or in such other place as the local inspectors of steam vessels shall determine, and of such character as to be heard in ordinary weather at a distance of at least two miles, and with an efficient bell, and it is hereby made the duty of the United States local inspectors of steam vessels when inspecting the same to require each steamer to be furnished with such whistle and bell. A sailing vessel shall be provided with an efficient fog horn and with an efficient bell.

Whenever there is thick weather by reason of fog, mist, falling snow, heavy rainstorms, or other causes, whether by day or by night, fog signals shall be used as follows:

(a) A steam vessel under way, excepting only a steam vessel with raft in tow, shall sound at intervals of not more than one minute three distinct blasts of her whistle.

(b) Every vessel in tow of another vessel shall, at intervals of one minute, sound four bells on a good and efficient and properly placed bell as follows: By striking the bell twice in quick succession, followed by a little longer interval, and then again striking twice in quick succession (in the manner in which four bells is struck in indicating time).

(c) A steamer with a raft in tow shall sound at intervals of not more than one minute a screeching or Modoc whistle for from three to five seconds.

(d) A sailing vessel under way and not in tow shall sound at intervals of not more than one minute—

If on the starboard tack with wind forward of abeam, one blast of her fog horn;

If on the port tack with wind forward of the beam, two blasts of her fog horn;

If she has the wind abaft the beam on either side, three blasts of her fog horn.

(e) Any vessel at anchor and any vessel aground in or near a channel or fairway shall at intervals of not more than two minutes ring the bell rapidly for three to five seconds.

(f) Vessels of less than ten tons registered tonnage, not being steam vessels, shall not be obliged to give the above-mentioned signals, but if they do not they shall make some other efficient sound signal at intervals of not more than one minute.

(g) Produce boats, fishing boats, rafts, or other water craft navigating by hand power or by the current of the river, or anchored or moored in or near the channel or fairway and not in any port, and not otherwise provided for in these rules, shall sound a fog horn, or equivalent signal, at intervals of not more than one minute.—(28 Stat., 647–648, chap. 64.)

RULE 15. Every vessel shall, in thick weather, by reason of fog, mist, falling snow, heavy rainstorms, or other causes, go at moderate speed. A steam vessel hearing, apparently not more than four points from right ahead, the fog signal of another vessel shall at once reduce her speed to bare steerage-way, and navigate with caution until the vessels shall have passed each other.—(28 Stat., 648, chap. 64.)

## STEERING AND SAILING RULES.

### SAILING VESSELS.

RULE 16. When two sailing vessels are approaching one another so as to involve risk of collision one of them shall keep out of the way of the other, as follows, namely:

(a) A vessel which is running free shall keep out of the way of a vessel which is closehauled.

(b) A vessel which is closehauled on the port tack shall keep out of the way of a vessel which is closehauled on the starboard tack.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d) When they are running free, with the wind on the same side, the vessel which is to windward shall keep out of the way of the vessel which is to leeward.—(28 Stat., 648, chap. 64.)

### STEAM VESSELS.

RULE 17. When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision each shall alter her course to starboard, so that each shall pass on the port side of the other.—(28 Stat., 648, chap. 64.)

RULE 18.—When two steam vessels are crossing so as to involve risk of collision the vessel which has the other on her own starboard side shall keep out of the way of the other.—(28 Stat., 648, chap. 64.)



RULE 19. When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision the steam vessel shall keep out of the way of the sailing vessel.—(28 Stat., 648, chap. 64.)

RULE 20.—Where, by any of the rules herein prescribed, one of two vessels shall keep out of the way, the other shall keep her course and speed.—(28 Stat., 649, chap. 64.)

RULE 21. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.—(28 Stat., 649, chap. 64.)

RULE 22. Notwithstanding anything contained in these rules every vessel overtaking any other shall keep out of the way of the overtaken vessel.—(28 Stat., 649, chap. 64.)

RULE 23. In all weathers every steam vessel under way in taking any course authorized or required by these rules shall indicate that course by the following signals on her whistle, to be accompanied whenever required by corresponding alteration of her helm; and every steam vessel receiving a signal from another shall promptly respond with the same signal or, as provided in Rule Twenty-six:

One blast to mean, "I am directing my course to starboard."

Two blasts to mean, "I am directing my course to port." But the giving or answering signals by a vessel required to keep her course shall not vary the duties and obligations of the respective vessels.—(28 Stat., 649, chap. 64.)

RULE 24. That in all narrow channels where there is a current, and in the rivers Saint Mary, Saint Clair, Detroit, Niagara, and Saint Lawrence, when two steamers are meeting, the descending steamer shall have the right of way, and shall, before the vessel shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take.—(28 Stat., 649, chap. 64.)

RULE 25. In all channels less than five hundred feet in width, no steam vessel shall pass another going in the same direction unless the steam vessel ahead be disabled or signify her willingness that the steam vessel astern shall pass, when the steam vessel astern may pass, subject, however, to the other rules applicable to such a situation. And when steam vessels proceeding in opposite directions are about to meet in such channels, both such vessels shall be slowed down to a moderate speed, according to the circumstances.—(28 Stat., 649, chap. 64.)

RULE 26. If the pilot of a steam vessel to which a passing signal is sounded deems it unsafe to accept and assent to said signal, he shall not sound a cross signal; but in that case, and in every case where the pilot of one steamer fails to understand the course or intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes, the pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle; and if the vessels shall have approached within half a mile of each other both shall reduce their speed to bare steerageway, and, if necessary, stop and reverse. [28 Stat., 649, chap. 64.]

RULE 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances

which may render a departure from the above rules necessary in order to avoid immediate danger. [28 Stat., 649, chap. 64.]

**RULE 28.** Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of a neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. [28 Stat., 649, chap. 64.]

[1895, Feb. 8, sec. 2. **Violation of rules, navigation of Great Lakes, etc.; penalty.**] That a fine, not exceeding two hundred dollars, may be imposed for the violation of any of the provisions of this Act. The vessel shall be liable for the said penalty, and may be seized and proceeded against, by way of libel, in the district court of the United States for any district within which such vessel may be found. (28 Stat., 649, chap. 64.)

[1895, Feb. 8, sec. 3. **Regulations to be established for enforcement of act; steam vessels passing each other; etc.**] That the Secretary of the Treasury of the United States shall have authority to establish all necessary regulations, not inconsistent with the provisions of this Act, required to carry the same into effect.

The Board of Supervising Inspectors of the United States shall have authority to establish such regulations to be observed by all steam vessels in passing each other, not inconsistent with the provisions of this Act, as they shall from time to time deem necessary; and all regulations adopted by the said Board of Supervising Inspectors under the authority of this Act, when approved by the Secretary of the Treasury, shall have the force of law. Two printed copies of any such regulations for passing, signed by them, shall be furnished to each steam vessel, and shall at all times be kept posted up in conspicuous places on board.—(28 Stat., 649-650, chap. 64.)

The authority of the Secretary of the Treasury with respect to this and other navigation laws of the United States, was vested in the Secretary of Commerce and Labor by

act of February 14, 1903 (32 Stat., 825-830); and in the Secretary of Commerce by act of March 4, 1913 (37 Stat., 736).

[1895, Feb. 8, sec. 4. **Repeal of inconsistent laws relating to navigation.**] That all laws or parts of laws, so far as applicable to the navigation of the Great Lakes and their connecting and tributary waters as far east as Montreal, inconsistent with the foregoing rules are hereby repealed.—(28 Stat., 650, chap. 64.)

[1895, Feb. 19. **Rules for navigation of certain inland waters.**] That on and after March first, eighteen hundred and ninety-five, the provisions of sections forty-two hundred and thirty-three, forty-four hundred and twelve, and forty-four hundred and thirteen of the Revised Statutes and regulations pursuant thereto shall be followed on the harbors, rivers and inland waters of the United States.

The provisions of said sections of the Revised Statutes and regulations pursuant thereto are hereby declared special rules duly made by local authority relative to the navigation of harbors, rivers and inland waters as provided for in Article thirty, of the Act of August nineteenth, eighteen hundred and ninety, entitled "An Act to adopt regulations for preventing collisions at sea."

**SEC. 2.** The Secretary of the Treasury is hereby authorized, empowered and directed from time to time to designate and define by suitable bearings



or ranges with lighthouses, light vessels, buoys or coast objects, the lines dividing the high seas from rivers, harbors and inland waters.

SEC. 3. Collectors or other chief officers of the customs shall require all sail vessels to be furnished with proper signal lights. Every such vessel that shall be navigated without complying with the Statutes of the United States, or the regulations that may be lawfully made thereunder, shall be liable to a penalty of two hundred dollars, one-half to go to the informer; for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense.

SEC. 4. The words "inland waters" used in this Act shall not be held to include the Great Lakes and their connecting and tributary waters as far east as Montreal; and this Act shall not in any respect modify or affect the provisions of the Act entitled "An Act to regulate navigation on the Great Lakes and their connecting and tributary waters," approved February eighth, eighteen hundred and ninety-five.—(28 Stat., 672, chap. 102.)

Sections 1 and 3 of this act, and sections 4233, 4412, and 4413, Revised Statutes, were repealed, except in so far as concerned "the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico, and their tributaries": See act of June 7, 1897, section 5 (30 Stat., 103).

The duties of the Secretary of the Treasury and officers of the Treasury Department,

under sections 2 and 3 of this act, were transferred to the Secretary of Commerce and his subordinates by act of February 14, 1903 (32 Stat., 825-830), as amended by act of March 4, 1913 (37 Stat., 736).

See sections 4233 and 4412, Revised Statutes, and acts of August 19, 1890 (26 Stat., 320), February 8, 1895 (28 Stat., 645), and June 7, 1897 (30 Stat., 96), and notes thereto.

[1895, Mar. 2, sec. 5. Official bonds, examination and renewal of; liability pending successor's appointment.] Hereafter every officer required by law to take and approve official bonds shall cause the same to be examined at least once every two years for the purpose of ascertaining the sufficiency of the sureties thereon; and every officer having power to fix the amount of an official bond shall examine it to ascertain the sufficiency of the amount thereof and approve or fix said amount at least once in two years and as much oftener as he may deem it necessary.—(28 Stat., 807-808, chap. 177.)

Hereafter every officer whose duty it is to take and approve official bonds shall cause all such bonds to be renewed every four years after their dates, but he may require such bonds to be renewed or strengthened oftener if he deem such action necessary. In the discretion of such officer the requirement of a new bond may be waived for the period of service of a bonded officer after the expiration of a four-year term of service pending the appointment and qualification of his successor: *Provided*, That the nonperformance of any requirement of this section on the part of any official of the Government shall not be held to affect in any respect the liability of principal or sureties on any bond made or to be made to the United States: *Provided further*, That the liability of the principal and sureties on all official bonds shall continue and cover the period of service ensuing until the appointment and qualification of the successor of the principal \* \* \* .—(28 Stat., 808, chap. 177.)

See sections 1383-1385, Revised Statutes, and notes thereto.

[1895, Mar. 2. Retired officers, detailed to colleges.] That any retired officer of the Navy or Marine Corps may, on his own application, be detailed to

service as a teacher or professor in any school or college, but while so serving such officer shall be allowed no additional compensation.—(28 Stat., 826, chap. 186.)

See section 1225, Revised Statutes, and note thereto.

[1895, Mar. 2. Quarters, training force.] NAVAL TRAINING STATION, COASTERS HARBOR ISLAND, RHODE ISLAND (FOR APPRENTICES): \* \* \* *Provided*, That no part of the personnel of the training force shall be quartered on shore except in case of sickness.—(28 Stat., 827, chap. 186.)

[1895, Mar. 2. Courts-martial for naval cadets.] That the Secretary of the Navy shall have power to convene general courts-martial for the trial of naval cadets, subject to the same limitations and conditions now existing as to other general courts-martial, and to approve the proceedings and execute the sentences of such courts, except the sentences of suspension and dismissal, which, after having been approved by the Superintendent, shall not be carried into effect until confirmed by the President.—(28 Stat., 838, chap. 186.)

See note to section 1519, Revised Statutes.

[1895, Mar. 2. Disposal of useless papers.] That the Act entitled "An Act to authorize and provide for the disposition of useless papers in the Executive Department," approved February sixteenth, eighteen hundred and eighty-nine, be, and the same is hereby, amended so as to include in its provisions any accumulation of files of papers of a like character therein described now or hereafter in the various public buildings under the control of the several Executive Departments of the Government.—(28 Stat., 933, chap. 189.)

See act of February 16, 1889 (25 Stat., 672), and references thereunder.

[1895, Mar. 2. Estimates, printing and binding.] And it shall be the duty of the Public Printer to submit to Congress at the beginning of its next regular session, estimates in detail under the head of printing and binding for the service of the fiscal year eighteen hundred and ninety-seven and annually thereafter, covering appropriations requisite for all work to be done and services to be rendered under his direction by the provisions of the said Act and not previously required of him \* \* \* .—(28 Stat., 961, chap. 189.)

The words "said Act" in the provision refer to the act of January 12, 1895 (28 Stat., 601-624, chap. 23); see section 27 of that	act (28 Stat., 604), and references thereunder, as to estimates for printing and binding.
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[1896, Mar. 28. Commissions of officers.] That hereafter the commissions of all officers under the direction and control of the Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, and the Secretary of Agriculture shall be made out and recorded in the respective Departments under which they are to serve, and the Department seal affixed thereto, any laws to the contrary notwithstanding: *Provided*, That the said seal shall not be affixed to any such commission before the same shall have been signed by the President of the United States.—(29 Stat., 75, chap. 73.)

See note to Constitution, Article II, section 3, under "II. Duty to commission officers"; and see note to section 417, Revised	Statutes, under "The Secretary of the Navy represents the President."
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[1896, Apr. 24, sec. 2. Apprentices additional to number of enlisted persons.] That all apprentices of the Navy, whether at a training station or on board



an apprentice training ship, shall be additional to the number of enlisted persons allowed by law for the Navy.—(29 Stat., 97, chap. 120.)

See note to section 1417, Revised Statutes.

[1896, May 22. **Condemned ordnance, etc., loan or gift of.**] That the Secretary of War and the Secretary of the Navy are each hereby authorized, in their discretion, to loan or give to soldiers' monument associations, posts of the Grand Army of the Republic, and municipal corporations, condemned ordnance, guns, and cannon balls which may not be needed in the service of either of said Departments. Such loan or gift shall be made subject to rules and regulations covering the same in each Department, and the Government shall be at no expense in connection with any such loan or gift.—(29 Stat., 133–134, chap. 231.)

See section 418, Revised Statutes, and note thereto.

[1896, May 28. **Appropriation acts, footing of paragraphs to determine amount appropriated.**] That hereafter the total amount appropriated in the various paragraphs of an appropriation Act shall be determined by the correct footing up of the specific sums or rates appropriated in each paragraph contained therein unless otherwise expressly provided.—(29 Stat., 148, chap. 252.)

[1896, May 28, sec 2. **Liability to draft, officers in merchant service; wages for naval service.**] No master, mate, pilot, or engineer of steam vessels licensed under title fifty-two of the Revised Statutes, pages forty-three hundred and ninety-nine to forty-five hundred, shall be liable to draft in time of war, except for the performance of duties such as required by his license; and while performing such duties in the service of the United States every such master, mate, pilot, or engineer shall be entitled to the highest rate of wages paid in the merchant marine of the United States for similar services; and if killed or wounded while performing such duties under the United States, they, or their heirs, or their legal representatives, shall be entitled to all the privileges accorded to soldiers and sailors serving in the Army or Navy, under the pension laws of the United States.—(29 Stat., 189, chap. 255; 38 Stat., 765–766, chap. 334.)

This provision was expressly amended and reenacted to read as above by act of October 22, 1914 (38 Stat., 765–766).

[1896, June 10. **Allotments of pay.**] That the Secretary of the Navy be, and he is hereby, authorized to permit officers of the Navy and the Marine Corps to make allotments from their pay, under such regulations as he may prescribe, for the support of their families or relatives, for their own savings, or for other proper purposes, during such time as they may be absent at sea, on distant duty, or under other circumstances warranting such action.—(29 Stat., 361, chap. 399.)

See sections 1430, 1551, 1576, and 3477, Revised Statutes, and notes thereto.

[1896, June 10. **Officers reappointed, credit for previous service.**] That all officers who have been or may be appointed to any corps of the Navy or to the Marine Corps after service in a different corps of the Navy or of the Marine Corps shall have all the benefits of their previous service in the same manner as if said appointments were a reentry into the Navy or into the Marine Corps.—(29 Stat., 361, chapter, 399.)

This enactment superseded a similar provision contained in the act of July 26, 1894 (28 Stat., 123), which did not make specific reference to the Marine Corps.

See sections 1443, 1556, and 1600, Revised Statutes; and see act of March 3, 1883 (22 Stat., 473).

[1896, June 10. **Officers employed by contractors.**] That hereafter no payment shall be made from appropriations made by Congress to any officer in the Navy or Marine Corps on the active or retired list while such officer is employed, after June thirtieth, eighteen hundred and ninety-seven, by any person or company furnishing naval supplies or war material to the Government; and such employment is hereby made unlawful after said date.—(29 Stat., 361, chap. 399.)

See sections 1440, 1763–1765, and 1860, Revised Statutes, and notes thereto, for other restrictions upon employment of naval officers; see also sections 41 and 112, Criminal Code, act of March 4, 1909 (35 Stat., 1097, 1108).

**Nature of employment forbidden.**—“The law makes no distinction as to the character of service rendered by a retired officer of the Navy who might be in the employ of a contractor, and makes no provision for exceptions on any ground.” Therefore, the acceptance by a retired officer of employment as assistant superintendent of motive power with a company furnishing naval supplies or war material for the Government would be unlawful, even though such officer would have nothing to do with the manufacture or sale of products. (Department’s letter, January 19, 1910; file 9736–14.)

The question whether this law prevents retired officers from serving as “directors” of a company furnishing naval supplies to the Government depends upon the construction of the words “employed” and “employment” as used therein. It would seem that retired officers can not legally serve in this capacity. (Opinion of Judge Advocate General, June 6, 1908; file 9736–9.)

Without regard to whether employment by a retired officer as superintendent or foreman with contractors performing work on contracts at a naval training station is specifically prohibited by law or regulation, the acceptance of such employment by a retired officer would be regarded by the Department as in the highest degree objectionable and improper. (Department’s letter, May 26, 1910; file 9736–17.)

[1896, June 10. **Tobacco, advertisement for.**] And the Secretary of the Navy is hereby authorized and directed to cause advertisement to be made for tobacco for the use of the Navy, as the needs of the service may require, in the manner prescribed by law for other supplies. Bidders shall submit with their proposals a sample of the tobacco which they propose to furnish, and the contract shall, in the discretion of the Department, be awarded to the bidder whose sample is found by a board of officers to be the best adapted for use in the Navy.—(29 Stat., 370, chap. 399.)

See sections 3718, 3721, Revised Statutes, and notes thereto.

[1896, June 10. **Model tank for experiments.**] For making plans, examining and preparing the ground, and other preliminary work toward the construction of a model tank, with all buildings and appliances, to be built upon the grounds of the navy yard at Washington, District of Columbia, under the Bureau of Construction and Repair of the Navy Department, which shall conduct therein the work of investigating and determining the most suitable and desirable shapes and forms to be adopted for United States naval vessels, seven thousand five hundred dollars: *Provided*, That upon the authorization of the Secretary of the Navy experiments may be made at this establishment for private shipbuilders, who shall defray the cost of material and of labor of per diem employees for such experiments: *And provided further*, That the results of such private experiments shall be regarded as confidential and shall not be divulged without the consent of the shipbuilder for whom they may be made.—(29 Stat., 372, chap. 399.)



[1896, June 10. **Mileage, Marine Corps.**] And hereafter officers of the Marine Corps traveling under orders without troops shall be allowed the same mileage as is now allowed officers of the Navy traveling without troops.—(29 Stat., 376, chap. 399.)

See notes to sections 1566 and 1612, Revised Statutes.

[1897, Feb. 13. **Passed assistant surgeons to be commissioned.**] That passed assistant surgeons now borne upon the Navy Register shall be commissioned as such by the President, such commissions to bear the dates upon which said passed assistant surgeons, respectively, received their appointments as such; and hereafter assistant surgeons shall be regularly promoted and commissioned as passed assistant surgeons, and passed assistant surgeons as surgeons, subject to such examinations as may be prescribed by the Secretary of the Navy: *Provided, however,* That no examination of passed assistant surgeons shall be ordered until the expiration of six months from the passage of this Act, during which time promotions shall be made as now provided by law.—(29 Stat., 526, chap. 221.)

See note to section 1368, Revised Statutes under "Passed assistant surgeons."

[1897, Mar. 3, sec. 7. **Applications for patents, heads of Departments to be represented.**] That in every case where the head of any Department of the Government shall request the Commissioner of Patents to expedite the consideration of an application for a patent it shall be the duty of such head of a Department to be represented before the Commissioner in order to prevent the improper issue of a patent.—(29 Stat., 694, chap. 391.)

See note to section 4894, Revised Statutes.

[1897, June 4. **Branch hydrographic offices.**] That the Secretary of the Navy is hereby authorized to establish branch hydrographic offices at Duluth, in the State of Minnesota, Sault Sainte Marie, in the State of Michigan, and Buffalo, in the State of New York, the same to be conducted under the provisions of an Act entitled "An Act to establish a hydrographic office in the Navy Department," approved June twenty-first, eighteen hundred and sixty-six.—(30 Stat., 39, chap. 2.)

The act of June 21, 1866, referred to in this provision, is embodied in section 431, Revised Statutes.

See sections 431-433, Revised Statutes, and notes thereto.

By act of March 3, 1921 (41 Stat., 1284), appropriation was made for expenses of branch

hydrographic offices at Boston, New York, Philadelphia, Baltimore, Norfolk, Savannah, New Orleans, San Francisco, (Portland, Oregon), Portland (Maine), Chicago, Cleveland, Buffalo, Duluth, Sault Sainte Marie, Seattle, Panama, and Galveston.

[1897, June 7. **Regulations for navigation of all harbors, rivers, and inland waters of the United States, except the Great Lakes, etc., and except the Red River of the North, etc.**]

Whereas the provisions of chapter eight hundred and two of the laws of eighteen hundred and ninety, and the amendments thereto, adopting regulations for preventing collisions at sea, apply to all waters of the United States connected with the high seas navigable by seagoing vessels, except so far as the navigation of any harbor, river, or inland waters is regulated by special rules duly made by local authority; and

Whereas it is desirable that the regulations relating to the navigation of all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, shall be stated in one Act: Therefore,

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following regulations for preventing collision shall be followed by all vessels navigating all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, and are hereby declared special rules duly made by local authority:—(30 Stat., 96, chap. 4.)

Regulations for preventing collisions at sea: See act of August 19, 1890 (26 Stat., 320), and amendments thereto.

Navigation on the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries: See sections 4233 and 4412, Revised Statutes, and notes thereto.

Navigation on the Great Lakes and their connecting and tributary waters as far east as Montreal: See act of February 8, 1895 (28 Stat., 645).

Navigation, Pearl Harbor, Hawaii: See act of August 22, 1912 (37 Stat., 341).

Rules governing motor boats: See act of June 9, 1910 (36 Stat., 462).

See, generally, notes to sections 4233 and 4412, Revised Statutes; and Navy Regulations 1920 (chap. 55), quoting laws, and regulations of the Department of Commerce, "for preventing collisions," etc.

#### PRELIMINARY.

In the following rules every steam-vessel which is under sail and not under steam is to be considered a sailing-vessel, and every vessel under steam whether under sail or not, is to be considered a steam vessel.

The word "steam-vessel" shall include any vessel propelled by machinery.

A vessel is "under way," within the meaning of these rules, when she is not at anchor, or made fast to the shore, or aground.

#### RULES CONCERNING LIGHTS, AND SO FORTH.

The word "visible" in these rules, when applied to lights, shall mean visible on a dark night with a clear atmosphere.

ARTICLE 1. The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited.—(30 Stat., 96, chap. 4.)

ART. 2. A steam-vessel when under way shall carry—(a) On or in front of the foremast, or, if a vessel without a foremast, then in the fore part of the vessel, a bright white light so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least five miles.

(b) On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles.



(c) On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles.

(d) The said green and red side-lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

(e) A sea-going steam-vessel when under way may carry an additional white light similar in construction to the light mentioned in subdivision (a). These two lights shall be so placed in line with the keel that one shall be at least fifteen feet higher than the other, and in such a position with reference to each other that the lower light shall be forward of the upper one. The vertical distance between these lights shall be less than the horizontal distance.

(f) All steam-vessels (except sea-going vessels and ferry-boats), shall carry in addition to green and red lights required by article two (b), (c), and screens as required by article two (d), a central range of two white lights; the after-light being carried at an elevation at least fifteen feet above the light at the head of the vessel. The head-light shall be so constructed as to show an unbroken light through twenty points of the compass, namely, from right ahead to two points abaft the beam on either side of the vessel, and the after-light so as to show all around the horizon.—(30 Stat., 96-97, chap. 4.)

ART. 3. A steam-vessel when towing another vessel shall, in addition to her side-lights, carry two bright white lights in a vertical line one over the other, not less than three feet apart, and when towing more than one vessel shall carry an additional bright white light three feet above or below such lights, if the length of the tow measuring from the stern of the towing vessel to the stern of the last vessel towed exceeds six hundred feet. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light mentioned in article two (a) or the after range light mentioned in article two (f).

Such steam-vessel may carry a small white light abaft the funnel or aftermast for the vessel towed to steer by, but such light shall not be visible forward of the beam.—(30 Stat., 97, chap. 4.)

This act did not contain any article numbered four.

ART. 5. A sailing-vessel under way or being towed shall carry the same lights as are prescribed by article two for a steam-vessel under way, with the exception of the white lights mentioned therein, which they shall never carry.—(30 Stat., 97, chap. 4.)

ART. 6. Whenever, as in the case of vessels of less than ten gross tons under way during bad weather, the green and red side-lights can not be fixed, these lights shall be kept at hand, lighted and ready for use; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side nor the red light on the starboard side, nor, if practicable, more than two points abaft the beam on their respective sides. To make the use of these portable lights more certain and easy the lanterns containing them shall each be painted outside with

the color of the light they respectively contain, and shall be provided with proper screens.—(30 Stat., 97, chap. 4.)

ART. 7. Rowing boats, whether under oars or sail, shall have ready at hand a lantern showing a white light which shall be temporarily exhibited in sufficient time to prevent collision.—(30 Stat., 98, chap. 4.)

ART. 8. Pilot-vessels when engaged on their station on pilotage duty shall not show the lights required for other vessels, but shall carry a white light at the masthead, visible all around the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes.

On the near approach of or to other vessels they shall have their side-lights lighted, ready for use, and shall flash or show them at short intervals, to indicate the direction in which they are heading, but the green light shall not be shown on the port side nor the red light on the starboard side.

A pilot-vessel of such a class as to be obliged to go alongside of a vessel to put a pilot on board may show the white light instead of carrying it at the masthead, and may, instead of the colored lights above mentioned, have at hand, ready for use, a lantern with a green glass on the one side and a red glass on the other, to be used as prescribed above.

Pilot-vessels, when not engaged on their station on pilotage duty, shall carry lights similar to those of other vessels of their tonnage.—(30 Stat., 98, chap. 4.)

By act of February 19, 1900 (31 Stat., 30-31), which was expressly "supplementary" to this article, it was provided: "That a steam pilot vessel, when engaged on her station on pilotage duty and in waters of the United States, and not at anchor, shall, in addition to the lights required for all pilot boats, carry at a distance of eight feet below her white masthead light a red light, visible all around the horizon and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles, and also the colored side lights required to be carried by vessels when under way.

"When engaged on her station on pilotage duty and in waters of the United States, and at anchor, she shall carry in addition to the

lights required for all pilot boats the red light above mentioned, but not the colored side lights.

"When not engaged on her station on pilotage duty, she shall carry the same lights as other steam vessels.

"SEC. 2. That this Act shall be construed as supplementary to article eight of the Act approved June seventh, eighteen hundred and ninety-seven, entitled 'An Act to adopt regulations for preventing collisions upon certain harbors, rivers, and inland waters of the United States,' and to article eight of an Act approved August nineteenth, eighteen hundred and ninety, entitled 'An Act to adopt regulations for preventing collisions at sea.'"

ART. 9. (a) Fishing-vessels of less than ten gross tons, when under way and when not having their nets, trawls, dredges, or lines in the water, shall not be obliged to carry the colored side-lights; but every such vessel shall, in lieu thereof, have ready at hand a lantern with a green glass on one side and a red glass on the other side, and on approaching to or being approached by another vessel such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

(b) All fishing-vessels and fishing-boats of ten gross tons or upward, when under way and when not having their nets, trawls, dredges, or lines in the water, shall carry and show the same lights as other vessels under way.

(c) All vessels, when trawling, dredging, or fishing with any kind of dragnets or lines, shall exhibit, from some part of the vessel where they can be best



seen, two lights. One of these lights shall be red and the other shall be white. The red light shall be above the white light, and shall be at a vertical distance from it of not less than six feet and not more than twelve feet; and the horizontal distance between them, if any, shall not be more than ten feet. These two lights shall be of such a character and contained in lanterns of such construction as to be visible all round the horizon, the white light a distance of not less than three miles and the red light of not less than two miles.

(d) Rafts, or other water craft not herein provided for, navigating by hand power, horse power, or by the current of the river, shall carry one or more good white lights, which shall be placed in such manner as shall be prescribed by the Board of Supervising Inspectors of Steam Vessels.—(30 Stat., 98, chap. 4.)

ART. 10. A vessel which is being overtaken by another, except a steam-vessel with an after range-light showing all around the horizon, shall show from her stern to such last-mentioned vessel a white light or a flare-up light.—(30 Stat., 98, chap. 4.)

ART. 11. A vessel under one hundred and fifty feet in length when at anchor shall carry forward, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light, in a lantern so constructed as to show a clear, uniform, and unbroken light visible all around the horizon at a distance of at least one mile.

A vessel of one hundred and fifty feet or upwards in length when at anchor shall carry in the forward part of the vessel, at a height of not less than twenty and not exceeding forty feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than fifteen feet lower than the forward light, another such light.

The length of a vessel shall be deemed to be the length appearing in her certificate of registry.—(30 Stat., 98–99, chap. 4.)

ART. 12. Every vessel may, if necessary, in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that can not be mistaken for a distress signal.—(30 Stat., 99, chap. 4.)

ART. 13. Nothing in these rules shall interfere with the operation of any special rules made by the Government of any nation with respect to additional station and signal lights for two or more ships of war or for vessels sailing under convoy, or with the exhibition of recognition signals adopted by shipowners, which have been authorized by their respective Governments, and duly registered and published.—(30 Stat., 99, chap. 4.)

ART. 14. A steam-vessel proceeding under sail only, but having her funnel up, may carry in daytime, forward, where it can best be seen, one black ball or shape two feet in diameter.—(30 Stat., 99, chap. 4.)

#### SOUND SIGNALS FOR FOG, AND SO FORTH.

ART. 15. All signals prescribed by this article for vessels under way shall be given:

1. By “steam-vessels” on the whistle or siren.
2. By “sailing-vessels” and “vessels towed” on the fog horn.

The words "prolonged blast" used in this article shall mean a blast of from four to six seconds duration.

A steam-vessel shall be provided with an efficient whistle or siren, sounded by steam or by some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog horn; also with an efficient bell. A sailing-vessel of twenty tons gross tonnage or upward shall be provided with a similar fog horn and bell.

In fog, mist, falling snow, or heavy rainstorms, whether by day or night, the signals described in this article shall be used as follows, namely:

(a) A steam-vessel under way shall sound, at intervals of not more than one minute, a prolonged blast.

(c) A sailing-vessel under way shall sound, at intervals of not more than one minute, when on the starboard tack, one blast; when on the port tack, two blasts in succession, and when with the wind abaft the beam, three blasts in succession.

(d) A vessel when at anchor shall, at intervals, of not more than one minute, ring the bell rapidly for about five seconds.

(e) A steam-vessel when towing, shall, instead of the signals prescribed in subdivision (a) of this article, at intervals of not more than one minute, sound three blasts in succession, namely, one prolonged blast followed by two short blasts. A vessel towed may give this signal and she shall not give any other.

(f) All rafts or other water craft, not herein provided for, navigating by hand power, horse power, or by the current of the river, shall sound a blast of the fog-horn, or equivalent signal, at intervals of not more than one minute.—(30 Stat., 99, chap. 4.)

#### SPEED OF SHIPS TO BE MODERATE IN FOG, AND SO FORTH.

ART. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam-vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.—(30 Stat., 99, chap. 4.)

#### STEERING AND SAILING RULES.

##### PRELIMINARY—RISK OF COLLISION.

Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.

ART. 17. When two sailing-vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other as follows, namely:

(a) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(b) A vessel which is closed-hauled on the port tack shall keep out of the way of a vessel which is closed-hauled on the starboard tack.



(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d) When both are running free, with the wind on the same side, the vessel which is to the windward shall keep out of the way of the vessel which is to the leeward.

(e) A vessel which has the wind aft shall keep out of the way of the other vessel.—(30 Stat., 100, chap. 4.)

ART. 18. RULE I. When steam-vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other. But if the courses of such vessels are so far on the starboard of each other as not to be considered as meeting head and head, either vessel shall immediately give two short and distinct blasts of her whistle, which the other vessel shall answer promptly by two similar blasts of her whistle, and they shall pass on the starboard side of each other.

The foregoing only applies to cases where vessels are meeting end on or nearly end on, in such a manner as to involve risk of collision; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own, and by night to cases in which each vessel is in such a position as to see both the sidelights of the other.

It does not apply by day to cases in which a vessel sees another ahead crossing her own course, or by night to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.—(30 Stat., 100, chap. 4.)

This article did not contain any Rule II, IV, VI, or VII.

RULE III. If, when steam-vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam-whistle.—(30 Stat., 100, chap. 4.)

RULE V. Whenever a steam-vessel is nearing a short bend or curve in the channel, where, from the height of the banks or other cause, a steam-vessel approaching from the opposite direction can not be seen for a distance of half a mile, such steam-vessel, when she shall have arrived within half a mile of such curve or bend, shall give a signal by one long blast of the steam whistle, which signal shall be answered by a similar blast, given by any approaching steam-vessel that may be within hearing. Should such signal be so answered by a steam-vessel upon the farther side of such bend, then the usual signals for meeting and passing shall immediately be given and answered; but, if the first alarm signal of such vessel be not answered, she is to consider the channel clear and govern herself accordingly.

When steam-vessels are moved from their docks or berths, and other boats are liable to pass from any direction toward them, they shall give the same signal as in the case of vessels meeting at a bend, but immediately after clearing the berths so as to be fully in sight they shall be governed by the steering and sailing rules.—(30 Stat., 100–101, chap. 4.)

RULE VIII. When steam-vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam-whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam-whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals. The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel.—(30 Stat., 101, chap. 4.)

RULE IX. The whistle signals provided in the rules under this article, for steam-vessels meeting, passing, or overtaking, are never to be used except when steamers are in sight of each other, and the course and position of each can be determined in the daytime by a sight of the vessel itself, or by night by seeing its signal lights. In fog, mist, falling snow or heavy rainstorms, when vessels can not so see each other, fog-signals only must be given.—(30 Stat., 101, chap. 4.)

ART. 19. When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.—(30 Stat., 101, chap. 4.)

ART. 20. When a steam-vessel and a sailing-vessel are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sailing-vessel.—(30 Stat., 101, chap. 4.)

ART. 21. Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed.—(30 Stat., 101, chap. 4.)

ART. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.—(30 Stat., 101, chap. 4.)

ART. 23. Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.—(30 Stat., 101, chap. 4.)

ART. 24. Notwithstanding anything contained in these rules every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

Every vessel coming up with another vessel from any direction more than two points abaft her beam, that is, in such a position, with reference to the vessel which she is overtaking that at night she would be unable to see either of that vessel's side-lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the over-



taking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

As by day the overtaking vessel can not always know with certainty whether she is forward of or abaft this direction from the other vessel she should, if in doubt, assume that she is an overtaking vessel and keep out of the way.—(30 Stat., 101, chap. 4.)

ART. 25. In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel.—(30 Stat., 101, chap. 4.)

ART. 26.—Sailing-vessels under way shall keep out of the way of sailing-vessels or boats fishing with nets, or lines, or trawls, This rule shall not give to any vessel or boat engaged in fishing the right of obstructing a fair-way used by vessels other than fishing-vessels or boats.—(30 Stat., 102, chap. 4.)

ART. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.—(30 Stat., 102, chap. 4.)

#### SOUND SIGNALS FOR VESSELS IN SIGHT OF ONE ANOTHER.

ART. 28. When vessels are in sight of one another a steam-vessel under way whose engines are going at full speed astern shall indicate that fact by three short blasts on the whistle.—(30 Stat., 102, chap. 4.)

#### NO VESSEL UNDER ANY CIRCUMSTANCES TO NEGLECT PROPER PRECAUTIONS.

ART. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.—(30 Stat., 102, chap. 4.)

ART. 30. The exhibition of any light on board of a vessel of war of the United States or a revenue cutter may be suspended whenever, in the opinion of the Secretary of the Navy, the commander in chief of a squadron, or the commander of a vessel acting singly, the special character of the service may require it.—(30 Stat., 102, chap. 4.)

#### DISTRESS SIGNALS.

ART. 31. When a vessel is in distress and requires assistance from other vessels or from the shore the following shall be the signals to be used or displayed by her, either together or separately, namely:

##### IN THE DAYTIME.

A continuous sounding with any fog-signal apparatus, or firing a gun.

##### AT NIGHT.

First. Flames on the vessel as from a burning tar barrel, oil barrel, and so forth.

Second. A continuous sounding with any fog-signal apparatus, or firing a gun.—(30 Stat., 102, chap. 4.)

[1897, June 7, sec. 2. Rules to be established as to steam vessels passing each other, lights and day signals, etc.] That the supervising inspectors of steam vessels and the Supervising Inspector General shall establish such rules to be observed by steam vessels in passing each other and as to the lights to be carried by ferryboats and by barges and canal boats when in tow of steam vessels, and as to the lights and day signals to be carried by vessels, dredges of all types, and vessels working on wrecks by other obstruction to navigation or moored for submarine operations, or made fast to a sunken object which may drift with the tide or be towed, not inconsistent with the provisions of this Act, as they from time to time may deem necessary for safety, which rules when approved by the Secretary of Commerce are hereby declared special rules duly made by local authority, as provided for in article thirty of chapter eight hundred and two of the laws of eighteen hundred and ninety. Two printed copies of such rules shall be furnished to such ferryboats, barges, dredges, canal boats, vessels working on wrecks and steam vessels, which rules shall be kept posted up in conspicuous places in such vessels, barges, dredges, and boats.—(30 Stat., 102, chap. 4; 38 Stat., 381, chap. 98.)

This section was expressly amended and reenacted to read as above, by act of May 25, 1914 (38 Stat., 381).

See note above, under section 1 of this act (30 Stat., 96).

[1897, June 7, sec. 3. Penalty for pilots, etc.] That every pilot, engineer, mate, or master of any steam-vessel, and every master or mate of any barge or canal-boat, who neglects or refuses to observe the provisions of this Act, or the regulations established in pursuance of the preceding section, shall be liable to a penalty of fifty dollars, and for all damages sustained by any passenger in his person or baggage by such neglect or refusal: *Provided*, That nothing herein shall relieve any vessel, owner or corporation from any liability incurred by reason of such neglect or refusal.—(30 Stat., 102-103, chap. 4.)

[1897, June 7, sec. 4. Penalty for vessels.] That every vessel that shall be navigated without complying with the provisions of this Act shall be liable to a penalty of two hundred dollars, one-half to go to the informer, for which sum the vessel so navigated shall be liable and may be seized and proceeded against by action in any district court of the United States having jurisdiction of the offense.—(30 Stat., 103, chap. 4.)

[1897, June 7, sec. 5. Repeal of prior laws and regulations; exceptions.] That sections forty-two hundred and thirty-three and forty-four hundred and twelve (with the regulations made in pursuance thereof, except the rules and regulations for the government of pilots of steamers navigating the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, and except the rules for the Great Lakes and their connecting and tributary waters as far east as Montreal), and forty-four hundred and thirteen of the Revised Statutes of the United States, and chapter two hundred and two of the laws of eighteen hundred and ninety-three, and sections one and three of chapter one hundred and two of the laws of eighteen hundred and ninety-five, and sections five, twelve, and thirteen of the Act approved March third, eighteen hundred and ninety-seven, entitled "An Act to amend the laws relating to navi-



gation," and all amendments thereto, are hereby repealed so far as the harbors, rivers, and inland waters aforesaid (except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico, and their tributaries) are concerned.—(30 Stat., 103, chap. 4.)

[1898, Mar. 15, sec. 3. Law books, etc., purchase from contingent funds.] That hereafter law books, books of reference, and periodicals for use of any Executive Department, or other Government establishment not under an Executive Department, at the seat of Government, shall not be purchased or paid for from any appropriation made for contingent expenses or for any specific or general purpose unless such purchase is authorized and payment therefor specifically provided in the law granting the appropriation.—(30 Stat., 316, chap. 68.)

See act of January 12, 1895, section 95 (28 Stat., 623), as to exchange of books and documents.

See section 193, Revised Statutes, and notes thereto, as to use of contingent funds.

[1898, May 4. Assistant to chief, Bureau of Ordnance.] That a line officer of the Navy may be detailed temporarily as assistant to the Chief of the Bureau of Ordnance in the Navy Department, and that such officer during such detail shall receive the highest pay of his grade, and in the case of the death, resignation, absence, or sickness of the chief of the bureau shall, unless otherwise directed by the President, as provided by sections one and seventy-nine of the Revised Statutes, perform the duties of such chief until his successor is appointed or such absence or sickness shall cease, provided that, in case of the death, sickness, or absence on duty of the chief of the bureau and the assistant thereto, the chief clerk shall act as chief of the bureau.—(30 Stat., 373, chap. 234.)

See sections 177–182, and 421, Revised Statutes, and notes thereto.

[1898, May 4. Pensions of inmates, Naval Home and naval hospitals.] Whenever any officer, seaman, or marine entitled to a pension is admitted to the Naval Home at Philadelphia, or to a naval hospital, his pension, while he remains there, shall be deducted from his accounts and paid to the Secretary of the Navy for the benefit of the fund from which such home or hospital, respectively, is maintained; and section forty-eight hundred and thirteen of the Revised Statutes of the United States is hereby amended accordingly.—(30 Stat., 377, chap. 234.)

See notes to sections 4756, 4757, and 4813, Revised Statutes.

This enactment was repeated in act of March 3, 1899 (30 Stat., 1027).

[1898, May 4. Acting assistant surgeons.] The President is hereby authorized to appoint for temporary service twenty-five acting assistant surgeons, who shall have the relative rank and compensation of assistant surgeons.—(30 Stat., 380, chap. 234.)

See section 1411, Revised Statutes, and note thereto.

[1898, May 4. Names of battle ships and monitors.] That hereafter all first-class battle ships and monitors owned by the United States shall be named for the States, and shall not be named for any city, place, or person until the names of the States, shall have been exhausted: *Provided*, That nothing herein

contained shall be so construed as to interfere with the names of States already assigned to any such battle ship or monitor.—(30 Stat., 390, chap. 234.)

See note to section 1531, Revised Statutes.

This provision was expressly repealed,

as to monitors, by act of May 13, 1908 (35 Stat., 159).

[1898, May 4. **Medals of honor, enlisted men; rosettes and ribbons.**] That the Secretary of the Navy be, and he is hereby, authorized to issue to any person to whom a medal of honor has been awarded, or may hereafter be awarded, under the provisions of the Acts approved December twenty-first, eighteen hundred and sixty-one, and July sixteenth, eighteen hundred and sixty-two, a rosette or knot to be worn in lieu of the medal, and a ribbon to be worn with the medal; said rosette or knot and ribbon to be each of a pattern to be prescribed and established by the President of the United States, and any appropriation that may hereafter be available for the contingent expenses of the Navy Department is hereby made available for the purposes of this Act: *Provided*, That whenever a ribbon issued under the provisions of this Act shall have been lost, destroyed, or rendered unfit for use, without fault or neglect on the part of the person to whom it was issued, the Secretary of the Navy shall cause a new ribbon to be issued to such person without charge therefor.—(30 Stat., 741, Res. No. 30.)

The act of December 21, 1861, section 7 (12 Stat., 330), referred to in this resolution, was temporary legislation; the act of July 16, 1862 (12 Stat., 584), also referred to herein, was superseded by an identical provision contained in the act of May 17, 1864,

section 3 (13 Stat., 79–80), which latter enactment was embodied in section 1407, Revised Statutes, see that section and note thereto; see also act of February 4, 1919 (40 Stat., 1056–1057), for later provisions on the subject.

[1898, June 17. **Hospital Corps established; organization of.**] That a hospital corps of the United States Navy is hereby established, and shall consist of pharmacists hospital stewards, hospital apprentices (first class), and hospital apprentices; and for this purpose the Secretary of the Navy is empowered to appoint twenty-five pharmacists with the rank, pay, and privileges of warrant officers, removable in the discretion of the Secretary, and to enlist, or cause to be enlisted, as many hospital stewards, hospital apprentices (first class), and hospital apprentices as in his judgment may be necessary, and to limit or fix the number, and to make such regulations as may be required for their enlistment and government. Enlisted men in the Navy or the Marine Corps shall be eligible for transfer to the hospital corps, and vacancies occurring in the grade of pharmacist shall be filled by the Secretary of the Navy by selection from those holding the rate of hospital steward.—(30 Stat., 474–475, chap. 463.)

SEC. 2. That all necessary hospital and ambulance service at naval hospitals, naval stations, navy-yards, and marine barracks, and on vessels of the Navy, Coast Survey, and Fish Commission, shall be performed by the members of said corps, and the corps shall be permanently attached to the Medical Department of the Navy, and shall be included in the effective strength of the Navy and be counted as a part of the enlisted force provided by law, and shall be subject to the laws and regulations for the government of the Navy.—(30 Stat., 475, chap. 463.)

SEC. 3. That the pay of hospital stewards shall be sixty dollars a month, the pay of hospital apprentices (first class) thirty dollars a month, and the pay of hospital apprentices twenty dollars a month, with the increase on account of



length of service as is now or may hereafter be allowed by law to other enlisted men in the Navy.—(30 Stat., 475, chap. 463.)

SEC. 4. That all benefits derived from existing laws, or that may hereafter be allowed by law, to other warrant officers or enlisted men in the Navy shall be allowed in the same manner to the warrant officers or enlisted men in the hospital corps of the Navy.—(30 Stat., 475, chap. 463.)

SEC. 5. That all acts and parts of acts, so far as they conflict with the provisions of this Act, are hereby repealed.—(30 Stat., 475, chap. 463.)

Section 3 of this act was expressly repealed by act of August 29, 1916 (39 Stat., 573), which contained other provisions on the subject of pay of enlisted men of the Hospital Corps. (See note to section 1569, Revised Statutes, as to pay of enlisted men.)

The authorized strength of the Hospital Corps was fixed by act of August 29, 1916 (39 Stat., 572), and its duties were prescribed by the same act (39 Stat., 573), superseding

the provisions of sections 1 and 2 of this act on the same subject.

The pay of pharmacists was also prescribed by act of August 29, 1916 (39 Stat., 573), which further provided for the promotion of pharmacists to chief pharmacists, thereby superseding a provision in the act of August 22, 1912 (37 Stat., 345), which had previously authorized such promotion.

See note to section 1405, Revised Statutes.

[1898, July 7. Leaves of absence, Executive Departments.] Nothing contained in section seven of the Act making appropriations for legislative, executive, and judicial expenses of the Government for the fiscal year eighteen hundred and ninety-nine, approved March fifteenth, eighteen hundred and ninety-eight, shall be construed to prevent the head of any Executive Department from granting thirty days' annual leave with pay in any one year to a clerk or employee, notwithstanding such clerk or employee may have had during such year not exceeding thirty days' leave with pay on account of sickness as provided in said section seven.—(30 Stat., 653, chap. 571.)

The act of March 15, 1898, section 7 (30 Stat., 316-317), referred to herein, expressly amended and reenacted section 5 of the act

of March 3, 1893 (27 Stat., 715). See the latter act and note thereto.

[1899, Feb. 24, sec. 4. Leaves of absence, Executive Departments.] That the thirty days' annual leave of absence with pay in any one year to clerks and employees in the several Executive Departments authorized by existing law shall be exclusive of Sundays and legal holidays.—(30 Stat., 890, chap. 187.)

See act of March 3, 1893, section 5 (27 Stat., 715), and note thereto.

[1899, Mar. 3, secs. 1-6. Personnel Act; Engineer Corps transferred to line.]

These sections provided as follows:

"That the officers constituting the Engineer Corps of the Navy be, and are hereby, transferred to the line of the Navy, and shall be commissioned accordingly. (30 Stat., 1004, chap. 413.)

"SEC. 2. That engineer officers holding the relative rank of captain, commander, and lieutenant-commander shall take rank in the line of the Navy according to the dates at which they attained such relative rank. Engineer officers graduated from the Naval Academy from eighteen hundred and sixty-eight to eighteen hundred and seventy-six, both years inclusive, shall take rank in the line next after officers in the line who graduated from the Naval Academy in the same year with them: *Provided*, That when the date of a line officer's commission as captain, commander, or lieutenant-commander and the date when the engineer

officer attained the same relative rank of captain, commander, or lieutenant-commander are the same, the engineer officer shall take rank after such line officer.—(30 Stat., 1005, chap. 413.)

"SEC. 3. That engineer officers who completed their Naval Academy course of four years from eighteen hundred and seventy-eight to eighteen hundred and eighty, both inclusive, shall take rank in the line as determined by the Academic Board under the Department's instructions of December first, eighteen hundred and ninety-seven; and engineer officers who completed their Naval Academy course of four years in eighteen hundred and eighty-one and eighteen hundred and eighty-two shall take rank in the line as determined by the merit roll of graduating classes at the conclusion of the six years' course, June, eighteen hundred and eighty-three and eighteen hundred and

eighty-four: *Provided*, That those engineer officers who were appointed from civil life, and whose status is not fixed by section two of this Act, shall take rank with other line officers according to the dates of their first commissions, respectively: *And provided further*, That the engineer officers who completed their Naval Academy course of four years in eighteen hundred and eighty-one and eighteen hundred and eighty-two shall retain among themselves the same relative standing as shown on the Navy register at the date of the passage of this Act.—(30 Stat., 1005, chap. 413.)

“SEC. 4. That engineer officers transferred to the line who are below the rank of commander, and extending down to, but not including, the first engineer who entered the Naval Academy as cadet midshipman, shall perform sea or shore duty, and such duty shall be such as is performed by engineers in the Navy: *Provided*, That any officer described in this section may, upon his own application, made within six months after the passage of this Act, be assigned to the general duties of the line, if he pass the examination now provided by law as preliminary to promotion to the grade he then holds, failure to pass not to displace such officer from the list of officers for sea or shore duty such as is performed by engineers in the Navy.—(30 Stat., 1005, chap. 413.)

“SEC. 5. That engineer officers transferred to the line to perform engineer duty only who rank as, or above, commander, or who subse-

quently attain such rank, shall perform shore duty only.—(30 Stat., 1005, chap. 413.)

“SEC 6. That all engineer officers not provided for in sections four and five transferred to the line shall perform the duties now performed by line officers of the same grade: *Provided*, That after a period of two years subsequent to the passage of this Act they shall be required to pass the examinations now provided by law as preliminary to promotion to the grade they then hold, and subject to existing law governing examinations for promotion.” (30 Stat., 1005, chap. 413.)

See sections 1390-1394, and 1521, Revised Statutes, and notes thereto, for laws and decisions relating to officers of the former Engineer Corps.

**Duties of former engineer officers.**—Former engineer officers who, under this act, performed engineering duty only, on shore only, were made eligible for any shore duty compatible with their rank and grade to which the Secretary of the Navy may assign them, by act of June 30, 1914 (38 Stat., 394), reenacted and made permanent by act of March 3, 1915 (38 Stat., 930). See notes to section 1390 and 1404, Revised Statutes.

**Line officers for engineering duty only.**—The appointment and assignment of line officers for engineering duty only were authorized by acts of February 16, 1914, section 21 (38 Stat., 283), and August 29, 1916 (39 Stat., 580).

#### [1899, Mar. 3, sec. 7. Number of line officers; commodores omitted.]

This provision read as follows:

“That the active list of the line of the Navy, as constituted by section one of this Act, shall be composed of eighteen rear-admirals, seventy captains, one hundred and twelve commanders, one hundred and seventy lieutenant-commanders, three hundred lieutenants, and not more

than a total of three hundred and fifty lieutenants (junior grade) and ensigns.”—(30 Stat., 1005, chap. 413.)

See sections 1362-1363, Revised Statutes, and note thereto, as to interpretation of this proviso, and for later laws relating to the number of line officers.

#### [1899, Mar. 3, sec. 7. Pay of rear admirals, lower nine.]

This proviso read as follows:

“*Provided*, That each rear-admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowance as are now allowed a brigadier-general in the Army.”—(30 Stat., 1005, chap. 413.)

See section 1556, Revised Statutes, and note thereto, under “4. Rear admirals,” for interpretation of this clause, and for later laws relating to pay of rear admirals.

[1899, Mar. 3, sec. 7. Promotion of ensigns.] Officers, after performing three years' service in the grade of ensign, shall, after passing the examinations now required by law, be eligible to promotion to the grade of lieutenant (junior grade).—(30 Stat., 1005, chap. 413.)

By act of June 4, 1920, section 5 (41 Stat., 836), it was provided that, until June 30, 1923, promotions to lieutenant (junior grade) may be made without regard to length of service.

As to examinations for promotion, see sections 1493-1505, Revised Statutes, and notes thereto.

#### [1899, Mar. 3, sec. 7. Chiefs of bureaus, rank and pay.]

This proviso read as follows:

“*Provided*, That when the office of chief of bureau is filled by an officer below the rank of rear-admiral, said officer shall, while holding

said office, have the rank of rear-admiral and receive the same pay and allowance as are now allowed a brigadier-general in the Army.”—(30 Stat., 1005-1006, chap. 413.)



See sections 421, 1471, 1472, and 1565, Revised Statutes, and notes thereto, for laws and decisions relating to chiefs of bureaus.

By act of May 13, 1908 (35 Stat., 128), it was provided that the pay and allowances of chiefs of bureaus "shall be the highest pay of the grade to which they belong, and not below that of rear admiral of the lower nine"; by act of June 24, 1910 (36 Stat., 607), it was provided that their pay and allowances shall be the

highest shore duty pay and allowances of rear admiral of the lower nine; said provision of June 24, 1910, was repealed by act of August 22, 1912 (37 Stat., 328), which made no other provision on the subject; by act of July 1, 1918 (40 Stat., 717), chiefs of bureaus in the Navy Department are to have corresponding rank and receive the same pay and allowances as chiefs of bureaus in the War Department.

[1899, Mar. 3, sec. 7. Retirement of commodores.]

This proviso read as follows:

"*And provided further*, That nothing contained in this section shall be construed to prevent the retirement of officers who now have the rank or relative rank of commodore with the rank and pay of that grade."—(30 Stat., 1006, chap. 413.)

See sections 421, 1362, 1473, and 1481, Revised Statutes, and notes thereto, for laws and decisions relating to retirement of officers with the rank of commodore. Such retirements are now made only under section 1481, Revised Statutes.

[1899, Mar. 3, sec. 7. Relative rank abolished; military command; titles.]

*And provided further*, That all sections of the Revised Statutes which, in defining the rank of officers or positions in the Navy, contain the words "the relative rank of" are hereby amended so as to read "the rank of," but officers whose rank is so defined shall not be entitled, in virtue of their rank to command in the line or in other staff corps. Neither shall this Act be construed as changing the titles of officers in the staff corps of the Navy.—(30 Stat., 1006, chap. 413.)

See sections 1471–1480, Revised Statutes, for provisions relating to relative rank of staff officers and chiefs of bureaus.

See section 1488, Revised Statutes, as to military command.

See sections 421, 1471, and 1480, Revised Statutes, and notes thereto, as to titles.

[1899, Mar. 3, sec. 7. Number of civil engineers.]

This provision read as follows:

"No appointments shall be made of civil engineers in the Navy on the active list under section fourteen hundred and thirteen of the Revised Statutes in excess of the present num-

ber, twenty-one."—(30 Stat., 1006, chap. 413.)

See section 1413, Revised Statutes, and note thereto, for later laws relating to civil engineers.

[1899, Mar. 3, sec. 8. Voluntary retirements, to create vacancies.]

That officers of the line in the grades of captain, commander, and lieutenant-commander may, by official application to the Secretary of the Navy, have their names placed on a list which shall be known as the list of "Applicants for voluntary retirement," and when at the end of any fiscal year the average vacancies for the fiscal years subsequent to the passage of this Act above the grade of commander have been less than thirteen, above the grade of lieutenant-commander less than twenty, above the grade of lieutenant less than twenty-nine, and above the grade of lieutenant (junior grade) less than forty, the President may, in the order of the rank of the applicants, place a sufficient number on the retired list with the rank and three-fourths the sea pay of the next higher grade, as now existing, including the grade of commodore, to cause the aforesaid vacancies for the fiscal year then being considered.—(30 Stat., 1006, chap. 413.)

By act of August 22, 1912 (37 Stat. 328), it was provided that officers thereafter retired under this section shall be retired with the rank and three-fourths of the sea pay of the grade from which retired.

See sections 1457 and 1588, Revised Statutes, and notes thereto, on general subject of rank and pay on retirement; see also next section of this act, set forth below, and note thereto.

**[1899, Mar. 3, sec. 9. Compulsory retirements, to create vacancies.]**

This section read as follows:

"That should it be found at the end of any fiscal year that the retirements pursuant to the provisions of law now in force, the voluntary retirements provided for in this Act, and casualties are not sufficient to cause the average vacancies enumerated in section eight of this Act, the Secretary of the Navy shall, on or about the first day of June, convene a board of five rear-admirals, and shall place at its disposal the service and medical records on file in the Navy Department of all the officers in the grades of captain, commander, lieutenant-commander, and lieutenant. The board shall then select, as soon as practicable after the first day of July, a sufficient number of officers from the before-mentioned grades, as constituted on the thirtieth day of June of that year, to cause the average vacancies enumerated in section eight of this Act. Each member of said board shall swear, or affirm, that he will, without prejudice or partiality, and having in view solely the special fitness of officers and the efficiency of the naval service, perform the duties imposed upon him by this Act. Its finding, which shall be in writing, signed by all the members, not less than four governing, shall be transmitted to the President, who shall thereupon, by order, make the transfers of such officers to the retired list as are selected by the board: *Provided*, That not more than five captains, four commanders, four lieutenant-commanders, and two lieutenants

are so retired in any one year. The promotions to fill the vacancies thus created shall date from the thirtieth day of June of the current year: *And provided further*, That any officer retired under the provisions of this section shall be retired with the rank and three-fourths the sea pay of the next higher grade, including the grade of commodore, which is retained on the retired list for this purpose."—(30 Stat. 1006, chap. 413.)

It was amended by act of August 22, 1912 (37 Stat. 328), which provided that officers thereafter retired under this section were to be retired with the rank and three-fourths of the sea pay of the grade from which retired.

It was repealed by act of March 3, 1915. (38 Stat. 938.) The same act (38 Stat. 939), authorized the President, with the advice and consent of the Senate, within two years from the date of said act, to restore to the active list any officer of the Navy retired under this section. No restorations were made under said enactment. By act of August 29, 1916 (39 Stat. 602-603), the President was authorized to restore to the active list certain officers named therein who had been retired under the provisions of this and the preceding section.

See note to Constitution, Article I, section 7, clause 2, under "Veto of bill to restore to active list officer voluntarily retired," and "Veto of bill to restore to active list officer compulsorily retired."

**[1899, Mar. 3, sec. 10. Construction officers, number and rank of; promotions.]** That of the naval constructors five shall have the rank of captain, five of commander, and all others that of lieutenant-commander or lieutenant. Assistant naval constructors shall have the rank of lieutenant or lieutenant (junior grade). Assistant naval constructors shall be promoted to the grade of naval constructor after not less than eight or more than fourteen years' service as assistant naval constructor: *Provided*, That the whole number of naval constructors and assistant naval constructors on the active list shall not exceed forty in all.—(30 Stat., 1006-1007, chap. 413.)

See sections 1402-1404, and 1477, Revised Statutes, and notes thereto, for later laws relating to the number and rank of construction officers.

Assistant naval constructors are appointed with the rank of lieutenant (junior grade), in accordance with this section; they are advanced in rank up to and including the rank of lieutenant commander with their "running mates" in the line, in accordance

with act of August 29, 1916 (39 Stat. 576). They are promoted to naval constructor after length of service, in accordance with this section; naval constructors are advanced to ranks above lieutenant commander by selection, in accordance with act of July 1, 1918 (40 Stat. 718).

As to promotion and advancement of officers, see sections 1493-1505, Revised Statutes, and notes thereto.

**[1899, Mar. 3, sec. 11. Retirement, officers, civil war service.]** That any officer of the Navy, with a creditable record, who served during the civil war, shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade.—(30 Stat., 1007, chap. 413.)

See act of June 29, 1906 (34 Stat., 554), and notes thereto; and see notes to sections 1457, 1588, and 1622, Revised Statutes.

**[1899, Mar. 3, Sec. 12. Warrant officers and commissioned warrant officers; appointment, promotion, pay.]** That boatswains, gunners, carpenters, and sailmakers shall after ten years from date of warrant be commissioned chief



boatswains, chief gunners, chief carpenters, and chief sailmakers, to rank with but after ensign: *Provided*, That the chief boatswains, chief gunners, chief carpenters, and chief sailmakers shall on promotion have the same pay and allowances as are now allowed a second lieutenant in the Marine Corps: *Provided*, That the pay of boatswains, gunners, carpenters and sailmakers shall be the same as that now allowed by law: *Provided, further*, That nothing in this Act shall give additional rights to quarters on board ship or to command, and that immediately after the passage of this Act boatswains, gunners, carpenters and sailmakers, who have served in the Navy as such for fifteen years, shall be commissioned in accordance with the provisions of this section, and thereafter no warrant officer shall be promoted until he shall have passed an examination before a board of chief boatswains, chief gunners, chief carpenters and chief sailmakers, in accordance with regulations prescribed by the Secretary of the Navy.—(30 Stat., 1007, chap. 413.)

See notes to sections 1405, 1407, 1410, 1417, 1438, 1491, and 1556, Revised Statutes; and see sections 14 and 15 of this act.

Promotion of boatswains, gunners, carpenters, and sailmakers, to commissioned warrant officers, after six years from date of warrant, was authorized by act of April 27, 1904

(33 Stat., 346). See also note to section 1405, Revised Statutes, under "Promotion of warrant officers."

Pay of warrant officers and commissioned warrant officers. See note to section 1556, Revised Statutes.

[1899, Mar. 3, sec. 13. Pay and allowances, commissioned officers.] That, after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army.—(30 Stat., 1007, chap. 413.)

By the Army appropriation act of May 11, 1908 (35 Stat., 108), it was provided that this section "shall not be construed as changing the pay of any naval officer by reason of the provisions of this Act."

So much of this provision as relates to pay has been superseded by later laws, except in so far as such later enactments have contained saving clauses protecting officers against any reduction in pay by reason thereof. (See note to sec. 1556, R. S., under "1. General rule; amendatory statutes.")

So much of this provision as relates to allowances is still in force, and has been extended to include all commissioned officers of the Navy. (See acts of May 13, 1908, 35 Stat., 128, and Aug. 29, 1916, 39 Stat., 581; see also 24 Comp. Dec. 610, noted under sec. 1487, R. S.; and see, as to allowances in general, notes to secs. 1487 and 1558, R. S.)

The designation of the "Pay Corps" was changed to "Supply Corps," by act of July 11, 1919 (41 Stat., 147)

#### [1899, Mar. 3, sec. 13. Pay reduced for shore duty.]

This proviso read as follows:

"*Provided*, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty; but this provision shall not apply to warrant officers commissioned under section twelve of this Act."—(30 Stat., 1007, chap. 413.)

It was repealed by act of June 29, 1906 (34 Stat., 554).

By act of May 13, 1908 (35 Stat., 128), officers on sea duty were allowed 10 per cent increase in the pay therein provided for shore duty. (See notes to sec. 1571, R. S., as to sea service.)

#### [1899, Mar. 3, sec. 13. Shore duty beyond seas.]

This proviso read as follows:

"*Provided further*, That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places."—(30 Stat., 1007, chap. 413.)

See note to section 1556, Revised Statutes, under "38. Additional pay for special duty," for later laws and decisions relating to pay of officers for shore duty beyond seas.

**[1899, Mar. 3, sec. 13. Rank of chaplains.]**

This proviso read as follows:

"Provided further, That naval chaplains, who do not possess relative rank, shall have the rank of lieutenant in the Navy."—(30 Stat., 1007, chap. 413.)

See section 1479, Revised Statutes, and note thereto, for later laws and decisions relating to the rank of chaplains.

**[1899, Mar. 3, sec. 13. Constructive service, longevity pay.]**

This clause read as follows:

"And that all officers, including warrant officers, who have been or may be appointed to the Navy from civil life shall, on the date of appointment, be credited, for computing their pay, with five years' service."—(30 Stat., 1007, chap. 413.)

It was repealed by act of March 4, 1913 (37 Stat., 891-892), as to persons entering the Navy from and after the date of said act.

See note to section 1556, Revised Statutes, under "39. Longevity pay."

**[1899, Mar. 3, sec. 13. Prize and bounty, laws repealed.]** And all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed.—(30 Stat., 1007, chap. 413.)

See sections 4613-4652, Revised Statutes, and notes thereto, as to prize.

See section 1536, Revised Statutes, and note thereto, as to salvage.

**[1899, Mar. 3, sec. 13. Present pay not reduced.]** *And provided further,* That no provision of this Act shall operate to reduce the present pay of any commissioned officer now in the Navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay according to existing law.—(30 Stat., 1007, chap. 413.)

Amendment to this proviso was made by act of June 7, 1900 (31 Stat., 697), so as to provide that nothing contained in this act "shall operate to reduce the pay which, but for the passage of said act, would have been

received by any commissioned officer at the time of its passage or thereafter."

See note to section 1556, Revised Statutes, under "1. General rule: amendatory statutes."

**[1899, Mar. 3, sec. 13. Pay of retired officers.]**

This proviso read as follows:

"*And provided further,* That nothing in this Act shall operate to increase or reduce the pay of any officer now on the retired list of

the Navy."—(30 Stat., 1007, chap. 413.)

See section 1588 Revised Statutes, and note thereto, as to pay of retired officers.

**[1899, Mar. 3, sec. 14. Machinists, appointment, qualifications, number.]**

That upon the passage of this Act the Secretary of the Navy shall appoint a board for the examination of men for the position of warrant machinists, one hundred of whom are hereby authorized. The said examination shall be open, first, to all machinists by trade, of good record in the naval service, and if a sufficient number of machinists from the Navy are not found duly qualified, then any machinist of good character, not above thirty years of age, in civil life shall be eligible for such examination and appointment to fill the remaining vacancies. All subsequent vacancies in the list of warrant machinists shall be filled by competitive examination before a board ordered by the Secretary of the Navy, and open to all machinists by trade who are in the Navy, and machinists of good character, not above thirty years of age, in civil life authorized by the Secretary of the Navy to appear before said board, and, where candidates from civil life and from the naval service possess equal qualifications,



the preference shall be given to those from the naval service.—(30 Stat., 1007–1008, chap. 413.)

See note to section 1405, Revised Statutes, under “Machinists,” and “Promotion of warrant officers”; see also sections 1407, 1417, 1438, 1491, and 1556, Revised Statutes, and notes thereto.

The title of “warrant machinist” was changed to “machinist” by act of March 3, 1909 (35 Stat., 771).

[1899, Mar. 3, sec. 15. **Machinists, pay and retirement; acting appointment; uniform.**] That the pay of warrant machinists shall be the same as that of warrant officers, and they shall be retired under the provisions of existing law for warrant officers. Warrant machinists shall receive at first an acting appointment, which may be made permanent under regulations established by the Navy Department for other warrant officers. They shall take rank with other warrant officers according to date of appointment and shall wear such uniform as may be prescribed by the Navy Department.—(30 Stat., 1008, chap. 413.)

Title of “warrant machinist” changed to “machinist”: See note to preceding section.

Pay of warrant officers and acting warrant officers: See note to section 1556, Revised Statutes, under “25. Warrant officers, acting warrant officers, and commissioned warrant officers.”

Retirement of warrant officers: See notes to sections 1405 and 1448, Revised Statutes, under “Retirement of warrant officers.”

Acting appointments: See section 1410, Revised Statutes, and note thereto.

Rank of warrant officers: See section 1491, Revised Statutes, and note thereto.

[1899, Mar. 3, sec. 16. **Term of enlistment; honorable discharge gratuity; continuous service pay.**]

This section read as follows:

“That hereafter the term of enlistment of all enlisted men of the Navy shall be four years: *Provided*, That section fifteen hundred and seventy-three, Revised Statutes, be amended to read: ‘If any enlisted man or apprentice, being honorably discharged, shall reenlist for four years within four months thereafter, he shall, on presenting his honorable discharge or on accounting in a satisfactory manner for its loss, be entitled to pay during the said four months equal to that to which he would have been entitled if he had been employed in actual service; and that any man who has received an honorable discharge from his last term of enlistment, or who has received a

recommendation for reenlistment upon the expiration of his last term of service of not less than three years, who reenlists for a term of four years within four months from the date of his discharge, shall receive an increase of one dollar and thirty-six cents per month to the pay prescribed for the rating in which he serves for each consecutive reenlistment.’”—(30 Stat., 1008, chap. 413.)

See note to section 1418, Revised Statutes, for later laws as to term of enlistment; and see section 1573, Revised Statutes, and note thereto, for later amendment and reenactment of that section, and for decisions respecting honorable discharge gratuity and continuous service pay.

[1899, Mar. 3, sec. 17. **Retirement of enlisted men.**] That when an enlisted man or appointed petty officer has served as such thirty years in the United States Navy, either as an enlisted man or petty officer, or both, he shall, by making application to the President, be placed on the retired list hereby created, with the rank held by him at the date of retirement; and he shall thereafter receive seventy-five per centum of the pay and allowances of the rank or rating upon which he was retired: *Provided*, That if said enlisted man or appointed petty officer had active service in the Navy or in the Army or Marine Corps, either as volunteer or regular, during the civil or Spanish-American war, such war service shall be computed as double time in computing the thirty years necessary to entitle him to be retired: *And provided further*, That applicants for retirement under this section shall, unless physically disqualified for service, be at least fifty years of age.—(30 Stat., 1008, chap. 413.)

This section was amended by act of June 22, 1906 (34 Stat., 451), and as so amended was in large part superseded by act of March 2, 1907 (34 Stat., 1217).

By act of March 3, 1915 (38 Stat., 941), “the period of time during which members of the naval reserve were actively employed with the Navy while enlisted in the naval

reserve shall, for the purposes of retirement, be counted as active service in the Navy in the case of those who reenlist in the Navy after service in the naval reserve." By act of August 29, 1916 (39 Stat., 591), transferred members of the Fleet Naval Reserve may be placed on the retired list of the Navy upon completing 30 years service, including naval and fleet naval reserve service; and by act of July 1, 1918 (40 Stat., 710), "service in the Navy, Marine Corps, National Naval Volunteers, and Naval Militia shall be counted as continuous service in the Naval Reserve Force" for the purpose of retirement.

Active duty for retired enlisted men, in time of war or emergency, was authorized by acts of March 3, 1915 (38 Stat., 941), and August 29, 1916 (39 Stat., 591).

Authority for the advancement of retired enlisted men employed on active duty is contained in the act of July 1, 1918 (40 Stat., 719). As to their pay while on active duty, see note to section 1569, Revised Statutes, under "17. Retired enlisted men."

As to status of retired enlisted men, and whether subject to trial by court-martial, see note to section 1624, Revised Statutes.

#### [1899, Mar. 3, sec. 18. Marine Corps, number and rank of line officers.]

This section provided as follows:

"That from and after the date of the approval of this Act the active list of the line officers of the United States Marine Corps shall consist of one brigadier-general commandant, five colonels, five lieutenant colonels, ten majors, sixty captains, sixty first lieutenants and sixty second lieutenants: *Provided*, That vacancies in all grades in the line created by this section shall be filled as far as possible by promotion by seniority from the line officers on the active list of said Corps: *And provided further*, That the

commissions of officers now in the Marine Corps shall not be vacated by this act: *And provided further*, That vacancies in the grade of brigadier-general shall be filled by selection from officers on the active list of the Marine Corps not below the grade of field officer."—(30 Stat., 1008, chap. 413.)

See note to section 1596, Revised Statutes, for later laws as to organization of the Marine Corps; and see note to section 1601, Revised Statutes, as to rank of the commandant.

#### [1899, Mar. 3, sec. 19. Marine Corps, filling of vacancies.]

This section provided as follows:

"That the vacancies existing in said Corps after the promotions and appointments herein provided for shall be filled by the President from time to time, whenever the actual needs of the naval service require it, first, from the graduates of the Naval Academy in the manner now provided by law; or, second, from those who are serving or who have served as second lieutenants in the Marine Corps during the war

with Spain; or, third, from meritorious non-commissioned officers of the Marine Corps; or, fourth, from civil life: *Provided*, That after said vacancies are once filled there shall be no further appointments from civil life."—(30 Stat., 1008, chap. 413.)

See note to section 1599, Revised Statutes, for later laws and decisions relating to the filling of vacancies in the Marine Corps.

[1899, Mar. 3, sec. 20. Marine Corps, ages of candidates; examination for promotion.] That no person except such officers or former graduates of the Naval Academy as have served in the war with Spain, as hereinbefore provided for, shall be appointed a commissioned officer in the Marine Corps who is under twenty or over thirty years of age; and that no person shall be appointed a commissioned officer in said corps until he shall have passed such examination as may be prescribed by the President of the United States, except graduates of the Naval Academy, as above provided. That the officers of the Marine Corps above the grade of captain, except brigadier-general, shall, before being promoted, be subject to such physical, mental and moral examination as is now, or may hereafter be, prescribed by law for other officers of the Marine Corps.—(30 Stat., 1009, chap. 413.)

Ages for appointment: See section 1599, Revised Statutes, and laws noted thereunder.

Examination for promotion: See note to section 1599, Revised Statutes, under "Laws relating to promotion," and "Laws relating to promotion construed."

#### [1899, Mar. 3, sec. 21. Marine Corps vacancies, when filled.]

This section provided as follows:

"That upon the passage of this Act not more than forty-five of the captains, forty-five first lieutenants and forty-five second lieutenants herein provided for shall be appointed; fifteen

captains, fifteen first lieutenants and fifteen second lieutenants to be appointed subsequently to January first, nineteen hundred."—(30 Stat., 1009, chap. 413.)



[1899, Mar. 3, sec. 22. Marine Corps, number and rank of staff officers; filling of vacancies.]

**This section provided as follows:**

"That the staff of the Marine Corps shall consist of one adjutant and inspector, one quartermaster and one paymaster, each with the rank of colonel; one assistant adjutant and inspector, two assistant quartermasters and one assistant paymaster, each with the rank of major; and three assistant quartermasters with the rank of captain. That the vacancies created by this Act in the departments of the adjutant and inspector and paymaster shall be filled first by promotion according to seniority of the officers in each of these departments respectively, and then by selection from the line officers on the active list of the Marine Corps not below the grade of captain, and who shall have seen not less than ten years' service in the Marine Corps. That the vacancies created by this Act in the quartermaster's department of said corps shall be filled, first by promotion according to

seniority of the officers in this department, and then by selection from the line officers on the active list of said corps not below the grade of first lieutenant: *Provided*, That all vacancies hereafter occurring in the staff of the Marine Corps shall be filled first by promotion according to seniority of the officers in their respective departments, and then by selection from officers of the line on the active list, as hereinbefore provided for."—(30 Stat., 1009, chap. 413.)

See notes to section 1596, 1598, 1599, and 1602, Revised Statutes, for later laws superseding this section.

By act of August 29, 1916 (39 Stat., 610), the permanent staff system in the Marine Corps was abolished, and a system of temporary details from the line was substituted therefor. (See note to section 1598, Revised Statutes.)

As to rank of staff officers, see note to section 1602, Revised Statutes.

[1899, Mar. 3, sec. 23. Marine Corps, number of enlisted men.] That the enlisted force of the Marine Corps shall consist of five sergeant majors, one drum major, twenty quartermaster sergeants, seventy-two gunnery sergeants with the rank and allowance of the first sergeant, and whose pay shall be thirty-five dollars per month; sixty first sergeants; two hundred and forty sergeants; four hundred and eighty corporals; eighty drummers; eighty trumpeters; and four thousand nine hundred and sixty-two privates.—(30 Stat., 1009, chap. 413.)

See note to section 1596, Revised Statutes, under "Number and grades of enlisted men," for later laws increasing the num-

ber of enlisted men from time to time, and otherwise modifying, but not repealing or superseding, this section.

[1899, Mar. 3, sec. 24. Marine band; organization and pay of.]

**This section provided as follows:**

"That the band of the United States Marine Corps shall consist of one leader, with the pay and allowances of a first lieutenant; one second leader, whose pay shall be seventy-five dollars per month, and who shall have the allowances of a sergeant major; thirty first class musicians, whose pay shall be sixty dollars per month; and thirty second class musicians whose pay shall

be fifty dollars per month and the allowances of a sergeant; such musicians of the band to have no increased pay for length of service."—(30 Stat., 1009, chap. 413.)

It was superseded by act of August 29, 1916 (39 Stat., 612). See note to section 1596, Revised Statutes; see also section 1613, Revised Statutes, and note thereto.

[1899, Mar. 3, sec. 25. Navy, oath of allegiance, officers and enlisted men.] That the oath of allegiance now provided for the officers and men of the Army and Marine Corps shall be administered hereafter to the officers and men of the Navy.—(30 Stat., 1009, chap. 413.)

See section 1609, Revised Statutes, and note thereto; see also notes to sections 1342, 1418, and 1757, Revised Statutes.

[1899, Mar. 3, sec. 26. Repeal of prior laws.] That all acts and parts of acts, so far as they conflict with the provisions of this Act, are hereby repealed.—(30 Stat., 1009, chap. 413.)

[1899, Mar. 3. Pay of assistant to chief, Bureau of Supplies and Accounts.] The officer of the Pay Corps of the Navy detailed as assistant to the Chief of the Bureau of Supplies and Accounts pursuant to the act of Congress approved July twenty-seventh, eighteen hundred and ninety-four, shall hereafter receive the highest pay of his grade.—(30 Stat., 1038, chap. 421.)

The designation of the "Pay Corps" was changed to "Supply Corps" by act of July 11, 1919.—(41 Stat., 147.)  
See act of July 26, 1894 (28 Stat., 132), which

is the act referred to herein as the act approved "July twenty-seventh," 1894; see also note to section 421, Revised Statutes.

[1900, Mar. 21. **Naval Intelligence, publications.**] That the Secretary of the Navy be, and is hereby, authorized to print, in excess of the one thousand copies authorized by the Act of January twelfth, eighteen hundred and ninety-five, such extra copies of the publications of the Office of Naval Intelligence as may be necessary for distribution to the naval service and to meet other official demands: *Provided*, That in no case shall the edition of any one publication exceed two thousand copies.—(31 Stat., 713, Res. No. 14.)

See act of January 12, 1895, section 89 (28 Stat., 622-623).

[1900, Apr. 17. **Book of Estimates, statement of employees paid from general appropriations.**] It shall be the duty of the Secretary of the Navy to submit in the Book of Estimates for the fiscal year nineteen hundred and two, and annually thereafter, under the respective bureaus and offices of the Navy Department, a statement in detail, showing the number of persons employed during the previous fiscal year and the rate of compensation of each under appropriations for "Increase of the Navy" or other general appropriations.—(31 Stat., 117, chap. 192.)

See note to sections 429 and 430, Revised Statutes, and laws cited thereunder.

[1900, May 24. **Removal of charge of desertion.**] That chapter eight hundred and ninety, volume twenty-five, of the United States Statutes at Large, entitled "An Act to relieve certain appointed or enlisted men of the Navy and Marine Corps from the charge of desertion," approved August fourteenth, eighteen hundred and eighty-eight, be, and the same is hereby, revived and reenacted.

SEC. 2. That section five of the said Act be, and is hereby, so amended as to remove the limitation of time within which applications for relief may be received and acted upon under the provisions of said Act.—(31 Stat., 183, chap. 550.)

See act of August 14, 1888 (25 Stat., 442-443).

[1900, June 6. **Accounting officers, not to deduct attorneys' fees.**] That in the settlement of claims of officers, soldiers, sailors, and marines, or their representatives, and all other claims for pay and allowances within the jurisdiction of the Auditor for the War Department or the Auditor for the Navy Department, presented and filed hereafter in which it is the present practice to make deductions of attorneys' fees from the amount found due, no deductions of fees for attorneys or agents shall hereafter be made, but the draft, check, or warrant for the full amount found due shall be delivered to the payee in person or sent to his bona fide post-office address (residence or place of business).—(31 Stat., 637, chap. 791.)

See note to section 236, Revised Statutes, on general subject of accounts.

[1900, June 7. **Mileage or actual expenses, officers of the Navy.**] That in lieu of traveling expenses and all allowances whatsoever connected therewith, including transportation of baggage, officers of the Navy traveling from point to point within the United States under orders shall hereafter receive mileage



at the rate of eight cents per mile, distance to be computed by the shortest usually traveled route; but in cases where orders are given for travel to be performed repeatedly between two or more places in the same vicinity the Secretary of the Navy may, in his discretion, direct that actual and necessary expenses only be allowed. Actual expenses only shall be paid for travel under orders outside the limits of the United States in North America.—(31 Stat., 685, chap. 859.)

See notes to sections 1566 and 1612, Revised Statutes; and see acts of March 3, 1901 (31 Stat., 1029), and July 1, 1902 (32 Stat., 663).

[1900, June 7. **Naval hospital fund.**] That from and after July first, nineteen hundred, all forfeitures on account of desertion shall be passed to the credit of the naval hospital fund.—(31 Stat., 697, chap. 859.)

See sections 4807–4810, Revised Statutes, and notes thereto.

[1900, June 7. **Rank of assistant surgeons.**] Assistant surgeons shall rank with assistant surgeons in the Army.—(31 Stat., 697, chap. 859.)

See section 1474, Revised Statutes, and note thereto.

[1900, June 7. **Pay of commissioned officers not reduced.**] Section thirteen of the act approved March third, eighteen hundred and ninety-nine, entitled “An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States,” is hereby so amended as to provide that nothing therein contained shall operate to reduce the pay which, but for the passage of said act, would have been received by any commissioned officer at the time of its passage or thereafter.—(31 Stat., 697, chap. 859.)

See note to section 1556, Revised Statutes, and see act of March 3, 1899, section 13 (30 Stat., 1007).

[1901, Feb. 2, sec. 41. **Wearing of badges, military societies.**] That the distinctive badges adopted by military societies of men “who served in the armies and navies of the United States during the Spanish-American war and the incident insurrection in the Philippines” may be worn upon all occasions of ceremony by officers and men of the Army and Navy of the United States who are members of said organizations in their own right.—(31 Stat., 758, chap. 192.)

See note to section 1407, Revised Statutes.

[1901, Mar. 2. **Departmental publications, furnished Library of Congress.**] That of the publications described in this section the number of copies which shall be printed and distributed by the Public Printer to the Library of Congress for its own use and for international exchange in lieu of the number now provided by law shall be sixty-two, except as such number shall be enlarged to not exceeding one hundred copies by request of the Librarian of Congress, to wit: The House documents and reports, bound; the Senate documents and reports, bound; the House Journals, bound; the Senate Journals, bound; all other documents bearing a Congressional number and all documents not bearing a Congressional number printed by order of either House of Congress, or by order of any Department, bureau, commission, or officer of the Government, except confidential matter, blank forms, and circular letters not of a public character; the Revised Statutes, bound; the Statutes at Large, bound; the

Congressional Record, bound; the Official Register of the United States, bound.—(31 Stat., 1464, Res. No. 16.)

SEC. 2. That in addition to the foregoing the Public Printer shall supply to the Library of Congress, for its own use two copies of each of the above-described publications, unbound, as published; five copies of all bills and resolutions; ten copies of the daily Congressional Record; and two copies of all documents printed for the use of Congressional committees not of a confidential character.—(31 Stat., 1464, Res. No. 16.)

SEC. 3. That of any publication printed at the Government expense by direction of any Department, commission, bureau, or officer of the Government elsewhere than at the Government Printing Office there shall be supplied to the Library of Congress for its own use and for international exchange sixty-two copies, except as such number shall be enlarged to not exceeding one hundred copies by request of the Joint Committee on the Library.—(31 Stat., 1465, Res. No. 16.)

See act of January 12, 1895, section 58 (28 Stat., 610).

[1901, Mar. 3, sec. 5. Estimates, time for submitting.] That hereafter it shall be the duty of the heads of the several Executive Departments, and of other officers authorized or required to make estimates, to furnish to the Secretary of the Treasury, on or before the fifteenth day of October of each year, their annual estimates for the public service, to be included in the Book of Estimates prepared by law under his direction, and in case of failure to furnish estimates as herein required it shall be the duty of the Secretary of the Treasury to cause to be prepared in the Treasury Department, on or before the first day of November of each year, estimates for such appropriations as in his judgment shall be requisite in every such case, which estimates shall be included in the Book of Estimates prepared by law under his direction for the consideration of Congress.—(31 Stat., 1009, chap. 830.)

See act of March 3, 1875, section 3 (18 Stat., 370); and see, generally, sections 429, 430, | and 3666. Revised Statutes, and laws noted thereunder.

[1901, Mar. 3. Mileage and traveling expenses; naval officers.] That in lieu of traveling expenses and all allowances whatsoever connected therewith, including transportation of baggage, officers of the Navy traveling from point to point within the United States under orders shall hereafter receive mileage at the rate of eight cents per mile, distance to be computed by the shortest usually traveled route; but in cases where orders are given for travel to be performed repeatedly between two or more places in the same vicinity the Secretary of the Navy may, in his discretion, direct that actual and necessary expenses only be allowed. Actual expenses only shall be paid for travel under orders outside the limits of the United States in North America \* \* \*.—(31 Stat., 1029, chap. 831.)

See note to section 1566, Revised Statutes, and see acts of June 7, 1900 (31 Stat., 685), and July 1, 1902 (32 Stat., 663).

[1901, Mar. 3. Transportation, enlisted men, Navy, discharged on medical survey and expiration of enlistment.] That the transportation to their homes, if residents of the United States, of enlisted men and apprentices discharged on medical survey; and the transportation to the place of enlistment, if residents of the United States, of enlisted men and apprentices discharged on



account of expiration of enlistment, shall hereafter be chargeable to the appropriation "Transportation, recruiting, and contingent."—(31 Stat., 1030, chap. 831.)

See note to section 1569, Revised Statutes, under "20. Mileage and transportation on discharge"; see also note to section 1566,

Revised Statutes, and act of June 3, 1916, section 126 (39 Stat., 217).

[1901, Mar. 3. Facilities of Departments allowed students and others.] That facilities for study and research in the Government Departments, \* \* \* shall be afforded to scientific investigators and to duly qualified individuals, students, and graduates of institutions of learning in the several States and Territories, as well as in the District of Columbia, under such rules and restrictions as the heads of the Departments and Bureaus mentioned may prescribe.—(31 Stat., 1039, chap. 831.)

See joint resolution of April 12, 1892 (27 Stat., 395).

[1901, Mar. 3. Medals of honor and gratuity, enlisted men.] That any enlisted man of the Navy or Marine Corps who shall have distinguished himself in battle or displayed extraordinary heroism in the line of his profession shall, upon the recommendation of his commanding officer, approved by the flag-officer and the Secretary of the Navy, receive a gratuity and medal of honor as provided for seamen in section fourteen hundred and seven of the Revised Statutes.—(31 Stat., 1099, chap. 850.)

[1901, Mar. 3. Quarters.] Boatswains, gunners, carpenters, sailmakers, warrant machinists, pharmacists and mates, \* \* \* shall hereafter receive the same commutation for quarters as second lieutenants of the Marine Corps.—(31 Stat., 1107, 1108.)

[1901, Mar. 3. Shore duty beyond seas.] That officers of the Navy, and officers and enlisted men of the Marine Corps, who have been detailed, or may hereafter be detailed, for shore duty in Alaska, the Philippine Islands, Guam, or elsewhere beyond the continental limits of the United States, shall be considered as having been detailed for "shore duty beyond seas," and shall receive pay accordingly, with such additional pay as may be provided by law for service in island possessions of the United States.—(31 Stat., 1108, chap. 852.)

See sections 1556, 1569, 1571, and 1612, Revised Statutes, and notes thereto.

[1901, Mar. 3. Advancement for war service; additional number officers.] That the advancement in rank of officers of the Navy and Marine Corps, whensoever made, for service rendered during the war with Spain, pursuant, respectively, to the provisions of sections fifteen hundred and six and sixteen hundred and five of the Revised Statutes, shall not interfere with the regular promotion of officers otherwise entitled to promotion, but officers so advanced, by reason of war service, shall, after they are promoted to higher grades, be carried thereafter as additional to the numbers of each grade to which they may at any time be promoted; and each such officer shall hereafter be promoted in due course, contemporaneously with and to take rank next after the officer immediately above him; and all advancements made by reason of war service shall be appropriately so designated upon the official Navy list: *Provided, however,* That no promotion shall be made to fill a vacancy occasioned by the promotion, retirement, death, resignation, or dismissal of any officer who, at the time of

such promotion, retirement, death, resignation, or dismissal, is an additional member of his grade under the foregoing provisions.—(31 Stat., 1108, chap. 852.)

See sections 1506 and 1605, Revised Statutes, and notes thereto; and see act of June 16, 1906 (34 Stat., 296). See also note to section 1363, Revised Statutes, under "Additional officers are authorized," etc.

**Additional numbers, promotion of.**—The practice of making officers additional numbers in their grade is followed by Congress only where for good and sufficient reasons it is desired that such officers shall not delay the promotion of others who are their juniors. In other words, the provision that an officer shall be an additional number in his grade is not intended for his benefit, but is intended to facilitate the promotion of others below him on the list; and unless Congress uses language clearly indicating its intention that the officer so made an additional number is to be promoted

at an earlier date than he would otherwise have been entitled to promotion; that is to say, on the same date as the officer next above him on the list, he should be promoted only from the date on which his position would have entitled him to promotion had he not been made an additional number. In such cases the additional number officer is not promoted either with the officer next below him or with the officer next above him, but is promoted precisely as he would be if he were not an additional number, only his promotion does not operate to delay the promotion of junior officers. It can make no difference to the additional number officer how many junior officers may be promoted at the same time; his promotion is in no way delayed thereby. (C. M. O. 6, 1915, p. 10, citing file 11130-26, Jan. 8, 1915.)

[1901, Mar. 3. Board of visitors, Naval Observatory.] There shall be appointed by the President, by and with the advice and consent of the Senate, from persons not officers of the United States a board of six visitors to the Naval Observatory, four to be astronomers of high professional standing and two to be eminent citizens of the United States. Appointments to this board shall be made for periods of three years, but provision shall be made by initial appointments for shorter terms so that two members shall retire in each year. Members of this board shall serve without compensation, but the Secretary of the Navy shall pay the actual expenses necessarily incurred by members of the board in the discharge of such duties as are assigned to them by the Secretary of the Navy or are otherwise imposed upon them. The board of visitors shall make an annual visitation to the Observatory at a date to be determined by the Secretary of the Navy, and may make such other visitations not exceeding two in number annually by the full board or by a duly appointed committee as may be deemed needful or expedient by a majority of the board. The board of visitors shall report to the Secretary of the Navy at least once in each year the result of its examinations of the Naval Observatory as respects the condition of buildings, instruments, and apparatus, and the efficiency with which its scientific work is prosecuted, and shall also report as respects the expenditures in the administration of the Observatory. The board of visitors shall prepare and submit to the Secretary of the Navy regulations prescribing the scope of the astronomical and other researches of the Observatory and the duties of its staff with reference thereto. When an appointment or detail is to be made to the office of astronomical director, director of the Nautical Almanac, astronomer, or assistant astronomer, the board of visitors may recommend to the Secretary of the Navy a suitable person to fill such office, but such recommendation shall be determined only by the majority vote of the members present at a regularly called meeting of the board held in the city of Washington.—(31 Stat., 1122, chap. 852.)

See note to section 434, Revised Statutes.

[1901, Mar. 3. Superintendent of Naval Observatory.] The Superintendent of the Naval Observatory shall be, until further legislation by Congress, a line



officer of the Navy of a rank not below that of captain.—(31 Stat., 1122, chap. 852.)

See section 434, Revised Statutes, and note thereto.

[1901, Mar. 3. Warrant officers, appointment as ensigns.] Whenever, in view of the vacancies in the grade of ensign on July thirtieth of any year unfilled by graduates of the Naval Academy, the Secretary of the Navy shall so recommend, the President may appoint to that grade, as of July thirtieth, from among the boatswains, gunners, or warrant machinists, not exceeding six in any one calendar year. No person shall be so appointed who is over thirty-five years of age; who has served less than six years as a warrant officer; who is not recommended by a commanding officer under whom he has served; nor until he shall have passed such competitive examination as may be prescribed by the Navy Department.—(31 Stat., 1129, chap. 852.)

See notes to section 1405, Revised Statutes, under "Machinists," and "Ensigns and assistant paymasters appointed from warrant officers."

[1901, Mar. 3. Classification and command of vessels.] That the President of the United States be, and he is hereby, authorized to establish, and from time to time to modify, as the needs of the service may require, a classification of vessels of the Navy, and to formulate appropriate rules governing assignments to command of vessels and squadrons.—(31 Stat., 1133, chap. 852.)

See note to section 1529, Revised Statutes.

[1901, Mar. 3. Military schools, loan of naval equipment.] That the President be, and he is hereby, authorized, upon the application of the governor of any State having seacoast line or bordering on one or more of the Great Lakes, to direct the Secretary of the Navy to furnish to one well-established military school in that State, desiring to afford its cadets instruction in elementary seamanship, one fully equipped man-of-war's cutter for every twenty-five cadets in actual attendance, and such other equipment as may be spared and be deemed adequate for instruction in elementary seamanship: *Provided*, That the said school shall have adequate facilities for cutter drill, and shall have in actual attendance at least one hundred and forty cadets in uniform receiving military instruction and quartered in barracks under military regulation, and shall have the capacity to quarter and educate at the same time one hundred and fifty cadets: *And provided further*, That the Secretary of the Navy shall require a bond in each case, in double the value of the property, for the care and safe-keeping thereof and for the return of the same when required.—(31 Stat., 1440, chap. 863; 34 Stat., 620, chap. 3612.)

This act was expressly amended and reenacted to read as above by act of June 29, 1906 (34 Stat., 620). The opening clause of the latter act was as follows: "That chapter eight hundred and sixty-three, volume thirty-one, of the Statutes at Large, approved March third, nineteen hundred and one, to authorize the Secretary of the Navy to loan naval equipment to certain military schools, and now the law in force, be, and the same is hereby, amended to read as follows."

It was further amended by the following clause in the naval appropriation act of June 24,

1910 (36 Stat., 613): "That the Act entitled 'An Act to authorize the Secretary of the Navy to loan naval equipment to certain military schools,' approved March third, nineteen hundred and one, be amended by striking out the words 'one hundred and forty cadets' and inserting in lieu thereof the words 'seventy-five cadets over fifteen years of age.'"

See also act of March 4, 1911 (36 Stat., 1353), for the establishment of marine schools; and see act of June 30, 1906 (34 Stat., 817), as to nautical schools in the Philippines.

[1902, May 13. **Printing of American Ephemeris and Nautical Almanac.**] That hereafter the "usual number" of copies of the American Ephemeris and Nautical Almanac shall not be printed. In lieu thereof there shall be printed and bound one thousand one hundred copies of the same, uniform with the editions printed for the Navy Department, as provided in section seventy-three, paragraph five, of an Act approved January twelfth, eighteen hundred and ninety-five, providing for the public printing, binding, and distribution of public documents; one hundred copies for the Senate, four hundred for the House, and six hundred for the Superintendent of Documents for distribution to State and Territorial libraries and designated depositories.—(32 Stat., 740, Res. No. 20.)

See act of January 12, 1895, section 73 (28 Stat., 613), and note to section 436, Revised Statutes; see also act of July 1, 1902 (32 Stat., 678).

[1902, June 28. **Blanks, books, filing devices, etc., procured by Public Printer.**] The Public Printer is authorized hereafter to procure and supply, on the requisition of the head of any Executive Department or other Government establishment, complete manifold blanks, books, and forms, required in duplicating processes; also complete patented devices with which to file money-order statements, or other uniform official papers, and to charge such supplies to the allotment for printing and binding of the Department or Government establishment requiring the same.—(32 Stat., 481, chap. 1301.)

See act of January 12, 1895, section 18 (28 Stat., 603).

[1902, July 1. **Actual expenses, repeated travel.**] That hereafter in cases where orders are given to officers of the Navy or Marine Corps for travel to be performed repeatedly between two or more places in such vicinity as in the discretion of the Secretary of the Navy is appropriate, he may direct that actual and necessary expenses only be allowed.—(32 Stat., 663, chap. 1368.)

See notes to sections 1566 and 1612, Revised Statutes, and see act of June 7, 1900 (31 Stat., 685).

[1902, July 1. **Transit pay, employees in insular possessions.**] The Secretary of the Navy, in his discretion, is authorized to pay all civilian employees appointed for duty in the Philippine, Hawaiian, and Samoan islands, the island of Guam, and the island of Porto Rico, from the date of their sailing from the United States until they report for duty to the officer under whom they are to serve, and while returning to the United States by the most direct route and with due expedition, a per diem compensation corresponding to their pay while actually employed; and in cases where the appointee is not to fill an existing vacancy his pay while traveling may be charged to the annual appropriation of the bureau concerned.—(32 Stat., 663, chap. 1368.)

See note to section 1545, Revised Statutes.

[1902, July 1. **Publication of American Ephemeris and Nautical Almanac.**] Hereafter there shall be published of the American Ephemeris and Nautical Almanac two thousand five hundred copies, five hundred of which shall be for the use of the Senate, one thousand for the use of the House of Representatives, and one thousand for distribution or sale by the Navy Department.—(32 Stat., 678, chap. 1368.)

See act of January 12, 1895, section 73 (28 Stat., 613), and Joint Resolution of May 13, 1902 (32 Stat., 740). See also note to section 436, Revised Statutes.



[1902, July 1. Commuted rations, payment to messes.] That money accruing from the rations of enlisted men commuted for the benefit of any mess may be paid on public bills to the commissary officer by the pay officer having their accounts.—(32 Stat., 680, chap. 1368.)

See section 1585, Revised Statutes, and note thereto.

[1902, July 1. Title of “naval cadet” changed.] The title “naval cadet” is hereby changed to “midshipman.”—(32 Stat., 686, chap. 1368.)

See section 1512, Revised Statutes, and note thereto.

[1902, July 1, sec. 4. Public Health Service, duties in time of war.] That the President is authorized, in his discretion, to utilize the Public Health and Marine-Hospital Service in times of threatened or actual war to such extent and in such manner as shall in his judgment promote the public interest without, however, in any wise impairing the efficiency of the service for the purposes for which the same was created and is maintained.—(32 Stat., 713, chap. 1370.)

The designation of the “Public Health and Marine-Hospital Service” was changed to “Public Health Service” by act of August 14, 1912 (37 Stat., 309).

See note to section 1368, Revised Statutes, under “Public Health Service,” for later laws on the subject; and see Joint Resolution of July 9, 1917 (40 Stat., 242).

[1902, July 1, sec. 5. Surgeon General, Navy, to detail officer on advisory board.] That there shall be an advisory board for the hygienic laboratory provided by the Act of Congress approved March third, nineteen hundred and one, for consultation with the Surgeon-General of the Public Health and Marine-Hospital Service relative to the investigations to be inaugurated, and the methods of conducting the same, in said laboratory. Said board shall consist of three competent experts, to be detailed from the Army, the Navy, and the Bureau of Animal Industry by the Surgeon-General of the Army, the Surgeon-General of the Navy, and the Secretary of Agriculture, respectively, which experts, with the director of the said laboratory, shall be ex officio members of the board, and serve without additional compensation. Five other members of said board shall be appointed by the Surgeon-General of the Public Health and Marine-Hospital Service, with the approval of the Secretary of the Treasury, who shall be skilled in laboratory work in its relation to the public health, and not in the regular employment of the Government \* \* \*.—(32 Stat., 713, chap. 1370.)

See note to preceding section; see also sections 419 and 1471, Revised Statutes, and notes thereto.

[1902, July 1, sec. 4. Surgeon General, Navy, to serve on board on licensing sale of viruses, etc.] That the Surgeon-General of the Army, the Surgeon-General of the Navy, and the supervising Surgeon-General of the Marine-Hospital Service, be, and they are hereby, constituted a board with authority, subject to the approval of the Secretary of the Treasury, to promulgate from time to time such rules as may be necessary in the judgment of said board to govern the issue, suspension, and revocation of licenses for the maintenance of establishments for the propagation and preparation of viruses, serums, toxins, antitoxins, and analogous products, applicable to the prevention and cure of diseases of man, intended for sale in the District of Columbia, or to be sent, carried, or brought for sale from any State, Territory, or the District of Columbia, into any other

State, Territory, or the District of Columbia, or from the United States into any foreign country, or from any foreign country into the United States: *Provided*, That all licenses issued for the maintenance of establishments for the propagation and preparation in any foreign country of any virus, serum, toxin, anti-toxin, or product aforesaid, for sale, barter, or exchange in the United States, shall be issued upon condition that the licentiates will permit the inspection of the establishments where said articles are propagated and prepared, in accordance with section three of this Act.—(32 Stat., 729, chap. 1378.)

[1903, Jan. 12. **Wearing of badges, military societies.**] That the distinctive badges adopted by military societies of men who served in the armies and navies of the United States during the Chinese relief expedition of nineteen hundred may be worn upon all occasions of ceremony by officers and men of the Army and Navy of the United States who are members of said organization in their own right.—(32 Stat., 1229, Res. No. 2.)

See note to section 1407, Revised Statutes.

[1903, Feb. 25. **Departmental books, maps, etc., transferred to Library of Congress.**] The head of any Executive department or bureau or any commission of the Government is hereby authorized from time to time to turn over to the Librarian of Congress, for the use of the Library of Congress, any books, maps, or other material in the library of the department, bureau, or commission no longer needed for its use, and in the judgment of the Librarian of Congress appropriate to the uses of the Library of Congress.

Any books of a miscellaneous character no longer required for the use of such department, bureau, or commission, and not deemed an advisable addition to the Library of Congress, shall, if appropriate to the uses of the Free Public Library of the District of Columbia, be turned over to that library for general use as a part thereof.—(32 Stat., 865, chap. 755.)

See section 418, Revised Statutes, and note thereto.

[1903, Feb. 25. **Civilian assistant, Bureau of Supplies and Accounts.**] BUREAU OF SUPPLIES AND ACCOUNTS: For a civilian assistant, who shall perform the duties of chief clerk, and in case of the death, resignation, sickness, or absence of both the Paymaster-General of the Navy and his assistant, now provided for by law, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, Revised Statutes, such civilian assistant shall become the acting chief of the Bureau \* \* \*.—(32 Stat., 890, chap. 755.)

See acts of July 26, 1894 (28 Stat., 132), and March 3, 1899 (30 Stat., 1038).

[1903, Mar. 3. **Clothing and small-stores fund.**] For purchase of clothing and small stores for issue to the Naval service, the present fund being inadequate to meet the requirements of the service at this time; to be added to the "clothing and small-stores fund," one million dollars.—(32 Stat., 1191, chap. 1010.)

See note to section 3689, Revised Statutes.

[1903, Mar. 3. **Warrant officers, appointment as ensigns.**] Hereafter in each calendar year there may, under the restrictions imposed by existing law, be



appointed from the boatswains, gunners, and warrant machinists of the Navy twelve ensigns.—(32 Stat., 1197, chap. 1010.)

See notes to section 1405, Revised Statutes, under "Machinists," and "Ensigns and assistant paymasters appointed from warrant officers."

[1903, Mar. 3. Punishment for hazing.] That the superintendent of the Naval Academy shall make such rules, to be approved by the Secretary of the Navy, as will effectually prevent the practice of hazing; and any cadet found guilty of participating in or encouraging or countenancing such practice shall be summarily expelled from the Academy, and shall not thereafter be reappointed to the Corps of Cadets or be eligible for appointment as a commissioned officer in the Army or Navy or Marine Corps until two years after the graduation of the class of which he was a member.—(32 Stat., 1198, chap. 1010.)

See notes to section 1519, Revised Statutes, for later laws relating to hazing and the court-martial of midshipmen. 104-105), for partial repeal of this enactment.  
See act of April 9, 1906, section 2 (34 Stat., See note to section 1512, Revised Statutes, as to title of students at the Naval Academy.

[1903, Mar. 3. Midshipman from Porto Rico.] That hereafter there shall be at the Naval Academy one midshipman from Porto Rico, who shall be a native of said island, and whose appointment shall be made by the President on the recommendation of the governor of Porto Rico.—(32 Stat., 1198, chap. 1010.)

See note to section 1513, Revised Statutes, under "Midshipmen appointed from Porto Rico."

[1904, Mar. 18. Civilian employees, lump sum appropriations.] On and after July first, nineteen hundred and four, it shall not be lawful for the Secretary of the Navy to employ in the Navy Department, at Washington, District of Columbia, and pay out of the appropriations for new ships, any civilian expert aids, additional draftsmen, writers, copyists, and model makers, except as herein or as may hereafter be specifically authorized.—(33 Stat., 117, chap. 716.)

See note to section 416, Revised Statutes.

[1904, Mar. 18, sec. 3. Horses and carriages, restrictions on use.] No part of any money appropriated by this or any other Act shall be available for paying expenses of horses and carriages or drivers therefor for the personal use of any officer provided for by this or any other Act other than the President of the United States, the heads of Executive Departments, and the Secretary to the President: *Provided*, That this provision shall not apply to officials outside of the District of Columbia in the performance of their public duties. This paragraph shall not take effect until July first, nineteen hundred and four.—(33 Stat., 142, chap. 716.)

See acts of February 3, 1905, section 4 (33 Stat., 687-688), and July 16, 1914, section 5 (38 Stat., 508).

[1904, Mar. 28. Reprinting of documents for sale.] And the superintendent of documents is hereby authorized to order reprinted, from time to time, such public documents as may be required for sale, such order for reprinting to be subject to the approval of the Secretary or head of the Department in which such public document shall have originated: *Provided*, That the appropriation for printing and binding shall be reimbursed for the cost of such reprints from the

moneys received by the superintendent of documents from the sale of public documents.—(33 Stat., 584, Res. No. 11.)

See act of January 12, 1895, sections 42, 52, 61, and 67 (28 Stat., 607–612), as to sale of public documents.

[1904, Apr. 15. Duplicate medals, where originals lost.] That in any case where the President of the United States has heretofore, under any Act or resolution of Congress, caused any medal to be made and presented to any officer or person in the United States on account of distinguished or meritorious services, on a proper showing made by such person to the satisfaction of the President that such medal has been lost or destroyed through no fault of the beneficiary, and that diligent search has been made therefor, the President is hereby authorized to cause to be prepared and delivered to such person a duplicate of such medal, the cost of which shall be paid out of any money in the Treasury not otherwise appropriated.—(33 Stat., 588, Res. No. 23.)

See note to section 1407, Revised Statutes.

[1904, Apr. 27. Power plants, consolidated under Bureau of Yards and Docks.] The Secretary of the Navy is hereby authorized, in his discretion, to consolidate the several power plants in any or all of the several navy-yards and stations at each navy-yard and station under the Bureau of Yards and Docks for the generation and distribution of light, heat, and power for all the purposes of the Navy. To the above end all such plants may be transferred from other bureaus to the Bureau of Yards and Docks, and all appropriations heretofore made for power houses and power plants for bureaus other than Yards and Docks are hereby reappropriated and made available under the Bureau of Yards and Docks for the consolidations herein provided for; and to further carry out the purposes of this provision there is hereby appropriated the sum of three hundred thousand dollars.—(33 Stat., 337, chap. 1622.)

[1904, Apr. 27. Warrant officers, promotion of.] That subject to the restrictions imposed by existing law, boatswains, gunners, and warrant machinists shall be eligible for appointment to the grade of ensign after four years' service as warrant officers, and boatswains, gunners, carpenters, and sailmakers shall be eligible for appointment as chief boatswains, chief gunners, chief carpenters, and chief sailmakers after six years from date of warrant.—(33 Stat., 346, chap. 1622.)

See note to section 1405, Revised Statutes.

[1904, Apr. 27. Retirement of Marine officers.] That officers of the Marine Corps with creditable records who served during the civil war shall, when retired, be retired in like manner and under the same conditions as provided for officers of the Navy who served during the civil war.—(33 Stat., 349, chap. 1622.)

See act of June 29, 1906 (34 Stat., 554), and see note to section 1622, Revised Statutes.

[1904, Apr. 27. Mileage books, etc., payment in advance of travel.] And the Secretary of the Navy is hereby authorized to continue to purchase such mileage books, commutation tickets, and other similar transportation tickets as may in his discretion seem necessary, and to furnish same to officers and others ordered to perform travel on official business; and payment for such transportation tickets upon their receipt, in accordance with commercial usage, or prior to the actual performance of the travel involved, shall not be regarded



as an advance of public money within the meaning of section thirty-six hundred and forty-eight of the Revised Statutes.—(33 Stat., 403, chap. 1630.)

See sections 1566 and 3648, Revised Statutes, and notes thereto.

[1904, Apr. 27. **Naval records, transferred from other Departments.**] All naval records, such as muster and pay rolls, orders, and reports relating to the personnel and operations of the Navy of the United States, from the beginning of the Navy Department to the war of the rebellion, eighteen hundred and sixty-one, including operations against the French navy, Tripolitan war, war of eighteen hundred and twelve, operations against pirates in the West Indies, Florida war, and the war with Mexico, now in any of the Executive Departments, shall be transferred to the Secretary of the Navy, to be preserved.—(33 Stat., 403, chap. 1630.)

See section 418, Revised Statutes, and note thereto; see also acts of June 29, 1906 (34 Stat., 579), and March 2, 1913 (37 Stat., 723).

[1904, Apr. 28. **Transportation of supplies, vessels of United States, excessive charges.**] That vessels of the United States, or belonging to the United States, and no others, shall be employed in the transportation by sea of coal, provisions, fodder, or supplies of any description, purchased pursuant to law, for the use of the Army or Navy unless the President shall find that the rates of freight charges by said vessels are excessive and unreasonable, in which case contracts shall be made under the law as it now exists: *Provided*, That no greater charges be made by such vessels for transportation of articles for the use of the said Army and Navy than are made by such vessels for transportation of like goods for private parties or companies.—(33 Stat., 518–519, chap. 1766.)

See acts of March 3, 1915 (38 Stat., 944), and June 15, 1917 (40 Stat., 211), and notes thereto; see also section 3718, Revised Statutes.

[1905, Feb. 3. **Public Health Service, jurisdiction of Treasury Department.**] OFFICE OF SURGEON-GENERAL OF PUBLIC HEALTH AND MARINE-HOSPITAL SERVICE: \* \* \* and said Service shall remain under the jurisdiction of the Treasury Department until otherwise hereafter specifically provided by law. (33 Stat., 650–651, chap. 297.)

See joint resolution of July 9, 1917 (40 Stat., 242); see also acts of July 1, 1902, section 4 (32 Stat., 713), and October 6, 1917 (40 Stat., 393); and see note to section 1368, Revised Statutes. The designation of the "Public Health and Marine-Hospital Service" was changed to "Public Health Service" by act of August 14, 1912 (37 Stat., 309).

[1905, Feb. 3, sec. 4. **Vehicles, restrictions on purchase and use.**] No part of any money appropriated by this or any other Act shall be used for purchasing, maintaining, driving, or operating any carriage or vehicle (other than those for the use of the President of the United States, the heads of the Executive Departments, and the Secretary to the President, and other than those used for transportation of property belonging to or in the custody of the United States), for the personal or official use of any officer or employee of any of the Executive Departments or other Government establishments at Washington, District of Columbia, unless the same shall be specifically authorized by law or provided for in terms by appropriation of money, and all such carriages and vehicles so procured and used for official purposes shall have conspicuously painted thereon at all times the full name of the Executive

Department or other branch of the public service to which the same belong and in the service of which the same are used.—(33 Stat., 687-688, chap. 297.)

See acts of March 18, 1904, sec. 3 (33 Stat., 142), and July 16, 1914, section 5 (38 Stat., 508).

[1905, Mar. 2. **Sale of armament, sentimental reasons.**] And individual pieces of United States armament which are not needed on account of historical value, and can be advantageously replaced, may be sold at a price not less than their cost price, when there exist for such sale sentimental reasons adequate in the judgment of the Secretary of War or Secretary of the Navy.—(33 Stat., 841, chap. 1307.)

See section 1541, Revised Statutes, and acts of August 5, 1882, section 2 (22 Stat., 296), and June 30, 1890 (26 Stat., 194).

[1905, Mar. 3. **Assistant to chief, Bureau of Engineering.**] That a line officer of the Navy may be detailed as assistant to the Chief of the Bureau of Steam Engineering in the Navy Department, and that such officer during such detail shall receive the highest pay of his grade, and in case of death, resignation, absence, or sickness of the Chief of the Bureau shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine of the Revised Statutes, perform the duties of such chief until his successor is appointed or such absence or sickness shall cease.—(33 Stat., 1111, chap. 1481.)

See sections 177-182, and 421, Revised Statutes, and notes thereto.

The "Bureau of Steam Engineering" was designated as "Bureau of Engineering" by act of June 4, 1920 (41 Stat., 828).

[1905, Mar. 3. **Removal of derelicts at sea.**] The President in his discretion may temporarily detail any vessel or vessels of the Navy to remove or destroy derelicts in the course of vessels at sea. The regulations to govern the detail and service of said vessels shall be prescribed by the Secretary of the Navy and approved by the President.—(33 Stat., 1164, chap. 1483.)

See joint resolution of October 31, 1893 (28 Stat., 13), and see notes to sections 1529 and 1536, Revised Statutes.

[1905, Mar. 3. **Printing and binding, illustrations.**] That hereafter no part of the appropriations made for printing and binding shall be used for any illustration, engraving, or photograph in any document or report ordered printed by Congress unless the order to print expressly authorizes the same, nor in any document or report of any executive department or other Government establishment until the head of the executive department or Government establishment shall certify in a letter transmitting such report that the illustration is necessary and relates entirely to the transaction of public business.—(33 Stat., 1213, chap. 1483.)

See act of January 12, 1895, section 94 (28 Stat., 623).

[1905, Mar. 3. **Printing for Departments, authority of Congress required.**] Hereafter no book or document not having to do with the ordinary business transactions of the Executive Departments shall be printed on the requisition of any Executive Department or unless the same shall have been expressly authorized by Congress.—(33 Stat., 1249, chap. 1484.)

See act of January 12, 1895, sections 86 and 94 (28 Stat., 622, 623).



[1906, Mar. 30. Printing and binding, Departmental reports, etc., appropriations chargeable; apportionment of allotments.] That hereafter, in the printing and binding of documents or reports emanating from the Executive Departments, bureaus, and independent offices of the Government, the cost of which is now charged to the allotment for printing and binding for Congress, or to appropriations or allotments of appropriations other than those made to the Executive Departments, bureaus, or independent offices of the Government, the cost of illustrations, composition, stereotyping, and other work involved in the actual preparation for printing, apart from the creation of manuscript, shall be charged to the appropriation or allotment of appropriation for the printing and binding of the Department, bureau, or independent office of the Government in which such documents or reports originate; the balance of cost shall be charged to the allotment for printing and binding for Congress, and to the appropriation or allotment of appropriation of the Executive Department, bureau, or independent office of the Government, in proportion to the number delivered to each; the cost of any copies of such documents or reports distributed otherwise than through Congress, or the Executive Departments, bureaus, and independent offices of the Government, if such there be, shall be charged as heretofore: *Provided*, That on or before the first day of December in each fiscal year each Executive Department, bureau, or independent office of the Government to which an appropriation or allotment of appropriation for printing and binding is made, shall obtain from the Public Printer an estimate of the probable cost of all publications of such Department, bureau, or independent office now required by law to be printed, and so much thereof as would, under the terms of this resolution, be charged to the appropriation or allotment of appropriation of the Department, bureau, or independent office of the Government in which such publications originate, shall thereupon be set aside to be applied only to the printing and binding of such documents and reports, and shall not be available for any other purpose until all of such allotment of cost on account of such documents and reports shall have been fully paid.—(34 Stat., 825–826, Res. No. 13.)

See act of January 12, 1895, section 93 (28 Stat., 623).

[1906, Mar. 30. Printing of documents in two or more editions.] That the Joint Committee on Printing is hereby authorized and directed to establish rules and regulations, from time to time, which shall be observed by the Public Printer, whereby public documents and reports printed for Congress, or either House thereof, may be printed in two or more editions, instead of one, to meet the public requirements: *Provided*, That in no case shall the aggregate of said editions exceed the number of copies now authorized or which may hereafter be authorized: *And provided further*, That the number of copies of any public document or report now authorized to be printed or which may hereafter be authorized to be printed for any of the Executive Departments, or bureaus or branches thereof, or independent offices of the Government may be supplied in two or more editions, instead of one, upon a requisition on the Public Printer by the official head of such Department or independent office, but in no case shall the aggregate of said editions exceed the number of copies now authorized, or which may hereafter be authorized: *Provided further*, That nothing herein

shall operate to obstruct the printing of the full number of any document or report, or the allotment of the full quota to Senators and Representatives, as now authorized, or which may hereafter be authorized, when a legitimate demand for the full complement is known to exist.—(34 Stat., 826, Res. No. 14.)

See note to act of January 12, 1895, section 89 (28 Stat., 622-623).

[1906, Apr. 9. Dismissal of midshipmen; board of inquiry.] That it shall be the duty of the Superintendent of the United States Naval Academy, whenever he shall believe the continued presence of any midshipman at the said academy to be contrary to the best interests of the service, to report in writing such fact, with a full statement of the facts upon which are based his reasons for such belief, to the Secretary of the Navy, who, if after due consideration of the said report he shall deem the superintendent's said belief reasonable and well founded, shall cause a copy of the said report to be served upon the said midshipman and require the said midshipman to show cause, in writing and within such time as the said Secretary shall deem reasonable, why he should not be dismissed from the said academy; and after due consideration of any cause so shown the said Secretary may, in his discretion, but with the written approval of the President, dismiss such midshipman from the said academy. And the truth of any issue of fact so raised, except upon the record of demerit, shall be determined by a board of inquiry convened by the Secretary of the Navy under the rules and regulations for the government of the Navy.—(34 Stat., 104, chap. 1370.)

See notes to section 1519, Revised Statutes, under "Suspension of midshipman without pay," "Dismissal without court-martial," and "Effect of dismissal."

Courts of inquiry are regulated by section 1624, Revised Statutes, articles 55-60.

[1906, Apr. 9, sec. 2. Hazing, dismissal without court-martial; exception; prior statutes amended.] That so much of the acts approved June twenty-third, eighteen hundred and seventy-four, and March third, nineteen hundred and three, as requires the Superintendent of the United States Naval Academy to convene a court-martial in all cases when it shall come to the knowledge of the said superintendent that any midshipman has been guilty of the offense commonly known as "hazing," and declares the finding of a court-martial so convened, when approved by the said superintendent, final, and directs that any midshipman found guilty by such court-martial shall be summarily dismissed from the said academy, and also all other Acts or parts of Acts inconsistent with the present Act are hereby repealed, and that the offense known as "hazing" may hereafter be proceeded against, dealt with, and punished as offenses against good order and discipline and for violation and breaches of the rules of said academy. But no midshipman shall be dismissed for a single act of hazing except under the provisions of section three of this Act.—(34 Stat., 104, chap. 1370.)

See acts of June 23, 1874 (18 Stat., 203-204), and March 3, 1903 (32 Stat., 1198). As to partial repeal of said acts by this section, see note to section 1519, Revised Statutes, under "Dismissal without court-martial."

As to definition of hazing, see section 4 of this act set forth below, and note to section 1519, Revised Statutes, under "Court-martial of midshipmen for hazing;" as to interpretation of "a single act of hazing," also see note last cited.

[1906, Apr. 9, sec. 3. Court-martial for hazing; punishment; reviewing authority.] That the Superintendent of the United States Naval Academy may, in his discretion and with the approval of the Secretary of the Navy,



cause any midshipman in the said academy to be tried by court-martial for the offense of hazing, as provided by the Act approved June twenty-third, eighteen hundred and seventy-four, and such court-martial, upon conviction, may sentence such midshipman to any punishment authorized by the said Act or by the Act approved March third, nineteen hundred and three, or authorized for any violation or breach of the rules of the said academy by the said rules, or, in cases of brutal or cruel hazing may, in addition to dismissal, sentence such midshipman to imprisonment for a period not exceeding one year: *Provided*, That such midshipman shall not be confined in a military or naval prison or elsewhere with men who have been convicted of crimes or misdemeanors; and such finding and sentence shall be subject to review by the convening authority and by the Secretary of the Navy, as in the cases of other courts-martial.—(34 Stat., 104–105, chap. 1370.)

See acts of June 23, 1874 (18 Stat., 203–204), and March 3, 1903 (32 Stat., 1198), as modified by section 2 of this act, set forth above. See also act of March 2, 1895 (28 Stat., 838), and note to section 1519, Revised Statutes. See act of February 16, 1909, section 9 (35 Stat., 621), and reference thereunder, as to action by Secretary of the Navy on proceedings and sentences of courts-martial.

Not to be dismissed for single act of hazing except by sentence of court-martial. See section 2 of this act, set forth above, and note to section 1519, Revised Statutes, under “Dismissal without court-martial,” and “Court-martial of midshipmen for hazing.” See section 6 of this act, set forth below, as to waiver of court-martial in certain cases.

[1906, Apr. 9, sec. 4. “Hazing” defined.] That the offense of “hazing,” as mentioned in this Act, shall consist of any unauthorized assumption of authority by one midshipman over another midshipman whereby the last-mentioned midshipman shall or may suffer or be exposed to suffer any cruelty, indignity, humiliation, hardship, or oppression, or the deprivation or abridgement of any right, privilege, or advantage to which he shall be legally entitled.—(34 Stat., 105, chap. 1370.)

See note to section 1519, Revised Statutes, under “Court-martial of midshipmen for hazing.”

[1906, Apr. 9, sec. 5. Punishment of naval officers and civilian instructors for failing to report offenses; dismissal mandatory.] That it shall be the duty of every professor, assistant professor, academic officer, or any cadet officer or cadet petty officer, or instructor, as well as every other officer stationed at the United States Naval Academy, to promptly report to the superintendent thereof any fact which comes to his attention tending to indicate any violation by a midshipman or midshipmen of any of the provisions of this Act or any violation of the regulations of the said academy. Any naval officer attached to the academy who shall fail to make such report as provided in this section shall be tried by court-martial for neglect of duty and if convicted he shall be dismissed from the service. Any civilian instructor attached to the academy who shall fail to make such report as provided in this section shall be dismissed by the superintendent of the academy upon the approval of the Secretary of the Navy.—(34 Stat., 105, chap. 1370.)

[1906, Apr. 9, sec. 6. Waiver of court-martial in certain cases.] That this Act shall take effect from the date of its approval, but no midshipman now connected with the United States Naval Academy shall, by reason of its enactment, be punished for any offense heretofore committed otherwise than in pursuance of the sentence of a court-martial (if, by existing law, such sentence would be now necessary for such punishment) or punished more severely than

is now by law allowed for any offense heretofore committed: *Provided*, That any midshipman now in said Naval Academy may waive his right to trial by court-martial under existing law for any offense of hazing heretofore committed and may accept punishment under the provisions of section two of this Act.—(34 Stat., 105, chap. 1370.)

[1906, June 8. Preservation of historic monuments, etc., on public lands.] That any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

SEC. 2. That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected: *Provided*, That when such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is hereby authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.

SEC. 3. That permits for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the Secretaries of the Interior, Agriculture, and War to institutions which they may deem properly qualified to conduct such examination, excavation, or gathering, subject to such rules and regulations as they may prescribe: *Provided*, That the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums.

SEC. 4. That the Secretaries of the Departments aforesaid shall make and publish from time to time uniform rules and regulations for the purpose of carrying out the provisions of this Act.—(34 Stat., 225, chap. 3060.)

[1906, June 12. Contracts or purchases in excess of appropriations.] That no contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year.—(34 Stat., 255, chap. 3078.)

See section 3732, Revised Statutes, and note thereto.



[1906, June 14. Aliens fishing in Alaskan waters; seizures and arrests by naval officers.] SEC. 4. That the collector of customs of the district of Alaska is hereby authorized to search and seize every foreign vessel and arrest every person violating any provision of this Act or any regulation made thereunder, and the Secretary of Commerce and Labor shall have power to authorize officers of the Navy and of the Revenue-Cutter Service and agents of the Department of Commerce and Labor to likewise make such searches, seizures, and arrests. If any foreign vessel shall be found within the waters to which this Act applies, having on board fresh or cured fish and apparatus or implements suitable for killing or taking fish, it shall be presumed that the vessel and apparatus were used in violation of this Act until it is otherwise sufficiently proved. And every vessel, its tackle, apparatus, or implements so seized shall be given into the custody of the United States marshal of either of the districts mentioned in section three of this Act, and shall be held by him subject to the proceedings provided for in section two of this Act. The facts in connection with such seizure shall be at once reported to the United States district attorney for the district to which the vessel so seized shall be taken, whose duty it shall be to institute the proper proceedings.—(34 Stat., 264, chap. 3299.)

SEC. 5. That the Secretary of Commerce and Labor shall have power to make rules and regulations not inconsistent with law to carry into effect the provisions of this Act. And it shall be the duty of the Secretary of Commerce and Labor to enforce the provisions of this Act and the rules and regulations made thereunder, and for that purpose he may employ, through the Secretary of the Treasury and the Secretary of the Navy, the vessels of the United States Revenue-Cutter Service and of the Navy: *Provided, however,* That nothing contained in this Act shall be construed as affecting any existing treaty or convention between the United States and any foreign power.—(34 Stat., 264, chap. 3299.)

The designation of the Department of Commerce and Labor and the Secretary of that Department has been changed to Department of Commerce, and Secretary of Commerce. (Act Mar. 4, 1913, 37 Stat., 736.) The designation of the Revenue-Cutter

Service has been changed to Coast Guard. (Act Jan. 28, 1915, 38 Stat., 800.)

These sections were part of an act "to prohibit aliens from fishing in the waters of Alaska." See section 1529, Revised Statutes, and note thereto.

[1906, June 16. Officers advanced for heroism, additional numbers.] That officers of the Navy and Marine Corps advanced in rank for eminent and conspicuous conduct in battle or extraordinary heroism, and who since such advancement have been or may hereafter be promoted, shall from the date of the passage of this Act be carried as additional numbers of each grade in which they serve.—(34 Stat., 296, chap. 3338.)

This act was entitled "An Act To extend the provisions of the Act of March third, nineteen hundred and one, to officers of the Navy and Marine Corps advanced at any time under the provisions of sections fifteen hundred and six and sixteen hundred and five for eminent and conspicuous conduct in battle."

See act of March 3, 1901 (31 Stat., 1108), and sections 1506, 1507, and 1605, Revised Statutes, and notes thereto. See also note to section 1363, Revised Statutes, under "Additional officers are authorized," etc.

[1906, June 20, sec. 4. Naval vessels to enforce sponge law.] That it shall be the duty of the Secretary of Commerce and Labor to enforce the provisions of this Act, and upon his request the Secretary of the Treasury and the Secre-

tary of the Navy may employ the vessels of the Revenue-Cutter Service and of the Navy, respectively, to that end.—(34 Stat., 314, chap. 3442.)

The designation of the Secretary of Commerce and Labor has been changed to Secretary of Commerce. (Act. Mar. 4, 1913, 37 Stat., 736.)

The designation of the Revenue-Cutter Service has been changed to Coast Guard. (Act Jan. 28, 1915, 38 Stat., 800.)

This section was part of an act "to regulate the landing, delivery, cure, and sale of sponges," applicable to "the waters of the Gulf of Mexico or Straits of Florida."

See section 1529, Revised Statutes, and note thereto.

[1906, June 22, sec. 4. **Estimates, form and arrangement of; appropriation bills; Book of Estimates.**] Hereafter the estimates for expenses of the Government, except those for sundry civil expenses, shall be prepared and submitted each year according to the order and arrangement of the appropriation Acts for the year preceding. And any changes in such order and arrangement, and transfers of salaries from one office or bureau to another office or bureau, or the consolidation of offices or bureaus desired by the head of any Executive Department may be submitted by note in the estimates. The committees of Congress in reporting general appropriation bills shall, as far as may be practicable, follow the general order and arrangement of the respective appropriation Acts for the year preceding.

Hereafter the heads of the several Executive Departments and all other officers authorized or required to make estimates for the public service shall include in their annual estimates furnished the Secretary of the Treasury for inclusion in the Book of Estimates all estimates of appropriations required for the service of the fiscal year for which they are prepared and submitted, and special or additional estimates for that fiscal year shall only be submitted to carry out laws subsequently enacted, or when deemed imperatively necessary for the public service by the Department in which they shall originate, in which case such special or additional estimate shall be accompanied by a full statement of its imperative necessity and reasons for its omission in the annual estimates.—(34 Stat., 448-449, chap. 3514.)

See sections 430 and 3660, Revised Statutes; see also acts of March 4, 1909, section 4 (35 Stat., 907), August 23, 1912, section 9 (37

Stat., 415), and September 8, 1916, section 4 (39 Stat., 830).

[1906, June 22, sec. 5. **Transfer of employees between Departments.**] It shall not be lawful hereafter for any clerk or other employee in the classified service in any of the Executive Departments to be transferred from one Department to another Department until such clerk or other employee shall have served for a term of three years in the Department from which he desires to be transferred.—(34 Stat., 449, chap. 3514.)

See amendments to this section in acts of October 6, 1917, sections 6 and 7 (40 Stat., 383-384), and March 28, 1918, section 2 (40

Stat., 498); and see notes to sections 169 and 416, Revised Statutes.

[1906, June 22, sec. 6. **Restrictions on details to Departments from outside of District.**] Hereafter it shall be unlawful to detail civil officers, clerks, or other subordinate employees who are authorized or employed under or paid from appropriations made for the military or naval establishments, or any other branch of the public service outside of the District of Columbia, except those officers and employees whose details are now specially provided by law, for duty in any bureau, office, or other division of any Executive Department in



the District of Columbia, except temporary details for duty connected with their respective offices.—(34 Stat., 449, chap. 3514.)

Similar provision was contained in act of August 5, 1882, section 4 (22 Stat., 255), and punishment for violation of that section is prescribed by act of August 23, 1912, section 5 (37 Stat., 414).

See notes to sections 169 and 416, Revised Statutes.

[1906, June 22. Retirement of enlisted men, service credited.] That in computing the necessary thirty years' time for the retirement of petty officers and enlisted men of the Navy, all services in the Army, Navy, or Marine Corps shall be credited.—(34 Stat., 451, chap. 3518.)

See act of March 3, 1899, section 17 (30 Stat., 1008), and laws noted thereunder.

[1906, June 26. Official envelopes procured by Postmaster General.] The Postmaster-General shall contract, for a period not exceeding four years, for all envelopes, stamped or otherwise, designed for sale to the public, or for use by the Post-Office Department, the postal service, and other Executive Departments, and all Government bureaus and establishments; and the branches of the service coming under their jurisdiction, and may contract for them to be plain or with such printed matter as may be prescribed by the Department making requisition therefor: *Provided*, That no envelope shall be sold by the Government containing any lithographing or engraving, nor any printing nor advertisement, except a printed request to return the letter to the writer.—(34 Stat., 476, chap. 3546.)

See act of January 12, 1895, section 96 (28 Stat., 624), which this provision amends.

[1906, June 26. Penalty envelopes, use of.] That hereafter no article, package, or other matter, except postage stamps, stamped envelopes, newspaper wrappers, postal cards, and internal-revenue stamps, shall be admitted to the mails under a penalty privilege, unless such article, package, or other matter, except postage stamps, stamped envelopes, newspaper wrappers, postal cards, and internal-revenue stamps would be entitled to admission to the mails under laws requiring payment of postage.

That hereafter it shall be unlawful for any person entitled under the law to the use of a frank to lend said frank or permit its use by any committee, organization, or association, or permit its use by any person for the benefit or use of any committee, organization, or association: *Provided*, That this provision shall not apply to any committee composed of Members of Congress.—(34 Stat., 477, chap. 3546.)

See act of March 3, 1877, sections 5 and 6 (19 Stat., 335-336), and laws noted thereunder.

[1906, June 28. Guam and Samoa, etc., acknowledgment of deeds.] That deeds and other instruments affecting land situate in the District of Columbia or any Territory of the United States may be acknowledged in the islands of Guam and Samoa or in the Canal Zone before any notary public or judge, appointed therein by proper authority, or by any officer therein who has ex officio the powers of a notary public: *Provided*, That the certificate by such notary in Guam, Samoa, or the Canal Zone, as the case may be, shall be accompanied by the certificate of the governor or acting governor of such place to the effect that the notary taking said acknowledgment was in fact the officer he purported to be; and any deeds or other instruments affecting lands so situate, so acknowledged since the first day of January, nineteen hundred and five, and

accompanied by such certificate shall have the same effect as such deeds or other instruments hereafter so acknowledged and certified.—(34 Stat., 552, chap. 3585.)

See section 183, Revised Statutes, and note thereto, as to oaths.

**Status of Samoa and naval governor.**—

In this statute Congress recognizes and adopts the action of the President, taken pursuant to an opinion of the Attorney General, in commissioning a naval officer as governor of American Samoa. (File 3931-1429:36, Dec. 23, 1921, citing 25 Op. Att'y. Gen., 592.)

American Samoa is not conquered territory; nor was it acquired by the United States by treaty with any foreign country having power to dispose of it in that manner, although the Senate on February 13, 1900, ratified a convention between Great Britain, Germany, and the United States, under which Great Britain and Germany renounced to the United States all claim to the islands constituting what is now known as American Samoa. (File 3931-1429:36, Dec. 23, 1921.)

The sovereignty of the United States is based upon a formal cession of the island of Tutuila to the United States on April 17, 1900, by the chiefs of that island, and the subsequent recognition of the authority of the United States over Manua by the chiefs of said island on July 15, 1905. These cessions were accepted by the President of the United States, and full information with respect thereto was communicated to Congress, and the action of the President was adopted and approved in a number of separate statutory enactments. (File 3931-1429:36, Dec. 23, 1921.)

By act of August 5, 1909, section 1 (36 Stat., 11), a certain rate of duty was prescribed "upon all articles imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands and the islands of Guam and Tutuila)," thereby recognizing and describing Tutuila, one of the principal islands of American Samoa, as a "possession" of the United States. (File 3931-1429:36, Dec. 23, 1921, citing 30 Op. Att'y. Gen., 231.)

Prior legislation had also recognized the islands of Tutuila and Samoa as "possessions of the United States." (File 3931-1429:36, Dec. 23, 1921, citing 25 Op. Att'y. Gen., 128, 130, 131.)

By act of August 29, 1916 (39 Stat., 607), Congress made appropriation for a radio station in "American Samoa," thereby recognizing said islands as American territory. (File 3931-1429:36, Dec. 23, 1921.)

By act of March 3, 1919 (40 Stat., 1292), Congress provided for a census of American Samoa to be taken by the governor of said islands in accordance with plans approved by the United States Director of the Census, thereby recognizing the jurisdiction of the United States over American Samoa, and also that the chief executive charged with administration thereof is "governor" of said islands. (File 3931-1429:36, Dec. 23, 1921.)

The government established by the President in American Samoa having been recognized and acquiesced in by Congress, said government must be recognized by all individuals who have occasion to deal therewith as the lawfully established government for American Samoa, and that said government continues as such until Congress sees fit to provide otherwise. (File 3931-1429:36, Dec. 23, 1921.)

Under the system of government which has been established in American Samoa, the individual commissioned by the President as governor thereof possesses supreme legislative, executive, and judicial powers of government in relation thereto, except in so far as restricted by the President or by the enactments of Congress. (File 3931-1429:36, Dec. 23, 1921.)

For other cases, see generally notes to Constitution, Article I, section 8, clause 11, Article II, section 3 ("Duty to commission officers"), and Article IV, section 3, clause 2.

[1906, June 29. Refund of enlistment bounty.] That the Secretary of the Navy may, in his discretion, require the whole or a part of the bounty allowed upon enlistment to be refunded in cases where men are discharged during the first year of enlistment, by request, for inaptitude, as undesirable, or for disability not incurred in line of duty.—(34 Stat., 553, chap. 3590.)

This provision is repeated in act of March 2, 1907 (34 Stat., 1176).

Refund in cases of minors discharged on request of parents or guardians, is provided for in act of March 3, 1915 (38 Stat., 931).

Refund in cases of men discharged within six months of enlistment is authorized by a subsequent provision of this act set forth below (34 Stat., 556).

See act of March 1, 1889 (25 Stat., 781), as to furnishing of bounty upon enlistment.

See notes to sections 1418, 1569, and 3689, Revised Statutes; and see note to section 1556, Revised Statutes, as to uniform gratuity in the Naval Reserve Force. See also act of March 3, 1915 (38 Stat., 932).

Purchase of discharge was authorized by act of Mar. 3, 1893 (27 Stat., 717); and furlough without pay in lieu of discharge by purchase, and, under the same conditions, was authorized by act of August 29, 1916 (39 Stat., 580).

**Refund not authorized in absence of statute.**—Prior to this enactment, it was held by the Attorney General that regulations issued by the Secretary of the Navy, requiring a refund of enlistment bounty in cases of apprentices discharged within a year after enlistment, for disability not incurred in line of duty, were inconsistent with law, and void. (25 Op. Att'y. Gen., 270. See note to act of Mar. 1, 1889, 25 Stat., 781.)



[1906, June 29. Retirement of Navy officers for Civil War service.] That any officer of the Navy not above the grade of captain who served with credit as an officer or as an enlisted man in the regular or volunteer forces during the civil war prior to April ninth, eighteen hundred and sixty-five, otherwise than as a cadet, and whose name is borne on the official register of the Navy, and who has heretofore been, or may hereafter be, retired on account of wounds or disability incident to the service or on account of age or after forty years' service, may, in the discretion of the President, by and with the advice and consent of the Senate, be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement: *Provided*, That this act shall not apply to any officer who received an advance of grade at or since the date of his retirement or who has been restored to the Navy and placed on the retired list by virtue of the provisions of a special act of Congress.—(34 Stat., 554, chap. 3590.)

See act of March 3, 1899, section 11 (30 Stat., 1007), and act March 3, 1909 (35 Stat., 753); and see note to section 1457, Revised Statutes; see also sections 1443-1465, Revised Statutes, relating to retired officers of the Navy.

See section 1588, Revised Statutes, as to pay of retired officers.

**Midshipman service during the Civil War.**—As to whether service as a midshipman during the Civil War was service as an officer

of the Navy within the meaning of section 11 of the Navy personnel act of March 3, 1899 (30 Stat., 1007); and the effect of this enactment upon said provision of the personnel act, as applied to one who served as a midshipman in the Civil War, see the following cases: *Jasper v. United States* (38 Ct. Cls., 202, 40 Ct. Cls., 76); *Moser v. United States* (42 Ct. Cls., 86); *Jasper v. United States* (43 Ct. Cls., 368); *United States ex rel. Moser v. Meyer* (38 App. D. C., 13); *Moser v. United States* (49 Ct. Cls., 285).

[1906, June 29. Retirement of Marine officers for Civil War service.] That any officer of the Marine Corps below the grade of brigadier-general who served with credit as an officer or as an enlisted man in the regular or volunteer forces during the civil war prior to April ninth, eighteen hundred and sixty-five, otherwise than as a cadet, and whose name is borne on the official register of the Marine Corps, and who has heretofore been, or may hereafter be, retired on account of wounds or disability incident to the service, or on account of age or after forty years' service, may, in the discretion of the President, by and with the advice and consent of the Senate, be placed on the retired list of the Marine Corps with the rank and retired pay of one grade above that actually held by him at the time of retirement: *Provided*, That this act shall not apply to any officer who received an advance of grade since the date of his retirement or who has been restored to the Marine Corps and placed on the retired list by virtue of the provisions of a special act of Congress.—(34 Stat., 554, chap. 3590.)

See act of April 27, 1904 (33 Stat., 349); and see note to section 1622, Revised Statutes.

[1906, June 29. Shore duty pay, naval officers.] That the provision contained in section thirteen of an act approved March third, eighteen hundred and ninety-nine, entitled "An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States," reading as follows: "*Provided*, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty; but this provision shall not apply to warrant officers commissioned under section twelve of this act," be, and the same is hereby, repealed.—(34 Stat., 554, chap. 3590.)

See note to sections 1556 and 1571, Revised Statutes; and see act of March 3, 1899, section 13 (30 Stat., 1007).

[1906, June 29. Refund of enlistment outfits.] That hereafter the Secretary of the Navy may, in his discretion, require the whole or a part of the cost of outfits allowed upon enlistment to be refunded in cases where men are discharged during the first six months of enlistment for any cause other than disability incurred in line of duty.—(34 Stat., 556, chap. 3590.)

See provision in this act as to refund on discharge during first year of enlistment (34 Stat., 553), and note thereto.

[1906, June 29. Naval Home, employing beneficiaries.] That for the performance of such additional services in and about the Naval Home as may be necessary, the Secretary of the Navy is authorized to employ, on the recommendation of the governor, beneficiaries in said home, whose compensation shall be fixed by the Secretary and paid from the appropriation for the support of the home.—(34 Stat., 557, chap. 3590.)

This provision was repeated in the annual naval appropriation acts, providing for the maintenance of the Naval Home, to and including the act of August 22, 1912 (39 Stat., 334-335), since which time the annual appropriation acts for the naval service, in providing for the maintenance of

the Naval Home, have contained the following clause: “\* \* \* employment of such beneficiaries in and about the Naval Home as may be authorized by the Secretary of the Navy, on the recommendation of the governor.” (E. g., act June 4, 1920, 41 Stat., 818.)

[1906, June 29. Chief of Bureau of Yards and Docks.] The Chief of the Bureau of Yards and Docks shall be selected from the members of the Corps of Civil Engineers of the Navy having not less than seven years' active service.—(34 Stat., 564, chap. 3590.)

See section 422, Revised Statutes, and note thereto.

[1906, June 29. Naval Academy, admission of foreign students.] No person shall be admitted for instruction at the Naval Academy at Annapolis from any foreign country except upon authority of law hereafter enacted.—(34 Stat., 577, chap. 3590.)

See note to section 1513, Revised Statutes.

[1906, June 29. Appointment of midshipmen; nomination of candidates, etc.] Hereafter the Secretary of the Navy shall, as soon as possible after the first day of June of each year preceding the graduation of midshipmen in the succeeding year, notify in writing each Senator, Representative, and Delegate in Congress of any vacancy that will exist at the Naval Academy because of such graduation, or that may occur for other reasons and which he shall be entitled to fill by nomination of a candidate and one or more alternates therefor. The nomination of a candidate and alternate or alternates to fill said vacancy shall be made upon the recommendation of the Senator, Representative, or Delegate, if such recommendation is made by the fourth day of March of the year following that in which said notice in writing is given, but if it is not made by that time the Secretary of the Navy shall fill the vacancy by appointment of an actual resident of the State, Congressional district, or Territory, as the case may be, in which the vacancy will exist, who shall have been for at least two years immediately preceding the date of his appointment an actual and bona fide resident of the State, Congressional district, or Territory in which the vacancy will exist and of the legal qualification under the law as now provided. In cases where by reason of a vacancy in the membership of the Senate or House of Representatives, or by the death or declination of a



candidate for admission to the academy there occurs or is about to occur at the academy, a vacancy from any State, district, or Territory that can not be filled by nomination as herein provided, the same may be filled as soon thereafter and before the final entrance examination for the year as the Secretary of the Navy may determine. The candidates allowed for the District of Columbia and all the candidates appointed at large, together with alternates therefor, shall be selected by the President within the period herein prescribed for nomination of other candidates: *Provided*, That the President may select a candidate for the District of Columbia for the year nineteen hundred and eight.—(34 Stat., 578, chap. 3590.)

See notes to sections 1514 and 1517, Revised Statutes.

[1906, June 29. **Transfer of records to Navy Department.**] That all records (such as muster and pay rolls and reports) relating to the personnel and operations of public and private armed vessels of the North American colonies in the war of the Revolution now in any of the Executive Departments shall be transferred to the Secretary of the Navy, to be preserved, indexed, and prepared for publication.—(34 Stat., 579, chap. 3590.)

See acts of April 27, 1904 (33 Stat., 403), and March 2, 1913 (37 Stat., 723); see also note to section 418, Revised Statutes.

[1906, June 29. **Deposit of savings, Marine Corps.**] That hereafter enlisted men of the Marine Corps shall be entitled to deposit their savings with the United States, through any paymaster, in the some manner and under the same conditions as is now or may hereafter be provided for the enlisted men of the Navy: *Provided, however*, That the sums so deposited shall pass to the credit of the appropriation for pay of the Marine Corps.—(34 Stat., 579, chap. 3590.)

See act of February 9, 1889 (25 Stat., 657-658), as to deposit of savings by enlisted men of the Navy; see also notes to sections 1569, 1612, and 1621, Revised Statutes.

[1906, June 29. **Notaries public, practice before Departments.**] That section five hundred and fifty-eight of the Code of Law for the District of Columbia, relating to notaries public, be amended by adding at the end of said section the following: *Provided*, That the appointment of any person as such notary public, or the acceptance of his commission as such, or the performance of the duties thereunder, shall not disqualify or prevent such person from representing clients before any of the Departments of the United States Government in the District of Columbia or elsewhere, provided such person so appointed as a notary public who appears to practice or represent clients before any such Department is not otherwise engaged in Government employ and shall be admitted by the heads of such Departments to practice therein in accordance with the rules and regulations prescribed for other persons or attorneys who are admitted to practice therein: *And provided further*, That no notary public shall be authorized to take acknowledgments, administer oaths, certify papers, or perform any official acts in connection with matters in which he is employed as counsel, attorney, or agent or in which he may be in any way interested before any of the Departments aforesaid.”—(34 Stat., 622, chap. 3616.)

See section 190, Revised Statutes, and note thereto.

[1906, June 30. Deceased inmates, Saint Elizabeths Hospital; disposition of moneys.] All moneys belonging to deceased inmates of the Government Hospital for the Insane and deposited in the Treasury by the superintendent as agent prior to February twentieth, nineteen hundred and five, shall, if unclaimed by the legal heirs of such inmate within the period of five years from the date of the passage of this Act, be covered into the Treasury, and all moneys so deposited by the superintendent as agent after February twentieth, nineteen hundred and five, and belonging to inmates who have died since that time, or may hereafter die, shall likewise be covered into the Treasury unless claimed by his or her legal heirs within five years from the death of the inmate. And the superintendent of the Government Hospital for the Insane is hereby authorized and directed, under such regulations as may be prescribed by the Secretary of the Interior, to make diligent inquiry in every instance after the death of an inmate to ascertain the whereabouts of his or her legal heirs. Claims may be presented hereunder at any time, and when established by competent proof in any case more than five years after the death of an inmate shall be certified to Congress for consideration.—(34 Stat., 730–731, chap. 3914.)

See sections 4839 and 4843, Revised Statutes.  
The designation of the "Government Hospital  
for the Insane" was changed to "Saint

Elizabeth's Hospital" by act of July 1,  
1916 (39 Stat., 309).

[1906, June 30, sec. 2. Estimates for printing and binding; use of appropriations; envelopes excepted.] Hereafter there shall be submitted in the regular annual estimates to Congress under and as a part of the expenses for "Printing and binding," estimates for all printing and binding required by each of the Executive Departments, their bureaus and offices, and other Government establishments at Washington, District of Columbia, for each fiscal year; and after the fiscal year nineteen hundred and seven no appropriations other than those made specifically and solely for printing and binding shall be used for such purposes in any Executive Department or other Government establishment in the District of Columbia: *Provided*, That nothing in this section shall apply to stamped envelopes, or envelopes and articles of stationery other than letter heads and note heads, printed in the course of manufacture.—(34 Stat., 762, chap. 3914.)

See act of January 12, 1895, sections 27 and 96 (28 Stat., 604, 624).

[1906, June 30, sec. 5. Reports to Secretary of the Treasury, proceeds of public property, etc.] Hereafter the Secretary of the Treasury shall require, and it shall be the duty of the head of each Executive Department or other Government establishment to furnish him, within thirty days after the close of each fiscal year, a statement of all money arising from proceeds of public property of any kind or from any source other than the postal service, received by said head of Department or other Government establishment during the previous fiscal year for or on account of the public service, or in any other manner in the discharge of his official duties other than as salary or compensation, which was not paid into the General Treasury of the United States, together with a detailed account of all payments, if any, made from such funds during such year. All such statements, together with a similar statement applying to the Treasury Department, shall be transmitted by the Secretary of the



Treasury to Congress at the beginning of each regular session.—(34 Stat., 763, chap. 3914.)

See note to section 429, Revised Statutes, and see section 3692, Revised Statutes.

[1906, June 30, sec. 6. **Computation of annual or monthly compensation.**] Hereafter, where the compensation of any person in the service of the United States is annual or monthly the following rules for division of time and computation of pay for services rendered are hereby established: Annual compensation shall be divided into twelve equal installments, one of which shall be the pay for each calendar month; and in making payments for a fractional part of a month one-thirtieth of one of such installments, or of a monthly compensation, shall be the daily rate of pay. For the purpose of computing such compensation and for computing time for services rendered during a fractional part of a month in connection with annual or monthly compensation, each and every month shall be held to consist of thirty days, without regard to the actual number of days in any calendar month, thus excluding the thirty-first of any calendar month from the computation and treating February as if it actually had thirty days. Any person entering the service of the United States during a thirty-one day month and serving until the end thereof shall be entitled to pay for that month from the date of entry to the thirtieth day of said month, both days inclusive; and any person entering said service during the month of February and serving until the end thereof shall be entitled to one month's pay, less as many thirtieths thereof as there were days elapsed prior to date of entry: *Provided*, That for one day's unauthorized absence on the thirty-first day of any calendar month one day's pay shall be forfeited.—(34 Stat., 763, chap. 3914.)

See section 167, Revised Statutes, and note thereto.

[1906, June 30, sec. 9. **Appropriations and contracts; authority must be specific.**] No Act of Congress hereafter passed shall be construed to make an appropriation out of the Treasury of the United States, or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such Act shall in specific terms declare an appropriation to be made or that a contract may be executed.—(34 Stat., 764, chap. 3914.)

See section 3679, Revised Statutes.

[1906, June 30. **Nautical schools, Philippines, loan of vessel; detail of enlisted men; additional to authorized strength.**] That the Secretary of the Navy be, and he is hereby, authorized and empowered to loan temporarily to the government of the Philippine Islands, upon the written application of the Secretary of War, a vessel of the United States Navy, to be selected from such vessels as are not suitable or required for general service, together with such of her apparel, charts, books, and instruments of navigation as he may deem proper, said vessel to be used only by such nautical schools as are or may hereafter be maintained by said government of the Philippine Islands: *Provided*, That when such schools shall be abandoned, or when the interests of the naval service shall so require, such vessel, together with her apparel, charts, books, and instruments of navigation, shall be immediately restored to the custody of the Secretary of the Navy: *And provided further*, That when such loan is made to the

government of the Philippine Islands, the Secretary of the Navy is authorized to detail from the enlisted force of the Navy a sufficient number of men, not exceeding six for any vessel, as ship keepers, the men so detailed to be additional to the number of enlisted men allowed by law for the naval establishment, and in making details for this service preference shall be given to those men who have served twenty years or more in the Navy.—(34 Stat., 817, chap. 3937.)

See act of March 3, 1901 (31 Stat., 1440), as amended and reenacted; see also act of March 4, 1911 (36 Stat., 1353).

As to authorized enlisted strength of the Navy, see note to section 1417, Revised Statutes.

[1906, Dec. 11. **Certified checks in lieu of bonds, contracts for naval supplies.**] That the Secretary of the Navy may, in his discretion, accept, in lieu of the written guaranty required to accompany a proposal for naval supplies, and in lieu of the bond required for the faithful performance of a contract for furnishing such supplies, a certified check, payable to the order of the Secretary of the Navy, for from twenty-five to fifty per centum of the amount of such proposal or contract, the check to be held by the Secretary of the Navy until the requirements of the proposal or contract shall be complied with and as a guaranty for compliance with the same.—(34 Stat., 841, chap. 1.)

See section 3719, Revised Statutes; see also act of February 24, 1919, section 1320 (40 Stat., 1148), as to acceptance of Liberty or

other United States bonds in lieu of indemnity bonds.

[1907, Feb. 26, sec. 6. **Traveling expenses, naval officers, Light-House Establishment.**] That hereafter officers of the Army and Navy detailed for service in connection with the Light-House Establishment shall be paid their actual traveling expenses when traveling under orders on official duty to and from points which can not be conveniently reached by vessel or railroad.—(34 Stat., 997, chap. 1638.)

See sections 1566 and 4679, Revised Statutes, and notes thereto.

[1907, Mar. 2. **Army transports, accommodations available for naval personnel and supplies.**] When, in the opinion of the Secretary of War, accommodations are available, transportation may be provided for the officers, enlisted men, employees, and supplies of the Navy, the Marine Corps, and for members and employees of the Philippine and Hawaiian governments, officers of the War Department, Members of Congress, other officers of the Government while traveling on official business, and without expense to the United States, for the families of those persons herein authorized to be transported, and when accommodations are available, transportation may be provided for general passengers to the island of Guam, rates and regulations therefor to be prescribed by the Secretary of War.—(34 Stat., 1170-1171, chap. 2511.)

See sections 1135 and 3718, Revised Statutes, and notes thereto.

[1907, Mar. 2. **Refund of enlistment bounty.**] That the Secretary of the Navy may, in his discretion, require the whole or a part of the bounty allowed upon enlistment to be refunded in cases where men are discharged during the first year of enlistment by request, for inaptitude, as undesirable, or for disability not incurred in line of duty.—(34 Stat., 1176, chap. 2512.)

See identical provision contained in act of June 29, 1906 (34 Stat., 553), and note thereto; see also provision for refund in

cases of men discharged within six months of enlistment, contained in act of June 29, 1906 (34 Stat., 556).



[1907, Mar. 2. Open-market purchases.] That hereafter the purchase of supplies and the procurement of services for all branches of the naval service may be made in open market in the manner common among business men, without formal contract or bond, when the aggregate of the amount required does not exceed five hundred dollars, and when, in the opinion of the proper administrative officers, such limitation of amount is not designed to evade purchase under formal contract or bond, and equally or more advantageous terms can thereby be secured.—(34 Stat., 1193, chap. 2512.)

See sections 3709, 3718, and 3721, Revised Statutes, and notes thereto; and see act of June 17, 1910, section 4 (36 Stat., 531).

[1907, Mar. 2. Report to Congress, proposed repairs on vessels.] That the Secretary of the Navy shall hereafter report to Congress, at the commencement of each regular session, the number of vessels and their names upon which any repairs or changes are proposed which in any case shall amount to more than two hundred thousand dollars, the extent of such proposed repairs or changes, and the amounts estimated to be needed for the same in each vessel; and expenditures for such repairs or changes so limited shall be made only after appropriations in detail are provided for by Congress.—(34 Stat., 1195, chap. 2512.)

See note to section 1538, Revised Statutes, and see act of March 3, 1909 (35 Stat., 769).  
See also section 429, Revised Statutes, and note thereto.

By act of August 29, 1916 (39 Stat., 605), the statutory limit of \$200,000 for repairs and changes to capital ships, as provided in this act, was changed to \$300,000.

[1907, Mar. 2. Marines detailed as cooks.] PAY, MARINE CORPS. \* \* \* *Provided*, That hereafter privates regularly detailed and serving as cooks, shall receive, in addition to the pay otherwise allowed by law, the following: First-class cooks, ten dollars per month; second-class cooks, eight dollars; third-class cooks, seven dollars; and fourth-class cooks, five dollars.—(34 Stat., 1200, chap. 2512.)

See note to section 1612, Revised Statutes.

[1907, Mar. 2. Retirement of enlisted men, Navy and Marine Corps.] That when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, and that said allowances shall be as follows: Nine dollars and fifty cents per month in lieu of rations and clothing and six dollars and twenty-five cents per month in lieu of quarters, fuel, and light: *Provided*, That in computing the necessary thirty years' time all service in the Army, Navy, and Marine Corps shall be credited.

SEC. 2. That all Acts and parts of Acts, so far as they conflict with the provisions of this Act, are hereby repealed.—(34 Stat., 1217–1218, chap. 2515.)

See act of March 3, 1899, section 17 (30 Stat., 1008), and laws noted thereunder; and see

as to enlisted men of the Marine Corps, act of August 30, 1890 (26 Stat., 504).

[1907, Mar. 2. Wearing of badges, military societies.] That the distinctive badge adopted by the Army and Navy Union of the United States may be worn, in their own right, upon all public occasions of ceremony by officers and enlisted men of the Army and Navy of the United States who are members of said organization.—(34 Stat., 1423, Res. No. 18.)

See note to section 1407, Revised Statutes.

[1908, Jan. 15. Printing and binding; numbering of documents; title; printing of departmental edition.] That publications ordered printed by Congress, or either House thereof, shall be in four series, namely: One series of reports made by the committees of the Senate, to be known as Senate reports; one series of reports made by the committees of the House of Representatives, to be known as House reports; one series of documents other than reports of committees, the orders for printing which originate in the Senate, to be known as Senate documents, and one series of documents other than committee reports, the orders for printing which originate in the House of Representatives, to be known as House documents. The publications in each series shall be consecutively numbered, the numbers in each series continuing in unbroken sequence throughout the entire term of a Congress, but the foregoing provisions shall not apply to the documents printed for the use of the Senate in executive session: *Provided*, That of the "usual number," the copies which are intended for distribution to State and Territorial libraries and other designated depositories of all annual or serial publications originating in or prepared by an Executive Department, bureau, office, commission, or board shall not be numbered in the document or report series of either House of Congress, but shall be designated by title and bound as hereinafter provided, and the departmental edition, if any, shall be printed concurrently with the "usual number:" *And provided further*, That hearings of committees may be printed as Congressional documents only when specifically ordered by Congress or either House thereof.

SEC. 2. That in the binding of Congressional documents and reports for distribution by the superintendent of documents to State and Territorial libraries and other designated depositories, every publication of sufficient size on any one subject shall hereafter be bound separately and receive the title suggested by the subject of the volume, and the others shall be distributed in unbound form as soon as printed. The Public Printer shall supply the superintendent of documents sufficient copies of those publications distributed in unbound form, to be bound and distributed to the State and Territorial libraries and other designated depositories for their permanent files. The library edition, as well as all other bound sets of Congressional numbered documents and reports, shall be arranged in volumes and bound in the manner directed by the Joint Committee on Printing.—(35 Stat., 565–566, Res. No. 3.)

See act of January 12, 1895 (28 Stat., 601–624).

[1908, Apr. 28. Regattas or marine parades; regulations; enforcement.] That the Secretary of Commerce and Labor is hereby authorized and empowered in his discretion to issue from time to time regulations, not contrary to law, to promote the safety of life on navigable waters during regattas or marine parades.

SEC. 2. That to enforce such regulations the Secretary of Commerce and Labor may detail any public vessel in the service of that Department and make use of any private vessel tendered gratuitously for the purpose, or upon the request of the Secretary of Commerce and Labor the head of any other Department may enforce the regulations issued under this Act by means of any public vessel of such Department and of any private vessel tendered gratuitously for the purpose.



SEC. 3. That the authority and power bestowed upon the Secretary of Commerce and Labor by sections one and two may be transferred for any special occasion to the head of another Department by the President whenever in his judgment such transfer is desirable.

SEC. 4. That for any violation of regulations issued pursuant to this Act the following penalties shall be incurred:

(a) A licensed officer shall be liable to suspension or revocation of license in the manner now prescribed by law for incompetency or misconduct.

(b) Any person in charge of the navigation of a vessel other than a licensed officer shall be liable to a penalty of five hundred dollars.

(c) The owner of a vessel (including any corporate officer of a corporation owning the vessel) actually on board shall be liable to a penalty of five hundred dollars, unless the violation of regulations shall have occurred without his knowledge.

(d) Any other person shall be liable to a penalty of two hundred and fifty dollars.

The Secretary of Commerce and Labor is hereby authorized and empowered to mitigate or remit any penalty herein provided for in the manner prescribed by law for the mitigation or remission of penalties for violation of the navigation laws.—(35 Stat., 69, chap. 151.)

See section 4233, Revised Statutes, and laws noted thereunder.

The designation of the "Secretary of Commerce and Labor" was changed to "Secretary of Labor" by act of March 4, 1913 (37 Stat., 736).

[1908, May 13. Commissioned officers, pay and allowances.] Hereafter all commissioned officers of the active list of the Navy shall receive the same pay and allowances according to rank and length of service.—(35 Stat., 127, chap. 166.)

This provision was repeated in identical language in the act of August 29, 1916 (39 Stat., 581). In the act of May 13, 1908, it was restricted by a subsequent provision (35 Stat., 128), that "the pay and allowances of chaplains in the Navy shall in no case exceed that provided for lieutenant-commanders." This limitation was omitted in the act of August 29, 1916, the effect of which was to give chaplains the same pay and allowances as other officers of the Navy of corresponding rank and length of

service. (See note to section 1556, Revised Statutes.)

As to allowances of officers of the Navy, see section 1558, Revised Statutes, and note thereto.

For laws and decisions relating to pay of officers of the Navy, see section 1556, Revised Statutes, and note thereto.

For laws and decisions relating to pay and allowances of officers of the Marine Corps, see section 1612, Revised Statutes, and note thereto.

[1908, May 13. Annual pay of grades, commissioned officers.] The annual pay of each grade shall be as follows: For Admiral, thirteen thousand five hundred dollars; rear-admiral, first nine, eight thousand dollars; rear-admiral, second nine, or commodore, six thousand dollars; captain, four thousand dollars; commander, three thousand five hundred dollars; lieutenant-commander, three thousand dollars; lieutenant, two thousand four hundred dollars; lieutenant, junior grade, two thousand dollars; ensign, one thousand seven hundred dollars.—(35 Stat., 127-128, chap. 166.)

See note to section 1556, Revised Statutes.

[1908, May 13. Longevity pay, commissioned officers, maximum pay of grades.] There shall be allowed and paid to each commissioned officer below

the rank of rear-admiral ten per centum of his current yearly pay for each term of five years service in the Army, Navy and Marine Corps. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law: *Provided*, That the annual pay of captain shall not exceed five thousand dollars per annum; of commander, four thousand five hundred dollars per annum; and of lieutenant-commander, four thousand dollars per annum.—(35 Stat., 128, chap. 166.)

See note to section 1556, Revised Statutes.

[1908, May 13. **Additional pay for sea duty and shore duty beyond seas.**] All officers on sea duty and all officers on shore duty beyond the continental limits of the United States shall while so serving receive ten per centum additional of their salaries and increase as above provided, and such increase shall commence from the date of reporting for duty on board ship or the date of sailing from the United States for shore duty beyond the seas or to join a ship in foreign waters.—(35 Stat., 128, chap. 166.)

See notes to sections 1556 and 1571, Revised Statutes; and see section 1588, Revised Statutes, and note thereto, as to pay of retired officers.

[1908, May 13. **Pay of midshipmen.**] The pay of midshipmen shall hereafter be six hundred dollars per annum while at the Naval Academy, and one thousand four hundred dollars per annum after graduation from the Naval Academy.—(35 Stat., 128, chap. 166.)

See note to section 1556, Revised Statutes; and see note to section 1520, Revised Statutes, as to academic course of midshipmen.

[1908, May 13. **Pay of warrant officers and mates.**] The pay of all warrant officers and mates is hereby increased twenty-five per centum, and all paymasters' clerks shall, while on duty, receive the same pay and allowances as warrant officers of like length of service in the Navy.—(35 Stat., 128, chap. 166.)

See note to section 1556, Revised Statutes. The grade of paymasters' clerks was abolished and the grades of acting pay clerk,	pay clerk, and chief pay clerk created, by act of March 3, 1915 (38 Stat., 942), noted under section 1386, Revised Statutes.
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[1908, May 13. **Pay of enlisted men.**] The pay of all active and retired enlisted men of the Navy is hereby increased ten per centum.—(35 Stat., 128, chap. 166.)

See note to section 1569, Revised Statutes.

[1908, May 13. **Chiefs of bureaus.**] That the pay and allowances of chiefs of bureaus in the Navy Department shall be the highest pay of the grade to which they belong, and not below that of rear-admiral of the lower nine.—(35 Stat., 128, chap. 166.)

See notes to sections 421 and 1565, Revised Statutes.	By act of July 1, 1913 (40 Stat., 717), chiefs of bureaus in the Navy Department are to receive the same pay and allowances as chiefs of bureaus in the War Department.
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[1908, May 13. **Pay of chaplains.**] That the pay and allowances of chaplains in the Navy shall in no case exceed that provided for lieutenant-commanders.—(35 Stat., 128, chap. 166.)



This provision was superseded by the act of August 29, 1916 (39 Stat., 581), which re-enacted the first clause of this act as above	set forth, without any limitation upon the pay and allowances of chaplains. See note to section 1556, Revised Statutes.
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**[1908, May 13. Additional pay allowed aids.]** Aids to rear-admirals embraced in the nine lower numbers of that grade shall each receive one hundred and fifty dollars additional per annum, and aids to all other rear-admirals, two hundred dollars additional per annum each.—(35 Stat., 128, chap. 166.)

See note to section 1556, Revised Statutes, "Additional pay for special duty."

**[1908, May 13. Retirement of officers, 30 years' service.]** When an officer of the Navy has been thirty years in the service, he may, upon his own application, in the discretion of the President, be retired from active service and placed upon the retired list with three-fourths of the highest pay of his grade.—(35 Stat., 128, chap. 166.)

See generally, sections 1443-1465, Revised Statutes, as to retirement of officers, and sections 1588-1595, Revised Statutes, as to pay and allowances of retired officers. As to retired officers, Marine Corps, see section 1622, Revised Statutes, and note thereto.	By act of May 30, 1908 (35 Stat., 501), it was provided that "in computing the pay of retired officers of the Navy, the ten per cent additional pay allowed for sea duty or for shore duty beyond the continental limits of the United States shall not be included, and the pay of commodore shall be the same in all respects as that of rear-admiral, second nine."
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**[1908, May 13. Chief of bureau, subsequently retired.]** That any officer of the Navy who is now serving or shall hereafter serve as chief of a bureau in the Navy Department, and shall subsequently be retired, shall be retired with the rank, pay and allowances authorized by law for the retirement of such bureau chief.—(35 Stat., 128, chap. 166.)

See note to section 421, Revised Statutes, under "VI. Retirement of Chiefs of Bureaus," subheading, "Rank on retirement	of former bureau chief who has returned to general service."
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**[1908, May 13. Pay of officers and men on retired list.]** The pay of all commissioned, warrant and appointed officers and enlisted men of the Navy now on the retired list shall be based on the pay, as herein provided for, of commissioned, warrant and appointed officers and enlisted men of corresponding rank and service on the active list.—(35 Stat., 128, chap. 166.)

See sections 1588-1595, Revised Statutes, and notes thereto, as to pay of retired officers. See section 1569, Revised Statutes, as to pay of enlisted men.	See act of May 30, 1908 (35 Stat., 501), modifying this provision, quoted above under "Retirement of officers, 30 years' service."
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**[1908, May 13. Pay to continue until changed by Congress.]** All pay herein provided shall remain in force until changed by Act of Congress.—(35 Stat., 128, chap. 166.)

See note to section 1569, Revised Statutes, as to effect of this provision.

**[1908, May 13. Present pay not reduced.]** Nothing herein shall be construed so as to reduce the pay or allowances now authorized by law for any commissioned, warrant or appointed officer or any enlisted man of the active or retired lists of the Navy, and all laws inconsistent with this provision are hereby repealed.—(35 Stat., 128, chap. 166.)

**[1908, May 13. Nurse corps, female.]** The nurse corps (female) of the United States Navy is hereby established, and shall consist of one superintend-

ent, to be appointed by the Secretary of the Navy, who shall be a graduate of a hospital training school having a course of instruction of not less than two years, whose term of office may be terminated at his discretion, and of as many chief nurses, nurses, and reserve nurses as may be needed: *Provided*, That all nurses in the nurse corps shall be appointed or removed by the Surgeon-General, with the approval of the Secretary of the Navy, and that they shall be graduates of hospital training schools having a course of instruction not less than two years. The appointment of superintendent, chief nurses, nurses, and reserve nurses shall be subject to an examination as to their professional, moral, mental, and physical fitness, and that they shall be eligible for duty at naval hospitals and on board of hospital and ambulance ships and for such special duty as may be deemed necessary by the Surgeon-General of the Navy. Reserve nurses may be assigned to active duty when the necessities of the service demand, and when on such duty shall receive the pay and allowances of nurses: *Provided*, That they shall receive no compensation except when on active duty. The superintendent, chief nurses, and nurses shall respectively receive the same pay, allowances, emoluments, and privileges as are now or may hereafter be provided by or in pursuance of law for the nurse corps (female) of the Army.—(35 Stat., 146, chap. 166.)

See act of August 29, 1916 (39 Stat., 587-592), creating a "Naval Reserve Force."

See note to section 1556, Revised Statutes, as to pay and allowances of nurses.

[1908, May 13. Property returns, storekeeper at Naval Academy.] That hereafter the storekeeper at the Naval Academy, authorized by section fifteen hundred and twenty-seven of the Revised Statutes, shall render quarterly returns of property to the Chief of the Bureau of Supplies and Accounts, under such regulations as the Secretary of the Navy may prescribe. A full report shall be made annually of receipts and expenditures by the Chief of the Bureau of Supplies and Accounts to the Secretary of the Navy: *And provided further*, That an inspection of the storekeeper's accounts shall be made quarterly by the general inspector of the Pay Corps, with such recommendation as he may deem necessary, to the Chief of the Bureau of Supplies and Accounts.—(35 Stat., 153, chap. 166.)

See note to section 1527, Revised Statutes.

The designation of the "Pay Corps" was changed to "Supply Corps" by act of July 11, 1919 (41 Stat., 147).

[1908, May 13. Navy bands not to compete with civilians.] Navy bands or members thereof, other than the United States Naval Academy band at Annapolis, Maryland, shall not receive remuneration for furnishing music outside the limits of military posts, when the furnishing of such music places them in competition with local civilian musicians.—(35 Stat., 153, chap. 166.)

See act of June 3, 1916, section 35 (39 Stat., 188), as to restrictions upon enlisted men, generally, competing with civilians; and act August 29, 1916 (39 Stat., 612), as to restrictions upon Marine Band.

See note to section 1511, Revised Statutes, as to Naval Academy band.

See section 1613, Revised Statutes, and note thereto, as to Marine Band.

"Navy bands" not inclusive of Marine Band.—This enactment was held not applicable to the Marine Band, in an opinion of the Attorney General dated November 9, 1908. (27 Op. Atty. Gen., 90. See sec. 1613, R. S.)

[1908, May 13. Monitors, naming of.] So much of the act entitled "An act making appropriations for the naval service for the fiscal year ending June



thirtieth, eighteen hundred and ninety-nine, and for other purposes," approved May fourth, eighteen hundred and ninety-eight, as provides that monitors owned by the United States shall be named for the States, and shall not be named for any city, place, or person until the names of the States shall have been exhausted, is hereby repealed, and monitors now owned by the United States or hereafter built may be named as the President may direct.—(35 Stat., 159, chap. 166.)

See act of May 4, 1898 (30 Stat., 390), and see note to section 1531, Revised Statutes.

[1908, May 20. Gifts to vessels; acceptance and care of; appropriation chargeable.] That the Secretary of the Navy is hereby authorized to accept and care for such gifts in the form of silver, colors, books, or other articles of equipment or furniture as, in accordance with custom, may be presented to vessels of the Navy by States, municipalities, or otherwise. The necessary expense incident to the care and preservation of gifts of this character which have been or may hereafter be accepted shall be defrayed from the appropriation "equipment of vessels."—(35 Stat., 171, chap. 182.)

See section 418, Revised Statutes, and note thereto.

[1908, May 22, sec. 4. Annual report, traveling expenses of employees.] It shall be the duty of the head of each Executive Department and other Government establishment at Washington to submit to Congress at the beginning of each regular session a statement showing in detail what officers or employees (other than special agents, inspectors, or employees, who in the discharge of their regular duties are required to constantly travel) of such Executive Department or other Government establishment have traveled on official business from Washington to points outside of the District of Columbia during the preceding fiscal year, giving in each case the full title of the official or employee, the destination or destinations of such travel, the business or work on account of which the same was made, and the total expense to the United States charged in each case.—(35 Stat., 244, chap. 186.)

See section 429, Revised Statutes, and note thereto.

[1908, May 27. Deceased persons, naval service; settlement of accounts; payment of funeral expenses to claimants.] Hereafter, in the settlement of the accounts of deceased officers or enlisted men of the Navy and Marine Corps, where the amount due the decedent's estate is less than five hundred dollars and no demand is presented by a duly appointed legal representative of the estate, the accounting officers may allow the amount found due to the decedent's widow or legal heirs in the following order of precedence: First, to the widow; second, if the decedent left no widow, or widow be dead at time of settlement, then to the children or their issue, per stirpes; third, if no widow or descendants, then to the father and mother in equal parts, provided father has not abandoned the support of his family, in which case to the mother alone; fourth, if either the father or mother be dead, then to the one surviving; fifth, if there be no widow, child, father, or mother at the date of settlement, then to the brothers and sisters and children of deceased brothers and sisters, per stirpes: *Provided*, That this Act shall not be so construed as to prevent payment from the amount

due the decedent's estate of funeral expenses, provided a claim therefor is presented by the person or persons who actually paid the same before settlement by the accounting officers.—(35 Stat., 373, chap. 200.)

See laws noted under section 289, Revised Statutes.

See act of March 29, 1918 (40 Stat., 499), as to disposition of money and effects of deceased persons in naval service.

See section 1587, Revised Statutes, as to funeral expenses.

[1908, May 27. Navy mail clerks and assistants.] That enlisted men of the United States Navy may, upon selection by the Secretary of the Navy, be designated by the Post-Office Department as "navy mail clerks" and "assistant navy mail clerks," who shall be authorized to receive and open all pouches and sacks of mail addressed to naval vessels, to make proper delivery of such mail, to receive matter for transmission in the mails, to receipt for registered matter (keeping an accurate record thereof), to keep and have for sale an adequate supply of postage stamps, to make up and dispatch mails, and other postal duties as may be authorized by the Postmaster-General, all in accordance with such rules and regulations as may be prescribed by the commanding officer of the vessel or of the squadron to which the vessel is attached. Each mail clerk and assistant mail clerk shall take the oath of office prescribed for employees of the postal service and shall give bond to the United States in the sum of one thousand dollars for the faithful performance of his duties as such clerk, and shall be amenable in all respects to naval discipline, except that, as to their duties as such clerks, the commanding officers of the vessels upon which they are stationed shall require them to be governed by the postal laws and regulations of the United States. Whenever necessity arises therefor any assistant mail clerk may be required by the commanding officer of the vessel upon which he is stationed or of the squadron to which said vessel is attached to perform the duties of mail clerk. They shall receive as compensation for such services from the Navy Department, in addition to that paid them of the grade to which they are assigned, such sum in the case of mail clerks not to exceed five hundred dollars per annum, and in that of assistant mail clerks not to exceed three hundred dollars per annum, as may be determined and allowed by the Navy Department.—(35 Stat., 417-418, chap. 206.)

Amendments to this provision were made by various subsequent enactments, as follows:

"That every Navy mail clerk and assistant Navy mail clerk shall give bond to the United States in such penal sum as the Postmaster General may deem sufficient for the faithful performance of his duties as such clerk." (Act Aug. 24, 1912, sec. 3, 37 Stat., 554, chap. 389.)

"That the provision in the Act making appropriations for the service of the Post Office Department, approved May twenty-seventh, nineteen hundred and eight, authorizing the designation of enlisted men of the Navy as navy mail clerks and assistant navy mail clerks, be amended to include in such designation enlisted men of the Marine Corps, by the insertion in the said provision, after the words 'United States Navy,' the words 'or Marine Corps.'" (Act of Aug. 24, 1912, sec. 11, 37 Stat., 560, chap. 389.)

"That the provisions of the Act of May twenty-seventh, nineteen hundred and eight (Thirty-fifth Statutes, pages four hundred and seventeen and four hundred and eighteen), as amended by the Act of August twenty-fourth, nineteen hundred and twelve (Thirty-seventh Statutes, page five hundred and sixty), are hereby extended to authorize the designation of enlisted men of the Navy or Marine Corps as Navy mail clerks and assistant Navy mail clerks with expeditionary forces on shore." (Act Mar. 4, 1917, 39 Stat., 1188, chap. 180.)

"That the provisions of the Act of May twenty-seventh, nineteen hundred and eight (Thirty-fifth Statutes, pages four hundred and seventeen and four hundred and eighteen), as amended by the Act of August twenty-fourth, nineteen hundred and twelve (Thirty-seventh Statutes, page five hundred and sixty), and as amended by the Act of March fourth, nineteen hun-



dred and seventeen (Thirty-ninth Statutes, page eleven hundred and eighty-eight), are hereby extended to authorize the designation of enlisted men of the Navy or Marine Corps as Navy mail clerks and assistant Navy mail clerks for duty at stations and shore establishments under the jurisdiction of the Navy Department where the services of such mail clerks and assistant mail clerks are necessary." (Act July 1, 1918, 40 Stat., 718, chap. 114.)

See note to sections 391-392, Revised Statutes, as to oaths of mail clerks and assistants; see

note to section 1383, Revised Statutes, on general subject of bonds; see note to section 1569, Revised Statutes, under "8. Additional pay for special duty, etc.," and see note to section 236, Revised Statutes, under V, (A), "Secretary of the Navy," subheading, "The designation of Navy mail clerks." See also section 388, Revised Statutes, and note thereto.

By section 403, Revised Statutes, it is provided that "all bonds taken \* \* \* by the Post-Office Department shall be made to \* \* \* the United States of America."

[1908, May 28, sec. 2. Alaska coal; preference right to purchase for Army and Navy.] The the United States shall, at all times, have the preference right to purchase so much of the product of any mine or mines opened upon the lands sold under the provisions of this Act as may be necessary for the use of the Army and Navy, and at such reasonable and remunerative price as may be fixed by the President; but the producers of any coal so purchased who may be dissatisfied with the price thus fixed shall have the right to prosecute suits against the United States in the Court of Claims for the recovery of any additional sum or sums they may claim as justly due upon such purchase.—(35 Stat., 424, chap. 211.)

See section 3711, Revised Statutes, and act of October 20, 1914 (38 Stat., 741).

This section was part of an act "to encourage the development of coal deposits in the Territory of Alaska."

[1908, May 30. Pay of retired officers, Navy.] In computing the pay of retired officers of the Navy, the ten per cent additional pay allowed for sea duty or for shore duty beyond the continental limits of the United States shall not be included, and the pay of commodore shall be the same in all respects as that of rear-admiral, second nine.—(35 Stat., 501, chap. 227.)

See act of May 13, 1908 (35 Stat., 128), and section 1588, Revised Statutes.

[1908, May 30. Estimates of employees to be paid from lump sum appropriations; specific authorization required.] The Secretary of the Navy is authorized to employ and pay, during the fiscal year nineteen hundred and nine, out of the lump appropriations of the several bureaus of the Navy Department, such classified civil-service employees as may be necessary to properly perform the clerical, drafting, inspection, messenger, and other classified work at the several navy-yards and stations: *Provided*, That the Secretary of the Navy shall submit to Congress detailed estimates for all such classified civil-service employees that may be required to be employed during the fiscal year nineteen hundred and ten, and annually thereafter, and no such classified civil-service employees shall be employed during the fiscal year nineteen hundred and ten, or in any subsequent fiscal year, and paid from such lump appropriations except under specific authorization granted by law from year to year based upon estimates as herein required.—(35 Stat., 505, chap. 227.)

See notes to sections 416 and 1545, Revised Statutes; see also acts of August 5, 1882, section 4 (22 Stat., 255-256), and March 3, 1909 (35 Stat., 754-755).

The amount to be expended from lump appropriations for personal services at navy yards and stations is limited by provisions in the annual naval appropriation acts under appropriations for the various bu-

reaus of the Navy Department. (See act of June 4, 1920, 41 Stat., 816-820, 823, 826, 827.) Authority for employment of personal services in various bureaus of the Navy Department from lump appropriations for the naval service is contained in the annual legislative, executive, and judicial appropriation acts. (See act Mar. 3, 1921, 41 Stat., 1285, 1286, 1287.)

[1909, Feb. 16. Deck courts, jurisdiction, by whom ordered.] That courts for the trial of enlisted men in the Navy and Marine Corps for minor offenses now triable by summary court-martial may be ordered by the commanding officer of a naval vessel, by the commandant of a navy-yard or station, by a commanding officer of marines, or by higher naval authority.—(35 Stat., 621, chap. 131.)

As to designation of the courts herein provided for, as "deck courts," see section 2 of this act, set forth below.

Amendment to this section was made by act of August 29, 1916 (39 Stat., 586), which provided that "hereafter all officers of the Navy and Marine Corps who are authorized to order either general or summary courts-martial may order deck courts upon enlisted men under their command," and that, when empowered by the Secretary of the Navy to order summary courts-martial, "the commanding officer of a naval hospital or hospital ship shall be empowered to order such courts and deck courts \* \* \* upon all enlisted men of the naval service attached thereto, whether for duty or as patients." (As to officers authorized to order general and summary courts-martial, see sec. 1624, R. S., arts.

26 and 38, and notes thereto. As to jurisdiction of summary courts-martial, see sec. 1624, R. S., art. 26.)

See section 7 of this act, set forth below, as to objection by accused to trial by deck court. The act of August 29, 1916 (39 Stat., 586), further provided that "when a force of marines is embarked on a naval vessel, or vessels, as a separate organization, not a part of the authorized complement thereof, the authority and powers of the officers of such separate organization of marines shall be the same as though such organization were serving at a navy yard on shore, but nothing herein shall be construed as impairing the paramount authority of the commanding officer of any naval vessel over the vessel under his command and all persons embarked thereon."

[1909, Feb. 16, sec. 2. Constitution of deck courts; oaths; punishments.] That such courts shall be known as "deck courts," and shall consist of one commissioned officer only, who, while serving in such capacity shall have power to administer oaths, to hear and determine cases, and to impose, in whole or in part, the punishments prescribed by article thirty of the Articles for the Government of the Navy: *Provided*, That in no case shall such courts adjudge discharge from the service or adjudge confinement or forfeiture of pay for a longer period than twenty days.—(35 Stat., 621, chap. 131.)

For "article thirty of the Articles for the Government of the Navy," see section 1624, Revised Statutes, article 30; and see note thereto for amendatory statutes.

By act of October 6, 1917 (40 Stat., 393-394), commissioned officers of certain auxiliary naval forces were authorized to serve on

naval courts-martial and deck courts in time of war or emergency. (See that act and amendments noted thereunder.)

See section 183, Revised Statutes, and note thereto, as to authority of naval officers to administer oaths.

[1909, Feb. 16, sec. 3. Recorder of deck court.] That any person in the Navy under command of the officer by whose order a deck court is convened may be detailed to act as recorder thereof.—(35 Stat., 621, chap. 131.)

[1909, Feb. 16, sec. 4. Deck courts, reviewing authority, mitigation of sentence.] That the officer within whose command a deck court is sitting shall have full power as reviewing authority to remit or mitigate, but not to commute, any sentence imposed by such court; but no sentence of a deck court shall be carried into effect until it shall have been so approved or mitigated, and such officer shall have power to pardon any punishment such court may adjudge.—(35 Stat., 621, chap. 131.)

See notes to section 1624, Revised Statutes, under articles 32-33, and 53-54; see also note to Constitution, Article II, section 2, clause 1, under "III. Power to pardon

offenses against United States;" and see sections 6, 9, and 17 of this act, set forth below.



[1909, Feb. 16, sec. 5. Deck courts, regulations of the President.] That the courts hereby authorized shall be governed in all details of their constitution, powers, and procedure, except as herein provided, by such rules and regulations as the President may prescribe.—(35 Stat., 621, chap. 131.)

See sections 161 and 1547, Revised Statutes, and notes thereto, on general subject of regulations.

See section 1624, Revised Statutes, articles 34 and 42-45, as to the proceedings of summary and general courts-martial.

[1909, Feb. 16, sec. 6. Records of deck courts; review by Judge Advocate General; action of Secretary.] That the records of the proceedings of the courts hereby authorized shall contain such matters only as are necessary to enable the reviewing authorities to act intelligently thereon, except that if the party accused demands it within thirty days after the decision of the deck court shall become known to him, the entire record or so much as he desires shall be sent to the reviewing authority. Such records, after action thereon by the convening authority, shall be forwarded directly to, and shall be filed in, the Office of the Judge-Advocate-General of the Navy, where they shall be reviewed, and, when necessary, submitted to the Secretary of the Navy for his action.—(35 Stat., 621, chap. 131.)

See section 1624, Revised Statutes, articles 34 and 52, as to records of courts-martial; and see laws noted below, under section 14 of this act, as to the disposal of useless papers.

See act of June 8, 1880 (21 Stat., 164), as to the duties of the Judge Advocate General. See sections 4, 9, and 17 of this act, as to execution of deck court sentences.

[1909, Feb. 16, sec. 7. Objection to trial by deck court.] That no person who objects thereto shall be brought to trial before a deck court. Where such objection is made by the person accused, trial shall be ordered by summary or by general court-martial, as may be appropriate.—(35 Stat., 621, chap. 131.)

As to jurisdiction of deck courts, see section 1, of this act, set forth above; as to summary

and general courts-martial, see section 1624, Revised Statutes, articles 26 and 38.

[1909, Feb. 16, sec. 8. Punishments by summary courts-martial, etc.; use of irons.] That the courts authorized to impose the punishments prescribed by article thirty of the Articles for the Government of the Navy may adjudge either a part or the whole, as may be appropriate, of any one of the punishments therein enumerated: *Provided*, That the use of irons, single or double, is hereby abolished, except for the purpose of safe custody or when part of a sentence imposed by a general court-martial.—(35 Stat., 621, chap. 131.)

Article thirty of the Articles for the Government of the Navy, which is modified by this section, is article 30 of section 1624, Revised Statutes, prescribing punishments which may be imposed by summary courts-martial. By article 35 of section 1624, Revised Statutes, general courts-martial were empowered to adjudge any punishment which a summary court-martial is

authorized to inflict; by section 2 of this act, set forth above, deck courts were also authorized to impose such punishments, with certain limitations.

The use of irons in the Navy had previously been restricted by a clause in the act of May 13, 1908 (35 Stat., 132), superseded by this section.

[1909, Feb. 16, sec. 9. Secretary of the Navy; action on proceedings and sentences of courts-martial.] That the Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court-martial convened by his order or by that of any officer of the Navy or Marine Corps.—(35 Stat., 621, chap. 131.)

See notes to section 1624, Revised Statutes, under articles 32-33 and 53-54; see also act of June 8, 1880 (21 Stat., 164), as to review of court-martial proceedings by the Judge Advocate General; and see sections

4, 6, and 17 of this act as to sentences of deck courts.

See act of April 9, 1906, section 3 (34 Stat., 104-105), as to review of courts-martial in the cases of midshipmen.

[1909, Feb. 16, sec. 10. General courts-martial, by whom convened.] That general courts-martial may be convened by the President, by the Secretary of the Navy, by the commander in chief of a fleet or squadron, and by the commanding officer of any naval station beyond the continental limits of the United States.—(35 Stat., 621, chap. 131.)

This section superseded article 38 of section 1624, Revised Statutes; see note to that article for later law on the subject.

[1909, Feb. 16, sec. 11. Witnesses, naval courts-martial and courts of inquiry; compulsory process.] That a naval court-martial or court of inquiry shall have power to issue like process to compel witnesses to appear and testify which United States courts of criminal jurisdiction within the State, Territory, or District where such naval court shall be ordered to sit may lawfully issue.—(35 Stat., 621-622, chap. 131.)

See next section of this act, set forth below, restricting operation of this section; and see section 16, below, as to depositions.

See notes to section 1624, Revised Statutes, articles 42 and 57; see also sections 877-881,

Revised Statutes, and notes thereto; and see note to Constitution, Sixth Amendment, under "VII. Compulsory process for obtaining witnesses."

[1909, Feb. 16, sec. 12. Refusal of witness to appear or testify; punishment; fees; self-incrimination.] That any person duly subpoenaed to appear as a witness before a general court-martial or court of inquiry of the Navy, who willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or produce documentary evidence, which such person may have been legally subpoenaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States; and it shall be the duty of the United States District Attorney, on the certification of the facts to him by such naval court to file an information against and prosecute the persons so offending, and the punishment of such person, on conviction, shall be a fine of not more than five hundred dollars or imprisonment not to exceed six months, or both, at the discretion of the court: *Provided*, That this shall not apply to persons residing beyond the State, Territory, or District in which such naval court is held, and that the fees of such witnesses and his mileage at the rates provided for witnesses in the United States district court for said State, Territory, or District shall be duly paid or tendered said witness, such amounts to be paid by the Bureau of Supplies and Accounts out of the appropriation for compensation of witnesses: *Provided further*, That no witness shall be compelled to incriminate himself or to answer any question which may tend to incriminate or degrade him.—(35 Stat., 622, chap. 131.)

As to witness fees, see sections 848-851, Revised Statutes, and notes thereto.

As to refusal of witness to testify, see articles 42 and 57, section 1624, Revised Statutes.

As to protection of witness against self-incrimination, see note to Constitution, Fifth Amendment, under "III. Compelling person to be witness against himself."

As to depositions of witnesses, see section 16 of this act, set forth below.

[1909, Feb. 16, sec. 13. Naval prisoners, allowances to; clothing and gratuity on discharge.] That persons confined in prisons in pursuance of the sentence



of a naval court-martial shall, during such confinement, be allowed a reasonable sum, not to exceed three dollars per month, for necessary prison expenses, and shall upon discharge be furnished with suitable civilian clothing and paid a gratuity, not to exceed twenty-five dollars: *Provided*, That such allowances shall be made in amounts to be fixed by, and in the discretion of, the Secretary of the Navy and only in cases where the prisoners so discharged would otherwise be unprovided with suitable clothing or without funds to meet their immediate needs.—(35 Stat., 622, chap. 131.)

See act of March 3, 1909 (35 Stat., 756), providing for clothing and transportation to be furnished discharged naval prisoners.

Prior to this enactment it was held by the Comptroller of the Treasury that naval prisoners under sentence of court-martial were entitled, prior to expiration of enlistment, to credit for pay coming due and not

forfeited by the sentence of the court; but that after expiration of enlistment, although not then discharged, no pay could accrue or be credited to such prisoners. (See 9 Comp. Dec., 257, noted under sec. 1422, R. S., "Detention of enlisted men under court-martial sentence.")

[1909, Feb. 16, sec. 14. Summary court-martial proceedings and record.]

That section sixteen hundred and twenty-four, article thirty-four, Revised Statutes of the United States, is hereby amended as follows: "The proceedings of summary courts-martial shall be conducted with as much conciseness and precision as may be consistent with the ends of justice, and under such forms and rules as may be prescribed by the Secretary of the Navy, with the approval of the President, and all such proceedings shall be transmitted in the usual mode to the Navy Department, where they shall be kept on file for a period of two years from date of trial, after which time they may be destroyed in the discretion of the Secretary of the Navy."—(35 Stat., 622, chap. 131.)

See note to section 1624, Revised Statutes, article 34; see also acts of June 8, 1880 (21 Stat. 164), and February 16, 1889 (25 Stat., 672), and notes thereunder.

[1909, Feb. 16, sec. 15. Arrest of naval offenders.]

That it shall be lawful for any civil officer having authority under the laws of the United States or of any State, Territory, or District to arrest offenders, to summarily arrest a deserter from the Navy or Marine Corps of the United States and deliver him into the custody of the naval authorities.—(35 Stat., 622, chap. 131.)

See note to Constitution, Fourth Amendment, under "Arrest of military offenders;" and

see section 1624, Revised Statutes, article 43, and note thereto.

[1909, Feb. 16, sec. 16. Depositions of witnesses, naval courts.]

That the depositions of witnesses may be taken on reasonable notice to the opposite party, and when duly authenticated, may be put in evidence before naval courts, except in capital cases and cases where the punishment may be imprisonment or confinement for more than one year as follows: First, depositions of civilian witnesses residing outside the State, Territory, or District in which a naval court is ordered to sit; second, depositions of persons in the naval or military service stationed or residing outside the State, Territory, or District in which a naval court is ordered to sit, or who are under orders to go outside of such State, Territory, or District; third, where such naval court is convened on board a vessel of the United States, or at a naval station not within any State, Territory, or District of the United States, the depositions of witnesses may be taken and used as herein provided whenever such witnesses reside or are stationed at such a distance from the place where said naval court is ordered to sit,

or are about to go to such a distance as, in the judgment of the convening authority would render it impracticable to secure their personal attendance.—(35 Stat., 622–623, chap. 131.)

See sections 868–874, Revised Statutes, and notes thereto; see also note to Constitu-

tion, Sixth Amendment, under “VI. Confronting witnesses.”

[1909, Feb. 16, sec. 17. Sentences, summary courts-martial and deck courts; execution of.] That all sentences of summary courts-martial may be carried into effect upon the approval of the senior officer present, and all sentences of deck courts may be carried into effect upon approval of the convening authority or his successor in office.—(35 Stat., 623, chap. 131.)

This section is modified, as to sentences of summary courts-martial, by act of August 29, 1916 (39 Stat., 586); see note to article 32 of section 1624, Revised Statutes.

As to sentences of deck courts, see sections 4 and 6 of this act, set forth above.

As to power of Secretary of the Navy over proceedings and sentences of courts-martial, see section 9 of this act, set forth above, and see references thereunder.

[1909, Feb. 16, sec. 18. Repeal of prior acts.] That all Acts or parts of Acts inconsistent herewith are hereby repealed.—(35 Stat., 623, chap. 131.)

[1909, Mar. 3. Army ordnance property, sales to naval officers.] Articles of ordnance property may be sold by the Chief of Ordnance to officers of the Navy and Marine Corps, for their use in the public service, in the same manner as these articles are now sold to officers of the army.—(35 Stat., 751, chap. 252.)

See act of August 24, 1912 (37 Stat., 589), and laws noted thereunder.

1909, Mar. 3. Retirement for Civil-War service.] The provisions of the act approved June twenty-ninth, nineteen hundred and six, entitled “An act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and seven, and for other purposes,” providing for the retirement in the next higher grade of officers of the navy who served during the civil war, shall not operate to deprive any officer of the navy who has been, or may be, retired, since the passage of that act, of the right to increased rank and pay to which, but for the passage of said act, he would have been entitled.—(35 Stat., 753, chap. 255.)

See act of June 29, 1906 (34 Stat., 554), and act of March 3, 1899, section 11 (30 Stat., 1007).

[1909, Mar. 3. Estimates for “Pay of the Navy.”] The estimates for the support of the Navy shall hereafter show, under the head of Pay of the Navy, the sums allowed for pay of officers belonging to the line, to the several departments of the staff, and to the retired list; the estimates to show under each head the amount allowed for pay proper, for increases due to longevity and foreign service, and for pay at sea rates to officers employed on shore; together with the total number of warrant and petty officers and seamen of the several grades and designations, including as to each class the amount allowed for pay proper and for longevity or service increases. The estimates shall include a list giving the rates of pay for all petty officers and other enlisted men of the Navy.—(35 Stat., 754, chap. 255.)

An identical provision was contained in the act of May 13, 1908 (35 Stat., 129).

[1909, Mar. 3. Pay and number of employees at navy yards and stations; annual report to Congress, etc.] That hereafter the rates of pay of the clerical, drafting, inspection, and messenger force at navy-yards and naval stations and



other stations and offices under the Navy Department shall be paid from lump appropriations and shall be fixed by the Secretary of the Navy on a per annum or per diem basis as he may elect; that the number may be increased or decreased at his option and shall be distributed at the various navy-yards and naval stations by the Secretary of the Navy to meet the needs of the naval service

\* \* \*; that the total amount expended annually for pay for such clerical, drafting, inspection, and messenger force shall not exceed the amounts specifically allowed by Congress under the several lump appropriations, and that the Secretary of the Navy shall each year, in the annual estimates, report to Congress the number of persons so employed, their duties, and the amount paid to each.—(35 Stat., 754–755, chap. 255.)

The omitted portion of this enactment relates to leaves of absence allowed such employees; for text thereof, and later laws relating to such leaves of absence, see note to section 1545, Revised Statutes.

The above provision was followed by a proviso in the following language: "That it shall be the duty of the Secretary of the Navy to submit to Congress at its next session, and for its consideration, a schedule of rates of compensation, annual or per diem, that should, in his judgment, be permanently fixed by law for clerical, inspection, and messenger service in navy-yards, naval stations, and purchasing pay offices, superintending construction offices, and inspection of engineering material; and in fixing such rates of compensation he shall have

due regard for the rates usually paid for like services in the respective localities by employers other than the United States, and he shall not recommend any rate exceeding that being paid by the United States at any such yards, stations, or offices prior to January first, nineteen hundred and nine."

See act of July 16, 1862 (12 Stat., 587), providing that the rates of wages of employees in navy-yards shall conform, as nearly as is consistent with the public interest, with those of private establishments in the immediate vicinity.

See section 429, Revised Statutes, and note thereto, as to reports required to be made by the Secretary of the Navy; and see act of May 30, 1908 (35 Stat., 505).

[1909, Mar. 3. Preference for employment, navy yards and stations.] That persons employed in the clerical, drafting, and inspection force at navy-yards and stations discharged for lack of work or insufficiency of funds shall for one year thereafter be preferred for employment in such navy-yards and stations in the clerical, drafting, inspection, and messenger forces.—(35 Stat., 755, chap. 255.)

See sections 1544 and 1754, Revised Statutes, and notes thereto.

[1909, Mar. 3. Discharged prisoners; transportation and clothing.] That the Secretary of the Navy is hereafter authorized to transport to their homes or places of enlistment, as he may designate, all discharged naval prisoners; the expense of such transportation shall be paid out of any money that may be to the credit of prisoners when discharged; where there is no such money, the expense shall be paid out of money received from fines and forfeitures imposed by naval courts-martial: *Provided further*, That the Secretary of the Navy is hereby authorized to furnish naval prisoners upon discharge suitable civilian clothing in case, and only where, said discharged prisoners would otherwise be unprovided with suitable clothing to meet their immediate needs.—(35 Stat., 756, chap. 255.)

See act of February 16, 1909, section 13 (35 Stat., 622); and see sections 3689 and 4809, Revised Statutes, and notes thereto.

[1909, Mar. 3. Sale of stores to Navy and Marine Corps, and civilian employees.] That hereafter such stores as the Secretary of the Navy may designate may be procured and sold to officers and enlisted men of the Navy and

Marine Corps, also to civilian employees at naval stations beyond the continental limits of the United States and in Alaska, under such regulations as the Secretary of the Navy may prescribe.—(35 Stat., 768, chap. 255.)

See note to sections 418, 1135, and 1612, Revised Statutes; see also acts of June 24, 1910 (36 Stat., 619), and March 4, 1913

(37 Stat., 909); and see laws noted under act last cited.

[1909, Mar. 3. Report to Congress, repairs made on vessels.] That hereafter it shall be the duty of the Secretary of the Navy to report to Congress at the beginning of each regular session thereof, in addition to the report directed to be made in the act of March second, nineteen hundred and seven, making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and eight, and for other purposes, a detailed statement showing the amount expended from each of the appropriations for the repair of every ship where such repairs exceed for any one ship the sum of two hundred thousand dollars in any one fiscal year.—(35 Stat., 769, chap. 255.)

See act of March 2, 1907 (34 Stat., 1195), and see note to section 1538, Revised Statutes. See also section 429, Revised Statutes, and note thereto.

[1909, Mar. 3. Warrant machinists, title changed to machinist; promotion to chief machinists.] The title of warrant machinist is hereby changed to machinist; and all machinists shall, after six years from date of warrant, be commissioned chief machinists, to rank with, but after, ensign, and shall, on promotion, have the same pay and allowances as are allowed chief boatswains, chief gunners, chief carpenters, and chief sailmakers, and no machinist shall be promoted until he shall have passed such examination before a board as the Secretary of the Navy may prescribe.—(35 Stat., 771, chap. 255.)

See notes to sections 1405, 1556, 1588, and 1592, Revised Statutes.

[1909, Mar. 3. Warrant officers, promotion not to reduce pay.] No warrant officer, heretofore or hereafter promoted six years from date of warrant, shall suffer a reduction in pay which, but for such promotion, would have been received by him.—(35 Stat., 771, chap. 255.)

See notes to sections 1405, 1556, 1588, and 1592, Revised Statutes.

[1909, Mar. 3. Commissioned warrant officers, appointment as ensigns.] That chief boatswains, chief gunners, and chief machinists shall be eligible for appointment to the grade of ensign under the restrictions imposed by law upon the appointment of boatswains, gunners, and warrant machinists to that grade.—(35 Stat., 771, chap. 255.)

See notes to sections 1405 and 1491, Revised Statutes.

[1909, Mar. 3. Naval Academy chapel, use of for memorials.] The crypt and window spaces of the United States Naval Academy chapel are to be used only for memorials to United States naval officers who have successfully commanded a fleet or squadron in battle, or who have received or may receive the thanks of the Congress of the United States for conspicuously distinguished services in time of war, and no memorial shall be accepted for or installed in said crypt or window spaces until at least five years after the death of the officer in question: *Provided*, That nothing in this provision shall be considered as invalidating any agreement made by the present or any former superintendent



of the Naval Academy, authorizing a memorial window in the old Naval Academy chapel to be transferred to the new Naval Academy chapel.—(35 Stat., 773, chap. 255.)

See act of March 4, 1921 (41 Stat., 1440).

[1909, Mar. 3. **Traveling expense claims, shortest usually traveled route.**] PAY, MARINE CORPS \* \* \* That hereafter the settlement of all traveling expense claims, where the payment of such is authorized by existing law, and the determination of distances and of what constitutes the shortest usually traveled route in the meaning of laws relating to traveling allowances, shall accord to such rules as the Secretary of the Navy may prescribe.—(35 Stat., 774, chap. 255.)

See sections 1566 and 1612, Revised Statutes, and notes thereto.

[1909, Mar. 3. **Extra-duty pay, Marine Corps.**] That hereafter extra-duty pay will not be allowed to enlisted men of the Marine Corps except when they are regularly detailed thereon by a written order of the commandant of the corps.—(35 Stat., 776, chap. 255.)

See note to section 1612, Revised Statutes.

[1909, Mar. 4, sec. 4. **Estimates, form and arrangement of.**] When estimates hereafter transmitted to the Treasury for submission to Congress do not in form and arrangement comply with the provisions of section four of the legislative, executive, and judicial appropriation Act, approved June twenty-second, nineteen hundred and six, they shall, under direction of the Secretary of the Treasury, be rearranged so as to comply with said requirements of law.—(35 Stat., 907, chap. 297.)

See act of June 22, 1906, section 4 (34 Stat., 448-449); see also sections 430 and 3660, | Revised Statutes, and act of August 23, 1912, section 9 (37 Stat., 415.)

[1909, Mar. 4, sec. 7. **Estimates; reduction; additional revenues required.**] Immediately upon the receipt of the regular annual estimates of appropriations needed for the various branches of the Government it shall be the duty of the Secretary of the Treasury to estimate as nearly as may be the revenues of the Government for the ensuing fiscal year, and if the estimates for appropriations, including the estimated amount necessary to meet all continuing and permanent appropriations, shall exceed the estimated revenues the Secretary of the Treasury shall transmit the estimates to Congress as heretofore required by law and at once transmit a detailed statement of all of said estimates to the President, to the end that he may, in giving Congress information of the state of the Union and in recommending to their consideration such measures as he may judge necessary, advise the Congress how in his judgment the estimated appropriations could with least injury to the public service be reduced so as to bring the appropriations within the estimated revenues, or, if such reduction be not in his judgment practicable without undue injury to the public service, that he may recommend to Congress such loans or new taxes as may be necessary to cover the deficiency.—(35 Stat., 1027, chap. 299.)

See note to section 430, Revised Statutes.

[1909, Mar. 4, sec. 8. **Disbursing clerks; temporary absence; substitute.**] In case of the sickness or unavoidable absence of any disbursing clerk or dis-

bursing agent of any executive department, independent bureau, or office, in Washington, District of Columbia, he may, with the approval of the head of the department, independent bureau, or office, in which said disbursing clerk or agent is employed, authorize the clerk of highest grade employed therein to act in his place, and to discharge all the duties by law or regulations of such disbursing clerk or agent. The official bond given by the principal of the office shall be held to cover and apply to the acts of the person appointed to act in his place in such cases. Such acting officer shall, moreover, for the time being, be subject to all the liabilities and penalties prescribed by law for the official misconduct in like cases, of the disbursing clerk or disbursing agent, respectively, for whom he acts, and such acting officer shall be required by the head of the department, independent bureau, or office, to give bond to and in such sum as the disbursing clerk or disbursing agent may require.—(35 Stat., 1027, chap. 299.)

See notes to sections 176 and 1383, Revised Statutes.

[1909, Mar. 4, sec. 9. Expenses of unauthorized boards, commissions, etc.] That hereafter no part of the public moneys, or of any appropriation heretofore or hereafter made by Congress, shall be used for the payment of compensation or expenses of any commission, council, board, or other similar body, or any members thereof, or for expenses in connection with any work or the results of any work or action of any commission, council, board, or other similar body, unless the creation of the same shall be or shall have been authorized by law; nor shall there be employed by detail, hereafter or heretofore made, or otherwise personal services from any executive department or other government establishment in connection with any such commission, council, board, or other similar body.—(35 Stat., 1027, chap. 299.)

See section 3681, Revised Statutes.

[1909, Mar. 4. The Criminal Code.] That the penal laws of the United States be, and they hereby are, codified, revised, and amended, with title, chapters, headnotes, and sections, entitled, numbered, and to read as follows:—(35 Stat., 1088, chap. 321.)

See section 1624, Revised Statutes, article 22, and note thereto.

## CRIMES.

### CHAPTER ONE.

#### OFFENSES AGAINST THE EXISTENCE OF THE GOVERNMENT.

Sec.

1. Treason.
2. Punishment of treason.
3. Misprision of treason.
4. Inciting or engaging in rebellion or insurrection.
5. Criminal correspondence with foreign governments.

Sec.

6. Seditious conspiracy.
7. Recruiting soldiers or sailors to serve against the United States.
8. Enlistment to serve against the United States.

SEC. 1. [TREASON DEFINED.] Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.—(35 Stat., 1088; sec. 5331, R. S.)



SEC. 2. [PUNISHMENT OF TREASON.] Whoever is convicted of treason shall suffer death; or, at the discretion of the court, shall be imprisoned not less than five years and fined not less than ten thousand dollars, to be levied on and collected out of any or all of his property, real and personal, of which he was the owner at the time of committing such treason, any sale or conveyance to the contrary notwithstanding; and every person so convicted of treason shall, moreover, be incapable of holding any office under the United States.—(35 Stat., 1088; sec. 5332, R. S.)

SEC. 3. [MISPRISION OF TREASON DEFINED.] Whoever, owing allegiance to the United States and having knowledge of the commission of any treason against them, conceals and does not, as soon as may be, disclose and make known the same to the President or to some judge of the United States, or to the governor or to some judge or justice of a particular State, is guilty of misprision of treason and shall be imprisoned not more than seven years and fined not more than one thousand dollars.—(35 Stat., 1088; sec. 5333, R. S.)

SEC. 4. [INCITING, ETC., REBELLION OR INSURRECTION.] Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be imprisoned not more than ten years, or fined not more than ten thousand dollars, or both; and shall, moreover, be incapable of holding any office under the United States.—(35 Stat., 1088; sec. 5334, R. S.)

SEC. 5. [CRIMINAL CORRESPONDENCE WITH FOREIGN GOVERNMENTS.] Every citizen of the United States, whether actually resident or abiding within the same, or in any place subject to the jurisdiction thereof, or in any foreign country, without the permission or authority of the Government, directly or indirectly, commences or carries on any verbal or written correspondence or intercourse with any foreign Government or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign Government or of any officer or agent thereof in relation to any disputes or controversies with the United States or to defeat the measures of the Government of the United States; and every person, being a citizen of or resident within the United States or in any place subject to the jurisdiction thereof, and not duly authorized, counsels, advises, or assists in any such correspondence with such intent, shall be fined not more than five thousand dollars and imprisoned not more than three years; but nothing in this section shall be construed to abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.—(35 Stat., 1088–1089; sec. 5335, R. S.)

SEC. 6. [SEDITIONOUS CONSPIRACY.] If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than five thousand dollars or imprisoned not more than six years, or both.—(35 Stat., 1089; sec. 5336, R. S.)

By act of May 10, 1920 (41 Stat., 593-594), it was provided that any alien convicted of violating this section shall be deported and

excluded from readmission to the United States.

SEC. 7. [RECRUITING FOR SERVICE AGAINST UNITED STATES.] Whoever recruits soldiers or sailors within the United States, or in any place subject to the jurisdiction thereof, to engage in armed hostility against the same, or opens within the United States, or in any place subject to the jurisdiction thereof, a recruiting station for the enlistment of such soldiers or sailors to serve in any manner in armed hostility against the United States, shall be fined not more than one thousand dollars and imprisoned not more than five years.—(35 Stat., 1089; sec. 5337, R. S.)

SEC. 8. [ENLISTING TO SERVE AGAINST UNITED STATES.] Every person enlisted or engaged within the United States or in any place subject to the jurisdiction thereof, with intent to serve in armed hostility against the United States, shall be fined one hundred dollars and imprisoned not more than three years.—(35 Stat., 1089; sec. 5338, R. S.)

## CHAPTER TWO.

### OFFENSES AGAINST NEUTRALITY.

Sec.

9. Accepting a foreign commission.
10. Enlisting in foreign service.
11. Arming vessels against people at peace with the United States.
12. Augmenting force of foreign vessel of war.

Sec.

13. Military expeditions against people at peace with the United States.
14. Enforcement of foregoing provisions.
15. Compelling foreign vessels to depart.
18. Construction of this chapter.

SEC. 9. [ACCEPTING FOREIGN COMMISSION TO SERVE AGAINST FRIENDLY POWER.] Every citizen of the United States who, within the territory or jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district, or people, with whom the United States are at peace, shall be fined not more than two thousand dollars and imprisoned not more than three years.—(35 Stat., 1089; sec. 5281, R. S.)

SEC. 10. [ENLISTING, ETC., IN FOREIGN SERVICE WITHIN UNITED STATES.] Whoever, within the territory or jurisdiction of the United States, enlists or enters himself, or hires or retains another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, State, colony, district, or people as a soldier or as a marine or seaman on board of any vessel of war, letter of marque, or privateer shall be fined not more than \$1,000 and imprisoned not more than three years: *Provided*, That this section shall not apply to citizens or subjects of any country engaged in war with a country with which the United States is at war, unless such citizen or subject of such foreign country shall hire or solicit a citizen of the United States to enlist or go beyond the jurisdiction of the United States with intent to enlist or enter the service of a foreign country. Enlistments under this proviso shall be under regulations prescribed by the Secretary of War.—(35 Stat., 1089-1090; 40 Stat., 39-40; sec. 5282, R. S.)

This section of the Penal Code was expressly amended and reenacted to read as above by act of May 7, 1917 (40 Stat., 39).



SEC. 11. [ARMING VESSELS AGAINST FRIENDLY POWERS.] Whoever, within the territory or jurisdiction of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, or whoever issues or delivers a commission within the territory or jurisdiction of the United States for any vessel, to the intent that she may be so employed, shall be fined not more than ten thousand dollars and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer and the other half to the use of the United States.—(35 Stat., 1090; sec. 5283, R. S.)

SEC. 12. [AUGMENTING FORCE OF FOREIGN ARMED VESSEL.] Whoever, within the territory or jurisdiction of the United States, increases or augments, or procures to be increased or augmented, or knowingly is concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel which, at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger caliber, or by adding thereto any equipment solely applicable to war, shall be fined not more than one thousand dollars and imprisoned not more than one year.—(35 Stat., 1090; Sec. 5285, R. S.)

SEC. 13. [ORGANIZING MILITARY OR NAVAL EXPEDITION AGAINST FRIENDLY POWER.] Whoever, within the territory or jurisdiction of the United States or of any of its possessions, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or who takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than \$3,000 or imprisoned not more than three years, or both.—(35 Stat., 1090; 40 Stat., 223; sec. 5286, R. S.)

This section was expressly amended and reenacted to read as above by act of June 15, 1917, section 8 (40 Stat., 223). By section 9 of said act (40 Stat., 223), it was provided

“that the President may employ such part of the land or naval forces of the United States as he may deem necessary to carry out the purposes of this title.”

SEC. 14. [ENFORCEMENT OF FOREGOING SECTIONS; CAPTURES; USE OF NAVAL FORCES.] The district courts shall take cognizance of all complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof. In

every case in which a vessel is fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser, or other armed vessel is increased or augmented, or in which any military expedition or enterprise is begun or set on foot, contrary to the provisions and prohibitions of this chapter; and in every case of the capture of a vessel within the jurisdiction or protection of the United States as before defined; and in every case in which any process issuing out of any court of the United States is disobeyed or resisted by any person having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, or of any colony, district, or people, or of any subjects or citizens of any foreign prince or state, or of any colony, district, or people, it shall be lawful for the President, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purpose of taking possession of and detaining any such vessel, with her prizes, if any, in order to enforce the execution of the prohibitions and penalties of this chapter, and the restoring of such prizes in the cases in which restoration shall be adjudged; and also for the purpose of preventing the carrying on of any such expedition or enterprise from the territory or jurisdiction of the United States against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace.—(35 Stat., 1090; sec. 5287, R. S.)

SEC. 15. [COMPELLING OR PREVENTING DEPARTURE OF VESSELS; USE OF NAVAL FORCES.] It shall be lawful for the President to employ such part of the land or naval forces of the United States, or of the militia thereof, as he may deem necessary to compel any foreign vessel to depart from the United States or any of its possessions in all cases in which, by the law of nations or the treaties of the United States, it ought not to remain, and to detain or prevent any foreign vessel from so departing in all cases in which, by the law of nations or the treaties of the United States, it is not entitled to depart.—(35 Stat., 1091; 40 Stat., 223; sec. 5288, R. S.)

This section was expressly amended and reenacted to read as above by act of June 15, 1917, section 10 (40 Stat., 223). See also note to section 13 of the Criminal Code, set forth above.

For other provisions of law on this subject, see act of June 15, 1917 (40 Stat., 221-223).

SEC. 18. [CONSTRUCTION OF THIS CHAPTER.] The provisions of this chapter shall not be construed to extend to any subject or citizen of any foreign prince, state, colony, district, or people who is transiently within the United States and enlists or enters himself on board of any vessel of war, letter of marque, or privateer, which at the time of its arrival within the United States was fitted and equipped as such, or hires or retains another subject or citizen of the same foreign prince, state, colony, district, or people who is transiently within the United States to enlist or enter himself to serve such foreign prince, state, colony, district, or people on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, state, colony, district, or people. Nor shall they be construed to prevent the prosecution or punishment of treason, or of any piracy defined by the laws of the United States.—(35 Stat., 1091; sec. 5291, R. S.)



## CHAPTER THREE.

## OFFENSES AGAINST THE ELECTIVE FRANCHISE AND CIVIL RIGHTS OF CITIZENS.

Sec.	Sec.
22. Unlawful presence of troops at elections.	25. Officers, etc., of Army or Navy interfering with officers of election, etc.
23. Intimidation of voters by officers, etc., of Army or Navy.	26. Persons disqualified from holding office; when soldiers, etc., may vote.
24. Officers of Army or Navy prescribing qualifications of voters.	

SEC. 22. [UNLAWFUL PRESENCE OF TROOPS AT POLLS.] Every officer of the Army or Navy, or other person in the civil, military, or naval service of the United States, who orders, brings, keeps, or has under his authority or control any troops or armed men at any place where a general or special election is held in any State, unless such force be necessary to repel armed enemies of the United States, shall be fined not more than five thousand dollars and imprisoned not more than five years.—(35 Stat., 1092; sec. 5528, R. S.)

SEC. 23. [INTIMIDATING VOTERS BY ARMY OR NAVY OFFICERS, ETC.] Every officer or other person in the military or naval service of the United States who, by force, threat, intimidation, order, advice, or otherwise, prevents, or attempts to prevent, any qualified voter of any State from freely exercising the right of suffrage at any general or special election in such State shall be fined not more than five thousand dollars and imprisoned not more than five years.—(35 Stat., 1092; sec. 5529, R. S.)

SEC. 24. [ARMY OR NAVY OFFICERS PRESCRIBING QUALIFICATIONS OF VOTERS.] Every officer of the army or navy who prescribes or fixes, or attempts to prescribe or fix, whether by proclamation, order, or otherwise, the qualifications of voters at any election in any State shall be punished as provided in the preceding section.—(35 Stat., 1092; sec. 5530, R. S.)

See section 2003, Revised Statutes.

SEC. 25. [INTERFERING WITH ELECTION OFFICERS BY ARMY OR NAVY OFFICERS, ETC.] Every officer or other person in the military or naval service of the United States who, by force, threat, intimidation, order, or otherwise, compels, or attempts to compel, any officer holding an election in any State to receive a vote from a person not legally qualified to vote, or who imposes, or attempts to impose, any regulations for conducting any general or special election in a State different from those prescribed by law, or who interferes in any manner with any officer of an election in the discharge of his duty, shall be punished as provided in section twenty-three.—(35 Stat., 1092–1093; sec. 5531, R. S.)

SEC. 26. [ADDITIONAL PUNISHMENT; WHEN SOLDIERS, ETC., MAY VOTE.] Every person convicted of any offense defined in the four preceding sections shall, in addition to the punishment therein prescribed, be disqualified from holding any office of honor, profit, or trust under the United States; but nothing therein shall be construed to prevent any officer, soldier, sailor, or marine from exercising the right of suffrage in any election district to which he may belong, if otherwise qualified according to the laws of the State in which he offers to vote.—(35 Stat., 1093; sec. 5532, R. S.)

See note to Constitution, Article I, section 8, clause 13, under "II. Freedom from State interference," subheading, "Poll taxes upon persons in Navy;" see also note to

section 355, Revised Statutes, under "V. Jurisdiction of the United States," subheading, "Status of residents."

## CHAPTER FOUR.

## OFFENSES AGAINST THE OPERATIONS OF THE GOVERNMENT.

Sec.	Sec.
28. Forging bids, public records, etc.	40. Unlawfully taking or using papers relating to claims.
29. Forging deeds, powers of attorney, etc.	41. Persons interested not to act as agents of the Government.
30. Having forged papers in possession.	42. Enticing desertions from the military or naval service.
31. False acknowledgments.	43. Enticing away workmen.
32. Falsely pretending to be United States officer.	44. Injuries to fortifications, harbor defenses, etc.
34. False demand on fraudulent power of attorney.	45. Unlawfully entering upon military reservation, fort, etc.
35. Making or presenting false claims [purchase of naval clothing].	46. Robbery or larceny of personal property of the United States.
36. Embezzling arms, stores, etc.	47. Embezzling, stealing, etc., public property.
37. Conspiracy to commit offense against the United States; all parties liable for acts of one.	48. Receivers, etc., of stolen public property.
38. Delaying or defrauding captor or claimant, etc., of prize property.	49. Falsely claiming citizenship.
39. Bribery of United States officer.	

SEC. 28. [FORGING BONDS, PUBLIC RECORDS, OR OTHER WRITINGS.] Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid or assist in the false making, altering, forging, or counterfeiting, any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States; or shall utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, knowing the same to be false, forged, altered, or counterfeited; or shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, the office of any officer of the United States, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, or official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited, for the purpose of defrauding the United States, shall be fined not more than one thousand dollars, or imprisoned not more than ten years, or both.—(35 Stat., 1094; secs. 5418, 5479, R. S.)

Forging or altering certificates of discharge from the navy, or having same in possession;  
See act of March 4, 1917 (39 Stat., 1182).

SEC. 29. [FORGING DEEDS, POWERS OF ATTORNEY, RECEIPTS, OR OTHER WRITINGS.] Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid or assist in the false making, altering, forging, or counterfeiting, any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money; or whoever shall utter or publish as true, or cause to be uttered or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, contract, or other writing with intent to defraud the United States, knowing



the same to be false, altered, forged, or counterfeited; or whoever shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the Government of the United States, any deed, power of attorney, order, certificate, receipt, contract, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, shall be fined not more than one thousand dollars and imprisoned not more than ten years.—(35 Stat., 1094; sec. 5421, R. S.)

SEC. 30. [HAVING FORGED PAPERS IN POSSESSION.] Whoever, knowingly and with intent to defraud the United States, shall have in his possession any false, altered, forged, or counterfeited deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of enabling another to obtain from the United States, or from any officer or agent thereof, any sum of money, shall be fined not more than five hundred dollars or imprisoned not more than five years, or both.—(35 Stat., 1094; sec. 5422, R. S.)

SEC. 31. [OFFICER MAKING FALSE ACKNOWLEDGMENTS.] Whoever, being an officer authorized to administer oaths or to take and certify acknowledgments, shall knowingly make any false acknowledgment, certificate, or statement concerning the appearance before him, or the taking of an oath or affirmation by any person with respect to any proposal, contract, bond, undertaking, or other matter submitted to, made with, or taken on behalf of the United States, and concerning which an oath or affirmation is required by law or regulation made in pursuance of law, or with respect to the financial standing of any principal, surety, or other party to any such proposal, contract, bond, undertaking, or other instrument, shall be fined not more than two thousand dollars or imprisoned not more than two years, or both.—(35 Stat., 1094–1095.)

See note to section 183, Revised Statutes.

SEC. 32. [FALSELY PRETENDING TO BE OFFICER, ETC.] Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the Government thereof, any money, paper, document, or other valuable thing, shall be fined not more than one thousand dollars or imprisoned not more than three years, or both.—(35 Stat., 1095; sec. 5438, R. S.)

See act of June 3, 1916, section 125 (39 Stat., 216), as to unauthorized wearing of uniform of Navy or Marine Corps, etc.

SEC. 34. [FALSE DEMAND FOR WAGES, ETC.] Whoever shall knowingly or fraudulently demand or endeavor to obtain any share or sum in the public stocks of the United States, or to have any part thereof transferred, assigned, sold, or conveyed, or to have any annuity, dividend, pension, prize money, wages, or other debt due from the United States, or any part thereof, received, or paid by virtue of any false, forged, or counterfeited power of attorney, authority, or instrument shall be fined not more than five thousand dollars and imprisoned not more than ten years.—(35 Stat., 1095; sec. 5436, R. S.)

SEC. 35. [FRAUDULENT CLAIMS; LARCENY; CONSPIRACY; FALSE RECEIPTS; PURCHASE OF NAVAL CLOTHING, ETC.] Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry; or whoever shall take and carry away or take for his own use, or for the use of another, with intent to steal or purloin, any personal property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder; or whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim; and whoever, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, or willfully to conceal such money or other property, shall deliver or cause to be delivered to any person having authority to receive the same any amount of such money or other property less than that for which he received a certificate or took a receipt; or whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, shall make or deliver the same to any other person without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both. And whoever shall purchase, or receive in pledge, from any person any arms, equipment, ammunition, clothing, military stores, or other property furnished by the United States, under a clothing allowance or otherwise, to any soldier, sailor, officer, cadet, or midshipman in the military or naval service of the United States or of the National Guard or Naval Militia, or to any person accompanying, serving, or retained with the land or naval forces and subject to military or naval law, having knowledge or reason to believe that the property has been taken from the possession of the United States or furnished by the United States under



such allowance, shall be fined not more than \$500 or imprisoned not more than two years, or both.—(35 Stat., 1095–1096; 40 Stat., 1015–1016; sec. 5438, R. S.; 35 Stat., 555–556.)

This section was expressly amended and re-enacted to read as above by act of October 23, 1918 (40 Stat., 1015–1016.)

See section 1624, Revised Statutes, article 14; see also section 3748, Revised Statutes; and see section 46 of this act, set forth below.

**SEC. 36. [EMBEZZLING, ETC., ARMS, STORES, ETC.]** Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of, any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or to be used for the military or naval service, shall be punished as prescribed in the preceding section.—(35 Stat., 1096; sec. 5439, R. S.)

See section 1624, Revised Statutes, article 14; and see section 47 of this act, set forth below.

**Section held inoperative.**—Section 36 of the Criminal Code is inoperative as a criminal

statute, for uncertainty as to the punishment prescribed; the “preceding section” to which it refers prescribing different punishments for different offenses therein prescribed. (*Holmes v. U. S.*, 267 Fed. Rep., 529.)

**SEC. 37. [CONSPIRACY TO COMMIT OFFENSE AGAINST UNITED STATES.]** If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.—(35 Stat., 1096; sec. 5440, R. S.; 21 Stat., 4.)

This section was extended for certain purposes to the Philippine Islands and the Canal Zone by act of June 15, 1917 (40 Stat., 231).

**SEC. 38. [FRAUDULENT INTERFERENCE WITH DISPOSITION OF PRIZE, ETC.]** Whoever shall willfully do, or aid or advise in the doing, of any act relating to the bringing in, custody, preservation, sale, or other disposition of any property captured as prize, or relating to any documents or papers connected with the property, or to any deposition or other document or paper connected with the proceedings, with intent to defraud, delay, or injure the United States or any captor or claimant of such property, shall be fined not more than ten thousand dollars, or imprisoned not more than five years, or both.—(35 Stat., 1096; sec. 5441, R. S.)

See section 1624, Revised Statutes, articles 16–17; See also sections 4613–4652, Revised Statutes.

**SEC. 39. [BRIBERY OF UNITED STATES OFFICER.]** Whoever shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him

in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and imprisoned not more than three years.—(35 Stat., 1096; sec. 5451, R. S.)

SEC. 40. [UNAUTHORIZED USE OF OFFICIAL PAPERS RELATING TO CLAIMS.] Whoever shall take and carry away, without authority from the United States, from the place where it has been filed, lodged, or deposited, or where it may for the time being actually be kept by authority of the United States, any certificate, affidavit, deposition, written statement of facts, power of attorney, receipt, voucher, assignment, or other document, record, file, or paper, prepared, fitted, or intended to be used or presented in order to procure the payment of money from or by the United States, or any officer or agent thereof, or the allowance or payment of the whole or any part of any claim, account, or demand against the United States, whether the same has or has not already been so used or presented, and whether such claim, account, or demand, or any part thereof, has or has not already been allowed or paid; or whoever shall present, use, or attempt to use, any such document, record, file, or paper so taken and carried away in order to procure the payment of any money from or by the United States, or any officer or agent thereof, or the allowance or payment of the whole or any part of any claim, account, or demand against the United States, shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both.—(35 Stat., 1096–1097; sec. 5454, R. S.)

See sections 188, 190, and 418, Revised Statutes, and notes thereto; see also sections 109 and 128 of this act, set forth below.

SEC. 41. [PERSONS INTERESTED NOT TO ACT AS GOVERNMENT AGENTS.] No officer or agent of any corporation, joint-stock company, or association, and no member or agent of any firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation, joint-stock company, association, or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation, joint-stock company, association, or firm. Whoever shall violate the provision of this section shall be fined not more than two thousand dollars and imprisoned not more than two years.—(35 Stat., 1097; sec. 1783, R. S.)

See section 3745, Revised Statutes; see also act of June 10, 1896 (29 Stat., 361); and see note to section 1487, Revised Statutes, under "Hire of quarters."

SEC. 42. [ENTICING DESERTION FROM NAVY, ETC.; ASSISTING DESERTERS.] Whoever shall entice or procure, or attempt or endeavor to entice or procure, any soldier in the military service, or any seaman or other person in the naval service of the United States, or who has been recruited for such service, to desert therefrom, or shall aid any such soldier, seaman, or other person in deserting or in attempting to desert from such service; or whoever shall harbor, conceal, protect, or assist any such soldier, seaman, or other person who may have deserted from such service, knowing him to have deserted therefrom, or



shall refuse to give up and deliver such soldier, seaman, or other person on the demand of any officer authorized to receive him, shall be imprisoned not more than three years and fined not more than two thousand dollars.—(35 Stat., 1097; secs. 1553, 5455, R. S.)

See section 1624, Revised Statutes, article 8; see also note to section 1553, Revised Statutes.

SEC. 43. [ENTICING WORKMEN FROM ARSENALS, ETC.] Whoever shall procure or entice any artificer or workman retained or employed in any arsenal or armory to depart from the same during the continuance of his engagement, or to avoid or break his contract with the United States; or whoever, after due notice of the engagement of such workman or artificer, during the continuance of such engagement, shall retain, hire, or in anywise employ, harbor, or conceal such artificer or workman, shall be fined not more than fifty dollars or imprisoned not more than three months, or both.—(35 Stat., 1097; sec. 1668, R. S.)

SEC. 44. [INJURIES TO FORTIFICATIONS, ETC.; DEFENSIVE SEA AREAS.] Whoever shall willfully trespass upon, injure, or destroy any of the works or property or material of any submarine mine or torpedo or fortification or harbor-defense system owned or constructed or in process of construction by the United States, or shall willfully interfere with the operation or use of any such submarine mine, torpedo, fortification, or harbor-defense system, or shall knowingly, willfully, or wantonly violate any duly authorized and promulgated order or regulation of the President governing persons or vessels within the limits of defensive sea areas, which defensive sea areas are hereby authorized to be established by order of the President from time to time as may be necessary in his discretion for purposes of national defense, shall be punished on conviction thereof in a district or circuit court of appeals of the United States for the district or circuit in which the offense is committed, or into which the offender is first brought, by a fine of not more than \$5,000, or by imprisonment for a term not exceeding five years, or by both, in the discretion of the court.—(35 Stat., 1097; 30 Stat., 717; 39 Stat., 1194; 40 Stat., 89.)

This section was expressly amended and reenacted to read as above by the naval appropriation act of March 4, 1917 (39 Stat., 1194). It was further amended by the following section in act of May 22, 1917 (40 Stat., 89, chap. 20):

“SEC. 19. That section forty-four of the Act entitled ‘An Act to codify, revise, and amend the penal laws of the United States,’ approved March fourth, nineteen hundred and nine, as amended by an Act entitled ‘An Act making appropriation for the naval service for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes,’ approved

March fourth, nineteen hundred and seventeen, be, and is hereby, amended by adding the following to said section:

“‘Provided,’ That offenses hereunder committed within the Canal Zone or within any defensive sea areas which the President is authorized to establish by said section, shall be cognizable in the District Court of the Canal Zone, and jurisdiction is hereby conferred upon said court to hear and determine all such cases arising under said section and to impose the penalties therein provided for the violation of any of the provisions of said section.’”

SEC. 45. [UNLAWFULLY ENTERING MILITARY RESERVATION, ETC.] Whoever shall go upon any military reservation, army post, fort, or arsenal, for any purpose prohibited by law or military regulation made in pursuance of law, or whoever shall reenter or be found within any such reservation, post, fort, or arsenal, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.—(35 Stat., 1097.)

See section 1624, Revised Statutes, article 5; see also acts of June 15, 1917 (40 Stat., 217, et seq.), and April 20, 1918 (40 Stat., 533-534).

SEC. 46. [ROBBERY OR LARCENY OF PERSONAL PROPERTY OF UNITED STATES.] Whoever shall rob another of any kind or description of personal property belonging to the United States, or shall feloniously take and carry away the same, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both.—(35 Stat., 1097; sec. 5456, R. S.)

See section 35 of this act, set forth above.

SEC. 47. [EMBEZZLING, STEALING, ETC., PUBLIC MONEY OR PROPERTY.] Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.—(35 Stat., 1097; 18 Stat., 479.)

See sections 35, 36, and 46 of this act, set forth above; and see sections 86-92 of this act, set forth below.

SEC. 48. [RECEIVING, ETC., STOLEN PUBLIC PROPERTY.] Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both; and such person may be tried either before or after the conviction of the principal offender.—(35 Stat., 1098; 18 Stat., 479.)

SEC. 79. [FALSELY CLAIMING CITIZENSHIP.] Whoever shall knowingly use any certificate of naturalization heretofore or which hereafter may be granted by any court, which has been or may be procured through fraud or by false evidence, or which has been or may hereafter be issued by the clerk or any other officer of the court without any appearance and hearing of the applicant in court and without lawful authority; or whoever, for any fraudulent purpose whatever, shall falsely represent himself to be a citizen of the United States without having been duly admitted to citizenship, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both.—(35 Stat., 1103; sec. 5428, R. S.)

See note to section 1569, Revised Statutes, under "9. Longevity pay, General Order No. 34," as to additional pay allowed enlisted men of the Navy who are citizens of

the United States; see also note to section 236, Revised Statutes, under V, (A), "Citizenship of enlisted men;" and note to Constitution, fourteenth amendment.

## CHAPTER FIVE.

### OFFENSES RELATING TO OFFICIAL DUTIES.

Sec.

- 85. Officer, etc., of the United States guilty of extortion.
- 86. Receipting for larger sums than are paid.
- 87. Disbursing officers unlawfully converting, etc., public money.
- 88. Failure of Treasurer, etc., to safely keep public money.

Sec.

- 89. Custodian of public money failing to safely keep, etc.
- 90. Failure of officer to render accounts, etc.
- 91. Failure to deposit as required.
- 92. Provisions of the five preceding sections, to whom applicable.
- 93. Record evidence of embezzlement.



Sec.

- 94. Prima facie evidence.
- 95. Evidence of conversion.
- 97. Embezzlement by internal-revenue officer, etc. [Offense not otherwise punishable.]
- 98. Officer contracting beyond specific appropriation.
- 101. Failure to make returns or reports.
- 103. Collecting and disbursing officers forbidden to trade in public property.
- 106. Other false certificates.
- 109. Officer not to be interested in claims against the United States.
- 112. Member of Congress [or other officers] taking consideration for procuring contract, office, etc.; offering Member consideration, etc.
- 113. Member of Congress, etc., taking compensation in matters to which United States is a party.

Sec.

- 114. Member of Congress not to be interested in contract.
- 115. Officer making contracts with Member of Congress.
- 116. Contracts to which two preceding sections do not apply.
- 117. United States officer accepting bribe.
- 118. Political contributions not to be solicited by certain officers.
- 119. Political contributions not to be received in public offices.
- 120. Immunity from official proscription.
- 121. Giving money to officials for political purposes prohibited.
- 122. Penalty for violating provisions of four preceding sections.

SEC. 85. [EXTORTION BY OFFICIALS.] Every officer, clerk, agent, or employee of the United States, and every person representing himself to be or assuming to act as such officer, clerk, agent, or employee, who, under color of his office, clerkship, agency, or employment, or under color of his pretended or assumed office, clerkship, agency, or employment, is guilty of extortion, and every person who shall attempt any act which if performed would make him guilty of extortion, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both.—(35 Stat., 1104; sec. 5481, R. S.; 34 Stat., 546.)

SEC. 86. [RECEIPTING FOR LARGER SUMS THAN ARE PAID.] Whoever, being an officer, clerk, agent, employee, or other person charged with the payment of any appropriation made by Congress, shall pay to any clerk or other employee of the United States a sum less than that provided by law, and require such employee to receipt or give a voucher for an amount greater than that actually paid to and received by him, is guilty of embezzlement, and shall be fined in double the amount so withheld from any employee of the Government and imprisoned not more than two years.—(35 Stat., 1105; sec. 5483, R. S.)

See section 1624, Revised Statutes, article 14.

SEC. 87. [DISBURSING OFFICERS UNLAWFULLY USING, ETC., PUBLIC MONEY.] Whoever, being a disbursing officer of the United States, or a person acting as such, shall in any manner convert to his own use, or loan with or without interest, or deposit in any place or in any manner, except as authorized by law, any public money intrusted to him; or shall, for any purpose not prescribed by law, withdraw from the Treasurer or any assistant treasurer, or any authorized depositary, or transfer, or apply, any portion of the public money intrusted to him, shall be deemed guilty of an embezzlement of the money so converted, loaned, deposited, withdrawn, transferred, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both.—(35 Stat., 1105; sec. 5488, R. S.)

See section 1624, Revised Statutes, article 14; see also section 47 of this act, set forth above; and see section 92, below.

SEC. 88. [FAILURE OF DEPOSITARIES TO SAFELY KEEP PUBLIC DEPOSITS.] If the Treasurer of the United States or any assistant treasurer, or any public

depository, fails safely to keep all moneys deposited by any disbursing officer or disbursing agent, as well as all moneys deposited by any receiver, collector, or other person having money of the United States, he shall be deemed guilty of embezzlement of the moneys not so safely kept, and shall be fined in a sum equal to the amount of money so embezzled and imprisoned not more than ten years.—(35 Stat., 1105; sec. 5489, R. S.)

See section 1624, Revised Statutes, article 14; see also section 92 of this act, set forth below.

SEC. 89. [CUSTODIAN FAILING TO KEEP, ETC., PUBLIC MONEYS.] Every officer or other person charged by any act of Congress with the safe-keeping of the public moneys who shall loan, use, or convert to his own use, or shall deposit in any bank or exchange for other funds, except as specially allowed by law, any portion of the public moneys intrusted to him for safe-keeping, shall be guilty of embezzlement of the money so loaned, used, converted, deposited, or exchanged, and shall be fined in a sum equal to the amount of money so embezzled and imprisoned not more than ten years.—(35 Stat., 1105; sec. 5490, R. S.)

See section 1624, Revised Statutes, article 14; see also section 92 of this act, set forth below.

SEC. 90. [FAILURE OF OFFICER TO RENDER ACCOUNTS.] Every officer or agent of the United States who, having received public money which he is not authorized to retain as salary, pay, or emolument, fails to render his accounts for the same as provided by law shall be deemed guilty of embezzlement, and shall be fined in a sum equal to the amount of the money embezzled and imprisoned not more than ten years.—(35 Stat., 1105; sec. 5491, R. S.)

See section 1624, Revised Statutes, article 14; see also section 92 of this act, set forth below; and see notes to sections 176 and 1376, Revised Statutes.

Punishment for making false entries in accounts, rendering false returns, etc., is pre-

scribed by act of March 4, 1911 (36 Stat., 1355).

Time for rendering public accounts: See act of July 31, 1894, section 12 (28 Stat., 209); and see note to section 3622, Revised Statutes.

SEC. 91. [FAILURE TO DEPOSIT AS REQUIRED.] Whoever, having money of the United States in his possession or under his control, shall fail to deposit it with the Treasurer, or some assistant treasurer, or some public depository of the United States, when required so to do by the Secretary of the Treasury, or the head of any other proper department, or by the accounting officers of the Treasury, shall be deemed guilty of embezzlement thereof, and shall be fined in a sum equal to the amount of money embezzled and imprisoned not more than ten years.—(35 Stat., 1105; sec. 5492, R. S.)

See section 1624, Revised Statutes, article 14.

SEC. 92. [FIVE PRECEDING SECTIONS CONSTRUED.] The provisions of the five preceding sections shall be construed to apply to all persons charged with the safe-keeping, transfer, or disbursement of the public money, whether such persons be indicted as receivers or depositories of the same.—(35 Stat., 1105.)

See section 1624, Revised Statutes, article 14.

SEC. 93. [RECORD EVIDENCE OF EMBEZZLEMENT.] Upon the trial of any indictment against any person for embezzling public money under any provision of the six preceding sections, it shall be sufficient evidence, *prima facie*, for the purpose of showing a balance against such person, to produce a transcript



from the books and proceedings of the Treasury, as required in civil cases, under the provisions for the settlement of accounts between the United States and receivers of public money.—(35 Stat., 1105; sec. 5494, R. S.)

SEC. 94. [PRIMA FACIE EVIDENCE.] The refusal of any person, whether in or out of office, charged with the safe-keeping, transfer, or disbursement of the public money to pay any draft, order, or warrant, drawn upon him by the proper accounting officer of the Treasury, for any public money in his hands belonging to the United States, no matter in what capacity the same may have been received, or may be held, or to transfer or disburse any such money, promptly, upon the legal requirement of any authorized officer, shall be deemed, upon the trial of any indictment against such person for embezzlement, prima facie evidence of such embezzlement.—(35 Stat., 1106; sec. 5495, R. S.)

SEC. 95. [EVIDENCE OF CONVERSION.] If any officer charged with the disbursement of the public moneys accepts, receives, or transmits to the Treasury Department to be allowed in his favor any receipt or voucher from a creditor of the United States without having paid to such creditor in such funds as the officer received for disbursement, or in such funds as he may be authorized by law to take in exchange, the full amount specified in such receipt or voucher, every such act is an act of conversion by such officer to his own use of the amount specified in such receipt or voucher.—(35 Stat., 1106; sec. 5496, R. S.)

SEC. 97. [EMBEZZLEMENT; OFFENSES NOT OTHERWISE PUNISHABLE.] Any officer connected with, or employed in, the Internal-Revenue Service of the United States, and any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or other property of the United States, and any officer of the United States, or any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or assistant, whether the same shall be the money or property of the United States or of some other person or party, shall, where the offense is not otherwise punishable by some statute of the United States, be fined not more than the value of the money and property thus embezzled or converted, or imprisoned not more than ten years, or both.—(35 Stat., 1106; 20 Stat., 280.)

See section 1624, Revised Statutes, article 22.

SEC. 98. [OFFICER CONTRACTING BEYOND SPECIFIC APPROPRIATION.] Whoever, being an officer of the United States, shall knowingly contract for the erection, repair, or furnishing of any public building, or for any public improvement, to pay a larger amount than the specific sum appropriated for such purpose, shall be fined not more than two thousand dollars and imprisoned not more than two years.—(35 Stat., 1106; sec. 5503, R. S.)

See section 3733, Revised Statutes.

SEC. 101. [FAILURE TO MAKE REPORTS AT REQUIRED TIMES.] Every officer who neglects or refuses to make any return or report which he is required to make at stated times by any act of Congress or regulation of the Department of the Treasury, other than his accounts, within the time prescribed by such act or regulation, shall be fined not more than one thousand dollars.—(35 Stat., 1107; sec. 1780, R. S.)

See sections 195, 196, and 429, Revised Statutes, and notes thereto.

SEC. 103. [TRADING IN PUBLIC PROPERTY BY DISBURSING OFFICER.] Whoever, being an officer of the United States concerned in the collection or the disbursement of the revenues thereof, shall carry on any trade or business in the funds or debts of the United States, or of any State, or in any public property of either, shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both, and be removed from office, and thereafter be incapable of holding any office under the United States.—(35 Stat., 1107; secs. 1788, 1789, R. S.)

SEC. 106. [FALSE CERTIFICATES; NOT OTHERWISE PUNISHABLE.] Whoever, being a public officer or other person authorized by any law of the United States to make or give a certificate or other writing, shall knowingly make and deliver as true such a certificate or writing, containing any statement which he knows to be false, in a case where the punishment thereof is not elsewhere expressly provided by law, shall be fined not more than five hundred dollars or imprisoned not more than one year, or both.—(35 Stat., 1107.)

See section 1624, Revised Statutes, articles 8 | (36 Stat., 1355); and see sections 31, 35,  
and 14; see also act of March 4, 1911 | and 86 of this act, set forth above.

SEC. 109. [OFFICERS INTERESTED IN CLAIMS AGAINST THE UNITED STATES.] Whoever, being an officer of the United States, or a person holding any place of trust or profit, or discharging any official function under, or in connection with, any Executive Department of the Government of the United States, or under the Senate or House of Representatives of the United States, shall act as an agent or attorney for prosecuting any claim against the United States, or in any manner, or by any means, otherwise than in discharge of his proper official duties, shall aid or assist in the prosecution or support of any such claim, or receive any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall be fined not more than five thousand dollars or imprisoned not more than one year, or both.—(35 Stat., 1107; sec. 5498, R. S.)

See section 113 of this act, set forth below; and see note to section 190, Revised Statutes, as to status of retired officers; see also note to section 418, Revised Statutes, under "Records of Department," and section 40 of this act, set forth above.

By act of March 1, 1901 (31 Stat., 844-845), it was provided that members of the National

Guard of the District of Columbia who receive compensation for their services as such shall not be held or construed to be officers of the United States, or persons holding any place of trust or profit, etc., within the provision of section 5498, Revised Statutes, now embodied in section 109 of this act.

SEC. 112. [MEMBER OF CONGRESS, ETC., TAKING CONSIDERATION FOR PROCURING CONTRACT, ETC.] Whoever, being elected or appointed a Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being an officer or agent of the United States, shall directly or indirectly take, receive, or agree to receive, from any person, any money, property, or other valuable consideration whatever, for procuring, or aiding to procure, any contract, appointive office, or place, from the United States or from any officer or department thereof, for any person whatever, or for giving any such contract, appointive office, or place to any person whomsoever; or whoever, directly or indirectly, shall offer, or agree to give, or shall give, or bestow, any



money, property, or other valuable consideration whatever, for the procuring, or aiding to procure, any such contract, appointive office, or place, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall, moreover, be disqualified from holding any office of honor, profit, or trust under the Government of the United States. Any such contract or agreement may at the option of the President be declared void.—(35 Stat., 1108–1109; sec. 1781, R. S.)

See section 3741, R. S.; and see act of June 10, 1896 (29 Stat., 361).

SEC. 113. [MEMBER OF CONGRESS, ETC., RECEIVING PAY FOR SERVICES BEFORE COURTS-MARTIAL, BUREAUS, ETC.] Whoever, being elected or appointed a Senator, Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being the head of a department, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall, moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States.—(35 Stat., 1109; sec. 1782, R. S.)

See note to section 190, Revised Statutes, as to status of retired officer.

SEC. 114. [MEMBER OF CONGRESS INTERESTED IN PUBLIC CONTRACTS.] Whoever, being elected or appointed a Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement, made or entered into in behalf of the United States by any officer or person authorized to make contracts on its behalf, shall be fined not more than three thousand dollars. All contracts or agreements made in violation of this section shall be void; and whenever any sum of money is advanced by the United States, in consideration of any such contract or agreement, it shall forthwith be repaid; and in case of failure or refusal to repay the same when demanded by the proper officer of the department under whose authority such contract or agreement shall have been made or entered into, suit shall at once be brought against the persons so failing or refusing and his sureties, for the recovery of the money so advanced.—(35 Stat., 1109; sec. 3739, R. S.)

See section 112 of this act, set forth above, and section 3741, Revised Statutes.

SEC. 115. [OFFICER MAKING CONTRACT WITH MEMBER OF CONGRESS.] Whoever, being an officer of the United States, shall on behalf of the United States, directly or indirectly make or enter into any contract, bargain, or agreement, in writing or otherwise, with any Member of or Delegate to Congress, or any Resident Commissioner, after his election or appointment as such Member, Delegate, or Resident Commissioner, and either before or after he has qualified,

and during his continuance in office, shall be fined not more than three thousand dollars.—(35 Stat., 1109; sec. 3742, R. S.)

See section 3741, Revised Statutes.

SEC. 116. [CONTRACTS; TWO PRECEDING SECTIONS CONSTRUED.] Nothing contained in the two preceding sections shall extend, or be construed to extend, to any contract or agreement made or entered into, or accepted, by any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company; nor to the purchase or sale of bills of exchange or other property by any Member of or Delegate to Congress, or Resident Commissioner, where the same are ready for delivery, and payment therefor is made, at the time of making or entering into the contract or agreement.—(35 Stat., 1109; sec. 3740, R. S.)

SEC. 117. [OFFICIAL ACCEPTING BRIBE.] Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof; or whoever, being an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, shall ask, accept, or receive any money, or any contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of money or value of the thing so asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place and thereafter be forever disqualified from holding any office of honor, trust, or profit under the Government of the United States.—(35 Stat., 1109–1110; secs. 5501, 5502, R. S.)

SEC. 118. [POLITICAL CONTRIBUTIONS SOLICITED BY OFFICERS.] No Senator or Representative in, or Delegate or Resident Commissioner to Congress, or Senator, Representative, Delegate, or Resident Commissioner elect, or officer or employee of either House of Congress, and no executive, judicial, military, or naval officer of the United States, and no clerk or employee of any department, branch, or bureau of the executive, judicial, or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk, or employee of the United States, or any department, branch, or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States.—(35 Stat., 1110; 22 Stat., 406.)

See section 1546, Revised Statutes, and note thereto.

SEC. 119. [POLITICAL CONTRIBUTIONS SOLICITED IN PUBLIC OFFICES.] No person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in the preceding section, or in any navy-yard, fort, or arsenal, solicit in any manner whatever or receive any contribution of money or other thing of value for any political purpose whatever.—(35 Stat., 1110; 22 Stat., 407.)

See section 1546, Revised Statutes, and note thereto.



SEC. 120. [IMMUNITY FROM OFFICIAL PROSCRIPTION.] No officer or employee of the United States mentioned in section one hundred and eighteen, shall discharge, or promote, or degrade, or in any manner change the official rank or compensation of any other officer or employee, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose.—(35 Stat., 1110; 22 Stat., 407.)

See section 1546, Revised Statutes, and note thereto.

SEC. 121. [MAKING POLITICAL CONTRIBUTIONS TO OFFICIALS.] No officer, clerk, or other person in the service of the United States shall, directly or indirectly, give or hand over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of or Delegate to Congress, or Resident Commissioner, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever.—(35 Stat., 1110; 22 Stat., 407.)

See section 1546, Revised Statutes, and note thereto.

SEC. 122. [PUNISHMENT; FOUR PRECEDING SECTIONS.] Whoever shall violate any provision of the four preceding sections shall be fined not more than five thousand dollars, or imprisoned not more than three years, or both.—(35 Stat., 1110; 22 Stat., 407.)

## CHAPTER SIX.

### OFFENSES AGAINST PUBLIC JUSTICE.

Sec.	Sec.
125. Perjury.	133. Juror, referee, master, etc., or judicial officer, etc., accepting bribe.
126. Subornation of perjury.	134. Witness accepting bribe.
128. Destroying, etc., public records.	145. Extortion by informer.
129. Destroying records by officer in charge.	146. Misprision of felony.
131. Bribery of a judge or judicial officer.	

SEC. 125. [PERJURY DEFINED.] Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.—(35 Stat., 1111; sec. 5392, R. S.)

See sections 1023 and 1624, articles 14, 22, and 42, Revised Statutes.

SEC. 126. [SUBORNATION OF PERJURY.] Whoever shall procure another to commit any perjury is guilty of subornation of perjury and punishable as in the preceding section prescribed.—(35 Stat., 1111; sec. 5393, R. S.)

SEC. 128. [DESTROYING, ETC., PUBLIC RECORDS.] Whoever shall willfully and unlawfully conceal, remove, mutilate, obliterate, or destroy, or attempt to conceal, remove, mutilate, obliterate, or destroy, or, with intent to conceal, remove, mutilate, obliterate, destroy, or steal, shall take and carry away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined

not more than two thousand dollars, or imprisoned not more than three years, or both.—(35 Stat., 1111–1112; sec. 5403, R. S.)

See section 40 of this act, set forth above; and see notes to section 418, Revised Statutes, and act of February 16, 1889 (25 Stat., 672).

SEC. 129. [DESTROYING, ETC., RECORDS BY CUSTODIAN.] Whoever, having the custody of any record, proceeding, map, book, document, paper, or other thing specified in the preceding section, shall willfully and unlawfully conceal, remove, mutilate, obliterate, falsify, or destroy any such record, proceeding, map, book, document, paper, or thing, shall be fined not more than two thousand dollars, or imprisoned not more than three years, or both; and shall moreover forfeit his office and be forever afterward disqualified from holding any office under the Government of the United States.—(35 Stat., 1112; sec. 5408, R. S.)

SEC. 131. [BRIBERY OF JUDICIAL OFFICER, ETC.] Whoever, directly or indirectly, shall give or offer, or cause to be given or offered, any money, property, or value of any kind, or any promise or agreement therefor, or any other bribe, to any judge, judicial officer, or other person authorized by any law of the United States to hear or determine any question, matter, cause, proceeding, or controversy, with intent to influence his action, vote, opinion, or decision thereon, or because of any such action, vote, opinion, or decision, shall be fined not more than twenty thousand dollars, or imprisoned not more than fifteen years, or both; and shall forever be disqualified to hold any office of honor, trust, or profit under the United States.—(35 Stat., 1112; sec. 5449, R. S.)

SEC. 133. [ACCEPTANCE OF BRIBE BY OFFICER.] Whoever, being a juror, referee, arbitrator, appraiser, assessor, auditor, master, receiver, United States commissioner, or other person authorized by any law of the United States to hear or determine any question, matter, cause, controversy, or proceeding, shall ask, receive, or agree to receive, any money, property, or value of any kind, or any promise or agreement therefor, upon any agreement or understanding that his vote, opinion, action, judgment, or decision shall be influenced thereby, or because of any such vote, opinion, action, judgment, or decision, shall be fined not more than two thousand dollars, or imprisoned not more than two years, or both.—(35 Stat., 1112.)

SEC. 134. [WITNESS ACCEPTING BRIBE.] Whoever, being, or about to be, a witness upon a trial, hearing, or other proceeding, before any court or any officer authorized by the laws of the United States to hear evidence or take testimony, shall receive, or agree or offer to receive, a bribe, upon any agreement or understanding that his testimony shall be influenced thereby, or that he will absent himself from the trial, hearing, or other proceeding, or because of such testimony, or such absence, shall be fined not more than two thousand dollars, or imprisoned not more than two years, or both.—(35 Stat., 1113.)

SEC. 145. [EXTORTION BY INFORMER.] Whoever shall, under a threat of informing, or as a consideration for not informing, against any violation of any law of the United States, demand or receive any money or other valuable thing, shall be fined not more than two thousand dollars, or imprisoned not more than one year, or both.—(35 Stat., 1114; sec. 5484, R. S.)

SEC. 146. [MISPRISION OF FELONY.] Whoever, having knowledge of the actual commission of the crime of murder or other felony cognizable by the



courts of the United States, conceals and does not as soon as may be disclose and make known the same to some one of the judges or other persons in civil or military authority under the United States, shall be fined not more than five hundred dollars, or imprisoned not more than three years, or both.—(35 Stat., 1114; sec. 5390, R. S.)

## CHAPTER SEVEN.

### OFFENSES AGAINST THE CURRENCY, COINAGE, ETC.

SEC. 178. [ISSUING CHECKS, ETC., FOR LESS THAN ONE DOLLAR.] No person shall make, issue, circulate, or pay out any note, check, memorandum, token, or other obligation for a less sum than one dollar, intended to circulate as money or to be received or used in lieu of lawful money of the United States; and every person so offending shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.—(35 Stat., 1122; sec. 3583, R. S.)

## CHAPTER EIGHT.

### OFFENSES AGAINST THE POSTAL SERVICE.

Sec.	Sec.
189. Injuring mail bags, etc.	208. Unlawful pledging or sale of stamps.
190. Stealing post-office property.	209. Failure to account for postage and to cancel stamps, etc., by officials.
192. Breaking into and entering post-office.	210. Issuing money order without payment.
193. Unlawfully entering postal car, etc.	211. Obscene, etc., matter nonmailable.
194. Stealing, secreting, embezzling, etc., mail matter or contents.	212. Libelous and indecent wrappers and envelopes.
195. Postmaster or employee of postal service detaining, destroying, or embezzling letter, etc.	213. Lottery, gift enterprise, etc., circulars, etc., not mailable.
196. Postmaster, etc., detaining or destroying newspapers.	214. Postmasters not to be lottery agents.
197. Assaulting mail carrier with intent to rob, and robbing mail.	217. Poisons and explosives nonmailable.
199. Deserting the mail.	218. Counterfeiting money orders.
201. Obstructing the mail.	225. Misappropriation of postal funds or property.
207. Collection of unlawful postage forbidden.	227. Fraudulent use of official envelopes.
	230. Omission to take oath.

SEC. 189. [INJURING MAIL BAGS, ETC.] Whoever shall tear, cut, or otherwise injure any mail bag, pouch, or other thing used or designed for use in the conveyance of the mail, or shall draw or break any staple or loosen any part of any lock, chain, or strap attached thereto, with intent to rob or steal any such mail, or to render the same insecure, shall be fined not more than five hundred dollars or imprisoned not more than three years, or both.—(35 Stat., 1124; sec. 5476, R. S.)

See act of May 27, 1908 (35 Stat., 417-418), and amendments quoted thereunder, as to Navy mail clerks and assistants, their status, duties, etc.

SEC. 190. [STEALING, ETC., POST-OFFICE PROPERTY.] Whoever shall steal, purloin, or embezzle any mail bag or other property in use by or belonging to the Post-Office Department, or shall appropriate any such property to his own or any other than its proper use, or shall convey away any such property to the hindrance or detriment of the public service, shall be fined not more than two hundred dollars, or imprisoned not more than three years, or both.—(35 Stat., 1124; sec. 5475, R. S.)

See note to section 189, above, as to Navy mail clerks.

SEC. 192. [BREAKING INTO POST-OFFICE.] Whoever shall forcibly break into or attempt to break into any post-office, or any building used in whole or in part as a post-office, with intent to commit in such post-office, or building, or part thereof, so used, any larceny or other depredation, shall be fined not more than one thousand dollars and imprisoned not more than five years.—(35 Stat., 1125; sec. 5478, R. S.)

See note to section 189, above, as to Navy mail clerks.

SEC. 193. [UNLAWFULLY ENTERING COMPARTMENT OF VESSEL, ETC., USED BY MAIL SERVICE.] Whoever, by violence, shall enter a post-office car, or any apartment in any car, steamboat, or vessel, assigned to the use of the Mail Service, or shall willfully or maliciously assault or interfere with any postal clerk in the discharge of his duties in connection with such car, steamboat, vessel, or apartment thereof, or shall willfully aid or assist therein, shall be fined not more than one thousand dollars, or imprisoned not more than three years, or both.—(35 Stat., 1125; 32 Stat., 1176.)

See note to section 189, above, as to Navy mail clerks.

SEC. 194. [STEALING, EMBEZZLING, ETC., MAIL MATTER.] Whoever shall steal, take, or abstract, or by fraud or deception obtain, from or out of any mail, post-office, or station thereof, or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or shall abstract or remove from any such letter, package, bag, or mail, any article or thing contained therein, or shall secrete, embezzle, or destroy any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or whoever shall buy, receive, or conceal, or aid in buying, receiving, or concealing, or shall unlawfully have in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been so stolen, taken, embezzled, or abstracted; or whoever shall take any letter, postal card, or package, out of any post-office or station thereof, or out of any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post-office or station thereof, or other authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with a design to obstruct the correspondence, or to pry into the business or secrets of another, or shall open, secrete, embezzle, or destroy the same, shall be fined not more than two thousand dollars, or imprisoned not more than five years, or both.—(35 Stat., 1125; secs. 3892, 5469, Revised Statutes.)

See note to section 189, above, as to Navy mail clerks.

SEC. 195. [POSTAL EMPLOYEE DETAINING, DESTROYING, OR EMBEZZLING MAIL MATTER.] Whoever, being a postmaster or other person employed in any department of the postal service, shall unlawfully detain, delay, or open any letter, postal card, package, bag, or mail intrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any carrier, messenger, agent, or other person employed in any department of the postal service, or forwarded through or delivered from any post-office or station thereof established by authority of the Postmaster-



General; or shall secrete, embezzle, or destroy any such letter, postal card, package, bag, or mail; or shall steal, abstract, or remove from any such letter, package, bag, or mail, any article or thing contained therein, shall be fined not more than five hundred dollars, or imprisoned not more than five years or both.—(35 Stat., 1125–1126; secs. 3890, 3891, 5467, R. S.)

See note to section 189, above, as to Navy mail clerks.

SEC. 196. [POSTAL EMPLOYEE DETAINING, OPENING, OR DESTROYING, ETC., NEWSPAPERS IN MAIL.] Whoever, being a postmaster or other person employed in any department of the postal service, shall improperly detain, delay, embezzle, or destroy any newspaper, or permit any other person to detain, delay, embezzle, or destroy the same, or open, or permit any other person to open, any mail or package of newspapers not directed to the office where he is employed; or whoever shall open, embezzle, or destroy any mail or package of newspapers not being directed to him, and he not being authorized to open or receive the same; or whoever shall take or steal any mail or package of newspapers from any post-office or from any person having custody thereof, shall be fined not more than one hundred dollars, or imprisoned not more than one year, or both.—(35 Stat., 1126; sec. 5471, R. S.)

See note to section 189, above, as to Navy mail clerks.

SEC. 197. [ASSAULTING OR ROBBING MAIL CUSTODIAN.] Whoever shall assault any person having lawful charge, control, or custody of any mail matter, with intent to rob, steal, or purloin such mail matter or any part thereof, or shall rob any such person of such mail or any part thereof, shall, for a first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery, he shall wound the person having custody of the mail, or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.—(35 Stat., 1126; secs. 5472, 5473, R. S.)

See note to section 189, above, as to Navy mail clerks.

SEC. 199. [DESERTING THE MAIL.] Whoever, having taken charge of any mail, shall voluntarily quit or desert the same before he has delivered it into the post-office at the termination of the route, or to some known mail carrier, messenger, agent, or other employee in the postal service authorized to receive the same, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both.—(35 Stat., 1126; sec. 5474, R. S.)

See note to section 189, above, as to Navy mail clerks.

SEC. 201.—[OBSTRUCTING THE MAIL.] Whoever shall knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver, or carrier, or car, steamboat, or other conveyance or vessel carrying the same, shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both.—(35 Stat., 1127; sec. 3995, R. S.)

See note to section 189, above, as to Navy mail clerks.

SEC. 207. [COLLECTING UNLAWFUL POSTAGE.] Whoever, being a postmaster or other person authorized to receive the postage of mail matter, shall fraudulently demand or receive any rate of postage or gratuity or reward other

than is provided by law for the postage of such mail matter, shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both.—(35 Stat., 1128; sec. 3899, R. S.)

See note to section 189, above, as to Navy mail clerks.

SEC. 208. [UNLAWFUL PLEDGING OR SALE OF STAMPS, ETC.] Whoever, being a postmaster or other person employed in any branch of the postal service, and being intrusted with the sale or custody of postage stamps, stamped envelopes, or postal cards, shall use or dispose of them in the payment of debts, or in the purchase of merchandise or other salable articles, or pledge or hypothecate the same, or sell or dispose of them except for cash; or sell or dispose of postage stamps or postal cards for any larger or less sum than the values indicated on their faces; or sell or dispose of stamped envelopes for a larger or less sum than is charged therefor by the Post-Office Department for like quantities; or sell or dispose of, or cause to be sold or disposed of, postage stamps, stamped envelopes, or postal cards at any point or place outside of the delivery of the office where such postmaster or other person is employed; or induce or attempt to induce, for the purpose of increasing the emoluments or compensation of such postmaster, or the emoluments or compensation of any other person employed in such post-office or any station thereof, or the allowances or facilities provided therefor, any person to purchase at such post-office or any station thereof, or from any employee of such post-office, postage stamps, stamped envelopes, or postal cards; or sell or dispose of postage stamps, stamped envelopes, or postal cards, otherwise than as provided by law or the regulations of the Post-Office Department, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both.—(35 Stat., 1128; sec. 3920, R. S.)

See note to section 189, above, as to Navy mail clerks.

SEC. 209. [FAILING TO ACCOUNT FOR POSTAGE DUE, ETC.] Whoever, being a postmaster or other person engaged in the postal service, shall collect and fail to account for the postage due upon any article of mail matter which he may deliver, without having previously affixed and canceled the special stamp provided by law, or shall fail to affix such stamp, shall be fined not more than fifty dollars.—(35 Stat., 1128–1129; 20 Stat., 362.)

See note to section 189, above, as to Navy mail clerks.

SEC. 210. [ISSUING UNPAID-FOR MONEY ORDERS.] Whoever, being a postmaster or other person employed in any branch of the postal service, shall issue a money order without having previously received the money therefor, shall be fined not more than five hundred dollars.—(35 Stat., 1129; sec. 4030, R. S.)

See note to section 189, above, as to Navy mail clerks.

SEC. 211. [OBSCENE MATTER UNMAILABLE; INCITING ARSON, MURDER, ETC.] Every obscene, lewd, or lascivious, and every filthy, book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and every article, instrument, substance, drug, medicine, or thing which is advertised or



described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information directly or indirectly, where, or how, or from whom, or by what means any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can be, used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing, is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both. And the term "indecent" within the intentment of this section shall include matter of a character tending to incite arson, murder, or assassination.—(35 Stat., 1129; 25 Stat., 496; sec. 3893, R. S.; 36 Stat., 1339.)

Amendment to this section was made by act of March 4, 1911 (36 Stat., 1339), which added thereto the last sentence above set forth. See acts of July 31, 1912 (37 Stat., 240-241); and June 15, 1917 (40 Stat., 230-231).

Punishment for mailing threats against the President: See act of February 14, 1917 (39 Stat., 919).

SEC. 212. [LIBELOUS OR INDECENT MATTER ON WRAPPERS, ETC.] All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, may be written or printed or otherwise impressed or apparent, are hereby declared nonmailable matter, and shall not be conveyed in the mails nor delivered from any post-office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe. Whoever shall knowingly deposit or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter, or shall knowingly take the same or cause the same to be taken from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.—(35 Stat., 1129; 25 Stat., 496.)

SEC. 213. [LOTTERY CIRCULARS, ETC., NOT MAILABLE.] No letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme

offering prizes dependent in whole or in part upon lot or chance; and no lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance; and no check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme; and no newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be deposited in or carried by the mails of the United States, or be delivered by any postmaster or letter carrier. Whoever shall knowingly deposit or cause to be deposited, or shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of the provisions of this section, or shall knowingly deliver or cause to be delivered by mail anything herein forbidden to be carried by mail, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years. Any person violating any provision of this section may be tried and punished either in the district in which the unlawful matter or publication was mailed, or to which it was carried by mail for delivery according to the direction thereon, or in which it was caused to be delivered by mail to the person to whom it was addressed.—(35 Stat., 1129–1130; sec. 3894, R. S.; 26 Stat., 465; 28 Stat., 963.)

SEC. 214. [POSTAL EMPLOYEE SELLING OR DELIVERING LOTTERY TICKETS, ETC.] Whoever, being a postmaster or other person employed in the postal service, shall act as agent for any lottery office, or under color of purchase or otherwise, vend lottery tickets, or shall knowingly send by mail or deliver any letter, package, postal card, circular, or pamphlet advertising any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any ticket, certificate, or instrument representing any chance, share, or interest in or dependent upon the event of any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes awarded by means of any such scheme, shall be fined not more than one hundred dollars, or imprisoned not more than one year, or both.—(35 Stat., 1130; sec. 3851, R. S.)

See note to section 189, above, as to Navy mail clerks.

SEC. 217. [POISONS, EXPLOSIVES, INTOXICANTS, ETC., NONMAILABLE.] That all kinds of poison, and all articles and compositions containing poison, and all poisonous animals, insects, and reptiles, and explosives of all kinds, and inflammable materials, and infernal machines, and mechanical, chemical, or other devices or compositions which may ignite or explode, and all disease germs or scabs, and all other natural or artificial articles, compositions, or materials, of whatever kind, which may kill or in anywise hurt, harm, or injure another or damage, deface, or otherwise injure the mails or other property, whether sealed as first-class matter or not, are hereby declared to be nonmailable matter, and



shall not be conveyed in the mails or delivered from any post office or station thereof, nor by any letter carrier; but the Postmaster General may permit the transmission in the mails, from the manufacturer thereof or dealer therein to licensed physicians, surgeons, dentists, pharmacists, druggists, and veterinarians, under such rules and regulations as he shall prescribe, of any articles hereinbefore described which are not outwardly or of their own force dangerous or injurious to life, health, or property: *Provided*, That all spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind are hereby declared to be nonmailable, and shall not be deposited in or carried through the mails. Whoever shall knowingly deposit or cause to be deposited for mailing or delivery, or shall knowingly cause to be delivered by mail, according to the direction thereon or at any place at which it is directed to be delivered by the person to whom it is addressed, anything declared by this section to be nonmailable, unless in accordance with the rules and regulations hereby authorized to be prescribed by the Postmaster General, shall be fined not more than \$1,000 or imprisoned not more than two years, or both; and whoever shall knowingly deposit or cause to be deposited for mailing or delivery, or shall knowingly cause to be delivered by mail, according to the direction thereon or at any place to which it is directed to be delivered by the person to whom it is addressed, anything declared by this section to be nonmailable, whether transmitted in accordance with the rules and regulations authorized to be prescribed by the Postmaster General or not, with the design, intent, or purpose to kill or in anywise hurt, harm, or injure another, or damage, deface, or otherwise injure the mails or other property, shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.—(35 Stat., 1131; 41 Stat., 620-621.)

This section was expressly amended and re-enacted to read as above by act of May 25, 1920 (41 Stat., 620-621).

Restrictions on the mailing of advertisements or orders for intoxicants were prescribed by act of March 3, 1917 (39 Stat., 1069), as

amended by acts of October 3, 1917 (40 Stat., 329), and February 24, 1919 (40 Stat., 1151).

See sections 232 and 235, below, as to transportation of explosives.

SEC. 218. [FORGING MONEY ORDERS OR SIGNATURES THEREON, ETC.] Whoever, with intent to defraud, shall falsely make, forge, counterfeit, engrave, or print, or cause or procure to be falsely made, forged, counterfeited, engraved, or printed, or shall willingly aid or assist in falsely making, forging, counterfeiting, engraving, or printing, any order in imitation of or purporting to be a money order issued by the Post-Office Department, or by any postmaster or agent thereof; or whoever shall forge or counterfeit the signature of any postmaster, assistant postmaster, chief clerk, or clerk, upon or to any money order, or postal note, or blank therefor provided or issued by or under the direction of the Post-Office Department of the United States, or of any foreign country, and payable in the United States, or any material signature or indorsement thereon, or any material signature to any receipt or certificate of identification thereon; or shall falsely alter, or cause or procure to be falsely altered in any material respect, or knowingly aid or assist in falsely so altering any such money order or postal note; or shall, with intent to defraud, pass, utter, or publish any such forged or altered money order or postal note, knowing any material signature or indorsement thereon to be false, forged, or counterfeited, or any material

alteration therein to have been falsely made; or shall issue any money order or postal note without having previously received or paid the full amount of money payable therefor, with the purpose of fraudulently obtaining or receiving, or fraudulently enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any officer, employee, or agent thereof, any sum of money whatever; or shall, with intent to defraud the United States, or any person, transmit or present to, or cause or procure to be transmitted or presented to, any officer or employee, or at any office of the Government of the United States, any money order or postal note, knowing the same to contain any forged or counterfeited signature to the same, or to any material indorsement, receipt, or certificate thereon, or material alteration therein unlawfully made, or to have been unlawfully issued without previous payment of the amount required to be paid upon such issue, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.—(35 Stat., 1131–1132; 24 Stat., 355; 25 Stat., 187; sec. 5463, R. S.)

See note to section 189, above, as to Navy mail clerks.

SEC. 225. [MISAPPROPRIATING POSTAL FUNDS, ETC.] Whoever, being a postmaster or other person employed in or connected with any branch of the postal service, shall loan, use, pledge, hypothecate, or convert to his own use, or shall deposit in any bank, or exchange for other funds or property, except as authorized by law, any money or property coming into his hands or under his control in any manner whatever, in the execution or under color of his office, employment, or service, whether the same shall be the money or property of the United States or not; or shall fail or refuse to remit to or deposit in the Treasury of the United States or in a designated depository, or to account for or turn over to the proper officer or agent, any such money or property, when required so to do by law or the regulations of the Post-Office Department, or upon demand or order of the Postmaster-General, either directly or through a duly authorized officer or agent, shall be deemed guilty of embezzlement; and every such person, as well as every other person advising or knowingly participating therein, shall be fined in a sum equal to the amount or value of the money or property embezzled or imprisoned not more than ten years, or both. Any failure to produce or to pay over any such money or property, when required so to do as above provided, shall be taken to be *prima facie* evidence of such embezzlement; and upon the trial of any indictment against any person for such embezzlement it shall be *prima facie* evidence of a balance against him to produce a transcript from the account books of the Auditor for the Post-Office Department. But nothing herein shall be construed to prohibit any postmaster depositing, under the direction of the Postmaster-General, in a national bank designated by the Secretary of the Treasury for that purpose, to his own credit as postmaster, any funds in his charge, nor prevent his negotiating drafts or other evidences of debt through such bank, or through United States disbursing officers, or otherwise, when instructed or required so to do by the Postmaster-General, for the purpose of remitting surplus funds from one post-office to another.—(35 Stat., 1133–1134; secs. 4046, 4053.)

See note to section 189, above, as to Navy mail clerks.



SEC. 227. [FRAUDULENT USE OF OFFICIAL ENVELOPES.] Whoever shall make use of any official envelope, label, or indorsement authorized by law, to avoid the payment of postage or registry fee on his private letter, packet, package, or other matter in the mail, shall be fined not more than three hundred dollars.—(35 Stat., 1134; 19 Stat., 335.)

See act of March 3, 1877 (19 Stat., 335-336); and see laws noted under sections 388 and 398, Revised Statutes.

SEC. 230. [OMISSION TO TAKE OATH.] Every person employed in the Postal Service shall be subject to all penalties and forfeitures for the violation of the laws relating to such service, whether he has taken the oath of office or not.—(35 Stat., 1134; sec. 3832, R. S.)

See note to section 189, above, as to Navy mail clerks; see also sections 391-392, Revised Statutes, and notes thereto.

## CHAPTER NINE.

### OFFENSES AGAINST FOREIGN AND INTERSTATE COMMERCE.

SEC.	SEC.
232. Dynamite, etc., not to be carried on vessels or vehicles carrying passengers for hire.	237. Importation and transportation of lottery tickets, etc., forbidden.
235. Marking of packages of explosives; deceptive marking.	245. Importation and transportation of obscene, etc., books, etc.

SEC. 232. [EXPLOSIVES, TRANSPORTATION; NAVAL FORCES, ETC.] It shall be unlawful to transport, carry, or convey, within the limits of the jurisdiction of the United States, any high explosive, such as, and including, dynamite, blasting caps, detonating fuzes, black powder, gunpowder, or other like explosive, on any vessel, car, or vehicle of any description operated in the transportation of passengers by a common carrier engaged in interstate or foreign commerce, which vessel, car, or vehicle is carrying passengers for hire: *Provided*, That it shall be lawful to transport on any such vessel, car, or vehicle smokeless powder, primers, fuses, not including detonating fuzes, fireworks, or other similar explosives, and properly packed and marked samples of explosives for laboratory examination, not exceeding a net weight of one-half pound each, and not exceeding twenty samples at one time in a single vessel, car, or vehicle; but such explosives shall not be carried in that part of a vessel, car, or vehicle which is being used for the transportation of passengers for hire: *Provided further*, That it shall be lawful to transport on any such vessel, car, or vehicle small-arms ammunition in any quantity, and such fusees, torpedoes, rockets, or other signal devices as may be essential to promote safety in operation: *And provided further*, That nothing in this section shall be construed to prevent the transportation of military or naval forces with their accompanying munitions of war on passenger-equipment vessels, cars, or vehicles.

The words "detonating fuzes," as used in this section shall be interpreted to mean fuzes used in naval or military service to detonate the high explosive bursting charges of projectiles, mines, bombs, or torpedoes. The word "fuses" as used herein shall be interpreted to mean devices used in igniting the bursting charges of projectiles. The word "primers" as used herein shall be interpreted to mean devices used in igniting the propelling powder charges of ammunition.

The word "fuses" as used herein shall be interpreted to mean the slow-burning fuses used commercially and intended to convey fire to an explosive or combustible mass slowly or without danger to the person lighting. The word "fusces" as used herein shall be interpreted to mean the fusces ordinarily used on steamboats and railroads as night signals.—(35 Stat., 1134–1135; sec. 5353, R. S.; 35 Stat., 554; 41 Stat., 1444.)

This section was expressly amended and reenacted to read as above by act of March 4, 1921 (41 Stat., 1444).

SEC. 235. [MARKING PACKAGES OF EXPLOSIVES; PENALTY FOR VIOLATING PRECEDING SECTIONS.] Every package containing explosives or other dangerous articles when presented to a common carrier for shipment shall have plainly marked on the outside thereof the contents thereof; and it shall be unlawful for any person to deliver, or cause to be delivered, to any common carrier engaged in interstate or foreign commerce by land or water, or to carry upon any vessel, car, or vehicle operated by any common carrier engaged in interstate or foreign commerce by land or water any explosive, or other dangerous article, as specified in section 233 of this Act, under any false or deceptive marking, description, invoice, shipping order, or other declaration, or without informing the agent of such carrier in writing of the true character thereof, at or before the time such delivery or carriage is made. Whoever shall knowingly violate, or cause to be violated, any provision of this section, or of the three sections last preceding, or any regulation made by the Interstate Commerce Commission in pursuance thereof, shall be fined not more than \$2,000 or imprisoned not more than eighteen months, or both.—(35 Stat., 1135; 35 Stat., 555; sec. 5355, R. S.; 41 Stat., 1445.)

This section was expressly amended and reenacted to read as above by act of March 4, 1921 (41 Stat., 1445).

SEC. 237. [IMPORTING, ETC., LOTTERY TICKETS, ETC.] Whoever shall bring or cause to be brought into the United States or any place subject to the jurisdiction thereof, from any foreign country, for the purpose of disposing of the same, any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or shall therein knowingly deposit or cause to be deposited with any express company or other common carrier for carriage, or shall carry, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, to any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States through a foreign country to any place in or subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States to a foreign country, any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of any such lottery, gift enterprise, or similar scheme, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or



similar scheme, or shall knowingly take or receive, or cause to be taken or received, any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall, for the first offense, be fined not more than one thousand dollars, or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than two years.—(35 Stat., 1136; 28 Stat., 963.)

SEC. 245. [IMPORTING OR TRANSPORTING OBSCENE BOOKS, ETC.] Whoever shall bring or cause to be brought into the United States, or any place subject to the jurisdiction thereof, from any foreign country, or shall therein knowingly deposit or cause to be deposited with any express company or other common carrier, for carriage from one State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, to any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States, through a foreign country, to any place in or subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States to a foreign country, any obscene, lewd, or lascivious, or any filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character, or any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of the hereinbefore mentioned articles, matters, or things may be obtained or made; or whoever shall knowingly take or cause to be taken from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.—(35 Stat., 1138; 33 Stat., 705; 29 Stat., 512; 41 Stat., 1060–1061.)

This section was expressly amended and reenacted to read as above by act of June 5, 1920 (41 Stat., 1060–1061).

## CHAPTER TEN.

### THE SLAVE TRADE AND PEONAGE.

Sec.	Sec.
260. Seizure of vessels engaged in the slave trade.	267. Instructions to commanders of armed vessels.

SEC. 260. [SEIZURE OF VESSELS IN SLAVE TRADE; USE OF NAVAL FORCES.] The President is authorized, when he deems it expedient, to man and employ any of the armed vessels of the United States to cruise wherever he may judge attempts are making to carry on the slave trade, by citizens or residents of the United States, in contravention of laws prohibitory of the same; and, in such case, he shall instruct the commanders of such armed vessels to seize, take, and bring into any port of the United States, to be proceeded against according to law, all American vessels wheresoever found, which may have on board, or which may be intended for the purpose of taking on board, or of transporting, or may have transported any person, in violation

of the provisions of any Act of Congress prohibiting the traffic in slaves.—(35 Stat., 1140–1141; sec. 5557, R. S.)

SEC. 267. [INSTRUCTIONS TO COMMANDERS OF ARMED VESSELS.] The President is authorized to issue instructions to the commanders of the armed vessels of the United States, directing them, whenever it is practicable, and under such rules and regulations as he may prescribe, to proceed directly to the country from which they were taken, and there hand over to the agent of the United States all such persons, delivered from on board vessels seized in the prosecution of the slave trade; and they shall afterwards bring the captured vessels and persons engaged in prosecuting such trade to the United States for trial and adjudication.—(35 Stat., 1141: sec. 5567, R. S.)

#### CHAPTER ELEVEN.

#### OFFENSES WITHIN THE ADMIRALTY AND MARITIME AND THE TERRITORIAL [OR EXCLUSIVE] JURISDICTION OF THE UNITED STATES.

Sec.	Sec.
272. Places within or waters upon which sections of this chapter shall apply.	283. Maiming.
273. Murder.	284. Robbery.
274. Manslaughter.	285. Arson of dwelling house.
275. Punishment for murder; for manslaughter.	286. Arson of other buildings, etc.
276. Assault with intent to commit murder, etc.	287. Larceny.
277. Attempt to commit murder or manslaughter.	288. Receiving, etc., stolen goods.
278. Rape.	289. Laws of States adopted for punishing wrongful acts, etc.
279. Having carnal knowledge of female under sixteen.	

SEC. 272. [PLACES WITHIN OR WATERS UPON WHICH THIS CHAPTER SHALL APPLY.] The crimes and offenses defined in this chapter shall be punished as herein prescribed:

First. When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof.

Second. When committed upon any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, namely: Lake Superior, Lake Michigan, Lake Huron, Lake Saint Clair, Lake Erie, Lake Ontario, or any of the waters connecting any of said lakes, or upon the River Saint Lawrence where the same constitutes the International boundary line.

Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dock-yard, or other needful building.

Fourth. On any island, rock, or key, containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.—(35 Stat., 1142–1143; sec. 5339, R. S.; 26 Stat., 424.)



SEC. 273. [MURDER DEFINED.] Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree. (35 Stat., 1143.)

SEC. 274. [MANSLAUGHTER DEFINED.] Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

First. Voluntary—Upon a sudden quarrel or heat of passion.

Second. Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.—(35 Stat., 1143; sec. 5341, R. S.)

SEC. 275. [PUNISHMENT FOR MURDER AND MANSLAUGHTER.] Every person guilty of murder in the first degree shall suffer death. Every person guilty of murder in the second degree shall be imprisoned not less than ten years and may be imprisoned for life. Every person guilty of voluntary manslaughter shall be imprisoned not more than ten years. Every person guilty of involuntary manslaughter shall be imprisoned not more than three years, or fined not exceeding one thousand dollars, or both.—(35 Stat., 1143; secs. 5339, 5343, R. S.)

SEC. 276. [ASSAULT WITH INTENT TO COMMIT MURDER, ETC.] Whoever shall assault another with intent to commit murder, or rape, shall be imprisoned not more than twenty years. Whoever shall assault another with intent to commit any felony, except murder, or rape, shall be fined not more than three thousand dollars, or imprisoned not more than ten years, or both. Whoever, with intent to do bodily harm, and without just cause or excuse, shall assault another with a dangerous weapon, instrument, or other thing, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both. Whoever shall unlawfully strike, beat, or wound another, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both. Whoever shall unlawfully assault another, shall be fined not more than three hundred dollars, or imprisoned not more than three months, or both.—(35 Stat., 1143; sec. 5346, R. S.)

SEC. 277. [ATTEMPT TO COMMIT MURDER OR MANSLAUGHTER.] Whoever shall attempt to commit murder or manslaughter, except as provided in the preceding section, shall be fined not more than one thousand dollars and imprisoned not more than three years.—(35 Stat., 1143; sec. 5342, R. S.)

SEC. 278. [RAPE.] Whoever shall commit the crime of rape shall suffer death.—(35 Stat., 1143; sec. 5345, R. S.)

SEC. 279. [HAVING CARNAL KNOWLEDGE OF FEMALE UNDER SIXTEEN.] Whoever shall carnally and unlawfully know any female under the age of sixteen years, or shall be accessory to such carnal and unlawful knowledge before the fact, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense be imprisoned not more than thirty years.—(35 Stat., 1143; 25 Stat., 658.)

SEC. 283. [MAIMING, ETC.] Whoever, with intent to maim or disfigure, shall cut, bite, or slit, the nose, ear, or lip, or cut out or disable the tongue, or put out or destroy an eye, or cut off or disable a limb or any member of another person; or whoever, with like intent, shall throw or pour upon another person, any scalding hot water, vitriol, or other corrosive acid, or caustic substance whatever, shall be fined not more than one thousand dollars, or imprisoned not more than seven years, or both.—(35 Stat., 1144; sec. 5348, R. S.)

SEC. 284. [ROBBERY.] Whoever, by force and violence, or by putting in fear, shall feloniously take from the person or presence of another anything of value, shall be imprisoned not more than fifteen years.—(35 Stat., 1144.)

SEC. 285. [ARSON OF DWELLING HOUSE.] Whoever shall willfully and maliciously set fire to, burn, or attempt to burn, or by means of a dangerous explosive destroy or attempt to destroy, any dwelling house, or any store, barn, stable, or other building, parcel of a dwelling house, shall be imprisoned not more than twenty years.—(35 Stat., 1144; sec. 5385, R. S.)

SEC. 286. [ARSON OF OTHER BUILDINGS, ETC.] Whoever shall maliciously set fire to, burn, or attempt to burn, or by any means destroy or injure, or attempt to destroy or injure, any arsenal, armory, magazine, ropewalk, ship house, warehouse, blockhouse, or barrack, or any storehouse, barn, or stable, not parcel of a dwelling house, or any other building not mentioned in the section last preceding, or any vessel built, building, or undergoing repair, or any light-house, or beacon, or any machinery, timber, cables, rigging, or other materials or appliances for building, repairing, or fitting out vessels, or any pile of wood, boards, or other lumber, or any military, naval, or victualing stores, arms, or other munitions of war, shall be fined not more than five thousand dollars and imprisoned not more than twenty years.—(35 Stat., 1144; secs. 5386, 5387, R. S.)

See section 301, below.

SEC. 287. [LARCENY; VALUE OF WRITTEN INSTRUMENT.] Whoever shall take and carry away, with intent to steal or purloin, any personal property of another, shall be punished as follows: If the property taken is of a value exceeding fifty dollars, or is taken from the person of another, by a fine of not more than ten thousand dollars, or imprisonment for not more than ten years, or both; in all other cases, by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or both. If the property stolen consists of any evidence of debt, or other written instrument, the amount of money due thereon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, shall be deemed to be the value of the property stolen.—(35 Stat., 1144-1145; sec. 5356, R. S.)

SEC. 288. [RECEIVING STOLEN GOODS, ETC.] Whoever shall buy, receive, or conceal, any money, goods, bank notes, or other thing which may be the subject of larceny, which has been feloniously taken, stolen, or embezzled, from any other person, knowing the same to have been so taken, stolen, or embezzled, shall be fined not more than one thousand dollars and imprisoned not more than



three years; and such person may be tried either before or after the conviction of the principal offender.—(35 Stat., 1145; sec. 5357, R. S.)

See section 334, below.

SEC. 289. [STATE LAWS ADOPTED IN FEDERAL RESERVATIONS.] Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the places now existing or hereafter reserved or acquired, described in section two hundred and seventy-two of this Act, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or District in which such place is situated, by the laws thereof now in force would be penal, shall be deemed guilty of a like offense and be subject to a like punishment; and every such State, Territorial, or District law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory or District.—(35 Stat., 1145; sec. 5391, R. S.; 30 Stat., 717.)

## CHAPTER TWELVE.

### PIRACY AND OTHER OFFENSES UPON THE SEAS.

Sec.

- 290. Piracy under the law of nations.
- 291. Maltreatment of crew by officers of vessel.
- 292. Inciting revolt or mutiny on shipboard.
- 293. Revolt and mutiny on shipboard.
- 294. Seaman laying violent hands on his commander.

Sec.

- 295. Abandonment of mariners in foreign ports.
- 297. Plundering vessel in distress, etc.
- 299. Breaking and entering vessel, etc.
- 301. Other person destroying or attempting to destroy vessel at sea.
- 310. "Vessels of the United States" defined.

SEC. 290. [PIRACY.] Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.—(35 Stat., 1145; sec. 5368, R. S.)

See section 294, below.

SEC. 291. [MALTREATMENT OF CREW BY OFFICERS.] Whoever, being the master or officer of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, beats, wounds, or without justifiable cause, imprisons any of the crew of such vessel, or withholds from them suitable food and nourishment, or inflicts upon them any cruel and unusual punishment, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both. \* \* \*. —(35 Stat., 1145; 29 Stat., 691; sec. 5347, R. S.)

See section 310, below, for definition of "vessel of the United States."

SEC. 292. [INCITING REVOLT OR MUTINY ON SHIPBOARD.] Whoever, being of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, endeavors to make a revolt or mutiny on board such vessel, or combines, conspires, or confederates with any other person on board to make such revolt or mutiny, or solicits, incites, or stirs up any other of the crew to disobey or resist the lawful orders of the master or other officer of such vessel, or to refuse or neglect their proper duty on board thereof, or to betray their proper trust, or

assembles with others in a tumultuous and mutinous manner, or makes a riot on board thereof, or unlawfully confines the master or other commanding officer thereof, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.—(35 Stat., 1146; sec. 5359, R. S.)

See section 310, below, for definition of "vessel of the United States."

SEC. 293. [REVOLT OR MUTINY ON SHIPBOARD.] Whoever, being of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, unlawfully and with force, or by fraud, or intimidation, usurps the command of such vessel from the master or other lawful officer in command thereof, or deprives him of authority and command on board, or resists or prevents him in the free and lawful exercise thereof, or transfers such authority and command to another not lawfully entitled thereto, is guilty of a revolt and mutiny, and shall be fined not more than two thousand dollars and imprisoned not more than ten years.—(35 Stat., 1146; sec. 5360, R. S.)

See section 310, below, for definition of "vessel of the United States."

SEC. 294. [SEAMAN LAYING HANDS ON COMMANDER.] Whoever, being a seaman, lays violent hands upon his commander, thereby to hinder and prevent his fighting in defense of his vessel or the goods intrusted to him, is a pirate, and shall be imprisoned for life.—(35 Stat., 1146; sec. 5369, R. S.)

SEC. 295. [ABANDONMENT OF MARINER IN FOREIGN PORT.] Whoever, being master or commander of a vessel of the United States, while abroad, maliciously and without justifiable cause forces any officer or mariner of such vessel on shore, in order to leave him behind in any foreign port or place, or refuses to bring home again all such officers and mariners of such vessel whom he carried out with him, as are in a condition to return and willing to return, when he is ready to proceed on his homeward voyage, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.—(35 Stat., 1146; sec. 5363, R. S.)

See section 310, below, for definition of "vessel of the United States."

SEC. 297. [PLUNDERING VESSEL IN DISTRESS, ETC.] Whoever plunders, steals, or destroys any money, goods, merchandise, or other effects, from or belonging to any vessel in distress, or wrecked, lost, stranded, or cast away, upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States, shall be fined not more than five thousand dollars and imprisoned not more than ten years; and whoever willfully obstructs the escape of any person endeavoring to save his life from such vessel, or the wreck thereof; or whoever holds out or shows any false light, or extinguishes any true light, with intent to bring any vessel sailing upon the sea into danger, or distress, or shipwreck, shall be imprisoned not less than ten years and may be imprisoned for life.—(35 Stat., 1146; sec. 5358, R. S.)

See section 1536, Revised Statutes, and act of August 1, 1912 (37 Stat., 242).

SEC. 299. [BREAKING AND ENTERING VESSEL, ETC.] Whoever, upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State,



breaks or enters any vessel, with intent to commit any felony, or maliciously cuts, spoils, or destroys any cordage, cable, buoys, buoy-rope, head-fast, or other fast, fixed to the anchor or moorings belonging to any vessel, shall be fined not more than one thousand dollars and imprisoned not more than five years.—(35 Stat., 1147; sec. 5362, R. S.)

SEC. 301. [DESTROYING VESSEL, ETC.] Whoever, not being an owner, upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States, willfully and corruptly casts away or otherwise destroys any vessel of the United States to which he belongs, or, willfully, with intent to destroy the same, sets fire to any such vessel, or otherwise attempts the destruction thereof, shall be imprisoned not more than ten years.—(35 Stat., 1147; 28 Stat., 233; secs. 5366, 5367, R. S.)

See section 286, above, as to arson of vessel.

See section 310, below, for definition of "vessel of the United States."

SEC. 310. ["VESSEL OF THE UNITED STATES," DEFINED.] The words "vessel of the United States" wherever they occur in this chapter shall be construed to mean a vessel belonging in whole or in part to the United States, or any citizen thereof, or any corporation created by or under the laws of the United States or of any State, Territory, or District thereof.—(35 Stat., 1148.)

### CHAPTER THIRTEEN.

#### CERTAIN OFFENSES IN THE TERRITORIES [OR ELSEWHERE WITHIN THE EXCLUSIVE JURISDICTION OF THE UNITED STATES].

Sec.	Sec.
311. Places within which sections of this chapter shall apply.	314. Unlawful cohabitation.
312. Circulation of obscene literature; promoting abortion.	316. Adultery.
	317. Incest.
	318. Fornication.

SEC. 311. [PLACES WITHIN WHICH THIS CHAPTER SHALL APPLY.] Except as otherwise expressly provided, the offenses defined in this chapter shall be punished as hereinafter provided, when committed within any Territory or District, or within or upon any place within the exclusive jurisdiction of the United States.—(35 Stat., 1148–1149.)

SEC. 312. [CIRCULATING OBSCENE LITERATURE, ETC.] Whoever shall sell, lend, give away, or in any manner exhibit, or offer to sell, lend, give away, or in any manner exhibit, or shall otherwise publish or offer to publish in any manner, or shall have in his possession for any such purpose, any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article of an immoral nature, or any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion, or shall advertise the same for sale, or shall write or print, or cause to be written or printed, any card, circular, book, pamphlet, advertisement, or notice of any kind, stating when, where, how, or of whom, or what means, any of the articles above mentioned can be purchased or obtained, or shall manufacture, draw, or print, or in anywise make any of such articles, shall be fined not more than two thousand dollars, or imprisoned not more than five years, or both.—(35 Stat., 1149; sec. 5389, R. S.)

SEC. 314. [UNLAWFUL COHABITATION.] If any male person cohabits with more than one woman, he shall be fined not more than three hundred dollars, or imprisoned not more than six months, or both.—(35 Stat., 1149; 22 Stat., 31.)

SEC. 3160. [ADULTERY.] Whoever shall commit adultery shall be imprisoned not more than three years; and when the act is committed between a married woman and a man who is unmarried, both parties to such act shall be deemed guilty of adultery; and when such act is committed between a married man and a woman who is unmarried, the man shall be deemed guilty of adultery.—(35 Stat., 1149; 24 Stat., 635.)

SEC. 317. [INCEST.] Whoever, being related to another person within and not including the fourth degree of consanguinity computed according to the rules of the civil law, shall marry or cohabit with, or have sexual intercourse with such other so related person, knowing her or him to be within said degree of relationship, shall be deemed guilty of incest, and shall be imprisoned not more than fifteen years.—(35 Stat., 1149; 24 Stat., 636.)

SEC. 318. [FORNICATION.] If any unmarried man or woman commits fornication, each shall be fined not more than one hundred dollars, or imprisoned not more than six months.—(35 Stat., 1149; 24 Stat., 636.)

## CHAPTER FOURTEEN.

### GENERAL AND SPECIAL PROVISIONS.

Sec.

332. Who are principals.

333. Punishment of accessories.

334. Accessories to robbery or piracy.

335. Felonies and misdemeanors.

Sec.

336. Murder and manslaughter; place where crime deemed to have been committed.

337. Construction of certain words.

338. Omission of words "hard labor" not to deprive court of power to impose.

SEC. 332. [PRINCIPALS DEFINED.] Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.—(35 Stat., 1152; secs. 5323, 5427, R. S.)

SEC. 333. [PUNISHMENT OF ACCESSORIES.] Whoever, except as otherwise expressly provided by law, being an accessory after the fact to the commission of any offense defined in any law of the United States, shall be imprisoned not exceeding one-half the longest term of imprisonment, or fined not exceeding one-half the largest fine prescribed for the punishment of the principal, or both, if the principal is punishable by both fine and imprisonment; or if the principal is punishable by death, then an accessory shall be imprisoned not more than ten years.—(35 Stat., 1152; secs. 5533–5535, R. S.)

SEC. 334. [ACCESSORIES TO ROBBERY OR PIRACY.] Whoever, without lawful authority, receives or takes into custody any vessel, goods, or other property, feloniously taken by any robber or pirate against the laws of the United States, knowing the same to have been feloniously taken, and whoever, knowing that such pirate or robber has done or committed any such piracy or robbery, on the land or at sea, receives, entertains, or conceals any such pirate or robber, is an accessory after the fact to such robbery or piracy, and shall be imprisoned not more than ten years.—(35 Stat., 1152; secs. 5324, 5533, R. S.)

See section 288, above.



SEC. 335. [FELONIES AND MISDEMEANORS.] All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors.—(35 Stat., 1152.)

SEC. 336. [MURDER AND MANSLAUGHTER; PLACE WHERE COMMITTED.] In all cases of murder or manslaughter, the crime shall be deemed to have been committed at the place where the injury was inflicted, or the poison administered, or other means employed which caused the death, without regard to the place where the death occurs.—(35 Stat., 1152.)

SEC. 337. [CONSTRUCTION OF CERTAIN WORDS.] Words used in this title in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural, and the plural the singular; the word "person" and the word "whoever" include a corporation as well as a natural person; writing includes printing and typewriting, and signature or subscription includes a mark when the person making the same intended it as such. The words "this title," wherever they occur herein, shall be construed to mean this Act.—(35 Stat., 1152–1153.)

SEC. 338. [HARD LABOR.] The omission of the words "hard labor" from the provisions prescribing the punishment in the various sections of this Act, shall not be construed as depriving the court of the power to impose hard labor as a part of the punishment, in any case where such power now exists.—(35 Stat., 1153.)

[1909, Aug. 5. Premium on bonds.] Until otherwise provided by law no bond shall be accepted from any surety or bonding company for any officer or employee of the United States which shall cost more than thirty-five per centum in excess of the rate of premium charged for a like bond during the calendar year nineteen hundred and eight: *Provided*, That hereafter the United States shall not pay any part of the premium or other cost of furnishing a bond required by law or otherwise of any officer or employee of the United States.—(36 Stat., 125–126, chap. 7.)

See sections 1383–1385, Revised Statutes, and notes thereto; see also act of February 24, 1919, section 1320 (40 Stat., 1148), as to

acceptance of Liberty bonds, etc., in lieu of surety bonds.

[1910, Apr. 12. Naval Academy Band.] That the Naval Academy Band shall consist of one leader, who shall have the pay and allowance of a second lieutenant in the Marine Corps; one second leader, with pay at the rate of fifty dollars per month; twenty-nine musicians, first class, and eleven musicians, second class; and shall be paid from "Pay of the navy."

SEC. 2. That the members of the Naval Academy Band as now organized shall be enlisted in the navy and credited with all prior service of whatever nature as members of said band, as shown by the records of the Naval Academy and the pay rolls of the ships and academy; and the said leader and the enlisted musicians of the band shall be entitled to the same benefits in respect to pay, emoluments, and retirement arising from longevity, reenlistment, and length of service as are, or may hereafter become, applicable to other enlisted men of the navy: *Provided*, That no back pay shall be allowed to the leader or to any mem-

ber of the said band by reason of the passage of this Act.—(36 Stat., 297, chap. 157.)

See act of July 11, 1919 (41 Stat., 152), for amendment to section one of this act; see also notes to sections 1511 and 1569, Revised Statutes; and see also acts of May

13, 1908 (35 Stat., 153), and June 3, 1916, section 35 (39 Stat., 188), as to competition with civilian musicians.

[1910, June 9. Regulation of motor boats on navigable waters.] That the words "motor boat" where used in this Act shall include every vessel propelled by machinery and not more than sixty-five feet in length except tug boats and tow boats propelled by steam. The length shall be measured from end to end over the deck, excluding sheer: *Provided*, That the engine, boiler, or other operating machinery shall be subject to inspection by the local inspectors of steam vessels, and to their approval of the design thereof, on all said motor boats, which are more than forty feet in length, and which are propelled by machinery driven by steam.—(36 Stat., 462, chap. 268.)

SEC. 2. That motor boats subject to the provisions of this Act shall be divided into classes as follows:

Class one. Less than twenty-six feet in length.

Class two. Twenty-six feet or over and less than forty feet in length.

Class three. Forty feet or over and not more than sixty-five feet in length.—(36 Stat., 462, chap. 268.)

SEC. 3. That every motor boat in all weathers from sunset to sunrise shall carry the following lights, and during such time no other lights which may be mistaken for those prescribed shall be exhibited.

(a) Every motor boat of class one shall carry the following lights:

First. A white light aft to show all around the horizon.

Second. A combined lantern in the fore part of the vessel and lower than the white light aft showing green to starboard and red to port, so fixed as to throw the light from right ahead to two points abaft the beam on their respective sides.

(b) Every motor boat of classes two and three shall carry the following lights:

First. A bright white light in the fore part of the vessel as near the stem as practicable, so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side. The glass or lens shall be of not less than the following dimensions:

Class two. Nineteen square inches.

Class three. Thirty-one square inches.

Second. A white light aft to show all around the horizon.

Third. On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side. On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port



side. The glasses or lenses in the said side lights shall be of not less than the following dimensions on motor boats of—

Class two. Sixteen square inches.

Class three. Twenty-five square inches.

On and after July first, nineteen hundred and eleven, all glasses or lenses prescribed by paragraph (b) of section three shall be fresnel or fluted. The said lights shall be fitted with inboard screens of sufficient height and so set as to prevent these lights from being seen across the bow and shall be of not less than the following dimensions on motor boats of—

Class two. Eighteen inches long.

Class three. Twenty-four inches long: *Provided*, That motor boats as defined in this Act, when propelled by sail and machinery or under sail alone, shall carry the colored lights suitably screened but not the white lights prescribed by this section.—(36 Stat., 462–463, chap. 268.)

SEC. 4. (a) Every motor boat under the provisions of this Act shall be provided with a whistle or other sound-producing mechanical appliance capable of producing a blast of two seconds or more in duration, and in the case of such boats so provided a blast of at least two seconds shall be deemed a prolonged blast within the meaning of the law.

(b) Every motor boat of class two or three shall carry an efficient fog horn.

(c) Every motor boat of class two or three shall be provided with an efficient bell, which shall be not less than eight inches across the mouth on board of vessels of class three.—(36 Stat., 463, chap. 268.)

SEC. 5. That every motor boat subject to any of the provisions of this Act, and also all vessels propelled by machinery other than by steam more than sixty-five feet in length, shall carry either life-preservers of life belts, or buoyant cushions, or ring buoys or other device, to be prescribed by the Secretary of Commerce \* \* \* sufficient to sustain afloat every person on board and so placed as to be readily accessible. \* \* \*.—(36 Stat., 463, chap. 268.)

SEC. 6. That every motor boat and also every vessel propelled by machinery other than by steam, more than sixty-five feet in length, shall carry ready for immediate use the means of promptly and effectually extinguishing burning gasoline.—(36 Stat., 463, chap. 268.)

SEC. 7. That a fine not exceeding one hundred dollars may be imposed for any violation of this Act. The motor boat shall be liable for the said penalty and may be seized and proceeded against, by way of libel, in the district court of the United States for any district within which such vessel may be found.—(36 Stat., 463, chap. 268.)

SEC. 8. That the Secretary of Commerce \* \* \* shall make such regulations as may be necessary to secure the proper execution of this Act by collectors of customs and other officers of the Government. And the Secretary of the Department of Commerce \* \* \* may, upon application therefor, remit or mitigate any fine, penalty, or forfeiture relating to motor boats except for failure to observe the provisions of section six of this Act.—(36 Stat., 463, chap. 268.)

SEC. 9. That all laws and parts of laws only in so far as they are in conflict herewith are hereby repealed: *Provided*, That nothing in this Act shall be

deemed to alter or amend Acts of Congress embodying or revising international rules for preventing collisions at sea.—(36 Stat., 463, chap. 268.)

See sections 4233 and 4412, Revised Statutes, and notes thereto; see also acts of February

8, 1895 (23 Stat., 645); June 7, 1897 (30 Stat., 96); and August 19, 1890 (26 Stat., 320).

[1910, June 17, sec. 4.—Supplies for executive departments, etc.] That hereafter all supplies of fuel, ice, stationery, and other miscellaneous supplies for the executive departments and other government establishments in Washington, when the public exigencies do not require the immediate delivery of the article, shall be advertised and contracted for by the Secretary of the Treasury, instead of by the several departments and establishments, upon such days as he may designate. There shall be a general supply committee in lieu of the board provided for in section thirty-seven hundred and nine of the Revised Statutes as amended, composed of officers, one from each such department, designated by the head thereof, the duties of which committee shall be to make, under the direction of the said Secretary, an annual schedule of required miscellaneous supplies, to standardize such supplies, eliminating all unnecessary grades and varieties, and to aid said Secretary in soliciting bids based upon formulas and specifications drawn up by such experts in the service of the Government as the committee may see fit to call upon, who shall render whatever assistance they may require. The committee shall aid said Secretary in securing the proper fulfillment of the contracts for such supplies, for which purpose the said Secretary shall prescribe, and all departments comply with, rules providing for such examination and tests of the articles received as may be necessary for such purpose; in making additions to the said schedule; in opening and considering the bids, and shall perform such other similar duties as he may assign to them: *Provided*, That the articles intended to be purchased in this manner are those in common use by or suitable to the ordinary needs of two or more such departments or establishments; but the said Secretary shall have discretion to amend the annual common supply schedule from time to time as to any articles that, in his judgment, can as well be thus purchased. In all cases only one bond for the proper performance of each contract shall be required, notwithstanding that supplies for more than one department or government establishment are included in such contract. Every purchase or drawing of such supplies from the contractor shall be immediately reported to said committee. No disbursing officer shall be a member of such committee. No department or establishment shall purchase or draw supplies from the common schedule through more than one office or bureau, except in case of detached bureaus or offices having field or outlying service, which may purchase directly from the contractor with the permission of the head of their department: *And provided further*, That telephone service, electric light, and power service purchased or contracted for from companies or individuals shall be so obtained by him.—(36 Stat., 531, chap. 297.)

See section 3709, Revised Statutes, and act of March 2, 1907 (34 Stat., 1193).

[1910, June 24. Collision claims, adjustment of; report to Congress.] The Secretary of the Navy is hereby authorized to consider, ascertain, adjust and determine the amounts due on all claims for damages, where the amount of the claim does not exceed the sum of five hundred dollars, hereafter occasioned by



collision, for which collisions vessels of the navy shall be found to be responsible, and report the amounts so ascertained and determined to be due the claimants to Congress at each session thereof through the Treasury Department for payment as legal claims out of appropriations that may be made by Congress therefor.—(36 Stat., 607, chap. 378.)

See act of July 1, 1918 (40 Stat., 705), authorizing Secretary of the Navy to adjust and pay any claim not exceeding \$1,000, for damages to inhabitants to certain European countries; see also act of April 18, 1918 (40 Stat., 532).

See act of July 11, 1909 (41 Stat., 132), authorizing the Secretary of the Navy to adjust and pay claims for damages other than those occasioned by vessels of the Navy, where amount does not exceed \$500.

See act of June 4, 1920 (41 Stat., 814), authorizing Secretary of the Navy to adjust and pay claims not exceeding \$500 for damages caused by operations of naval aircraft. (A similar provision was contained in act of July 11, 1919, 41 Stat., 133).

**Claims for damages.**—It is not within the official duties of the head of any department to make estimates for appropriations to pay

claims which the Government is not in law bound to pay, however much they may be urged to do so by claimants who feel aggrieved by the tortious conduct of public officers. An executive department is not the place to apply for redress of grievances not founded on legal rights. (*Pitman v. U. S.*, 20 Ct. Cls., 256.)

The head of an executive department is not authorized to pay the actual expenses of repairing a vessel injured in a collision with a Government vessel, the claim arising from the collision being one for unliquidated damages caused by the tort of the Government's officers. (1 Comp. Dec., 261.)

It seems to be the approved practice to commit such claimants to the tender mercies of Congress for settlement. (1 Comp. Dec., 285.)

See note to section 236, Revised Statutes.

[1910, June 24. **Loan of equipment to military schools.**] That the act entitled "An act to authorize the Secretary of the Navy to loan naval equipment to certain military schools," approved March third, nineteen hundred and one, be amended by striking out the words "one hundred and forty cadets" and inserting in lieu thereof the words "seventy-five cadets over fifteen years of age."—(36 Stat., 613, chap. 378.)

See act of March 3, 1901 (31 Stat., 1440), as amended by act of June 29, 1906 (34 Stat., 620).

[1910, June 24. **Detail of line under staff officers.**] That line officers may be detailed for duty under staff officers in the manufacturing and repair departments of the navy-yards and naval stations, and all laws or parts of laws in conflict herewith are hereby repealed.—(36 Stat., 614, chap. 378.)

See notes to sections 1404 and 1488, Revised Statutes.

[1910, June 24. **Profit on sales from ships' stores.**] That hereafter a profit not to exceed fifteen per centum may be charged on sales from ships' stores, such profit to be expended in the discretion of the Secretary of the Navy, under such regulations as he may prescribe, for the amusement, comfort, and contentment of the enlisted force, and to be accounted for to the Bureau of Supplies and Accounts, Navy Department.—(36 Stat., 619, chap. 378.)

See act of March 3, 1909, (35 Stat., 768), and section 3689, Revised Statutes.

**Jurisdiction of accounting officers.**—In view of the wording of this enactment, providing for an accounting to the Bureau of Supplies and Accounts, the Comptroller of the Treasury

is without jurisdiction to render a decision as to the legality of proposed expenditures from the fund created by ships' stores profits. (Comp. Dec., Apr. 28, 1915, file 26254-1759:2; see note to sec. 236, R. S.)

[1910, June 25. **Detail of employees from Government Printing Office.**] Hereafter no employee of the Government Printing Office shall be detailed to duties not pertaining to the work of public printing and binding in any execu-

tive department or other government establishment unless expressly authorized by law.—(36 Stat., 770, chap. 384.)

See act of January 12, 1895, section 18 (28 Stat., 603).

[1910, June 25, sec. 6. Annual report, sales of old material, etc.] Hereafter the statement of the proceeds of all sales of old material, condemned stores, supplies, or other public property of any kind shall be submitted to Congress at the beginning of each regular session thereof as a separate communication and shall not hereafter be included in the annual Book of Estimates.—(36 Stat., 773, chap. 384.)

See sections 429, 430, 1541, and 3672, Revised Statutes, and notes thereto.

[1910, June 25. Patents, protection of owners; suit in Court of Claims.] That whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture: *Provided, however*, That said Court of Claims shall not entertain a suit or award compensation under the provisions of this Act where the claim for compensation is based on the use or manufacture by or for the United States of any article heretofore owned, leased, used by, or in the possession of the United States: *Provided further*, That in any such suit the United States may avail itself of any and all defenses, general or special, that might be pleaded by a defendant in an action for infringement, as set forth in Title Sixty of the Revised Statutes, or otherwise: *And provided further*, That the benefits of this Act shall not inure to any patentee who, when he makes such claim, is in the employment or service of the Government of the United States, or the assignee of any such patentee; nor shall this act apply to any device discovered or invented by such employee during the time of his employment or service.—(36 Stat., 851–852, chap. 423; 40 Stat., 705, chap. 114.)

This act was expressly amended and reenacted to read as above by act of July 1, 1918 (40 Stat., 705).

See notes to Constitution, Article I, section 8, clause 8; and section 4894, Revised Stat-

utes; see also act of October 6, 1917, section 10 (i) (40 Stat., 422).

As to jurisdiction of Court of Claims, see act of March 3, 1911, sections 145–150 (36 Stat., 1136–1138).

[1911, Mar. 1. Discrimination against the uniform; penalty.] That hereafter no proprietor, manager, or employee of a theater or other public place of entertainment or amusement in the District of Columbia, or in any Territory, the District of Alaska or Insular possession of the United States, shall make, or cause to be made, any discrimination against any person lawfully wearing the uniform of the Army, Navy, Revenue-Cutter Service or Marine Corps of the United States because of that uniform, and any person making, or causing to be made, such discrimination shall be guilty of a misdemeanor, punishable by a fine not exceeding five hundred dollars.—(36 Stat., 963–964, chap. 187.)

See act of June 3, 1916, section 125 (39 Stat., 216), as to unauthorized wearing of the uniform.

[1911, Mar. 3. Judicial Code.] That the laws relating to the judiciary be, and they hereby are, codified, revised, and amended, with title, chapters, head-



notes, and sections, entitled, numbered, and to read as follows:—(36 Stat., 1087, chap. 231.)

See note to Constitution, Article I, section 8, clause 9, for brief explanation of the judicial system of the United States; see also "Introduction," ante, under "IV. Decisions of the courts, opinions of law officers of the Government, regulations, etc."

See note to Constitution, Article I, section 8, clause 11, as to jurisdiction of civil courts over the military forces in time of war.

See notes to Constitution, Article I, section 8, clauses 13-14, as to jurisdiction of civil authorities over the military forces in time of peace.

See note to Constitution, Article II, section 1, clause 1, and notes to sections 236, 416, 417, and 868, Revised Statutes, as to jurisdiction of civil courts over the President, heads of departments, and other officers of the executive departments.

See notes to section 1624, Revised Statutes, as to jurisdiction of civil courts over court-martial proceedings.

See Criminal Code, act of March 4, 1909 (35 Stat., 1088-1153), for offenses by persons in naval service punishable by civil courts.

See sections 751, et seq., Revised Statutes, as to jurisdiction of civil courts by habeas corpus proceedings over persons held by naval authority.

See, generally, sections 751-1023, Revised Statutes, under the title, "The Judiciary."

That military and naval courts form no part of the judicial system of the United States, but are instrumentalities of the executive branch of the Government, see cases noted under the Constitution, Article I, section 8, clause 9.

SEC. 24. [DISTRICT COURTS; CLAIMS AGAINST UNITED STATES.] The district courts shall have original jurisdiction as follows: \* \* \*.—(36 Stat., 1091; secs. 563, 629, R. S.)

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided, however,* That nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims," or to hear and determine other claims which had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight, shall abate or be affected by this provision: *And provided further,* That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within

three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.—(36 Stat., 1093; 24 Stat., 505; 30 Stat., 495; 31 Stat., 33.)

SEC. 145. [COURT OF CLAIMS; JURISDICTION; RELIEF OF DISBURSING OFFICERS, ETC.] The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same.

Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided,* That no suit against the Government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this chapter until an account for said fees shall have been rendered and finally acted upon as required by law, unless the proper accounting officer of the Treasury fails to act finally thereon within six months after the account is received in said office.

Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of loss by capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible.—(36 Stat., 1136–1137; 24 Stat., 505.)

See note to section 236, Revised Statutes, as to jurisdiction of Court of Claims and the accounting officers of the Treasury.

See act of June 25, 1910 (36 Stat., 851–852); as amended and reenacted by act of July 1, 1918 (40 Stat., 705), as to jurisdiction in patent cases.

See act of July 11, 1919 (41 Stat., 132), as to disbursing officers being relieved of responsibility, without proceedings in the Court of Claims, where loss occurred in line of duty, etc.

See section 147, below.

**Jurisdiction limited to money demands.**—Where it was provided by law that retired officers who had served during the Civil War should be entitled to the rank and retired pay

of the next higher grade, and the Navy Department decided that a particular officer was not entitled to the benefits of the act, a decision of the Court of Claims (*Moser v. U. S.*, 42 Ct. Cls., 86), allowing the officer the retired pay of the next higher grade, and purporting to decide that he was also entitled to the rank of such higher grade, did not estop the Secretary of the Navy from contesting the officer's claim to the rank of such higher grade. The judgment of the court was one for money only. (*Moser v. Meyer*, 38 App. D. C., 13; see also 28 Op. Atty. Gen., 352.)

Same act, 41 Stat., 153, was limited to losses incurred during the "present emergency." See also section 285, Revised Statutes, and notes to sections 176 and 236, Revised Statutes.



SEC. 146. [DETERMINATION OF COUNTER-CLAIMS, ETC.] Upon the trial of any cause in which any set-off, counter-claim, claim for damages, or other demand is set up on the part of the Government against any person making claim against the Government in said court, the court shall hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided for by law. Any transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records thereof, and shall thereby become and be a judgment of such court and be enforced as other judgments in such court are enforced.—(36 Stat., 1137; Sec. 1061, R. S.)

See note to section 236, Revised Statutes, under "VI. Set-off;"

SEC. 147. [DECREE ON ACCOUNTS OF DISBURSING OFFICERS.] Whenever the Court of Claims ascertains the facts of any loss by any paymaster, quartermaster, commissary of subsistence, or other disbursing officer, in the cases hereinbefore provided, to have been without fault or negligence on the part of such officer, it shall make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the Treasury shall allow to such officer the amount so decreed as a credit in the settlement of his accounts.—(36 Stat., 1137; Sec. 1062, R. S.)

See section 145, above.

SEC. 148. [CLAIMS REFERRED BY DEPARTMENTS.] When any claim or matter is pending in any of the executive departments which involves controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, documents, and proofs pertaining thereto, to the Court of Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted for its guidance and action: *Provided, however,* That if it shall have been transmitted with the consent of the claimant, or if it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, in the latter case giving to either party such further opportunity for hearing as in its judgment justice shall require, and shall report its findings therein to the department by which the same was referred to said court. The Secretary of the Treasury may, upon the certificate of any auditor, or of the Comptroller of the Treasury, direct any claim or matter, of which, by reason of the subject matter or character, the said court might under existing laws, take jurisdiction on the voluntary action of the claimant, to be transmitted, with all the vouchers, papers, documents and proofs pertaining thereto, to the said court for trial and adjudication.—(36 Stat., 1137–1138; Sec. 1063, R. S.; 22 Stat., 485; 24 Stat., 507.)

"**Claim or matter**" construed.—The language of sections 148 and 149 of the Judicial Code contemplates the reference by a head of a department of a matter in which there is a claimant, to which the United States are de-

fendants, and in which there is a money demand. (Proposed reference by Secretary of Navy, 53 Ct. Cls., 370.)

The word "matter" appearing in section 148 does not vary the character of the claim

which is required to be pending in the department or in anywise extend the power of the court, because in any event the claim or matter must be one of which the court would have jurisdiction upon the voluntary action of the claimant seeking a judgment for money, except as the bar of the statute of limitations may be affected. (Proposed reference by Secretary of Navy, 53 Ct. Cls., 370.)

A claim or matter pending in a department which involves any controverted questions of fact or law, in order to be transmitted to the court under the provisions of section 148, must be one for the "guidance and action" of said department, and not one that is to be merely advisory. (Proposed reference by Secretary of Navy, 53 Ct. Cls., 370.)

Under section 148, the Court of Claims has not jurisdiction, upon reference of the Secretary of the Navy, to report its conclusions of law upon the questions, First, "Was the Appointment of Albert A. Hooper as a chief machinist in the Navy on April 30, 1917, a valid and lawful appointment, and is his status under such appointment that of a chief machinist in the Navy?" and, second, "From what date is Albert A. Hooper entitled to take rank as chief machinist in the Navy under his

appointment of April 30, 1917, or if said appointment is held contrary to law and ineffectual to confer upon the aforesaid Hooper the office of chief machinist in the Navy, upon what date is he entitled to take rank upon the issuance of a valid and effectual appointment?" (Proposed reference by Secretary of Navy, 53 Ct. Cls., 370. See also note to sec. 1562, R. S.)

The opinions and decisions of the court must be left to speak for themselves; if the construction of a statute is different in the executive and judicial branches, the fact but accentuates the necessity for each of them observing the limitations of its powers. Accordingly, *held*, that where a claim has been finally disposed of by the Court of Claims upon suit by the claimant, the same can not be reopened upon application of the claimant, nor indirectly presented again for consideration upon the application of the head of a department under section 148, Judicial Code. It would be alike unbecoming the court and the head of the department for the one to accept or the other to extend an invitation for a debate relative to such decisions. (Proposed reference by Secretary of Navy, 53 Ct. Cls., 370; see also *Hooper v. U. S.*, 53 Ct. Cls., 90; and file 26280-95:2, Mar. 22, 1918.)

SEC. 149. [PROCEDURE IN CASES REFERRED BY DEPARTMENTS.] All cases transmitted by the head of any department, or upon the certificate of any auditor, or of the Comptroller of the Treasury, according to the provisions of the preceding section, shall be proceeded in as other cases pending in the Court of Claims, and shall, in all respects, be subject to the same rules and regulations.—(36 Stat., 1138; sec. 1064, R. S.)

See note to preceding section.

SEC. 150. [PAYMENT OF JUDGMENTS, CASES REFERRED BY DEPARTMENTS.] The amount of any final judgment or decree rendered in favor of the claimant, in any case transmitted to the Court of Claims under the two preceding sections, shall be paid out of any specific appropriation applicable to the case, if any such there be; and where no such appropriation exists, the judgment or decree shall be paid in the same manner as other judgments of the said court.—(36 Stat., 1138; sec. 1065, R. S.)

SEC. 163. [COMMISSIONERS TO TAKE TESTIMONY.] The Court of Claims shall have power to appoint commissioners to take testimony to be used in the investigation of claims which come before it, to prescribe the fees which they shall receive for their services, and to issue commissions for the taking of such testimony, whether taken at the instance of the claimant or of the United States.—(36 Stat., 1140; sec. 1075, R. S.)

See sections 188 and 868 et seq., Revised Statutes, and notes thereto.

SEC. 164. [CALLS ON DEPARTMENTS FOR INFORMATION AND RECORDS.] The said court shall have power to call upon any of the departments for any information or papers it may deem necessary, and shall have the use of all recorded and printed reports made by the committees of each House of Congress, when deemed necessary in the prosecution of its business. But the head of any department may refuse and omit to comply with any call for information



or papers when, in his opinion, such compliance would be injurious to the public interest.—(36 Stat., 1140; sec. 1076, R. S.)

See sections 188 and 882, Revised Statutes; and see note to section 418, Revised Statutes, under "Records of department."

SEC. 175. [NEW TRIAL ON MOTION OF UNITED STATES.] The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion, on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law.—(36 Stat., 1141; sec. 1088, R. S.)

See sections 242-243, below, as to appeals.

SEC. 227. [SUPREME COURT REPORTS AND DIGESTS; DISTRIBUTION OF.] The Attorney General shall distribute copies of the Supreme Court reports as follows: To \* \* \* the Secretary of the Navy, \* \* \* each Assistant Secretary of each Executive Department, \* \* \* the Judge Advocate General, Navy Department, \* \* \* the Naval Academy at Annapolis, \* \* \* and the heads of such other executive offices as may be provided by law, of equal grade with any of said offices, each one copy; \* \* \*. He shall also distribute one complete set of said reports, and one set of the digests thereof, to such executive officers as are entitled to receive said reports under this section and have not already received them, \* \* \*. Such reports and digests shall remain the property of the United States, and shall be preserved by the officers above named and by them turned over to their successors in office.—(36 Stat., 1154-1155; sec. 683, R. S.; 32 Stat., 630.)

See act of January 12, 1895, section 74 (28 Stat., 620).

SEC. 242. [APPEALS FROM COURT OF CLAIMS.] An appeal to the Supreme Court shall be allowed on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court as provided in section one hundred and seventy-two.—(36 Stat., 1157; sec. 707, R. S.)

Section 172 relates to claims forfeited for fraud.

See section 175, above, as to new trials in Court of Claims.

SEC. 243. [TIME OF APPEALS.] All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the Supreme Court may direct.—(36 Stat., 1157; sec. 708, R. S.)

[1911, Mar. 4. Direct and indirect charges included in cost of work; annual report to Congress.] That hereafter, in fixing the cost of work under the various naval appropriations, the direct and indirect charges incident thereto shall be included in such cost: *And provided further*, That the Bureau

of Supplies and Accounts shall keep the money accounts of the Naval Establishment in such manner as to show such charges and shall report the same annually for the information of Congress.—(36 Stat., 1267, chap. 239.)

A slightly different provision was contained in the act of June 24, 1910 (36 Stat., 607).  
See act of June 30, 1914 (38 Stat., 413-414), as to distribution of overhead charges.

See section 429, Revised Statutes, and note thereto, as to reports required to be made to Congress; and see note to section 419, Revised Statutes, as to duties of the Bureau of Supplies and Accounts (formerly the Bureau of Provisions and Clothing).

[1911, Mar. 4. Former engineer officers made additional numbers.] That officers on the active list of the line of the United States Navy who, under authority of law, now perform engineering duty on shore only are hereby made additional to the numbers in the grades in which they are now serving, and shall be carried as additional to the numbers of each grade to which they may hereafter be promoted: *Provided*, That said officers shall be entitled to all the benefits of retirement under existing or future laws equally with other officers of like rank and service.—(36 Stat., 1267, chap. 239.)

See notes to sections 1363, and 1390-1394, Revised Statutes.  
Former officers of the Engineer Corps who were restricted by act of March 3, 1899 (30 Stat., 1004), to engineering duty on shore only, are now made available by

law for any shore duty compatible with their rank and grade. (See acts of June 30, 1914, 38 Stat., 394, and Mar. 3, 1915, 38 Stat., 930, noted under sections 1390 and 1404, R. S.)

[1911, Mar. 4. Officers failing physically for promotion, retired in higher rank.] Hereafter, if any officer of the United States Navy shall fail in his physical examination for promotion and be found incapacitated for service by reason of physical disability contracted in the line of duty, he shall be retired with the rank to which his seniority entitled him to be promoted.—(36 Stat., 1267, chap. 239.)

This provision is now inapplicable to officers of the rank of lieutenant commander and above. (See act of Aug. 29, 1916, 39 Stat., 579, as amended by act of July 1, 1918, 40 Stat., 718.)

See note to section 1457, Revised Statutes, under "Rank on retirement of officer failing to qualify for promotion;" and see sections 1588-1595, Revised Statutes, as to pay of retired officers.

See section 1622, Revised Statutes, as to retired officers of the Marine Corps.

[1911, Mar. 4. Y. M. C. A. buildings in Navy yards.] That the Secretary of the Navy is authorized, in his discretion, to furnish hereafter, without charge, heat and light for the Young Men's Christian Association buildings in navy yards and stations.—(36 Stat., 1274, chap. 239.)

[1911, Mar. 4. Naval supply account.] Hereafter the Naval Supply Account for the Naval Establishment, as created by the act of June twenty-fifth, nineteen hundred and ten, under the Bureau of Supplies and Accounts, shall govern the charging, crediting, receipt, purchase, transfer, manufacture, repair, issue, and consumption of all stores for the Naval Establishment, excepting the materials named in that act and such other materials as the Secretary of the Navy may designate: *Provided*, That the amount expended under General Account of Advances for the purchase and manufacture of stores and materials for the Naval Establishment shall not exceed the amount available for such purposes.—(36 Stat., 1279, chap. 239.)



The act of June 25, 1910 (36 Stat., 792), referred to in the provision, and which, as originally enacted, was temporary legislation, read as follows:

"Naval supply account for the Naval Establishment: All stores on hand July first, nineteen hundred and ten, shall be charged to a naval supply account on the records of the Bureau of Supplies and Accounts, and all purchases of stock or expenditures for manufactured or repaired articles for stock at navy-yards or stations, during the fiscal years nineteen hundred and eleven and nineteen hundred and twelve shall be charged to this account and be paid for from 'General account of advances.'

"The amount so advanced during the fiscal years nineteen hundred and eleven and nineteen hundred and twelve shall be charged to the proper appropriations as these stores are consumed from stock, and when disbursements made for all other purposes are accomplished, the amount so charged shall be returned to 'General account of advances' by pay or counter warrants: *Provided, however,* That such material as provisions, clothing and small stores, medical stores, and such other materials as the Secretary of the Navy may designate, may be purchased by specific appropriations or transferred to specific appropriations before such materials are issued for use or consumption. The said charge, however, to any particular appropriations shall be limited to the amount appropriated therefor.

"Credit shall be made to appropriations during said fiscal years nineteen hundred and eleven and nineteen hundred and twelve for the value of surveyed material taken from repairs made to ships or plant at navy-yards and stations, or for stores turned in from ships, and this credit shall not be used by the bureaus to increase the

amount of that appropriation, but shall be a deduction from the operating expenses of the annual appropriation concerned, subject to the same provision as stated in above paragraph."

For later legislation relating to the naval supply account and the naval supply account fund, see acts of June 30, 1914 (38 Stat., 405), and March 1, 1921 (41 Stat., 1169, 1170). See also acts of March 2, 1891 (26 Stat., 807), and March 2, 1889 (25 Stat., 818); and see sections 418, 3676, 3689, and 3718, Revised Statutes, and notes thereto.

The above-quoted provision in the act of March 4, 1911, relating to the naval supply account was immediately preceded by the following clause abolishing the Naval Supply Fund:

"The permanent Naval Supply Fund created by the act of March third, eighteen hundred and ninety-three, as modified by the acts of June tenth, eighteen hundred and ninety-six, and March third, eighteen hundred and ninety-seven, and further increased by the acts of January fifth, eighteen hundred and ninety-nine, and February fourteenth, nineteen hundred and two, is hereby abolished, and of the sum remaining on the books of the Treasury to the credit of the said fund after the adjustment of all liabilities, the Secretary of the Treasury is hereby authorized and directed to cause the sum of one million five hundred thousand dollars transferred to the credit of said fund from the General Account of Advances to be returned to General Account of Advances, and the remainder to be covered into the Treasury.

The Naval Supply Fund was created by act of March 3, 1893 (27 Stat., 723), and increased by acts of June 10, 1896 (29 Stat., 370), March 3, 1897 (29 Stat., 658), January 5, 1899 (30 Stat., 781), and February 14, 1902 (32 Stat., 17). (See 28 Op. Atty. Gen., 634, and 29 Op. Atty. Gen., 344.)

[1911, Mar. 4. Marine Schools; loan of vessels, etc., to.] That the Secretary of the Navy, to promote nautical education, is hereby authorized and empowered to furnish, upon the application in writing of the governor of a State, a suitable vessel of the navy, with all her apparel, charts, books, and instruments of navigation, provided the same can be spared without detriment to the naval service, to be used for the benefit of any nautical school, or school or college having a nautical branch, established at each of the following ports of the United States: Boston, Philadelphia, New York, Seattle, San Francisco, Baltimore, Detroit, Saginaw, Michigan, Norfolk, and Corpus Christi, upon the condition that there shall be maintained at such port a school or branch of a school for the instruction of youths in navigation, steamship-marine engineering, and all matters pertaining to the proper construction, equipment, and sailing of vessels or any particular branch thereof.—(36 Stat., 1353, chap. 265.)

SEC. 2. That a sum not exceeding the amount annually appropriated by any State or municipality for the purpose of maintaining such a marine school or schools or the nautical branch thereof is hereby authorized to be appropriated for the purpose of aiding in the maintenance and support of such school or schools: *Provided, however,* That appropriations shall be made for one school in any port

heretofore named in section one and that the appropriation for any one year shall not exceed twenty-five thousand dollars for any one school.—(36 Stat., 1353, chap. 265.)

SEC. 3. That the President of the United States is hereby authorized, when in his opinion the same can be done without detriment to the public service, to detail proper officers of the navy as superintendents of or instructors in such schools: *Provided*, That if any such school shall be discontinued, or the good of the naval service shall require, such vessel shall be immediately restored to the Secretary of the Navy and the officers so detailed recalled: *And provided further*, That no person shall be sentenced to or received at such schools as a punishment or commutation of punishment for crime.—(36 Stat., 1353–1354, chap. 265.)

SEC. 4. That all laws and parts of laws in conflict herewith are hereby repealed.—(36 Stat., 1354, chap. 265.)

Similar provisions were previously embodied in act of June 20, 1874 (18 Stat., 121), as amended by act of March 3, 1881 (21 Stat., 505).

See act of March 3, 1901 (31 Stat., 1440), and amendments noted thereunder with reference to military and nautical schools.

[1911, Mar. 4. Retired officers, commissions.] That commissioned officers, of the Army, Navy, and Marine Corps on the retired list whose rank has been or shall hereafter be advanced by operation of or in accordance with law shall be entitled to and shall receive commissions in accordance with such advanced rank.—(36 Stat., 1354, chap. 266.)

See act of March 28, 1896 (29 Stat., 75); see also note to Constitution, Article II, section 3, under "II. Duty to commission officers;"

and see note to section 1457, Revised Statutes.

[1911, Mar. 4. Falsification of accounts, etc.; penalty.] That whoever, being an officer, clerk, agent, or other person holding any office or employment under the Government of the United States and, being charged with the duty of keeping accounts or records of any kind, shall, with intent to deceive, mislead, injure, or defraud the United States or any person, make in any such account or record any false or fictitious entry or record of any matter relating to or connected with his duties, or whoever with like intent shall aid or abet any such officer, clerk, agent, or other person in so doing; or whoever, being an officer, clerk, agent, or other person holding any office or employment under the Government of the United States and, being charged with the duty of receiving, holding, or paying over moneys or securities to, for, or on behalf of the United States, or of receiving or holding in trust for any person any moneys or securities, shall, with like intent, make a false report of such moneys or securities, or whoever with like intent shall aid or abet any such officer, clerk, agent, or other person in so doing, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both.—(36 Stat., 1355–1356, chap. 270.)

See section 1624, Revised Statutes, article 14; and see Criminal Code, act of March 4, 1909, section 90 (35 Stat., 1105).

[1911, Mar. 4, sec. 6. Bonds and contracts, Panama Railroad.] Hereafter the Panama Railroad Company shall not be required to give bond, either with or without surety, in contracts which it may make to furnish services, materials,



or supplies to the Army, Navy, Marine Corps, or other departments of the Government, and such contracts may be made for periods less than one year, as may be agreed on, and formal contracts in writing shall not be required unless agreed on.—(36 Stat., 1452, chap. 285.)

See sections 3718, 3719, and 3744, Revised Statutes.

**1911, Aug. 22. Partial payments, Navy contracts.]** That the Secretary of the Navy be, and he hereby is, authorized, in his discretion, to make partial payments from time to time during the progress of the work under existing contracts and all contracts hereafter made under the Navy Department for public purposes, but not in excess of the value of work already done; and the contracts hereafter made shall provide for a lien in favor of the Government, which lien is hereby made paramount to all other liens, upon the articles or thing contracted for on account of all payments so made: *Provided*, That partial payments shall not be made under such contracts except where stipulated for, and then only in accordance with contract provisions.—(37 Stat., 32–33, chap. 42.)

A provision on this subject was previously contained in act of March 4, 1911 (36 Stat., 1267), but was expressly repealed by Joint

Resolution of August 14, 1911 (37 Stat., 38).  
See section 3648, Revised Statutes.

**[1912, Mar. 7. Course at Naval Academy; commissions on graduation.]** That the course at the Naval Academy shall be four years, and midshipmen on graduation shall be commissioned ensigns: *Provided*, That midshipmen now performing two years' service at sea in accordance with existing law shall be commissioned forthwith as ensigns from the date of the passage of this Act: *And provided*, That those midshipmen of the class which was graduated in nineteen hundred and nine, who have completed two years' service afloat, and who are due for promotion, shall be commissioned ensigns to take rank with the other members of their class, according to their standing as determined by their final multiples, respectively, for the six years' course, from the fifth day of June, nineteen hundred and eleven, the date of rank to which they were entitled prior to the passage of this Act: *And provided further*, That no back pay or allowances shall result by reason of the passage of this Act.—(37 Stat., 73, chap. 53.)

See sections 1520 and 1521, Revised Statutes, and notes thereto.

**[1912, Apr. 24. Red Cross; use of in time of war.]** That whenever in time of war, or when war is imminent, the President may deem the cooperation and use of the American National Red Cross with the sanitary services of the land and naval forces to be necessary, he is authorized to accept the assistance tendered by the said Red Cross and to employ the same under the sanitary services of the Army and Navy in conformity with such rules and regulations as he may prescribe.

SEC. 2. That when the Red Cross cooperation and assistance with the land and naval forces in time of war or threatened hostilities shall have been accepted by the President, the personnel entering upon the duty specified in section one of this Act shall, while proceeding to their place of duty, while serving thereat, and while returning therefrom, be transported and subsisted at the cost and charge of the United States as civilian employees employed with

the said forces, and the Red Cross supplies that may be tendered as a gift and accepted for use in the sanitary service shall be transported at the cost and charge of the United States.—(37 Stat., 90–91, chap. 90.)

See act of August 29, 1916 (39 Stat., 581), as to detail of medical officers of the Navy for duty with the Red Cross; and see

resolution of May 8, 1914 (38 Stat., 771), as to loan of naval property to Red Cross.

[1912, June 19. Eight-hour law; contract provisions.] That every contract hereafter made to which the United States, any Territory, or the District of Columbia is a party, and every such contract made for or on behalf of the United States, or any Territory, or said District, which may require or involve the employment of laborers or mechanics shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work; and every such contract shall stipulate a penalty for each violation of such provision in such contract of five dollars for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work; and any officer or person designated as inspector of the work to be performed under any such contract, or to aid in enforcing the fulfillment thereof, shall, upon observation or investigation, forthwith report to the proper officer of the United States, or of any Territory, or of the District of Columbia, all violations of the provisions of this Act directed to be made in every such contract, together with the name of each laborer or mechanic who has been required or permitted to labor in violation of such stipulation and the day of such violation, and the amount of the penalties imposed according to the stipulation in any such contract shall be directed to be withheld for the use and benefit of the United States, the District of Columbia, or the Territory contracting by the officer or person whose duty it shall be to approve the payment of the moneys due under such contract, whether the violation of the provisions of such contract is by the contractor or any subcontractor. Any contractor or subcontractor aggrieved by the withholding of any penalty as hereinbefore provided shall have the right within six months thereafter to appeal to the head of the department making the contract on behalf of the United States or the Territory, and in the case of a contract made by the District of Columbia to the Commissioners thereof, who shall have power to review the action imposing the penalty, and in all such appeals from such final order whereby a contractor or subcontractor may be aggrieved by the imposition of the penalty hereinbefore provided such contractor or subcontractor may within six months after decision by such head of a department or the Commissioners of the District of Columbia file a claim in the Court of Claims, which shall have jurisdiction to hear and decide the matter in like manner as in other cases before said court.—(37 Stat., 137–138; chap. 174.)

SEC. 2. That nothing in this Act shall apply to contracts for transportation by land or water, or for the transmission of intelligence, or for the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not, or for such materials or articles as may usually



be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not, or to the construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable waters of the United States: *Provided*, That all classes of work which have been, are now, or may hereafter be performed by the Government shall, when done by contract, by individuals, firms, or corporations for or on behalf of the United States or any of the Territories or the District of Columbia, be performed in accordance with the terms and provisions of section one of this Act. The President, by Executive order, may waive the provisions and stipulations in this Act as to any specific contract or contracts during time of war or a time when war is imminent, and until January first, nineteen hundred and fifteen, as to any contract or contracts entered into in connection with the construction of the Isthmian Canal. No penalties shall be imposed for any violation of such provision in such contract due to any extraordinary events or conditions of manufacture, or to any emergency caused by fire, famine, or flood, by danger to life or to property, or by other extraordinary event or condition on account of which the President shall subsequently declare the violation to have been excusable. Nothing in this Act shall be construed to repeal or modify the Act entitled "An Act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia" being chapter three hundred and fifty-two of the laws of the Fifty-second Congress, approved August first, eighteen hundred and ninety-two, as modified by the Acts of Congress approved February twenty-seventh, nineteen hundred and six, and June thirtieth, nineteen hundred and six, or apply to contracts which have been or may be entered into under the provisions of appropriation Acts approved prior to the passage of this Act.—(37 Stat., 138, chap. 174.)

See section 3738, Revised Statutes, and act of August 1, 1892 (27 Stat., 340), as amended and reenacted by act of March 3, 1913

(37 Stat., 726-727); and see act of March 4, 1917 (39 Stat., 1192).

[1912, June 26, Sec. 8. **Membership fees and expenses, societies or associations.**] No money appropriated by this or any other Act shall be expended for membership fees or dues of any officer or employee of the United States or of the District of Columbia in any society or association or for expenses of attendance of any person at any meeting or convention of members of any society or association, unless such fees, dues, or expenses are authorized to be paid by specific appropriations for such purposes or are provided for in express terms in some general appropriation.—(37 Stat., 184, chap. 182.)

Subsequent amendments to this section, which were either temporary or did not relate to the Navy, are omitted.

[1912, July 31. **Prize fight films and pictures.**] That it shall be unlawful for any person to deposit or cause to be deposited in the United States mails for mailing or delivery, or to deposit or cause to be deposited with any express company or other common carrier for carriage, or to send or carry from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or to bring or to cause to be brought into the United States from abroad, any film or other pictorial representation of any prize fight or encounter of pugilists,

under whatever name, which is designed to be used or may be used for purposes of public exhibition.—(37 Stat., 240–241, chap. 263.)

SEC. 2. That it shall be unlawful for any person to take or receive from the mails, or any express company or other common carrier, with intent to sell, distribute, circulate, or exhibit any matter or thing herein forbidden to be deposited for mailing, delivery, or carriage in interstate commerce.—(37 Stat., 241, chap. 263.)

SEC. 3. That any person violating any of the provisions of this Act shall for each offense, upon conviction thereof, be fined not more than one thousand dollars or sentenced to imprisonment at hard labor for not more than one year, or both, at the discretion of the court.—(37 Stat., 241, chap. 263.)

See section 211, Criminal Code, act of March 4, 1909 (35 Stat., 1129), and note thereto.

[1912, Aug. 1. **Salvage, remuneration, etc.**] That the right to remuneration for assistance or salvage services shall not be affected by common ownership of the vessels rendering and receiving such assistance or salvage services.

SEC. 2. That the master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, crew, or passengers, render assistance to every person who is found at sea in danger of being lost; and if he fails to do so, he shall, upon conviction, be liable to a penalty of not exceeding one thousand dollars or imprisonment for a term not exceeding two years, or both.

SEC. 3. That salvors of human life, who have taken part in the services rendered on the occasion of the accident giving rise to salvage, are entitled to a fair share of the remuneration awarded to the salvors of the vessel, her cargo, and accessories.

SEC. 4. That a suit for the recovery of remuneration for rendering assistance or salvage services shall not be maintainable if brought later than two years from the date when such assistance or salvage was rendered, unless the court in which the suit is brought shall be satisfied that during such period there had not been any reasonable opportunity of arresting the assisted or salvaged vessel within the jurisdiction of the court or within the territorial waters of the country in which the libellant resides or has his principal place of business.

SEC. 5. That nothing in this Act shall be construed as applying to ships of war or to Government ships appropriated exclusively to a public service.—(37 Stat., 242, chap. 263.)

See sections 1536 and 4642, Revised Statutes, | 1918 (40 Stat., 705), and March 9, 1920, sections 10–11 (41 Stat., 528).  
and notes thereto; see also acts of July 1,

[1912, Aug. 13. **Radio communication, regulation of.**] That a person, company, or corporation within the jurisdiction of the United States shall not use or operate any apparatus for radio communication as a means of commercial intercourse among the several States, or with foreign nations, or upon any vessel of the United States engaged in interstate or foreign commerce, or for the transmission of radiograms or signals the effect of which extends beyond the jurisdiction of the State or Territory in which the same are made, or where interference would be caused thereby with the receipt of messages or signals from beyond the jurisdiction of the said State or Territory, except under and in accordance with a license, revocable for cause, in that behalf granted by



the Secretary of Commerce \* \* \* upon application therefor; but nothing in this Act shall be construed to apply to the transmission and exchange of radiograms or signals between points situated in the same State: *Provided*, That the effect thereof shall not extend beyond the jurisdiction of the said State or interfere with the reception of radiograms or signals from beyond said jurisdiction; and a license shall not be required for the transmission or exchange of radiograms or signals by or on behalf of the Government of the United States, but every Government station on land or sea shall have special call letters designated and published in the list of radio stations of the United States by the Department of Commerce \* \* \*. Any person, company, or corporation that shall use or operate any apparatus for radio communication in violation of this section, or knowingly aid or abet another person, company, or corporation in so doing, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five hundred dollars, and the apparatus or device so unlawfully used and operated may be adjudged forfeited to the United States.—(37 Stat., 302–303, chap. 287.)

SEC. 2. That every such license shall be in such form as the Secretary of Commerce \* \* \* shall determine and shall contain the restrictions, pursuant to this Act, on and subject to which the license is granted; that every such license shall be issued only to citizens of the United States or Porto Rico or to a company incorporated under the laws of some State or Territory or of the United States or Porto Rico, and shall specify the ownership and location of the station in which said apparatus shall be used and other particulars for its identification and to enable its range to be estimated; shall state the purpose of the station, and, in case of a station in actual operation at the date of passage of this Act, shall contain the statement that satisfactory proof has been furnished that it was actually operating on the above-mentioned date; shall state the wave length or the wave lengths authorized for use by the station for the prevention of interference and the hours for which the station is licensed for work; and shall not be construed to authorize the use of any apparatus for radio communication in any other station than that specified. Every such license shall be subject to the regulations contained herein, and such regulations as may be established from time to time by authority of this Act or subsequent Acts and treaties of the United States. Every such license shall provide that the President of the United States in time of war or public peril or disaster may cause the closing of any station for radio communication and the removal therefrom of all radio apparatus, or may authorize the use or control of any such station or apparatus by any department of the Government, upon just compensation to the owners.—(37 Stat., 303, chap. 287.)

SEC. 3. That every such apparatus shall at all times while in use and operation as aforesaid be in charge or under the supervision of a person or persons licensed for that purpose by the Secretary of Commerce \* \* \*. Every person so licensed who in the operation of any radio apparatus shall fail to observe and obey regulations contained in or made pursuant to this Act or subsequent Acts or treaties of the United States, or any one of them, or who shall fail to enforce obedience thereto by an unlicensed person while serving under his supervision, in addition to the punishments and penalties herein

prescribed, may suffer the suspension of the said license for a period to be fixed by the Secretary of Commerce \* \* \* not exceeding one year. It shall be unlawful to employ any unlicensed person or for any unlicensed person to serve in charge or in supervision of the use and operation of such apparatus, and any person violating this provision shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than one hundred dollars or imprisonment for not more than two months, or both, in the discretion of the court, for each and every such offense: *Provided*, That in case of emergency the Secretary of Commerce \* \* \* may authorize a collector of customs to issue a temporary permit, in lieu of a license, to the operator on a vessel subject to the radio ship Act of June twenty-fourth, nineteen hundred and ten.—(37 Stat., 303, chap. 287.)

SEC. 4. That for the purpose of preventing or minimizing interference with communication between stations in which such apparatus is operated, to facilitate radio communication, and to further the prompt receipt of distress signals, said private and commercial stations shall be subject to the regulations of this section. These regulations shall be enforced by the Secretary of Commerce \* \* \* through the collectors of customs and other officers of the Government as other regulations herein provided for.

The Secretary of Commerce \* \* \* may, in his discretion, waive the provisions of any or all of these regulations when no interference of the character above mentioned can ensue.

The Secretary of Commerce \* \* \* may grant special temporary licenses to stations actually engaged in conducting experiments for the development of the science of radio communication, or the apparatus pertaining thereto, to carry on special tests, using any amount of power or any wave lengths, at such hours and under such conditions as will insure the least interference with the sending or receipt of commercial or Government radiograms, of distress signals and radiograms, or with the work of other stations.

In these regulations the naval and military stations shall be understood to be stations on land.

#### REGULATIONS.

##### NORMAL WAVE LENGTH.

First. Every station shall be required to designate a certain definite wave length as the normal sending and receiving wave length of the station. This wave length shall not exceed six hundred meters or it shall exceed one thousand six hundred meters. Every coastal station open to general public service shall at all times be ready to receive messages of such wave lengths as are required by the Berlin convention. Every ship station, except as hereinafter provided, and every coast station open to general public service shall be prepared to use two sending wave lengths, one of three hundred meters and one of six hundred meters, as required by the international convention in force: *Provided*, That the Secretary of Commerce \* \* \* may, in his discretion, change the limit of wave length reservation made by regulations first and second to accord with any international agreement to which the United States is a party.



## OTHER WAVE LENGTHS.

Second. In addition to the normal sending wave length all stations, except as provided hereinafter in these regulations, may use other sending wave lengths: *Provided*, That they do not exceed six hundred meters or that they do exceed one thousand six hundred meters: *Provided further*, That the character of the waves emitted conforms to the requirements of regulations third and fourth following.

## USE OF A "PURE WAVE."

Third. At all stations if the sending apparatus, to be referred to hereinafter as the "transmitter," is of such a character that the energy is radiated in two or more wave lengths, more or less sharply defined, as indicated by a sensitive wave meter, the energy in no one of the lesser waves shall exceed ten per centum of that in the greatest.—(37 Stat., 304, chap. 287.)

## USE OF A "SHARP WAVE."

Fourth. At all stations the logarithmic decrement per complete oscillation in the wave trains emitted by the transmitter shall not exceed two-tenths, except when sending distress signals or signals and messages relating thereto.

## USE OF "STANDARD DISTRESS WAVE."

Fifth. Every station on shipboard shall be prepared to send distress calls on the normal wave length designated by the international convention in force, except on vessels of small tonnage unable to have plants insuring that wave length.

## SIGNAL OF DISTRESS.

Sixth. The distress call used shall be the international signal of distress

. . . — — — . . .

## USE OF "BROAD INTERFERING WAVE" FOR DISTRESS SIGNALS.

Seventh. When sending distress signals, the transmitter of a station on shipboard may be tuned in such a manner as to create a maximum of interference with a maximum of radiation.

## DISTANCE REQUIREMENT FOR DISTRESS SIGNALS.

Eighth. Every station on shipboard, wherever practicable, shall be prepared to send distress signals of the character specified in regulations fifth and sixth with sufficient power to enable them to be received by day over sea a distance of one hundred nautical miles by a shipboard station equipped with apparatus for both sending and receiving equal in all essential particulars to that of the station first mentioned.

## "RIGHT OF WAY" FOR DISTRESS SIGNALS.

Ninth. All stations are required to give absolute priority to signals and radiograms relating to ships in distress; to cease all sending on hearing a

distress signal; and, except when engaged in answering or aiding the ship in distress, to refrain from sending until all signals and radiograms relating thereto are completed.

#### REDUCED POWER FOR SHIPS NEAR A GOVERNMENT STATION.

Tenth. No station on shipboard, when within fifteen nautical miles of a naval or military station, shall use a transformer input exceeding one kilowatt, nor, when within five nautical miles of such a station, a transformer input exceeding one-half kilowatt, except for sending signals of distress, or signals or radiograms relating thereto.—(37 Stat., 305, chap. 287.)

#### INTERCOMMUNICATION.

Eleventh. Each shore station open to general public service between the coast and vessels at sea shall be bound to exchange radiograms with any similar shore station and with any ship station without distinction of the radio systems adopted by such stations, respectively, and each station on shipboard shall be bound to exchange radiograms with any other station on shipboard without distinction of the radio systems adopted by each station, respectively.

It shall be the duty of each such shore station, during the hours it is in operation, to listen in at intervals of not less than fifteen minutes and for a period not less than two minutes, with the receiver tuned to receive messages of three hundred meter wave lengths.—(37 Stat., 305-306, chap. 287.)

#### DIVISION OF TIME.

Twelfth. At important seaports and at all other places where naval or military and private or commercial shore stations operate in such close proximity that interference with the work of naval and military stations can not be avoided by the enforcement of the regulations contained in the foregoing regulations concerning wave lengths and character of signals emitted, such private or commercial shore stations as do interfere with the reception of signals by the naval and military stations concerned shall not use their transmitters during the first fifteen minutes of each hour, local standard time. The Secretary of Commerce \* \* \* may, on the recommendation of the department concerned, designate the station or stations which may be required to observe this division of time.

#### GOVERNMENT STATIONS TO OBSERVE DIVISION OF TIME.

Thirteenth. The naval or military stations for which the above-mentioned division of time may be established shall transmit signals or radiograms only during the first fifteen minutes of each hour, local standard time, except in case of signals or radiograms relating to vessels in distress, as hereinbefore provided.

#### USE OF UNNECESSARY POWER.

Fourteenth. In all circumstances, except in case of signals or radiograms relating to vessels in distress, all stations shall use the minimum amount of energy necessary to carry out any communication desired.



## GENERAL RESTRICTIONS ON PRIVATE STATIONS.

Fifteenth. No private or commercial station not engaged in the transaction of bona fide commercial business by radio communication or in experimentation in connection with the development and manufacture of radio apparatus for commercial purposes shall use a transmitting wave length exceeding two hundred meters, or a transformer input exceeding one kilowatt, except by special authority of the Secretary of Commerce \* \* \* contained in the license of the station: *Provided*, That the owner or operator of a station of the character mentioned in this regulation shall not be liable for a violation of the requirements of the third or fourth regulations to the penalties of one hundred dollars or twenty-five dollars, respectively, provided in this section unless the person maintaining or operating such station shall have been notified in writing that the said transmitter has been found, upon tests conducted by the Government, to be so adjusted as to violate the said third and fourth regulations, and opportunity has been given to said owner or operator to adjust said transmitter in conformity with said regulations.

## SPECIAL RESTRICTIONS IN THE VICINITIES OF GOVERNMENT STATIONS.

Sixteenth. No station of the character mentioned in regulation fifteenth situated within five nautical miles of a naval or military station shall use a transmitting wave length exceeding two hundred meters or a transformer input exceeding one-half kilowatt.—(37 Stat., 306, chap. 287.)

## SHIP STATIONS TO COMMUNICATE WITH NEAREST SHORE STATIONS.

Seventeenth. In general, the shipboard stations shall transmit their radiograms to the nearest shore station. A sender on board a vessel shall, however, have the right to designate the shore station through which he desires to have his radiograms transmitted. If this can not be done, the wishes of the sender are to be complied with only if the transmission can be effected without interfering with the service of other stations.

## LIMITATIONS FOR FUTURE INSTALLATIONS IN VICINITIES OF GOVERNMENT STATIONS.

Eighteenth. No station on shore not in actual operation at the date of the passage of this Act shall be licensed for the transaction of commercial business by radio communication within fifteen nautical miles of the following naval or military stations, to wit: Arlington, Virginia; Key West, Florida; San Juan, Porto Rico; North Head and Tatoosh Island, Washington; San Diego, California; and those established or which may be established in Alaska and in the Canal Zone; and the head of the department having control of such Government stations shall, so far as is consistent with the transaction of governmental business, arrange for the transmission and receipt of commercial radiograms under the provisions of the Berlin convention of nineteen hundred and six and future international conventions or treaties to which the United States may be a party, at each of the stations above referred to, and shall fix the rates therefor, subject

to control of such rates by Congress. At such stations and wherever and whenever shore stations open for general public business between the coast and vessels at sea under the provisions of the Berlin convention of nineteen hundred and six and future international conventions and treaties to which the United States may be a party shall not be so established as to insure a constant service day and night without interruption, and in all localities wherever or whenever such service shall not be maintained by a commercial shore station within one hundred nautical miles of a naval radio station, the Secretary of the Navy shall, so far as is consistent with the transactions of governmental business, open naval radio stations to the general public business described above, and shall fix rates for such service, subject to control of such rates by Congress. The receipts from such radiograms shall be covered into the Treasury as miscellaneous receipts.

#### SECRECY OF MESSAGES.

Nineteenth. No person or persons engaged in or having knowledge of the operation of any station or stations, shall divulge or publish the contents of any messages transmitted or received by such station, except to the person or persons to whom the same may be directed, or their authorized agent, or to another station employed to forward such message to its destination, unless legally required so to do by the court of competent jurisdiction or other competent authority. Any person guilty of divulging or publishing any message, except as herein provided, shall, on conviction thereof, be punishable by a fine of not more than two hundred and fifty dollars or imprisonment for a period of not exceeding three months, or both fine and imprisonment, in the discretion of the court.—(37 Stat., 307, chap. 287.)

#### PENALTIES.

For violation of any of these regulations, subject to which a license under sections one and two of this Act may be issued, the owner of the apparatus shall be liable to a penalty of one hundred dollars, which may be reduced or remitted by the Secretary of Commerce \* \* \* and for repeated violations of any of such regulations, the license may be revoked.

For violation of any of these regulations, except as provided in regulation nineteenth, subject to which a license under section three of this Act may be issued, the operator shall be subject to a penalty of twenty-five dollars, which may be reduced or remitted by the Secretary of Commerce \* \* \* and for repeated violations of any such regulations, the license shall be suspended or revoked.—(37 Stat., 308, chap. 287.)

SEC. 5. That every license granted under the provisions of this Act for the operation or use of apparatus for radio communication shall prescribe that the operator thereof shall not willfully or maliciously interfere with any other radio communication. Such interference shall be deemed a misdemeanor, and upon conviction thereof the owner or operator, or both, shall be punishable by a fine of not to exceed five hundred dollars or imprisonment for not to exceed one year, or both.—(37 Stat., 308, chap. 287.)

SEC. 6. That the expression "radio communication" as used in this Act means any system of electrical communication by telegraphy or telephony



without the aid of any wire connecting the points from and at which the radiograms, signals, or other communications are sent or received.—(37 Stat., 308, chap. 287.)

SEC. 7. That a person, company, or corporation within the jurisdiction of the United States shall not knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent distress signal or call or false or fraudulent signal, call, or other radiogram of any kind. The penalty for so uttering or transmitting a false or fraudulent distress signal or call shall be a fine of not more than two thousand five hundred dollars or imprisonment for not more than five years, or both, in the discretion of the court, for each and every such offense, and the penalty for so uttering or transmitting, or causing to be uttered or transmitted, any other false or fraudulent signal, call, or other radiogram shall be a fine of not more than one thousand dollars or imprisonment for not more than two years, or both, in the discretion of the court, for each and every such offense.—(37 Stat., 308, chap. 287.)

SEC. 8. That a person, company, or corporation shall not use or operate any apparatus for radio communication on a foreign ship in territorial waters of the United States otherwise than in accordance with the provisions of sections four and seven of this Act and so much of section five as imposes a penalty for interference. Save as aforesaid, nothing in this Act shall apply to apparatus for radio communication on any foreign ship.—(37 Stat., 308, chap. 287.)

SEC. 9. That the trial of any offense under this Act shall be in the district in which it is committed, or if the offense is committed upon the high seas or out of the jurisdiction of any particular State or district the trial shall be in the district where the offender may be found or into which he shall be first brought.—(37 Stat., 308, chap. 287.)

SEC. 10. That this Act shall not apply to the Philippine Islands.—(37 Stat., 308, chap. 287.)

By Executive Order No. 2585, April 6, 1917, the President directed, by authority of this act, "that such radio stations within the jurisdiction of the United States as are required for naval communications shall be taken over by the Government of the United States and used and controlled by it, to the exclusion of any other control or use; and, furthermore, that all radio stations not necessary to the Government of the United States may be closed for radio communication;" and that "the enforcement of this order is hereby delegated to

the Secretary of the Navy, who is authorized and directed to take such action in the premises as to him may appear necessary." (See sec. 2 of this act, above set forth.)

By Joint Resolution of June 5, 1920 (41 Stat., 1061), provision was made for operation of Government radio stations for the use of the general public until two years from the date thereof; and further that all Government stations shall otherwise be used and operated in accordance with the above act of August 13, 1912.

[1912, Aug. 22. Certificates of discharge, etc., in true names.] That the Secretary of War and the Secretary of the Navy be, and they are hereby, authorized and required to issue certificates of discharge or orders of acceptance of resignation, upon application and proof of identity, in the true name of such persons as enlisted or served under assumed names, while minors or otherwise, in the Army or Navy during any war between the United States and any other nation or people and were honorably discharged therefrom. Applications for said certificates of discharge or amended orders of resignation may be made by or on behalf of persons entitled to them, but no such certificate or order shall

be issued where a name was assumed to cover a crime or to avoid its consequence.—(37 Stat., 324, chap. 329.)

Previous provisions on this subject were contained in the act of April 14, 1890 (26 Stat., 55), as amended and reenacted by act of June 25, 1910 (36 Stat., 824).

See sections 1426-1427, Revised Statutes, and notes thereto.

[1912, Aug. 22. Retirement of officers to create vacancies.] That hereafter any officer retired under the provisions of sections eight and nine of the act approved March third, eighteen hundred and ninety-nine, an act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States, shall be retired with the rank and three-fourths the sea pay of the grade from which he is retired.—(37 Stat., 328, chap. 335.)

See act of March 3, 1899, section 8 (30 Stat., 1006). Section 9 of the same act, also referred to in the above provision, was repealed by act of March 3, 1915 (38 Stat., 938).

retired officers of the Navy, the ten per cent additional pay allowed for sea duty or for shore duty beyond the continental limits of the United States shall not be included."

By act of May 30, 1908 (35 Stat., 501), it was provided that "in computing the pay of

See generally sections 1443-1465, Revised Statutes, as to retired officers of the Navy.

[1912, Aug. 22. Chiefs of bureaus, permanent commission and pay provisions repealed.] That the portion of the act entitled "An act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and eleven, and for other purposes," approved June twenty-fourth, nineteen hundred and ten, which reads as follows:

"The pay and allowances of chiefs of bureaus of the Navy Department shall be the highest shore-duty pay and allowances of the rear admiral of the lower nine, and all officers of the Navy who are now serving or who shall hereafter serve as chief of bureau in the Navy Department, and are eligible for retirement after thirty years' service, shall have, while on the active list, the rank, title, and emoluments of a chief of bureau, in the same manner as is already provided by statute law for such officers upon retirement by reason of age or length of service, and such officers, after thirty years' service, shall be entitled to and shall receive new commissions in accordance with the rank and title hereby conferred," be, and the same is hereby, repealed: *Provided*, That no officer who has received his commission under the provisions of said act shall be deprived of said commission or the rank, title, and emoluments thereof by virtue of this repeal.—(37 Stat., 329, chap. 335.)

The enactment hereby repealed was contained in the act of June 24, 1910 (36 Stat., 607-608). As to officers who had benefited by that enactment, and the construction thereof, see note to section 421, Revised Statutes, under "IV. Rank, Titles, and Precedence," subheading "Rank of chiefs of bureaus."

By act of July 1, 1918 (40 Stat., 717), chiefs of bureaus in the Navy Department are to receive the same pay and allowances as chiefs of bureaus in the War Department, and are to have corresponding rank.

[1912, Aug. 22. Retired officers, employment on active duty.] Hereafter any naval officer on the retired list may, with his consent, in the discretion of the Secretary of the Navy, be ordered to such duty as he may be able to perform at sea or on shore, and while so employed in time of peace shall receive the pay and allowances of an officer of the active list of the same rank: *Provided*, That no such retired officer so employed on active duty shall receive, in time of peace,



any greater pay and allowances than the pay and allowances which are now or may hereafter be provided by law for a lieutenant senior grade on the active list of like length of service: *And provided further*, That any such officer whose retired pay exceeds the highest pay and allowances of the grade of lieutenant senior grade, shall, while so employed in time of peace, receive his retired pay only, in lieu of all other pay and allowances.—(37 Stat., 329, chap. 335.)

See notes to sections 1462, 1592, and 1622, Revised Statutes; see also section 1225, Revised Statutes, and note thereto.

By act of August 29, 1916 (39 Stat., 581), general provision was made for the pay of any retired officer of the naval service detailed on active duty.

[1912, Aug. 22. **Useless papers on vessels, disposal of.**] The act "to authorize and provide for the disposal of useless papers in executive departments," approved February sixteenth, eighteen hundred and eighty-nine, is hereby amended so that accumulations in the files of vessels of the Navy of papers that, in the judgment of the commander in chief of the fleet, are not needed or useful in the transaction of current business and have no permanent value or historical interest may be disposed of by the commander in chief of the fleet by sale, after advertisement for proposals, as waste papers if practicable, or if not practicable, then otherwise, as may appear best for the interests of the Government, the commander in chief of the fleet to make report thereon to the Secretary of the Navy; provided always that no papers less than two years old from the date of the last indorsement thereon and no correspondence, or the related papers, with officers or representatives of a foreign government shall be destroyed or disposed of by such commander in chief of the fleet.—(37 Stat., 329-330, chap. 335.)

See acts of February 16, 1889 (25 Stat., 672), March 2, 1895 (28 Stat., 933), February 16, 1909, section 14 (35 Stat., 622), and

March 3, 1915 (38 Stat., 929). See also note to section 418, Revised Statutes.

[1912, Aug. 22. **Extension of enlistments.**] That the term of enlistment of any enlisted man in the Navy may, by his voluntary written agreement, under such regulations as may be prescribed by the Secretary of the Navy with the approval of the President, be extended for a period of either one, two, three, or four full years from the date of expiration of the then existing four-year term of enlistment, and subsequent to said date such enlisted men as extend the term of enlistment as authorized in this section shall be entitled to and shall receive the same pay and allowances in all respects as though regularly discharged and reenlisted immediately upon expiration of their term of enlistment, and such extension shall not operate to deprive them upon discharge at the termination thereof of any right, privilege, or benefit to which they would be entitled at the expiration of a four-year term of enlistment.—(37 Stat., 331, chap. 335.)

See notes to sections 1418 and 1573, Revised Statutes.

Extension of minority enlistments in the Navy and Marine Corps was authorized by act of April 25, 1917 (40 Stat., 38).

By act of June 4, 1920, section 7 (41 Stat.,

1836), enlistments in the Navy and Marine Corps were authorized for terms of two, three, or four years, and it was provided that all laws applicable to four-year enlistments shall apply to enlistments for a shorter period.

[1912, Aug. 22. **Discharge prior to expiration of enlistment.**] That under such regulations as the Secretary of the Navy may prescribe, with the approval of the President, any enlisted man may be discharged at any time within three months before the expiration of his term of enlistment or extended enlistment

without prejudice to any right, privilege, or benefit that he would have received, except pay and allowances for the unexpired period not served, or to which he would thereafter become entitled, had he served his full term of enlistment or extended enlistment: *Provided*, That nothing in this act shall be held to reduce or increase the pay and allowances of enlisted men of the Navy now authorized pursuant to law.—(37 Stat., 331, chap. 335.)

See notes to sections 1418, 1569, and 1573, Revised Statutes.  
By act of August 29, 1916 (39 Stat., 580), authority was granted to furlough enlisted

men without pay for the unexpired portion of their enlistment, in lieu of discharge by purchase.

[1912, Aug. 22. Advertising for recruits.] That authority is hereby granted to employ the services of an advertising agency in advertising for recruits under such terms and conditions as are most advantageous to the Government.—(37 Stat., 332, chap. 335.)

This provision, which was appended to the appropriation for "Recruiting," under "Bureau of Navigation," was repeated in the acts of March 4, 1913 (37 Stat., 894), and June 30, 1914 (38 Stat., 395), except that in the act last cited the words "or agencies" were inserted after the word "agency." A similar provision under "Transportation and recruiting, Marine Corps," was contained in the acts of

August 29, 1916 (39 Stat., 614), March 4, 1917 (39 Stat., 1190), June 15, 1917 (40 Stat., 214), and July 1, 1918 (40 Stat., 736), being preceded in the act last cited by the word "hereafter."

Annual appropriations are made, under "Bureau of Navigation," for "advertising for and obtaining men and apprentice seamen." (E. g., act June 4, 1920, 41 Stat., 815.)

[1912, Aug. 22. Pearl Harbor, rules governing navigation, anchorage, etc.] For the proper control, protection, and defense of the naval station, harbor, and entrance channel at Pearl Harbor, Territory of Hawaii, the Secretary of the Navy is hereby authorized, empowered, and directed to adopt and prescribe suitable rules and regulations governing the navigation, movement, and anchorage of vessels of whatsoever character in the waters of Pearl Harbor, island of Oahu, Hawaiian Islands, and in the entrance channel to said harbor, and to take all necessary measures for the proper enforcement of such rules and regulations.—(37 Stat., 341, chap. 335.)

See sections 4233, 4412, and 4413, Revised Statutes, and notes thereto.

[1912, Aug. 22. Nautical almanac, exchange of data with foreign offices, use of employees, etc.] The Secretary of the Navy is hereby authorized to arrange for the exchange of data with such foreign almanac offices as he may from time to time deem desirable with a view to reducing the amount of duplication of work in preparing the different national nautical and astronomical almanacs and increasing the total data which may be of use to navigators and astronomers available for publication in the American Ephemeris and Nautical Almanac: *Provided*, That any such arrangement shall be terminable on one year's notice: *Provided further*, That the work of the Nautical Almanac Office during the continuance of any such arrangement shall be conducted so that in case of emergency the entire portion of the work intended for the use of navigators may be computed by the force employed by that office, and without any foreign cooperation whatsoever: *Provided further*, That any employee of the Nautical Almanac Office who may be authorized in any annual appropriation bill and whose services in whole or in part can be spared from the duty of preparing for publication the annual volumes of the American Ephemeris and



Nautical Almanac may be employed by said office in the duty of improving the tables of the planets, moon, and stars, to be used in preparing for publication the annual volumes of the office.—(37 Stat., 342, chap. 335.)

See note to section 436, Revised Statutes.

[1912, Aug. 22. Pay of gunnery sergeants.] That the gunnery sergeants of the Marine Corps shall hereafter receive the same pay, and be entitled to the allowances, rank, continuous-service pay, and retired pay of a first sergeant in said corps.—(37 Stat., 351, chap. 335.)

See note to section 1612, Revised Statutes.

[1912, Aug. 22. Enlisted men, restriction on employment of.] No enlisted men or seamen, not including commissioned and warrant officers, on battleships of the Navy, when such battleships are docked or laid up at any navy yard for repairs, shall be ordered or required to perform any duties except such as are or may be performed by the crew while at sea or in a foreign port.—(37 Stat., 355, chap. 335.)

See act of June 3, 1916, section 35 (39 Stat., 188), as to restrictions on employment of enlisted men.

[1912, Aug. 23, sec. 4. Civil service; efficiency ratings; promotions, demotions, and dismissals; honorably discharged sailors, etc.] The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia based upon records kept in each department and independent establishment with such frequency as to make them as nearly as possible records of fact. Such system shall provide a minimum rating of efficiency which must be attained by an employee before he may be promoted; it shall also provide a rating below which no employee may fall without being demoted; it shall further provide for a rating below which no employee may fall without being dismissed for inefficiency. All promotions, demotions, or dismissals shall be governed by provisions of the civil service rules. Copies of all records of efficiency shall be furnished by the departments and independent establishments to the Civil Service Commission for record in accordance with the provisions of this section: *Provided*, That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary.—(37 Stat., 413, chap. 350.)

Any person knowingly violating the provisions of this section shall be summarily removed from office, and may also upon conviction thereof be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year.—(37 Stat., 414, chap. 350.)

By act of February 28, 1916 (39 Stat., 15), a Bureau of Efficiency was created as an independent establishment, and the duties relating to efficiency ratings, which were imposed upon the Civil Service Commission by this act, were expressly transferred to said bureau. Previously, a Division of Efficiency of the Civil Service Commission had been established by act of March 4, 1915 (38 Stat., 1007).

See note to section 416, Revised Statutes,

under "Honorably discharged soldiers and sailors," and particularly the case of *Persing v. Daniels* (43 App. D. C., 470), noted thereunder, which was decided prior to the acts above cited providing for the enforcement of this section. See also act of August 15, 1876 (19 Stat., 169), and section 1754, Revised Statutes.

See act of August 24, 1912, section 6 (37 Stat., 555), for other provisions as to removal of civil employees.

[1912, Aug. 23, sec. 5. **Penalty for violating law as to number and pay of employees, etc.**] That any person violating section four of the legislative, executive, and judicial appropriation Act approved August fifth, eighteen hundred and eighty-two (Statutes at Large, volume twenty-two, page two hundred and fifty-five), shall be summarily removed from office, and may also upon conviction thereof be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year.—(37 Stat., 414, chap. 350.)

See act of August 5, 1882, section 4 (22 Stat., 255–256); see also section 3682, Revised Statutes, and act of June 22, 1906, section 6 (34 Stat., 449).

[1912, Aug. 23, sec. 6. **Apportionment of contingent funds, etc.**] That in addition to the apportionment required by the so-called antideficiency Act, approved February twenty-seventh, nineteen hundred and six (Statutes at Large, volume thirty-four, page forty-nine), the head of each executive department shall, on or before the beginning of each fiscal year, apportion to each office or bureau of his department the maximum amount to be expended therefor during the fiscal year out of the contingent fund or funds appropriated for the entire year for the department, and the amounts so apportioned shall not be increased or diminished during the year for which made except upon the written direction of the head of the department, in which there shall be fully expressed his reasons therefor; and hereafter there shall not be purchased out of any other fund any article for use in any office or bureau of any executive department in Washington, District of Columbia, which could be purchased out of the appropriations made for the regular contingent funds of such department or of its offices or bureaus.—(37 Stat., 414, chap. 350.)

The act of February 27, 1906 (34 Stat., 49), referred to in this section, amended and re-enacted section 3679, Revised Statutes; see that section and note thereto.

[1912, Aug. 23, sec. 7. **Telephones in private residences, etc.**] That no money appropriated by this or any other Act shall be expended for telephone service installed in any private residence or private apartment or for tolls or other charges for telephone service from private residences or private apartments, except for long-distance telephone tolls required strictly for the public business, and so shown by vouchers duly sworn to and approved by the head of the department, division, bureau, or office in which the official using such telephone or incurring the expense of such tolls shall be employed.—(37 Stat., 414, chap. 350.)

By a paragraph in the naval appropriation act of August 29, 1916 (39 Stat., 581), the accounting officers of the Treasury were "authorized and directed to allow in the accounts of disbursing officers of the Navy

all payments for telephones in Government quarters" which had been disallowed under this section "by decision of the comptroller."

[1912, Aug. 23, sec. 8. **Distribution of departmental publications by Public Printer.**] That no money appropriated by this or any other Act shall be used after the first day of October, nineteen hundred and twelve, for services in any executive department or other Government establishment at Washington, District of Columbia, in the work of addressing, wrapping, mailing, or otherwise dispatching any publication for public distribution, except maps, weather reports, and weather cards issued by an executive department or other Govern-



ment establishment at Washington, District of Columbia, or for the purchase of material or supplies to be used in such work; and on and after October first, nineteen hundred and twelve, it shall be the duty of the Public Printer to perform such work at the Government Printing Office. Prior to October first, nineteen hundred and twelve, each executive department and other Government establishment at Washington, District of Columbia, shall transfer to the Public Printer such machines, equipment, and materials as are used in addressing, wrapping, mailing, or otherwise dispatching publications; and each head of such executive department and other Government establishment at Washington, District of Columbia, shall furnish from time to time to the Public Printer mailing lists, in convenient form, and changes therein, or franked slips, for use in the public distribution of publications issued by such department or establishment; and the Public Printer shall furnish copies of any publication only in accordance with the provisions of law or the instruction of the head of the department or establishment issuing the publication. The employment of all persons in the several executive departments and other Government establishments at Washington, District of Columbia, wholly in connection with the duties herein transferred to the Public Printer, or whose services can be dispensed with or devolved upon another because of such transfer, shall cease and determine on or before the first day of October, nineteen hundred and twelve, and their salaries or compensation shall lapse for the remainder of the fiscal year nineteen hundred and thirteen and be covered into the Treasury. A detailed statement of all machines, equipment, and material transferred to the Government Printing Office by operation of this provision and of all employments discontinued shall be submitted to Congress at its next session by the head of each executive department and other Government establishments at Washington, District of Columbia, in the annual estimates of appropriations: *Provided*, That nothing in this section shall be construed as applying to orders, instructions, directions, notices, or circulars of information, printed for and issued by any of the executive departments or other Government establishments or to the distribution of public documents by Senators or Members of the House of Representatives or to the folding rooms and document rooms of the Senate or House of Representatives.—(37 Stat., 414–415, chap. 350.)

See act of January 12, 1895, sections 18, 61, 73, and 92 (28 Stat., 603, 610, 620, and 623).

[1912, Aug. 23, sec. 9. **Estimates, form and time of submission.**] That until otherwise provided by law, the regular annual estimates of appropriations for expenses of the Government of the United States shall be prepared and submitted to Congress, by those charged with the duty of such preparation and submission, only in the form and at the time now required by law, and in no other form and at no other time.—(37 Stat., 415, chap. 350.)

See sections 430 and 3660, Revised Statutes, and laws noted thereunder.

[1912, Aug. 24, sec. 6. **Estimates, lump sum appropriations; notes in Book of Estimates.**] That there shall be submitted hereafter, in the annual Book of Estimates following every estimate for a general or lump-sum appropriation, except public buildings or other public works constructed under contract, a statement showing in parallel columns:

First, the number of persons, if any, intended to be employed and the rates of compensation to each, and the amounts contemplated to be expended for each of any other objects or classes of expenditures specified or contemplated in the estimate, including a statement of estimated unit cost of any construction work proposed to be done; and

Second, the number of persons, if any, employed and the rate of compensation paid each, and the amounts expended for each other object or class of expenditure, and the actual unit cost of any construction work done, out of the appropriation corresponding to the estimate so submitted, during the completed fiscal year next preceding the period for which the estimate is submitted.

Other notes shall not be submitted following any estimate embraced in the annual Book of Estimates other than such as shall suggest changes in form or order of arrangement of estimates and appropriations and reasons for such changes.—(37 Stat., 487, chap. 355; 38 Stat., 680, chap. 223.)

This section was expressly amended and reenacted to read as above by act of August 1, 1914, section 10 (38 Stat., 680).  
See sections 430 and 3660, Revised Statutes,

and laws noted thereunder; see also act of July 1, 1916, section 4 (39 Stat., 336), which expressly modified this section in certain particulars.

[1912, Aug. 24, sec. 7. **Permanent appropriations defined.**] No specific or indefinite appropriation made hereafter in any regular annual appropriation Act shall be construed to be permanent or available continuously without reference to a fiscal year unless it belongs to one of the following five classes: "Rivers and harbors," "lighthouses," "fortifications," "public buildings," and "pay of the Navy and Marine Corps," last specifically named in and excepted from the operation of the provisions of the so-called "covering-in Act" approved June twentieth, eighteen hundred and seventy-four, or unless it is made in terms expressly providing that it shall continue available beyond the fiscal year for which the appropriation Act in which it is contained makes provision.—(37 Stat., 487, chap. 355.)

See Section 3689, Revised Statutes, and act of June 20, 1874, section 5 (18 Stat., 110), and

notes thereto; see also act of July 26, 1886, section 2, (24 Stat., 157).

[1912, Aug. 24, sec. 8. **Oaths administered by chief clerks and other employees.**] After June thirtieth, nineteen hundred and twelve, postmasters, assistant postmasters, collectors of customs, collectors of internal revenue, chief clerks of the various executive departments and bureaus, or clerks designated by them for the purpose, the superintendent, the acting superintendent, custodian, and principal clerks of the various national parks and other Government reservations, superintendent, acting superintendents, and principal clerks of the different Indian superintendencies or Indian agencies, and chiefs of field parties, are required, empowered, and authorized, when requested, to administer oaths, required by law or otherwise, to accounts for travel or other expenses against the United States, with like force and effect as officers having a seal; for such services when so rendered, or when rendered on demand after said date by notaries public, who at the time are also salaried officers or employees of the United States, no charge shall be made; and on and after July first, nineteen hundred and twelve, no fee or money paid for the services herein described shall be paid or reimbursed by the United States.—(37 Stat., 487, chap. 355.)

See section 183, Revised Statutes, and note thereto.



[1912, Aug. 24, sec. 9. Fur seals, etc.; use of naval forces to protect.] That it shall be the duty of the President to cause a guard or patrol to be maintained in the waters frequented by the seal herd or herds and sea otter, in the protection of which the United States is especially interested, composed of naval or other public vessels of the United States designated by him for such service; and any officer of any such vessel engaged in such service and any other officers duly designated by the President may search any vessel of the United States, in port, or in territorial waters of the United States, or on the high seas, when suspected of having violated, or being about to violate, the provisions of said convention, or of this Act, or of any regulation made thereunder, and may seize such vessel and the officers and crew thereof and bring them into the most accessible port of the Territory or of any of the States mentioned in the eighth section of this Act for trial.—(37 Stat., 501, chap. 373.)

SEC. 10. That any vessel or person described in the first section of this Act offending or being about to offend against the prohibitions of the said convention, or of this Act, or of the regulations made thereunder, may be seized and detained by the naval or other duly commissioned officers of any of the parties to the said convention other than the United States, except within the territorial jurisdiction of one of the other of said parties, on condition, however, that when such vessel or person is so seized and detained by officers of any party other than the United States such vessel or person shall be delivered as soon as practicable at the nearest point to the place of seizure, with the witnesses and proofs necessary to establish the offense so far as they are under the control of such party, to the proper official of the United States, whose courts alone shall have jurisdiction to try the offense and impose the penalties for the same: *Provided, however,* That the said officers of any party to said convention other than the United States shall arrest and detain vessels and persons, as in this section specified, only after such party, by appropriate legislation or otherwise, shall have authorized the naval or other officers of the United States duly commissioned and instructed by the President to that end to arrest, detain, and deliver to the proper officers of such party vessels and subjects under the jurisdiction of that Government offending against said convention or any statute or regulation made by that Government to enforce said convention. The President of the United States shall determine by proclamation when such authority has been given by the other parties to said convention, and his determination shall be conclusive upon the question; and such proclamation may be modified, amended, or revoked by proclamation of the President whenever, in his judgment, it is deemed expedient.—(37 Stat., 501–502, chap. 373.)

The first section of this act read as follows:

“That no citizen of the United States, nor person owing duty of obedience to the laws or the treaties of the United States, nor any of their vessels, nor any vessel of the United States, nor any person belonging to or on board of such vessel, shall kill, capture, or pursue, at any time or in any manner whatever, any fur seal in the waters of the north Pacific Ocean north of the

thirtieth parallel of north latitude and including the seas of Bering, Kamchatka, Okhotsk, and Japan; nor shall any such person or vessel kill, capture, or pursue sea otter in any of the waters mentioned beyond the distance of three miles from the shore line of the territory of the United States.”

See notes to sections 1529 and 1536, Revised Statutes.

[1912, Aug. 24, sec. 3. Navy mail clerks, bonds.] That every Navy mail clerk and assistant Navy mail clerk shall give bond to the United States in

such penal sum as the Postmaster General may deem sufficient for the faithful performance of his duties as such clerk.—(37 Stat., 554, chap. 389.)

See act of May 27, 1908 (35 Stat., 417–418), and laws quoted thereunder.

[1912, Aug. 24, sec. 6. Civil service employees, discharge; right to petition Congress, etc.].—That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same \* \* \*. The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with.—(37 Stat., 555, chap. 389.)

See act of August 23, 1912, section 4 (37 Stat., 413–414), and references thereunder; see also note to section 416, Revised Statutes.

As to influencing legislation, see act of August 24, 1912, section 6 (37 Stat., 555), and note to Constitution, Article I, section 1.

[1912, Aug. 24. Ordnance stores, sales by War Department; payment by departments.] That hereafter when authorized transfers or sales of ordnance or ordnance stores are made to another bureau of the War Department, or to another executive department of the Government, payment therefor shall be made by the proper disbursing officer of the bureau, office, or department concerned. When the transaction is between two bureaus of the War Department, the price to be charged shall be the cost price of the stores, including the cost of inspection. When the transaction is between the Ordnance Department and another executive department of the Government, the price to be charged shall include the cost price of the stores and the costs of inspection and transportation.—(37 Stat., 589, chap. 391.)

See act of March 3, 1909 (35 Stat., 751), as to sale of Army ordnance property to officers of Navy and Marine Corps.

See act of July 11, 1919 (41 Stat., 132), as to interchange of supplies, etc., between Army and Navy without compensation.

See acts of March 4, 1915 (38 Stat., 1084), and

May 21, 1920, section 7 (41 Stat., 613), as to use of appropriations for interchange of supplies, etc., between departments and bureaus.

See notes to sections 418 and 1135, Revised Statutes, as to transfers, etc., of Government property.

[1912, Aug. 24, sec. 6. Cadet service, Naval Academy, not credited in Army.] That hereafter the service of a cadet who may hereafter be appointed to the United States Military Academy or to the Naval Academy shall not be counted in computing for any purpose the length of service of any officer of the Army.—(37 Stat., 594, chap. 391.)

See act of March 4, 1913 (37 Stat., 891).



[1912, Aug. 26, sec. 7. Lump sum employees, restrictions on salaries and transfers.] That no part of any money contained herein or hereafter appropriated in lump sum shall be available for the payment of personal services at a rate of compensation in excess of that paid for the same or similar services during the preceding fiscal year; nor shall any person employed at a specific salary be hereafter transferred and hereafter paid from a lump-sum appropriation a rate of compensation greater than such specific salary, and the heads of departments shall cause this provision to be enforced: *Provided*, That this section shall not apply to mechanics, artisans, their helpers and assistants, laborers, or any other employees whose duties are of similar character and required in carrying on the various manufacturing or constructing operations of the Government.—(37 Stat., 626, chap. 408; 37 Stat., 790, chap. 142.)

This section was expressly amended and reenacted to read as above by act of March 4, 1913, section 4 (37 Stat., 790).  
See acts of October 6, 1917 (40 Stat., 383), and March 28, 1918 (40 Stat., 498); see also

notes to sections 169 and 416, Revised Statutes, and see acts of June 22, 1906, section 5 (34 Stat., 449), and August 1, 1914, section 12 (38 Stat., 680).

[1913, Feb. 26. Handwriting evidence.] That in any proceeding before a court or judicial officer of the United States where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness.—(37 Stat., 683, chap. 79.)

See sections 859-906, Revised Statutes, as to evidence in criminal proceedings, etc.; see also note to section 1624, Revised

Statutes, articles 29 and 42, as to evidence before courts-martial.

[1913, Mar. 2. Naval records, transfer to the Navy Department; publication.] That, within the limits of the appropriation herein made, the Secretary of War is hereby authorized and directed to collect or copy and classify, with a view to publication, the scattered military records of the Revolutionary War, including all troops acting under State authority, and the Secretary of the Navy is hereby authorized and directed to collect or copy and classify, with a view to publication, the scattered naval records of the Revolutionary War.

SEC. 2. That all such records in the possession or custody of any official of the United States shall be transferred, the military records to the War Department and the naval records to the Navy Department.

SEC. 3. That there is hereby appropriated for the purposes of this Act, out of any money in the Treasury not otherwise appropriated, twenty-five thousand dollars for the War Department and seven thousand dollars for the Navy Department: *Provided*, That the aforesaid sums of money shall be expended, respectively, under the direction of the Secretary of War and the Secretary of the Navy, and that they shall make to Congress each year detailed statements showing how the money herein appropriated has been expended and to whom: *Provided further*, That no part of the sum hereby appropriated shall be used in the purchase of any such records that may be discovered either in the hands of private owners or in public depositories.—(37 Stat., 723, chap. 94.)

See acts of April 27, 1904 (33 Stat., 403), and June 29, 1906 (34 Stat., 579); and see section 418, Revised Statutes, and note thereto.

[1913, Mar. 4. Midshipman service, not credited as naval service.] Hereafter the service of a midshipman at the United States Naval Academy, or that of a cadet at the United States Military Academy, who may hereafter be appointed to the United States Naval Academy, or to the United States Military Academy, shall not be counted in computing for any purpose the length of service of any officer in the Navy or in the Marine Corps.—(37 Stat., 891, chap. 148.)

See note to next paragraph and see act of August 24, 1912 (37 Stat., 594).

[1913, Mar. 4. Longevity pay, constructive service, precedence.] That so much of an act entitled "An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps," approved March third, eighteen hundred and ninety-nine, which reads as follows: "and that all officers, including warrant officers, who have been or may be appointed to the Navy from civil life shall, on the date of appointment, be credited for computing their pay, with five years' service," shall not apply to any person entering the Navy from and after the passage of this act: *Provided*, That section fourteen hundred and eighty-six of the Revised Statutes shall not apply in the case of officers who enter the Navy after the passage of this act and all such officers shall take precedence when of the same grade according to their respective dates of commission in that grade.—(37 Stat., 891-892, chap. 148.)

See preceding paragraph as to midshipman service.

See act of June 29, 1906 (34 Stat., 554), as to cadet service during the civil war.

See note to section 1486, Revised Statutes, as to constructive service for precedence.

See note to section 1556, Revised Statutes, as to longevity pay.

See note to section 1443, Revised Statutes, as to length of service for retirement.

The provision of law quoted in this paragraph is contained in section 13 of the Navy personnel act approved March 3, 1899 (30 Stat., 1007).

[1913, Mar. 4. Pay on promotion from date stated in commission.] That all officers of the Navy who, since the third day of March, eighteen hundred and ninety-nine, have been advanced or may hereafter be advanced in grade or rank pursuant to law shall be allowed the pay and allowances of the higher grade or rank from the dates stated in their commissions.—(37 Stat., 892, chap. 148.)

See act of June 22, 1874 (18 Stat., 191); and see notes to sections 1561 and 1562, Revised Statutes.

[1913, Mar 4. Leave of absence, civil employees, additional pay not allowed.] That employees while taking their leaves of absence shall not receive compensation for services rendered during the period of such leave of absence in addition to leave pay.—(37 Stat., 893, chap. 148.)

This was a proviso following a clause relating to pay during the ensuing fiscal year for "clerical, inspection, and messenger service in navy yards, naval stations, and purchasing pay offices."

See note to section 1545, Revised Statutes, as to leaves of absence, employees at navy yards and stations.

[1913, Mar. 4. Contracts to be awarded by items.] That from and after the passage of this act all awards of contracts for provisions for the Navy shall be made by individual items; the contract for each item being awarded to the lowest responsible bidder.—(37 Stat., 904, chap. 148.)

See sections 3718 and 3724, Revised Statutes, and notes thereto.



[1913, Mar. 4. Servants in commissary department, Naval Academy.] That hereafter such additional payments from the midshipmen's commissary fund as the superintendent of the Naval Academy may deem necessary may be made to the servants authorized in the commissary department.—(37 Stat., 907, chap. 148.)

A slightly different provision was contained in the act of August 22, 1912 (37 Stat., 349). | See section 1527, Revised Statutes, and note thereto.

[1913, Mar. 4. Sale of Marine Corps stores to naval and civilian personnel.] PROVISIONS, MARINE CORPS: \* \* \* *Provided*, That hereafter so much of this appropriation as may be necessary may be applied for the purchase, for sale to officers, enlisted men, and civilian employees, of such articles of subsistence stores as may from time to time be designated and under such regulations as may be prescribed by the Secretary of the Navy.—(37 Stat., 909, chap. 148.)

This clause was repeated in acts of June 30, 1914 (38 Stat., 411), March 3, 1915 (38 Stat., 949), and August 29, 1916 (39 Stat., 613), after which it was omitted.

See act of March 3, 1909 (35 Stat., 768), as to sale of stores to naval and civilian personnel.

See act of August 29, 1916 (39 Stat., 630), authorizing sales of Army subsistence supplies to officers and enlisted men of the Navy and Marine Corps, and sales of Navy and Marine Corps subsistence supplies to officers and enlisted men of the Army.

See act of March 6, 1920 (41 Stat., 506, 507), authorizing sale of Navy and Marine Corps quartermaster supplies to officers and enlisted men of the Coast Guard, and to officers of the Public Health Service.

See act of June 5, 1920 (41 Stat., 976), authorizing sale of Navy and Marine Corps subsistence stores and other supplies to honorably discharged officers and enlisted men of the Army, Navy, and Marine Corps, while receiving treatment from the Public Health Service.

Above clause held to be permanent legislation.—When the question of repeating the above-quoted provision in the naval appropriation act for the fiscal year 1918 was presented to the House Committee on Naval Affairs, it was decided not to do so, for the reason that the committee concurred with the view taken by the Marine Headquarters that the clause above quoted from the act of August 29, 1916, was permanent legislation. This will be seen by reference to the hearings before the Committee on Naval Affairs of the House of Representatives (64th Cong., 2d sess., p. 365). That this interpretation is correct there can be little doubt, in view of the word "hereafter" contained in the clause, it being well understood that the said word makes permanent provisions contained in appropriation acts. The words "this appropriation" should be construed as meaning, "the appropriation, 'Provisions, Marine Corps.'" (File 26255-614, Feb. 4, 1921.)

[1913, May 1, sec. 3. Rented buildings, District of Columbia.] Hereafter the statement of buildings rented within the District of Columbia for use of the Government, required by the Act of July sixteenth, eighteen hundred and ninety-two (Statutes at Large, volume twenty-seven, page one hundred and ninety-nine), shall indicate as to each building rented the area thereof in square feet of available floor space for Government uses, the rate paid per square foot for such floor space, the assessed valuation of each building, and what proportion, if any, of the rental paid includes heat, light, elevator, or other service.—(38 Stat., 3, chap. 1.)

See act of July 16, 1892 (27 Stat., 199), and laws noted thereunder; and see act of May 29, 1920, section 7 (41 Stat., 691).

[1913, June 23, sec. 3. Estimates, official designated for preparation of.] That hereafter the head of each executive department and other Government establishment shall, on or before July first in every fiscal year, designate from among the officials employed therein one person whose duty it shall be to supervise the classification and compilation of all estimates of appropriations,

including supplemental and deficiency estimates to be submitted by such department or establishment. In the performance of their duties persons so designated shall have due regard for the requirements of all laws respecting the preparation of estimates, including the manner and time of their submission through the Treasury Department to Congress; they shall also, as early as may be practicable, eliminate from all such estimates unnecessary words and make uniform the language commonly used in expressing purposes or conditions of appropriations.—(38 Stat., 75, chap. 3.)

[1913, July 9. **Midshipmen.**] Midshipmen on graduation shall be commissioned ensigns in the Navy, or may be assigned by the Secretary of the Navy to fill vacancies in the lowest commissioned grades of the Marine Corps or Staff Corps of the Navy.—(38 Stat., 103.)

[1913, Dec. 19. **Major general commandant, Marine Corps; tenure of office, etc.**] That hereafter when a vacancy shall exist in the position of commandant of the Marine Corps the President may appoint to such position, by and with the advice and consent of the Senate, an officer of the Marine Corps on the active list not below the grade of field officer, who shall hold office as such commandant for a term of four years, unless sooner relieved, and who, while so serving, shall have the rank, pay, and allowances of a major general in the Army; and any officer appointed under the provisions of this Act who shall be retired from the position of commandant of the Marine Corps, in accordance with the provisions of sections twelve hundred and fifty-one, sixteen hundred and twenty-two, and sixteen hundred and twenty-three, Revised Statutes of the United States, or by reason of age or length of service, shall have the rank and retired pay of a major general; if retired for any other reason, he shall be placed on the retired list of officers of the grade to which he belonged at the time of his retirement: *Provided*, That an officer serving as commandant shall be carried as an additional number in his grade while so serving, and after his return to duty in his grade until said grade is reduced to the number authorized by law: *Provided further*, That nothing herein contained shall operate to increase or reduce the total number of officers in the Marine Corps now provided by law.—(38 Stat., 241, chap. 3.)

See notes to sections 1601 and 1622, Revised Statutes, and act of August 29, 1916 (39 Stat., 609).

[1914, Feb. 16, sec. 21. **Civilians commissioned in Regular Navy in time of war; reappointment of former officers; etc.**] That, for the purpose of securing a list of persons especially qualified to hold commissions in the Navy or in any reserve or volunteer naval force which may hereafter be called for and organized under the authority of Congress, other than a force composed of Organized Naval Militia, the Secretary of the Navy is authorized from time to time to convene examining boards at suitable and convenient places in different parts of the United States, who shall examine as to their qualifications for naval duties all applicants who shall have served in the Regular Navy of the United States or in the Organized Naval Militia of any State or Territory or the District of Columbia. Such examination shall be under rules and regulations



prescribed by the Secretary of the Navy. The record of previous service of the applicant shall be considered as part of the examination. Those applicants who pass such examinations shall be certified as to their fitness for naval duties and rank, and shall, subject to a physical examination at any time, constitute an eligible class for commissions, pursuant to such certification, in any volunteer naval force hereafter called for and organized under the authority of Congress other than a force composed of Organized Naval Militia; and the President is hereby further authorized, upon the outbreak of war, or when, in his opinion, war is imminent, to commission in the Regular Navy for the exigency of such war such of the persons whose names have been certified as above provided as he may select: *Provided*, That no one shall be commissioned to a higher rank than the rank for which he may have been recommended by said examining board: *And provided further*, That the President may also commission or warrant as of the highest rank formerly held by him, or the present equivalent of such former rank in case the nomenclature or some of the specific duties of the same may have been changed, any person who having been formerly a commissioned or warrant officer of the United States Navy shall have been honorably discharged from the service: *And provided further*, That persons may be commissioned in the Navy for engineer duties only, and for all line duties other than engineer duties, and when so commissioned shall have the full rank, pay, precedence, and so forth, of the line grade for which they are commissioned.—(38 Stat., 289–290, chap. 21.)

The remaining sections of this act related to the Naval Militia, and were repealed by act of July 1, 1918 (40 Stat., 708), and later revived, in part, until June 30, 1922, by act of June 4, 1920 (41 Stat., 817).

See act of August 29, 1916 (39 Stat., 587), creating a Naval Reserve Force, and amendments noted thereunder; see also note to section 1363, Revised Statutes.

As to officers for engineering duty only, see acts of August 29, 1916 (39 Stat., 580), and March 3, 1915 (38 Stat., 930); see also notes to sections 1390, 1404, and 1488, Revised Statutes.

**Former officer dismissed from the Navy; effect of pardon.**—The act of February 16, 1914, section 21 (38 Stat., 290), by its terms applies only to officers who have been “honorably discharged from the service.” Under that act, an officer of the Navy who has been dismissed by sentence of court-martial, and subsequently pardoned for the offense, is ineligible for reappointment to the Navy. (31 Op. Atty. Gen., 225; see also sec. 1441, Revised Statutes, and act of Aug. 29, 1916, 39 Stat., 587–588; and see note to Constitution, Art. II, sec. 2, clause 1, as to effect of pardon.)

[1914, Mar. 12. Alaskan railroads; transportation of coal; employment of naval officers, etc.] That the President of the United States is hereby empowered, authorized, and directed to adopt and use a name by which to designate the railroad or railroads and properties to be located, owned, acquired, or operated under the authority of this Act; to employ such officers, agents, or agencies, in his discretion, as may be necessary to enable him to carry out the purposes of this Act; to authorize and require such officers, agents, or agencies to perform any or all of the duties imposed upon him by the terms of this Act; to detail and require any officer or officers in the Engineer Corps in the Army or Navy to perform service under this Act; to fix the compensation of all officers, agents, or employees appointed or designated by him; to designate and cause to be located a route or routes for a line or lines of railroad in the Territory of Alaska not to exceed in the aggregate one thousand miles, to be so located as to connect one or more of the open Pacific Ocean harbors on the southern

coast of Alaska with the navigable waters in the interior of Alaska, and with a coal field or fields so as best to aid in the development of the agricultural and mineral or other resources of Alaska, and the settlement of the public lands therein, and so as to provide transportation of coal for the Army and Navy, transportation of troops, arms, munitions of war, the mails, and for other governmental and public uses, and for the transportation of passengers and property; to construct and build a railroad or railroads along such route or routes as he may so designate and locate \* \* \*.—(38 Stat., 305, 306, chap. 37.)

See acts of October 20, 1914, section 2 (38 Stat., 741), and May 28, 1908, section 2 (35 Stat., 424); see also section 3711, Revised Statutes.

[1914, Apr. 6. Subsistence for travel outside District of Columbia.] On and after July first, nineteen hundred and fourteen, unless otherwise expressly provided by law, no officer or employee of the United States shall be allowed or paid any sum in excess of expenses actually incurred for subsistence while traveling on duty outside of the District of Columbia and away from his designated post of duty, nor any sum for such expenses actually incurred in excess of \$5 per day; nor shall any allowance or reimbursement for subsistence be paid to any officer or employee in any branch of the public service of the United States in the District of Columbia unless absent from his designated post of duty outside of the District of Columbia, and then only for the period of time actually engaged in the discharge of official duties.—(38 Stat., 318, chap. 52.)

See act of August 1, 1914, section 13 (38 Stat., 680), and see note to section 1566, Revised Statutes.

[1914, Apr. 6, sec. 5. Efficiency experts, restrictions on employment of, etc.] That no part of any money appropriated in this or any other Act shall be used for compensation or payment of expenses of accountants or other experts in inaugurating new or changing old methods of transacting the business of the United States or the District of Columbia unless authority for employment of such services or payment of such expenses is stated in specific terms in the Act making provision therefor and the rate of compensation for such services or expenses is specifically fixed therein, or be used for compensation of or expenses for persons, aiding or assisting such accountants or other experts, unless the rate of compensation of or expenses for such assistants is fixed by officers or employees of the United States or District of Columbia having authority to do so, and such rates of compensation or expenses so fixed shall be paid only to the person so employed.—(38 Stat., 335, chap. 52.)

[1914, May 8. Red Cross, loan of naval equipment, etc.] That the Secretary of War and the Secretary of the Navy be, and are hereby, authorized to issue, each at his discretion and under proper regulations to be prescribed by him, out of equipment for medical and other establishments on hand, belonging to the Government and which can be temporarily spared, such articles as may appear to be required for instruction and practice by organizations formed by the American National Red Cross, for the purpose of rendering aid to the Army and Navy in war.

SEC. 2. That the regulations prescribed by the Secretary of War or by the Secretary of the Navy, in pursuance of the authority granted by section



one, shall provide for the immediate return of the articles of equipment loaned the American National Red Cross when called for by the authority which issued them; and the said Secretaries shall require a bond in each case, in double the value of the property, for the care and safe-keeping thereof and for the return of the same when required.—(38 Stat., 771, Res. No. 15.)

See acts of April 24, 1912 (37 Stat., 90-91), and August 29, 1916 (39 Stat., 551); see also

section 418, Revised Statutes, and note thereto.

[1914, June 30. Mileage, not paid if transportation furnished.] That hereafter no mileage shall be paid to any officer where Government transportation is furnished such officer.—(38 Stat., 393, chap. 130.)

See notes to sections 1566 and 1612, Revised Statutes.

The above proviso was contained in the act cited, under "Pay, Miscellaneous," which made appropriation for mileage of officers

of the Navy. An identical provision was contained in the same act (38 Stat., 410), under the heading, "Marine Corps," sub-heading, "Mileage."

[1914, June 30. Naval Home, effects of deceased inmates.] That hereafter all moneys belonging to a deceased beneficiary of the Naval Home or derived from the sale of his personal effects, not claimed by his legal heirs or next of kin, shall be deposited with the pay officer of the Naval Home, and if any sum so deposited has been or shall hereafter be unclaimed for a period of two years from the death of such beneficiary it shall be deposited in the Treasury to the credit of the naval pension fund: *And provided further*, That the governor of the Naval Home is hereby authorized and directed, under such regulations as may be prescribed by the Secretary of the Navy, to make diligent inquiry in every instance after the death of an inmate to ascertain the whereabouts of his heirs or next of kin: *And provided further*, That claims may be presented hereunder at any time within five years after moneys have been so deposited in the Treasury, and, when supported by competent proof in any case after such deposit in the Treasury, shall be certified to Congress for consideration.—(38 Stat., 398, chap. 130.)

A somewhat different provision on the same subject was contained in act of August 22, 1912 (37 Stat., 335).

See sections 4750, 4810-4813, Revised Statutes, and notes thereto.

[1914, June 30. Naval Home, pensions of inmates.] That the pensions of beneficiaries of the Naval Home shall be disposed of in the same manner as prescribed for inmates of the Soldiers' Home, as provided for in section four of the act approved March third, eighteen hundred and eighty-three, under such regulations as the Secretary of the Navy may prescribe, except that in the case of death of any beneficiary leaving no heirs at law nor next of kin any pension due him shall, subject to the foregoing provisions, escheat to the naval pension fund.—(38 Stat., 398, chap. 130.)

See note to section 4756, Revised Statutes, and see 31 Op. Atty. Gen., 268.

See act of March 3, 1883, section 4 (22 Stat.,

564), quoted under section 4813, Revised Statutes.

[1914, June 30. Purchase of shells and projectiles.] That hereafter no part of any appropriation shall be expended for the purchase of shells or projectiles for the Navy except for shells or projectiles purchased in accordance with the terms and conditions of proposals submitted by the Secretary of the Navy to all the manufacturers of shells and projectiles and upon bids received in accord-

ance with the terms and requirements of such proposals: *Provided*, That this restriction shall not apply to purchases of shells or projectiles of an experimental nature or to be used for experimental purposes and paid for from the appropriation "Experiments, Bureau of Ordnance."—(38 Stat., 398–399, chap. 130.)

A similar provision was contained in act of March 4, 1913 (37 Stat., 896). | See sections 3718 and 3721, Revised Statutes, and notes thereto.

[1914, June 30. **Purchases abroad, free of duty.**] That hereafter the Secretary of the Navy is hereby authorized to make emergency purchases of war material abroad: *And provided further*, That when such purchases are made abroad, this material shall be admitted free of duty.—(38 Stat., 399, chap. 130.)

Similar provisions, without the word "hereafter," were contained in acts of August 22, 1912 (37 Stat., 335), and March 4, 1913 (37 Stat., 896). | See sections 3723, 3725, and 3728, Revised Statutes, and notes thereto.

[1914, June 30. **Enlisted men, daily average number.**] That hereafter the number of enlisted men of the Navy and Marine Corps provided for shall be construed to mean the daily average number of enlisted men in the naval service during the fiscal year.—(38 Stat., 403, chap. 130.)

See sections 1417 and 1596, Revised Statutes, and notes thereto.

[1914, June 30. **Acting chaplains, appointment, rank, and pay.**] The grade of acting chaplain in the Navy is hereby authorized and created, and hereafter original appointments shall be made by the Secretary of the Navy, not to exceed the number hereinafter provided, in the grade of acting chaplains in the Navy after such examination as may be prescribed by the Secretary of the Navy, and while so serving acting chaplains shall have the rank, pay, and allowances of lieutenant, junior grade, in the Navy. After three years' sea service on board ship each acting chaplain before receiving a commission in the Navy shall establish to the satisfaction the Secretary of the Navy by examination by a board of chaplains and medical officers of the Navy his physical, mental, moral, and professional fitness to perform the duties of chaplain in the Navy, and if found so qualified, shall be commissioned a chaplain in the Navy with the rank of lieutenant, junior grade. If any acting chaplain shall fail on the examinations herein prescribed he shall be honorably discharged from the naval service, and the appointment of any acting chaplain may be revoked at any time in the discretion of the Secretary of the Navy.—(38 Stat., 403, chap. 130.)

See notes to sections 1395–1398, 1410, and 1556, Revised Statutes.

**Retirement.**—An acting chaplain who fails physically on examination for commission can not be retired. (File 15721–22:1, Mar. 8, 1922.)

[1914, June 30. **Acting chaplains and chaplains, total number; rank and pay of chaplains.**] Hereafter the total number of chaplains and acting chaplains in the Navy shall be one to each twelve hundred and fifty of the total personnel of the Navy and Marine Corps as fixed by law, including midshipmen, apprentice seamen, and naval prisoners, and of the total number of chaplains and acting chaplains herein authorized ten per centum thereof shall have the rank of captain in the Navy, twenty per centum the rank of commander, twenty per centum the rank of lieutenant commander, and the remainder to have the rank of lieutenants and lieutenants, junior grade.



Naval chaplains hereafter commissioned from acting chaplains shall have the rank, pay, and allowances of lieutenants, junior grade, in the Navy until they shall have completed four years' service in that grade, when, subject to examination as above prescribed, they shall have the rank, pay, and allowances of lieutenant in the Navy, and chaplains with the rank of lieutenant shall have at least four years' service in that grade before promotion to the grade of lieutenant commander, after which service, chaplains shall be promoted as vacancies occur to the grades of lieutenant commander, commander, and captain: *Provided*, That not more than seven acting chaplains shall be commissioned chaplains in any one year: *And provided further*, That no provision of this section shall operate to reduce the rank, pay, or allowances that would have been received by any person in the Navy except for the passage of this section, and that all laws or parts of laws inconsistent with the provisions of this section be, and the same are hereby, repealed.—(38 Stat., 404, chap. 130.)

See notes to sections 1395-1398 and 1556, Revised Statutes.

See note to section 1457, Revised Statutes, under "Distinction between 'rank' and 'grade.'"

See note to section 1479, Revised Statutes, under "Advancement in rank and promotion of chaplains."

[1914, June 30. **Naval supply account, law amended.**] Those portions of the acts of June twenty-fifth, nineteen hundred and ten, and March fourth, nineteen hundred and eleven, which create the "Naval supply account" under the Bureau of Supplies and Accounts, are hereby so modified and amended that hereafter the appraised value of all stores, equipage, and supplies turned in from ships, and ships' equipage turned in from yards or stations (except salvage), shall be credited to the current appropriations concerned, and the amounts so credited shall be available for expenditures for the same purposes as the appropriations credited; and all acts or parts of acts in so far as they conflict with this provision are hereby repealed.—(38 Stat., 405, chap. 130.)

See act of March 4, 1911 (36 Stat., 1279), and note thereto.

[1914, June 30. **Issue of flags used for draping coffins.**] That the Secretary of the Navy be authorized at his discretion to issue free of cost the national flag (United States national ensign No. 7) used for draping the coffin of any officer or enlisted man of the Navy or Marine Corps whose death occurs while in the service of the United States Navy or Marine Corps, upon request, to the relatives of the deceased officer or enlisted man or upon request, to a school, patriotic order, or society to which the deceased officer or man belonged.—(38 Stat., 406, chap. 130.)

See note to section 418, Revised Statutes.

[1914, June 30. **Bureau of Equipment abolished.**] The Bureau of Equipment of the Navy Department is hereby abolished, and the duties assigned by law to that bureau shall be distributed among the other bureaus and offices of the Navy Department as herein provided, and all available funds heretofore appropriated for that bureau and such civil employees of that bureau as were heretofore authorized by law are hereby assigned and transferred to the other bureaus and offices as herein provided: *Provided*, That nothing herein shall be so construed as to authorize the expenditure of any appropriation for purposes

other than those specifically provided by the terms of the appropriations heretofore and herein made.—(38 Stat., 408, chap. 130.)

Temporary provisions for distribution of the duties, funds, and employees of the Bureau of Equipment among the other bureaus and offices of the Navy Department

were contained in the naval appropriation acts for the fiscal years 1911–1914.  
See section 419, Revised Statutes, and note thereto.

[1914, June 30. Overhead charges, how distributed.] Hereafter there shall be charged against the several appropriations for the support of the Naval Establishment the overhead charges incident to upkeep and to industrial work at navy yards and stations. The total sum so charged shall be distributed in accordance with the work done in the various yards and stations in order that the cost of work may be determined.—(38 Stat., 413–414.)

See act of March 4, 1911 (36 Stat., 1267), as to direct and indirect charges being included in cost of work, and reported annually to Congress.

[1914, July 16, sec. 5. Passenger vehicles, restrictions on purchase and maintenance.] No appropriation made in this or any other Act shall be available for the purchase of any motor-propelled or horse-drawn passenger-carrying vehicle for the service of any of the executive departments or other Government establishments, or any branch of the Government service, unless specific authority is given therefor, and after the close of the fiscal year nineteen hundred and fifteen there shall not be expended out of any appropriation made by Congress any sum for purchase, maintenance, repair, or operation of motor-propelled or horse-drawn passenger-carrying vehicles for any branch of the public service of the United States unless the same is specifically authorized by law, and in the estimates for the fiscal year nineteen hundred and sixteen and subsequent fiscal years there shall be submitted in detail estimates for such necessary appropriations as are intended to be used for purchase, maintenance, repair, or operation of all motor-propelled or horse-drawn passenger-carrying vehicles, specifying the sums required, the public purposes for which said vehicles are intended, and the officials or employees by whom the same are to be used. (38 Stat., 508–509, chap. 141.)

See acts of March 18, 1904, section 3 (33 Stat., 142), and February 3, 1905, section 4 (33 Stat., 687–688).

[1914, Aug. 1, sec. 12. Lump-sum employees, restrictions on compensation.] That it shall not be lawful hereafter to pay to any person, employed in the service of the United States under any general or lump sum appropriation, any sum additional to the regular compensation received for or attached to any employment held prior to an appointment or designation as acting for or instead of an occupant of any other office or employment. This provision shall not be construed as prohibiting regular and permanent appointments by promotion from lower to higher grades of employments.—(38 Stat., 680, chap. 223.)

See act of August 26, 1912, section 7 (37 Stat., 626), and references thereunder.

[1914, Aug. 1, sec. 13. Per diem in lieu of subsistence; estimates of appropriations.] That the heads of executive departments and other Government establishments are authorized to prescribe per diem rates of allowance not exceeding \$4 in lieu of subsistence to persons engaged in field work or traveling



on official business outside of the District of Columbia and away from their designated posts of duty when not otherwise fixed by law. For the fiscal year nineteen hundred and sixteen and annually thereafter estimates of appropriations from which per diem allowances are to be paid shall specifically state the rates of such allowances.—(38 Stat., 680–681, chap. 223.)

See act of April 6, 1914 (38 Stat., 318), as to subsistence allowance.

See note to section 430, Revised Statutes, as to estimates of appropriations.

**[Aug. 25, 1914. Naval Petroleum Reserves, use of proceeds; fund created.]**

Any money which may accrue to the United States under the provisions of this Act from lands within the Naval Petroleum Reserves shall be set aside for the needs of the Navy and deposited in the Treasury to the credit of a fund to be known as the Navy Petroleum Fund, which fund shall be applied to the needs of the Navy as Congress may from time to time direct, by appropriation or otherwise.—(38 Stat., 709, chap. 287.)

This clause was part of an act providing for agreements to be entered into by the Secretary of the Interior, with parties in possession of oil and gas lands, as to the disposition of oil or gas produced therefrom,

or the proceeds thereof, pending final determination of title to the land.

See act of February 25, 1920 (41 Stat., 437, et seq.); see also section 3689, Revised Statutes, and note thereto.

**[1914, Oct. 13. Naval officers, appointments to office in Brazil; leaves of absence.]**

Whereas the Republic of Brazil has recently established the Naval War College of Brazil at Rio de Janeiro, Brazil, and is desirous that two commissioned officers of the line of the Navy of the United States experienced in naval war college work be permitted to serve therein as instructors in naval strategy and tactics; and

Whereas the United States of America wishes to show its friendly feeling for the Republic of Brazil by complying with its desire: Now, therefore, be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President be, and he is hereby, authorized, in his discretion, to grant leave of absence to not more than two commissioned officers of the line of the Navy of the United States to assist the Republic of Brazil as instructors in naval strategy and tactics in the Naval War College of Brazil, in pursuance of an arrangement to be made between such officers so detailed and the Government of Brazil; and that such officers while absent on such leave be, and they are hereby, authorized to accept from the Government of Brazil the said employment with compensation from the said Government: *Provided, however*, That the permission so given shall be held to terminate at such date as the President may determine. To insure the continuance of this work during such time as may be desirable, the President may have the power of substitution in case of the termination of the detail of an officer for any cause; and that the officers, while so absent in the service of the Republic of Brazil, shall receive no pay or allowances from the United States Government.—(38 Stat., 780, Res. No. 48.)

See act of June 12, 1916 (39 Stat., 223), as to Haiti; act of February 11, 1918 (40 Stat., 437), as to Dominican Republic; and act of June 5, 1920 (41 Stat., 1056), as to all

South American Republics; see also note to Constitution, Article I, section 9, clause 8.

[1914, Oct. 20, sec. 2. Alaskan coal lands; use of for Navy, etc.] That the President of the United States shall designate and reserve from use, location, sale, lease, or disposition not exceeding five thousand one hundred and twenty acres of coal-bearing land in the Bering River field and not exceeding seven thousand six hundred and eighty acres of coal-bearing land in the Matanuska field, and not to exceed one-half of the other coal lands in Alaska: *Provided*, That the coal deposits in such reserved areas may be mined under the direction of the President when, in his opinion, the mining of such coal in such reserved areas, under the direction of the President, becomes necessary, by reason of an insufficient supply of coal at a reasonable price for the requirements of Government works, construction and operation of Government railroads, for the Navy, for national protection, or for relief from monopoly or oppressive conditions.—(38 Stat., 742, chap. 330.)

See acts of May 28, 1908, section 2 (35 Stat., 424), March 12, 1914 (38 Stat., 305-306), | and June 4, 1920 (41 Stat., 826); see also section 3711, Revised Statutes.

[1915, Jan. 28. Coast Guard established; service with Navy; expenses; etc.] That there shall be established in lieu of the existing Revenue-Cutter Service and the Life-Saving Service, to be composed of those two existing organizations, with the existing offices and positions and the incumbent officers and men of those two services, the Coast Guard, which shall constitute a part of the military forces of the United States and which shall operate under the Treasury Department in time of peace and operate as a part of the Navy, subject to the orders of the Secretary of the Navy, in time of war or when the President shall so direct. When subject to the Secretary of the Navy in time of war the expense of the Coast Guard shall be paid by the Navy Department: *Provided*, That no provision of this Act shall be construed as giving any officer of either the Coast Guard or the Navy, military or other control at any time over any vessel, officer, or man of the other service except by direction of the President.—(38 Stat., 800-801, chap. 20.)

This section was modified by act of August 29, 1916 (39 Stat., 600); see also act of October | 6, 1917 (40 Stat., 393-394), and notes to sections 1492 and 2757, Revised Statutes.

[1915, Mar. 3. National Home for Disabled Volunteer Soldiers; admission to.] The following persons only shall hereafter be entitled to the benefits of the National Home for Disabled Volunteer Soldiers, and may be admitted thereto upon the order of a member of the board of managers, namely: All honorably discharged officers, soldiers, and sailors who served in the regular, volunteer, or other forces of the United States in any war in which the country has been or is engaged, including the Spanish American War, the Provisional Army (authorized by Act of Congress approved March second, eighteen hundred and ninety-nine), in any of the campaigns against hostile Indians, or who have served in the Philippines, in China, or in Alaska, or in the Organized Militia or National Guard when called into the Federal service to enforce the laws, suppress insurrection, or repel invasion, who are disabled by disease, wounds, or otherwise and have no adequate means of support, and who are not otherwise provided for by law, and by reason of such disability are incapable of earning their living.—(38 Stat., 853, chap. 75; 40 Stat., 368, chap. 79.)



This provision was expressly amended and re-enacted to read as above by act of October 6, 1917 (40 Stat., 368).

See sections 4810 et seq., Revised Statutes, and notes thereto, as to Naval Home.

[1915, Mar. 3. Newspapers and periodicals, payment in advance.] Newspapers and periodicals for the naval service (hereafter subscriptions may be paid for in advance).—(38 Stat., 929, chap. 83.)

See act of March 4, 1915, section 5 (38 Stat., 1049), as to subscriptions to "periodicals." See also section 192, Revised Statutes, and note thereto.

[1915, Mar. 3. Chief of Naval Operations, tenure and duties.] There shall be a Chief of Naval Operations, who shall be an officer on the active list of the Navy appointed by the President, by and with the advice and consent of the Senate, from among the officers of the line of the Navy not below the grade of captain for a period of four years, who shall, under the direction of the Secretary of the Navy, be charged with the operations of the fleet, and with the preparation and readiness of plans for its use in war.

During the temporary absence of the Secretary and the Assistant Secretary of the Navy, the Chief of Naval Operations shall be next in succession to act as Secretary of the Navy.—(38 Stat., 929, chap. 83.)

Amendments to this provision were made by acts of August 29 1916 (39 Stat., 558), and July 1, 1918 (40 Stat., 716).

[1915, Mar. 3. Useless papers at navy yards and stations, disposal of.] That the act "To authorize and provide for the disposal of useless papers in the executive departments," approved February sixteenth, eighteen hundred and eighty-nine, is hereby amended so that accumulations in the files of navy yards and naval stations that, in the judgment of the Secretary of the Navy, are not needed or useful in the transaction of current business and have no permanent value or historical interest may be disposed of by the Secretary of the Navy by sale, after advertisement for proposals as waste paper if practicable, or if not practicable then otherwise as may appear best for the interests of the Government, the said Secretary to make detailed report to the Congress in every case of the papers destroyed; *Provided always* That no papers less than two years old from the date of the last indorsement thereon shall be destroyed or disposed of by the Secretary of the Navy, except in the manner provided in said act of February sixteenth, eighteen hundred and eighty-nine.—(38 Stat., 929-930, chap. 83.)

See act of August 22, 1912 (37 Stat., 329-330), and laws noted thereunder.

[1915, Mar. 3. Duties of engineering and construction officers.] Hereafter officers who now perform engineering duty on shore only and officers of the Construction Corps shall be eligible for any shore duty compatible with their rank and grade to which the Secretary of the Navy may assign them.—(38 Stat., 930, chap. 83.)

A similar provision, without the word "hereafter," was contained in act of June 30, 1914 (38 Stat., 394).

See notes to sections 1390 and 1404, Revised Statutes; see also section 1488, Revised Statutes, and note thereto; and see sections 1-6, Navy personnel act, March 3, 1899 (30 Stat., 1004-1005).

The appointment and assignment of line officers for engineering duty only were authorized by acts of February 16, 1914, section 21 (38 Stat., 283), and August 29, 1916 (39 Stat., 580).

[1915, Mar. 3. Advisory Committee for Aeronautics.] An Advisory Committee for Aeronautics is hereby established, and the President is authorized to appoint not to exceed twelve members, to consist of two members from the War Department, from the office in charge of military aeronautics; two members from the Navy Department, from the office in charge of naval aeronautics; a representative each of the Smithsonian Institution, of the United States Weather Bureau, and of the United States Bureau of Standards; together with not more than five additional persons who shall be acquainted with the needs of aeronautical science, either civil or military, or skilled in aeronautical engineering or its allied sciences: *Provided*, That the members of the Advisory Committee for Aeronautics, as such, shall serve without compensation: *Provided further*, That it shall be the duty of the Advisory Committee for Aeronautics to supervise and direct the scientific study of the problems of flight, with a view to their practical solution, and to determine the problems which should be experimentally attacked, and to discuss their solution and their application to practical questions. In the event of a laboratory or laboratories, either in whole or in part, being placed under the direction of the committee, the committee may direct and conduct research and experiment in aeronautics in such laboratory or laboratories: *And provided further*, That rules and regulations for the conduct of the work of the committee shall be formulated by the committee and approved by the President.

That the sum of \$5,000 a year, or so much thereof as may be necessary, for five years is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to be immediately available, for experimental work and investigations undertaken by the committee, clerical expenses and supplies, and necessary expenses of members of the committee in going to, returning from, and while attending, meetings of the committee: *Provided*, That an annual report to the Congress shall be submitted through the President, including an itemized statement of expenditures.—(38 Stat., 930, chap. 83.)

In the act of March 4, 1917 (39 Stat., 1170), appropriations for this committee were made under the name of the "National Advisory Committee for Aeronautics," and the said act consolidated the appropriations previously made for the "Advisory Com-

mittee for Aeronautics." Appropriations have continued to be made under the new designation in subsequent acts, to and including the act of March 4, 1921 (41 Stat., 1381).

[1915, Mar. 3. Medals of honor.] The President of the United States is hereby empowered to prepare a suitable medal of honor to be awarded to any officer of the Navy, Marine Corps, or Coast Guard who shall have distinguished himself in battle or displayed extraordinary heroism in the line of his profession.—(38 Stat., 931, chap. 83.)

See act of February 4, 1919 (40 Stat., 1056); and see section 1407, Revised Statutes, and note thereto.

[1915, Mar. 3. Enlistment of minors; discharge upon request of parents.] That hereafter no part of any appropriation for the naval service shall be expended in recruiting seamen, ordinary seamen, or apprentice seamen unless, in case of minors, a certificate of birth or a verified written statement by the parents, or either of them, or in case of their death a verified written statement by the legal guardian, be first furnished to the recruiting officer, showing applicant to be of age required by naval regulations, which shall be presented



with the application for enlistment; except in cases where such certificate is unobtainable, enlistment may be made when the recruiting officer is convinced that oath of applicant as to age is credible; but when it is afterwards found, upon evidence satisfactory to the Navy Department, that recruit has sworn falsely as to age, and is under eighteen years of age at the time of enlistment, he shall, upon request of either parent, or, in case of their death, by the legal guardian, be released from service in the Navy, upon payment of full cost of first outfit, unless, in any given case, the Secretary, in his discretion, shall relieve said recruit of such payment.—(38 Stat., 931, chap. 83.)

See sections 1418, 1419, and 1624, article 22, Revised Statutes, and notes thereto.

See acts of June 29, 1906 (34 Stat., 553), and March 3, 1915 (38 Stat., 932), as to clothing outfits.

[1915, Mar. 3. Clothing outfits, reissued on second enlistment.] That hereafter the Secretary of the Navy is authorized to issue a clothing outfit to all enlisted men serving in their second enlistment who failed to receive an outfit of the value authorized by law on their first enlistment, or who, having received such outfit, were required to refund its value on account of discharge prior to expiration of enlistment: *Provided further*, That the net cost to the Government of clothing outfits furnished any one enlisted man shall not exceed \$60.—(38 Stat., 932, chap. 83.)

A similar provision, without the word "hereafter," was contained in act of June 30, 1914 (38 Stat., 396).

A clothing outfit on first enlistment, not to exceed in value \$45, was authorized by act of March 1, 1889 (25 Stat., 781). See that act and note thereto.

The value of clothing outfits on first enlistment has been increased from time to time by annual appropriation acts. The amount fixed by the act of June 4, 1920 (41 Stat., 815), was "not to exceed \$100 each," dur-

ing the fiscal year ending June 30, 1921. The latter act further provided that during the said fiscal year the value of such outfits should be charged to the "clothing and small stores fund." See also note to section 1569, Revised Statutes.

As to refund of outfits on discharge, see acts of June 29, 1906 (34 Stat., 553 and 556), and March 2, 1907 (34 Stat., 1176).

As to uniform gratuity in the Naval Reserve Force, see note to section 1556, Revised Statutes.

[1915, Mar. 3. Involuntary retirement, to create vacancies, repealed.] Section nine of the naval personnel act of March third, eighteen hundred and ninety-nine, entitled, "An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States," be, and the same is hereby, repealed.—(38 Stat., 938, chap. 83.)

See act of March 3, 1899, section 9 (30 Stat., 1006); see also act of August 22, 1912 (37 Stat., 328).

[1915, Mar. 3. Aviators, pay of.] Hereafter officers of the Navy and Marine Corps appointed student naval aviators, while lawfully detailed for duty involving actual flying in air craft, including balloons, dirigibles, and aeroplanes, shall receive the pay and allowances of their rank and service plus thirty-five per centum increase thereof; and those officers who have heretofore qualified, or may hereafter qualify, as naval aviators, under such rules and regulations as have been or may be prescribed by the Secretary of the Navy, shall, while lawfully detailed for duty involving actual flying in air craft, receive the pay and allowances of their rank and service plus fifty per centum increase thereof. Hereafter enlisted men of the Navy or Marine Corps, while detailed for duty involving actual flying in air craft, shall receive the pay, and the permanent additions thereto, including allowances, of their rating and service, or rank and

service, as the case may be, plus fifty per centum increase thereof: *Provided*, That not more than a yearly average of forty-eight officers and ninety-six enlisted men of the Navy, and twelve officers and twenty-four enlisted men of the Marine Corps, detailed for duty involving actual flying in air craft, shall receive any increase in pay while on duty involving actual flying in air craft, nor shall any officer in the Navy senior in rank to commander, nor any officer in the Marine Corps senior in rank to major, receive any increase in pay or allowances by reason of such detail or duty.—(38 Stat., 939, chap. 83.)

By act of July 1, 1918 (40 Stat., 718), increased allowances for aviation duty were prohibited.

This provision was modified by act of August 29, 1916 (39 Stat., 582-586). See note to section 1556, Revised Statutes. It was followed by a paragraph authorizing payment of one year's pay and double pension to the beneficiaries of deceased personnel

of the Navy or Marine Corps whose death resulted from wounds or disease resulting from an aviation accident; which benefits were repealed by the War Risk insurance amendment of October 6, 1917, section 312 (40 Stat., 408).

A prior provision relating to pay of aviators, contained in act of March 4, 1913 (37 Stat., 892), was superseded by the above.

[1915, Mar. 3. Prior acts repealed.] All Acts or parts of Acts in so far as they are inconsistent with the provisions of this Act are hereby repealed.—(38 Stat., 940, chap. 83.)

[1915, Mar. 3. Naval reserve established.]

This provision read as follows:

"There is hereby established a United States naval reserve, which shall consist of citizens of the United States who have been or may be entitled to be honorably discharged from the Navy after not less than one four-year term of enlistment or after a term of enlistment during minority. The naval reserve shall be organized under the Bureau of Navigation and shall be governed by the Articles for the Government of the Navy and by the Naval Regulations and Instructions. Whenever actively employed with the Navy, or whenever employed in authorized travel to and from prescribed active duty with the Navy, its members shall be employed as members of the naval reserve and shall while so employed be held and considered to be in all respects in the same status as enlisted men of the Navy on active duty, except that they shall not be advanced in rating in time of peace. When not actively employed with the Navy, members of the naval reserve shall not be entitled to any pay, bounty, gratuity, or pension except the pay expressly provided for members of the naval reserve by the provisions of this Act, nor shall they be entitled to retirement by reason of such service in the naval reserve.

"Enlistments in the naval reserve shall be made in the rating in which last honorably discharged from the Navy for a period of four years unless sooner discharged by competent authority. No man shall be first enlisted in the naval reserve after eight years from the date of his last discharge from the Navy nor unless he be found to be physically fit to perform the duties of the rating in which last discharged, nor shall any man whose last service in the Navy was terminated by any means other than by an honorable discharge be eligible

for enlistment in the naval reserve. Reenlistments in the naval reserve shall be made under such regulations as may be prescribed by the Secretary of the Navy.

"Enlistments in the naval reserve shall be made in two classes. Class one shall consist of those men who enlist in the naval reserve within four months from the date of their last honorable discharge from the Navy. Class two shall consist of those men who enlist in the naval reserve after four months and within eight years from the date of their last honorable discharge from the Navy.

"In addition to the enlistments in the naval reserve above provided, the Secretary of the Navy is authorized to transfer to the naval reserve at the expiration of an enlistment any enlisted man of the Navy who may, after two years from the date of approval of this Act, complete service in the Navy of sixteen, or twenty or more years and be entitled at the expiration of his enlistment to an honorable discharge. Such transfers shall only be made upon voluntary application and in the rating in which then serving, and the men so transferred shall be continued in the naval reserve until discharged by competent authority.

"Members of the naval reserve of class one and men transferred to the naval reserve shall be required to keep on hand such part of the uniform clothing outfit as may be prescribed by the Secretary of the Navy, and all members of the naval reserve shall be issued a distinctive badge or button which may be worn with civilian dress.

"Members of class one who have served less than eight years in the Navy shall be paid at the rate of \$30 per annum, and those who have served eight or more years and less than twelve years in the Navy shall be paid at the rate of \$60 per annum and those who have served twelve



or more years in the Navy, \$100 per annum. All members of the naval reserve of class two shall be paid at the rate of \$12 per annum, and when first called into active service on board a vessel of the Navy shall receive an allowance for an outfit of clothing not exceeding \$30 in value, to be expended under regulations prescribed by the Secretary of the Navy.

"Members of the naval reserve who have, when transferred to the naval reserve, completed service in the Navy of sixteen, or twenty or more years shall be paid at the rate of one-third and one-half, respectively, of the base pay, plus permanent additions thereto, which they were receiving at the close of their last service in the Navy.

"Members of the naval reserve may, in time of peace, be required to perform not less than one month's active service on board a vessel of the Navy, during each year of service in the naval reserve, and such active service shall not exceed two months in any one year: *Provided*, That the aforesaid active service with the Navy may be required at any time after entrance in the naval reserve. In time of war they may be required to perform active service with the Navy throughout the war, not to exceed the term of enlistment in the case of those enlisted in the naval reserve. Any pay which may be due any member of the naval reserve shall be forfeited when so ordered by the Secretary of the Navy upon the failure, under such conditions as may be prescribed by the Secretary of the Navy, of such man to report for muster and inspection.

"Those members of the naval reserve of class one, and those members who have been transferred to the naval reserve, who reenlist in the Navy within four months from the date of their discharge from the naval reserve, shall not be entitled to a gratuity of four months' pay, but their reenlistment in the Navy shall be held and considered to have been made within four months from the date of discharge from the Navy for the purpose of continuous-service pay. The period of time during which members of the naval reserve were actively employed with the Navy while enlisted in the naval reserve shall, for the purposes of retirement, be counted as active service in the Navy in the case of those who reenlist in the Navy after service in the naval reserve." (38 Stat., 940-941, chap. 83.)

This provision was held to be superseded by the act of August 29, 1916 (39 Stat., 587-593), establishing the Naval Reserve Force and Marine Corps Reserve (23 Comp. Dec., 190, affirmed, 26 Comp. Dec., 556).

In the comptroller's decision first above cited, it was held that "the former Naval Reserve having been superseded on August 29, 1916, by the Naval Reserve Force," the right

to pay of members of the Naval Reserve "terminated August 28, 1916."

In the second decision cited, the comptroller held that "upon the passage of the act of August 29, 1916, 39 Stat., 587, the United States Naval Reserve ceased to exist and a new branch, the Naval Reserve Force, was created in place thereof."

The act of August 29, 1916 (39 Stat., 593), provided that "All Acts or parts of Acts relating to the Naval Reserve which are inconsistent with the provisions of this Act relating to the Naval Reserve Force are hereby repealed."

After the comptroller's decision first above cited, Congress, by act of March 4, 1917 (39 Stat., 1174), enacted the following provision:

"Any former member of class one of the United States Naval Reserve, established by the Act of March third, nineteen hundred and fifteen, 'An Act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and sixteen, and for other purposes,' who shall have reenlisted in the Navy prior to May first, nineteen hundred and seventeen, shall be held and considered to have reenlisted within four months from the date of discharge from the Navy for the purpose of continuous-service pay. And any such member of the said Naval Reserve who was serving therein on August twenty-ninth, nineteen hundred and sixteen, shall upon his application therefor, any time prior to July first, nineteen hundred and seventeen, be enrolled in the Naval Reserve Force, and any such person so enrolled shall, for all purposes, be considered as having served continuously in such Naval Reserve Force since August twenty-ninth, nineteen hundred and sixteen, with due credit for previous and continuous service in the Naval Reserve in the same manner and to the same effect as for equal length of service in the Naval Reserve Force: *Provided*, That no such enrolled person shall receive any back pay or allowances for any period during which he shall have received pay or allowances, or either, for service in any other branch of the naval service, regular or reserve."

See note to section 1573, Revised Statutes, as to continuous-service pay in the Navy; see note to section 1556, Revised Statutes, as to pay and allowances of the Naval Reserve Force; and see, generally, note to section 1569, Revised Statutes, as to pay of enlisted men of the Navy, and note to section 1612, Revised Statutes, as to pay of enlisted men of the Marine Corps.

See act of August 29, 1916 (39 Stat., 587-593), and amendments noted thereunder, as to the Naval Reserve Force and Marine Corps Reserve.

[1915, Mar. 3. Retired enlisted men, active duty.] The Secretary of the Navy is authorized in time of war, or when, in the opinion of the President, war is threatened, to call any enlisted man on the retired list into active service for such duty as he may be able to perform. While so employed such enlisted men shall receive the same pay and allowances they were receiving when placed on the retired list: *Provided*, That enlisted men on the retired list shall not be

eligible for enlistment in or transfer to the naval reserve.—(38 Stat., 941, chap. 83.)

A later provision for the employment of retired enlisted men on active duty, which apparently supersedes this enactment, is contained in the act of August 29, 1916 (39 Stat., 591).

Authority for the advancement of retired enlisted men employed on active duty is contained in the act of July 1, 1918 (40 Stat., 719).

As to status of retired enlisted men, and whether subject to trial by court-martial, see note to section 1624, Revised Statutes.

See notes above, as to the naval reserve; and see act of March 3, 1899, section 17 (30 Stat., 1008), and laws noted thereunder, as to retirement of enlisted men.

See note to section 1569, Revised Statutes, under "17. Retired enlisted men;" and see note to section 1622, Revised Statutes, as to retired enlisted men of the Marine Corps.

[1915, Mar. 3. Grades of acting pay clerk, pay clerk, and chief pay clerk, established.] The title of paymaster's clerk in the United States Navy is hereby changed to pay clerk, and hereafter all pay clerks shall be warranted from acting pay clerks, who shall be appointed from enlisted men in the Navy holding acting or permanent appointments as chief petty officers who have served at least three years as enlisted men, at least two years of which service must have been on board a cruising vessel of the Navy. All appointments as acting pay clerks shall be made by the Secretary of the Navy, and all such appointees, in addition to the qualifications above set forth, must be citizens of the United States. All acting appointments herein provided for shall be made permanent under regulations established by the Secretary of the Navy: *Provided*, That paymasters' clerks now in the Navy whose total service as such is less than one year and who are citizens of the United States may, upon the passage of this act, be given appointments as acting pay clerks without previous service as enlisted men: *Provided further*, That paymasters' clerks now in the service and former paymasters' clerks whose appointments have been revoked within six months next preceding the passage of this act, who have had not less than one year's actual service as such, and who are citizens of the United States, may, upon the passage of this act, be warranted as pay clerks without previous service as enlisted men or as acting pay clerks: *And provided further*, That pay clerks and acting pay clerks shall have the same pay, allowances, and other benefits as are now or may hereafter be allowed other warrant officers and acting warrant officers, respectively.

That all pay clerks shall, after six years' service as such, be commissioned chief pay clerks and shall on promotion have the rank, pay, and allowances of chief boatswain: *Provided*, That in computing the six years' service herein provided for credit shall be given for all service in the Navy as pay clerk, acting pay clerk, and paymasters' clerk: *Provided further*, That paymasters' clerks now in the Navy and former paymasters' clerks whose appointments have been revoked within six months next preceding the passage of this act, who have had not less than six years' actual service as such, and who are citizens of the United States, may, upon the passage of this act, be commissioned as chief pay clerks without previous service as enlisted men, acting pay clerks, or pay clerks.

That the total number of chief pay clerks, pay clerks, and acting pay clerks allowed by this act shall not exceed one for each two hundred and fifty enlisted men in the United States Navy now or hereafter allowed by law, and



such chief pay clerks, pay clerks, and acting pay clerks shall be assigned to duty with pay officers under such rules as the Secretary of the Navy may prescribe: *Provided*, That no person shall be appointed a chief pay clerk, pay clerk, or acting pay clerk under any provisions contained in this act until his physical, mental, moral, and professional qualifications have been satisfactorily established by examination before a board of examining officers appointed by the Secretary of the Navy, from officers of the pay corps when practicable and according to such regulations as he may prescribe: *Provided further*, That no person shall be appointed a chief pay clerk, pay clerk, or acting pay clerk unless his accumulated previous service in the Army, Navy, and Marine Corps, together with his possible future service prior to attaining the age of sixty-two years, will amount to at least thirty years, except that this proviso shall not apply to such persons as were serving in the Navy as paymasters' clerks during the period from September first, nineteen hundred and thirteen, to October thirty-first, nineteen hundred and thirteen.—(38 Stat., 942-943, chap. 83.)

As to pay of warrant officers and commissioned warrant officers, see note to section 1556, Revised Statutes; as to allowances of officers, see note to section 1558, Revised Stat-

utes. See, generally, sections 1386-1388, and 1405, Revised Statutes, and notes thereto.

[1915, MAR. 3. Assistant paymasters, appointment from chief pay clerks and pay clerks.] That the limitation as to age contained in section thirteen hundred and seventy-nine of the Revised Statutes of the United States, relating to appointment of assistant paymasters in the United States Navy, shall not apply to chief pay clerks and pay clerks appointed under the provisions of this Act, who must be between the ages of twenty-one and thirty-five years at the time of appointment as assistant paymasters in the United States Navy: *Provided*, That this shall not be construed as giving any preference in said appointment of assistant paymasters to said chief pay clerks and pay clerks except as to the limitation of age.—(38 Stat., 943, chap. 83.)

See section 1379, Revised Statutes, and note thereto.

[1915, MAR. 3. Paymasters' clerks; laws repealed.] That sections thirteen hundred and eighty-six, thirteen hundred and eighty-seven, and thirteen hundred and eighty-eight of the Revised Statutes, and all Acts and parts of Acts, so far as they are in conflict with the provisions of this Act, be, and the same are hereby, repealed.—(38 Stat., 943, chap. 83.)

[1915, MAR. 3. Transportation of fuel; charges excessive.] That hereafter, when the lowest obtainable cost of transportation of fuel between the Atlantic and Pacific coasts of the United States by merchant carriers is considered excessive, the appropriation "Fuel and transportation" may be charged with the expense of pay, transportation, shipping, and subsistence of civilian officers and crews, and such other incidental expenses as can not be paid from other appropriations, of naval auxiliaries engaged in the transportation of fuel: *Provided*, That the appropriation "Maintenance of naval auxiliaries" is insufficient therefor.—(38 Stat., 944, chap. 83.)

See sections 3718 and 3728, Revised Statutes, and notes thereto.

**Transportation in foreign vessels.**—Coal for the use of the Navy may, under existing law, be transported by sea from ports on the Atlantic to ports on the Pacific coast of the United States in vessels of foreign registry where sufficient American vessels for that purpose can not be had, or where the charges made by such vessels are excessive and unreasonable. (26 Op. Atty. Gen., 415, Oct. 3, 1917.)

The act of April 28, 1904 (33 Stat., 518), relating to transportation of coal and other supplies for the Navy, contemplates the possibility that it may be impossible to comply with its terms without exposing the Government to exorbitant and unreasonable expense; in such case the act does not require that transportation be in American vessels. (26 Op. Atty. Gen., 415.)

Section 4347, Revised Statutes, and the act of February 17, 1898 (30 Stat., 248), which

prohibit the transportation of merchandise from one port to another in vessels owned by foreigners, do not apply to property owned by the Government. (26 Op. Atty. Gen., 415.)

**Tonnage tax.**—A British steamship which transported coal belonging to the Navy, from Newport News to San Francisco, and had no other cargo, was not a vessel having on board goods, wares, and merchandise within the meaning of section 4219, Revised Statutes, and amendments thereto, imposing a tonnage tax upon foreign vessels. (26 Op. Atty. Gen., 426.)

**Coal imported for the Navy; duties.**—Coal imported for the use of the Navy is subject to the duties prescribed by paragraph 415 of the act of July 24, 1897 (30 Stat., 190), notwithstanding the coal is imported by the Navy Department and the duties will have to be paid from the appropriations of that Department (26 Op. Atty. Gen., 466.)

[1915, Mar. 3. Assistant naval constructors, appointment from line officers.] Officers of the line of the Navy who have had not less than three years' service in the grade of ensign and have taken or are taking satisfactorily a post-graduate course in naval architecture under orders from the Secretary of the Navy shall be eligible for transfer to the grade of assistant naval constructor: *Provided*, That there shall not be more than five such transfers in any one calendar year and that the total increase in the number of naval constructors and assistant naval constructors by reason of such transfers shall not exceed twenty-four.—(38 Stat., 945, chap. 83.)

See section 1403, Revised Statutes, and note thereto, as to appointment of assistant naval constructors.

See section 1402, Revised Statutes, and note thereto, as to the number of officers in the Construction Corps.

[1915, Mar. 3. Pay, Marine Corps, sea duty.] That the increased compensation as now fixed by law for the Marine Corps for foreign shore service shall hereafter be paid to the officers and enlisted men of that corps while on sea duty, in the same manner and under the same conditions as is provided by the act approved May thirteenth, nineteen hundred and eight, for officers of the Navy.—(38 Stat., 948, chap. 83.)

See act of May 13, 1908 (35 Stat., 128), and see notes to sections 1556, 1571, and 1612, Revised Statutes.

[1915, Mar. 3. Equipment outfits, naval vessels; appropriation chargeable.] INCREASE OF THE NAVY, EQUIPMENT: The unexpended balance on June thirtieth, nineteen hundred and fifteen, shall be transferred to appropriation "Increase of the Navy, construction and machinery," and beginning with July first, nineteen hundred and fifteen, equipment outfits shall be charged to appropriation "Increase of the Navy, construction and machinery."—(38 Stat., 952, chap. 83.)

[1915, Mar. 4, sec. 5. Subscriptions to periodicals, payment in advance.] That hereafter subscriptions to periodicals, which have been certified in writing by the respective heads of the executive departments or other Government



establishments to be required for official use, may be paid in advance from appropriations available therefor.—(38 Stat., 1049, chap. 141.)

See act of March 3, 1915 (38 Stat., 929); see also section 192, Revised Statutes, and note thereto.

[1915, Mar. 4, sec. 6. Civil employees, etc., number of.] The officers and employees of the United States whose salaries are herein appropriated for are established and shall continue from year to year to the extent they shall be appropriated for by Congress.—(38 Stat., 1049, chap. 141.)

See note to section 416, Revised Statutes.

This section was part of the legislative, execu-

tive, and judicial appropriation act for the fiscal year 1916.

[1915, Mar. 4. Transfer of appropriations between bureaus and departments; supplies and services.] That hereafter when one bureau of the War or Navy Departments procures by purchase or manufacture stores or material of any kind or performs any service for another bureau of such departments the funds of the bureau or department for which the stores or material are to be procured or the service performed may be placed subject to the requisition of the bureau or department making the procurement or performing the service for direct expenditure by it: *Provided*, That when the stores being procured are for current issue during the year stores of equal value may be issued from stock on hand in place of any of those aforesaid.—(38 Stat., 1084, chap. 143.)

See act of May 21, 1920, section 7 (41 Stat., 613), which contains provisions similar to the foregoing, applicable to all departments and bureaus of the Government; see

also acts of August 24, 1912 (37 Stat., 589), and July 11, 1919 (41 Stat., 132); and see sections 418, 419, 1135, 1437, and 3676, Revised Statutes, and notes thereto.

[1915, Mar. 4. National forests; use of earth, stone, and timber by Navy.] That hereafter the Secretary of Agriculture, under regulations to be prescribed by him, is hereby authorized to permit the Navy Department to take from the national forests such earth, stone, and timber for the use of the Navy as may be compatible with the administration of the national forests for the purposes for which they are established, and also in the same manner to permit the taking of earth, stone, and timber from the national forests for the construction of Government railways and other Government works in Alaska: *Provided*, That the Secretary of Agriculture shall submit with his annual estimates a report of the quantity and market value of earth, stone, and timber furnished as herein provided.—(38 Stat., 1100-1101, chap. 144.)

[1915, Mar. 4, sec. 4. Appropriations, unexpended balances; reappropriation.] That the reappropriation and diversion of the unexpended balance of any appropriation to a purpose other than that for which it was originally made shall be construed and accounted hereafter as a new appropriation and the unexpended balance shall be reduced by the sum proposed to be so diverted.—(38 Stat., 1161, chap. 147.)

See section 3690, Revised Statutes.

[1915, Mar. 4, sec. 5. Exchange of typewriters, adding machines, etc.; report to Congress.] That the executive departments and other Government establishments and all branches of the public service may hereafter exchange typewriters, adding machines, and other similar labor saving devices in part payment for new machines used for the same purpose as those proposed to be

exchanged. There shall be submitted to Congress, on the first day of the session following the close of each fiscal year, a report showing, as to each exchange hereunder, the make of the article, the period of its use, the allowance therefor, and the article, make thereof, and price, including exchange value, paid or to be paid for each article procured through such exchange.—(38 Stat., 1161, chap. 147.)

See sections 418, 429, and 3718, Revised Statutes, and notes thereto; and see acts of

June 5, 1920, section 7 (41 Stat., 947), and March 3, 1921 (41 Stat., 1265-1266).

[1916, Apr. 27. Medal of honor roll; special pension.] That there is hereby established in the War Department and Navy Department, respectively, a roll designated as "the Army and Navy medal of honor roll." Upon written application made to the Secretary of the proper department, and subject to the conditions and requirements hereinafter contained, the name of each surviving person who has served in the military or naval service of the United States in any war, who has attained or shall attain the age of sixty-five years, and who has been awarded a medal of honor for having in action involving actual conflict with an enemy distinguished himself conspicuously by gallantry or intrepidity, at the risk of his life, above and beyond the call of duty, and who was honorably discharged from service by muster out, resignation, or otherwise, shall be, by the Secretary of the proper department, entered and recorded on said roll. Applications for entry on said roll shall be made in such form and under such regulations as shall be prescribed by the War Department and Navy Department, respectively, and proper blanks and instructions shall be, by the proper Secretary, furnished without charge upon request made by any person claiming the benefits of this Act.—(39 Stat., 53, chap. 88.)

SEC. 2. That it shall be the duty of the Secretary of War and of the Secretary of the Navy to carry this Act into effect and to decide whether each applicant, under this Act, in his department is entitled to the benefit of this Act. If the official award of the medal of honor to the applicant, or the official notice to him thereof, shall appear to show that the medal of honor was awarded to the applicant for such an act as is required by the provisions of this Act, it shall be deemed sufficient to entitle the applicant to such special pension without further investigation. Otherwise all official correspondence, orders, reports, recommendations, requests, and other evidence now on file in any public office or department shall be considered. A certificate of service and of the act of heroism, gallantry, bravery, or intrepidity for which the medal of honor was awarded, and of enrollment under this Act, and of the right of the special pensioner to be entitled to and to receive the special pension herein granted, shall be furnished each person whose name shall be so entered on said roll. The Secretary of War and the Secretary of the Navy shall deliver to the Commissioner of Pensions a certified copy of each of such of said certificates as he may issue, as aforesaid, and the same shall be full and sufficient authority to the Commissioner of Pensions for the payment by him to the beneficiary named in each such certificate the special pension herein provided for.—(39 Stat., 54, chap. 88.)

SEC. 3. That each such surviving person whose name shall have been entered on said roll in accordance with this Act shall be entitled to and shall receive and be paid by the Commissioner of Pensions in the Department of the



Interior, out of any moneys in the Treasury of the United States not otherwise appropriated, a special pension of \$10 per month for life, payable quarter yearly. The Commissioner of Pensions shall make all necessary rules and regulations for making payment of such special pensions to the beneficiaries thereof.

Such special pension shall begin on the day that such person shall file his application for enrollment on said roll in the office of the Secretary of War or of the Secretary of the Navy after the passage and approval of this Act, and shall continue during the life of the beneficiary.

Such special pension shall not deprive any such special pensioner of any other pension or of any benefit, right, or privilege to which he is or may hereafter be entitled under any existing or subsequent law, but shall be in addition thereto.

The special pension allowed under this Act shall not be subject to any attachment, execution, levy, tax, lien, or detention under any process whatever.—(39 Stat., 54, chap. 88.)

SEC. 4. That in case any person has been awarded two or more medals of honor, he shall not be entitled to and shall not receive more than one such special pension.

Rank in the service shall not be considered in applications filed hereunder.—(39 Stat., 54, chap. 88.)

As to medals of honor, see note to section 1407, Revised Statutes.

[1916, Apr. 27. Attorneys before departments; advertising.] That it shall be unlawful for any person, firm, or corporation practicing before any department or office of the Government to use the name of any Member of either House of Congress or of any officer of the Government in advertising the said business.—(39 Stat., 54, chap. 89.)

[1916, May 10, sec. 6. Double salaries restricted.] That unless otherwise specially authorized by law, no money appropriated by this or any other Act shall be available for payment to any person receiving more than one salary when the combined amount of said salaries exceeds the sum of \$2,000 per annum, but this shall not apply to retired officers or enlisted men of the Army, Navy, Marine Corps, or Coast Guard, or to officers and enlisted men of the Organized Militia and Naval Militia in the several States, Territories, and the District of Columbia: *Provided*, That no such retired officer, officer, or enlisted man shall be denied or deprived of any of his pay, salary, or compensation as such, or of any other salary or compensation for services heretofore rendered, by reason of any decision or construction of said section six.—(39 Stat., 120, chap. 117; 39 Stat., 582, chap. 417.)

This section was expressly amended and reenacted to read as above by act of August 29, 1916 (39 Stat., 582).

See notes to sections 1763 and 1765, Revised Statutes.

[1916, June 3, sec. 35. Enlisted men, civil employment.] Hereafter no enlisted man in the active service of the United States in the Army, Navy, and Marine Corps, respectively, whether a noncommissioned officer, musician, or private, shall be detailed, ordered, or permitted to leave his post to engage in any pursuit, business, or performance in civil life, for emolument, hire, or

otherwise, when the same shall interfere with the customary employment and regular engagement of local civilians in the respective arts, trades, or professions.—(39 Stat., 188–189, chap. 134.)

Navy bands, competition with civilians: See act of May 13, 1908 (35 Stat., 153.)	Employment of enlisted men at navy yards, etc., during repairs to vessels: See act of August 22, 1912 (37 Stat., 355).
Marine Band, competition with civilians: See act of August 29, 1916 (39 Stat., 612).	

[1916, June 3, sec. 74. **National Guard officers, appointed from naval and reserve officers, etc.**] Persons hereafter commissioned as officers of the National Guard shall not be recognized as such under any of the provisions of this Act unless they shall have been selected from the following classes, and shall have taken and subscribed to the oath of office prescribed in the preceding section of this Act; officers or enlisted men of the National Guard; officers, active or retired, reserve officers, and former officers of the Army, Navy, or Marine Corps, enlisted men and former enlisted men of the Army, Navy, or Marine Corps who have received an honorable discharge therefrom; graduates of the United States Military and Naval Academies; and graduates of schools, colleges, universities, and officers' training camps, where they have received military instruction under the supervision of an officer of the Regular Army who certified their fitness for appointment as commissioned officers; and for the technical branches or Staff Corps and departments, such other civilians as may be specially qualified for duty therein.—(39 Stat., 201–202, chap. 134, 41 Stat., 781–782, chap. 227.)

This section was expressly amended and reenacted to read as above by act of June 4, 1920, section 41 (41 Stat., 781–782).

[1916, June 3, sec. 80. **Leave of absence employees belonging to National Guard.**] All officers and employees of the United States and of the District of Columbia who shall be members of the National Guard shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be engaged in field or coast-defense training ordered or authorized under the provisions of this Act.—(39 Stat., 203, chap. 134.)

See act of May 12, 1917 (40 Stat., 72), as to employees belonging to Officers' Reserve Corps.

[1916, June 3, sec. 113. **Rifle practice.**] The Secretary of War shall annually submit to Congress recommendations and estimates for the establishment and maintenance of indoor and outdoor rifle ranges, under such a comprehensive plan as will ultimately result in providing adequate facilities for rifle practice in all sections of the country. And that all ranges so established and all ranges which may have already been constructed, in whole or in part, with funds provided by Congress shall be open for use by those in any branch of the military or naval service of the United States and by all able-bodied males capable of bearing arms, under reasonable regulations to be prescribed by the controlling authorities and approved by the Secretary of War. That the President may detail capable officers and noncommissioned officers of the Regular Army and National Guard to duty at such ranges as instructors for the purpose of training the citizenry in the use of the military arm. Where rifle ranges shall have been so established and instructors assigned to duty thereat,



the Secretary of War shall be authorized to provide for the issue of a reasonable number of standard military rifles and such quantities of ammunition as may be available for use in conducting such rifle practice.—(39 Stat., 211, chap. 134.)

By annual appropriation acts for the support of the Army appropriations are made "for the purpose of furnishing a national trophy and medals and other prizes to be provided and contested for annually, under such regulations as may be prescribed by the Secretary of War, said contest to be open to the Army, Navy, Marine Corps, and the National Guard or Organized Militia of the several States, Territories, and of the District of Columbia, members of rifle clubs,

and civilians, and for the cost of the trophy, prizes, and medals herein provided for, and for the promotion of rifle practice throughout the United States, including the reimbursement of necessary expenses of members of the National Board for the promotion of Rifle Practice, to be expended for the purposes hereinbefore prescribed, under the direction of the Secretary of War." (Act June 5, 1920, 41 Stat., 971.)

[1916, June 3, sec. 120. Procurement of supplies in time of war, etc.] The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, \* \* \* and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding \$50,000.

The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just.—(39 Stat., 213, chap. 134.)

The omitted portion of this section related in terms to the Army.

See act of March 4, 1917 (39 Stat., 1192-1193), which contained authority "in addition to all other existing provisions of law," for

the procurement by the President of ships and material, etc., for the Navy in time of war; and see act of September 7, 1916, section 10 (39 Stat., 731).

[1916, June 3, sec. 124. Nitrate supply.] The products of such plants shall be used by the President for military and naval purposes to the extent that he may deem necessary, and any surplus which he shall determine is not required shall be sold and disposed of by him under such regulations as he may prescribe.—(39 Stat., 215, chap. 134.)

This was a paragraph contained in section 124 of the act cited, which section authorized the President to construct, maintain, and operate plants and equipment for the production of nitrates or other products needed for munitions of war, etc.

See act of July 2, 1917 (40 Stat., 241), as amended by acts of April 11, 1918 (40 Stat., 518), and July 9, 1918 (40 Stat., 888).

[1916, June 3, sec. 125. Protection of the uniform.] It shall be unlawful for any person not an officer or enlisted man of the United States Army, Navy, or Marine Corps, to wear the duly prescribed uniform of the United States Army, Navy, or Marine Corps, or any distinctive part of such uniform, or a uniform any part of which is similar to a distinctive part of the duly prescribed uniform of the United States Army, Navy, or Marine Corps: *Provided*, That the foregoing provision shall not be construed so as to prevent officers or enlisted men of the National Guard from wearing, in pursuance of law and regulations, the uniform lawfully prescribed to be worn by such officers or enlisted men of the National Guard; nor to prevent members of the organization known as the Boy Scouts of America, or the Naval Militia, or such other organizations as the Secretary of War may designate, from wearing their prescribed uniforms; nor to prevent persons who in time of war have served honorably as officers of the United States Army, Navy, or Marine Corps, Regular or Volunteer, and whose most recent service was terminated by an honorable discharge, muster out, or resignation, from wearing, upon occasions of ceremony, the uniform of the highest grade they have held by brevet or other commission in such Regular or Volunteer service; nor to prevent any person who has been honorably discharged from the United States Army, Navy, or Marine Corps, Regular or Volunteer, from wearing his uniform from the place of his discharge to his home, within three months after the date of such discharge; nor to prevent the members of military societies composed entirely of honorably discharged officers or enlisted men, or both, of the United States Army, Navy, or Marine Corps, Regular or Volunteer, from wearing, upon occasions of ceremony, the uniform duly prescribed by such societies to be worn by the members thereof; nor to prevent the instructors and members of the duly organized cadet corps of a State university, State college, or public high school offering a regular course in military instruction from wearing the uniform duly prescribed by the authorities of such university, college, or public high school for wear by the instructors and members of such cadet corps; nor to prevent the instructors and members of the duly organized cadet corps of any other institution of learning offering a regular course in military instruction, and at which an officer or enlisted man of the United States Army, Navy, or Marine Corps is lawfully detailed for duty as instructor in military science and tactics, from wearing the uniform duly prescribed by the authorities of such institution of learning for wear by the instructors and members of such cadet corps; nor to prevent civilians attendant upon a course of military or naval instruction authorized and conducted by the military or naval authorities of the United States from wearing, while in attendance upon such course of instruction, the uniform authorized and prescribed by such military or naval authorities for wear during such course of instruction; nor to prevent any person from wearing the uniform of the United States Army, Navy, or Marine Corps in any playhouse or theater or in moving-picture films while actually engaged in representing therein a military or naval character not tending to bring discredit or reproach upon the United States Army, Navy, or Marine Corps: *Provided further*, That the uniforms worn by officers or enlisted men of the National Guard, or by the members of the military societies or the instructors and members of the cadet corps referred to in the preceding proviso shall include some distinctive mark or insignia to be prescribed by the



Secretary of War to distinguish such uniforms from the uniforms of the United States Army, Navy, and Marine Corps: *And provided further*, That the members of the military societies and the instructors and members of the cadet corps hereinbefore mentioned shall not wear the insignia of rank prescribed to be worn by officers of the United States Army, Navy, or Marine Corps, or any insignia of rank similar thereto.

Any person who offends against the provisions of this section shall, on conviction, be punished by a fine not exceeding \$300, or by imprisonment not exceeding six months, or by both such fine and imprisonment.—(39 Stat., 216–217, chap. 134; 41 Stat., 836, chap. 228.)

This section was expressly amended by act of July 9, 1918, section 10 (40 Stat., 891), by adding thereto a provision with respect to enlisted men of the Army and National Guard. It was further amended, but without express reference thereto, by act of February 28, 1919, sections 1 and 2 (40 Stat., 1202–1203), with respect to all persons who served in the Army, Navy, or Marine Corps, “during the present war,” honorably discharged since April 6, 1917. (See file 29225–21, Dec. 23, 1920.)

By act of June 4, 1920, section 8 (41 Stat., 836) it was provided “That section 125 of the Act entitled ‘An Act for making further and more effectual provisions for the national defense, and for other purposes,’ approved June 3, 1916, shall hereafter be in full force and effect as originally enacted, notwithstanding anything contained in the Act entitled ‘An Act permitting any person who has served in the United States Army, Navy, or Marine Corps in the present war to retain his uniform and personal equipment and to wear the same under certain conditions,’ approved February 28, 1918:

*Provided*, That the words ‘or the Secretary of the Navy’ shall be inserted immediately after the words ‘the Secretary of War’ wherever those words appear in section 125 of the Act approved June 3, 1916, hereinbefore referred to.” (The reference in this amendment to the act approved February 28, “1918,” was evidently intended to mean the act of February 28, “1919,” above cited.)

See section 32, Criminal Code, act of March 4, 1909 (35 Stat., 1095), as to impersonating officers of the United States, etc.; act of March 1, 1911 (36 Stat., 963), as to discrimination against the uniform of the United States by places of amusement, etc.; act of July 8, 1918 (40 Stat., 821), as to unauthorized wearing of uniforms of friendly nations; act of July 1, 1918 (40 Stat., 712) as to members of Naval Reserve Force authorized to wear their uniforms when not in active service; and act of August 29, 1916 (39 Stat., 588), as to unauthorized wearing of the distinctive insignia of the Naval Reserve Force.

[1916, June 3, Sec. 126. Mileage and transportation on discharge.] That an enlisted man honorably discharged from the Army, Navy, or Marine Corps since November eleventh, nineteen hundred and eighteen, or who may hereafter be honorably discharged, shall receive five cents per mile from the place of his discharge to his actual bona fide home or residence, or original muster into the service, at his option: *Provided*, That for sea travel on discharge, transportation and subsistence only shall be furnished to enlisted men: *Provided*, That naval reservists duly enrolled who have been honorably released from active service since November eleventh, nineteen hundred and eighteen, or who may hereafter be honorably released from active service, shall be entitled likewise to receive mileage as aforesaid.—(39 Stat., 217, chap. 134; 40 Stat., 1203, chap. 70.)

This section was expressly amended and reenacted to read as above by act of February 28, 1919, section 3 (40 Stat., 1203). See act of March 3, 1901 (31 Stat., 1030), and see note to section 1569, Revised Statutes, under “20. Mileage and transportation on discharge.”

By act of June 4, 1920, section 6 (41 Stat., 836) it was provided: “That in case any enlisted man or enrolled man who, since the 11th day of November, 1918, has been or hereafter shall be discharged from any branch

or class of the naval service for the purpose of reenlisting in the Navy or Marine Corps or heretofore has extended or hereafter shall extend his enlistment therein, he shall be entitled \* \* \* to travel pay as authorized in section 3 of the Act entitled “An Act permitting any person who has served in the United States Army, Navy, or Marine Corps in the present war to retain his uniform and personal equipment and to wear the same under certain conditions” approved February 28, 1919 \* \* \*.”

[1916, June 12. Naval officers appointed to office in Haiti; increases in personnel, pay, etc.] That the President of the United States be, and he is hereby, authorized, in his discretion, to detail to assist the Republic of Haiti such officers and enlisted men of the United States Navy and the United States Marine Corps as may be mutually agreed upon by him and the President of the Republic of Haiti: *Provided*, That the officers and enlisted men so detailed be, and they are hereby, authorized to accept from the Government of Haiti the said employment with compensation and emoluments from the said Government of Haiti, subject to the approval of the President of the United States.—(39 Stat., 223, chap. 140.)

SEC. 2. That to insure the continuance of this work during such time as may be desirable, the President may have the power of substitution in the case of the termination of the detail of any officer or enlisted man for any cause: *Provided*, That during the continuance of such details the officers and enlisted men shall continue to receive the pay and allowances of their ranks or ratings in the Navy or Marine Corps.—(39 Stat., 224, chap. 140.)

SEC. 3. That the following increase in the United States Marine Corps be, and the same is hereby, authorized: Two majors, twelve captains, eighteen first lieutenants, two assistant quartermasters with the rank of captain, one assistant paymaster with the rank of captain, five quartermaster sergeants, five first sergeants, five gunnery sergeants, and eleven sergeants.—(39 Stat., 224, chap. 140.)

SEC. 4. That the following increase in the United States Navy be, and the same is hereby authorized: One surgeon, two passed assistant surgeons, five hospital stewards, and ten hospital apprentices, first class.—(39 Stat., 224, chap. 140.)

SEC. 5. That officers and enlisted men of the Navy and Marine Corps detailed for duty to assist the Republic of Haiti shall be entitled to the same credit for such service, for longevity, retirement, foreign service, pay, and for all other purposes, that they would receive if they were serving with the Navy or with the Marine Corps.—(39 Stat., 224, chap. 140.)

As to acceptance of office under foreign governments, see note to Constitution, Article I, section 9, clause 8; see also joint resolution of October 13, 1914 (38 Stat., 780), and acts of February 11, 1918 (40 Stat., 437), and June 5, 1920 (41 Stat., 1056).

As to number of officers and enlisted men of the Marine Corps, see note to section 1596, Revised Statutes; as to Medical Corps of the Navy, see note to section 1368, Revised Statutes; and as to Hospital Corps, see act of August 29, 1916 (39 Stat., 572).

[1916, July 1, sec. 3. Annual reports; copy furnished Public Printer.] That appropriations herein and hereafter made for printing and binding shall not be used for any annual report or the accompanying documents unless the copy therefor is furnished to the Public Printer in the following manner: Copies of the documents accompanying such annual reports on or before the fifteenth day of October of each year; copies of the annual reports on or before the fifteenth day of November of each year; complete revised proofs of the accompanying documents and the annual reports on the tenth and twentieth days of November of each year, respectively; and all of said annual reports and accompanying documents shall be printed, made public, and available for distribution not later than within the first five days after the assembling of each regular session of Congress: The provisions of this section shall not apply to



the annual reports of the Smithsonian Institution, the Commissioner of Patents, or the Comptroller of the Currency.—(39 Stat., 336, chap. 209).

See notes to sections 196 and 429, Revised Statutes.

[1916, July 1, sec. 4. **Estimates; lump-sum appropriations.**] That the information required in connection with estimates for general or lump-sum appropriations by section ten of the sundry civil appropriation Act, approved August first, nineteen hundred and fourteen, shall be submitted hereafter according to uniform and concise methods which shall be prescribed by the Secretary of the Treasury, but with reference to estimates for pay of mechanics and laborers there shall be submitted in detail only the ratings and trades and the rates per diem paid or to be paid.—(39 Stat., 336, chap. 209.)

The act of August 1, 1914, section 10 (38 Stat., 680), referred to in this section, expressly amended and reenacted section 6 of the	act of August 24, 1912 (37 Stat., 487); see the latter act and note thereto.
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[1916, July 1, sec. 5. **Outstanding checks; annual report.**] That hereafter at the termination of each fiscal year each Auditor of the Treasury shall report to the Secretary of the Treasury all checks issued by any disbursing officer of the Government as shown by his accounts rendered to such auditor, which shall then have been outstanding and unpaid for three years or more, stating fully in such report the name of the payee, for what purpose each check was given, the office on which drawn, the number of the voucher received therefor, the date, the number, and the amount for which it was drawn, and, when known, the residence of the payee. And such reports shall be in lieu of the returns required of disbursing officers by section three hundred and ten of the Revised Statutes.—(39 Stat., 336, chap. 209.)

See section 310, Revised Statutes.

[1916, Aug. 29. **Appropriation for obtaining information; accounting.**] That hereafter expenditures from the appropriation for obtaining information from abroad and at home shall be accounted for specifically, if, in the judgment of the Secretary of the Navy, they may be made public, and he shall make a certificate of the amount of such expenditures as he may think it advisable not to specify, and every such certificate shall be deemed a sufficient voucher for the sum therein expressed to have been expended.—(39 Stat., 557, chap. 417.)

[1916, Aug. 29. **Leave of absence; employees outside United States.**] That hereafter any civilian employee of the Navy Department who is a citizen of the United States and employed at any station outside the continental limits of the United States may, in the discretion of the Secretary of the Navy, after at least two years' continuous faithful, and satisfactory service abroad, and subject to the interests of the public service, be granted accrued leave of absence, with pay, for each year of service, and if an employee should elect to postpone the taking of any or all of the leave to which he may be entitled in pursuance hereof such leave may be allowed to accumulate for a period of not exceeding four years, the rate of pay for accrued leave to be the rate obtaining at the time the leave is granted.—(39 Stat., 557-558, chap. 417.)

See note to section 1545, Revised Statutes.

[1916, Aug. 29. **Insane prisoners of war, etc.**] Hereafter interned persons and prisoners of war, under the jurisdiction of the Navy Department, who

are or may become insane, shall be entitled to admission for treatment to the Government Hospital for the Insane.—(39 Stat., 558, chap. 417.)

The designation of the "Government Hospital for the Insane" was changed to "Saint Elizabeths Hospital" by act of July 1,	1916 (39 Stat., 309), noted under section 4838, Revised Statutes; see also section 4843, Revised Statutes.
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[1916, Aug. 29. **Chief of Naval Operations.**] Hereafter the Chief of Naval Operations, while so serving as such Chief of Naval Operations, shall have the rank and title of admiral, to take rank next after The Admiral of the Navy, and shall, while so serving as Chief of Naval Operations, receive the pay of \$10,000 per annum and no allowances. All orders issued by the Chief of Naval Operations in performing the duties assigned him shall be performed under the authority of the Secretary of the Navy, and his orders shall be considered as emanating from the Secretary, and shall have full force and effect as such. To assist the Chief of Naval Operations in performing the duties of his office there shall be assigned for this exclusive duty not less than fifteen officers of and above the rank of lieutenant commander of the Navy or major of the Marine Corps: *Provided*, That if an officer of the grade of captain be appointed Chief of Naval Operations he shall have the rank and title of admiral, as above provided, while holding that position: *Provided further*, That should an officer, while serving as Chief of Naval Operations, be retired from active service he shall be retired with the lineal rank and the retired pay to which he would be entitled had he not been serving as Chief of Naval Operations.—(39 Stat., 558, chap. 417.)

Amendment to this provision was made by act of July 1, 1918 (40 Stat., 716), as to allowances of the Chief of Naval Operations. The office of Chief of Naval Operations was es-	tablished by act of March 3, 1915 (38 Stat., 929). See note to section 419, Revised Statutes.
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[1916, Aug. 29. **Assistants to chiefs of bureaus and Judge Advocate General.**] Hereafter an officer of the Corps of Civil Engineers may be detailed as assistant to the Chief of the Bureau of Yards and Docks and an officer of the Corps of Naval Constructors as assistant to the Chief of Bureau of Construction and Repair; and, in case of death, resignation, absence, or sickness of the chief of bureau, shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine of the Revised Statutes, perform the duties of such chief until his successor is appointed or such absence or sickness shall cease; and hereafter an officer of the line of the Navy or Marine Corps may be detailed as assistant to the Judge Advocate General of the Navy, who shall, under similar conditions, perform the duties of the Judge Advocate General. (39 Stat., 558, chap. 417.)

See sections 178-182 and 421, Revised Statutes, and notes thereto. For laws authorizing appointment of assistants	to other chiefs of bureaus in the Navy Department, see references under section 421, Revised Statutes.
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[1916, Aug. 29. **Lump sum employees; compensation, annual report.**] Hereafter such amount may be expended annually for pay of drafting, technical, and inspection force from the several lump sum appropriations in which specific authority for such expenditure is given, as the Secretary of the Navy may deem necessary within the limitation of appropriation provided for such service in said lump sum appropriations at such rates of compensation as the Secretary of the Navy may prescribe; and the Secretary of the Navy shall each year, in the



annual estimates, report to Congress the number of persons so employed, their duties, and the amount paid to each.—(39 Stat., 558, chap. 417.)

See notes to sections 416, 429, and 1545, Revised Statutes.

[1916, Aug. 29. Lease of naval lands.] That authority be, and is hereby, given to the Secretary of the Navy, when in his discretion it will be for the public good, to lease for periods not exceeding five years and revocable at any time, such property of the United States under his control as may not for the time being be required for public use and for the leasing of which there is no authority under existing law, and such leases shall be reported annually to Congress: *Provided*, That the authority herein granted shall not be held to apply to oil, mineral, or phosphate lands: *Provided further*, That all moneys received from such leases shall be covered into the Treasury as miscellaneous receipts.—(39 Stat., 559–560, chap. 417.)

See acts of August 25, 1914 (38 Stat., 709), and February 25, 1920 (41 Stat., 437).

[1916, Aug. 29. Honorable discharge; one year's service. Repealed.]

This provision read as follows:

“That any person who may hereafter enlist in the Navy for the first time shall, in time of peace if he so elects, receive discharge therefrom without cost to himself during the month of June or December, respectively, following the completion of one year's service at sea. An honorable discharge may be granted under this provision but when so granted shall not entitle the holder,

in case of reenlistment, to the benefits of an honorable discharge granted upon completion of an enlistment: *And provided further*, That, at the time, he is not under charges, or undergoing punishment, or in debt to the Government.” (39 Stat., 560, chap. 417.)

It was expressly repealed by act of March 4, 1917 (39 Stat., 1171).

[1916, Aug. 29. Postmasters enlisting recruits. Repealed.]

This provision read as follows:

“That the President is authorized in his discretion to utilize the services of postmasters of the second, third, and fourth classes in procuring the enlistment of recruits for the Navy and the Marine Corps, and for each recruit ac-

cepted for enlistment in the Navy or the Marine Corps, the postmaster procuring his enlistment shall receive the sum of \$5.” (39 Stat., 560, chap. 417.)

It was expressly repealed by act of July 2, 1918, section 11 (40 Stat., 754).

[1916, Aug. 29. Armor plants; annual report.] The Secretary of the Navy shall keep accurate and itemized account of the cost per ton of the product of such factory or factories and report the same to Congress in his annual report.—(39 Stat., 564, chap. 417.)

This paragraph followed authorization and appropriation for the erection and purchase of factories by the Secretary of the Navy, at locations approved by the General Board, for the manufacture of armor for the Navy.

As to annual reports required to be made by the Secretary of the Navy, see section 429, Revised Statutes, and notes thereto.

[1916, Aug. 29. Exchange of motor vehicles.] That hereafter worn-out motor-propelled vehicles for the Naval Establishment may be exchanged as a part of the purchase price of new ones.—(39 Stat., 565, chap. 417.)

See section 418, Revised Statutes, and note thereto.

[1916, Aug. 29. Hospital Corps; enlistments, appointments, and promotions; pay; duties; etc.] Hereafter the authorized strength of the Hospital Corps of the Navy shall equal three and one-half per centum of the authorized enlisted strength of the Navy and Marine Corps, and shall be in addition thereto, and as soon as the necessary transfers or appointments may be effected the Hospital Corps of the United States Navy shall consist of the following grades and ratings: Chief pharmacists, pharmacists, and enlisted men classified as

chief pharmacists' mates; pharmacists' mates, first class; pharmacists' mates, second class; pharmacists' mates, third class; hospital apprentices, first class; and hospital apprentices, second class; such classifications in enlisted ratings to correspond respectively to the enlisted ratings, seamen branch, of chief petty officers; petty officers, first class; petty officers, second class; petty officers, third class; seamen, first class; and seamen, second class: *Provided*, That enlisted men of other ratings in the Navy and in the Marine Corps shall be eligible for transfer to the Hospital Corps, and men of that corps to other ratings in the Navy and the Marine Corps.—(39 Stat., 572, chap. 417.)

The President may hereafter, from time to time, appoint as many pharmacists as may be deemed necessary, from the rating of chief pharmacist's mate, subject to such moral, physical, and professional examinations and requirements as to length of service as the Secretary of the Navy may prescribe: *Provided*, That the pharmacists now in the Hospital Corps of the United States Navy or hereafter appointed therein in accordance with the provisions of this Act shall have the same rank, pay, and allowances as are now or may hereafter be allowed other warrant officers.—(39 Stat., 572-573, chap. 417.)

Pharmacists shall, after six years from the date of warrant, be commissioned chief pharmacists after passing satisfactorily such examinations as the Secretary of the Navy may prescribe, and shall, when so commissioned, have the same rank, pay, and allowances as now or may hereafter be allowed other commissioned warrant officers: *Provided*, That the pharmacists at present in the service who have served or may hereafter serve six or more years in that grade shall be eligible for promotion to the grade of chief pharmacist upon satisfactorily passing the examinations provided for in this Act.

The Secretary of the Navy is hereby empowered to limit and fix the numbers in the various ratings.

Section three of an Act entitled "An Act to organize a Hospital Corps of the Navy of the United States; to define its duties and regulate its pay," approved June seventeenth, eighteen hundred and ninety-eight, be, and the same is hereby, repealed, and the pay, allowances, and emoluments of the enlisted men of the Hospital Corps shall be the same as are now, or may hereafter be, allowed for respective corresponding ratings, except the rating of turret captain of the first class in the seaman branch of the Navy: *Provided*, That the pay of the rating of the chief pharmacist's mate shall be the same as that now allowed for the existing rating of hospital steward.

Hospital and ambulance service with such commands and at such places as may be prescribed by the Secretary of the Navy, shall be performed by members of said corps, and the corps shall be a constituent part of the Medical Department of the Navy; and the enlisted men thereof shall be a part of the enlisted force provided by law for the Navy.—(39 Stat., 573, chap. 417.)

The Hospital Corps was established by act of June 17, 1898 (30 Stat., 474). See that act and note thereto.

As to appointment and promotion of pharmacists, see note to section 1405, Revised Statutes.

As to the authorized enlisted strength of the Navy and Marine Corps, see notes to sections 1417 and 1596, Revised Statutes.

As to pay of pharmacists and chief pharmacists, see note to section 1556, Revised Statutes, under "25. Warrant officers, acting warrant officers, and commissioned warrant officers;" as to pay of enlisted men of the Navy, see note to section 1569, Revised Statutes.

As to the organization of the Medical Department of the Navy, see note to section 1368, Revised Statutes.



[1916, Aug. 29. Medical personnel serving with the Army.] Officers and enlisted men of the Medical Department of the Navy, serving with a body of marines detached for service with the Army in accordance with the provisions of section sixteen hundred and twenty-one of the Revised Statutes, shall, while so serving, be subject to the rules and articles of war prescribed for the government of the Army in the same manner as the officers and men of the Marine Corps while so serving.—(39 Stat., 573, chap. 417.)

See note to section 1621, Revised Statutes; see also article 2 of the Articles of War, act of June 4, 1920 (40 Stat., 787).

[1916, Aug. 29. Naval Dental Corps.] That the President of the United States is hereby authorized to appoint and commission, by and with the advice and consent of the Senate, dental officers in the Navy at the rate of one for each thousand of the total authorized number of officers and enlisted men of the Navy and Marine Corps, in the grades of assistant dental surgeon, passed assistant dental surgeon and dental surgeon, who shall constitute the Naval Dental Corps, and shall be a part of the Medical Department of the Navy. Original appointments to the Naval Dental Corps shall be made in the grade of assistant dental surgeon with the rank of lieutenant (junior grade), and all dental officers now in the Dental Corps appointed under the provisions of the Act of Congress approved August twenty-second, nineteen hundred and twelve (Statutes at Large, volume thirty-seven, page three hundred and forty-five), or under the provisions of the Act of Congress approved August twenty-ninth, nineteen hundred and sixteen (Statutes at Large, volume thirty-nine, page five hundred and seventy-three), or who may hereafter be appointed shall take rank and precedence with officers of the Naval Medical Corps of the same rank according to the dates of their respective commissions or original appointments, and all such dental officers shall be eligible for advancement in grade and rank in the same manner and under the same conditions as officers of the Naval Medical Corps with or next after whom they take precedence, and shall receive the same pay and allowances as officers of corresponding rank and length of service in the Naval Medical Corps up to and including the rank of lieutenant commander: *Provided*, That dental surgeons shall be eligible for advancement in pay and allowances, but not in rank, to and including the pay and allowances of commander and captain, subject to such examinations as the Secretary of the Navy may prescribe, except that the number of dental surgeons with the pay and allowances of captain shall not exceed four and one-half per centum and the number of dental surgeons with the pay and allowances of commander shall not exceed eight per centum of the total authorized number of dental officers: *Provided further*, That dental surgeons shall be eligible for advancement to the pay and allowances of commander and captain when their total active service as dental officers in the Navy is such that if rendered as officers of the Naval Medical Corps, it would place them in the list of medical officers with the pay and allowances of commander or captain, as the case may be: *And provided further*, That dental officers who shall have gained or lost numbers on the Navy list shall be considered to have gained or lost service accordingly; and the time served by dental officers on active duty as acting assistant dental surgeons

and assistant dental surgeons under provisions of law existing prior to the passage of this Act shall be reckoned in computing the increased service pay and service for precedence and promotion of dental officers herein authorized or heretofore appointed.

All appointees authorized by this Act shall be citizens of the United States between twenty-one and thirty-two years of age, and shall be graduates of standard medical or dental colleges and trained in the several branches of dentistry, and shall, before appointment, have successfully passed mental, moral, physical, and professional examinations before medical and professional examining boards appointed by the Secretary of the Navy, and have been recommended for appointment by such boards: *Provided*, That hereafter no person shall be appointed as assistant dental surgeon in the Navy who is not a graduate of a standard medical or dental college.

Officers of the Naval Dental Corps shall become eligible for retirement in the same manner and under the same conditions as now prescribed by law for officers of the Naval Medical Corps, except that section fourteen hundred and forty-five of the Revised Statutes of the United States shall not be applicable to dental officers, and they shall not be entitled to rank above lieutenant commander on the retired list, or to retired pay above that of captain.

All dental officers now serving under probationary appointments shall become immediately eligible for permanent appointment under the provisions of this Act, subject to the examinations prescribed by the Secretary of the Navy for original appointment as dental officers, and may be appointed assistant dental surgeon with the rank of lieutenant (junior grade) to rank from the date of their probationary appointments: *Provided*, That the senior dental officer now at the United States Naval Academy shall not be displaced by the provisions of this Act, and he shall hereafter have the grade of dental surgeon and the rank, pay, and allowances of lieutenant commander, and he shall not be eligible for retirement before he has reached the age of seventy years, except for physical disability incurred in the line of duty: *Provided further*, That no dental officer in the Navy who on original appointment as dental officer was over forty years of age shall be eligible for retirement before he has reached the age of seventy years, except for physical disability incurred in line of duty.

All Acts or parts of Acts inconsistent with the provisions of this Act relating to the Dental Corps of the Navy are hereby repealed: *Provided*, That nothing herein contained shall be construed to legislate out of the service any officer now in the Medical Department of the Navy or to reduce the rank, pay, or allowances now authorized by law for any officer of the Navy.—(39 Stat., 573-574, chap. 417; 40 Stat., 708-710, chap. 114.)

The foregoing paragraphs relating to the Naval Dental Corps were expressly amended and reenacted to read as above set forth by act of July 1, 1918 (40 Stat., 708-710).

The Naval Dental Corps was created by act of August 22, 1912 (37 Stat., 344), which was superseded by the provisions on the same subject in the act of August 29, 1916 (39 Stat., 573-574).

As to the organization of the Medical Department of the Navy, see note to section 1368, Revised Statutes.

As to pay of Dental Corps, see note to section 1556, Revised Statutes; see also act of March 4, 1917 (39 Stat., 1182).



**[1916, Aug. 29. Dental Reserve Corps. Repealed.]**

A Navy Dental Reserve Corps was authorized by the act of March 4, 1913 (37 Stat., 903), to be organized and operated under the provisions of law providing for the Navy Medical Reserve Corps. Said act of March 4, 1913, was superseded by provisions on the same subject con-

tained in the act of August 29, 1916 (39 Stat., 574-575), which in turn were expressly repealed by act of July 1, 1918 (40 Stat., 708), which provided for the transfer of Dental Reserve Corps officers to the Naval Reserve Force.

**[1916, Aug. 29, Authorized enlisted strength; men sentenced to discharge.]**

**PAY OF THE NAVY:** \* \* \* pay of petty officers, seamen, landsmen, and apprentice seamen, including men in the engineers' force and men detailed for duty with the Fish Commission, sixty-eight thousand seven hundred men, and the President is hereafter authorized, whenever in his judgment a sufficient national emergency exists, to increase the authorized enlisted strength of the Navy to eighty-seven thousand men; and pay of enlisted men of the Hospital Corps, and for the pay of enlisted men detailed for duty with the Naval Militia, \$30,655,704.29; pay of enlisted men undergoing sentence of court-martial, \$225,000, and hereafter the number of enlisted men of the Navy shall be exclusive of those sentenced by court-martial to discharge \* \* \*.—(39 Stat., 575, chap. 417.)

By act of July 1, 1918 (40 Stat., 714), "the authorized enlisted strength of the active list of the Navy" was increased to 131,485; and by act of July 11, 1919 (41 Stat., 138), the "total authorized enlisted strength of the active list of the Navy" was temporarily increased, with the proviso "that nothing herein shall be construed as affecting the permanent \* \* \* enlisted strength of the Regular Navy as authorized by existing law." The latter act further provided that "the President is hereby authorized, whenever in his judgment a sufficient national emergency exists, to increase the authorized enlisted strength of the Navy to 191,000 men."

By act of June 4, 1920, section 2 (41 Stat., 834), it was provided that nothing therein should

be construed as reducing the permanent enlisted strength of the Regular Navy as authorized by existing law.

See note to section 1417, Revised Statutes, for other laws relating to the enlisted strength of the Navy, and for definition of "authorized enlisted strength," and "total authorized enlisted strength."

**Men sentenced by court-martial to discharge.**—The foregoing provisions in the act of August 29, 1916, that "hereafter the number of enlisted men of the Navy shall be exclusive of those sentenced by court-martial to discharge," is permanent legislation, and modifies that contained in previous acts on the same subject. (File 28687-4, Sept. 16, 1916. See note to sec. 1417, R. S.)

**[1916, Aug. 29. New ratings established.]** That the designation of the rating of coal passer be changed to fireman, third class, and that of ordinary seaman, to seaman, second class, without change of pay; and that the Bureau of Navigation be authorized under rules established for the advancement of other enlisted men, to advance printers to the ratings of printer, first class, and chief printer, which ratings are hereby authorized with same pay and increases allowed to yeomen, first class, and chief yeomen, respectively: *And provided further,* That the rating of storekeeper is hereby established in the artificer branch with the following rates of pay per month: Chief petty officer, \$50; petty officer, first class, \$40; petty officer, second class, \$35; petty officer, third class, \$30, subject to such increases of pay and allowances as are or may hereafter be authorized by law for the enlisted men of the Navy.—(39 Stat., 575, chap. 417.)

See note to section 1569, Revised Statutes, for later enactments as to the ratings and pay

of enlisted men; and see particularly act of June 4, 1920 (41 Stat., 836).

[1916, Aug. 29. Midshipmen, appointments allowed President and Secretary of the Navy.]

This provision reads as follows: "Hereafter in addition to the appointment of midshipmen to the United States Naval Academy, as now prescribed by law, the President is hereby allowed fifteen appointments annually instead of ten as now prescribed by law, and the Secretary of the Navy is allowed twenty-five appointments annually, instead of fifteen as now prescribed by law, the latter to be appointed from the enlisted men of the Navy who are citizens of the United States, and not more than twenty years of age on the date of entrance to the Naval Academy, and who shall have served

not less than one year as enlisted men on the date of entrance: *Provided*, That such appointments shall be made in the order of merit from candidates who have in competition with each other passed the mental examination now or hereafter required by law for entrance to the Naval Academy, and who passed the physical examinations required before entrance under existing laws." (39 Stat., 576, chap. 417.)

It was superseded by acts of March 4, 1917 (39 Stat., 1182), and December 20, 1917 (40 Stat., 430), noted under section 1513, Revised Statutes.

[1916, Aug. 29. Filipino students, Naval Academy.] That hereafter the Secretary of the Navy is authorized to permit not exceeding four Filipinos, to be designated, one for each class, by the Governor General of the Philippine Islands, to receive instruction at the United States Naval Academy at Annapolis, Maryland: *Provided*, That the Filipinos undergoing instruction, as herein authorized, shall receive the same pay, allowances, and emoluments, to be paid out of the same appropriations, and shall be subject to the same rules and regulations governing admission, attendance, discipline, resignation, discharge, dismissal, and graduation as are authorized by law and regulation for midshipmen appointed from the United States, but the Filipino midshipmen herein authorized shall not be entitled to appointment to any commissioned office in the United States Navy by reason of their graduation from the Naval Academy.—(39 Stat., 576, chap. 417.)

See note to section 1513, Revised Statutes, under "Students from the Philippine Islands."

#### COMMISSIONED PERSONNEL.

[1916, Aug. 29. Number of commissioned officers, line of the Navy.] Hereafter the total number of commissioned officers of the active list of the line of the Navy, exclusive of commissioned warrant officers, shall be four per centum of the total authorized enlisted strength of the active list, exclusive of the Hospital Corps, prisoners undergoing sentence of discharge, enlisted men detailed for duty with the Naval Militia, and the Flying Corps.—(39 Stat., 576, chap. 417.)

By act of June 4, 1920, section 2 (41 Stat., 834), it was provided that "the number of commissioned officers of the line, permanent, temporary, and reserve, on active duty shall not exceed 4 per centum of the total authorized enlisted strength of the Regular Navy; \* \* \* that nothing herein shall be construed as reducing the permanent commissioned \* \* \* strength of the Regular Navy as authorized by existing law."

As to total authorized enlisted strength of the Navy, see note to section 1417, Revised Statutes.

As to number of commissioned officers in the staff corps, see provisions of this act (39 Stat., 577), set forth below.

As to number of commissioned line officers, additional numbers, etc., see notes to sections 1363-1364, Revised Statutes.

As to warrant officers and commissioned warrant officers, see note to section 1405, Revised Statutes.

The words "total number of commissioned officers of the active list of the line of the Navy," refer to the total authorized number of commissioned line officers of the active list, as distinguished from the actual number of such officers in the Navy at any one time. But no officers are included except those who are "commissioned" officers in the literal sense; hence, these words can not be construed to embrace acting ensigns, acting lieutenants of the junior grade, who are not commissioned by the President, and additional number officers are not included. (File 25687-4, Sept. 16, 1916.)



[1916, Aug. 29. Distribution in grades of line officers.] That the total number of commissioned line officers on the active list at any one time, exclusive of commissioned warrant officers, shall be distributed in the proportion of one of the grade of rear admiral to four in the grade of captain, to seven in the grade of commander, to fourteen in the grade of lieutenant commander, to thirty-two and one-half in the grade of lieutenant, to forty-one and one-half in the grades of lieutenant (junior grade) and ensign, inclusive.—(39 Stat., 576, chap. 417.)

See provisions of this act (39 Stat., 577), set forth below, as to computations to be made by the Secretary of the Navy to determine the number of officers in each grade and rank; distribution of officers between the upper and lower halves of the rank of rear admiral; disposition of fractional numbers resulting from computations; and exclusion of additional number officers from computations.

See notes to sections 1362-1364, Revised Statutes, as to grades of line officers, etc.

"Total number of commissioned line officers on the active list at any one time."—These words refer to the actual num-

ber of commissioned line officers on the active list, as distinguished from the authorized number. They do not include anyone who is not actually a commissioned officer at the time under consideration. Thus, one commissioned after July 1 in any year could not be counted as one of the commissioned officers on the active list July 1 of that year, notwithstanding that his commission when subsequently issued might bear date as of July 1 or prior thereto. (File 28687-4, Sept. 16, 1916. Compare act of July 1, 1918, 40 Stat., 716, providing that midshipmen may be commissioned "effective" from date of graduation.)

[1916, Aug. 29. Promotions to lieutenant; length of service.] That lieutenants (junior grade) shall have had not less than three years' service in that grade before being eligible for promotion to the grade of lieutenant.—(39 Stat., 576, chap. 417.)

See act of June 4, 1920, section 5 (41 Stat., 836), which suspended the operation of this provision until June 30, 1923.

See act of March 3, 1899, section 7 (30 Stat., 1005), as to promotion of ensigns to lieu-

tenants (junior grade), after three years, service.

See notes to section 1561-1562, Revised Statutes, as to commencement of pay on promotion.

[1916, Aug. 29. Number of commissioned officers, staff corps.] The total authorized number of commissioned officers of the active list of the following staff corps, exclusive of commissioned warrant officers, shall be based on percentages of the total number of commissioned officers of the active list of the line of the Navy as follows:

Pay Corps, twelve per centum; Construction Corps, five per centum; Corps of Civil Engineers, two per centum; and that the total authorized number of commissioned officers of the Medical Corps shall be sixty-five one hundredths of one per centum of the total authorized number of the officers and enlisted men of the Navy and Marine Corps, including midshipmen, Hospital Corps, prisoners undergoing sentence of discharge, enlisted men detailed for duty with the Naval Militia, and the Flying Corps.—(39 Stat., 576, chap. 417.)

The designation of the "Pay Corps" was changed to "Supply Corps" by act of July 11, 1919 (41 Stat., 417).

By act of June 4, 1920, section 2 (41 Stat., 834), it was provided that "the number of commissioned officers of the line, permanent, temporary, and reserve on active duty shall not exceed 4 per centum of the total authorized enlisted strength of the Regular Navy, and the number of staff officers on active duty of whatever kind shall be in

the same proportions as authorized by existing law; \* \* \* that nothing herein shall be construed as reducing the permanent commissioned or enlisted strength of the Regular Navy as authorized by existing law."

Medical Corps: See note to section 1368, Revised Statutes. As to total authorized number of enlisted men of the Navy, see note to section 1417, Revised Statutes; as to authorized number of midshipmen, see note

to section 1513, Revised Statutes; as to authorized commissioned and enlisted strength of the Marine Corps, see note to section 1596, Revised Statutes.

Dental Corps: See act of August 29, 1916 (39 Stat., 573-574).

Supply Corps: See note to section 1376, Revised Statutes.

Chaplain Corps: See note to section 1395, Revised Statutes, and see act of June 30, 1914 (38 Stat., 403).

Professors of Mathematics: See note to section 1399, Revised Statutes.

Construction Corps: See notes to sections 1402-1403, Revised Statutes.

Civil Engineer Corps: See note to section 1413, Revised Statutes.

Warrant officers and commissioned warrant officers: See note to section 1405, Revised Statutes.

**"Total authorized number of commissioned officers of the active list of the \* \* \* staff corps."**—These words refer to the total authorized number of commissioned officers of the active list of the staff corps concerned, as distinguished from the actual number of such officers in the Navy at any one time.

Additional numbers not included. (File 28687-4, Sept. 16, 1916.)

To ascertain the "authorized" number of commissioned staff officers in the various corps concerned, exclusive of commissioned warrant officers, the total authorized number of commissioned line officers of the active list is taken as a basis, and not the actual number of commissioned line officers. (File 28687-4, Sept. 16, 1916.)

To ascertain the total authorized number of commissioned officers of the Medical Corps, the "total authorized number of the officers and enlisted men of the Navy and Marine Corps" is taken as the basis; these words are used in the law in the broad sense, which includes every person authorized for the active list of the regular naval service. Where the total "authorized" number is not fixed by law, as in the cases of some warrant and commissioned warrant officers, the computation may be based upon the actual number of such officers; but in other cases, the computation should be based upon the "total authorized number" and not the actual number. (File 28687-4, Sept. 16, 1916.)

[1916, Aug. 29. Advancement of staff officers below lieutenant commander; rank of assistant surgeons.] Officers of the lower grades of the Medical Corps, Pay Corps, Construction Corps, and Corps of Civil Engineers shall be advanced in rank up to and including the rank of lieutenant commander with the officers of the line with whom or next after whom they take precedence under existing law: *Provided*, That all assistant surgeons shall from date of their original appointment take rank and precedence with lieutenants (junior grade).—(39 Stat., 576-577, chap. 417.)

By act of May 22, 1917, section 17 (40 Stat., 89), it was provided that nothing contained in this act "shall operate to disturb the relative position of officers in the Medical Corps with reference to precedence or promotion, but all such officers otherwise qualified shall be advanced in rank with or ahead of officers in said corps who were their juniors on the date of said act."

A provision with reference to assistant civil engineers, similar to the above proviso relating to assistant surgeons, was embodied in act of March 4, 1917 (39 Stat., 1184).

As to advancement of staff officers to the ranks of commander, captain, and rear admirals, see act of July 1, 1918 (40 Stat., 718).

As to change in designation of "Pay Corps" to "Supply Corps," see act of July 11, 1919 (41 Stat., 147).

As to precedence of line and staff officers, see sections 1485-1486, Revised Statutes, and notes thereto.

Examinations required for advancement in rank of staff officers: See sections 1493 and 1496, Revised Statutes, and act of May 22, 1917, section 20 (40 Stat., 89).

Rank and promotion in Medical Corps: see sections 1371, 1474, and 1480, Revised Statutes; Supply Corps: see sections 1380, 1475, and 1480, Revised Statutes; Con-

struction Corps: see sections 1402-1403, 1477, and 1480, Revised Statutes; Civil Engineer Corps: see sections 1413, 1478, and 1480, Revised Statutes; Chaplain Corps: see act of June 30, 1914 (38 Stat., 403), and notes to sections 1479-1480, Revised Statutes; professors of mathematics: see note to section 1480, Revised Statutes; Dental Corps: see act of August 29, 1916 (39 Stat., 573-574).

This provision as to advancement of staff officers to higher ranks was suspended in certain cases until June 30, 1923: see act of June 4, 1920 (41 Stat., 836).

**Advancement in rank with line officers.**—This enactment is substantially identical with the long established prior practice of advancing staff officers to higher ranks with their "running mates," which found expression in the Navy Regulations (e. g., art. 1005 (f), Navy Regs. 1913). The previous practice was not changed by this enactment, and as that practice was to advance staff officers in rank on the date their running mates in this line became due for promotion, regardless of whether or not the latter qualified for promotion as of that date, and not necessarily contemporaneously with their line running mates, the same rule should be applied under this enactment. (File 28687-4:1, Sept. 16, 1916.)



**Rank of assistant surgeons.**—The proviso in the act of August 29, 1916, as to the rank of assistant surgeons is explicit; in order to give effect thereto, certain officers in the grade of assistant surgeon on the date of that act must be given precedence with the line officers who were lieutenants (junior grade) when such assistant surgeons were originally appointed, and "with whom or next after whom" the assistant sur-

geons in question took precedence on date of appointment; the assistant surgeons in question will thus in some cases be given precedence ahead of certain passed assistant surgeons, but this is a matter which can be remedied only by Congress. (File 11130-37, Jan. 19, 1917. See act of May 22, 1917, sec. 17, above quoted, which was enacted to remedy this situation.)

**[1916, Aug. 29. Computations; authorized number in each rank, line and staff.]** That to determine the authorized number of officers in the various grades and ranks of the line and of the staff corps as herein provided, computations shall be made by the Secretary of the Navy semiannually, as of July first and January first of each year, and the resulting numbers in the various grades and ranks, as so computed, shall be held and considered for all purposes as the authorized number of officers in such various grades and ranks and shall not be varied between such dates.—(39 Stat., 577, chap. 417.)

This provision was amended by act of July 11, 1919 (41 Stat., 139), which provided that "the provision of existing law which requires the Secretary of the Navy to make computations semiannually as of July 1 and January 1 of each year \* \* \* is hereby amended so that said computations shall be made \* \* \* at least once each year and at such times as the Secretary of the Navy may direct \* \* \*."

See provisions of this act (39 Stat., 577), set forth below, as to distribution of officers between upper and lower halves in the rank of rear admiral; disposition of fractional numbers in computation of officers; and exclusion of additional number officers from computations.

The words, "such dates," as used in the act of August 29, 1916, referred specifically to the dates of July 1 and January 1 of each year; accordingly, the provision against varying the

number of officers between those dates resulted in preventing additional appointments of commissioned officers except on the dates mentioned and not *between* those dates. By act of May 22, 1917, section 6 (40 Stat., 86), the Secretary of the Navy was authorized, during the existing war, to make computations on July 1 and January 1 of each year, "and at such other times as he may deem necessary." This enactment suspended temporarily the restriction contained in the act of August 29, 1916, upon varying the number of officers between specified dates, and permitted of daily computations if the Secretary considered such action advisable. The result was that additional appointments of commissioned officers in the lowest grades, line and staff, could be made under said provision of May 22, 1917, at any time that eligibles became available. (File 28687-22, June 14, 1917.)

**[1916, Aug. 29. Staff officers, distribution in grades; appointments in Medical and Construction Corps; qualifications.]** The total number of commissioned officers of the active list of the following mentioned staff corps at any one time, exclusive of commissioned warrant officers, shall be distributed in the various grades of the respective corps as follows:

**MEDICAL CORPS:** One-half medical directors with the rank of rear admiral to four medical directors with the rank of captain, to eight medical inspectors with rank of commander, to eighty-seven and one-half in the grades below medical inspector: *Provided*, That hereafter appointees to the grade of assistant surgeon shall be between the ages of twenty-one and thirty-two at the time of appointment.

**PAY CORPS:** One-half pay directors with the rank of rear admiral to four pay directors with the rank of captain, to eight pay inspectors with the rank of commander, to eighty-seven and one-half in the grades below pay inspector.

**CONSTRUCTION CORPS:** One-half naval constructors with the rank of rear admiral to eight and one-half naval constructors with the rank of captain, to fourteen naval constructors with the rank of commander, to seventy-seven naval constructors and assistant naval constructors with rank below com-

mander: *Provided*, That vacancies in the Construction Corps shall be filled in the manner now prescribed by law, at such annual rate as the Secretary of the Navy may prescribe: *Provided further*, That hereafter ensigns of not less than one year's service as such shall be eligible for transfer to the Construction Corps.

**CORPS OF CIVIL ENGINEERS:** One-half civil engineers with the rank of rear admiral to five and one-half civil engineers with the rank of captain, to fourteen civil engineers with the rank of commander, to eighty civil engineers and assistant civil engineers with the rank below commander.—(39 Stat., 577, chap. 417.)

The designation of the "Pay Corps" was changed to "Supply Corps" by act of July 11, 1919 (41 Stat., 147).

As to number and rank of officers in the staff corps, see the following citations: Medical Corps: sections 1368 and 1474, Revised Statutes; Supply Corps: sections 1376 and 1475, Revised Statutes; Construction Corps: sections 1402, 1403, and 1477, Revised Statutes; Civil Engineer Corps: sections 1413 and 1478, Revised Statutes; Chaplain Corps: sections 1395 and 1479, Revised Statutes, and act of June 30, 1914 (38 Stat., 403); Professors of mathematics: sections 1399 and 1480, Revised Statutes; Dental Corps: act of August 29, 1916 (39 Stat., 573-574).

See note to section 1480, Revised Statutes, as to filling of vacancies in the rank of rear-admiral under this provision; and see act of July 1, 1918 (40 Stat., 718), as to advance-

ment by selection to the ranks of commander, captain, and rear admiral in the staff corps of the Navy.

Qualifications for appointment as assistant surgeon: See section 1370, Revised Statutes, and note thereto.

Vacancies in the Construction Corps, how filled: See sections 1402-1403, Revised Statutes, and notes thereto.

Computations to determine number of officers in each grade and rank in certain staff corps: See provision of this act (39 Stat., 577), set forth above.

See below (39 Stat., 577), as to distribution of officers between upper and lower halves of rear admiral, disposition of fractional numbers resulting from computations, and exclusion of additional-number officers in making computations.

See above as to distribution in grades of line officers.

**[1916, Aug. 29. Professors of mathematics, no further appointments.]** Hereafter no further appointments shall be made to the Corps of Professors of Mathematics, and that corps shall cease to exist upon the death, resignation, or dismissal of the officers now carried in that corps on the active and retired lists of the Navy.—(39 Stat., 577, chap. 417.)

See sections 1399-1401, and 1480, Revised Statutes, and notes thereto.

**[1916, Aug. 29. Rear admirals, distribution between upper and lower halves.]** When there is an odd number of officers in the grade or rank of rear admiral in the line or in each corps, the lower division thereof shall include the excess in number, except where there is but one.—(39 Stat., 577, chap. 417.)

See note to section 1362, Revised Statutes, as to division of rear admirals into two grades for pay purposes; and see provision of this

act (39 Stat., 577-578), set forth below, as to pay of rear admirals.

**[1916, Aug. 29. Computations, disposition of fractional numbers.]** Whenever a final fraction occurs in computing the authorized number of any corps, grade or rank in the naval service, the nearest whole number shall be regarded as the authorized number: *Provided*, That at least one officer shall be allowed in each grade or rank.—(39 Stat., 577, chap. 417.)

**Total number of officers not to be exceeded.**—In computing the authorized number of officers in the various grades and ranks in the manner prescribed, by taking the nearest whole number whenever a final fraction occurs, the result may be in some cases an excess of one officer in the total number of the

line or in a staff corps authorized for the period following the computations, while in other cases, the result may be a shortage of one in such total authorized number. The provisions of the law in this respect are conflicting, and under such circumstances the total number authorized for the line or the particular corps



concerned should control; this may be done by adding one officer to the authorized number in the lowest grade or rank, or subtracting one therefrom, as the case may be, in order to make the total number conform to the total number authorized for the period involved. (File 28687-4, Sept. 16, 1916.)

**Computations in Marine Corps.**—The words "naval service" as used in this provision with reference to final fractions in computing the number of officers, etc., include the Marine Corps. (File 28687-5, Aug. 29, 1916; see note to sec. 1596, R. S., "Computing number of officers.")

[1916, Aug. 29. Computations; additional number officers excluded; no reduction in any staff grade.] For the purpose of determining the authorized number of officers in any grade or rank of the line or of the staff corps, there shall be excluded from consideration those officers carried by law as additional numbers, including staff officers heretofore permanently commissioned with the rank of rear admiral, and nothing contained herein shall be held to reduce below that heretofore authorized by law the number of officers in any grade or rank in the staff corps.—(39 Stat., 577, chap. 417.)

See note to section 1363, Revised Statutes, as to additional number officers; see note to section 421, Revised Statutes, under "Rank of chiefs of bureaus," with reference to the act of June 24, 1910 (36 Stat., 607, repealed by act of August 22, 1912, 37 Stat., 328), under which certain staff officers were commissioned with the permanent rank of rear admiral on the active list prior to the act of August 29, 1916; and see act of March 4, 1915 (cited in note to sec. 1478, R. S.), under which an officer in the Civil Engineer Corps was commissioned with the permanent rank of rear admiral on the active list.

See notes to sections 1368, 1376, 1395, 1399, 1402, 1403, and 1413, Revised Statutes, as

to numbers of officers authorized in the various staff corps.

**Additional number officers.**—While there are many references in the act of August 29, 1916, to additional number officers, which show that Congress was familiar with the legislation on that subject, there is nothing in said act which expressly indicates that Congress intended to repeal prior laws relating thereto and to provide that additional number officers should become regular numbers on promotion; instead, the act indicates the contrary; accordingly, *held*, that officers who are additional numbers in grade continue to be additional numbers after promotion by selection. (File 28687-11, Jan. 2, 1917.)

[1916, Aug. 29. Rear admirals, pay and allowances.] Hereafter pay and allowances of officers in the upper half of the grade or rank of rear admiral, including the staff corps and including staff officers heretofore permanently commissioned with the rank of rear admiral, shall be that now allowed by law for the first nine rear admirals, and the pay and allowances of officers in the lower half of the grade or rank of rear admiral, including the staff corps, shall be that now allowed by law for the second nine rear admirals.—(39 Stat., 577-578, chap. 417.)

See note to section 1362, Revised Statutes, as to division of rear admirals into two grades for pay purposes; see note to section 1556, Revised Statutes, as to pay of rear admirals; see notes to sections 1487 and 1558, Revised Statutes, as to allowances; and see note to

section 421, Revised Statutes, under "Rank of chiefs of bureaus," and note to section 1478, Revised Statutes, as to staff officers permanently commissioned with the rank of rear admiral on the active list prior to the act of August 29, 1916.

[1916, Aug. 29. Rank by date of commission, staff corps; exceptions.] That officers shall take rank in each staff corps according to the dates of commission in the several grades, excepting in cases where they have gained or lost numbers.—(39 Stat., 578, chap. 417.)

See notes to sections 1485-1486, Revised Statutes.

[1916, Aug. 29. Commissioned warrant officers, pay and allowances.] Hereafter chief boatswains, chief gunners, chief machinists, chief carpenters, chief sail makers, chief pharmacists, and chief pay clerks, on the active list with

creditable records, shall, after six years from date of commission, receive the pay and allowances that are now or may hereafter be allowed a lieutenant (junior grade), United States Navy: *Provided*, That chief boatswains, chief gunners, chief machinists, chief carpenters, chief sail makers, chief pharmacists, and chief pay clerks, on the active list with creditable records, shall, after twelve years from date of commission, receive the pay and allowances that are now or may hereafter be allowed a lieutenant, United States Navy.—(39 Stat., 578, chap. 417.)

See note to section 1556, Revised Statutes, under "25. Warrant officers, acting warrant officers, and commissioned warrant officers."

[1916, Aug. 29. Warrant officers, heat and light; leave of absence.] Warrant officers shall receive the same allowances of heat and light as are now or may hereafter be allowed an ensign, United States Navy.

Warrant officers shall be allowed such leave of absence, with full pay, as is now or may hereafter be allowed other officers of the United States Navy.—(39 Stat., 578, chap. 417.)

See note to section 1487, Revised Statutes, as to allowance of quarters and heat and light therefor.

See note to section 1556, Revised Statutes, under "40. Absence from duty."

[1916, Aug. 29. Promotion by selection, line officers.] Hereafter all promotions to the grades of commander, captain, and rear admiral of the line of the Navy, including the promotion of those captains, commanders, and lieutenant commanders who are, or may be, carried on the Navy list as additional to the numbers of such grades, shall be by selection only from the next lower respective grade upon the recommendation of a board of naval officers as herein provided.—(39 Stat., 578, chap. 417.)

The provisions of this act relating to promotion by selection were extended, with certain modifications, to the staff corps by act of July 1, 1918 (40 Stat., 718).

By act of July 11, 1919 (41 Stat., 147), it was provided: "That the provisions of the Act of August 29, 1916, regarding the promotion of captains in the line of the permanent Navy shall not restrict the promotion of such captains as may have been wounded in line of duty and who are now on the active list, and such captains shall be entitled to the benefits of the provisions of section 1494, Revised Statutes of the United States, and also to the benefits of the Act of March 4, 1911."

The requirement of this provision, that promotions be made "from the next lower respective grade," was suspended in certain cases until June 30, 1923, by act of June 4, 1920, section 5 (41 Stat., 836), having previously been suspended in the same class of cases by act of July 11, 1919 (41 Stat., 140).

See note to section 1453, Revised Statutes, on general subject of promotion.

**Selection law not applicable to temporary promotions.**—This act clearly relates to promotions in the permanent Navy. The act of May 22, 1917 (40 Stat., 85), authorized temporary promotions to all grades, without making any express provision as to the manner in which such promotions were to be made: *Held*, that such temporary promotions above the grade of lieutenant commander may be made without compliance with the selection law of August 29, 1916; but that the provisions of said law may be extended by regulations to such temporary promotions if deemed advisable. (File 28687-22, June 14, 1917.)

The Secretary of the Navy established a procedure with reference to the selection of officers for temporary promotion somewhat similar to that required by the act of August 29, 1916, with reference to permanent promotions: *Held*, that this did not have the effect of making any provision of said act of August 29, 1916, applicable to such temporary promotions, but was merely a procedure administratively adopted which was not binding upon the Secretary, who could modify same if he deemed it advisable to do so. (File 26521-230:5, Feb. 1, 1918.)

[1916, Aug. 29. Selection board; proceedings.] The board shall consist of nine rear admirals on the active list of the line of the Navy not restricted by law to the performance of shore duty only, and shall be appointed by the Sec-



retary of the Navy and convened during the month of December of each year and as soon after the first day of the month as practicable.

Each member of said board shall swear, or affirm, that he will, without prejudice or partiality, and having in view solely the special fitness of officers and the efficiency of the naval service, perform the duties imposed upon him as herein provided.

The board shall be furnished by the Secretary of the Navy with the number of vacancies in the grades of rear admiral, captain, and commander to be filled during the following calendar year, including the vacancies existing at the time of the convening of the board and those that will occur by operation of law from the date of convening until the end of the next calendar year, and with the names of all officers who are eligible for consideration for selection as herein authorized, together with the record of each officer: *Provided*, That any officer eligible for consideration for selection shall have the right to forward through official channels at any time not later than ten days after the convening of said board a written communication inviting attention to any matter of record in the Navy Department concerning himself which he deems important in the consideration of his case: *Provided*, That such communication shall not contain any reflection upon the character, conduct, or motives of or criticism of any officer.—(39 Stat., 578, chap. 417.)

Amendment to this provision was made by act of July 11, 1919 (41 Stat., 139), as follows: "The provision of existing law which requires the Secretary of the Navy \* \* \* to convene the boards to select officers of the line and of the staff corps for promotion is hereby amended so that \* \* \* said boards shall be convened at least once each year and at such times as the Secretary of the Navy may direct, and the boards shall recommend for promotion such number of officers as may be necessary to fill vacancies then existing and which may occur during the next period of time."

The provisions of this act as to promotion by selection were extended, with certain modifications, to the staff corps by act of July 1, 1918 (40 Stat., 718).

See note to section 1499, Revised Statutes, under "Records submitted to Board on Selection for promotion."

**Date of vacancy on retirement.**—The retirement of an officer on his own application, pursuant to section 1443, Revised Statutes, takes effect, so as to create a vacancy which may be filled by the appointing power, on the date when his application for retirement is approved by the President, and is not deferred until the date he receives notice of the President's action. (32 Op. Atty. Gen., 176. See also notes to secs. 1444 and 1458, R. S.)

**Membership of selection board.**—Officers of the line of the Navy who have qualified for the permanent rank of rear admiral, and who have been commissioned as such by the President during a recess of the Senate, are

qualified for service as members of the selection board provided by the act of August 29, 1916. (File 28687-31, Oct. 11, 1920.)

**Additional number officers,** if recommended for promotion, will not become regular numbers if promoted, and are therefore in addition to the number of vacancies as furnished the selection board. (File 28687-11, Jan. 2, 1917.)

**Names of officers previously selected but not promoted** must be submitted to the next selection board, if otherwise eligible for consideration. Under the act of August 29, 1916, the officer's eligibility for promotion after favorable recommendation by a selection board continued until the end of the following calendar year; if no vacancy occurred in the next higher grade to which he could be promoted during that calendar year, he became ineligible for promotion unless again recommended by a selection board. By act of May 22, 1917, section 6 (40 Stat. 86), the Secretary of the Navy was authorized, during the existing war, to convene selection boards "at such times as the exigencies of the service may require." Under this amendment, an officer recommended by a special board so convened continued eligible for promotion only during such indefinite period as might intervene between the date that his eligibility attached and the convening of the next following board for selection; and if no vacancy occurred for him in the meantime, his name was required to be furnished to the new board, if still eligible for consideration. (File 28687-22, June 20, 1917; 28687-22:1, Dec. 27, 1918.)

[1916, Aug. 29. Service in grade necessary before selection.] That no captains, commanders, or lieutenant commanders who shall have had less than four years' service in the grade in which he is serving on November the thirtieth of the year of the convening of the board shall be eligible for consideration by the board.—(39 Stat., 578, chap. 417.)

This requirement as to length of service in grade not applicable to the selection of staff officers under the act of July 1, 1918 (40 Stat., 718).

This requirement as to length of service in grade was suspended in certain cases until June 30, 1923, by act of June 4, 1920, section 5 (41 Stat., 836), having previously been suspended until July 1, 1920, in the same class of cases, by act of July 11, 1919 (41 Stat., 140).

**Temporary promotions.**—The requirement as to four years' service in grade before becoming eligible for consideration by the selection board does not apply with respect to temporary promotions under the act of May 22, 1917 (40 Stat., 85); but the President may prescribe a similar requirement for temporary promotion if he deems such action advisable. (File 28687-22, June 14, 1917.)

[1916, Aug. 29. Engineer officers, eligibility for selection; additional numbers.] That the recommendation of the board in the case of officers of the former Engineer Corps who are restricted by law to the performance of shore duty only and in that of officers who may hereafter be assigned to engineering duty only shall be based upon their comparative fitness for the duties prescribed for them by law. Upon promotion they shall be carried as additional numbers in grade.—(39 Stat., 578-579, chap. 417.)

See note to section 1390, Revised Statutes, for laws relating to officers for engineering duty only; and see note to section 1363, Revised Statutes, for laws relating to additional officers.

See provisions of this act (39 Stat., 579); set forth below, as to recommendation of selection board and exemption from sea service in the cases of engineer officers; and see below (39 Stat., 584), as to promotion of officers commissioned for aeronautic duty only.

**Additional number officers** continue to be additional numbers after promotion by selection. This provision with reference to engineer officers indicates that it was not the purpose of Congress to abolish additional number officers with reference to higher grades in the line filled by selection. Prior laws relating to additional number officers are not repealed by the act of August 29, 1916, nor do such officers become regular numbers on promotion. (File 28687-11, Jan. 2, 1917.)

[1916, Aug. 29. Number of officers recommended for promotion; six members of board must concur.] The board shall recommend for promotion a number of officers in each grade equal to the number of vacancies to be filled in the next higher grade during the following calendar year: *Provided*, That no officer shall be recommended for promotion unless he shall have received the recommendation of not less than six members of said board.—(39 Stat., 579, chap. 417.)

Amendment to this provision was made by act of July 11, 1919 (41 Stat., 139), which provided for selection boards being convened "at such times as the Secretary of the Navy may direct," and further provided that "the boards shall recommend for promotion such number of officers as may be necessary to fill vacancies then existing and which may occur during the next period of time."

As to selection of staff officers, see act of July 1, 1918 (40 Stat., 718).

As to form of board's recommendation, see below (39 Stat., 579).

**Additional number officers**, if recommended for promotion, will not become regular numbers when promoted, but will continue to be additional numbers in their grade; they are therefore in addition to the number of vacancies as furnished the selection board. (File 28687-11, Jan. 2, 1917.)

[1916, Aug. 29. Annual appointment of captains limited. Repealed.]

This provision read as follows:

"That the increase in the number of captains herein authorized shall be made at the rate of not more than ten captains in any one year."

(39 Stat., 579, chap. 417.)

It was expressly repealed by act of May 22, 1917, section 14 (40 Stat., 87).



[1916, Aug. 29. Recommendation of selection board to be in writing, etc.; report as to engineer officers.] The report of the board shall be in writing signed by all of the members and shall certify that the board has carefully considered the case of every officer eligible for consideration under the provisions of this law, and that in the opinion of at least six of the members, the officers therein recommended are the best fitted of all those under consideration to assume the duties of the next higher grade, except that the recommendation of the board in the case of officers of the former Engineer Corps who are restricted by law to the performance of shore duty only, and in that of officers who may hereafter be assigned to engineering duty only, shall be based upon their comparative fitness for the duties prescribed for them by law.—(39 Stat., 579, chap. 417.)

See above (39 Stat., 578–579), as to engineer officers; and see below (39 Stat., 584), as to promotion of officers commissioned for aeronautic duty only.

See act of July 1, 1918 (40 Stat., 718), as to selection of staff officers.

[1916, Aug. 29. President's action; reconvening of selection board.] The report of the board shall be submitted to the President for approval or disapproval. In case any officer or officers recommended by the board are not acceptable to the President, the board shall be informed of the name of such officer or officers, and shall recommend a number of officers equal to the number of those found not acceptable to the President and if necessary shall be reconvened for this purpose.—(39 Stat., 579, chap. 417.)

See note to Constitution, Article II, section 2, clause 2, as to President's power with respect to appointment and promotion of officers; see also notes to sections 1458 and 1480, Revised Statutes, on the same subject.

As to action by the President in the cases of retiring and promotion boards, see notes to sections 1452 and 1502, Revised Statutes.

[1916, Aug. 29. President's approval of selection board's report; professional and physical examinations required; rank on promotion or retirement.] When the report of the board shall have been approved by the President, the officers recommended therein shall be deemed eligible for selection, and if promoted shall take rank with one another in accordance with their seniority in the grade from which promoted: *Provided*, That any officers so selected shall prior to promotion be subject in all respects to the examinations prescribed by law for officers promoted by seniority, and in case of failure to pass the required professional examination such officer shall thereafter be ineligible for selection and promotion. And should any such officer fail to pass the required physical examination he shall not be considered, in the event of retirement, entitled to the rank of the next higher grade.—(39 Stat., 579, chap. 417.)

Examinations for promotion: see sections 1493–1505, Revised Statutes.

See act of March 4, 1911 (36 Stat., 1267), which was modified by this provision as to the rank of officers retired after failure to pass the physical examination for promotion. By act of July 11, 1919 (41 Stat., 147), this restriction on retired rank was made inapplicable to any captain then on the active list who had been wounded in line of duty. (See note to sec. 1494, R. S.)

**Eligibility for selection; when terminated.**—Under the act of August 29, 1916, an officer's eligibility for selection continued until the end of the calendar year following the favorable recommendation of the board. Under the amendment of May 22, 1917 (40 Stat., 86), which authorized the Secretary to convene selection boards "at such times as the exigencies of the service may require," officers recommended by a board so convened continued eligible only until the next board was con-

vened. If no vacancies occurred to which they could be promoted during the calendar year, in the one case, or, in the other, during the period until the next selection board was convened, their eligibility for promotion ceased, unless they were again selected; and their names, if otherwise eligible for consideration, must be submitted to the next selection board. (File 28687-22, June 20, 1917; 28687-22:1, Dec. 27, 1918.)

**Examinations after selection.**—An officer examined professionally and physically prior

to being recommended for promotion by the selection board, must be reexamined after selection for promotion. (File 26521-337, June 23, 1919, citing 26260-3630:2.)

The requirements of the selection law, including examinations prior to promotion, were not applicable to temporary promotions authorized by act of May 22, 1917; but the President had power to make regulations requiring such examinations before promotion if he deemed such action advisable. (File 28687-22, June 14, 1917.)

[1916, Aug. 29. Sea service and age requirements for promotion; exceptions.] On and after June thirtieth, nineteen hundred and twenty, no captain commander, or lieutenant commander shall be promoted unless he has had not less than two years' actual sea service on seagoing ships in the grade in which serving or who is more than fifty-six, fifty, or forty-five years of age, respectively: *Provided*, That in exceptional cases where officers are specifically designated during war or national emergency declared by the President by the Secretary of the Navy as performing, or as having performed, such highly important duties on shore that their services can not be or could not have been spared from such assignment without serious prejudice to the successful prosecution of the war, the qualification of sea service in the cases of those officers so specifically designated shall not apply while the United States is at war, or during a national emergency declared by the President, or within two and one-half years subsequent to the ending of such war or national emergency: *Provided*, That the qualification of sea service shall not apply to officers restricted to the performance of engineering duty only.—(39 Stat., 579, chap. 417; 40 Stat., 717-718, chap. 114.)

This paragraph was expressly amended to read as above by act of July 1, 1918 (40 Stat., 717-718), which inserted therein the first proviso above set forth, relating to shore duty in time of war or emergency. (See Joint Res., Mar. 3, 1921, 41 Stat., 1359, as to constructive termination of war with Germany and Austria-Hungary.)

By act of July 11, 1919 (41 Stat., 140), the "age and grade" requirement prescribed by this act "in the rank of commander" was "extended from June 30, 1920, to June 30, 1921;" and by act of June 4, 1920, section 10 (41 Stat., 837), "the age limits for promotion by selection" were "deferred until June 30, 1921" in the cases of officers "who may request such deferment."

By act of July 11, 1919 (41 Stat., 140), all "statutory requirements other than professional and physical examinations," with respect to promotion by selection were suspended in certain cases until July 1, 1920;

and by act of June 4, 1920, section 5, (41 Stat., 836), all such requirements "other than age and professional and physical examination" were similarly suspended in certain cases until June 30, 1923.

See other special provisions of this act, set forth above, with respect to promotion by selection of engineer officers; and see special provisions of this act (39 Stat., 584), set forth below, as to promotion of officers commissioned for aeronautic duty only.

By act of June 4, 1920, section 5 (41 Stat., 836), the requirements of this provision as to age limits for promotion were suspended in the cases of officers appointed to the line from sources other than the Naval Academy, as authorized by that act, until they have rendered 10 years' service in the grade of lieutenant commander, six years in the grade of commander or eight years in the grade of captain.

[1916, Aug. 29. Retirement of officers ineligible for selection.] That captains, commanders, and lieutenant commanders who become ineligible for promotion on account of age shall be retired on a percentage of pay equal to two and one-half per centum of their shore-duty pay for each year of service: *Provided further*, That the total retired pay shall not exceed seventy-five per centum of the shore-duty pay they were entitled to receive while on the active list.—(39 Stat., 579, chap. 417.)



See sections 1443-1465, and 1588, Revised Statutes, for general provisions relating to retirement.

See acts of March 3, 1883 (22 Stat., 473), and June 10, 1896 (29 Stat., 361), and note to section 1443, Revised Statutes, as to service credited for retirement, etc.

[1916, Aug. 29. Retiring age, 64 years.] Except as herein otherwise provided, hereafter the age for retirement of all officers of the Navy shall be sixty-four years instead of sixty-two years as now prescribed by law.—(39 Stat., 579, chap. 417.)

See sections 1444, 1481, and 1588, Revised Statutes.

[1916, Aug. 29. Rank and pay not reduced.] Nothing contained in this Act shall be construed to reduce the rank, pay, or allowances of any officer of the Navy or Marine Corps as now provided by law.—(39 Stat., 579, chap. 417.)

#### OFFICERS FOR ENGINEERING DUTY ONLY.

[1916, Aug. 29. Detail of line officers for engineering duty.] Officers of the line of the Navy not below the grade of lieutenant may, upon application, and with the approval of the Secretary of the Navy, be assigned to engineering duty only, and that when so assigned and until they reach the grade of commander, they shall perform duty as prescribed in section four of the Personnel Act approved March third, eighteen hundred and ninety-nine, and thereafter shore duty only as now prescribed for officers transferred to the line from the former engineer corps, except that commanders may be assigned to duty as fleet and squadron engineers: *Provided*, That when so assigned they shall retain their place with respect to other line officers in the grades they now or may hereafter occupy, and also the right to succession to command on shore in accordance with their seniority, and shall be promoted as vacancies occur subject to physical examination and to such examination in engineering as the Secretary of the Navy may prescribe: *Provided further*, That the number of officers so assigned in any one year shall be in accordance with the requirements of the service as determined by the Secretary of the Navy.—(39 Stat., 580, chap. 417.)

See acts of March 3, 1899, section 4 (30 Stat., 1005), February 16, 1914, section 21 (38 Stat., 283), and March 3, 1915 (38 Stat., 930); see also notes to sections 1390-1394 Revised Statutes.

See provisions of this act (39 Stat., 578-579), as to promotion by selection of officers assigned to engineering duty only.

[1916, Aug. 29. Acting ensigns for engineering duty; appointment and promotion.] That the Secretary of the Navy is hereby authorized to appoint annually in the line of the Navy for a period of ten years following the passage of this Act, in the order of merit determined by such competitive examination as he may prescribe, thirty acting ensigns for the performance of engineering duties only. Persons so appointed must have received a degree of mechanical or electrical engineer from a college or university of high standing or be graduates of technical schools approved by the Secretary of the Navy, must have been found physically qualified by a board of medical officers of the Navy for the performance of the duties required, and must at the time of appointment be not less than twenty nor more than twenty-six years of age. Such appointments shall be for a probationary period of three years, and may be revoked at any time by the Secretary of the Navy.

Such acting ensigns shall, upon the completion of the probationary period of three years, of which two years shall have been spent on board cruising vessels and one year pursuing a course of instruction at the Naval Academy prescribed by the Secretary of the Navy, be commissioned in the grade of lieutenant of the junior grade after satisfactorily passing such examination as may be prescribed by the Secretary of the Navy, and having been recommended for promotion by the examining board and found physically qualified by a board of medical officers of the Navy.

Such officers shall thereafter be required to perform engineering duties only, and shall be eligible for advancement to the higher grades in the manner herein provided for line officers assigned to engineering duty only.—(39 Stat., 580, chap. 417.)

See section 1410, Revised Statutes, and note thereto, as to status of "acting" officers.

See note above under this act (39 Stat., 576), as to number of commissioned officers not including acting ensigns.

[1916, Aug. 29. Absence due to misconduct.] Hereafter no officer or enlisted man in the Navy or Marine Corps in active service who shall be absent from duty on account of injury, sickness or disease resulting from his own intemperate use of drugs or alcoholic liquors, or other misconduct, shall receive pay for the period of such absence, the time so absent and the cause thereof to be ascertained under such procedure and regulations as may be prescribed by the Secretary of the Navy: *Provided*, That an enlistment shall not be regarded as complete until the enlisted man shall have made good any time in excess of one day lost on account of injury, sickness or disease resulting from his own intemperate use of drugs or alcoholic liquors, or other misconduct.—(39 Stat., 580, chap. 417; 40 Stat., 717, chap. 114.)

This paragraph was expressly amended to read as above by act of July 1, 1918 (40 Stat., 717), which inserted therein, in two places, the word "injury" followed by a comma.

See note to section 1556, Revised Statutes, under "40. Absence from duty;" note to section 1569, Revised Statutes, under "13. Forfeiture of pay;" note to section 1624,

Revised Statutes, article 8, under "Making good time lost by absence;" note to Constitution, Article I, section 9, clause 3, as to bills of attainder; and notes to sections 1418 and 1608, Revised Statutes, as to detention of men after expiration of enlistment.

[1916, Aug. 29. Furloughs in lieu of discharge.] The Secretary of the Navy is hereby authorized to grant furlough without pay to enlisted men for a period covering the unexpired portion of their enlistment: *Provided*, That such furlough be granted under the same conditions and in lieu of discharge by purchase or by special order of the department. Enlisted men so furloughed shall be subject to recall in time of war or national emergency to complete the unexpired portion of their enlistment, and shall be in addition to the authorized number of enlisted men of the Navy.—(39 Stat., 580–581, chap. 417.)

As to discharge by purchase, see act of March 3, 1893 (27 Stat., 717); as to refund of enlistment bounty by men discharged within six months of enlistment, see act of June 29, 1906 (34 Stat., 556); and as to refund on

discharge within 12 months of enlistment in certain cases, see act of March 2, 1907 (34 Stat., 1176).

See note to section 1417, Revised Statutes, under "Enlisted men furloughed without pay."

[1916, Aug. 29. Red Cross, detail of medical officers to.] Hereafter the authorized number of surgeons in the United States Navy be, and it is hereby, increased by one; and that hereafter the Secretary of the Navy be, and he is



hereby, authorized to detail one or more officers of the Medical Corps of the United States Navy for duty with the Military Relief Division of the American National Red Cross.—(39 Stat., 581, chap. 417.)

See note to section 1368, Revised Statutes, as to authorized number of medical officers; and see provision of this act (39 Stat., 576), set forth above, as to number of commissioned officers of the Staff Corps.

See act of April 24, 1912 (37 Stat., 90-91), and Joint Resolution of May 8, 1914 (38 Stat., 771), relating to the Red Cross.

**[1916, Aug. 29. Retired officer on duty with General Board.]**

**This provision read as follows:**

“No officer who, after having commanded a fleet in active commission, has been retired for age and whom, in the judgment of the Secretary of the Navy, the public interests make it necessary to retain for a time after said retirement and who is performing active duty as chairman of the executive committee of the General Board,

shall, for the period so retained, suffer any reduction in the emoluments he was receiving at the time of his retirement.” (39 Stat., 581, chap. 417.)

It has been fully executed, and is no longer in force or effect. The officer to whom it applied was Rear Admiral Charles J. Badger.

**[1916, Aug. 29. Pay of retired officers on active duty.]** That hereafter any retired officer of the naval service who shall be detailed on active duty shall, while so serving, receive the active duty pay and allowances of the grade, not above that of lieutenant commander in the Navy or of major in the Marine Corps, that he would have attained in due course of promotion if he had remained on the active list for a period beyond the date of his retirement equal to the total amount of time during which he has been detailed on active duty since his retirement: *Provided*, That nothing herein shall be construed to reduce the pay of any retired officer on active duty whose retired pay exceeds the active duty pay and allowances for the grade of lieutenant commander.—(39 Stat., 581, chap. 417.)

See note to section 1592, Revised Statutes, for other laws relating to pay of retired officers on active duty.

**[1916, Aug. 29. Pay and allowances of commissioned officers, active list.]**

Hereafter all commissioned officers of the active list of the Navy shall receive the same pay and allowances according to rank and length of service: *Provided*, That this provision shall not be construed to reduce the pay and allowances of commissioned warrant officers as herein authorized.—(39 Stat., 581, chap. 417.)

As to effect of this provision, see note to section 1556, Revised Statutes, under “23. Chaplains and acting chaplains.”

As to pay of commissioned officers, see, generally, note to section 1556, Revised Statutes; as to allowances, see notes to sections 1487 and 1558, Revised Statutes.

**NAVAL FLYING CORPS.**

**[1916, Aug. 29. Composition of Flying Corps.]** The Naval Flying Corps shall be composed of one hundred and fifty officers and three hundred and fifty enlisted men, detailed, appointed, commissioned, enlisted, and distributed in the various grades, ranks, and ratings of the Navy and Marine Corps as hereafter provided. The said number of officers, student flyers, and enlisted men shall be in addition to the total number of officers and enlisted men which is now or may hereafter be provided by law for the other branches of the naval service.—(39 Stat., 582, chap. 417.)

See act of June 5, 1920 (41 Stat., 954), as to distribution of Army and Navy aviation control.

See below (39 Stat., 592), as to Naval Reserve Flying Corps.

[1916, Aug. 29. Detail of officers to actual flying.] The number of officers detailed to duty in aircraft involving actual flying in any one year shall be in accordance with the requirements of the Air Service as determined by the Secretary of the Navy: *Provided*, That the officers so detailed from the line of the Navy and from the Marine Corps shall not exceed the total number herein prescribed for the Naval Flying Corps: *Provided further*, That the proportion of line officers of the Navy and of the Marine Corps thus detailed shall be the same as the proportion established for the regular services: *And provided further*, That the student flyers hereinafter provided for shall be in addition to the officers and enlisted men comprising the Naval Flying Corps.—(39 Stat., 582-583, chap. 417.)

[1916, Aug. 29. Pay and allowances, Flying Corps.] The officers detailed and the enlisted men of the Naval Flying Corps shall receive the same pay and allowances that are now provided by law for officers and enlisted men of the same grade or rank and rating in the Navy and Marine Corps detailed to duty with aircraft involving actual flying.—(39 Stat., 583, chap. 417.)

By act of July 1, 1918 (40 Stat., 718), increased allowances for aviation duty were prohibited.

See act of March 3, 1915 (38 Stat., 939), and note to section 1556, Revised Statutes, under "38. Additional pay for special duty."

**Number and pay of officers detailed to actual flying.**—Under the act of August 29, 1916, in addition to the number of officers in the regular Naval Flying Corps, the Secretary of the Navy is authorized to detail for duty

involving actual flying in aircraft, either as student aviators, student airmen, or qualified naval aviators, such number of naval officers, not in excess of the number prescribed in that act for the regular Flying Corps, as he shall determine the needs of the air service require; and while so detailed such officers are entitled to 50 per cent or 35 per cent increase of pay and allowances, according as they have or have not qualified as naval aviators. (23 Comp. Dec., 583. But see act of July 1, 1918, above noted, as to increase of allowances.)

[1916, Aug. 29. Acting ensigns and acting second lieutenants for aeronautic duty.]

These paragraphs read as follows:

"The Secretary of the Navy is hereby authorized to appoint annually in the line of the Navy and the Marine Corps for a period of two years following the passage of this Act, in order of merit as determined by such competitive examinations as he may prescribe, fifteen acting ensigns or acting second lieutenants for the performance of aeronautic duties only. Persons so appointed must be citizens of the United States, and may be appointed from warrant officers or enlisted men of the naval service or from civil life, and must, at the time of appointment, be not less than eighteen or more than twenty-four years of age: *Provided*, That no person shall be so appointed until he has been found physically qualified by a board of medical officers of the Navy for the performance of the duties required: *Provided further*, That the number of such appointments to the line of the Navy and of the Marine Corps shall be in the proportion decided for the regular services. Such appointments shall be for a probationary period of three years and may be revoked at any time by the Secretary of the Navy.

"Such acting ensigns and acting second lieutenants shall be detailed to duty in the Naval Flying Corps in aircraft involving actual flying.

"Such acting ensigns of the Navy and acting second lieutenants of the Marine Corps shall, upon completion of the probationary period of three years, be appointed acting lieutenants of the junior grade, or acting first lieutenants, respectively, by the Secretary of the Navy for the performance of aeronautic duties only, after satisfactorily passing such examinations as he may prescribe, and after having been recommended for promotion by the examining board and found physically qualified by a board of medical officers of the Navy. Such appointments shall be for a probationary period of four years and may be revoked at any time by the Secretary of the Navy.

"Such acting lieutenants (junior grade) and acting first lieutenants may elect to qualify for aeronautic duty only or to qualify for all the duties of officers of the same grade in the Navy and in the Marine Corps, respectively. Those officers who elect to qualify for aeronautic duty only shall be detailed to duty in the Naval Flying Corps involving actual flying



in aircraft. Those officers who elect to qualify for the regular duties of their grade shall be detailed to duty in the regular service for at least two years to allow them to prepare for such qualification.

"Such acting lieutenants (junior grade) and acting first lieutenants who have elected to qualify for aeronautic duty only shall, upon completion of the probationary period of four years, be commissioned in the grade of lieutenant of the line of the Navy or captain of the Marine Corps for aeronautic duties only, after satisfactorily passing such competitive examination as may be prescribed by the Secretary of the Navy to determine their moral, physical, and professional qualifications for such commissions and the order of rank in which they shall be commissioned. Such lieutenants for aeronautic duty only shall be borne on the list as extra numbers, taking rank with and next after officers of the same date of commission. (39 Stat., 583, chap. 417.)

"Such acting lieutenants (junior grade) and acting first lieutenants who have elected to qualify for the regular duties of the line of the Navy and of the Marine Corps, respectively, shall, upon completion of the probationary period of four years, two years of which shall have been on such regular duties, be commissioned in the grade of the line of the Navy or Marine Corps according to his length of service, after passing satisfactorily such competitive examinations as may be prescribed by the Secretary of the Navy to determine their moral, physical, and professional qualifications for such commissions and to determine the

order of rank in which they shall be commissioned. Such officers of the line of the Navy and Marine Corps will be borne upon the lists of their respective corps as extra numbers, taking rank with and next after officers of the regular services of the same date of commissions.

"Acting lieutenants (junior grade) of the line of the Navy for aeronautic duties only and acting first lieutenants of the Marine Corps for aeronautic duty only who have completed the probationary period of four years may, upon examination for commissions to the next higher grade, if recommended by the board of examination, be transferred to the Naval Reserve Flying Corps and commissioned in the same grade or the next higher grade as may be recommended in accordance with their qualifications as determined by the examination: *Provided*, That at any time during such probationary period any such officer can, upon his own request, if his record warrants it, be transferred to the Naval Reserve Flying Corps and commissioned in the acting grade he then holds. Any officer of the Naval Flying Corps holding an appointment of student flyer or acting ensign, second lieutenant, lieutenant (junior grade), or first lieutenant, who, upon examination for promotion, is found not qualified shall, if not recommended by the examining board for transfer to the Naval Reserve Flying Corps, be honorably discharged from the naval service." (39 Stat., 584, chap. 417.)

The above paragraphs were rendered obsolete two years after the passage of this act, owing to the fact that no appointments were made of acting ensigns or acting second lieutenants as therein authorized.

[1916, Aug. 29. Promotion of officers commissioned for aeronautic duty only.] Officers commissioned for aeronautic duty only shall be eligible for advancement to the higher grades, not above captain in the Navy or colonel in the Marine Corps, in the same manner as other officers whose employment is not so restricted, except that they shall be eligible to promotion without restriction as to sea duty, and their professional examinations shall be restricted to the duty to which personally assigned: *Provided*, That any such officer must serve at least three years in any grade before being eligible to promotion to the next higher grade.—(39 Stat., 584, chap. 417.)

[1916, Aug. 29. Detail from other branches as student aviators or airmen; pay.] Nothing in this Act shall be so construed as to prevent the detail of officers and enlisted men of other branches of the Navy as student aviators or student airmen in such numbers as the needs of the service may require.

Such officers and enlisted men, while detailed as student aviators and student airmen involving actually flying in aircraft, shall receive the same pay and allowances that are now provided by law for officers and enlisted men of the same grade or rank and rating in the Navy detailed for duty with aircraft.—(39 Stat., 584, chap. 417.)

See note above (39 Stat., 583), as to pay and allowances for aviation duty.

[1916, Aug. 29. Student flyers, appointment, instruction, promotion, etc.]

These paragraphs read as follows:  
"The Secretary of the Navy is hereby authorized to appoint annually for a period of four

years, from enlisted men of the naval service, or from citizens of the United States in civil life, not to exceed thirty student flyers for in-

struction and training in aeronautics who shall receive the same pay and allowances as midshipmen at the United States Naval Academy: *Provided*, That persons so appointed must, at the time of appointment, be not less than seventeen or more than twenty-one years of age: *Provided further*, That no person shall be appointed a student flyer until he shall have qualified therefor by such examination as may be prescribed by the Secretary of the Navy. (39 Stat., 584, chap. 417.)

"The appointment of student flyers shall continue in force for two years, unless sooner revoked by the Secretary of the Navy, in his discretion, and at the end of such period student flyers shall be examined for qualification as qualified aviators: *Provided*, That if such student flyers are not qualified, their appointment will be revoked, or, if recommended by the examining board, they shall be transferred to the Naval Reserve Flying Corps and commissioned as ensigns therein.

"Student flyers shall, after receiving a certificate of qualification as an aviator for actual flying in aircraft, rank with midshipmen and shall receive the same pay and allowances as midshipmen, plus fifty per centum thereof: *Provided*, That student flyers who have qualified as aviators under the provisions of this Act shall be commissioned acting ensigns for aero-

nautic duties only, after three years' service: *Provided further*, That they shall have been examined by a board of officers of the Naval Flying Corps to determine by a competitive examination prescribed by the Secretary of the Navy their moral, physical, and professional fitness and the order of rank in which they shall be commissioned: *And provided further*, That any student flyer qualified as an aviator may at any time, in the discretion of the Secretary of the Navy, if his record warrants it, at his own request, be transferred to the Naval Reserve Flying Corps and be commissioned as ensign therein: *And provided further*, That student flyers not considered qualified for commissions as acting ensigns for aeronautic duties only may, upon recommendation of the examining board, be transferred to the Naval Reserve Flying Corps and be commissioned as ensigns therein.

"The Secretary of the Navy is hereby authorized to establish aeronautic schools for the instruction and training of student flyers and prescribe the course of instruction and qualifications for certificate of graduation as a qualified aviator." (39 Stat., 585, chap. 417.)

The above paragraphs were rendered obsolete four years after the date of this act, owing to the fact that no appointments were made of student flyers for instruction and training as therein authorized.

[1916, Aug. 29. Temporary details for aircraft duty.] Nothing in this or any other Act shall be so construed as to prevent the temporary detail of officers and enlisted men of any branch of the Navy for duty with aircraft.— (39 Stat., 585, chap. 417.)

#### [1916, Aug. 29. Aviation accidents, payment of gratuity and pension.]

This paragraph read as follows:

"In the event of the death of an officer or enlisted man or student flyer of the Naval Flying Corps from wounds or disease, the result of an aviation accident, not the result of his own misconduct, received while engaged in actual flying in or in handling aircraft, the gratuity to be paid under the provisions of the Act approved August twenty-second, nineteen hundred and twelve, entitled 'An Act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes,' shall be an amount equal to one year's pay at the rate received by such officer or enlisted man or student flyer at the time of the accident resulting in his death. In all cases where an officer or enlisted man or student flyer of the Navy or Marine Corps dies, or where a student flyer or an enlisted man of the Navy or Marine Corps is disabled by reason

of any injury received or disease contracted in line of duty, the result of an aviation accident, received while employed in actual flying in or handling aircraft, the amount of pension allowed shall be double that authorized to be paid should death or the disability have occurred by reason of an injury received or disease contracted in line of duty not the result of an aviation accident." (39 Stat., 585, chap. 417.)

It was repealed, together with the provisions of the act of August 22, 1912 (37 Stat., 329), referred to herein, by act of October 6, 1917, section 312 (40 Stat., 408), which also repealed a provision on the same subject in the act of March 3, 1915 (38 Stat., 939-940). (See 31 Op. Atty. Gen., 205.)

By act of June 4, 1920 (41 Stat., 824), provision is made for payment in cases of death of persons in the naval service.

#### [1916, Aug. 29. Student flyers and acting officers, laws applicable to.]

This paragraph read as follows:

"Student flyers and the acting ensigns and acting lieutenants (junior grade) and acting second and first lieutenants for aeronautic duties only provided for herein shall be subject to the laws and regulations and orders for the government of the Navy, but shall not be en-

titled to retirement or retired pay." (39 Stat., 585, chap. 417.)

It was rendered obsolete by the fact that no appointments of student flyers or acting officers were made as authorized by this act. (See above, 39 Stat., 583, 584, and 585.)

[1916, Aug. 29. Ratings of enlisted men, Flying Corps.] The enlisted personnel of the Naval Flying Corps shall be distributed by the Secretary of



the Navy in the various ratings as now obtain in the Navy in so far as such ratings are applicable to duties connected with aircraft.—(39 Stat., 585–586, chap. 417.)

See note to section 1569, Revised Statutes, as to enlisted ratings in the Navy; and note

to section 1608, Revised Statutes, as to enlisted ratings in the Marine Corps.

**[1916, Aug. 29. Enlisted men transferred to Flying Corps.]**

**This paragraph read as follows:**

“Within the first two years after the approval of this Act enlisted men may be transferred from other branches of the Naval Service to the Naval Flying Corps, under regulations established by the Secretary of the Navy governing such transfer and the qualifications for this

corps: *Provided*, That the number so transferred shall not exceed one-half the total number of enlisted men allowed by this Act.” (39 Stat., 586, chap. 417.)

It expired by limitation two years after approval of this act.

**[1916, Aug. 29. Term of enlistment, etc., Flying Corps; regulations.]** The Secretary of the Navy shall establish regulations governing the term of enlistment, the qualifications, and advancement of the enlisted men of the Flying Corps.—(39 Stat., 586, chap. 417.)

See note to section 1418, Revised Statutes, as to term of enlistment in the Navy; and see

notes to sections 161 and 1547, Revised Statutes, on general subject of regulations.

**[1916, Aug. 29. Student flyers, appointments from enlisted men.]**

**This paragraph read as follows:**

“Any enlisted man who passes satisfactorily the prescribed examination and is recommended by a board of officers may be appointed a student flyer as herein provided.” (39 Stat., 586, chap. 417.)

It was rendered obsolete by the fact that no appointments of student flyers were made from enlisted men as provided by this act. The authority for such appointments expired four years after the date of this act. (See above, 39 Stat., 584–585.)

ADMINISTRATION OF JUSTICE.

**[1916, Aug. 29. Deck courts; punishments by commanding officers.]** Hereafter all officers of the Navy and Marine Corps who are authorized to order either general or summary courts-martial may order deck courts upon enlisted men under their command, and shall have the same authority to inflict minor punishments as is conferred by law upon the commander of a naval vessel.—(39 Stat., 586, chap. 417.)

See act of February 16, 1909 (35 Stat., 621), establishing deck courts, and which was amended by this paragraph; see provisions of this act, set forth below, and notes to section 1624, Revised Statutes, articles

26 and 38, as to summary and general courts-martial; see note to section 1624, Revised Statutes, articles 24 and 25, as to punishments by commanding officers.

**[1916, Aug. 29. Summary courts-martial, by whom convened; deck courts and minor punishments at naval hospitals.]** Summary courts-martial may be ordered upon enlisted men in the naval service under his command by the commanding officer of any brigade, regiment, or separate or detached battalion, or other separate or detached command, and, when empowered by the Secretary of the Navy, by the commanding officer or officer in charge of any command not specifically mentioned in the foregoing: *Provided*, That when so empowered by the Secretary of the Navy to order summary courts-martial, the commanding officer of a naval hospital or hospital ship shall be empowered to order such courts and deck courts, and inflict the punishments which the commander of a naval vessel is authorized by law to inflict, upon all enlisted men of the naval

service attached thereto, whether for duty or as patients.—(39 Stat., 586, chap. 417.)

See note to section 1624, Revised Statutes, article 26, as to summary courts-martial; and see note to section 1488, Revised

Statutes, as to command of hospital ships; see also note to section 1529, Revised Statutes.

[1916, Aug. 29. Execution of summary court-martial sentences.] No sentence of a summary court-martial shall be carried into execution until the proceedings and sentence have been approved by the officer ordering the court, or his successor in office, and by his immediate superior in command: *Provided*, That if the officer ordering the court, or his successor in office, be the senior officer present, such sentence may be carried into execution upon his approval thereof.—(39 Stat., 586, chap. 417.)

See note to section 1624, Revised Statutes, article 32; and see act of February 16, 1909, sections 9 and 17 (35 Stat., 621, 623).

[1916, Aug. 29. General courts-martial, by whom convened.] When empowered by the Secretary of the Navy, general courts-martial may be convened by the commanding officer of a squadron, of a division, of a flotilla, or of a larger naval force afloat, and of a brigade or larger force of the naval service on shore beyond the continental limits of the United States: *Provided*, That in time of war, if then so empowered by the Secretary of the Navy, general courts-martial may be convened by the commandant of any navy yard or naval station, and by the commanding officer of a brigade or larger force of the Navy or Marine Corps on shore not attached to a navy yard or naval station.—(39 Stat., 586, chap. 417.)

See note to section 1624, Revised Statutes, article 38.

[1916, Aug. 29. Courts of inquiry, by whom convened.] Courts of inquiry may be convened by any officer of the naval service authorized by law to convene general courts-martial.—(39 Stat., 586, chap. 417.)

See note to section 1624, Revised Statutes, article 55.

[1916, Aug. 29. Marines embarked on naval vessels; power of officers.] When a force of marines is embarked on a naval vessel, or vessels, as a separate organization, not a part of the authorized complement thereof, the authority and powers of the officers of such separate organization of marines shall be the same as though such organization were serving at a navy yard on shore, but nothing herein shall be construed as impairing the paramount authority of the commanding officer of any naval vessel over the vessel under his command and all persons embarked thereon.—(39 Stat., 586, chap. 417.)

See sections 1616 and 1617, Revised Statutes, and notes thereto.

#### NAVAL RESERVE FORCE.

[1916, Aug. 29. Classes in Naval Reserve Force. There is hereby established, under the Department of the Navy, a Naval Reserve Force, to consist of six classes, designated as follows and as hereinafter described:

First. The Fleet Naval Reserve.

Second. The Naval Reserve.

Third. The Naval Auxiliary Reserve.

Fourth. The Naval Coast Defense Reserve.



## Fifth. The Volunteer Naval Reserve.

## Sixth. Naval Reserve Flying Corps.—(39 Stat., 587, chap. 417.)

The National Naval Volunteers was abolished, and the members thereof transferred to the various classes of the Naval Reserve Force and Marine Corps Reserve, by act of July 1, 1918 (40 Stat., 708).

Mileage allowed naval reservists honorably released from active duty: See act of June 3, 1916, section 126 (39 Stat., 217), as amended and reenacted by act of February 28, 1919 (40 Stat., 1203).

**[1916, Aug. 29. Members, citizenship; obligation assumed; naturalization.]**

The Naval Reserve Force shall be composed of citizens of the United States who, by enrolling under regulations prescribed by the Secretary of the Navy or by transfer thereto as in this Act provided, obligate themselves to serve in the Navy in time of war or during the existence of a national emergency, declared by the President: *Provided*, That citizens of the insular possessions of the United States may enroll in the Naval Auxiliary Reserve. *Provided further*, That such persons who are not citizens of the United States, but who have or shall have declared their intention to become citizens of the United States, and who are citizens of countries which are at peace with the United States, may enroll in the Naval Reserve Force subject to the condition that they may be discharged from such enrollment at any time within the discretion of the Secretary of the Navy, and such persons who may, under existing law, become citizens of the United States, and who render honorable service in the Naval Reserve Force in time of war for a period of not less than one year may become citizens of the United States without proof of residence on shore and without further requirement than proof of good moral character and certificate from the Secretary of the Navy that such honorable service was actually rendered.—(39 Stat., 587, chap. 417; 40 Stat., 84, chap. 18.)

This paragraph was expressly amended to read as above by act of May 22, 1917 (40 Stat., 84), which added thereto the words,

"Provided further" to the end of the paragraph as above set forth.

**[1916, Aug. 29. Regulations, Naval Reserve Force.]** The Secretary of the Navy shall make all necessary and proper regulations not inconsistent with law for the administration of the provisions of this Act which relate to the Naval Reserve Force.—(39 Stat., 587, chap. 417.)

See notes to sections 161 and 1547, Revised Statutes, on the general subject of regulations.

**[1916, Aug. 29. Active service during war, etc.]** Members of the Naval Reserve Force may be ordered into active service in the Navy by the President in time of war or when, in his opinion, a national emergency exists.—(39 Stat., 587, chap. 417.)

Active duty afloat in time of peace was authorized by act of July 1, 1918 (40 Stat., 711).

Not to perform active duty on shore of a kind ordinarily performed by civilians. (Act July 11, 1919, 41 Stat., 138.)

See below (39 Stat., 588), as to active service during war, etc.

See act of June 4, 1920, section 2 (41 Stat., 834), as to active duty authorized in time of peace to supply deficiencies in enlisted strength of the Navy.

**[1916, Aug. 29. Ranks and ratings; engineering duties, etc.]** There shall be allowed in the Naval Reserve Force the various ratings, grades, and ranks, not above the rank of lieutenant commander, corresponding to those in the Navy. Officers of the line may be appointed for deck or engineering duties, as they may elect.—(39 Stat., 587, chap. 417.)

Promotion above the grade of lieutenant commander in time of war was authorized by act of July 1, 1918 (40 Stat., 711).

Transfer to the Naval Reserve Force of members of the National Naval Volunteers, in the ranks held by them at that time, was authorized by act of July 1, 1918 (40 Stat., 708), which further authorized reenroll-

ment of members in the Naval Reserve Force in the ranks held by them on termination of their last enrollment.

As to officers for engineering duty only, see act of February 16, 1914, section 21 (38 Stat., 289-290); see also act of March 3, 1915 (38 Stat., 930), and note thereto.

[1916, Aug. 29. Appointment of officers, how made; retainer pay, etc., not reduced.] Members of the Naval Reserve Force appointed to commissioned grades shall be commissioned by the President alone, and members of such force appointed to warrant grades shall be warranted by the Secretary of the Navy: *Provided*, That officers so warranted or commissioned shall not be deprived of the retainer pay, allowances, or gratuities to which they would otherwise be entitled.—(39 Stat., 587, chap. 417.)

[1916, Aug. 29. Precedence of officers, Naval Reserve Force.]

This provision read as follows:

"Officers of the Naval Reserve Force shall rank with but after officers of corresponding rank in the Navy." (39 Stat., 587, chap. 417.)

It was superseded by act of July 1, 1918 (40 Stat., 711), which contained other provisions on the same subject.

[1916, Aug. 29. Term of enrollment; discharge on request.] Enrollment and reenrollment shall be for terms of four years, but members shall in time of peace, when no national emergency exists, be discharged upon their own request upon reimbursing the Government for any clothing gratuity that may have been furnished them during their current enrollment.—(39 Stat., 587, chap. 417.)

See below (39 Stat., 589), as to refund of uniform gratuity when discharged without compulsion.

Members to be disenrolled at age of 64 years, except in time of war, etc. (Act July 1, 1918, 40 Stat., 711.)

See act of June 4, 1920 (41 Stat., 817), as to enrollments for instruction at summer schools for boys.

[1916, Aug. 29. Oath of allegiance.] Persons enrolling shall be required to take the oath of allegiance to the United States.—(39 Stat., 587, chap. 417.)

See act of March 3, 1899, section 25 (30 Stat., 1009).

[1916, Aug. 29. Provisional grade on enrollment; instruction prior to confirmation.] When first enrolled members of the Naval Reserve Force, except those in the Fleet Naval Reserve, shall be given a provisional grade, rank or rating in accordance with their qualifications determined by examination. They may thereafter, upon application, be assigned to active service in the Navy for such periods of instruction and training as may enable them to qualify for and be confirmed in such grade, rank or rating.—(39 Stat., 587, chap. 417.)

**Advancement to higher provisional ranks.**—When an enrolled member has been given a provisional rank, he may thereafter, either with or without being confirmed in such provisional rank, be given a higher provisional rank without examination by the statutory board of three naval officers of or above the

rank of lieutenant commander and the statutory board of naval surgeons. Such assignment of higher provisional rank is not a "promotion" within the meaning of the law relating to examinations. (31 Op. Atty. Gen., 173; see below as to examinations for appointment and promotion.)

[1916, Aug. 29. Requirements for confirmation in grade.] No member shall be confirmed in his provisional grade, rank or rating until he shall have



performed the minimum amount of active service required for the class in which he is enrolled, nor until he has duly qualified by examination for such rank or rating under regulations prescribed by the Secretary of the Navy.—(39 Stat., 587, chap 417.)

Duty performed in the Naval Militia may be counted as active service for the maintenance of efficiency required for members	of the Naval Reserve Force. (Act June 4, 1920, 41 Stat., 818.)
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[1916, Aug. 29. Examinations for appointment and promotion; former officers and midshipmen.] No person shall be appointed or commissioned as an officer in any rank in any class of the Naval Reserve Force, or promoted to a higher rank therein, unless he shall have been examined and recommended for such appointment, commission, or promotion by a board of three naval officers not below the rank of lieutenant commander, nor until he shall have been found physically qualified by a board of medical officers to perform the duties required in time of war, except that former officers and midshipmen of the Navy, who shall have left the service under honorable conditions and who shall have enrolled in the Naval Reserve Force, may be appointed in the grade and rank last held by them without examination other than the physical examination above prescribed.—(39 Stat., 587–588, chap. 417.)

Promotion of officers below rank of lieutenant-commander shall be in accordance with regulations prescribed by Secretary of the Navy; above lieutenant commander, shall be by selection, in time of war. (Act July 1, 1918, 40 Stat., 711.)

“Appointment” and “promotion” construed.—The assignment of a provisional rank is not an “appointment,” and advancement to a higher provisional rank is not a “promotion” within the meaning of this paragraph. (31 Op. Atty. Gen., 173.)

Former officer dismissed from Navy; effect of pardon.—An officer of the Navy who has been dismissed by sentence of court-martial, and subsequently pardoned for the offense for which dismissed, is not eligible for reappointment to the Navy or to membership in the Fleet Naval Reserve. (31 Op. Atty. Gen., 225; see below, 39 Stat., 589, as to qualifications for Fleet Naval Reserve; and see note to Constitution, Art. II, sec. 2, clause 1, and note to sec. 1441, Revised Statutes, as to effect of pardon.)

[1916, Aug. 29. Retainer pay, before confirmation in grade.] The retainer pay of all members of the Naval Reserve Force, except the Volunteer Naval Reserve, while enrolled in a provisional rank or rating, and until such time as they shall have been confirmed in such rank or rating, shall be \$12 per annum. Thereafter, the retainer pay shall be that prescribed for members in the various classes.—(39 Stat., 588, chap. 417.)

[1916, Aug. 29. Retainer pay while on active duty.] Retainer pay shall be in addition to any pay to which a member may be entitled by reason of active service.—(39 Stat., 588, chap. 417.)

No retainer pay in time of peace while on duty for purposes other than training. (Act July 1, 1918, 40 Stat., 711.)

See note to section 1556, Revised Statutes, under “37. Naval Reserve Force,” for laws and decisions relating to retainer pay.

[1916, Aug. 29. Retainer pay; conditions of payment.] Retainer pay shall only be paid to members of the Naval Reserve Force upon their making such reports concerning their movements and occupations as may be required by the Secretary of the Navy.—(39 Stat., 588, chap. 417.)

See below (39 Stat., 590), as to forfeiture of retainer pay in the Fleet Naval Reserve upon failure to report for required inspection;

and see act of June 4, 1920 (41 Stat., 824 and 837), for other provisions relating to forfeiture of retainer pay.

[1916, Aug. 29. Increased retainer pay on reenrollment.] Members of the Naval Reserve Force who reenroll for a term of four years within four months

from the date of the termination of their last term of enrollment, and who shall have performed the minimum amount of active service required during the preceding term of enrollment, shall, for each such reenrollment, receive an increase of twenty-five per centum of their base retainer pay.—(39 Stat., 588, chap. 417.)

No enrolled member to receive retainer pay in excess of amount authorized to members having had 16 years' continuous service. (Act July 1, 1918, 40 Stat., 710-711.)  
Service in Navy, Marine Corps, Naval Militia, etc., counted as continuous service in the Naval Reserve Force for purpose of computing retainer pay. (Act July 1, 1918, 40 Stat., 710.)

Service in the Naval Reserve, created by act of March 3, 1915 (38 Stat., 940), credited as service in the Naval Reserve Force in certain cases. (Act of Mar. 4, 1917, 39 Stat., 1174; see note to act Mar. 3, 1915, 38 Stat., 940-941, and note to sec. 1556 R. S., under "37, Naval Reserve Force.")

[1916, Aug. 29. Retirement, enrolled members, 20 years' service.] That enrolled members who shall have completed twenty years of service in the Naval Reserve Force, and who shall have performed the minimum amount of active service required in their class for maintaining efficiency during each term of enrollment, shall, upon their own application, be retired with the rank or rating held by them at the time, and shall receive in lieu of any pay, a cash gratuity equal to the total amount of their retainer pay during the last term of their enrollment.—(39 Stat., 588, chap. 417.)

No member of the Naval Reserve Force shall be eligible for retirement other than for physical disability incurred in line of duty. (Act July 1, 1918, 40 Stat., 710.)  
Service in the Navy, Marine Corps, National Naval Volunteers, and Naval Militia shall be counted as continuous service in the Naval Reserve Force, both for the purpose

of retirement and of computing retainer pay. (Act July 1, 1918, 40 Stat., 710.)  
All officers of the Naval Reserve Force shall be eligible for retirement for physical disability in line of duty. (Act June 4, 1920, 41 Stat., 834.)  
See below (39 Stat., 591), as to retirement in Fleet Naval Reserve.

[1916, Aug. 29. Retainer pay, paid annually, etc.] Retainer pay shall be paid annually or at shorter intervals, as the Secretary of the Navy, in his discretion, may direct.—(39 Stat., 588, chap. 417.)

See act of June 4, 1920, section 9 (41 Stat., 837), as to withholding retainer pay; see also same act (41 Stat., 824).

[1916, Aug. 29. Reservists holding public employment, except in military service.] No existing law shall be construed to prevent any member of the Naval Reserve Force from accepting employment in any branch of the public service, except as an officer or enlisted man in any branch of the military service of the United States or any State thereof, nor from receiving the pay and allowances incident to such employment in addition to his retainer pay.—(39 Stat., 588, chap. 417.)

Members of Naval Reserve Force may become members of naval militia in any State or Territory, etc. (Act July 11, 1919, 41 Stat., 141.)  
Until June 30, 1922, certain Naval Militia organizations shall be a part of the Naval Reserve Force. (Act June 4, 1920, 41 Stat., 817.)

See act of June 3, 1916, section 74 (39 Stat., 201-202), as amended by act of June 4, 1920, section 41 (41 Stat., 781-782), as to qualifications for appointment as National Guard officers.

[1916, Aug. 29. Enrolled members subject to naval laws, etc.] Enrolled members of the Naval Reserve Force shall be subject to the laws, regulations, and orders for the government of the Regular Navy only during such time as



they may by law be required to serve in the Navy, in accordance with their obligations, and when on active service at their own request as herein provided, and when employed in authorized travel to and from such active service in the Navy.—(39 Stat., 588, chap. 417.)

See provision in act of July 1, 1918 (40 Stat., 712), on this subject; and see below (39 Stat., 591), as to Fleet Naval Reserve.  
See note to section 1624, Revised Statutes, as to

persons amenable to articles for the government of the Navy, and particularly cases noted under "Naval reservists released from active duty."

[1916, Aug. 29. Badge of Naval Reserve Force; unauthorized wearing of.] Members of the Naval Reserve Force shall be issued a distinctive badge or button which may be worn with civilian dress, and whoever, not being a member of the Naval Reserve Force of the United States and not entitled under the law to wear the same, willfully wears or uses the badge or button or who uses or wears the same to obtain aid or assistance thereby, shall be punished by a fine of not more than \$20 or by imprisonment for not more than thirty days or by both such fine and imprisonment.—(39 Stat., 588, chap. 417.)

See act of July 1, 1918 (40 Stat., 712), as to reservists wearing their uniforms while not in active service; and see act of June 3,

1916, section 125 (39 Stat., 216-217), and notes thereto, as to unauthorized wearing of the uniform, etc.

[1916, Aug. 29. Active service pay; allowances when not actively employed.] All members of the Naval Reserve Force shall, when actively employed as set forth in this Act, be entitled to the same pay, allowances, gratuities, and other emoluments as officers and enlisted men of the naval service on active duty of corresponding rank or rating and of the same length of service. When not actively employed in the Navy, members of the Naval Reserve Force shall not be entitled to any pay, bounty, gratuity, or pension except as expressly provided for members of the Naval Reserve Force by the provisions of this Act.—(39 Stat., 588, chap. 417.)

See act of July 1, 1918 (40 Stat., 712), which modifies the first sentence of this paragraph relating to pay, etc., on active duty; and see note to section 1556, Revised Statutes, under "37. Naval Reserve Force."

See act of June 4, 1920, section 2 (41 Stat., 834), as to retirement of officers of the Naval Reserve Force for physical disability.

[1916, Aug. 29. Service in time of war, etc.] Enrolled members of the Naval Reserve Force may, in time of war or national emergency, be required to perform active service in the Navy throughout the war or until the national emergency ceases to exist.—(39 Stat., 588-589, chap. 417.)

See above (39 Stat., 587), as to active service during war, etc.

Not to perform active duty on shore of a kind ordinarily performed by civilians. (Act July 11, 1919, 41 Stat., 138.)

Service afloat, in time of peace, was authorized by act of July 1, 1918. (40 Stat., 711.)

[1916, Aug. 29. Uniform gratuity, amount credited; refund on discharge.] Members of the Naval Reserve Force shall, upon first reporting for active service for training during each period of enrollment, be credited with a uniform gratuity of \$50 for officers and of \$30 for men.

Upon reporting for active service in time of war or national emergency the uniform gratuity shall be \$150 for officers and \$60 for men, or the difference between these amounts and any amounts that may have been credited as a

uniform gratuity during the current enrollment: *Provided*, That should any member of the Naval Reserve Force sever his connection with the service without compulsion on part of the Government before the expiration of his term of enrollment, the amount so credited shall be deducted from any money that may be or may become due him.—(39 Stat., 589, chap. 417.)

See act of July 1, 1918 (40 Stat., 711), which modified this paragraph as to amount of uniform gratuity allowed members, other than officers; and further provided that no part of the "clothing gratuity" shall be deducted when members accept temporary

appointments in the Navy in time of war or emergency.

See note to section 1556, Revised Statutes, under "37. Naval Reserve Force."

See above (39 Stat., 587), as to discharge of members on request in time of peace.

[1916, Aug. 29. Reservists to be shipped for service on auxiliary vessels.] Hereafter, in shipping officers and men for service on board United States auxiliary vessels, preference shall be given to members of the Naval Reserve Force, and, after two years from the date of approval of this Act, no person shall be shipped for such service who is not a member of the Naval Reserve Force herein provided.—(39 Stat., 589, chap. 417.)

[1916, Aug. 29. Transfers between classes of Reserve Force.] Members of the Naval Reserve Force may, upon application, be transferred from one class to another class for which qualified under the provisions of this Act; and may in time of war volunteer for and be assigned to duties prescribed for any class which they may be deemed competent to perform.—(39 Stat., 589, chap. 417.)

[1916, Aug. 29. Pennant for merchant vessels commanded by reservists.] The Secretary of the Navy shall prescribe a suitable flag, or pennant, that may be flown as an insignia on private vessels or vessels of the merchant service commanded by officers of the Naval Reserve Force: *Provided*, That it shall not be flown in lieu of the National ensign.—(39 Stat., 589, chap. 417.)

[1916, Aug. 29. Schools of instruction for reservists and applicants.] The Secretary of the Navy is hereby authorized to establish schools or camps of instruction at such times and in such localities as he may deem advisable for the purpose of instructing members and applicants for membership in the Naval Reserve Force. No applicant shall be accepted for instruction unless he agrees to abide by the regulations of the school and pursue the course prescribed by the Secretary of the Navy. Persons who satisfactorily complete the course will be given certificates of qualification for the rank or rating for which duly qualified, and may be permitted to enroll in the proper class of the reserve in such rank or rating.—(39 Stat., 589, chap. 417.)

#### FLEET NAVAL RESERVE.

[1916, Aug. 29. Membership qualifications, Fleet Naval Reserve.] All former officers of the United States naval service, including midshipmen, who have left that service under honorable conditions, and those citizens of the United States who have been, or may be entitled to be, honorably discharged from the naval service after not less than one four-year term of enlistment or after a term of enlistment during minority, and who shall have enrolled in the Naval Reserve Force shall be eligible for membership in the Fleet Naval Reserve.—(39 Stat., 589, chap. 417.)

See above (39 Stat., 587-588), as to eligibility of former officer dismissed from the Navy and subsequently pardoned.



[1916, Aug. 29. Transfer of enlisted men to Fleet Naval Reserve.] In addition to the enrollments in the Fleet Naval Reserve above provided, the Secretary of the Navy is authorized to transfer to the Fleet Naval Reserve at any time within his discretion any enlisted man of the naval service with twenty or more years' naval service, and any enlisted man, at the expiration of a term of enlistment who may be then entitled to an honorable discharge, after sixteen years' naval service: *Provided*, That such transfers shall only be made upon voluntary application and in the rating in which then serving, and the men so transferred shall be continued in the Fleet Naval Reserve until discharged by competent authority.—(39 Stat., 589-590, chap. 417.)

[1916, Aug. 29. Minimum active service, enrolled members, Fleet Naval Reserve.] The Secretary of the Navy is authorized to assign any member of the Fleet Naval Reserve to active duty for training on board ship, upon the application of such member, but any member who has failed to perform three months' active service with the Navy in any term of enrollment shall, on the next reenrollment, receive retainer pay at the rate of \$12 per annum until such time as he shall have completed three months' active service. The three months' active service with the Navy may be taken in one or more periods, at the election of the member: *Provided*, That no member shall be entitled to travel allowance unless the period of such active service is for not less than one month, or unless specifically provided for by such regulations as may be prescribed by the Secretary of the Navy.—(39 Stat., 590, chap. 417.)

Amendment to this paragraph was made by act of April 25, 1917 (40 Stat., 37), which expressly repealed the words "on board ship" after the word "training" in the first sentence of the paragraph as set forth above. By act of June 4, 1920, section 9 (41 Stat., 837), it was provided "that hereafter the mini-

imum amount of active service required for the maintenance of the efficiency of the Fleet Naval Reserve shall be the same as for the Naval Reserve." (See below, under "Naval Reserve," as to active service for maintaining efficiency therein.)

[1916, Aug. 29. Retainer pay, enrolled men, Fleet Naval Reserve; retirement of transferred members.] The retainer pay of the enrolled men of the Fleet Naval Reserve shall be the same as for the enrolled men of the Naval Reserve and shall be computed in like manner: *Provided*, That nothing herein shall operate to reduce the retainer pay allowed by existing law to enlisted men who, after sixteen years' or more naval service, are transferred to the Fleet Naval Reserve, nor to deny to such enlisted men their privilege of retirement upon completing thirty years' naval service as now provided by law.—(39 Stat., 590, chap. 417; 40 Stat., 710, chap. 114.)

This provision was expressly amended and reenacted to read as above by act of July 1, 1918 (40 Stat., 710). As to retirement of transferred members, see below (39 Stat.,

591); as to retirement of enrolled members, see above (39 Stat., 588). See note to section 1556, Revised Statutes, under "37. Naval Reserve Force."

[1916, Aug. 29. Constructive service; men discharged before expiration of enlistment.] That for all purposes of this act a complete enlistment during minority and any enlistment terminated within three months prior to the expiration of the term of enlistment by special order of the Secretary of the Navy shall be considered as four years' service.—(39 Stat., 590, chap. 417.)

**[1916, Aug. 29. Retainer pay, officers, Fleet Naval Reserve.]**

This clause read as follows:

"The annual retainer pay of officers of the Fleet Naval Reserve shall be two months' base pay of the corresponding rank in the Navy." (39 Stat., 590, chap. 417.)

It was superseded by act of July 1, 1918 (40 Stat., 710), which made other provision as to

the retainer pay of "all members" of the Naval Reserve Force, "except officers in the Naval Auxiliary Reserve and transferred members of the Fleet Naval Reserve."

See note to section 1556, Revised Statutes, under "37. Naval Reserve Force."

**[1916, Aug. 29. Increased retainer pay on reenrollment.]** Reenrollments in the Fleet Naval Reserve shall be for four years. Officers and men enrolling in the Fleet Naval Reserve within four months of the date of the termination of their last naval service or reenrolling within four months of the date of the termination of their last term of enrollment shall receive an increase of twenty-five per centum of their retainer pay for each such enrollment.—(39 Stat., 590, chap. 417.)

See above (39 Stat., 588), as to increased retainer pay on reenrollment; and see note to section 1556, Revised Statutes, under "37. Naval Reserve Force."

No enrolled member shall receive retainer pay in excess of amount authorized to members having had 16 years' continuous service. (Act July 1, 1918, 40 Stat., 710-711.)

Service in the Navy, Marine Corps, National Naval Volunteers, etc., counted as continuous service in the Naval Reserve Force for purpose of computing retainer pay. (Act July 1, 1918, 40 Stat., 710.)

**[1916, Aug. 29. Enrolled members reenlisting in the regular naval service.]** That men who have enrolled in the Fleet Naval Reserve within four months of the date of their discharge from the regular naval service shall, upon reenlistment in the regular naval service within four months of the date of discharge from the Fleet Naval Reserve, be entitled to the same gratuity and additional pay as if they had reenlisted in the regular naval service within four months of discharge therefrom.—(39 Stat., 590, chap. 417.)

Active reserve service credited to enlisted men and warrant officers of the Navy and Marine Corps for retirement, continuous service pay, and longevity pay, in certain cases: See act of July 11, 1919 (41 Stat., 141); see also notes to sections 1569 and 1573, Revised

Statutes, as to pay of enlisted men of the Navy; note to section 1556, Revised Statutes, as to pay of officers of the Navy and members of the Naval Reserve Force; and note to section 1612, Revised Statutes, as to pay of the Marine Corps.

**[1916, Aug. 29. Retainer pay, transferred members of Fleet Naval Reserve; special increases for heroism and conduct marks.]** Members of the Fleet Naval Reserve who have, when transferred to the Fleet Naval Reserve, completed naval service of sixteen or twenty or more years shall be paid a retainer at the rate of one-third and one-half, respectively, of the base pay they were receiving at the close of their last naval service plus all permanent additions thereto: *Provided*, That the pay authorized in this paragraph as a retainer shall be increased ten per centum for all men who may be credited with extraordinary heroism in the line of duty or whose average marks in conduct for twenty years or more shall not be less than ninety-five per centum of the maximum.—(39 Stat., 590, chap. 417.)

See note to section 1556, Revised Statutes, under "37. Naval Reserve Force."

Retainer pay in the cases of certain members, Fleet Naval Reserve, on active duty between June, 1920, and July, 1922, shall be

computed on the base pay they are receiving when retransferred to inactive duty, plus the additions or increases authorized by act of August 29, 1916. (Act May 18, 1920, sec. 6, 41 Stat., 603.)

**[1916, Aug. 29. Retainer pay forfeited for cause.]** Any pay which may be due any member of the Fleet Naval Reserve shall be forfeited when so ordered



by the Secretary of the Navy upon the failure, under such conditions as may be prescribed by the Secretary of the Navy, of such man to report for inspection.—(39 Stat., 590, chap. 417.)

See above (39 Stat., 588), under "Retainer pay; conditions of payment;" and see act of June 4, 1920 (41 Stat., 824 and 837), for	other provisions relating to forfeiture of retainer pay.
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[1916, Aug. 29. **Members warranted or commissioned; retainer pay, etc., not reduced.**] Members of the Fleet Naval Reserve who have established their qualifications by examination to the satisfaction of the Secretary of the Navy may be given warrants or commissions in the Fleet Naval Reserve in the grades of boatswain, gunner, carpenter, machinist, pharmacist, pay clerk, ensign for deck or engineering duties, or in the lowest grades of the staff corps: *Provided further*, That those so warranted or commissioned shall not be deprived of the retainer pay, allowances, or gratuities to which they would be otherwise entitled.—(39 Stat., 590–591, chap. 417.)

[1916, Aug. 29. **Fleet Naval Reserve, laws governing; discharge and retirement; uniform outfit.**] Men transferred to the Fleet Naval Reserve shall be governed by the laws and regulations for the government of the Navy and shall not be discharged from the Naval Reserve Force without their consent, except by sentence of a court-martial. They may, upon their own request, upon completing thirty years' service, including naval and fleet naval reserve service, be placed on the retired list of the Navy with the pay they were then receiving plus the allowances to which enlisted men of the same rating are entitled on retirement after thirty years' naval service. They shall be required to keep on hand such part of the uniform-clothing outfit as may be prescribed by the Secretary of the Navy.—(39 Stat., 591, chap. 417.)

As to laws and regulations governing enrolled members, see act of July 1, 1918 (40 Stat., 712); as to retirement of enrolled members, see above (39 Stat., 588), under "Retire-	ment, enrolled members, 20 years' service." See also above (39 Stat., 590, as amended), as to retirement of transferred members.
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[1916, Aug. 29. **Retired enlisted men; active duty; pay, etc.**] The Secretary of the Navy is authorized in time of war or when a national emergency exists to call any enlisted man on the retired list into active service for such duty as he may be able to perform. While so employed such enlisted men shall receive the same pay and allowances they were receiving when placed on the retired list.—(39 Stat., 591, chap. 417.)

See act of March 3, 1915 (38 Stat., 941). and references thereunder, as to retired enlisted men.

#### NAVAL RESERVE.

[1916, Aug. 29. **Qualifications for Naval Reserve.**] Members of the Naval Reserve Force who have enrolled for general service and are citizens of the United States are eligible for membership in the Naval Reserve. No person shall be enrolled in or transferred to this class unless he establishes satisfactory evidence as to his qualifications for duty on board combatant ships of the Navy.—(39 Stat., 591, chap. 417; 40 Stat., 710, chap. 114.)

This paragraph was expressly amended and reenacted to read as above by act of July 1, 1918 (40 Stat., 710).

No person shall enroll in the Naval Reserve Force except for general service. (Act June 4, 1920, sec. 2, 41 Stat., 834.)

The age limits for the several ranks, grades, and ratings on first enrollment in the Naval Reserve shall be as prescribed by the Secretary of the Navy. (Act July 1, 1918, 40 Stat., 710.)

[1916, Aug. 29. Minimum active service for confirmation.] The minimum active service required of members to qualify for confirmation in their rank or rating in this class shall be three months.—(39 Stat., 591, chap. 417.)

[1916, Aug. 29. Minimum service for maintaining efficiency, Naval Reserve.]

This paragraph read as follows:

"The minimum active service required for maintaining the efficiency of a member of this class is three months during each term of enrollment. This active service may be in one period or in periods of not less than three weeks each year." (39 Stat., 591, chap. 417.)

It was superseded by the following provision on the same subject contained in act of July 1, 1918 (40 Stat., 710):

"That the minimum active service required for maintaining the efficiency of a member of the Naval Reserve shall be two months during each term of enrollment and an attendance at not less than thirty-six drills during each year, or other equivalent duty. The active service may be in one period or in periods of not less than fifteen days each."

[1916, Aug. 29. Retainer pay, Naval Reserve.]

This paragraph read as follows:

"The annual retainer pay of members in this class after confirmation in rank or rating shall be two months' base pay of the corresponding rank or rating in the Navy." (39 Stat., 591, chap. 417.)

It was superseded by other provisions contained in act of July 1, 1918 (40 Stat.,

710), relating to the retainer pay of all members of the Naval Reserve Force "except officers in the Naval Auxiliary Reserve and transferred members of the Fleet Naval Reserve."

See note to section 1556, Revised Statutes, under "37. Naval Reserve Force."

#### NAVAL AUXILIARY RESERVE.

[1916, Aug. 29. Qualifications for Naval Auxiliary Reserve.] Members of the Naval Reserve Force of the seagoing profession who shall have been or may be employed on American vessels of the merchant marine of suitable type for use as naval auxiliaries and which shall have been listed as such by the Navy Department for use in war, shall be eligible for membership in the Naval Auxiliary Reserve.—(39 Stat., 591, chap. 417.)

No person shall enroll in the Naval Reserve Force except for general service. (Act June 4, 1920, sec. 2, 41 Stat., 834.)

[1916, Aug. 29. Active service in time of war.] In time of war or during the existence of a national emergency, persons in this class shall be required to serve only in vessels of the merchant ship type, except in cases of emergency, to be determined by the senior officer present, when said officer may, in his discretion, detail them for temporary duty elsewhere as the exigencies of the service may require.—(39 Stat., 591, chap. 417.)

[1916, Aug. 29. Requirements for confirmation and maintenance of efficiency.] The requirement as to qualifications of officers and men for confirmation in rank or rating, and as to the maintenance of efficiency in rank or rating, shall be prescribed by the Secretary of the Navy and shall be limited to the requirements for the proper organization, discipline, maneuvering, navigation, and operation of vessels of the merchant ship type while performing auxiliary service to the fleet in time of war, and length of time of employment on board such vessels in the merchant service.—(39 Stat., 591-592, chap. 417.)



[1916, Aug. 29. Military command, limitation or exercise of.] Officers in the Naval Auxiliary Reserve shall exercise military command only on board the ships to which they are attached and in the naval auxiliary service.—(39 Stat., 592, chap. 417.)

[1916, Aug. 29. Retainer pay, Naval Auxiliary Reserve.] The annual retainer pay of members in this class after confirmation in rank or rating shall be for officers, one month's base pay of the corresponding rank in the Navy, and for men, two months' base pay of the corresponding rating in the Navy.—(39 Stat., 592, chap. 417.)

So much of this paragraph as relates to retainer pay for members, other than officers, in the Naval Auxiliary Reserve, was superseded by act of July 1, 1918 (40 Stat., 710).

See note to section 1556, Revised Statutes, under "37. Naval Reserve Force."

#### NAVAL COAST DEFENSE RESERVE.

[1916, Aug. 29. Qualifications for Coast Defense Reserve.] Members of the Naval Reserve Force who may be capable of performing special useful service in the Navy or in connection with the Navy in defense of the coast, shall be eligible for membership in the Naval Coast Defense Reserve.—(39 Stat., 592, chap. 417.)

[1916, Aug. 29. Character of service for which enrolled.] Persons may enroll in this class for service in connection with the naval defense of the coast, such as service with coast-defense vessels, torpedo craft, mining vessels, patrol vessels or as radio operators, in various ranks or ratings corresponding to those of the Navy for which they shall have qualified under regulations prescribed by the Secretary of the Navy.—(39 Stat., 592, chap. 417.)

No person shall enroll in the Naval Reserve Force except for general service. (Act June 4, 1920, sec. 2, 41 Stat., 834.)

Not to exercise command except within particular service and for due performance of duty. (Act July 1, 1918, 40 Stat., 711.)

Not to perform active duty on shore of a kind ordinarily performed by civilians. (Act July 11, 1919, 41 Stat., 138.)

[1916, Aug. 29. Owners of power boats; enrollment; contracts for use of boats.] That the Secretary of the Navy may permit the enrollment in this class of owners and operators of yachts and motor power boats suitable for naval purposes in the naval defense of the coast; and is hereby authorized to enter into contract with the owners of such power boats and other craft suitable for war purposes to take over the same in time of war or national emergency upon payment of a reasonable indemnity.—(39 Stat., 592, chap. 417.)

See note above, as to "character of service for which enrolled;" and see act of March 4,

1917 (39 Stat., 1192-1193), as to procurement of vessels, etc., in time of war.

[1916, Aug. 29. Active service for confirmation and efficiency.] The amount of active service required for confirmation in rank and rating and for maintaining efficiency in rank and rating shall be the same as that required for members of the Naval Reserve.—(39 Stat., 592, chap. 417.)

See above (39 Stat., 591), as to active service required for confirmation and maintenance of efficiency in the Naval Reserve.

[1916, Aug. 29. Retainer pay, Coast Defense Reserve.]

This paragraph read as follows:

"The annual retainer pay of members of this class shall be the same as that of members of the Naval Reserve." (39 Stat., 592, chap. 417.)

It was superseded by other provisions contained in the act of July 1, 1918 (40 Stat., 710).

See note to section 1556, Revised Statutes, under "37. Naval Reserve Force."

VOLUNTEER NAVAL RESERVE.

[1916, Aug. 29. Qualifications for membership, etc.] The Volunteer Naval Reserve shall be composed of those members of the Naval Reserve Force who are eligible for membership in any one of the other classes of the Naval Reserve Force, and who obligate themselves to serve in the Navy in any one of said classes without retainer pay and uniform gratuity in time of peace.—(39 Stat., 592, chap. 417.)

No person shall enroll in the Naval Reserve Force except for general service. (Act June 4, 1920, sec. 2, 41 Stat., 834.)

See note to section 1556, Revised Statutes, under "37. Naval Reserve Force."

NAVAL RESERVE FLYING CORPS.

[1916, Aug. 29. Qualifications for membership, etc.] The Naval Reserve Flying Corps shall be composed of officers and student flyers who have been transferred from the Naval Flying Corps to the Naval Reserve Flying Corps and of enlisted men who shall have been so transferred under the same conditions as those provided by law for enlisted men of the Navy transferred to the Fleet Naval Reserve: *Provided*, That surplus graduates of the aeronautic school may be commissioned as ensigns in the Naval Reserve Flying Corps and promoted therein under such regulations as may be prescribed by the President. Members of the Naval Reserve Force skilled in the flying of aircraft or in their design, building, or operation, shall be eligible for membership in the Naval Reserve Flying Corps. The amount of active service required for confirmation in grade, rank, or rating, and for maintaining efficiency therein, shall be the same as that required for members of the Naval Reserve. The retainer pay of members of the Naval Reserve Flying Corps shall be the same as that of members of the Naval Reserve.—(39 Stat., 592, chap. 417.)

The last sentence of this paragraph, as to retainer pay, was superseded by other provisions on the subject contained in act of July 1, 1918 (40 Stat., 710).

Members not to exercise command, except

within their particular department or service for the due performance of their duties. (Act July 1, 1918, 40 Stat., 711.)

See above (39 Stat., 582-583), relating to the Naval Flying Corps.

MARINE CORPS RESERVE.

[1916, Aug. 29. Established under laws relating to Naval Reserve Force; exceptions.] A United States Marine Corps Reserve, to be a constituent part of the Marine Corps and in addition to the authorized strength thereof, is hereby established under the same provisions in all respects (except as may be necessary to adapt the said provisions to the Marine Corps) as those providing for the Naval Reserve Force in this Act: *Provided*, That the Marine Corps Reserve may consist of not more than five classes, corresponding, as near as may be, to the Fleet Naval Reserve, the Naval Reserve, the Naval Coast



Defense Reserve, the Volunteer Naval Reserve, and the Naval Reserve Flying Corps, respectively.—(39 Stat., 593, chap. 417.)

See above (39 Stat., 587–592) for provisions of law relating to Naval Reserve Force.

**Amendatory statutes.**—Only provisions of law contained in the act of August 29, 1916, relating to the Naval Reserve Force, or which are expressly amendatory of that act, are made

applicable to the Marine Corps Reserve by this paragraph. Other subsequent enactments apply to the Marine Corps Reserve only where specifically named therein. (File 26253–737, Oct. 16, 1919.)

**[1916, Aug. 29. Old Naval Reserve law repealed in part.]** All Acts or parts of Acts relating to the Naval Reserve which are inconsistent with the provisions of this Act relating to the Naval Reserve Force are hereby repealed.—(39 Stat., 593, chap. 417.)

See act of March 3, 1915 (38 Stat., 940–941), and note thereto, relating to the Naval Reserve.

**[1916, Aug. 29. Retainer pay; appropriations to which chargeable.]** The retainer pay and active service pay of members of the Naval Reserve Force shall be paid from the appropriation “Pay—the Navy,” and the retainer pay and active service pay of the Marine Corps Reserve shall be paid from the appropriation “Pay, Marine Corps.”—(39 Stat., 593, chap. 417.)

**[1916, Aug. 29. Naval Militia and National Naval Volunteers. Repealed.]**

The provisions of the act of August 29, 1916 (39 Stat., 593–600), and all other laws relating to the Naval Militia and the National Naval Volunteers, were repealed by act of July 1, 1918 (40 Stat., 708), which authorized the transfer of members of the latter organization to the

various classes of the Naval Reserve Force and Marine Corps Reserve. Some legislation relating to the Naval Militia was partially revived until June 30, 1922, by act of June 4, 1920 (41 Stat., 817).

**[1916, Aug. 29. Sale of fuel to Volunteer Patrol Squadrons.]** That the Secretary of the Navy is hereby authorized to sell at cost and issue lubricating oil and gasoline to vessels of the Volunteer Patrol Squadrons duly enrolled in the several naval districts; and that during maneuvers or practice drills when any vessels of said Patrol Boat Squadrons shall be acting singly or as squadrons under the direct command or control of an officer or officers of the United States Navy, gasoline fuel shall be supplied to them free of charge.—(39 Stat., 600, chap. 417.)

Amendment to this paragraph was made by act of March 4, 1917 (39 Stat., 1172), which struck out the word “gasoline” where it first appears therein, and substituted there-

for the word “fuel”; and struck out the word “gasoline” where it occurs the second time in said paragraph.

**[1916, Aug. 29. Coast Guard, laws to which subject.]** Whenever, in time of war, the Coast Guard operates as a part of the Navy in accordance with law, the personnel of that service shall be subject to the laws prescribed for the government of the Navy: *Provided*, That in the initiation, prosecution, and completion of disciplinary action, including remission and mitigation of punishments for any offense committed by any officer or enlisted man of the Coast Guard, the jurisdiction shall hereafter depend upon and be in accordance with the laws and regulations of the department having jurisdiction of the person of such offender at the various stages of such action: *Provided further*, That any punishment imposed and executed in accordance with the provisions of this section shall not exceed that to which the offender was liable at the time of the commission of his offense.—(39 Stat., 600, chap. 417.)

See acts of January 28, 1915 (38 Stat., 800), and October 6, 1917 (40 Stat., 393).

[1916, Aug. 29. Expenses of Coast Guard when serving with the Navy.] Hereafter whenever, in accordance with law, the expenses of the Coast Guard are paid by the Navy Department, any naval appropriations from which payments are so made shall be reimbursed from available appropriations made by Congress for the expenses of the Coast Guard.—(39 Stat., 600, chap. 417.)

See section 2757, Revised Statutes, and act of January 28, 1915 (38 Stat., 800).

[1916, Aug. 29. Precedence between officers of Navy and Coast Guard.] Whenever the personnel of the Coast Guard, or any part thereof, is operating with the personnel of the Navy in accordance with law, precedence between commissioned officers of corresponding grades in the two services shall be determined by the date of commissions in those grades.—(39 Stat., 600, chap. 417.)

See note to section 1492, Revised Statutes.

[1916, Aug. 29. Coast Guard personnel, duties; maintenance of stations.] Any commissioned or warrant officer, petty officer, or other enlisted man in the Coast Guard may be assigned to any duty which may be necessary for the proper conduct of the Coast Guard; and the Secretary of the Treasury in time of peace and the Secretary of the Navy in time of war may, in his discretion, man any Coast Guard station during the entire year, or any portion thereof, maintain any house of refuge as a Coast Guard station, and change, establish, and fix the limits of Coast Guard districts and divisions.—(39 Stat., 600, chap. 417.)

See act of January 28, 1915 (38 Stat., 800).

[1916, Aug. 29. Instruction of Coast Guard at Navy schools.] At the request of the Secretary of the Treasury the Secretaries of War and Navy are authorized to receive officers and enlisted men of the Coast Guard for instruction in aviation at any aviation school maintained by the Army and Navy, and such officers and enlisted men shall be subject to the regulations governing such schools.—(39 Stat., 601, chap. 417.)

[1916, Aug. 29. Lighthouse Service, status and duties in war.] The President is hereby authorized, whenever in his judgment a sufficient national emergency exists, to transfer to the service and jurisdiction of the Navy Department, or of the War Department, such vessels, equipment, stations, and personnel of the Lighthouse Service as he may deem to the best interest of the country, and after such transfer all expenses connected therewith shall be defrayed out of the appropriations for the department to which transfer is made: *Provided*, That such vessels, equipment, stations, and personnel shall be returned to the Lighthouse Service when such national emergency ceases in the opinion of the President, and nothing in this Act shall be construed as transferring the Lighthouse Service or any of its functions from the Department of Commerce except in time of national emergency and to the extent herein provided: *Provided further*, That any of the personnel of the Lighthouse Service who may be transferred as herein provided shall, while under the jurisdiction of the Navy Department or War Department, be subject to the laws, regulations, and orders for the government of the Navy or Army, as the case may be, in so far as the same may be applicable to persons whose retention permanently in the military service of the United States is not contemplated by law.



The Secretary of the Navy, the Secretary of War, and the Secretary of Commerce shall jointly prescribe regulations governing the duties to be performed by the Lighthouse Service in time of war, and for the cooperation of that service with the Navy and War Departments in time of peace in preparation for its duties in war, and this may include arrangements for a direct line of communication between the officers or bureaus of the Navy and War Departments and the Bureau of Lighthouses to provide for immediate action on all communications from these departments.—(39 Stat., 602, chap. 417.)

See act of October 6, 1917 (40 Stat., 393).

[1916, Aug. 29. Repairs and changes to capital ships.] The statutory limit of \$200,000 for repairs and changes to capital ships of the Navy, as provided in the Act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and eight, approved March second, nineteen hundred and seven, is hereby changed to \$300,000.—(39 Stat., 605, chap. 417.)

See note to section 1538, Revised Statutes.

[1916, Aug. 29. Sale of unserviceable vessels.] The Secretary of the Navy is hereby authorized to sell any or all of the auxiliary ships of the Navy classified as colliers, transports, tenders, supply ships, special types, and hospital ships, which are eighteen years and over in age, which he deems unsuited to present needs of the Navy and which can be disposed of at an advantageous price, which shall not be less than fifty per centum of their original cost, the money obtained from such sale to be covered into the Treasury as miscellaneous receipts.—(39 Stat., 605, chap. 417.)

See section 1541, Revised Statutes, and note thereto.

[1916, Aug. 29. Transfer of lands to jurisdiction of Navy Department.] That such land of the United States under the control of a particular department or other branch of the Government that has been or may hereafter be mutually selected as a site for a naval radio station may, by direction of the President, be transferred to and placed under the control and jurisdiction of the Navy Department for use as a naval radio station or other naval purposes.—(39 Stat., 606, chap. 417.)

See section 418, Revised Statutes, and note thereto.

[1916, Aug. 29. Employment of professors, Naval Academy.] That the Secretary of the Navy is authorized to employ at the Naval Academy such number of professors and instructors, including one professor as librarian, as, in his opinion, may be necessary for the proper instruction of the midshipmen; and that professors and instructors so employed shall receive such compensation for their services as may be prescribed by the Secretary of the Navy: *Provided further*, That the total amount so paid shall not exceed \$175,000 annually: *And provided further*, That the Secretary of the Navy shall report to Congress each year the number of professors and instructors so employed and the amount of compensation prescribed for each.—(39 Stat., 607, chap. 417.)

See note to section 1528, Revised Statutes; and see act of May 18, 1920, section 7 (41 Stat., 603).

[1916, Aug. 29. Board of Visitors, Naval Academy.] From and after the passage of this Act there shall be appointed every year, in the following manner, a Board of Visitors, to visit the academy, the date of the annual visit of the board aforesaid to be fixed by the Secretary of the Navy: Seven persons shall be appointed by the President and four Senators and five Members of the House of Representatives shall be designated as visitors by the Vice President or President pro tempore of the Senate and the Speaker of the House of Representatives, respectively, in the month of January of each year. The chairman of the Committee on Naval Affairs of the Senate and chairman of the Committee on Naval Affairs of the House of Representatives shall be ex officio members of said board.

Each member of said board shall receive while engaged upon duties as a member of the board not to exceed \$5 a day and actual expenses of travel by the shortest mail routes.—(39 Stat., 608, chap. 417.)

See sections 1511-1528, Revised Statutes, relating to the Naval Academy; and see | act of August 4, 1886 (24 Stat., 268), as to expenses of Board of Visitors.

[1916, Aug. 29. Marine Corps, number of officers; distribution in ranks.] Hereafter the total number of commissioned officers of the active list of the line and staff of the Marine Corps, exclusive of officers borne on the Navy list as additional numbers, shall be four per centum of the total authorized enlisted strength of the active list of the Marine Corps, exclusive of the Marine Band, and of men under sentence of discharge by court-martial, distributed in the proportion of one officer with rank senior to colonel to four with the rank of colonel, to five with the rank of lieutenant colonel, to fourteen with the rank of major, to thirty-seven with the rank of captain, to thirty-one with the rank of first lieutenant, to thirty-one with the rank of second lieutenant.—(39 Stat., 609, chap. 417.)

See section 1596, Revised Statutes, and note thereto.

**Additional numbers.**—This paragraph, in so far as it deals with distribution of commissioned officers in the various grades and ranks of the Marine Corps, refers only to officers who are regular numbers in grade, and not to officers who, for any reason are, or may become, additional numbers. Accordingly, in all computations having to do with the distribution of officers in the various ranks and grades, additional number officers are to be excluded from consideration. (File 28687-1, Aug. 18, 1916.)

See below as to additional number officers promoted to brigadier general.

**Computations, final fractions.**—The clause in this act (39 Stat., 577), relating to the disposition of final fractions which occur in computing the authorized number of any corps, grade, or rank in the naval service, applies to the Marine Corps, and accordingly "the nearest whole number shall be regarded as the authorized number" of marine officers in the cases mentioned in that clause. (File 28687-5, Aug. 29 and Nov. 20, 1916. See below, 39 Stat., 610, as to proportionate ratio of staff officers.)

There is a conflict between the provisions of the law fixing the total number of commissioned officers on the active list of the Marine Corps, and prescribing a method of determining the

number of officers in each grade and rank therein by taking the nearest whole number in the case of a final fraction. Under such circumstances, the provision fixing the total number of officers on the active list is controlling, and the result is to increase the number allowed in the grade of second lieutenant by one officer in the present instance, in order that the total number may be fully distributed. This increase must be placed in the grade of second lieutenant, and can not be placed in any higher grade. (File 28687-5, Nov. 20, 1916.)

**Distribution of actual number of officers when less than authorized number.**—This paragraph provides for the distribution of the authorized number of officers, and is mandatory, when the Marine Corps has its full number of commissioned officers, as to the proportion in which such officers shall be distributed in the various ranks; but where the actual number of commissioned officers is less than the authorized number, it is within the discretion of the Secretary of the Navy to place the shortage in the higher or lower ranks, or to distribute same between the various ranks, as he deems expedient. (File 28687-5:1, Apr. 11, 1917.)

The act of August 29, 1916 (39 Stat., 576), requires that the actual number of commissioned officers in the Navy shall be distributed in the various grades and ranks in certain pro-



portions and in accordance with computations to be made by the Secretary of the Navy; but as to the Marine Corps, when the actual number is less than the authorized number, the distribution of the shortage is a matter in the discretion of the Secretary of the Navy. In the exercise of this discretion, the Secretary decides that the actual number of commissioned officers in the Marine Corps shall be distributed between the various ranks in the same proportion provided by said act of August 29, 1916, with reference to the distribution of the authorized number, thus establishing a uniform rule

in this respect for the Navy and Marine Corps. Under this ruling, only commissioned officers actually in the regular service may be counted; and no officer is actually in the service until he has accepted his appointment. Computations should be based on definite information as to the actual number of officers in the service on a given date, counting changes due to new appointments, casualties, etc. (File 28687-5:1, Sept. 7, 1917; see also file 28687-5:5, Aug. 19, 1918.)

**Total authorized enlisted strength.**—See note to section 1596, Revised Statutes.

[1916, Aug. 29. Brigadier generals; additional numbers; filling vacancies.] That brigadier generals shall be appointed from officers of the Marine Corps senior in rank to lieutenant colonel: *Provided further*, That the promotion to the grade of brigadier general of any officer now or hereafter carried as an additional number in the grade or with the rank of colonel shall be held to fill a vacancy in the grade of brigadier general.—(39 Stat., 609, chap. 417.)

**Promotion of additional number colonel.**—Any officer carried as an additional number in the grade of colonel will, if promoted to the grade of brigadier general, immediately become a regular number in the latter grade, and will continue to be carried as a regular number therein, unless by operation of some other law applicable to his specific case his status should revert to that of an additional number in grade. (File 28687-1, Aug. 18, 1916.)

A colonel carried as an additional number by virtue of section 1605, Revised Statutes, as amended by act of June 16, 1906 (34 Stat., 296), would cease to be an additional number upon promotion to the grade of brigadier general. (File 28687-1, Aug. 18, 1916.)

A colonel, serving as Major General Commandant of the Marine Corps under the act of December 19, 1913 (38 Stat., 201), would continue to be an additional number while so serving, although in the meantime promoted to the grade of brigadier general. (File 28687-1, Aug. 18, 1916. See note to sec. 1601, R. S.)

If a colonel should be appointed to an existing vacancy in the position of Major General Commandant at the time when the grade of brigadier general was full, although said colonel would thereupon become an additional number in the grade of colonel, nevertheless he could not under the law be promoted to the grade of brigadier general unless a vacancy occurred therein. Should a former Major General Commandant be in the grade of brigadier general as an additional number, a vacancy thereafter

occurring would be immediately filled, by operation of law, by the additional number brigadier general becoming a regular number in that grade. If thereafter another vacancy should occur in the grade of brigadier general, the additional number colonel serving as Major General Commandant might legally be promoted thereto, but he would become an additional number brigadier general under the act of December 19, 1913, and a vacancy would still exist to which a regular number colonel could be promoted. (File 28687-1, Aug. 18, 1916.)

**Date of rank on promotion.**—The date of rank given officers of the Marine Corps on promotion should ordinarily be the date of the vacancy to which promoted; but in no case will an officer permanently or temporarily promoted be given rank from a date earlier than his date of rank in the lower grade. (File 28687-5:1, Sept. 7, 1917. See note to sec. 1458, R. S.)

Vacancies resulting from the President's order of March 26, 1917, increasing the authorized number of enlisted men in the Marine Corps, as authorized by this act (39 Stat., 612), were created on the date of said order; and vacancies resulting from the temporary increase of enlisted men authorized by act of May 22, 1917, were created on the date of said act. (File 28687-5:1, Sept. 7, 1917.)

**Rank of brigadier generals and rear admirals.**—See note to section 1466, Revised Statutes.

[1916, Aug. 29. Major General Commandant counted as senior to colonel.] That in determining the officers with rank senior to colonel there shall be included the officer serving as major general commandant.—(39 Stat., 609, chap. 417.)

See below as to appointment of Major General Commandant from rank of colonel; and see above, as to promotion of additional number colonel; see also note to section 1601, Revised Statutes.

**This provision has the effect of making the Major General Commandant one of the authorized number of officers above the rank of colonel, as though the law read, that there shall be one major general commandant, and so many brigadier generals, etc.** (File 28687-1, Aug. 18, 1916.)

[1916, Aug. 29. Appointment as Major General Commandant.] That appointments hereafter made to the position of major general commandant under the provisions of the Act approved December nineteenth, nineteen hundred and thirteen, entitled "An Act to make the tenure of office of the major general commandant of the Marine Corps for a term of four years," shall be made from officers of the active list of the Marine Corps not below the rank of colonel.—(39 Stat., 609, chap. 417.)

See act of December 19, 1913 (38 Stat., 241), and note to section 1601, Revised Statutes.

**Appointment from rank of colonel.**—This provision expressly confers upon the President full discretion to fill a vacancy in the position of Major General Commandant from officers of the rank of colonel as well as from those having the rank of brigadier general.

Should the authorized number of officers senior to colonel be full, this could not operate to restrict the President's discretion by requiring him to appoint another brigadier general to fill the vacancy and preventing him from appointing a colonel should he desire to do so. (File 28687-1, Aug. 18, 1916.)

[1916, Aug. 29. Rank of senior staff officers; counted as colonels.] That the officers serving in the senior grade of the Adjutant and Inspector's, Quartermaster's, and Paymaster's Departments shall, while serving therein, have the rank, pay, and allowances of a brigadier general: *And provided further*, That for the purpose of determining the number of officers in the various ranks as herein provided such staff officers shall be counted as being of the rank of colonel.—(39 Stat., 609-610, chap. 417.)

See note to section 1602, Revised Statutes.

[1916, Aug. 29. Permanent staff officers not eligible for line promotion.] That officers holding permanent appointments in the staff departments shall not be eligible for appointment to the grade of brigadier general of the line as hereinbefore provided.—(39 Stat., 610, chap. 417.)

[1916, Aug. 29. Organization of staff departments; number of officers; filling vacancies.] The total commissioned personnel of the active list of the staff departments, whether serving therein under permanent appointments or under temporary detail, as herein provided, shall be eight per centum of the authorized commissioned strength of the Marine Corps, and of this total one-fifth shall constitute the adjutant and inspector's department, one-fifth the paymaster's department, and three-fifths the quartermaster's department.

No further permanent appointments shall be made in any grade in any staff department. Any vacancy hereafter occurring in the lower grade of any staff department shall be filled by the detail of an officer of the line for a period of four years unless sooner relieved; any vacancy hereafter occurring in the upper grade of any staff department shall be filled by the appointment of an officer with the rank of colonel holding a permanent appointment in the staff department in which the vacancy exists, or of some other officer holding a permanent appointment in such staff department in case there be no permanent staff officer with the rank of colonel in that department, or of a colonel of the line in case there be no officer holding a permanent appointment in such staff department. Such appointments shall be made by the President and be for a term of four years, and the officer so appointed shall be recommissioned in the grade to which appointed.—(39 Stat., 610, chap. 417.)



See note to section 1598, Revised Statutes.

**Computations in staff departments.**—The provision of this act (39 Stat., 577) relating to the disposition of final fractions does not in terms apply to the distribution of the authorized number of officers between the three staff departments. The total number in the three departments should be 8 per centum of the authorized commissioned strength of the Marine Corps, exclusive of additional numbers. Where counting the nearest whole number in cases of final fractions in computing the number

for each department would increase the authorized number for the three departments by one, and disregarding such fractions would leave a shortage of two officers in the three departments, *held*, that the final fractions will be disregarded and the two officers remaining will be distributed between the three departments by the Secretary of the Navy, upon recommendation of the Major General Commandant, in such manner as may be to the best interest of efficient administration. (File 28687-5, Nov. 20, 1916.)

[1916, Aug. 29. Permanent staff officers reappointed in the line.]

This paragraph read as follows:

"That prior to June thirtieth, nineteen hundred and eighteen, an officer holding a permanent appointment in any staff department may, upon his own application, with the approval of the President, be reappointed in the line of the Marine Corps in the grade and with the rank he would hold on the date of his reappointment if he had remained continuously in the line: *Provided*, That no officer holding a permanent appointment in any staff department shall be recommissioned in the line with the rank of colonel or lieutenant colonel: *Pro-*

*vided further*, That such staff officer shall, before being reappointed in the line of the Marine Corps as above provided, perform line duties for one year, at the expiration of which time he shall as a prerequisite to reappointment in the line be required to establish to the satisfaction of an examining board consisting of line officers of the Marine Corps his physical, mental, and professional fitness for the performance of line duty." (39 Stat., 610, chap. 417.)

It expired by its terms on June 30, 1918, and is no longer in force.

[1916, Aug. 29. Common promotion list, Marine Corps.] That for the purpose of advancement in rank to and including the grade of colonel, all commissioned officers of the line and staff of the Marine Corps shall be placed on a common list in the order of seniority each would hold had he remained continuously in the line. All advancements in rank to captain, major, lieutenant colonel, and colonel shall, subject to the usual examinations, be made from officers with the next junior respective rank, whether of the line or staff, in the order in which their names appear on said list.—(39 Stat., 610, chap. 417.)

See note to section 1599, Revised Statutes, under "Laws relating to promotion construed."

[1916, Aug. 29. Second lieutenants, qualifications; age; examination; former officers; probation; midshipmen failing to graduate.] Appointees to the grade of second lieutenant, if appointed from civil life, shall be between the ages of twenty and twenty-five years, and before receiving a commission in the Marine Corps, each appointee shall establish to the satisfaction of the Secretary of the Navy his mental, physical, moral, and professional qualifications for such commission: *Provided*, The President of the United States be, and hereby is, authorized, by and with the advice and consent of the Senate, to appoint as second lieutenants on the active list in the United States Marine Corps, to take rank at the foot of the list of second lieutenants as it stands at the date of reinstatement, former officers of the Marine Corps who resigned from the naval service in good standing: *Provided*, That they shall establish their moral, physical, mental, and professional qualifications to perform the duties of that grade to the satisfaction of the Secretary of the Navy: *Provided further*, That the Secretary of the Navy, in his discretion, may waive the age limit in favor of the aforesaid former officers of the Marine Corps: *Provided further*, That the prior services of such officers and the service after reinstatement shall be not less than thirty years before the age of retirement. That appointments from noncommissioned officers of the Marine Corps and from civil life shall be for a probationary period of two years and may be revoked at any time during that

period by the Secretary of the Navy: *Provided further*, That the rank of such officers of the same date of appointment among themselves at the end of said probationary period shall, with the approval of the Secretary of the Navy, be determined by the report of a board of Marine officers who shall conduct a competitive professional examination under such rules as may be prescribed by the Secretary of the Navy and the rank of such officers so determined shall be as of date of original appointment with reference to other appointments to the Marine Corps: *Provided further*, That no midshipman at the United States Naval Academy or cadet at the United States Military Academy who fails to graduate therefrom shall be eligible for appointment as a commissioned officer in the Marine Corps until after the graduation of the class of which he was a member.—(39 Stat., 610-611, chap. 417.)

Probationary second lieutenants could be given probationary appointments in higher grades "during the continuance of the present war," under the act of May 22, 1917, section 10 (40 Stat., 87).

See note to section 1599, Revised Statutes.

**Vacancies required.**—Where the number of officers allowed a given grade, as in the case of second lieutenants, is fixed by law, such number can not be exceeded. Accordingly, midshipmen graduating from the Naval Academy can not be commissioned as second lieutenants in excess of the number in that grade fixed by law, even though the result would overfill the grade at most only for a period of a few days. (File 13261-486, June 8, 1916, citing 23 Op. Att'y. Gen., 30, 35; file 26521-67, June 4, 1913; 26521-67.1, Dec. 4, 1913.)

**Former officers.**—The provision for pro-

bationary appointments does not apply to former officers of the Marine Corps who are reinstated as second lieutenants after they have established, by examination, their existing qualifications to perform the duties of that grade. (File 13261-544.1, Oct. 10, 1916.)

It is significant that the law requires civilians to establish their qualifications for a "commission" in the Marine Corps; while it requires former officers to establish their qualifications for the "duties" of the grade to which appointed (File 13261-544: 1, Oct. 10, 1916.)

**Promotion of probationary officer.**—The earliest date of commission in the grade of captain which may be assigned a probationary officer of the Marine Corps is the date on which he completed his probationary period. (File 29226-6:4, Apr. 28, 1921.)

[1916, Aug. 29. Warrant officers, Marine Corps.] That the warrant grades of marine gunner and quartermaster clerk are hereby established, and the appointment as herein prescribed of twenty marine gunners and twenty quartermaster clerks is hereby authorized. Officers in those grades shall have the rank and receive the pay, allowances and privileges of retirement of warrant officers in the Navy. They shall be appointed from the noncommissioned officers of the Marine Corps and clerks to quartermasters now serving as such and who have performed field service.—(39 Stat., 611, chap. 417.)

By act of May 22, 1917, section 11 (40 Stat., 87), the appointment was authorized of 30 marine gunners and 30 quartermaster's clerks, additional to the number prescribed by this paragraph.

By act of June 4, 1920 (41 Stat., 830), the authorized number of warrant officers in the Marine Corps was increased by not exceeding 50, to provide for the appointment of certain officers who held temporary commissions during the war.

See notes to sections 1405, 1487, and 1566, Revised Statutes, as to pay and allowances, etc., of warrant officers in the Navy; see also act of March 4, 1917 (39 Stat., 1188), as to foreign shore service pay of warrant officers in the Marine Corps; and see act of July 11, 1919 (41 Stat., 141), as to warrant officers who served as commissioned officers in the Marine Corps Reserve, and note to section 1612, Revised Statutes.

#### [1916, Aug. 29. Retirement of colonels as brigadier generals.]

This paragraph reads as follows:

"That officers of the Marine Corps with the rank of colonel who shall have served faithfully for forty-five years on the active list shall, when retired, have the rank of brigadier general; and such officers who shall hereafter be retired at the age of sixty-four years before having served for forty-five years, but who shall have served faithfully on the active list until retired, shall,

on the completion of forty years from their entry in the naval service, have the rank of brigadier general." (39 Stat., 611, chap. 417.)

It was expressly repealed by act of May 22, 1917, section 14 (40 Stat., 87).

See section 1481, Revised Statutes, for somewhat similar provision relating to staff officers of the Navy.



[1916, Aug. 29. Marine Corps, examinations for promotion.] The provisions of sections fourteen hundred and ninety-three and fourteen hundred and ninety-four of the Revised Statutes of the United States shall apply to the Marine Corps.—(39 Stat., 611, chap. 417.)

See sections 1493–1494, and note to section 1599, Revised Statutes.

[1916, Aug. 29. Officers failing in examination for promotion.] In lieu of suspension from promotion of any officer of the Marine Corps who hereafter fails to pass a satisfactory professional examination for promotion, or who is now under suspension from promotion by reason of such failure, such officer shall suffer loss of numbers, upon approval of the recommendation of the examining board, in the respective ranks, as follows: Lieutenant colonel, one; major, two; captain, three; first lieutenant, five; second lieutenant, eight: *Provided*, That any such officer shall be reexamined as soon as may be expedient after the expiration of six months if he in the meantime again becomes due for promotion, and if he does not in the meantime again become due for promotion he shall be reexamined at such time anterior to again becoming due for promotion as may be for the best interests of the service: *Provided further*, That if any such officer fails to pass a satisfactory professional reexamination he shall be honorably discharged with one year's pay from the Marine Corps.—(39 Stat., 611–612, chap. 417.)

See note to section 1599, Revised Statutes; and see section 1505, Revised Statutes, and	note thereto, for law relating to the Navy on the same subject.
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[1916, Aug. 29. Authorized enlisted strength, Marine Corps.] Hereafter the number of enlisted men of the Marine Corps shall be exclusive of those sentenced by court-martial to discharge. \* \* \*

The President is authorized, when, in his judgment, it becomes necessary to place the country in a complete state of preparedness, to further increase the enlisted strength of the Marine Corps to seventeen thousand four hundred: *And provided*, That the distribution in the various grades shall be in the same proportion as that authorized at the time when the President avails himself of the authority herein granted.—(39 Stat., 612, chap. 417.)

See note to section 1596, Revised Statutes, as to the number and grades of enlisted men in the Marine Corps.

[1916, Aug. 29. Marine Band; organization and pay; competition with civilians restricted.] That the band of the United States Marine Corps shall consist of one leader, whose pay and allowances shall be those of a captain in the Marine Corps; one second leader, whose pay shall be \$150 per month and who shall have the allowances of a sergeant major; ten principal musicians, whose pay shall be \$125 per month; twenty-five first-class musicians, whose pay shall be \$100 per month; twenty second-class musicians, whose pay shall be \$85 per month; and ten third-class musicians, whose pay shall be \$70 per month; such musicians of the band to have the allowances of a sergeant and to have no increase in the rates of pay on account of length of service: *Provided*, That a member of the said band shall not, as an individual, furnish music or accept an engagement to furnish music, when such furnishing of music places him in competition with any civilian musician or musicians, and shall

not accept or receive remuneration for furnishing music except under special circumstances when authorized by the President.—(39 Stat., 612, chap. 417.)

See notes to sections 1596 and 1613, Revised Statutes; and see acts of May 13, 1908 (35 Stat., 153), and June 3, 1916, section 35

(39 Stat., 188), for other restrictions upon enlisted men competing with civilians.

[1916, Aug. 29. Sales to officers, etc., of subsistence stores.] PROVISIONS, MARINE CORPS: \* \* \* That hereafter so much of this appropriation as may be necessary may be applied for the purchase, for sale to officers, enlisted men, and civilian employees, of such articles of subsistence stores as may from time to time be designated and under such regulations as may be prescribed by the Secretary of the Navy.—(39 Stat., 613, chap. 417.)

See act of March 4, 1913 (37 Stat., 909), and note thereto.

[1916, Aug. 29. Marine Corps training camps.] The Secretary of the Navy is hereby authorized to establish and maintain at such places as he may designate, and prescribe regulations for the government thereof, Marine Corps training camps for the instruction of citizens of the United States who make application and are designated for such training; no such camps to be in existence for a period longer than six weeks in each fiscal year, except in time of actual or threatened war; to use Marine Corps and such other Government property as he may deem necessary for the military training of such citizens while in attendance at such camps. The Quartermaster's Department, United States Marine Corps, is authorized to sell such articles of uniform clothing as may be prescribed at cost price to the volunteer citizens who are designated to participate in these instructions: *Provided*, That these citizens shall be required to furnish at their own expense transportation and subsistence to and from these camps, and subsistence while undergoing training therein.—(39 Stat., 614, chap. 417.)

[1916, Aug. 29. Navy yard employees; leaves of absence.] That each and every employee of the navy yards, gun factories, naval stations, and arsenals of the United States Government is hereby granted thirty days' leave of absence each year, without forfeiture of pay during such leave: *Provided further*, That it shall be lawful to allow pro rata leave only to those serving twelve consecutive months or more: *And provided further*, That in all cases the heads of divisions shall have discretion as to the time when the leave can best be allowed: *And provided further*, That not more than thirty days' leave with pay shall be allowed any such employee in one year: *Provided further*, That this provision shall not be construed to deprive employees of any sick leave or legal holidays to which they may now be entitled under existing law.—(39 Stat., 617–618, chap. 417.)

See note to section 1545, Revised Statutes.

[1916, Aug. 29. Government employees serving in National Guard and Medical Reserve Corps.] That all officers and enlisted men of the National Guard and of the Medical Reserve Corps of the Army who are Government employees and who respond to the call of the President for service shall, at the expiration of the military service to which they are called, be restored to the positions occupied by them at the time of the call.—(39 Stat., 624, chap. 418.)

See note to section 416, Revised Statutes under "Honorably discharged soldiers or sailors"; and see act of June 3, 1916, section 80 (39

Stat., 203), as to leaves of absence allowed Government employees who are members of the National Guard.



[1916, Aug. 29. Sales of Army, Navy, and Marine Corps subsistence supplies.] That hereafter the officers and enlisted men of the Navy and the Marine Corps shall be permitted to purchase subsistence supplies at the same price as is charged the officers and the enlisted men of the Army; and the officers and the enlisted men of the Army shall be permitted to purchase subsistence supplies from the Navy and Marine Corps at the same price as is charged the officers and the enlisted men of the Navy and Marine Corps.—(39 Stat., 630, chap. 418.)

[1916, Aug. 29. Transportation of troops, etc., in time of war.] The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable.—(39 Stat., 645, chap. 418.)

See act of February 4, 1887, section 6 (24 Stat., 380), as amended by act of August 29, 1916 (39 Stat., 604, chap. 417).

[1916, Aug. 29. Director of Civilian Marksmanship.] That the President be, and he is hereby, authorized, in his discretion, to appoint, as Director of Civilian Marksmanship, under the direction of the Secretary of War, an officer of the Army or of the Marine Corps.—39 Stat., 648, chap. 418.)

[1916, Aug. 29, sec. 2. Council of National Defense.] That a Council of National Defense is hereby established, for the coordination of industries and resources for the national security and welfare, to consist of the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor.

That the Council of National Defense shall nominate to the President, and the President shall appoint, an advisory commission, consisting of not more than seven persons, each of whom shall have special knowledge of some industry, public utility, or the development of some natural resource, or be otherwise specially qualified, in the opinion of the council, for the performance of the duties hereinafter provided. The members of the advisory commission shall serve without compensation, but shall be allowed actual expenses of travel and subsistence when attending meetings of the commission or engaged in investigations pertaining to its activities. The advisory commission shall hold such meetings as shall be called by the council or be provided by the rules and regulations adopted by the council for the conduct of its work.—(39 Stat., 649, chap. 418.)

That it shall be the duty of the Council of National Defense to supervise and direct investigations and make recommendations to the President and the heads of executive departments as to the location of railroads with reference to the frontier of the United States so as to render possible expeditious concentration of troops and supplies to points of defense; the coordination of military, industrial, and commercial purposes in the location of extensive highways and branch lines of railroad; the utilization of waterways; the mobilization of military and naval resources for defense; the increase of domestic production of articles and materials essential to the support of armies and of the people

during the interruption of foreign commerce; the development of seagoing transportation; data as to amounts, location, method and means of production, and availability of military supplies; the giving of information to producers and manufacturers as to the class of supplies needed by the military and other services of the Government, the requirements relating thereto, and the creation of relations which will render possible in time of need the immediate concentration and utilization of the resources of the Nation.—(39 Stat., 649–650, chap. 418.)

That the Council of National Defense shall adopt rules and regulations for the conduct of its work, which rules and regulations shall be subject to the approval of the President, and shall provide for the work of the advisory commission to the end that the special knowledge of such commission may be developed by suitable investigation, research, and inquiry and made available in conference and report for the use of the council; and the council may organize subordinate bodies for its assistance in special investigations, either by the employment of experts or by the creation of committees of specially qualified persons to serve without compensation, but to direct the investigations of experts so employed.

\* \* \* Reports shall be submitted by all subordinate bodies and by the advisory commission to the council, and from time to time the council shall report to the President or to the heads of executive departments upon special inquiries or subjects appropriate thereto, and an annual report to the Congress shall be submitted through the President, including as full a statement of the activities of the council and the agencies subordinate to it as is consistent with the public interest, including an itemized account of the expenditures made by the council or authorized by it, in as full detail as the public interest will permit: *Provided, however,* That when deemed proper the President may authorize, in amounts stipulated by him, unvouchered expenditures and report the gross sums so authorized not itemized.—(39 Stat., 650, chap. 418.)

By act of June 15, 1917 (40 Stat., 182), which contained appropriations for the council of National Defense, it was provided "that in the expenditure of said moneys the existence of a state of war shall not be construed as enlarging the powers or duties

of the Council of National Defense, but that such powers and duties shall remain as prescribed by the Act creating said council, approved August twenty-ninth, nineteen hundred and sixteen."

[1916, Sept. 7. United States Shipping Board.] SEC. 4. \* \* \* The President, upon the request of the board, may authorize the detail of officers of the military, naval, or other services of the United States for such duties as the board may deem necessary in connection with its business. \* \* \* .—(39 Stat., 729, chap. 451.)

SEC. 5. The board, with the approval of the President, is authorized to have constructed and equipped in American shipyards and navy yards or elsewhere, giving preference, other things being equal, to domestic yards, or to purchase, lease, or charter, vessels suitable, as far as the commercial requirements of the marine trade of the United States may permit, for use as naval auxiliaries or Army transports, or for other naval or military purposes, and to make necessary repairs on and alterations of such vessels. \* \* \* .—(39 Stat., 730, chap. 451.)



Section 5 was expressly repealed by act of June 5, 1920 (41 Stat., 988), with certain limitations relating to contracts previously entered into, construction already commenced, etc.

By act of March 4, 1921 (41 Stat., 1382-1383), it was provided that after the approval of said act, "no contract shall be entered into or work undertaken for the construction of any additional vessels for the United States Shipping Board or the United States Shipping Board Emergency Fleet Corporation."

SEC. 6. That the President may transfer either permanently or for limited periods to the board such vessels belonging to the War or Navy Department as are suitable for commercial uses and not required for military or naval use in time of peace, and cause to be transferred to the board vessels owned by the Panama Railroad Company and not required in its business. \* \* \*.—(39 Stat., 730, chap. 451.)

SEC. 10. That the President, upon giving to the person interested such reasonable notice in writing as in his judgment the circumstances permit, may take possession, absolutely or temporarily, for any naval or military purpose, of any vessel purchased, leased, or chartered from the board: *Provided*, That if, in the judgment of the President, an emergency exists requiring such action he may take possession of any such vessel without notice.

Thereafter, upon ascertainment by agreement or otherwise, the United States shall pay the person interested the fair actual value based upon normal conditions at the time of taking of the interest of such person in every vessel taken absolutely, or if taken for a limited period, the fair charter value under normal conditions for such period. In case of disagreement as to such fair value it shall be determined by appraisers, one to be appointed by the board, one by the person interested, and a third by the two so appointed. The finding of such appraisers shall be final and binding upon both parties. \* \* \*.—(39 Stat., 731, chap. 451.)

SEC. 12. \* \* \* It shall examine the navigation laws of the United States and the rules and regulations thereunder, and make such recommendations to the Congress as it deems proper for the amendment, improvement, and revision of such laws, and for the development of the American merchant marine. \* \* \*.—(39 Stat., 732, chap. 451.)

[1916, Sept. 7. Employees, compensation for injuries, etc.] That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.—(39 Stat., 742-743, chap. 458.)

SEC. 2. That during the first three days of disability the employee shall not be entitled to compensation except as provided in section nine. No compensation shall at any time be paid for such period. \* \* \*

SEC. 7. That as long as the employee is in receipt of compensation under this Act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services

actually performed, and except pensions for service in the Army or Navy of the United States.

SEC. 8. That if at the time the disability begins the employee has annual or sick leave to his credit he may, subject to the approval of the head of the department, use such leave until it is exhausted, in which case his compensation shall begin on the fourth day of disability after the annual or sick leave has ceased.—(39 Stat., 743, chap. 458.)

SEC. 9. That immediately after an injury sustained by an employee while in the performance of his duty, whether or not disability has arisen, and for a reasonable time thereafter, the United States shall furnish to such employee reasonable medical, surgical, and hospital services and supplies unless he refuses to accept them. Such services and supplies shall be furnished by United States medical officers and hospitals, but where this is not practicable shall be furnished by private physicians and hospitals designated or approved by the commission and paid for from the employees' compensation fund. If necessary for the securing of proper medical, surgical, and hospital treatment, the employee, in the discretion of the commission, may be furnished transportation at the expense of the employees' compensation fund. \* \* \*.—(39 Stat., 743-744, chap. 458.)

SEC. 15. That every employee injured in the performance of his duty, or some one on his behalf, shall, within forty-eight hours after the injury, give written notice thereof to the immediate superior of the employee. Such notice shall be given by delivering it personally or by depositing it properly stamped and addressed in the mail.—(39 Stat., 746, chap. 458.)

SEC. 16. That the notice shall state the name and address of the employee, the year, month, day, and hour when and the particular locality where the injury occurred, and the cause and nature of the injury, and shall be signed by and contain the address of the person giving the notice.

SEC. 17. That unless notice is given within the time specified or unless the immediate superior has actual knowledge of the injury, no compensation shall be allowed, but for any reasonable cause shown, the commission may allow compensation if the notice is filed within one year after the injury.

SEC. 18. That no compensation under this Act shall be allowed to any person, except as provided in section thirty-eight, unless he or some one on his behalf shall, within the time specified in section twenty, make a written claim therefor. Such claim shall be made by delivering it at the office of the commission or to any commissioner or to any person whom the commission may by regulation designate, or by depositing it in the mail properly stamped and addressed to the commission or to any person whom the commission may by regulation designate.

SEC. 19. That every claim shall be made on forms to be furnished by the commission and shall contain all the information required by the commission. Each claim shall be sworn to by the person entitled to compensation or by the person acting on his behalf, and, except in case of death, shall be accompanied by a certificate of the employee's physician stating the nature of the injury and the nature and probable extent of the disability. For any reasonable cause shown the commission may waive the provisions of this section.—(39 Stat., 746, chap. 458.)



SEC. 20. That all original claims for compensation for disability shall be made within sixty days after the injury. All original claims for compensation for death shall be made within one year after the death. For any reasonable cause shown the commission may allow original claims for compensation for disability to be made at any time within one year. \* \* \*

SEC. 24. That immediately after an injury to an employee resulting in his death or in his probable disability, his immediate superior shall make a report to the commission containing such information as the commission may require, and shall thereafter make such supplementary reports as the commission may require \* \* \*.—(39 Stat., 747, chap. 458.)

SEC. 28. That a commission is hereby created, to be known as the United States Employees' Compensation Commission, and to be composed of three commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom shall be designated by the President as chairman. \* \* \* The principal office of said commission shall be in Washington, District of Columbia, but the said commission is authorized to perform its work at any place deemed necessary by said commission, subject to the restrictions and limitations of this Act. \* \* \*.—(39 Stat., 748, chap. 458.)

SEC. 32. That the commission is authorized to make necessary rules and regulations for the enforcement of this Act, and shall decide all questions arising under this Act. \* \* \*

SEC. 36. The commission, upon consideration of the claim presented by the beneficiary, and the report furnished by the immediate superior and the completion of such investigation as it may deem necessary, shall determine and make a finding of facts thereon and make an award for or against payment of the compensation provided for in this Act. Compensation when awarded shall be paid from the employees' compensation fund. \* \* \*.—(39 Stat., 749, chap. 458.)

See act of May 22, 1920, section 5 (41 Stat., 617),  
as to disability retirement of civil em-  
ployees; and see act of October 6, 1917,

section 312 (40 Stat., 408), as to members  
of the Navy Nurse Corps (female).

[1916, Sept. 8, sec. 4. Special estimates must conform to law.] That the Secretary of the Treasury shall not hereafter transmit special or additional estimates of appropriations to Congress unless they shall conform to the requirements of section four of the Act approved June twenty-second, nineteen hundred and six (Thirty-fourth Statutes, page four hundred and forty-eight).—(39 Stat., 830, chap. 464.)

See act of June 22, 1906, Section 4 (34 Stat., 448-449), and references thereunder.

[1917, Feb. 14. Threats against the President.] That any person who knowingly and willfully deposits or causes to be deposited for conveyance in the mail or for delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, or who knowingly and willfully otherwise makes any such threat against the President, shall upon conviction be fined not exceeding \$1,000 or imprisoned not exceeding five years, or both.—(39 Stat., 919, chap. 64.)

[1917, Mar. 3. Bureau of Efficiency; assistance of departments.] Officers and employees of the executive departments and other establishments shall

furnish authorized representatives of the Bureau of Efficiency with all information that the bureau may require for the performance of the duties imposed on it by law, and shall give such representatives access to all records and papers that may be needed for that purpose.—(39 Stat., 1081, chap. 163.)

[1917, Mar. 3. Payments to Government employees by private parties restricted.] That on and after July first, nineteen hundred and nineteen, no Government official or employee shall receive any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality, and no person, association, or corporation shall make any contribution to, or in any way supplement the salary of, any Government official or employee for the services performed by him for the Government of the United States. Any person violating any of the terms of this proviso shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than \$1,000 or imprisonment for not less than six months, or by both such fine and imprisonment as the court may determine.—(39 Stat., 1106, chap. 163.)

See sections 1763–1765, Revised Statutes, as to double salaries and extra allowances to Government employees.

[1917, Mar. 3. Virgin Islands; temporary government.] That, except as hereinafter provided, all military, civil, and judicial powers necessary to govern the West Indian Islands acquired from Denmark shall be vested in a governor and in such person or persons as the President may appoint, and shall be exercised in such manner as the President shall direct until Congress shall provide for the government of said islands: *Provided*, That the President may assign an officer of the Army or Navy to serve as such governor and perform the duties appertaining to said office: *And provided further*, That the governor of the said islands shall be appointed by and with the advice and consent of the Senate: *And provided further*, That the compensation of all persons appointed under this Act shall be fixed by the President.—(39 Stat., 1132, chap. 171.)

SEC. 2. That until Congress shall otherwise provide, in so far as compatible with the changed sovereignty and not in conflict with the provisions of this Act, the laws regulating elections and the electoral franchise as set forth in the code of laws published at Amalienborg the sixth day of April, nineteen hundred and six, and the other local laws, in force and effect in said islands on the seventeenth day of January, nineteen hundred and seventeen, shall remain in force and effect in said islands, and the same shall be administered by the civil officials and through the local judicial tribunals established in said islands, respectively; and the orders, judgments, and decrees of said judicial tribunals shall be duly enforced. With the approval of the President, or under such rules and regulations as the President may prescribe, any of said laws may be repealed, altered, or amended by the colonial council having jurisdiction. The jurisdiction of the judicial tribunals of said islands shall extend to all judicial proceedings and controversies in said islands to which the United States or any citizen thereof may be a party. In all cases arising in the said West Indian Islands and now reviewable by the courts of Denmark, writs of error and appeals shall be to the Circuit Court of Appeals for the Third Circuit, and, except as provided



in sections two hundred and thirty-nine and two hundred and forty of the Judicial Code, the judgments, orders, and decrees of such court shall be final in all such cases.—(39 Stat., 1132–1133, chap. 171.)

SEC. 3. That on and after the passage of this Act there shall be levied, collected, and paid upon all articles coming into the United States or its possessions, from the West Indian Islands ceded to the United States by Denmark, the rates of duty and internal-revenue taxes which are required to be levied, collected, and paid upon like articles imported from foreign countries: *Provided*, That all articles, the growth or product of, or manufactured in such islands from materials the growth or product of such islands or of the United States, or of both, or which do not contain foreign materials to the value of more than twenty per centum of their total value, upon which no drawback of customs duties has been allowed therein, coming into the United States from such islands shall hereafter be admitted free of duty.

SEC. 4. That until Congress shall otherwise provide all laws now imposing taxes in the said West Indian Islands, including the customs laws and regulations, shall, in so far as compatible with the changed sovereignty and not otherwise herein provided, continue in force and effect, except that articles the growth, product, or manufacture of the United States shall be admitted there free of duty: *Provided*, That upon exportation of sugar to any foreign country, or the shipment thereof to the United States or any of its possessions, there shall be levied, collected, and paid thereon an export duty of \$8 per ton of two thousand pounds irrespective of polariscope test, in lieu of any export tax now required by law.

SEC. 5. That the duties and taxes collected in pursuance of this Act shall not be covered into the general fund of the Treasury of the United States, but shall be used and expended for the government and benefit of said islands under such rules and regulations as the President may prescribe.

SEC. 6. That for the purpose of taking over and occupying said islands and of carrying this Act into effect and to meet any deficit in the revenues of the said islands resulting from the provisions of this Act the sum of \$100,000 is hereby appropriated, to be paid out of any moneys in the Treasury not otherwise appropriated, and to be applied under the direction of the President of the United States.

SEC. 7. That the sum of \$25,000,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid in the city of Washington to the diplomatic representative or other agent of His Majesty the King of Denmark duly authorized to receive said money, in full consideration of the cession of the Danish West Indian Islands to the United States made by the convention between the United States of America and His Majesty the King of Denmark entered into August fourth, nineteen hundred and sixteen, and ratified by the Senate of the United States on the seventh day of September, nineteen hundred and sixteen.—(39 Stat., 1133, chap. 171.)

SEC. 8. That this Act, with the exception of section seven, shall be in force and effect and become operative immediately upon the payment by the United States of said sum of \$25,000,000. The fact and date of such payment shall thereupon be made public by a proclamation issued by the President and published in the said Danish West Indian Islands and in the United States.

Section seven shall become immediately effective and the appropriation thereby provided for shall be immediately available.—(39 Stat., 1133–1134, chap. 171.)

See note to section 1860, Revised Statutes, as to status of Virgin Islands, and appointment of naval officer as judge therein;

**Citizenship in Virgin Islands.**—Certain Danish citizens residing in the Virgin Islands were to be held “to have accepted citizenship

in the United States,” and provision was made for the naturalization of others, by convention between the United States and Denmark, proclaimed January 25, 1917 (39 Stat., 1706, 1721). (See file 26252–143:3, July 14, 1919.)

**[1917, Mar. 4. Naval examining and retiring boards on foreign stations.]**

That hereafter the Secretary of the Navy may authorize the senior officer present, or other commanding officer, on a foreign station to order boards of medical examiners, examining boards, and retiring boards for the examination of such candidates for appointment, promotion, and retirement in the Navy and Marine Corps as may be serving in such officer's command and may be directed to appear before any such board.—(39 Stat., 1171, chap. 180.)

This paragraph modifies sections 1370, 1379, 1448, 1493, 1496, 1599, and 1622, Revised Statutes, and subsequent laws relating to appointments and promotions in the Navy.

The words “foreign station” in this paragraph are not limited to waters, ports, and

stations in foreign countries. Commanding officers of naval forces outside of the continental limits of the United States, including the commander in chief of the Pacific Fleet, may lawfully be empowered to order the boards mentioned. (File 26521–186:30, Oct. 8, 1920.)

**[1917, Mar. 4. Naval Home sales, etc., credited to naval pension fund.]**

That all moneys derived from the sale of material at the Naval Home, which was originally purchased from moneys appropriated from the income from the naval pension fund, and all moneys derived from the rental of Naval Home property, shall hereafter be turned into the naval pension fund.—(39 Stat., 1175, chap. 180.)

See sections 4750 and 4810, Revised Statutes, and notes thereto.

Similar provisions were contained in naval appropriation acts of June 30, 1914, March 3,

1915, and August 29, 1916, but without the word “hereafter” which was embodied in this paragraph.

**[1917, Mar. 4. Shore pay, warrant officers.]** Hereafter the pay of warrant officers while on shore duty during the fourth three years' service shall be \$1,750 per annum.—(39 Stat., 1181, chap. 180.)

See note to section 1556, Revised Statutes, as to pay of warrant officers.

**[1917, Mar. 4. Advances of pay to naval officers.]** Hereafter advances of pay not to exceed three months' pay in any one case may be made to officers ordered to and from sea duty and to and from shore duty beyond the seas, under such regulations as the Secretary of the Navy may prescribe.—(39 Stat., 1181–1182, chap. 180.)

See section 1563, Revised Statutes, and note thereto.

**[1917, Mar. 4. Appointment of midshipmen from enlisted men.]** Hereafter, in addition to the appointment of midshipmen to the United States Naval Academy, as now prescribed by law, the Secretary of the Navy is allowed one hundred appointments annually, instead of twenty-five as now prescribed by law, to be appointed from the enlisted men of the Navy who are citizens of the United States, and not more than twenty years of age on the date of entrance to the Naval Academy, and who shall have served not less than one year as enlisted men on the date of entrance: *Provided*, That such appointments shall be made in the order of merit from candidates who have, in competition



with each other, passed the mental examination now or hereafter required by law for entrance to the Naval Academy, and who passed the physical examination before entrance under existing laws.—(39 Stat., 1182, chap. 180.)

The act of December 20, 1917 (40 Stat., 430), as amended and reenacted by act of July 11, 1919 (41 Stat., 140), authorized the appointment of midshipmen from congressional districts, etc., "and one hun-

dred appointed annually from enlisted men of the Navy, and members of the Naval Reserve Force on active duty, as now authorized by law."

See note to section 1513, Revised Statutes.

[1917, Mar. 4. **Examinations of staff officers for advancement; dental officers credited with prior service.**] Hereafter all laws relating to the examination of officers of the Navy for promotion shall be construed to apply to the regular advancement of staff officers to higher ranks on the active list, the same as though such advancements in rank were promotions to higher grades: *Provided*, That nothing in this paragraph shall be construed as in any way affecting the original appointments of officers to the Dental Corps as provided in the Act approved August twenty-ninth, nineteen hundred and sixteen, making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes, and the time served by dental surgeons as acting or acting assistant dental surgeons shall be reckoned in computing the increased service pay and service for promotion of such as are commissioned under said Act.—(39 Stat., 1182, chap. 180.)

The first part of this paragraph was repeated, with additions, by act of May 22, 1917, section 20 (40 Stat., 89-90).

As to promotion of dental officers, see act of

August 29, 1916 (39 Stat., 573-574), as amended and reenacted by act of July 1, 1918 (40 Stat., 708-710).

[1917, Mar. 4. **Forging, etc., discharge certificates.**] Whoever shall forge, counterfeit, or falsely alter any certificate of discharge from the military or naval service of the United States, or shall in any manner aid or assist in forging, counterfeiting, or falsely altering any such certificate, or shall use, unlawfully have in his possession, exhibit, or cause to be used or exhibited, any such forged, counterfeited, or falsely altered certificate, knowing the same to be forged, counterfeited, or falsely altered, shall be fined not more than \$1,000 or imprisoned not more than one year, or both, in the discretion of the court.—(39 Stat., 1182, chap. 180.)

See sections 1426-1427, Revised Statutes, and notes thereto; and see Criminal Code, Act of March 4, 1909, section 28 (35 Stat., 1094).

[1917, Mar. 4. **Reserve material, Navy.**] For procuring apparatus and materials (other than ordnance materials and medical stores), as a war reserve necessary to be carried in the supply departments for the purpose of fitting out vessels of the fleet and merchant auxiliaries in time of war or when, in the opinion of the President, a national emergency exists, to be immediately available and to continue available until expended, \$3,000,000: *Provided*, That, to prevent deterioration such materials shall be used as required in time of peace, and when so used reimbursement shall be made to this appropriation from current naval appropriations in order that additional stocks may be procured.—(39 Stat., 1183, chap. 180.)

Similar provision was contained in act of June 15, 1917 (40 Stat., 211).

See section 3718, Revised Statutes, and note thereto.

[1917, Mar. 4. Rank of assistant civil engineers.] Officers of the Corps of Civil Engineers hereafter appointed shall, from the date of their original appointment, take rank and precedence with Lieutenants (junior grade).—(39 Stat., 1184, chap. 180.)

See note to section 1478, Revised Statutes.

[1917, Mar. 4. Navy mail clerks on shore.] That the provisions of the Act of May twenty-seventh, nineteen hundred and eight (Thirty-fifth Statutes, pages four hundred and seventeen and four hundred and eighteen), as amended by the Act of August twenty-fourth, nineteen hundred and twelve (Thirty-seventh Statutes, page five hundred and sixty), are hereby extended to authorize the designation of enlisted men of the Navy or Marine Corps as Navy mail clerks and assistant Navy mail clerks with expeditionary forces on shore.—(39 Stat., 1188, chap. 180.)

See act of May 27, 1908 (35 Stat., 417–418), and amendments noted thereunder.

[1917, Mar. 4. Warrant officers, Marine Corps; foreign shore service pay.] That marine gunners and quartermaster clerks of the Marine Corps assigned to foreign shore service shall hereafter be entitled to the same increased compensation and under the same conditions as is now or hereafter allowed by law to commissioned officers of the Marine Corps.—(39 Stat., 1188, chap. 180.)

See note to section 1612, Revised Statutes, as to pay of the Marine Corps; and see act of August 29, 1916 (39 Stat., 611).

[1917, Mar. 4. Exchange of sewing machines, etc.] That hereafter worn-out sewing machines, machinery, rubber tires, and band instruments may be exchanged in part payment for the purchase of like articles.—(39 Stat., 1189, chap. 180.)

This was a proviso following appropriation for "Clothing, Marine Corps."  
See note to section 418, Revised Statutes.

[1917, Mar. 4. Pay of enlisted men on clerical duty, marine headquarters.] That hereafter no part of the pay and allowances authorized for enlisted men detailed as clerks and messengers in the office of the Major General Commandant and the several staff offices shall be forfeited when granted furlough for not exceeding thirty days in each calendar year.—(39 Stat., 1191, chap. 180.)

By section 1612, Revised Statutes, enlisted men of the Marine Corps are entitled to the same pay as enlisted men of the Army; by act of June 4, 1920, section 4 (41 Stat., 761), amending act of June 3, 1916, section 4

(39 Stat., 167), it was provided, with reference to the Army, that "all laws and parts of laws providing for extra duty for enlisted men are repealed, to take effect July 1, 1920."

[1917, Mar. 4. Eight hour law suspended in national emergency.] That in case of national emergency the President is authorized to suspend provisions of law prohibiting more than eight hours labor in any one day of persons engaged upon work covered by contracts with the United States: *Provided further*, That the wages of persons employed upon such contracts shall be computed on a basic day rate of eight hours work, with overtime rates to be paid for at not less than time and one-half for all hours work in excess of eight hours.—(39 Stat., 1192, chap. 180.)

See act of August 1, 1892 (27 Stat., 340), as amended and reenacted by act of March 3, 1913 (37 Stat., 726–727); and see act of

June 19, 1912 (37 Stat., 137–138), and section 3738, Revised Statutes.



[1917, Mar. 4. Procurement of ships and material during war; changes in contracts; commandeering factories, etc.] (a) That the word "person" as used in paragraphs (b), (c), next hereafter shall include any individual, trustee, firm, association, company, or corporation. The word "ship" shall include any boat, vessel, submarine, or any form of aircraft, and the parts thereof. The words "war material" shall include arms, armament, ammunition, stores, supplies, and equipment for ships and airplanes, and everything required for or in connection with the production thereof. The word "factory" shall include any factory, workshop, engine works, building used for manufacture, assembling, construction, or any process, and any shipyard or dockyard. The words "United States" shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States.—(39 Stat., 1192–1193, chap. 180.)

(b) That in time of war, or of national emergency arising prior to March first, nineteen hundred and eighteen, to be determined by the President by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law:

First. Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. If any person owning, leasing, or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give to the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish, or manufacture the kind, quantity, or quality of ships or war material so ordered at such reasonable price as shall be determined by the President, the President may take immediate possession of any factory of such person, or of any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

Second. Within the limit of the amounts appropriated therefor, to modify or cancel any existing contract for the building, production, or purchase of ships or war material; and if any contractor shall refuse or fail to comply with the contract as so modified the President may take immediate possession of any factory of such contractor, or any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

Third. To require the owner or occupier of any factory in which ships or war material are built or produced to place at the disposal of the United States the whole or any part of the output of such factory, and, within the limit of the amounts appropriated therefor, to deliver such output or parts thereof in such quantities and at such times as may be specified in the order at such reasonable price as shall be determined by the President.

Fourth. To requisition and take over for use or operation by the Government any factory, or any part thereof without taking possession of the entire factory, whether the United States has or has not any contract or agreement with the owner or occupier of such factory.

That all authority granted to the President in this paragraph, to be exercised in time of national emergency, shall cease on March first, nineteen hundred and eighteen.

(d) That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material, in accordance with the provisions of paragraph (b), it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum shall make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.—(39 Stat., 1193, chap. 180.)

So much of this act as related to the authority of the President in time of national emergency, expired, by its terms, on March 1, 1918.

The authority granted the President by this act, to be exercised in time of war, was "in addition to" the authority contained in act of June 3, 1916, section 120 (39 Stat., 213); see also acts of September 7, 1916, section 10 (39 Stat., 731), and August 29, 1916 (39 Stat., 592).

Other provisions for procurement of ships and material, cancellation of contracts, etc., were contained in act of June 15, 1917 (40 Stat., 182-183), which in terms was to expire six months after a treaty of peace

proclaimed between this Government and the German Empire. Said act of June 15, 1917, was amended by acts of April 22, 1918 (40 Stat., 535), and November 4, 1918 (40 Stat., 1022), and was repealed, together with said amendments, by act of June 5, 1920 (41 Stat., 988), which also repealed an act approved July 18, 1918 (40 Stat., 913), which contained authority for commandeering vessels during the then existing war.

Other provisions on this subject, but limited to the then existing war, were contained in act of July 1, 1918 (40 Stat., 719-720).

As to changes in contracts, see note to act of August 3, 1886 (24 Stat., 215).

[1917, Apr. 25. Extension of minority enlistments.] That hereafter any enlistment for minority in the Navy or Marine Corps may be extended as is provided by law for extending an enlistment for a term of four years, under similar conditions and with like rights, privileges, benefits, and obligations.—(40 Stat., 38, chap. 6.)

See sections 1418, 1573, and 1608, Revised Statutes, and notes thereto.

[1917, May 12. Government employees, members of Officers' Reserve Corps; leaves of absence; reinstatement.] That all officers and employees of the United States or of the District of Columbia who shall be members of the Officers' Reserve Corps shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be ordered to duty with troops or at field exercises, or for instruction, for periods not to exceed fifteen days in any one calendar year.

*Provided further,* That members of the Officers' Reserve Corps who are in the employ of the United States Government or of the District of Columbia and who are ordered to duty by proper authority shall, when relieved from duty, be restored to the positions held by them when ordered to duty.—(40 Stat., 72, chap. 12.)



See act of June 3, 1916, section 80 (39 Stat., 203), as to employees belonging to National Guard; and see note to section 416, Revised

Statutes, under "Honorably discharged soldiers or sailors."

[1917, May 12. Seizure of vessels belonging to alien enemies.] That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

SEC. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation.—(40 Stat., 75, chap. 13, Pub. Res. No. 2.)

By act of June 5, 1920, section 4 (41 Stat., 990), it was provided that vessels acquired by the President pursuant to this joint resolution, "are hereby transferred" to the

Shipping Board, with certain exceptions which included "all vessels in the military and naval service of the United States."

[1917, May 18, sec. 12. Liquor prohibition authorized, near military camps, etc.] That the President of the United States, as Commander in Chief of the Army, is authorized to make such regulations governing the prohibition of alcoholic liquors in or near military camps and to the officers and enlisted men of the Army as he may from time to time deem necessary or advisable: *Provided*, That no person, corporation, partnership, or association shall sell, supply, or have in his or its possession any intoxicating or spirituous liquors at any military station, cantonment, camp, fort, post, officers' or enlisted men's club, which is being used at the time for military purposes under this Act, but the Secretary of War may make regulations permitting the sale and use of intoxicating liquors for medicinal purposes. It shall be unlawful to sell any intoxicating liquor, including beer, ale, or wine, to any officer or member of the military forces while in uniform, except as herein provided. Any person, corporation, partnership, or association violating the provisions of this section or the regulations made thereunder shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than \$1,000 or imprisonment for not more than twelve months, or both.—(40 Stat., 82-83, chap. 15.)

This section was amended by act of October 6, 1917 (40 Stat., 393), which provided that, in construing this section, "the word 'Army' shall extend to and include 'Navy';

the word 'military' shall include 'naval'; 'Article of War' shall include 'Articles for the Government of the Navy'; the words 'camps, station, cantonment, camp, fort,

post, officers' or enlisted men's club,' \* \* \* shall include such places under naval jurisdiction as the President may prescribe, and the powers therein conferred upon the Secretary of War with regard to the military service are hereby conferred upon the Secretary of the Navy with regard to the naval service."

By the National Prohibition Act of October 28, 1919, section 7 (41 Stat., 307), it was provided that "None of the provisions of this Act shall be construed to repeal any of the provisions of the 'War Prohibition Act,' or to limit or annul any order or regulation prohibiting the manufacture, sale, or disposition of intoxicating liquors within certain prescribed zones or districts, nor shall the provisions of this Act be construed to prohibit the use of the power of the military or naval authorities to enforce the regulations of the President or Secretary of War or Navy issued in pursuance of law, prohibiting the manufacture, use, possession, sale, or other disposition of intoxicating liquors during the period of the war and demobilization thereafter." The same act, section 35 (41 Stat., 317), provided that "all provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or

traffic in intoxicating liquor shall be construed as in addition to existing laws."

See section 1624, Revised Statutes, article 13, and Constitution, eighteenth amendment. Section 13 of the above act of May 18, 1917 (40 Stat., 83), relating to prostitution, etc., near military places, which was also extended by act of October 6, 1917 (40 Stat., 393), to include naval places, was in terms limited to "the present war," and is therefore omitted.

#### Arrest of civilians by naval authorities.—

The act of May 18, 1917, section 12, as amended by act of October 6, 1917, was not repealed by the National Prohibition Act of October 28, 1919. The general orders issued pursuant to the former statutes (G. O. 411, Aug. 3, 1918, and G. O. 412, Aug. 16, 1918) are therefore still in effect, and the commanding officer of a marine barracks is authorized, in the enforcement of said orders, to arrest civilians who are apprehended in the act of violating any of the provisions of said orders, and to retain them in custody no longer than is necessary to turn them over to the proper civil authorities of the United States. He is not, however, authorized to arrest civilians except on the Government reservation; offenders outside, although within the zone prescribed by general orders, should be arrested by the Federal civil authorities, to whom report of the facts should be made. (File 29163-2, Feb. 24, 1920.)

[1917, May 22. "Authorized enlisted strength" defined; instruction in trade schools.] \* \* \* That the phrase "authorized enlisted strength," as applied to the personnel of the Navy, shall mean the total number of enlisted men of the Navy authorized by law, exclusive of the Hospital Corps, apprentice seamen, those sentenced by court-martial to discharge, those detailed for duty with Naval Militia, those furloughed without pay, enlisted men of the Flying Corps, and those under instruction in trade schools: *Provided further*, That the number of enlisted men for instruction in trade schools shall not at any time exceed fourteen thousand, which number is hereby temporarily authorized. \* \* \*.—(40 Stat., 84, chap. 20; 40 Stat., 714, chap. 114.)

This section was expressly amended and reenacted to read as above by act of July 1, 1918 (40 Stat., 714). The omitted portions of this section and other provisions of this act were temporary legislation, no longer in force.

As to authorized enlisted strength of the Navy, see note to section 1417, Revised Statutes.

By act of July 11, 1919 (41 Stat., 138), temporarily increasing the "total authorized enlisted strength of the active list of the Navy," it was provided "that nothing herein shall be construed as affecting the permanent \* \* \* enlisted strength of the Regular Navy as authorized by existing law."

[1917, May 22, sec. 2. Privates, first class, Marine Corps.] \* \* \* That not more than twenty-five per centum of the authorized number of privates in the Marine Corps shall have the rank of private, first class, which rank is hereby established in the Marine Corps.—(40 Stat., 84-85, chap. 20; 40 Stat., 714, chap. 114.)

This section was expressly amended and reenacted to read as above by act of July 1, 1918 (40 Stat., 714). Other portions of the section are omitted as temporary.

See note to section 1596, Revised Statutes, as to the organization of the Marine Corps and number of enlisted men.



[1917, May 22, sec. 5. Commissions to midshipmen on graduation.] \* \* \* the class of midshipmen graduated from the Naval Academy on March twenty-ninth, nineteen hundred and seventeen, and the classes to be graduated hereafter, may be commissioned effective from date of graduation \* \* \*.—(40 Stat., 86, chap. 20; 40 Stat., 716, chap. 114.)

This section was reenacted by act of July 1, 1918 (40 Stat., 716), but without any change in the clause above set forth.

Other portions of this section are omitted as temporary.

See note to act of August 29, 1916 (39 Stat., 576), as to distribution in grades of line officers; and note to section 1521, Revised Statutes, as to appointment of midshipmen to commissioned grades on graduation from the Naval Academy.

The word "effective" as used in this clause is sufficiently broad to authorize the treating of midshipmen, when commissioned, as though they had been commissioned on, instead of from, date of graduation; and in making computations to determine the distribution of officers in the various grades and ranks. Midshipmen so commissioned may be counted as though they had been commissioned on date of graduation. (File 11130-41, May 21, 1917; see act of August 29, 1916, 39 Stat., 577, as to computations.)

[1917, May 22, sec. 11. Additional warrant officers in the Marine Corps.] That the appointment of thirty marine gunners, thirty quartermaster's clerks, and nine clerks to assistant paymasters, additional to the number now prescribed by law, and the temporary appointment of eight clerks to assistant paymasters for the war, is hereby authorized, such appointments to be made in the manner now provided by law.—(40 Stat., 87, chap. 20.)

See act of August 29, 1916 (39 Stat., 611), and note thereto, as to number of warrant officers in the Marine Corps; see act of

July 1, 1918 (40 Stat., 735), as to pay clerks in the Marine Corps; see also note to section 1596, Revised Statutes.

[1917, May 22, sec. 15. Pay of enlisted men.] That commencing June first, nineteen hundred and seventeen, and continuing until not later than six months after the termination of the present war, all enlisted men of the Navy of the United States in active service whose base pay does not exceed \$21 per month shall receive an increase of \$15 per month; those whose base pay is over \$21 and does not exceed \$24 per month, an increase of \$12 per month; those whose base pay is over \$24 and less than \$45 per month, an increase of \$8 per month; and those whose base pay is \$45 or more per month, an increase of \$6 per month: *Provided*, That the increases of pay herein authorized shall not enter into the computation of continuous-service pay.—(40 Stat., 87, chap. 20.)

By act of July 11, 1919 (41 Stat., 140), the rates of pay prescribed in this section were "made the permanent rates of pay of the enlisted men of the Navy during their present current enlistment and for those

who enlist or reenlist prior to July 1, 1920, for the term of such enlistment or reenlistment."

See note to section 1569, Revised Statutes, as to pay of enlisted men of the Navy.

[1917, May 22, sec. 16. Coast and Geodetic Survey, transfer to Navy during war; status and rank of personnel.] That the President is hereby authorized, whenever in his judgment a sufficient national emergency exists, to transfer to the service and jurisdiction of the War Department, or of the Navy Department, such vessels, equipment, stations, and personnel of the Coast and Geodetic Survey as he may deem to the best interest of the country, and after such transfer all expenses connected therewith shall be defrayed out of the appropriations for the department to which transfer is made: *Provided*, That such vessels, equipment, stations, and personnel shall be returned to the Coast and Geodetic Survey when such national emergency ceases, in the opinion of the President,

and nothing in this Act shall be construed as transferring the Coast and Geodetic Survey or any of its functions from the Department of Commerce except in time of national emergency and to the extent herein provided: *Provided further*, That any of the personnel of the Coast and Geodetic Survey who may be transferred as herein provided shall, while under the jurisdiction of the War Department or Navy Department, have proper military status and shall be subject to the laws, regulations, and orders for the government of the Army or Navy, as the case may be, in so far as the same may be applicable to persons whose retention permanently in the military service of the United States is not contemplated by law \* \* \*. While actually employed in active service under direct orders of the War Department or of the Navy Department members of the Coast and Geodetic Survey shall receive the benefit of all provisions of laws relating to disability incurred in line of duty or loss of life.

When serving with the Army or Navy the relative rank shall be as follows:

Hydrographic and geodetic engineers receiving \$4,000 or more shall rank with and after colonels in the Army and captains in the Navy.

Hydrographic and geodetic engineers receiving \$3,000 or more but less than \$4,000 shall rank with and after lieutenant colonels in the Army and commanders in the Navy.

Hydrographic and geodetic engineers receiving \$2,500 or more but less than \$3,000 shall rank with and after majors in the Army and lieutenant commanders in the Navy.

Hydrographic and geodetic engineers receiving \$2,000 or more but less than \$2,500 shall rank with and after captains in the Army and lieutenants in the Navy.

Junior hydrographic and geodetic engineers shall rank with and after first lieutenants in the Army and lieutenants (junior grade) in the Navy.

Aids shall rank with and after second lieutenants in the Army and ensigns in the Navy.

And nothing in this Act shall be construed to affect or alter their rates of pay and allowances when not assigned to military duty as hereinbefore mentioned.

The Secretary of War, the Secretary of the Navy, and the Secretary of Commerce shall jointly prescribe regulations governing the duties to be performed by the Coast and Geodetic Survey in time of war, and for the cooperation of that service with the War and Navy Departments in time of peace in preparations for its duties in war, which regulations shall not be effective unless approved by each of the said Secretaries, and included therein may be rules and regulations for making reports and communications between the officers or bureaus of the War and Navy Departments and the Coast and Geodetic Survey.—(40 Stat., 87-88, chap. 20.)

See act of October 6, 1917 (40 Stat., 393-394),  
as to members of Coast and Geodetic Sur-  
vey serving on naval courts-martial in time

of war; and see note to section 1363, Revised  
Statutes.

[1917, May 22, sec. 17. Precedence of medical officers.] That nothing contained in the Act of August twenty-ninth, nineteen hundred and sixteen, shall operate to disturb the relative position of officers in the Medical Corps with reference to precedence or promotion, but all such officers otherwise



qualified shall be advanced in rank with or ahead of officers in said corps who were their juniors on the date of said Act.—(40 Stat., 89, chap. 20.)

See note to act of August 29, 1916 (39 Stat., 576–577), under “Rank of assistant surgeons,”

for explanation of the situation which this section was enacted to remedy.

[1917, May 22, sec. 18. Ranks of admiral and vice admiral for fleet officers.] That the President be, and he is hereby, further authorized to designate six officers of the Navy for the command of fleets or subdivisions thereof and, after being so designated from the date of assuming such command until relinquishing thereof, not more than three of such officers shall each have the rank and pay of an admiral, and the others shall each have the rank and pay of a vice admiral; and the grades of admiral and vice admiral are hereby authorized and continued for the purpose of this Act: *Provided*, That in time of war the selections under the provisions of this section shall be made from the grades of rear admiral or captain on the active list of the Navy: *Provided further*, That the pay of an admiral shall be \$10,000 and the pay of a vice admiral \$9,000 per annum: *Provided further*, That in time of peace officers for the command of fleets and subdivisions thereof, as herein authorized, shall be designated from among the rear admirals on the active list of the Navy: *Provided further*, That nothing herein contained shall create any vacancy in any grade in the Navy or increase the total number of officers authorized by law: *Provided further*, That when an officer with the rank of admiral or vice admiral is detached from the command of a fleet or subdivision thereof, as herein authorized, he shall return to his regular rank in the list of officers of the Navy and shall thereafter receive only the pay and allowances of such rank: *And provided further*, That nothing in this Act shall be held or construed as amending or repealing the provisions of sections fourteen hundred and thirty-four, fourteen hundred and sixty-three, and fourteen hundred and sixty-four of the Revised Statutes of the United States.

That the provision in the Act approved March third, nineteen hundred and fifteen, for the designation of commanders in chief of certain fleets with the rank of admiral and for the designation of officers second in command of such fleets with the rank of vice admiral be, and the same is hereby, repealed.—(40 Stat., 89, chap. 20.)

See note to section 1362, Revised Statutes, under “The grade of Admiral;” note to section 1556, Revised Statutes, under

“2-3. Admirals; Vice admirals;” and see sections 1434, 1463, and 1464, Revised Statutes.

[1917, May 22, sec. 20. Advancement of staff officers, examinations; Secretary of the Navy empowered to act for President on records of certain boards.] That hereafter all laws relating to the examination of officers of the Navy for promotion shall be construed to apply to the regular advancement of staff officers to higher ranks on the active list the same as though such advancements in rank were promotions to higher grades: *Provided*, That examinations for such staff officers shall not be required except for such regular advancements in rank: *Provided further*, That the President be, and he is hereby, authorized to direct the Secretary of the Navy to take such action on the records of proceedings of naval examining boards and boards of naval surgeons for the promotion of officers of the Navy as is now required by law to be taken by the President.—(40 Stat., 89–90, chap. 20.)

See act of March 4, 1917 (39 Stat., 1182), which contained a provision identical with the first clause of this section; see also sections 1480, 1493, and 1496, Revised Statutes, and notes thereto, as to examinations for promotion. As to distinction between "rank"

and "grade" see notes to sections 421, 422, 423, 1362, 1457, 1477, 1479, 1480, and 1481 Revised Statutes.

See section 1502, Revised Statutes, as to action of the President on records of promotion boards in the Navy.

[1917, June 15. Commutation allowed Nurse Corps.] Members of Nurse Corps (female) \* \* \* shall hereafter be paid the same commutation as is or may be allowed members of the Nurse Corps of the Army.—(40 Stat., 209, chap. 29.)

See note to section 1556, Revised Statutes, under "36. Dental Corps; and Nurse Corps (female)."

[1917, June 15. Purchase of vessels for transportation of fuel.] That when, in the opinion of the President, the prices asked for the charter of vessels for the transportation of fuel are excessive, he is authorized to purchase vessels suitable for the purpose and, if money is not otherwise available, to pay for them from the appropriation "Fuel and transportation."—(40 Stat., 211, chap. 29.)

See act of April 28, 1904 (33 Stat., 518), and sections 3711, 3718, and 3728, Revised Statutes.

Identical provision was contained in act of July 1, 1918 (40 Stat., 730).

[1917, June 15. Reserve material, Navy.] For procuring apparatus and materials (other than ordnance materials and medical stores), as a war reserve necessary to be carried in the supply departments for the purpose of fitting out vessels of the fleet and merchant auxiliaries in time of war or when, in the opinion of the President, a national emergency exists, \$2,000,000: *Provided*, That to prevent deterioration materials purchased under the reserve material Navy fund shall be used as required in time of peace, and when so used reimbursement shall be made to this appropriation from current naval appropriations in order that additional stocks may be procured.—(40 Stat., 211, chap. 29.)

Similar provision was contained in act of March 4, 1917 (39 Stat., 1183).

See sections 3689, 3690, and 3718, Revised Statutes, and notes thereto.

[1917, June 15. Espionage; international relations; enforcement of neutrality; forgery of Government seal, military papers, etc.; illegal use of mails; use of naval forces.]

## TITLE I.

### ESPIONAGE.

SECTION 1. That (a) whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers



or agents, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored, under any contract or agreement with the United States, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place within the meaning of section six of this title; or (b) whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or (c) whoever, for the purpose aforesaid, receives or obtains or agrees or attempts or induces or aids another to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts or induces or aids another to receive or obtain it, that it has been or will be obtained, taken, made or disposed of by any person contrary to the provisions of this title; or (d) whoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or (e) whoever, being intrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, or information, relating to the national defense, through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, shall be punished by a fine of not more than \$10,000, or by imprisonment for not more than two years, or both.—(40 Stat., 217–218, chap. 30.)

See Criminal Code, act of March 4, 1909, section 45 (35 Stat., 1097).

SEC. 2. (a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided*, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished

by death or by imprisonment for not more than thirty years; and (b) whoever, in time of war, with intent that the same shall be communicated to the enemy, shall collect, record, publish, or communicate, or attempt to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for not more than thirty years.—(40 Stat., 218–219, chap. 30.)

SEC. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.—(40 Stat., 219, chap. 30.)

This section was amended and reenacted by act of May 16, 1918 (40 Stat., 553–554), which amendatory act was repealed and the original section, as above set forth,

“revived and restored with the same force and effect as originally enacted,” by Joint Resolution of March 3, 1921 (41 Stat., 1360).

SEC. 4. If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the Act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine.

SEC. 5. Whoever harbors or conceals any person who he knows, or has reasonable grounds to believe or suspect, has committed, or is about to commit, an offense under this title shall be punished by a fine of not more than \$10,000 or by imprisonment for not more than two years, or both.

SEC. 6. The President in time of war or in case of national emergency may by proclamation designate any place other than those set forth in subsection (a) of section one hereof in which anything for the use of the Army or Navy is being prepared or constructed or stored as a prohibited place for the purposes of this title: *Provided*, That he shall determine that information with respect thereto would be prejudicial to the national defense.

SEC. 7. Nothing contained in this title shall be deemed to limit the jurisdiction of the general courts-martial, military commissions, or naval courts-martial under sections thirteen hundred and forty-two, thirteen hundred and forty-three, and sixteen hundred and twenty-four of the Revised Statutes as amended.



SEC. 8. The provisions of this title shall extend to all Territories, possessions, and places subject to the jurisdiction of the United States whether or not contiguous thereto, and offenses under this title when committed upon the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States and outside the territorial limits thereof shall be punishable hereunder.

SEC. 9. The Act entitled "An Act to prevent the disclosure of national defense secrets," approved March third, nineteen hundred and eleven, is hereby repealed.—(40 Stat. 219, chap. 30.)

## TITLE II.

### VESSELS IN PORTS OF THE UNITED STATES.

SECTION 1. Whenever the President by proclamation or Executive order declares a national emergency to exist by reason of actual or threatened war, insurrection, or invasion, or disturbance or threatened disturbance of the international relations of the United States, the Secretary of the Treasury may make, subject to the approval of the President, rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, may inspect such vessel at any time, place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of the rights and obligations of the United States, may take, by and with the consent of the President, for such purposes, full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by him to go or remain on board thereof.

Within the territory and waters of the Canal Zone the Governor of the Panama Canal, with the approval of the President, shall exercise all the powers conferred by this section on the Secretary of the Treasury.

SEC. 2. If any owner, agent, master, officer, or person in charge, or any member of the crew of any such vessel fails to comply with any regulation or rule issued or order given by the Secretary of the Treasury or the Governor of the Panama Canal under the provisions of this title, or obstructs or interferes with the exercise of any power conferred by this title, the vessel, together with her tackle, apparel, furniture, and equipment, shall be subject to seizure and forfeiture to the United States in the same manner as merchandise is forfeited for violation of the customs revenue laws; and the person guilty of such failure, obstruction, or interference shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

SEC. 3. It shall be unlawful for the owner or master or any other person in charge or command of any private vessel, foreign or domestic, or for any member of the crew or other person, within the territorial waters of the United States, willfully to cause or permit the destruction or injury of such vessel or knowingly to permit said vessel to be used as a place of resort for any person conspiring with another or preparing to commit any offense against the United States, or in violation of the treaties of the United States or of the obligations of the United States under the law of nations, or to defraud the United States,

or knowingly to permit such vessels to be used in violation of the rights and obligations of the United States under the law of nations; and in case such vessel shall be so used, with the knowledge of the owner or master or other person in charge or command thereof, the vessel, together with her tackle, apparel, furniture, and equipment, shall be subject to seizure and forfeiture to the United States in the same manner as merchandise is forfeited for violation of the customs revenue laws; and whoever violates this section shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

SEC. 4. The President may employ such part of the land or naval forces of the United States as he may deem necessary to carry out the purpose of this title.—(40 Stat., 220, chap. 30.)

## TITLE V.

### ENFORCEMENT OF NEUTRALITY.

SECTION 1. During a war in which the United States is a neutral nation, the President, or any person thereunto authorized by him, may withhold clearance from or to any vessel, domestic or foreign, which is required by law to secure clearance before departing from port or from the jurisdiction of the United States, or, by service of formal notice upon the owner, master, or person in command or having charge of any domestic vessel not required by law to secure clearances before so departing, to forbid its departure from port or from the jurisdiction of the United States, whenever there is reasonable cause to believe that any such vessel, domestic or foreign, whether requiring clearance or not, is about to carry fuel, arms, ammunition, men, supplies, dispatches, or information to any warship, tender, or supply ship of a foreign belligerent nation in violation of the laws, treaties, or obligations of the United States under the law of nations; and it shall thereupon be unlawful for such vessel to depart.—(40 Stat., 221, chap. 30.)

See Criminal Code, act of March 4, 1909, sections 9–18 (35 Stat., 1089–1091), for “offenses against neutrality.”

SEC. 2. During a war in which the United States is a neutral nation, the President, or any person thereunto authorized by him, may detain any armed vessel owned wholly or in part by American citizens, or any vessel, domestic or foreign (other than one which has entered the ports of the United States as a public vessel), which is manifestly built for warlike purposes or has been converted or adapted from a private vessel to one suitable for warlike use, until the owner or master, or person having charge of such vessel, shall furnish proof satisfactory to the President, or to the person duly authorized by him, that the vessel will not be employed by the said owners, or master, or person having charge thereof, to cruise against or commit or attempt to commit hostilities upon the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with which the United States is at peace, and that the said vessel will not be sold or delivered to any belligerent nation, or to an agent, officer, or citizen of such nation, by them or any of them, within the jurisdiction of the United States, or, having left that jurisdiction, upon the high seas.—(40 Stat., 221–222, chap. 30.)



SEC. 3. During a war in which the United States is a neutral nation, it shall be unlawful to send out of the jurisdiction of the United States any vessel built, armed, or equipped as a vessel of war, or converted from a private vessel into a vessel of war, with any intent or under any agreement or contract, written or oral, that such vessel shall be delivered to a belligerent nation, or to an agent, officer, or citizen of such nation, or with reasonable cause to believe that the said vessel shall or will be employed in the service of any such belligerent nation after its departure from the jurisdiction of the United States.

SEC. 4. During a war in which the United States is a neutral nation, in addition to the facts required by sections forty-one hundred and ninety-seven, forty-one hundred and ninety-eight, and forty-two hundred of the Revised Statutes to be set out in the masters' and shippers' manifests before clearance will be issued to vessels bound to foreign ports, each of which sections of the Revised Statutes is hereby declared to be and is continued in full force and effect, every master or person having charge or command of any vessel, domestic or foreign, whether requiring clearance or not, before departure of such vessel from port shall deliver to the collector of customs for the district wherein such vessel is then located a statement duly verified by oath, that the cargo or any part of the cargo is or is not to be delivered to other vessels in port or to be transshipped on the high seas and, if it is to be so delivered or transshipped, stating the kind and quantities and the value of the total quantity of each kind of article so to be delivered or transshipped, and the name of the person, corporation, vessel, or government, to whom the delivery or transshipment is to be made; and the owners, shippers, or consignors of the cargo of such vessel shall in the same manner and under the same conditions deliver to the collector like statements under oath as to the cargo or the parts thereof laden or shipped by them, respectively.

SEC. 5. Whenever it appears that the vessel is not entitled to clearance or whenever there is reasonable cause to believe that the additional statements under oath required in the foregoing section are false, the collector of customs for the district in which the vessel is located may, subject to review by the Secretary of Commerce, refuse clearance to any vessel, domestic or foreign, and by formal notice served upon the owners, master, or person or persons in command or charge of any domestic vessel for which clearance is not required by law, forbid the departure of the vessel from the port or from the jurisdiction of the United States; and it shall thereupon be unlawful for the vessel to depart.

SEC. 6. Whoever, in violation of any of the provisions of this title, shall take, or attempt or conspire to take, or authorize the taking of any such vessel, out of port or from the jurisdiction of the United States, shall be fined not more than \$10,000 or imprisoned not more than five years, or both; and, in addition, such vessel, her tackle, apparel, furniture, equipment, and her cargo shall be forfeited to the United States.—(40 Stat., 222, chap. 30.)

SEC. 7. Whoever, being a person belonging to the armed land or naval forces of a belligerent nation or belligerent faction of any nation and being interned in the United States, in accordance with the law of nations, shall leave or attempt to leave said jurisdiction, or shall leave or attempt to leave the limits of internment in which freedom of movement has been allowed, without

permission from the proper official of the United States in charge, or shall willfully overstay a leave of absence granted by such official, shall be subject to arrest by any marshal or deputy marshal of the United States, or by the military or naval authorities thereof, and shall be returned to the place of internment and there confined and safely kept for such period of time as the official of the United States in charge shall direct; and whoever, within the jurisdiction of the United States and subject thereto, shall aid or entice any interned person to escape or attempt to escape from the jurisdiction of the United States, or from the limits of internment prescribed, shall be fined not more than \$1,000 or imprisoned not more than one year, or both. \* \* \*

SEC. 9. That the President may employ such part of the land or naval forces of the United States as he may deem necessary to carry out the purposes of this title. \* \* \*

SEC. 11. The joint resolution approved March fourth, nineteen hundred and fifteen, "To empower the President to better enforce and maintain the neutrality of the United States," and any Act or parts of Acts in conflict with the provisions of this title are hereby repealed.—(40 Stat., 223, chap. 30.)

## TITLE VI.

### SEIZURE OF ARMS AND OTHER ARTICLES INTENDED FOR EXPORT.

SECTION 1. Whenever an attempt is made to export or ship from or take out of the United States, any arms or munitions of war, or other articles, in violation of law, or whenever there shall be known or probable cause to believe that any such arms or munitions of war, or other articles, are being or are intended to be exported, or shipped from, or taken out of the United States, in violation of law, the several collectors, naval officers, surveyors, inspectors of customs, and marshals, and deputy marshals of the United States, and every other person duly authorized for the purpose by the President, may seize and detain any articles or munitions of war about to be exported or shipped from, or taken out of the United States, in violation of law, and the vessels or vehicles containing the same, and retain possession thereof until released or disposed of as hereinafter directed. If upon due inquiry as hereinafter provided, the property seized shall appear to have been about to be so unlawfully exported, shipped from, or taken out of the United States, the same shall be forfeited to the United States \* \* \*.—(40 Stat., 223-224, chap. 30.)

SEC. 6. Except in those cases in which the exportation of arms and munitions of war or other articles is forbidden by proclamation or otherwise by the President, as provided in section one of this title, nothing herein contained shall be construed to extend to, or interfere with any trade in such commodities, conducted with any foreign port or place wheresoever, or with any other trade which might have been lawfully carried on before the passage of this title, under the law of nations, or under the treaties or conventions entered into by the United States, or under the laws thereof \* \* \*.—(40 Stat., 225, chap. 30.)

SEC. 8. The President may employ such part of the land or naval forces of the United States as he may deem necessary to carry out the purposes of this title \* \* \*.—(40 Stat., 225, chap. 30.)



## TITLE X.

## COUNTERFEITING GOVERNMENT SEAL.

SECTION 1. Whoever shall fraudulently or wrongfully affix or impress the seal of any executive department, or of any bureau, commission, or office of the United States, to or upon any certificate, instrument, commission, document, or paper of any description; or whoever, with knowledge of its fraudulent character, shall with wrongful or fraudulent intent use, buy, procure, sell, or transfer to another any such certificate, instrument, commission, document, or paper, to which or upon which said seal has been so fraudulently affixed or impressed, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.—(40 Stat., 227–228, chap. 30.)

SEC. 2. Whoever shall falsely make, forge, counterfeit, mutilate, or alter, or cause or procure to be made, forged, counterfeited, mutilated, or altered, or shall willingly assist in falsely making, forging, counterfeiting, mutilating, or altering, the seal of any executive department, or any bureau, commission, or office of the United States, or whoever shall knowingly use, affix, or impress any such fraudulently made, forged, counterfeited, mutilated, or altered seal to or upon any certificate, instrument, commission, document, or paper, of any description, or whoever with wrongful or fraudulent intent shall have possession of any such falsely made, forged, counterfeited, mutilated, or altered seal, knowing the same to have been so falsely made, forged, counterfeited, mutilated, or altered, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both.

SEC. 3. Whoever shall falsely make, forge, counterfeit, alter, or tamper with any naval, military, or official pass or permit, issued by or under the authority of the United States, or with wrongful or fraudulent intent shall use or have in his possession any such pass or permit, or shall personate or falsely represent himself to be or not to be a person to whom such pass or permit has been duly issued, or shall willfully allow any other person to have or use any such pass or permit, issued for his use alone, shall be fined not more than \$2,000 or imprisoned not more than five years, or both \* \* \*.—(40 Stat., 228, chap. 30.)

## TITLE XII.

## USE OF MAILS.

SECTION 1. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind, in violation of any of the provisions of this Act is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier: *Provided*, That nothing in this Act shall be so construed as to authorize any person other than an employee of the Dead Letter Office, duly authorized thereto, or other person upon a search warrant authorized by law, to open any letter not addressed to himself.

SEC. 2. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter

or thing, of any kind, containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, is hereby declared to be nonmailable.—(40 Stat., 230, chap. 30.)

SEC. 3. Whoever shall use or attempt to use the mails or Postal Service of the United States for the transmission of any matter declared by this title to be nonmailable, shall be fined not more than \$5,000 or imprisoned not more than five years, or both. Any person violating any provision of this title may be tried and punished either in the district in which the unlawful matter or publication was mailed, or to which it was carried by mail for delivery according to the direction thereon, or in which it was caused to be delivered by mail to the person to whom it was addressed.—(40 Stat., 230-231, chap., 30.)

By act of May 16, 1918 (40 Stat., 554), a new section, numbered 4, was added to this title, denying the use of the mails to any person violating this act; which said amendatory act was repealed by Joint

Resolution of March 3, 1921 (41 Stat., 1360).

See Criminal Code, March 4, 1909, section 189-230 (35 Stat., 1124-1134), for "offenses against the postal service."

## TITLE XIII.

### GENERAL PROVISIONS.

SECTION 1. The term "United States" as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States. \* \* \* —(40 Stat., 231, chap. 30.)

[1917, July 2. **Condemnation of lands for military purposes.**] That hereafter the Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided*, That when the owner of such land, interest, or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay: *Provided further*, That the Secretary of War is hereby authorized to accept on behalf of the United States donations of land and the interest and rights pertaining thereto required for the above-mentioned purposes: *And provided further*, That when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes, and the provision of section three hundred and fifty-five of the Revised Statutes, providing that no public money shall be expended upon such land until the



written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land is located has been given, shall be, and the same are hereby, suspended during the period of the existing emergency.—(40 Stat., 241, chap. 35; 40 Stat., 518-519, chap. 51.)

This act was expressly amended and reenacted to read as above by act of April 11, 1918 (40 Stat., 518-519); as so amended, it was extended to the Navy for certain pur-

poses by act of July 9, 1918 (40 Stat., 888).  
See acts of August 1, 1888 (25 Stat., 357), and June 3, 1916, section 124 (39 Stat., 215).

[1917, July 9. Public Health Service, subject to Navy laws, etc.] That when officers of the United States Public Health Service are serving on Coast Guard vessels in time of war, or are detailed in time of war for duty with the Army or Navy in accordance with law, they shall be entitled to pensions for themselves and widows and children, if any, as are now provided for officers of corresponding grade and length of service of the Coast Guard, Army or Navy, as the case may be, and shall be subject to the laws prescribed for the government of the service to which they are respectively detailed.—(40 Stat., 242, chap. 37, Pub. Res. No. 9.)

See acts of July 1, 1902, section 4 (32 Stat., 713), February 3, 1905 (33 Stat., 650-651),

and October 6, 1917 (40 Stat., 393); and see note to section 1368, Revised Statutes.

[1917, Oct. 6, sec. 6. Transfer of employees from executive departments to independent establishments, etc.] That section five of the Act of June twenty-second, nineteen hundred and six, prohibiting the transfer of employees from one executive department to another, shall apply with equal force and effect to the transfer of employees from executive departments to independent establishments and vice versa and to the transfer of employees from one independent establishment to another: *Provided*, That the United States Shipping Board Emergency Fleet Corporation shall be considered a Government establishment for the purposes of this section.—(40 Stat., 383, chap. 79.)

See act of June 22, 1906, section 5 (34 Stat., 449); act of August 26, 1912, section 7 (37 Stat., 626), as amended and reenacted by act of March 4, 1913, section 4 (37 Stat., 790);

act of March 28, 1918, section 2 (40 Stat., 498), and notes to sections 169 and 416, Revised Statutes; see also next section of this act, set forth below.

[1917, Oct. 6, sec. 7. Lump-sum employees; restrictions on pay of.] That no civil employee in any of the executive departments or other Government establishments, or who has been employed therein within the period of one year next preceding his proposed employment in any other executive department or other Government establishment, shall be employed hereafter and paid from a lump-sum appropriation in any other executive department or other Government establishment at an increased rate of compensation. And no civil employee in any of the executive departments or other Government establishments or who has been employed therein within the period of one year next preceding his proposed employment in any other executive department or other Government establishment and who may be employed in another executive department or other Government establishment shall be granted an increase in compensation within the period of one year following such reemployment: *Provided*, That the United States Shipping Board Emergency Fleet Corporation shall be considered a Government establishment for the

purposes of this section: *Provided further*, That this section shall not be construed to repeal section five of the Act of June twenty-second, nineteen hundred and six, which prohibits the transfer of employees from one department to another.—(40 Stat., 383-384, chap. 79.)

See preceding section of this act, set forth  
above, and references thereunder.  
By act of March 28, 1918, section 2 (40 Stat.,

498), this section was extended to include  
all branches of the government of the  
District of Columbia.

[1917, Oct. 6. Explosives, manufacture and possession in time of war restricted; use of public officers to enforce.] SEC. 2. \* \* \* That nothing herein contained shall be construed to prevent the manufacture, under the authority of the Government, of explosives for, their sale to or their possession by, the military or naval service of the United States of America. \* \* \*.—(40 Stat., 386, chap. 83.)

SEC. 21. That the Director of the Bureau of Mines, with the approval of the President, is hereby authorized to utilize such agents, agencies, and all officers of the United States and of the several States, Territories, dependencies, and municipalities thereof, and the District of Columbia, in the execution of this Act, and all agents, agencies, and all officers of the United States and of the several States and Territories, dependencies, and municipalities thereof, and the District of Columbia, shall hereby have full authority for all acts done by them in the execution of this Act when acting by the direction of the Bureau of Mines.—(40 Stat., 389, chap. 83.)

[1917, Oct. 6. Reimbursement of naval personnel for lost or damaged property]. That the Paymaster General of the Navy be, and he is hereby, authorized and directed to reimburse such officers, enlisted men, and others in the naval service of the United States as may have suffered, or may hereafter suffer, loss or destruction of or damage to their personal property and effects in the naval service due to the operations of war or by shipwreck or other marine disaster when such loss, destruction, or damage was without fault or negligence on the part of the claimant, or where the private property so lost, destroyed, or damaged was shipped on board an unseaworthy vessel by order of an officer authorized to give such order or direct such shipment, or where it appears that the loss, destruction, or damage of or to the private property of the claimant was in consequence of his having given his attention to the saving of the lives of others or of property belonging to the United States which was in danger at the same time and under similar circumstances. And the liability of the Government under this Act shall be limited to such articles of personal property as the Chief of the Bureau of Navigation of the Navy Department, with reference to the personnel of the Navy, or the major general commandant of the Marine Corps, with reference to the personnel of that corps, in his discretion, shall decide to be reasonable, useful, and proper for such officer, enlisted man, or other person while engaged in the public service in line of duty, and the certificate of said chief of bureau or major general commandant, as the case may be, shall be sufficient voucher for and shall be final as to all matters necessary to the establishment and payment or settlement of any claim filed hereunder; and the action of the said chief of bureau or major general commandant, as the case may be, upon all claims arising under this Act shall be final, and no right to prosecute a claim or action in the Court of Claims or in



any other court of the United States, or before any accounting officer of the United States, or elsewhere, except as herein provided, shall accrue to any person by virtue of this Act: *Provided*, That the liability of the Government under this Act shall be limited to such articles of personal property as are required by the United States Naval Regulations and in force at the time of loss or destruction for such officers, petty officers, seamen, or others engaged in the public service in the line of duty: *Provided further*, That with reference to claims of persons in the Marine Corps filed under the terms of this Act the paymaster of the Marine Corps shall make the reimbursement in money, and the quartermaster of the Marine Corps shall make the reimbursement in kind herein provided for: *And provided further*, That all claims now existing under this Act shall be presented within two years from the passage hereof and not thereafter; and all such claims hereafter arising shall be presented within two years from the occurrence of the loss, destruction, or damage: *And provided further*, That the term "in the naval service," as herein employed, shall be held to include service performed on board any vessel, whether of the Navy or not, provided the claimant is serving on such vessel pursuant to the orders of duly constituted naval authority: *And provided further*, That all claimants under this Act shall be required to submit their claims in writing and under oath to the said Chief of the Bureau of Navigation or major general commandant, as the case may be: *And provided further*, That claims arising in the manner indicated in this Act and which have been settled under the terms of previously existing law shall be regarded as finally determined and no other or further right of recovery under the provisions hereof shall accrue to persons who have submitted such claims as aforesaid: *And provided further*, That sections two hundred and eighty-eight, two hundred and eighty-nine, and two hundred and ninety, Revised Statutes, and the Act of March second, eighteen hundred and ninety-five (Twenty-eighth Statutes, page nine hundred and sixty-two), are hereby repealed: *And provided further*, That reimbursement for loss, destruction, or damage sustained and determined as herein provided shall be made in kind for such articles as are customarily issued to the service and shall be made in money for other articles at the valuation thereof at the time of their loss, destruction, or damage: *And provided further*, That in cases involving persons in the Navy reimbursement in money shall be made from the appropriation "Pay of the Navy," and reimbursement in kind shall be made from the appropriation "Outfits on first enlistment," and in cases involving persons in the Marine Corps reimbursement in money shall be made from the appropriation "Pay, Marine Corps," and reimbursement in kind shall be made from the appropriation "Clothing, Marine Corps," respectively, current at the time the claim covering such loss, damage, or destruction is paid: *And provided further*, That the provisions of this Act shall apply to the personnel of the Coast Guard in like manner as to the personnel of the Navy, whether the Coast Guard is operating under the Treasury Department or operating as a part of the Navy, and all of the duties, which, under this Act, devolve upon the major general commandant of the Marine Corps with reference to the personnel of that corps, shall devolve upon the captain commandant of the Coast Guard, and in cases involving persons in the Coast Guard reimbursement in money

shall be made by a disbursing officer of the Coast Guard from the appropriation "Coast Guard" and reimbursement in kind shall be made by the captain commandant from the appropriation "Coast Guard."—(40 Stat., 389-391, chap. 85.)

See notes to sections 288-290, and 3689, Revised Statutes.

[1917, Oct. 6. Officers of auxiliary naval forces eligible for court-martial duty.] That when actively serving under the Navy Department in time of war or during the existence of an emergency, pursuant to law, as a part of the naval forces of the United States, commissioned officers of the Naval Reserve Force, Marine Corps Reserve, National Naval Volunteers, Naval Militia, Coast Guard, Lighthouse Service, Coast and Geodetic Survey, and Public Health Service are hereby empowered to serve on naval courts-martial and deck courts under such regulations necessary for the proper administration of justice and in the interests of the services involved, as may be prescribed by the Secretary of the Navy. \* \* \*

*And provided further,* That any Act or parts of Acts in conflict with the provisions hereof are hereby repealed.—(40 Stat., 393-394, chap. 93.)

All laws relating to the Naval Militia and the National Naval Volunteers were repealed by act of July 1, 1918 (40 Stat., 708); some provisions of law relating to the Naval Militia were revived, until June 30, 1922, by act of June 4, 1920 (41 Stat., 817).

The omitted portions of this act specifically repealed certain prior laws relating to the Naval Militia and National Naval Volunteers.  
See note to section 1363, Revised Statutes, and laws there cited.

[1917, Oct. 6. Publication of inventions in time of war restricted; use of by Government.] That whenever during a time when the United States is at war the publication of an invention by the granting of a patent might, in the opinion of the Commissioner of Patents, be detrimental to the public safety or defense or might assist the enemy or endanger the successful prosecution of the war he may order that the invention be kept secret and withhold the grant of a patent until the termination of the war: *Provided*, That the invention disclosed in the application for said patent may be held abandoned upon it being established before or by the commissioner that in violation of said order said invention has been published or that an application for a patent therefor has been filed in a foreign country by the inventor or his assigns or legal representatives, without the consent or approval of the Commissioner of Patents, or under a license of the Secretary of Commerce as provided by law.

When an applicant whose patent is withheld as herein provided and who faithfully obeys the order of the Commissioner of Patents above referred to shall tender his invention to the Government of the United States for its use, he shall, if and when he ultimately received a patent, have the right to sue for compensation in the Court of Claims, such right to compensation to begin from the date of the use of the invention by the Government.—(40 Stat., 394-395, chap. 95.)

See section 4894, Revised Statutes, and references thereunder.  
Similar provisions were contained in the

"Trading with the enemy Act" of October 6, 1917, section 10 (i) (40 Stat., 422).

[1917, Oct. 6. Ratings and pay of enlisted men in the Navy.] That the ratings of engineman, first class, engineman, second class; blacksmith, first



class, blacksmith, second class; coppersmith, first class, coppersmith, second class; pattern maker, first class, pattern maker, second class; molder, first class, molder, second class; chief special mechanic and special mechanic, first class, be, and they are hereby, established in the artificer branch of the Navy with the following rates of base pay per month: Engineman, first class, \$45; engineman, second class, \$40; blacksmith, first class, \$65; blacksmith, second class, \$50; coppersmith, first class, \$65; coppersmith, second class, \$50; pattern maker, first class, \$65; pattern maker, second class, \$50; molder, first class, \$65; molder, second class, \$50; chief special mechanic, \$127; special mechanic, first class, \$80: *Provided*, That the base pay of machinists' mates, second class, and water tenders be, and it is hereby, increased from \$40 to \$45 per month: *Provided further*, That all the aforesaid rates of pay shall be subject to such increases of pay and allowances as are, or may hereafter be, authorized by law for enlisted men of the Navy: *And provided further*, That appointments or enlistments in the said ratings may be made from enlisted men in the Navy or from civil life, respectively, and the qualifications of candidates for any of said ratings shall be determined in accordance with such regulations as the Secretary of the Navy may prescribe.—(40 Stat., 397, chap. 103.)

See note to section 1569, Revised Statutes, for later laws as to the ratings and pay of enlisted men.

[1917, Oct. 6. War Risk Insurance; allotments; compensation for death or disability; insurance.] That the first section of the Act entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department," approved September second, nineteen hundred and fourteen, as amended, is hereby amended to read as follows:

#### "ARTICLE I.

"SECTION 1. That there is established in the Treasury Department a Bureau to be known as the Bureau of War Risk Insurance \* \* \*."—(40 Stat., 398, chap. 105.)

SEC. 2. That such Act of September second, nineteen hundred and fourteen, as amended, is hereby amended by adding new sections, as follows: \* \* \*

"SEC. 13. [POWERS OF DIRECTOR.] That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in section five \* \* \*."—(40 Stat., 399, chap. 105; 40 Stat., 555, chap. 77.)

Section 13 is reproduced above as reenacted by act of May 20, 1918 (40 Stat., 555).  
See note to section 471, Revised Statutes.

"SEC. 14. [ASSISTANCE OF NAVY SURGEONS.] \* \* \* The bureau shall, by arrangement with the Secretary of War and the Secretary of the Navy, respectively, make use of the services of surgeons in the Army and Navy. \* \* \*."—(40 Stat., 399, chap. 105.)

"SEC. 15. [REPORTS BY EXECUTIVE DEPARTMENTS.] \* \* \* The director may obtain such information and such reports from officials and employees of

the departments of the Government of the United States and of the States as may be agreed upon by the heads of the respective departments. \* \* \*.”—(40 Stat., 399, chap. 105.)

“SEC. 22. [DEFINITIONS.] \* \* \* In Articles II, III, and IV of this Act unless the context otherwise requires—\* \* \*

“(6) The term ‘commissioned officer’ includes a warrant officer, but includes only an officer in active service in the military or naval forces of the United States.

“(7) The terms ‘man’ and ‘enlisted man’ mean a person, whether male or female, and whether enlisted, enrolled, or drafted into active service in the military or naval forces of the United States, and include noncommissioned and petty officers, and members of training camps authorized by law.

“(8) The term ‘enlistment’ includes voluntary enlistment, draft, and enrollment in active service in the military or naval forces of the United States.

“(10) The term ‘injury’ includes disease.

“(11) The term ‘pay’ means the pay for service in the United States according to grade and length of service, excluding all allowances.

“(12) The term ‘military or naval forces’ means the Army, the Navy, the Marine Corps, the Coast Guard, the Naval Reserves, the National Naval Volunteers, and any other branch of the United States service while serving pursuant to law with the Army or the Navy.”—(40 Stat., 401–402, chap. 105.)

“SEC. 28. [BENEFITS NOT ASSIGNABLE, NOR SUBJECT TO DEBTS, ETC.; EXCEPTION.] That the allotments and family allowances, compensation, and insurance payable under Articles II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Articles II, III, or IV; and shall be exempt from all taxation: *Provided*, That such allotments and family allowances, compensation, insurance shall be subject to any claims which the United States may have, under Articles II, III, and IV, against the person on whose account the allotments and family allowances, compensation, or insurance is payable.”—(40 Stat., 402, chap. 105; 40 Stat., 609, chap. 104.)

This section was added, by act of June 25, 1918 (40 Stat., 609), to the act of September 2, 1914, as amended by act of October 6, 1917 (40 Stat., 402).

By act of December 24, 1919, section 6 (41 Stat., 372), it was provided “that the provisions of section 28 of the war Risk Insurance Act

shall not be construed to prohibit the assignment by any person to whom converted insurance shall be payable under Article IV of such Act of his interest in such insurance to any other member of the permitted class of beneficiaries.”

“SEC. 29. [DISCHARGE OR DISMISSAL FOR CAUSE BAR TO BENEFITS.] That the discharge or dismissal of any person from the military or naval forces on the ground that he is an enemy alien, conscientious objecter, or a deserter, or as guilty of mutiny, treason, spying, or any offense involving moral turpitude, or willful and persistent misconduct shall terminate any insurance granted on the life of such person under the provisions of Article IV, and shall bar all rights to any compensation under Article III or any insurance under Article IV.”—(40 Stat., 402, chap. 105; 40 Stat., 609–610, chap. 104.)

This section was added, by act of June 25, 1918 (40 Stat., 609), to the act of September 2, 1914 as amended by act of October 6, 1917 (40 Stat., 402).



## ARTICLE II.

## ALLOTMENTS AND FAMILY ALLOWANCES.

SEC. 200. [PERSONS INCLUDED BY ARTICLE.] That the provisions of this article shall apply to all enlisted men in the military or naval forces of the United States, except the Philippine Scouts, the insular force of the Navy, and the Samoan native guard and band of the Navy.—(40 Stat., 402, chap. 105; 40 Stat., 610, chap. 104.)

This section of the Act of October 6, 1917, was reenacted to read as above by act of June 25, 1918, section 3 (40 Stat., 610).

SEC. 202. [VOLUNTARY ALLOTMENTS OF PAY.—That the enlisted man may allot any proportion or proportions or any fixed amount or amounts of his monthly pay or of the proportion thereof remaining after the compulsory allotment, for such purposes and for the benefit of such person or persons as he may direct, subject, however, to such conditions and limitations as may be prescribed under regulations to be made by the Secretary of War and the Secretary of the Navy, respectively.—(40 Stat., 403, chap. 105.)

The provisions of this act, section 201, as to "compulsory allotments," are omitted as temporary. See also section 211, below, as to voluntary allotments.

By act of November 4, 1918 (40 Stat., 1024), it was provided that "for the purpose of the payment of allotments made by the enlisted men \* \* \* under Article II of the Act of October 6, 1917, as amended, an

enlisted man reported as missing in action shall be considered as occupying a pay status until his actual status has been determined by proper official authority of the department in which the man served or is serving: *Provided*, That payments authorized hereunder shall not continue for more than one year."

SEC. 203. [COMPULSORY DEPOSIT OF UNALLOTTED PAY.] That in case one-half of an enlisted man's monthly pay is not allotted, regulations to be made by the Secretary of War and the Secretary of the Navy, respectively, may require, under circumstances and conditions as may be prescribed in such regulations, that any proportion of such one-half pay as is not allotted shall be deposited to his credit, to be held during such period of his service as may be prescribed. Such deposit shall bear interest at the same rate as United States bonds bear for the same period, and, when payable, shall be paid principal and interest to the enlisted man, if living, otherwise to any beneficiary or beneficiaries he may have designated, or if there be no such beneficiary, then to the person or persons who, under the laws of the State of his residence, would be entitled to his personal property in case of intestacy.—(40 Stat., 403, chap. 105; 40 Stat., 610, chap. 104.)

This section of the act of October 6, 1917, was reenacted to read as above by act of June 25, 1918, section 5 (40 Stat., 610).

SEC. 211. [ALL ALLOTMENTS TO BE VOLUNTARY; PAYMENT BY WAR RISK BUREAU DISCONTINUED.] That all family allowances and allotments payable by the Bureau of War Risk Insurance under the authority of this article shall be discontinued at the end of the fourth calendar month after the termination of the present war emergency, as declared by proclamation of the President of the United States, and thereafter all allotments of pay shall be voluntary and shall be made under such regulations as may be prescribed by the Secretary of War and the Secretary of the Navy, respectively.—(40 Stat., 405, chap. 105; 41 Stat., 372, chap. 16.)

This section was added to the act of October 6, 1917 (40 Stat., 405), by act of December 24, 1919, section 9 (41 Stat., 372).

By section 209 of this act, payments of allotments were to be made through the Bureau

of War Risk Insurance. See sections 1430, 1556, 1575, and 1576, Revised Statutes, and notes thereto.

### ARTICLE III.

#### COMPENSATION FOR DEATH OR DISABILITY.

SEC. 300. [CASES IN WHICH COMPENSATION ALLOWED.] That for death or disability resulting from personal injury suffered or disease contracted in the line of duty, by any commissioned officer or enlisted man, or by any member of the Army Nurse Corps (female) or of the Navy Nurse Corps (female) when employed in the active service under the War Department or Navy Department, the United States shall pay compensation as hereinafter provided; but no compensation shall be paid if the injury or disease has been caused by his own willful misconduct: *Provided*, That for the purposes of this section said officer, enlisted man, or other member shall be held and taken to have been in sound condition when examined, accepted, and enrolled for service: *Provided further*, That this section, as amended, shall be deemed to become effective as of April 6, 1917.—(40 Stat., 405, chap. 105; 41 Stat., 373, chap. 16.)

This section of the act of October 6, 1917, was reenacted to read as above by act of December 24, 1919, section 10a (41 Stat., 373); it had previously been reenacted by act of June 25, 1918, section 10 (40 Stat., 611).

Termination of war does not affect the compensation provisions of this act, which continue in effect. (22 Op. Atty. Gen., 538.)

SEC. 301. [BURIAL EXPENSES.] \* \* \* If death occur or shall have occurred subsequent to April 6, 1917, and before discharge or resignation from service, the United States shall pay for burial expenses and the return of body to his home a sum not to exceed \$100, as may be fixed by regulations. \* \* \*—(40 Stat., 405, chap. 105; 41 Stat., 372, chap. 16.)

The above paragraph, which is a part of subdivision (g), section 301, act of October 6, 1917, was reenacted to read as above set forth by act of December 24, 1919, section

10 (41 Stat., 372); it had previously been reenacted by act of June 25, 1918 (40 Stat., 612).

SEC. 302. [DISABILITY COMPENSATION, TREATMENT, ETC.] That if disability results from the injury—

(1) If and while the disability is rated as total and temporary, the monthly compensation shall be the following amounts:

(a) If the disabled person has neither wife nor child living, \$80.

(b) If he has a wife but no child living, \$90.

(c) If he has a wife and one child living, \$95.

(d) If he has a wife and two or more children living, \$100.

(e) If he has no wife but one child living, \$90, with \$5 for each additional child.

(f) If he has a mother or father, either or both dependent on him for support, then, in addition to the above amounts, \$10 for each parent so dependent.

(2) If and while the disability is rated as partial and temporary, the monthly compensation shall be a percentage of the compensation that would be payable for his total and temporary disability, equal to the degree of the reduction



in earning capacity resulting from the disability, but no compensation shall be payable for a reduction in earning capacity rated at less than 10 per centum.

(3) If and while the disability is rated as total and permanent, the rate of compensation shall be \$100 per month: *Provided, however,* That the loss of both feet, or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden, shall be deemed to be total, permanent disability: *Provided, further,* That for double total, permanent disability the rate of compensation shall be \$200 per month.

(4) If and while the disability is rated as partial and permanent, the monthly compensation shall be a percentage of the compensation that would be payable for his total and permanent disability equal to the degree of the reduction in earning capacity resulting from the disability, but no compensation shall be payable for a reduction in earning capacity rated at less than 10 per centum. \* \* \*

(5) If the disabled person is so helpless as to be in constant need of a nurse or attendant, such additional sum shall be paid, but not exceeding \$20 per month, as the director may deem reasonable.

(6) In addition to the compensation above provided, the injured person shall be furnished by the United States such reasonable governmental medical, surgical, and hospital services and with such supplies, including wheeled chairs, artificial limbs, trusses, and similar appliances, as the director may determine to be useful and reasonably necessary, which wheeled chairs, artificial limbs, trusses, and similar appliances may be procured by the Bureau of War Risk Insurance in such manner, either by purchase or manufacture, as the director may determine to be advantageous and reasonably necessary: *Provided,* That nothing in this Act shall be construed to affect the necessary military control over any member of the military or naval establishments before he shall have been discharged from the military or naval service.

(7) Where the disabled person and his wife are not living together, or where the children are not in the custody of the disabled person the amount of the compensation shall be apportioned as may be prescribed by regulations.

(8) The term "wife" as used in this section shall include "husband" if the husband is dependent upon the wife for support. \* \* \*

(10) That section 302 of the War Risk Insurance Act as amended shall be deemed to be in effect as of April 6, 1917: *Provided,* That any person who is now receiving a gratuity or pension under existing law shall not receive compensation under this Act unless he shall first surrender all claim to such gratuity or pension.—(40 Stat., 406, chap. 105; 41 Stat., 373-374, chap. 16.)

This section of the act of October 6, 1917, was reenacted to read as above by act of December 24, 1919, section 11 (41 Stat., 373-374).

It had previously been amended by acts of June 25, 1918 (40 Stat., 612-613), and August 6, 1919 (41 Stat., 274).

SEC. 303. [MEDICAL EXAMINATIONS AND TREATMENT; REFUSAL TO SUBMIT.] That every person applying for or in receipt of compensation for disability under the provisions of this article shall, as frequently and at such times and places as may be reasonably required, submit himself to examination by a medical officer of the United States or by a duly qualified physician designated or approved by the director. He may have a duly qualified physician desig-

nated and paid by him present to participate in such examination. For all examinations he shall, in the discretion of the director, be paid his reasonable traveling and other expenses and also loss of wages incurred in order to submit to such examination. If he refuses to submit himself for, or in any way obstructs, any examination, his right to claim compensation under this article shall be suspended until such refusal or obstruction ceases. No compensation shall be payable while such refusal or obstruction continues, and no compensation shall be payable for the intervening period.

Every person in receipt of compensation for disability shall submit to any reasonable medical or surgical treatment furnished by the bureau whenever requested by the bureau; and the consequences of unreasonable refusal to submit to any such treatment shall not be deemed to result from the injury compensated for.—(40 Stat., 406–407, chap. 105.)

SEC. 307. [DEATH TO BE OFFICIALLY RECORDED.] That compensation shall not be payable for death in the course of the service until the death be officially recorded in the department under which he may be serving. No compensation shall be payable for a period during which the man has been reported “missing” and a family allowance has been paid for him under the provisions of Article II.—(40 Stat., 407, chap. 105.)

See section 211, above, as to family allowance.

SEC. 308. [DEATH FOR CRIME: DISHONORABLE DISCHARGE.] That no compensation shall be payable for death inflicted as a lawful punishment for a crime or military offense except when inflicted by the enemy. A dismissal or dishonorable or bad conduct discharge from the service shall bar and terminate all right to any compensation under the provisions of this article.—(40 Stat., 407, chap. 105.)

See section 29, above, under Article I.

SEC. 312. [COMPENSATION EXCLUDES BENEFITS UNDER OTHER LAWS.] That compensation under this article shall not be paid while the person is in receipt of service or retirement pay. The laws providing for gratuities or payments in the event of death in the service and existing pension laws shall not be applicable after the enactment of this amendment to any person in the active military or naval service on the sixth day of October, nineteen hundred and seventeen, or who thereafter entered the active military or naval service, or to their widows, children, or their dependents, except in so far as rights under any such law have heretofore accrued.

Compensation because of disability or death of members of the Army Nurse Corps (female) or of the Navy Nurse Corps (female) shall be in lieu of any compensation for such disability or death under the Act entitled “An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes,” approved September seventh, nineteen hundred and sixteen.—(40 Stat., 408, chap. 105; 40 Stat., 613, chap. 104.)

This section of the act of October 6, 1917, was reenacted to read as above by act of June 25, 1918, section 17 (40 Stat., 613). See also section 302, paragraph (10), above;

and see note to act of June 4, 1920 (41 Stat., 824–825), relating to death gratuities, and note to section 4756, Revised Statutes, relating to service pensions.



## ARTICLE IV

## INSURANCE.

SEC. 400. [PERSONS TO WHOM APPLICABLE; AMOUNT.] That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of \$500, and not less than \$1,000 or more than \$10,000, upon the payment of the premiums as hereinafter provided.—(40 Stat., 409, chap. 105.)

**Effect of termination of the war.**—Any person entering the active service within five years after the termination of the war may be granted term insurance providing he applies for it within 120 days after entering such service. But in order to retain such insurance it must be converted within five years from the date of the termination of the war. (32 Op. Atty. Gen., 538.)

Any person entering the active service after the expiration of five years from the date of the termination of the war may not apply for nor be granted war risk insurance. (32 Op. Atty. Gen., 538.)

See note above, under section 300 of this act (40 Stat., 405).

SEC. 401. [TIME FOR MAKING APPLICATION.] That such insurance must be applied for within one hundred and twenty days after enlistment or after entrance into or employment in the active service and before discharge or resignation, except that those persons who are in the active war service at the time of the publication of the terms and conditions of such contract of insurance may apply at any time within one hundred and twenty days thereafter and while in such service \* \* \*.—(40 Stat., 409, chap. 105; 41 Stat., 374–375, chap. 16.)

This section was reenacted to read as above by act of December 24, 1919, section 12 (41 Stat., 374–375); it had previously been

reenacted by act of June 25, 1918 (40 Stat., 614).

[1917, Oct. 6, sec. 3. Rank of brigadier generals.] That brigadier generals of the Army shall hereafter rank relatively with rear admirals of the lower half of the grade.—(40 Stat., 411, chap. 105.)

See note to section 1466. Revised Statutes, under "Relative rank of brigadier generals and rear admirals of the lower half."

[1917, Oct. 6, sec. 10 (i). Publication of inventions in time of war restricted; use of by Government.] Whenever the publication of an invention by the granting of a patent may, in the opinion of the President, be detrimental to the public safety or defense, or may assist the enemy or endanger the successful prosecution of the war, he may order that the invention be kept secret and withhold the grant of a patent until the end of the war: *Provided*, That the invention disclosed in the application for said patent may be held abandoned upon it being established before or by the Commissioner of Patents that, in violation of said order, said invention has been published or that an application for a patent therefor has been filed in any other country, by the inventor or his assigns or legal representatives, without the consent or approval of the commissioner or under a license of the President.

When an applicant whose patent is withheld as herein provided and who faithfully obeys the order of the President above referred to shall tender his invention to the Government of the United States for its use, he shall, if he ultimately receives a patent, have the right to sue for compensation in the Court of Claims, such right to compensation to begin from the date of the use of the invention by the Government.—(40 Stat., 422, chap. 106.)

Similar provisions were contained in act of October 6, 1917 (40 Stat., 394-395, chap. 95). The above paragraph was part of section 10 of the "Trading with the enemy Act."

See section 4894, Revised Statutes, and references thereunder.

[1917, Dec. 20. Number of midshipmen.] That hereafter there shall be allowed at the United States Naval Academy five midshipmen for each Senator, Representative, Delegate in Congress, and Resident Commissioner from Porto Rico, and five for the District of Columbia, fifteen appointed each year at large, and one hundred appointed annually from enlisted men of the Navy, and members of the Naval Reserve Force on active duty, as now authorized by law.

SEC. 2. That all Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed.—(40 Stat., 430, chap. 5; 41 Stat., 140, chap. 9.)

The first section of this act was expressly amended and reenacted to read as above set forth by act of July 11, 1919 (41 Stat., 140).

See note to section 1513, Revised Statutes, for other laws relating to the number of midshipmen.

Qualifications for appointment of midshipmen from enlisted men of the Navy were prescribed by act of March 4, 1917 (39 Stat., 1182).

[1918, Feb. 11. Dominican Republic; detail of naval personnel to assist.] That the President of the United States be, and he is hereby, authorized, in his discretion, to detail to assist the Dominican Republic, officers and enlisted men of the United States Navy and the United States Marine Corps: *Provided*, That officers and enlisted men so detailed be, and they are hereby, authorized to accept from the Government of the Dominican Republic offices under said Government with compensation and emoluments from the said Dominican Republic, subject to the approval of the President of the United States: *Provided further*, That while so detailed such officers and enlisted men shall receive, in addition to the compensation and emoluments allowed them by the Dominican Republic, the pay and allowances of their rank or rating in the United States Navy or United States Marine Corps, as the case may be, and they shall be entitled to the same credit, while so serving, for longevity, retirement, foreign-service pay, and for all other purposes that they would receive if they were serving with the United States Navy or Marine Corps in said Dominican Republic.—(40 Stat., 437, chap. 15.)

See act of June 12, 1916 (39 Stat., 223), as to Haiti; joint resolution of October 13, 1914 (38 Stat., 780), as to Brazil; and act of June

5, 1920 (41 Stat., 1056), as to all South American Republics; see also note to Constitution, Article I, section 9, clause 8.

[1918, Mar. 28. Navy Building, supervision of.] The maintenance and protection of all of the foregoing temporary buildings when completed shall be under the supervision and direction of the superintendent of the State, War, and Navy Department Buildings.—(40 Stat., 483, chap. 28.)



This paragraph followed appropriations for the erection of a temporary office building for the Navy Department at Seventeenth and B Streets, in Potomac Park, D. C.,

and temporary buildings for the War Department.  
See note to section 415, Revised Statutes.

[1918, Mar. 28, sec. 2. Lump-sum employees; restriction on pay of.] That all branches of the government of the District of Columbia shall be considered a governmental establishment for the purposes of section seven of the deficiency appropriation Act approved October sixth, nineteen hundred and seventeen.—(40 Stat., 498, chap. 28.)

See act of October 6, 1917, section 7 (40 Stat., 383–384).

[1918, Mar. 29. Deceased persons, naval service; disposition of effects.] That hereafter all moneys, articles of value, papers, keepsakes, and other similar effects belonging to deceased persons in the naval service, not claimed by their legal heirs or next of kin, shall be deposited in safe custody, and if any such moneys, articles of values, papers, keepsakes, or other similar effects so deposited have been, or shall hereafter be, unclaimed for a period of two years from the date of the death of such person, such articles and effects shall be sold and the proceeds thereof, together with the moneys above mentioned, shall be deposited in the Treasury to the credit of the Navy pension fund: *Provided*, That the Secretary of the Navy is hereby authorized and directed to make diligent inquiry in every instance after the death of such person to ascertain the whereabouts of his heirs or next of kin, and to prescribe such regulations as may be necessary to carry out the foregoing provisions: *Provided further*, That claims may be presented hereunder at any time within five years after such moneys or proceeds have been so deposited in the Treasury, and, when supported by competent proof in any case after such deposit in the Treasury, shall be certified to Congress for consideration.—(40 Stat., 499, chap. 31.)

See note to section 289, Revised Statutes; see also act of May 27, 1908 (35 Stat., 373).

[1918, Apr. 2. Naval officers dropped for unauthorized absence, etc.] That the President is hereby authorized to drop from the rolls of the Navy or Marine Corps any officer thereof who is absent from duty without leave for a period of three months or more, or who, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a State or Federal penitentiary: *Provided*, That no officer so dropped shall be eligible for reappointment.—(40 Stat., 501, chap. 39.)

See sections 1229, 1441, and 1624, articles 36 and 37, Revised Statutes, and notes thereto; see also note to preamble, section 1624, Re-

vised Statutes, under "Persons discharged from the Navy."

[1918, Apr. 10. Retired warrant and chief warrant officers; pay on active duty.] That any retired chief warrant officer who has been on active duty since August twenty-ninth, nineteen hundred and sixteen, or who may hereafter perform active duty, and whose record is creditable, shall, during such time as he has been or may hereafter be, on active duty, and from the time his service on the active list after date of commission, plus his service on active duty while on the retired list, is equal to six years, receive the pay and allowances that are now, or may hereafter be, allowed a lieutenant (junior grade), United

States Navy; and shall, during such time as he has been, or may hereafter be, on active duty, and from the time such total service is equal to twelve years, receive the pay and allowances that are now, or may hereafter be, allowed a lieutenant, United States Navy.

SEC. 2. That any retired warrant officer who has been on active duty since August twenty-ninth, nineteen hundred and sixteen, or who may hereafter perform active duty, and whose record is creditable, shall, during such time as he has been or may hereafter be on active duty, and from the time his service on the active list after date of warrant, plus his service on active duty while on the retired list, is equal to twelve years, receive the pay and allowances that are now or may hereafter be allowed a lieutenant (junior grade), United States Navy; and shall, during such time as he has been or may hereafter be on active duty, and from the time such total service is equal to eighteen years, receive the pay and allowances that are now or may hereafter be allowed a lieutenant, United States Navy.—(40 Stat., 516, chap. 49.)

See note to section 1592, Revised Statutes, as to pay of retired officers on active duty; and see note to section 1556, Revised Statutes, under "25. Warrant officers, acting warrant officers, and commissioned warrant officers," for decisions as to what constitutes a "creditable" record.

Other provisions allowing increased pay to commissioned and warrant officers on active duty were contained in act of July 1, 1918 (40 Stat., 717).

[1918, Apr. 18. Claims for damages by American forces aboard.] That claims of inhabitants of France or of any other European country not an enemy or ally of an enemy for damages caused by American military forces may be presented to any officer designated by the President, and when approved by such an officer shall be paid under regulations made by the Secretary of War.

SEC. 2. That claims under this statute shall not be approved unless they would be payable according to the law or practice governing the military forces of the country in which they occur.

SEC. 3. That hereafter appropriations for the incidental expenses of the Quartermaster Corps shall be available for paying the claims herein described.

SEC. 4. That this statute does not supersede other modes of indemnity now in existence and does not diminish responsibility of any member of the military forces to the person injured or to the United States.—(40 Stat., 532, chap. 57.)

See act of June 24, 1910 (36 Stat., 607), and references thereunder.

[1918, Apr. 20. Destruction of war material, or war premises, etc.] That the words "war material," as used herein, shall include arms, armament, ammunition, live-stock, stores of clothing, food, foodstuffs, or fuel; and shall also include supplies, munitions, and all other articles of whatever description, and any part or ingredient thereof, intended for, adapted to, or suitable for the use of the United States, or any associate nation, in connection with the conduct of the war.

The words "war premises," as used herein, shall include all buildings, grounds, mines, or other places wherein such war material is being produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported, together with all machinery and appliances therein contained;



and all forts, arsenals, navy yards, camps, prisons, or other military or naval stations of the United States, or any associate nation.

The words, "war utilities," as used herein, shall include all railroads, railways, electric lines, roads of whatever description, railroad or railway fixture, canal, lock, dam, wharf, pier, dock, bridge, building, structure, engine, machine, mechanical contrivance, car, vehicle, boat, or aircraft, or any other means of transportation whatsoever, whereon or whereby such war material or any troops of the United States, or of any associate nation, are being or may be transported either within the limits of the United States or upon the high seas; and all dams, reservoirs, aqueducts, water and gas mains and pipes, structures and buildings, whereby or in connection with which water or gas is being furnished, or may be furnished, to any war premises or to the military or naval forces of the United States, or any associate nation, and all electric light and power, steam or pneumatic power, telephone and telegraph plants, poles, wires, and fixtures and wireless stations, and the buildings connected with the maintenance and operation thereof used to supply water, light, heat, power, or facilities of communication to any war premises or to the military or naval forces of the United States, or any associate nation.—(40 Stat., 533, chap. 59.)

The words "United States" shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States.

The words "associate nation," as used in this Act, shall be deemed to mean any nation at war with any nation with which the United States is at war.

SEC. 2. That when the United States is at war, whoever, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, or whoever, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, shall willfully injure or destroy, or shall attempt to so injure or destroy, any war material, war premises, or war utilities, as herein defined, shall, upon conviction thereof, be fined not more than \$10,000 or imprisoned not more than thirty years, or both.

SEC. 3. That when the United States is at war, whoever, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, or whoever, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, shall willfully make or cause to be made in a defective manner, or attempt to make or cause to be made in a defective manner, any war material, as herein defined, or any tool, implement, machine, utensil, or receptacle used or employed in making, producing, manufacturing, or repairing any such war material, as herein defined, shall, upon conviction thereof, be fined not more than \$10,000 or imprisoned not more than thirty years, or both.—(40 Stat., 534, chap. 59.)

See Criminal Code, act of March 4, 1909, section 45 (35 Stat., 1097).

[1918, May 9. Naturalization of aliens in the naval service, etc.] That section four of the Act entitled "An Act to establish a Bureau of Immigration and Naturalization and to provide a uniform rule for the naturalization of aliens throughout the United States," approved June twenty-ninth, nineteen

hundred and six, be, and is hereby, amended by adding seven new subdivisions as follows:

"Seventh. Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States Navy or Marine Corps or the Naval Auxiliary Service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for reenlistment; or any alien, or any Porto Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, either the Regular or the Volunteer Forces, or the National Army, the National Guard or Naval Militia of any State, Territory, or the District of Columbia, or the State militia in Federal service, or in the United States Navy or Marine Corps, or in the United States Coast Guard, or who has served for three years on board of any vessel of the United States Government, or for three years on board of merchant or fishing vessels of the United States of more than twenty tons burden, and while still in the service on a reenlistment or reappointment, or within six months after an honorable discharge or separation therefrom, or while on furlough to the Army Reserve or Regular Army Reserve after honorable service, may, on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence within the United States if upon examination by the representative of the Bureau of Naturalization, in accordance with the requirements of this subdivision it is shown that such residence can not be established; any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States; any alien declarant who has served in the United States Army or Navy, or the Philippine Constabulary, and has been honorably discharged therefrom, and has been accepted for service in either the military or naval service of the United States on the condition that he becomes a citizen of the United States, may file his petition for naturalization upon proof of continuous residence within the United States for the three years immediately preceding his petition, by two witnesses, citizens of the United States, and in these cases only residence in the Philippine Islands and the Panama Canal Zone by aliens may be considered residence within the United States, and the place of such military service shall be construed as the place of residence required to be established for purposes of naturalization; and any alien, or any person owing permanent allegiance to the United States embraced within this subdivision, may file his petition for naturalization in the most convenient court without proof of residence within its jurisdiction, notwithstanding the limitation upon the jurisdiction of the courts specified in section three of the Act of June twenty-ninth, nineteen hundred and six, provided he appears with his two witnesses before the appropriate representative of the Bureau of Naturalization and passes the preliminary examination hereby required before filing his petition for naturalization in the office of the clerk of the court, and in each case the



record of this examination shall be offered in evidence by the representative of the Government from the Bureau of Naturalization and made a part of the record at the original and any subsequent hearings; and, except as otherwise herein provided, the honorable discharge certificate of such alien, or person owing permanent allegiance to the United States, or the certificate of service showing good conduct, signed by a duly authorized officer, or by the masters of said vessels, shall be deemed prima facie evidence to satisfy all of the requirements of residence within the United States and within the State, Territory, or the District of Columbia, and good moral character required by law, when supported by the affidavits of two witnesses, citizens of the United States identifying the applicant as the person named in the certificate or honorable discharge, and in those cases only where the alien is actually in the military or naval service of the United States, the certificate of arrival shall not be filed with the petition for naturalization in the manner prescribed; and any petition for naturalization filed under the provisions of this subdivision may be heard immediately, notwithstanding the law prohibits the hearing of a petition for naturalization during thirty days preceding any election in the jurisdiction of the court \* \* \*.—(40 Stat., 542-543, chap. 69.)

See act of August 29, 1916 (39 Stat., 587), as amended by act of May 22, 1917 (40 Stat., 84), with respect to naturalization of members of the Naval Reserve Force; and

see notes to Constitution, Article I, section 8, clause 4; Article IV, section 3, clause 2; and fourteenth amendment.

[1918, May 14. Age of candidates for Naval Academy.] That hereafter all candidates for admission to the Naval Academy must be not less than sixteen years of age nor more than twenty years of age on April first of the calendar year in which they enter the academy: *Provided*, That the foregoing shall not apply to candidates for midshipmen designated for entrance to the academy in nineteen hundred and eighteen.—(40 Stat., 550, chap. 73.)

See note to section 1517, Revised Statutes.

[1918, July 1. Government fuel yards, District of Columbia.] The Secretary of the Interior is authorized and directed to establish in the District of Columbia storage and distributing yards for the storage of fuel for the use of and delivery to all branches of the Federal service and the municipal government in the District of Columbia and such parts thereof as may be situated immediately without the District of Columbia and economically can be supplied therefrom, and to select, purchase, contract for, and distribute all fuel required by the said services. Authority is granted the Secretary of the Interior, in connection with the establishment of the said yards, to procure by purchase, requisition for immediate use, condemnation, or lease for such period as may be necessary, land, wharves, and railroad trestles and sidings requisite therefor. All branches of the Federal service and the municipal government in the District of Columbia, from and after the establishment of the said fuel yards, shall purchase all fuel from the Secretary of the Interior and make payment therefor from applicable appropriations at the actual cost thereof to the United States, including all expenses connected therewith \* \* \*.—(40 Stat., 672-673, chap. 113.)

By act of July 11, 1919 (41 Stat., 148), it was provided that the above enactment of July 1, 1918, "shall not apply to the fuel required for the Naval Establishment,

except the naval hospital, in the District of Columbia." See act of June 5, 1920 (41 Stat., 913).

[1918, July 1. Claims for damages by naval forces abroad.] That hereafter the Secretary of the Navy is authorized to consider, ascertain, adjust, determine, and pay the amounts due on all claims for damages to and loss of private property of inhabitants of any European country not an enemy or ally of an enemy when the amount of the claim does not exceed the sum of \$1,000, occasioned and caused by men in the naval service during the period of the present war, all payments in settlement of such claims to be made out of "Pay, Miscellaneous."—(40 Stat., 705, chap. 114.)

See act of June 24, 1910 (36 Stat., 607), and references thereunder.

[1918, July 1. Improvements on land leased by the Navy.] The Secretary of the Navy is authorized in leasing water-front property from any State or municipality where the State law or charter of the municipality requires that the improvements placed upon leased lands shall at the termination of the lease become the property of the State or municipality, to provide, as a part or all of the consideration therefor, that improvements placed thereon by the United States shall become the property of the lessor upon the expiration of the lease or any renewal thereof.—(40 Stat., 705, chap. 114.)

See note to section 355, Revised Statutes.

[1918, July 1. Salvage by naval vessels.] That hereafter the Secretary of the Navy is authorized to cause vessels under his control adapted to the purpose, to afford salvage service to public or private vessels in distress: *Provided*, That when such salvage service is rendered by a vessel specially equipped for the purpose or by a tug, the Secretary of the Navy may determine and collect reasonable compensation therefor.—(40 Stat., 705, chap. 114.)

See sections 1536 and 4642, Revised Statutes,   and March 9, 1920, sections 10 and 11
and acts of August 1, 1912 (37 Stat., 242),   (41 Stat., 528).

[1918, July 1. Hydrographic Office, naval officers detailed to.] That the Secretary of the Navy is authorized to detail such naval officers as may be necessary to the Hydrographic Office.—(40 Stat., 708, chap. 114.)

This provision was repeated in acts of July 11,   See section 431, Revised Statutes, and note
1919 (41 Stat., 135), and June 4, 1920 (41   thereto.
Stat., 816).

[1918, July 1. Naval Militia and National Naval Volunteers abolished. Naval Reserve Force, rank of members.] That upon the approval of this Act all laws heretofore enacted by the Congress relating to the Naval Militia and the National Naval Volunteers be, and the same hereby are, repealed; and the President is authorized to transfer as a class all members of the National Naval Volunteers to the class "the Naval Reserve," "the Naval Reserve Flying Corps," or "the Marine Corps Reserve" of the Naval Reserve Force or the Marine Corps Reserve, for general service, in the confirmed rank, grade, or rating they now hold in the National Naval Volunteers, regardless of their being members of a State military force, and without examination and the necessity of executing or filing a new oath and acceptance of office; that until such transfer is affected members of the National Naval Volunteers shall retain their present status and be entitled to receive the same pay, allowances,



gratuities, and other benefits as heretofore provided by law, and shall continue subject to the laws prescribed for the government of the Navy; that all members of the Naval Reserve Force shall be eligible for reenrollment in the rank, grade, or rating held on the termination of their last enrollment; that no enrollments or promotions shall be made in any rank or grade above that of lieutenant commander, except as herein otherwise provided.—(40 Stat., 708, chap. 114.)

See act of August 29, 1916 (39 Stat., 587-593), creating the Naval Reserve Force and Marine Corps Reserve.  
Some legislation relating to the Naval Militia was revived, until June 30, 1922, by act of June 4, 1920 (41 Stat., 817).

Rank of members of the Naval Reserve Force: See act of August 29, 1916 (39 Stat., 587), and see provision of this act (40 Stat., 711) set forth below, as to promotion in the Naval Reserve Force.

[1918, July 1. Medical and Dental Reserve Corps abolished.] That all laws heretofore enacted by Congress relating to the Medical Reserve Corps and Dental Reserve Corps be, and the same hereby are, repealed: *Provided*, That members of the Medical Reserve Corps and Dental Reserve Corps may be enrolled in the Naval Reserve Force in their present grades and ranks.—(40 Stat., 708, chap. 114.)

See note to section 1368, Revised Statutes, as to the organization of the Medical Department of the Navy.

[1918, July 1. Naval Reserve, age limits; minimum active service.] That the age limits for the several ranks, grades, and ratings on first enrollment in the Naval Reserve shall be as prescribed by the Secretary of the Navy.

That the minimum active service required for maintaining the efficiency of a member of the Naval Reserve shall be two months during each term of enrollment and an attendance at not less than thirty-six drills during each year, or other equivalent duty. The active service may be in one period or in periods of not less than fifteen days each.—(40 Stat., 710, chap. 114.)

See act of August 29, 1916 (39 Stat., 591), relating to the Naval Reserve.

[1918, July 1. Naval Reserve Force, retainer pay and retirement.] That the annual retainer pay of members of the Naval Reserve Force, except officers in the Naval Auxiliary Reserve and transferred members of the Fleet Naval Reserve, after confirmation in rank, grade, or rating, shall be the equivalent of two months' base pay of the corresponding rank, grade, or rating in the Navy, but the highest base pay upon which the retainer pay of officers of the Naval Reserve Force shall be computed shall not be greater than the base pay of a lieutenant commander. Service in the Navy, Marine Corps, National Naval Volunteers, and Naval Militia shall be counted as continuous service in the Naval Reserve Force, both for the purpose of retirement and of computing retainer pay: *Provided*, That no member of the Naval Reserve Force shall be eligible for retirement other than for physical disability incurred in line of duty: *Provided further*, That no retainer pay of any member of the Naval Reserve Force except those enlisted men transferred to the Fleet Naval Reserve after sixteen or twenty or more years' naval service shall be in excess of the amount authorized to members having had sixteen years' continuous service therein.—(40 Stat., 710-711. chap. 114.)

See note to section 1556, Revised Statutes, as to pay of Naval Reserve Force.

Retirement of enrolled members of the Naval Reserve Force, after 20 years' service, and of transferred members, after 30 years' service, was authorized by act of August 29, 1916 (39 Stat., 588 and 591); retirement of officers of the Naval Reserve Force for

physical disability in line of duty was authorized by act of June 4, 1920, section 2 (41 Stat., 834).

**Marine Corps Reserve.**—The provisions of this paragraph as to retirement for physical disability apply to the Marine Corps Reserve. (File 26253-737, Oct. 16, 1919; see note to act of Aug. 29, 1916, 39 Stat., 593.)

[1918, July 1. **Naval Reserve Force, active duty; uniform gratuity; retainer pay while on active duty.**] That in time of peace the Secretary of the Navy is authorized, in his discretion, to order any member of the Naval Reserve Force, with his consent, who has been confirmed in his rank, grade, or rating, to perform any duty afloat for any period of time for which his services may be required: *Provided*, That such members may be relieved from duty by the Secretary of the Navy at any time and shall upon their own application be released from said duty within four months from the date of their application therefor.

That the uniform gratuity for the members, other than officers, of each class of the Naval Reserve Force shall be the same as that prescribed for enlisted men of the Navy, but in time of peace the Secretary of the Navy shall prescribe the portion of the clothing gratuity to be issued to such members, other than officers, of the Naval Reserve Force.

That in time of peace no member of any class of the Naval Reserve Force shall be entitled to retainer pay when assigned to active duty for purposes other than training.

That no part of the clothing gratuity credited to members of the Naval Reserve Force shall be deducted from their accounts where said members accept or have accepted temporary appointments in the Navy in time of war or other national emergency.—(40 Stat., 711, chap. 114.)

As to uniform gratuity and retainer pay of the Naval Reserve Force, see note to section 1556, Revised Statutes, under "37. Naval Reserve Force."

As to active service in the Naval Reserve Force, see act of August 29, 1916 (39 Stat., 587-589).

[1918, July 1. **Naval Reserve Force, disenrollment for age; promotion; precedence; command.**] That members of the Naval Reserve Force shall upon reaching the age of sixty-four years be disenrolled except that in time of war or other national emergency such members of the Naval Reserve Force, if in active service, may be continued therein during such period as the Secretary of the Navy may determine, but not longer than six months after said war or other national emergency shall cease to exist.

That no officer of any class of the Naval Reserve Force shall in time of peace be promoted above the grade of lieutenant commander, but in time of war or other national emergency officers of the Naval Reserve Force of and above the rank of lieutenant commander in active service shall be eligible for selection for promotion to the next higher grade or rank by the same board of officers that selects officers of the United States Navy for promotion to such higher ranks and grades, under the same rules and regulations as apply to the selection for promotion of officers of the United States Navy. The promotion of officers of the Naval Reserve Force below the rank of lieutenant commander shall at all times be in accordance with such regulations as the Secretary of the Navy may prescribe.



That when on active duty officers of the Naval Reserve Force shall take precedence among themselves and with other officers of the naval service in their respective grades or ranks according to the dates of their commissions or provisional assignment of rank in the Naval Reserve Force: *Provided*, That all officers of the Naval Reserve Force of and above the rank of lieutenant commander shall rank with but after officers of the same rank or grade in the United States Navy, except that in time of war or other national emergency such officers of the Naval Reserve Force shall have a date of precedence with officers of the United States Navy as of the date of general mobilization, to be established by the Secretary of the Navy: *Provided further*, That during the present emergency the date of precedence of all officers of the Naval Reserve Force shall be as prescribed by the Secretary of the Navy.

No officer of the Naval Coast Defense Reserve or officer of the Naval Reserve Flying Corps shall exercise command except within his particular department or service for the due performance of his respective duties.—(40 Stat., 711, chap. 114.)

As to promotion by selection in the Navy, see acts of August 29, 1916 (39 Stat., 578-579), and July 1, 1918 (40 Stat., 718).

[1918, July 1. Naval Reserve Force, pay and discipline; wearing of uniform when not in active service.] Members of the Naval Reserve Force when employed in active service, ashore or afloat, under the Navy Department shall receive the same pay and allowances as received by the officers and enlisted men of the Regular Navy of the same rank, grades, or ratings and of the same length of service, which shall include service in the Navy, Marine Corps, Naval Reserve Force, Naval Militia, National Naval Volunteers, or Marine Corps Reserve. \* \* \*

Enrolled members of the Naval Reserve Force when in active service shall be subject to the laws, regulations, and orders for the government of the Regular Navy, and the Secretary of the Navy may, in his discretion, permit the members of the Naval Reserve Force to wear the uniform of their respective ranks, grades, or ratings while not in active service, and such members shall, for any act committed by them while wearing the uniform of their respective ranks, grades, or ratings, be subject to the laws, regulations, and orders for the government of the Regular Navy.—(40 Stat., 712, chap. 114.)

As to pay of Naval Reserve Force, see note to section 1556, Revised Statutes, under "37. Naval Reserve Force."

As to amenability of members to trial by naval court-martial, see note to preamble of section 1624, Revised Statutes.

See act of June 3, 1916, section 125 (39 Stat., 216-217), and note thereto, with respect to unauthorized wearing of the uniform.

[1918, July 1. Authorized enlisted strength of the Navy.] That the authorized enlisted strength of the active list of the Navy is hereby increased from eighty-seven thousand to one hundred and thirty-one thousand four hundred and eighty-five.—(40 Stat., 714, chap. 114.)

Subsequent provisions of this act reenacted section 1 of the act of May 22, 1917 (40 Stat., 84), and in such reenactment embodied a definition of the words "authorized enlisted strength." (See the act last cited for definition.)

See note to section 1417, Revised Statutes, as to enlisted strength of the Navy; see also act of August 29, 1916 (39 Stat., 575), and references thereunder.

[1918, July 1. Major generals authorized, Marine Corps.] The rank and title of Major General is hereby created in the Marine Corps, and the President is authorized to nominate, and, by and with the advice and consent of the Senate, to appoint one Major General, who shall at all times be junior in rank to the Major General Commandant, and also one temporary Major General in the Marine Corps, who shall at all times be junior to the permanent Major General.—(40 Stat., 715, chap. 114.)

A subsequent provision of this act (40 Stat., 733), set forth below, limited the duration of "all temporary promotions and advancements authorized by this Act," to "not later than six months after the termination of the present war."

See note to section 1596, Revised Statutes, as to number and grades of officers in the Marine Corps.

[1918, July 1. Allowances of admirals and vice admirals; rank, pay and allowances of chiefs of bureaus and Judge Advocate General.] That hereafter the Chief of Naval Operations shall receive the allowances which are now or may hereafter be prescribed by or in pursuance of law for the grade of general in the Army, and the officers of the Navy holding the rank and title of Admiral and Vice Admiral in the Navy while holding such rank and title shall receive the allowances of a General and Lieutenant General of the Army, respectively. And hereafter chiefs of bureaus of the Navy Department, including the Judge Advocate General of the Navy, shall, while so serving, have corresponding rank and shall receive the same pay and allowances as are now or may hereafter be prescribed by or in pursuance of law for chiefs of bureaus of the War Department and the Judge Advocate General of the Army.—(40 Stat., 716-717, chap. 114.)

See note to sections 421 and 1565, Revised Statutes, as to chiefs of bureaus; see note to section 1556, Revised Statutes, under "2-3. Admirals; Vice admirals;" see also notes to sections 1362, 1487, 1558, and 1578, Revised Statutes.

Chief of Naval Operations: See acts of March 3,

1915 (38 Stat., 929), and August 29, 1916 (39 Stat., 558).

Judge Advocate General: See act of June 8, 1880 (21 Stat., 164), as amended by act of June 5, 1896 (29 Stat., 251).

Ranks of admiral and vice admiral: See act of May 22, 1917, section 18 (40 Stat., 89).

[1918, July 1. Retired officers, permanent promotion in time of war.] That hereafter, during the existence of war or of a national emergency declared by the President to exist, any commissioned or warrant officer of the Navy, Marine Corps, or Coast Guard of the United States on the retired list may, in the discretion of the Secretary of the Navy, be ordered to active duty at sea or on shore; and any retired officer performing such active duty in time of war or national emergency, declared as aforesaid, shall be entitled to promotion on the retired list to the grade or rank, not above that of lieutenant commander in the Navy or major in the Marine Corps or captain in the Coast Guard, and shall thereafter receive the pay and allowances thereof, which his total active service as an officer both prior and subsequent to retirement, in the manner rendered by him, would have enabled him to attain in due course of promotion had such service been rendered continuously on the active list during the period of time last past.—(40 Stat., 717, chap. 114.)

See notes to sections 1591-1592, Revised Statutes.

[1918, July 1. Retired officers, temporary promotion in time of war.] That during the existence of war or of a national emergency, declared as afore-



said, any commissioned or warrant officer of the Navy, Marine Corps or Coast Guard of the United States on the retired list, while on active duty, may be temporarily advanced to and commissioned in such higher grade or rank on the retired list, not above that of lieutenant commander in the Navy or major in the Marine Corps or captain in the Coast Guard, as the President may determine, and any officer so advanced shall, while on active duty, be entitled to the same pay and allowances as officers of like grade or rank on the active list: *Provided*, That any such commissioned or warrant officer who has been so temporarily advanced in grade or rank shall, upon his relief from active duty, or in any case not later than six months after the termination of the war or of the national emergency, declared as aforesaid, revert to the grade or rank on the retired list and to the pay and allowance status which he would have held had he not been so temporarily advanced: *Provided further*, That nothing in this Act shall operate to reduce the pay and allowances now allowed by law to retired officers.—(40 Stat., 717, chap. 114.)

See notes to sections 1591-1592, Revised Statutes.

[1918, July 1. Staff Corps, promotion by selection.] The provisions of existing laws with reference to promotion by selection in the line of the Navy are hereby extended to include and authorize advancement to the ranks of commander, captain, and rear admiral in the Staff Corps of the Navy under the same conditions in all respects except as may be necessary to adapt the said provisions to such Staff Corps: *Provided*, That boards of selection shall in each case be composed, when practicable, of not less than five members of the corps concerned and promotions shall be made on the basis of fitness alone by selection from among the officers of the rank next below: *Provided further*, That the requirements for sea service in grade, length of service in grade and maximum age in grade for promotion shall not apply.—(40 Stat., 718, chap. 114.)

See act of August 29, 1916 (39 Stat., 578-579), as to promotion by selection in the line of the	Navy; and see notes to sections 1458 and 1480, Revised Statutes.
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[1918, July 1. Aviation duty; no increased allowances.] That hereafter the allowances of officers, enlisted men, and student flyers of the naval service shall in no case be increased by reason of the performance of aviation duty.—(40 Stat., 718, chap. 114.)

See acts of March 3, 1915 (38 Stat., 939), and August 29, 1916 (39 Stat., 582-586); and see note to section 1556, Revised Statutes,	under "38. Additional pay for special duty," and note to section 1569, Revised Statutes.
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[1918, July 1. Navy mail clerks, shore duty.] That the provisions of the Act of May twenty-seventh, nineteen hundred and eight (Thirty-fifth Statutes, pages four hundred and seventeen and four hundred and eighteen), as amended by the Act of August twenty-fourth, nineteen hundred and twelve (Thirty-seventh Statutes, page five hundred and sixty), and as amended by the Act of March fourth, nineteen hundred and seventeen (Thirty-ninth Statutes, page eleven hundred and eighty-eight), are hereby extended to authorize the designation of enlisted men of the Navy or Marine Corps as Navy mail clerks and assistant Navy mail clerks for duty at stations and shore establishments under

the jurisdiction of the Navy Department where the services of such mail clerks and assistant mail clerks are necessary.—(40 Stat., 718, chap. 114.)

See act of May 27, 1908 (35 Stat., 417), and note thereto.

[1918, July 1. Quarters, when not available.] That hereafter the Secretary of the Navy may determine where and when there are no public quarters available for persons in the Navy and Marine Corps, or serving therewith, within the meaning of any Acts or parts of Acts relating to the assignment of quarters or commutation therefor.—(40 Stat., 718, chap. 114.)

See note to sections 236 and 1487, Revised Statutes.

[1918, July 1. Cash rewards to civilians for suggested improvements.] That the Secretary of the Navy is hereby authorized, in his discretion and under such rules and regulations as he may prescribe, to pay cash rewards to civilian employees of the Navy Department or the Naval Establishment or other persons in civil life when due to a suggestion or series of suggestions by them there results an improvement or economy in manufacturing process or plant or naval material: *Provided*, That such sums as may be awarded to employees or other persons in civil life in accordance with this Act shall be paid them out of current naval appropriations in addition to their usual compensation: *Provided further*, That no employee or other person in civil life shall be paid a reward under this Act until he has properly executed an agreement to the effect that the use by the United States of the suggestion or series of suggestions made by him shall not form the basis of a further claim of any nature from the United States by him, his heirs, or assigns.—(40 Stat., 718, chap. 114.)

See sections 1763–1765, Revised Statutes, and references thereunder.

[1918, July 1. Retired enlisted men, promotion.] That any enlisted man of the Navy or Marine Corps upon the retired list who has been ordered into active service since April sixth, nineteen hundred and seventeen, or who may hereafter be ordered into active service, shall be eligible for promotion and he shall be entitled to the pay and benefits of continuous service of such rank and for such length of time as he is or has been employed in active service, and when relieved of active service shall retain upon the retired list the rank and service held by him at the time of such relief, with the pay and allowances of such rank on the retired list; and the accounting officers of the Treasury are hereby directed to allow in the accounts of any enlisted man of the Navy or Marine Corps who resigned from the retired list in order to reenlist for appointment in a higher grade, the same continuous service pay and the benefits of such rank to which he may have been appointed upon reenlistment, as if his service had been continuous, and any difference in pay from the date of reenlistment shall be credited to his account.—(40 Stat., 719, chap. 114.)

See notes to sections 1569 and 1622, Revised Statutes.

By act of July 11, 1919 (41 Stat., 153), it was provided "That so much of the Act of July 1, 1918 (Public Numbered 182), as authorizes the promotion of retired enlisted men of the Navy and Marine Corps ordered to active duty shall not be so construed as to make illegal promotions of such men as

have heretofore been made to warrant grades or as to deprive them of any of the pay, allowances, or other benefits accruing under such promotion." (It had previously been held that the above act of July 1, 1918, did not authorize the promotion of retired enlisted men except to higher enlisted grades on the retired list: see note to sec. 1622, R. S.)



[1918, July 1. Purchase of vessels for transportation of fuel.] That when, in the opinion of the President, the prices asked for the charter of vessels for the transportation of fuel are excessive, he is authorized to purchase vessels suitable for the purpose, and, if money is not otherwise available, to pay for them from the appropriation "Fuel and transportation."—(40 Stat., 730, chap. 114.)

The above was a proviso following appropriations for "fuel and transportation" in the naval appropriation act of July 1, 1918; an identical provision was contained in act

of June 15, 1917 (40 Stat., 211.)  
See act of April 28, 1904 (33 Stat., 518), and sections 3711, 3718, and 3728, Revised Statutes.

[1918, July 1. Termination of temporary promotions.] That all temporary promotions and advancements authorized by this Act shall continue in force only until otherwise directed by the President, and not later than six months after the termination of the present war.—(40 Stat., 733, chap. 114.)

The above paragraph in the naval appropriation act of July 1, 1918, followed imme-

diately after provisions for temporary promotions in the Coast Guard.

[1918, July 1. Pay clerks, Marine Corps.] The title of clerks for assistant paymasters is hereby changed to pay clerk, who shall hereafter receive the same pay, allowances, and other benefits now provided by law for clerks for assistant paymasters; and the total number of pay clerks shall not exceed ten for duty in the office of the paymaster, Marine Corps, fifteen for duty in the paymaster's department at large, and one for each assistant paymaster: *Provided*, That nothing herein contained shall be construed to reduce the pay, allowances, or other benefits granted by existing law to any clerk for assistant paymaster now in service.—(40 Stat., 735, chap. 114.)

See notes to sections 1596 and 1612, Revised Statutes.

[1918, July 1. Advertising for recruits.] That hereafter authority is hereby granted to employ the services of advertising agencies in advertising for recruits under such terms and conditions as are most advantageous to the Government.—(40 Stat., 736, chap. 114.)

This was a proviso in the naval appropriation act of July 1, 1918, following appropriation for "transportation and recruiting, Marine Corps."

[1918, July 8. Transfer of naval ordnance to War Department.] Such naval ordnance and ordnance material as the Secretary of War and the Secretary of the Navy may determine necessary is authorized to be transferred from the Navy Department to the War Department: *Provided*, That if such ordnance and ordnance material is obsolete for naval purposes the transfer shall be made without reimbursement and payment to the Navy for other ordnance and ordnance material transferred hereunder shall be made only after estimates shall have been submitted to Congress and a specific appropriation for such payment shall have been made.—(40 Stat., 817, chap. 137.)

See act of July 11, 1919 (41 Stat., 132), and references thereunder.

[1918, July 8. Unauthorized wearing of uniform or decorations of friendly nations.] That it shall be unlawful for any person, with intent to deceive or mislead, within the United States or Territories, possessions, waters, or places subject to the jurisdiction of the United States, to wear any naval, military, police, or other official uniform, decoration, or regalia of any foreign State,

nation, or Government with which the United States is at peace, or any uniform, decoration, or regalia so nearly resembling the same as to be calculated to deceive, unless such wearing thereof be authorized by such State, nation, or Government.

Any person who violates the provisions of this Act shall upon conviction be punished by a fine not exceeding \$300 or imprisonment for not exceeding six months, or by both such fine and imprisonment.—(40 Stat., 821, chap. 138.)

See act of June 3, 1916, section 125 (39 Stat., 216–217), as to unauthorized wearing of uniform of the United States, and see note to Constitution, Article I, section 9, clause

8, and acts of January 31, 1881, section 2 (21 Stat., 604), and July 9, 1918 (40 Stat., 872), as to foreign decorations.

[1918, July 9. Sale of war supplies.] That the President be, and he hereby is, authorized, through the head of any executive department, to sell, upon such terms as the head of such department shall deem expedient, to any person, partnership, association, corporation, or any other department of the Government, or to any foreign State or Government, engaged in war against any Government with which the United States is at war, any war supplies, material and equipment, and any by-products thereof, and any building, plant or factory, acquired since April sixth, nineteen hundred and seventeen, including the lands upon which the plant or factory may be situated, for the production of such war supplies, materials, and equipment which, during the present emergency, may have or may hereafter be purchased, acquired, or manufactured by the United States: *Provided further*, That sales of guns and ammunition made under the authority contained in this or any other Act shall be limited to sales to other departments of the Government and to foreign States or Governments engaged in war against any Government with which the United States is at war, and to members of the National Rifle Association and of other recognized associations organized in the United States for the encouragement of small-arms target practice: *Provided further*, That a detailed report shall be made to Congress on the first day of each regular session of the sales of any war supplies, matériel, lands, factories, or buildings, and equipment made under the authority contained in this or any other Act, except sales made to any foreign State or Government engaged in war against any Government with which the United States is at war, showing the character of the articles sold, to whom sold, the price received therefor, and the purpose for which sold \* \* \* .—(40 Stat., 850, chap. 143.)

The above provision was followed by a clause authorizing the deposit of proceeds of any such sales to the credit of the appropriation from which the cost of the property was paid, and the use thereof for the

purposes of the original appropriation. The said clause was expressly repealed by act of February 25, 1919, section 3 (40 Stat., 1173).

[1918, July 9. Medals and decorations, interchanged between United States and foreign military forces.] That American citizens who have received, since August first, nineteen hundred and fourteen, decorations or medals for distinguished service in the armies or in connection with the field service of those nations engaged in war against the Imperial German Government, shall, on entering the military service of the United States, be permitted to wear such medals or decorations.



That any and all members of the military forces of the United States serving in the present war be, and they are hereby, permitted and authorized to accept during the present war or within one year thereafter, from the Government of any of the countries engaged in war with any country with which the United States is or shall be concurrently likewise engaged in war, such decorations, when tendered, as are conferred by such Government upon the members of its own military forces; and the consent of Congress required therefor by clause eight of section nine of Article I of the Constitution is hereby expressly granted: *Provided*, That any officer or enlisted man of the military forces of the United States is hereby authorized to accept and wear any medal or decoration heretofore bestowed by the Government of any of the nations concurrently engaged with the United States in the present war.—(40 Stat., 872, chap. 143.)

That the President is authorized, under regulations to be prescribed by him, to confer such medals and decorations as may be authorized in the military service of the United States upon officers and enlisted men of the military forces of the countries concurrently engaged with the United States in the present war.—(40 Stat., 872–873, chap. 143.)

See acts of January 31, 1881, sections 2 and 3 (21 Stat., 604), July 1, 1918 (40 Stat., 821), and February 4, 1919 (40 Stat., 1056); see also notes to section 1407, Revised Statutes, and Constitution, article I, section 9, clause 8.

**Applicable to the Navy.**—The word “military” as used in the above paragraphs includes the Navy. (See 31 Op. Atty. Gen., 445, and file 9644–55, Navy Dept.)

**[1918, July 9. Interdepartmental Social Hygiene Board; protection of naval forces from venereal diseases.]** That there is hereby created a board to be known as the Interdepartmental Social Hygiene Board, to consist of the Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury as ex officio members, and of the Surgeon General of the Army, the Surgeon General of the Navy, and the Surgeon General of the Public Health Service, or of representatives designated by the Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury, respectively. The duties of the board shall be: (1) To recommend rules and regulations for the expenditure of moneys allotted to the States under section five of this chapter; (2) to select the institutions and organizations and fix the allotments to each institution under said section five; (3) to recommend to the Secretary of the Treasury, the Secretary of War, and the Secretary of the Navy such general measures as will promote correlation and efficiency in carrying out the purposes of this chapter by their respective departments; and (4) to direct the expenditure of the sum of \$100,000 referred to in the last paragraph of section seven of this chapter. The board shall meet at least quarterly, and shall elect annually one of its members as chairman, and shall adopt rules and regulations for the conduct of its business.

**SEC. 2.** That the Secretary of War and the Secretary of the Navy are hereby authorized and directed to adopt measures for the purpose of assisting the various States in caring for civilian persons whose detention, isolation, quarantine, or commitment to institutions may be found necessary for the protection of the military and naval forces of the United States against venereal diseases. \* \* \*.—(40 Stat., 886, chap. 143.)

SEC. 5. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$1,000,000, to be expended under the joint direction of the Secretary of War and the Secretary of the Navy to carry out the provisions of section two of this chapter: *Provided*, That the appropriation herein made shall not be deemed exclusive, but shall be in addition to other appropriations of a more general character which are applicable to the same or similar purposes. \* \* \*

SEC. 8. That the terms "State" and "States," as used in this chapter, shall be held to include the District of Columbia.—(40 Stat., 887, chap. 143.)

[1918, July 9. **Condemnation proceedings; sale of timber lands, logs, etc.; reuse of proceeds.**] That the act entitled "An Act to authorize condemnation proceedings of lands for military purposes," approved July second, nineteen hundred and seventeen, as amended by an act approved April eleventh, nineteen hundred and eighteen, be, and the same is hereby, amended, and its provisions in all respects together with all its privileges and benefits are hereby extended to the right of condemnation of standing or fallen timber, sawmills, camps, machinery, logging roads, rights of way, equipment, materials, supplies, and any works, property, or appliances suitable for the effectual production of such lumber and timber products, for the Army, Navy, United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation. That the right to institute such condemnation proceedings is hereby conferred upon the Secretary of War, the Secretary of the Navy, and the Chairman of the United States Shipping Board and the United States Shipping Board Emergency Fleet Corporation, individually or collectively. Such right of condemnation shall be exercised by such officials only for the purpose of obtaining such property when needed for the production, manufacture, or building aircraft, dry-docks, or vessels, their apparel or furniture, for housing of Government employees in connection with the Army, Navy, or the United States Shipping Board and the United States Shipping Board Emergency Fleet Corporation, and for the procurement of materials and equipment for aircraft, dry-docks and vessels. The jurisdiction of such condemnation proceedings is hereby vested in the District Courts of the United States, where the property which is sought to be condemned or any part thereof is located or situated, regardless of the value of the same.

And the President is hereby authorized through any department or the United States Shipping Board or said Fleet Corporation to sell and dispose of any lands or interests in real estate acquired for the production of lumber and timber products, and to sell any logs, manufactured or partly manufactured or otherwise procured for the Army, Navy, or United States Shipping Board Emergency Fleet Corporation, or resulting from such manufacture or procurement, either to individuals, corporations or foreign states or governments, at such price as he shall determine acting through his above representatives selling or disposing of the same, and the proceeds of such sale shall be returned to the appropriations which bore the expense of such procurement.—(40 Stat., 888, chap. 143.)

See act of July 2, 1917 (40 Stat., 241), as amended  
and reenacted by act of April 11, 1918 (40  
Stat., 518-519); see also acts of August 1,

1888 (25 Stat., 357), and June 3, 1916, sec-  
tion 124 (39 Stat., 215).



[1918, July 9. Navigation regulations; transportation of explosives; public vessels to enforce.] That in the interest of the national defense, and for the better protection of life and property on said waters, the Secretary of War is hereby authorized and empowered to prescribe such regulations as he may deem best for the use and navigation of any portion or area of the navigable waters of the United States or waters under the jurisdiction of the United States endangered or likely to be endangered by Coast Artillery fire in target practice or otherwise, or by the proving operations of the Government ordnance proving grounds at Sandy Hook, New Jersey, or at any Government ordnance proving ground that may be established elsewhere on or near such waters, and of any portion or area of said waters occupied by submarine mines, mine fields, submarine cables, or other material and accessories pertaining to seacoast fortifications, or by any plant or facility engaged in the execution of any public project of river and harbor improvement; and the said Secretary shall have like power to regulate the transportation of explosives upon any of said waters: *Provided*, That the authority hereby conferred shall be so exercised as not unreasonably to interfere with or restrict the food fishing industry, and the regulations prescribed in pursuance hereof shall provide for the use of such waters by food fishermen operating under permits granted by the War Department.—(40 Stat., 892, chap. 143.)

SEC. 2. That to enforce the regulations prescribed pursuant to this chapter, the Secretary of War may detail any public vessel in the service of the War Department, or, upon the request of the Secretary of War, the head of any other department may enforce, and the head of any such department is hereby authorized to enforce, such regulations by means of any public vessel of such department.

SEC. 3. That the regulations made the Secretary of War pursuant to this Chapter shall be posted in conspicuous and appropriate places, designated by him, for the information of the public; and every person who and every corporation which shall willfully violate any regulations made by the said Secretary pursuant to this Chapter shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction shall be punished by a fine not exceeding \$500, or by imprisonment (in the case of a natural person) not exceeding six months, in the discretion of the court.—(40 Stat., 893, chap. 143.)

See sections 4233 and 4412, Revised Statutes, and references thereunder, as to navigation laws; and see Criminal Code, act of

March 4, 1909, sections 217, 232, and 235 (35 Stat., 1131, 1134, 1135), as to transportation of explosives.

[1918, July 10. Atlanta penitentiary; products used by naval forces.] That the Attorney General of the United States is authorized and directed to establish, equip, maintain, and operate at the United States Penitentiary, Atlanta, Georgia, a factory or factories for the manufacture of cotton fabrics to supply the requirements of the War and Navy Departments, the Shipping Corporation, cotton duck suitable for tents and other army purposes and canvas for mail sacks and for the manufacture of mail sacks and other similar mail-carrying equipment for the use of the United States Government. The factory or factories shall not be so operated as to abolish any existing Government workshop or curtail the production within its present limits of any such

Government workshop, and the articles so manufactured shall be sold only to the Government of the United States.

The Attorney General is hereby further authorized and directed to acquire by purchase or condemnation proceedings such tracts of land at such points as he may determine, at a total cost of not to exceed \$200,000, which may be cleared, graded, and cultivated. And the Attorney General is authorized to employ the inmates of the institution herein mentioned under such regulations as he may prescribe in the work of clearing, grading, and cultivation of such acquired tracts of land. The products of any such agricultural development, including live stock, shall be utilized in said penitentiary or be sold to the Government of the United States for the use of the military and naval forces of the United States.—(40 Stat., 896, chap. 144.)

SEC. 2. That articles so manufactured shall be sold at the current market prices as determined by the Attorney General or his authorized agent, and all moneys or reimbursements received from such sales shall be deposited to the credit of the working capital fund created by this Act.—(40 Stat., 896–897, chap. 144.)

[1918, July 18, sec. 2. **Standardized screw threads, used by Navy; specifications in proposals.**] That it shall be the duty of said commission to ascertain and establish standards for screw threads, which shall be submitted to the Secretary of War, the Secretary of the Navy, and the Secretary of Commerce for their acceptance and approval. Such standards, when thus accepted and approved, shall be adopted and used in the several manufacturing plants under the control of the War and Navy Departments, and, so far as practicable, in all specifications for screw threads in proposals for manufactured articles, parts, or materials to be used under the direction of these departments.—(40 Stat., 913, chap. 156; 40 Stat., 1291, chap. 96.)

This section was reenacted, without change, by act of March 3, 1919 (40 Stat., 1291).

[1918, Aug. 31, sec. 5. **Wife of soldier or sailor in World War eligible for Government position.**] That the wife of a soldier or sailor serving in the present war shall not be disqualified for any position or appointment under the Government because she is a married woman.—(40 Stat., 956, chap. 166.)

See note to section 416, Revised Statutes.

[1918, Oct. 1, sec. 2. **Navy medical department to cooperate in suppressing communicable diseases.**] That the Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury are authorized and directed, respectively, to utilize jointly the personnel and facilities of the Medical Department of the Army, the Medical Department of the Navy, and the Public Health Service, so far as possible, in aiding to combat and suppress the said diseases.—(40 Stat., 1008, chap. 179, Pub. Res. No. 42.)

The first section of this resolution made an appropriation, available until June 30, 1919, for suppression of "Spanish influenza and other communicable diseases."

[1918, Nov. 4. **Allotments of men missing in action.**] For the purpose of the payment of allotments made by the enlisted men or the payment of family allowances under Article II of the Act of October 6, 1917, as amended, an enlisted man reported as missing in action shall be considered as occupying a pay status until his actual status has been determined by proper official authority of



the department in which the man served or is serving: *Provided*, That payments authorized hereunder shall not continue for more than one year.—(40 Stat., 1024, chap. 201.)

See act of October 6, 1917 (40 Stat., 402-405), and amendments noted thereunder.

[1919, Jan. 12. Sale of uniforms at cost to naval officers and midshipmen.] That hereafter uniforms, accouterments, and equipment shall, upon the request of any officer of the Navy or any officer of the Marine Corps or any officer of the Coast Guard while operating with the Navy or any midshipman at the Naval Academy or cadets at the Coast Guard Academy, be furnished by the Government at cost, subject to such restrictions and regulations as the Secretary of the Navy may prescribe.—(40 Stat., 1054, chap. 8).

[1919, Feb. 4. Medals of honor, distinguished service medals, and Navy crosses.] That the President of the United States be, and he is hereby, authorized to present, in the name of Congress, a medal of honor to any person who, while in the naval service of the United States, shall, in action involving actual conflict with the enemy, distinguish himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty and without detriment to the mission of his command or the command to which attached.

SEC. 2. That the President be, and he hereby is, further authorized to present, but not in the name of Congress, a distinguished-service medal of appropriate design and a ribbon, together with a rosette or other device to be worn in lieu thereof, to any person who, while in the naval service of the United States, since the sixth day of April, nineteen hundred and seventeen, has distinguished, or who hereafter shall distinguish, himself by exceptionally meritorious service to the Government in a duty of great responsibility.

SEC. 3. That the President be, and he hereby is, further authorized to present, but not in the name of Congress, a Navy cross of appropriate design and a ribbon, together with a rosette or other device to be worn in lieu thereof, to any person who, while in the naval service of the United States, since the sixth day of April, nineteen hundred and seventeen, has distinguished, or who shall hereafter distinguish, himself by extraordinary heroism or distinguished service in the line of his profession, such heroism or service not being sufficient to justify the award of a medal of honor or a distinguished-service medal.

SEC. 4. That each enlisted or enrolled person of the naval service to whom is awarded a medal of honor, distinguished-service medal, or a Navy cross shall, for each such award, be entitled to additional pay at the rate of \$2 per month from the date of the distinguished act or service on which the award is based, and each bar, or other suitable emblem or insignia, in lieu of a medal of honor, distinguished-service medal, or Navy cross, as hereinafter provided for, shall entitle him to further additional pay at the rate of \$2 per month from the date of the distinguished act or service for which the bar is awarded, and such additional pay shall continue throughout his active service, whether such service shall or shall not be continuous.

SEC. 5. That no more than one medal of honor or one distinguished-service medal or one Navy cross shall be issued to any one person; but for each succeeding deed or service sufficient to justify the award of a medal of honor or a distinguished-service medal or Navy cross, respectively, the President may

award a suitable bar, or other suitable emblem or insignia, to be worn with the decoration and the corresponding rosette or other device—(40 Stat., 1056, chap. 14.)

SEC. 6. That the Secretary of the Navy is hereby authorized to expend from the appropriation "Pay of the Navy" of the Navy Department so much as may be necessary to defray the cost of the medals of honor, distinguished-service medals, and Navy crosses, and bars, emblems, or insignia herein provided for, and so much as may be necessary to replace any medals, crosses, bars, emblems, or insignia as are herein or may heretofore have been provided for: *Provided*, That such replacement shall be made only in those cases where the medal of honor, distinguished-service medal, or Navy cross, or bar, emblem, or insignia presented under the provisions of this or any other Act shall have been lost, destroyed, or rendered unfit for use without fault or neglect on the part of the person to whom it was awarded, and shall be made without charge therefor.—(40 Stat., 1056-1057, chap. 14.)

SEC. 7. That, except as otherwise prescribed herein, no medal of honor, distinguished-service medal, Navy cross, or bar or other suitable emblem or insignia in lieu of either of said medals or of said cross, shall be issued to any person after more than five years from the date of the act or service justifying the award thereof, nor unless a specific statement or report distinctly setting forth the act or distinguished service and suggesting or recommending official recognition thereof shall have been made by his naval superior through official channels at the time of the act or service or within three years thereafter.

SEC. 8. That in case an individual who shall distinguish himself dies before the making of the award to which he may be entitled the award may nevertheless be made and the medal or cross or the bar or other emblem or insignia presented within five years from the date of the act or service justifying the award thereof to such representative of the deceased as the President may designate: *Provided*, That no medal or cross or no bar or other emblem or insignia shall be awarded or presented to any individual or to the representative of any individual whose entire service subsequent to the time he distinguished himself shall not have been honorable: *Provided further*, That in cases of persons now in the naval service for whom the award of the medal of honor has been recommended in full compliance with then existing regulations, but on account of services which, though insufficient fully to justify the award of the medal of honor, appears to have been such as to justify the award of the distinguished-service medal or Navy cross hereinbefore provided for, such cases may be considered and acted upon under the provisions of this Act authorizing the award of the distinguished-service medal and Navy cross notwithstanding that said services may have been rendered more than five years before said cases shall have been considered as authorized by this proviso, but all consideration or any action upon any of said cases shall be based exclusively upon official records now on file in the Navy Department.

SEC. 9. That the President be, and he hereby is, authorized to delegate, under such conditions, regulations, and limitations as he shall prescribe, to flag officers who are commanders in chief or commanding on important independent duty the power conferred upon him by this Act to award the Navy cross; and he is further authorized to make from time to time any and all



rules, regulations, and orders which he shall deem necessary to carry into effect the provisions of this Act and to execute the full purpose and intention thereof.— (40 Stat., 1057, chap. 14.)

See note to section 1407, Revised Statutes, joint resolution of May 4, 1898 (30 Stat., 741), and acts of March 3, 1915 (38 Stat., 931), April 27, 1916 (39 Stat., 53), and July 9, 1918 (40 Stat., 872).

The words "naval superior" in section 7 of this act include the Secretary of the Navy, and are not limited to officers of the Navy in immediate command of a naval force in which the special act or service deserving recognition occurs. (File 9644-350, Jan. 22, 1920.)

[1919, Feb. 24. United States bonds accepted in lieu of sureties.] That wherever by the laws of the United States or regulations made pursuant thereto, any person is required to furnish any recognizance, stipulation, bond, guaranty, or undertaking, hereinafter called "penal bond," with surety or sureties, such person may, in lieu of such surety or sureties, deposit as security with the official having authority to approve such penal bond, United States Liberty bonds or other bonds of the United States in a sum equal at their par value to the amount of such penal bond required to be furnished, together with an agreement authorizing such official to collect or sell such bonds so deposited in case of any default in the performance of any of the conditions or stipulations of such penal bond. The acceptance of such United States bonds in lieu of surety or sureties required by law shall have the same force and effect as individual or corporate sureties, or certified checks, bank drafts, post-office money orders, or cash, for the penalty or amount of such penal bond. The bonds deposited hereunder, and such other United States bonds as may be substituted therefor from time to time as such security, may be deposited with the Treasurer, or an Assistant Treasurer of the United States, a Government depository, Federal Reserve bank, or member bank, which shall issue receipt therefor, describing such bonds so deposited. As soon as security for the performance of such penal bond is no longer necessary, such bonds so deposited, shall be returned to the depositor: *Provided*, That in case a person or persons supplying a contractor with labor or material as provided by the Act of Congress, approved February 24, 1905 (33 Stat., 811), entitled "An Act to amend an Act approved August thirteenth, eighteen hundred and ninety-four, entitled 'An Act for the protection of persons furnishing materials and labor for the construction of public works,'" shall file with the obligee, at any time after a default in the performance of any contract subject to said Acts, the application and affidavit therein provided, the obligee shall not deliver to the obligor the deposited bonds nor any surplus proceeds thereof until the expiration of the time limited by said Acts for the institution of suit by such person or persons, and, in case suit shall be instituted within such time, shall hold said bonds or proceeds subject to the order of the court having jurisdiction thereof: *Provided further*, That nothing herein contained shall affect or impair the priority of the claim of the United States against the bonds deposited or any right or remedy granted by said acts or by this section to the United States for default upon any obligation of said penal bond: *Provided further*, That all laws inconsistent with this section are hereby so modified as to conform to the provisions hereof: *And provided further*, That nothing contained herein shall affect the authority of courts over the security, where such bonds are taken as security in judicial proceedings, or the authority of any administrative officer of the United States

to receive United States bonds for security in cases authorized by existing laws. The Secretary may prescribe rules and regulations necessary and proper for carrying this section into effect.—(40 Stat., 1148–1149, chap. 18.)

See sections 1383–1385, Revised Statutes, and notes thereto; see also act of August 13, 1894 (28 Stat., 278), as amended and reenacted by act of February 24, 1905 (33 Stat., 811–812); and see act of December 11,

1906 (34 Stat., 841), and section 3719, Revised Statutes.  
The word “Secretary” as used in this act is defined by section one thereof (40 Stat., 1058) to mean the Secretary of the Treasury.

[1919, Feb. 25. Reinstatement of employees honorably discharged from military service.] That all former Government employees who have been drafted or enlisted in the military service of the United States in the war with Germany shall be reinstated on application to their former positions, if they have received an honorable discharge and are qualified to perform the duties of the position.—(40 Stat., 1164, chap. 39.)

See note to section 416, Revised Statutes.

[1919, Feb. 28. Uniforms retained on discharge.] That any person who served in the United States Army, Navy, or Marine Corps in the present war may, upon honorable discharge and return to civil life, permanently retain one complete suit of outer uniform clothing, including the overcoat, and such articles of personal apparel and equipment as may be authorized, respectively, by the Secretary of War or the Secretary of the Navy, and may wear such uniform clothing after such discharge: *Provided*, That the uniform above referred to shall include some distinctive mark or insignia to be prescribed, respectively, by the Secretary of War or the Secretary of the Navy, such mark or insignia to be issued, respectively, by the War Department or Navy Department to all enlisted personnel so discharged. The word “Navy” shall include the officers and enlisted personnel of the Coast Guard who have served with the Navy during the present war.—(40 Stat., 1202–1203, chap. 70.)

SEC. 2. That the provisions of this Act shall apply to all persons who served in the United States Army, Navy, or Marine Corps during the present war honorably discharged since April sixth, nineteen hundred and seventeen. And in cases where such clothing and uniforms have been restored to the Government on their discharge the same or similar clothing and uniform in kind and value as near as may be shall be returned and given to such soldiers, sailors, and marines.—(40 Stat., 1203, chap. 70.)

See act of June 3, 1916, section 125 (39 Stat., 216–217), and note thereto.  
Travel allowance on discharge: Section 3 of this act (40 Stat., 1203), reenacted section 126 of the act approved June 3, 1916 (39 Stat., 217), and embodied in such reenactment

provision for furnishing mileage and transportation to enlisted men of the Navy and Marine Corps on discharge, and to naval reservists on release from active service; see the act and section last cited.

[1919, Mar. 1, sec. 10. Public Buildings Commission; control of office space in District of Columbia.] Public Buildings Commission: With a view to the control and allotment of space in owned or leased Government buildings in the District of Columbia, a Public Buildings Commission is hereby created to be composed of two Senators to be appointed by the President of the Senate and two Members of the House of Representatives to be appointed by the Speaker, who shall serve thereon only so long as they are Members of Congress, and the Superintendent of the Capitol Building and Grounds, the officer in charge of



public buildings and grounds, and the Supervising Architect or the Acting Supervising Architect of the Treasury during any vacancy in said office. Said commission shall elect one of its members as chairman of the commission and is authorized to employ such expert clerical or other services as it may deem necessary.

Any vacancies in said commission shall be filled in the same manner as the original appointments were made.—(40 Stat., 1269, chap. 86.)

Said commission shall have the absolute control of and the allotment of all space in the several public buildings owned or buildings leased by the United States in the District of Columbia, with the exception of the Executive Mansion and office of the President, Capitol Building, the Senate and House Office Buildings, the Capitol power plant, the buildings under the jurisdiction of the Regents of the Smithsonian Institution, and the Congressional Library Building, and shall from time to time assign and allot, for the use of the several activities of the Government, all such space.—(40 Stat., 1270, chap. 86.)

See note to section 415, Revised Statutes.

[1919, Mar. 1, sec. 11. **Delay and waste in public printing; restriction on periodicals; work to be done at Government Printing Office.**] That the Joint Committee on Printing shall have power to adopt and employ such measures as, in its discretion, may be deemed necessary to remedy any neglect, delay, duplication, or waste in the public printing and binding and the distribution of Government publications: *Provided*, That hereafter no journal, magazine, periodical, or other similar publication, shall be printed and issued by any branch or officer of the Government service unless the same shall have been specifically authorized by Congress \* \* \*. That on and after July 1, 1919, all printing, binding, and blank-book work for Congress, the Executive Office, the judiciary, and every executive department, independent office, and establishment of the Government, shall be done at the Government Printing Office, except such classes of work as shall be deemed by the Joint Committee on Printing to be urgent or necessary to have done elsewhere than in the District of Columbia for the exclusive use of any field service outside of said District.—(40 Stat., 1270, chap. 86.)

See act of January 12, 1895 (28 Stat., 601–624), and particularly sections 80 and 87 (28 Stat., 621, 622).

[1919, Mar. 3. **Census of Guam and Samoa, etc.**] That a census of the population, agriculture, manufactures, forestry and forest products, and mines and quarries of the United States shall be taken by the Director of the Census in the year nineteen hundred and twenty and every ten years thereafter. The census herein provided for shall include each State, the District of Columbia, Alaska, Hawaii, and Porto Rico. A census of Guam and Samoa shall be taken in the same year by the respective governors of said islands and a census of the Panama Canal Zone by the governor of the Canal Zone in accordance with plans prescribed or approved by the Director of the Census.—(40 Stat., 1291–1292, chap. 97.)

See note to act of June 28, 1906 (34 Stat., 552) as to status of Samoa and naval governor thereof.

[1919, Mar. 3, sec. 6. Preference to discharged soldiers and sailors in Government employment.] \* \* \* That hereafter in making appointments to clerical and other positions in the Executive branch of the Government in the District of Columbia or elsewhere preference shall be given to honorably discharged soldiers, sailors, and marines, and widows of such and to the wives of injured soldiers, sailors and marines who themselves are not qualified, but whose wives are qualified to hold such positions.—(40 Stat., 1293, chap. 97; 41 Stat., 37, chap. 6.)

This section was expressly amended and reenacted to read as above by act of July 11, 1919 (41 Stat., 37).

See note to section 416, Revised Statutes.

[1919, Mar. 3, sec. 7. Transfer of employees to Census Office; reinstatement.] \* \* \* That employees in other branches of the departmental classified service who have had previous experience in census work may be transferred without examination to the Census Office to serve during the whole or a part of the decennial census period, and at the end of such service the employees so transferred shall be eligible to appointment to positions in any department held by them at date of transfer to the Census Office without examination, but no employee so transferred shall within one year after such transfer receive higher salary than he is receiving at the time of the transfer \* \* \*.—(40 Stat., 1294, chap. 97.)

[1919, Mar. 3, sec. 3. Transfer of lands, etc., to the Public Health Service.] \* \* \* The President is authorized to direct the transfer to the Treasury Department of the use of such lands or parts of lands, buildings, fixtures, appliances, furnishings, or furniture under the control of any other department of the Government not required for the purposes of such department and suitable for the uses of the Public Health Service.—(40 Stat., 1303, chap. 98.)

See section 418, Revised Statutes, and note thereto; and see act of March 4, 1921 (41 Stat., 1365).

[1919, July 11, sec. 5. Interchange of supplies between departments.] That the heads of the several executive departments and other responsible officials, in expending appropriations contained in this or any other Act, so far as possible shall purchase material, supplies, and equipment, when needed and funds are available, from other services of the Government possessing material, supplies, and equipment no longer required because of the cessation of war activities. It shall be the duty of the heads of the several executive departments and other officials, before purchasing any of the articles described herein, to ascertain from the other services of the Government whether they have articles of the character described that are serviceable. And articles purchased by one service from another, if the same have not been used, shall be paid for at a reasonable price not to exceed actual cost, and if the same have been used, at a reasonable price based upon length of usage. The various services of the Government are authorized to sell such articles under the conditions specified, and the proceeds of such sales shall be covered into the Treasury as a miscellaneous receipt: *Provided*, That this section shall not be construed to amend, alter, or repeal the Executive order of December 3, 1918, concerning the transfer of office material, supplies, and equipment in the District of Columbia falling into disuse because of the cessation of war activities.—(41 Stat., 67–68, chap. 6.)

See acts of July 11, 1919 (41 Stat., 132, chap. 9), May 21, 1920, section 7 (41 Stat., 613), and July 11, 1919 (41 Stat., 130).



[1919, July 11, sec. 6. Influencing legislation.] That hereafter no part of the money appropriated by this or any other Act shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers and employees of the United States from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

Any officer or employee of the United States who, after notice and hearing by the superior officer vested with the power of removing him, is found to have violated or attempted to violate this section, shall be removed by such superior officer from office or employment. Any officer or employee of the United States who violates or attempts to violate this section shall also be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not more than \$500 or by imprisonment for not more than one year, or both.—(41 Stat., 68, chap. 6.)

See note to Constitution. Article I, section 1; and see act of August 24, 1912, section 6 (37 Stat., 555); see also article 95, Navy Regulations, 1920.

[1919, July 11, Transfer of Army ammunition to other departments.] That the Secretary of War be, and he is hereby, authorized to turn over on request from other executive departments of the Government, in his discretion, from time to time, without charge therefor, such ammunition, explosives, and other ammunition components as may prove to be or shall become surplus or unsuitable for the purposes of the War Department and as shall be suitable for use in the proper activities of other executive departments.—(41 Stat., 130, chap. 8.)

See acts of July 11, 1919, section 5 (41 Stat., 67-68, chap. 6); July 11, 1919 (41 Stat., 132, chap. 9); and May 21, 1920, section 7 (41 Stat., 613).

[1919, July 11. Claims for damage to private property.] That the Secretary of the Navy is authorized to consider, ascertain, adjust, determine, and pay the amounts due in all claims for damages (other than such as are occasioned by vessels of the Navy), to and loss of privately owned property, occurring subsequent to April 6, 1917, where the amount of the claim does not exceed \$500, for which damage or loss men in the naval service or Marine Corps are found to be responsible, all payments in settlement of said claims to be made out of the appropriation "Pay, miscellaneous": *Provided further*, That all claims adjusted under this authority during any fiscal year shall be reported in detail to the Congress by the Secretary of the Navy.—(41 Stat., 132, chap. 9.)

See act of June 24, 1910 (36 Stat., 607), and note thereto.

[1919, July 11. Navy disbursing officers relieved from losses, etc.] The accounting officers of the Treasury shall relieve any disbursing officer of the Navy charged with responsibility on account of loss or deficiency while in the

line of his duty, of Government funds, vouchers, records, or papers, in his charge, where such loss or deficiency occurred without fault or negligence on the part of said officer: *Provided*, That the Secretary of the Navy shall have determined that the officer was in the line of his duty, and the loss or deficiency occurred without fault or negligence on his part: *Provided further*, That the determination by the Secretary of the Navy of the aforesaid questions shall be conclusive upon the accounting officers of the Treasury: *Provided further*, That all cases of relief granted under this authority during any fiscal year shall be reported in detail to the Congress by the Secretary of the Navy.—(41 Stat., 132, chap. 9.)

See Judicial Code, act of March 3, 1911, section 145 (36 Stat., 1136-1137).

A provision for relief of disbursing officers from responsibility for illegal payments made

during "the period of the present emergency," was contained in this act (41 Stat., 153), but is omitted as temporary.

[1919, July 11. Interchange of supplies between Army and Navy.] The interchange without compensation therefor, of military stores, supplies, and equipment of every character, including real estate owned by the Government, is hereby authorized between the Army and the Navy upon the request of the head of one service and with the approval of the head of the other service.—(41 Stat., 132, chap. 9.)

See acts of August 24, 1912 (37 Stat., 589), March 4, 1915 (38 Stat., 1084), July 8, 1918 (40 Stat., 817), July 9, 1918 (40 Stat., 850), July 11, 1919, section 5 (41 Stat., 67-68, chap. 6), July 11, 1919 (41 Stat., 130, chap. 8),

July 19, 1919, section 5 (41 Stat., 233), and May 21, 1920, section 7 (41 Stat., 613). See also act of March 4, 1911 (36 Stat., 1279), and references thereunder.

[1919, July 11. Authorized enlisted strength, Navy, increased during national emergency.] The President is hereby authorized, whenever in his judgment a sufficient national emergency exists, to increase the authorized enlisted strength of the Navy to 191,000 men.—(41 Stat., 137-138, chap. 9.)

See note to section 1417, Revised Statutes, as to the authorized enlisted strength of the Navy under various laws; and see particularly act of July 1, 1918 (40 Stat., 714), which established the permanent authorized enlisted strength of the Navy.

The omitted portions of the act (41 Stat., 137) temporarily increased the "total authorized enlisted strength of the active list of the Navy" during the current fiscal year.

[1919, July 11. Permanent commissioned and enlisted strength not affected.] That nothing herein shall be construed as affecting the permanent, commissioned, or enlisted strength of the Regular Navy as authorized by existing law.—(41 Stat., 138, chap. 9.)

The permanent commissioned strength of the Navy was established by act of August 29, 1916 (39 Stat., 576-577). The permanent enlisted strength was established by act of July 1, 1918 (40 Stat., 714); see note to section 1417, Revised Statutes.

Omitted portions of this act (41 Stat., 137-138), contained temporary provisions dealing with the commissioned and enlisted strength of the Navy for the current fiscal year.

[1919, July 11. Naval Reserve Force, active duty restricted.] Members of the Naval Reserve Force shall not hereafter be ordered to perform active duty on shore of a kind which is ordinarily performed by civilians, and all reservists now performing such duty shall be relieved from such duty within thirty days after the date of approval of this Act.—(41 Stat., 138, chap. 9.)

See act of August 29, 1916 (39 Stat., 587-593), and notes thereto, relating to the Naval Reserve Force.



[1919, July 11. **Commissioned officers, computations as to numbers, and convening of selection boards.**] The provision of existing law which requires the Secretary of the Navy to make computations semiannually as of July 1 and January 1 of each year and to convene the boards to select officers of the line and of the staff corps for promotion is hereby amended so that said computations shall be made and said boards shall be convened at least once each year and at such times as the Secretary of the Navy may direct, and the boards shall recommend for promotion such number of officers as may be necessary to fill vacancies then existing and which may occur during the next period of time.—(41 Stat., 139, chap. 9.)

See act of August 29, 1916 (39 Stat., 577, 578), and notes thereto, as to computations and convening of selection board.

[1919, July 11. **Pay of Navy not reduced.**] That nothing contained in this Act shall be construed to reduce the pay or allowances of any commissioned, warrant, or appointed officer or any enlisted man as authorized by law for such officer or enlisted man in his present permanent status in the Regular Navy.—(41 Stat., 139, chap. 9.)

See notes to sections 1556 and 1569, Revised Statutes, as to pay of officers and enlisted men of the Navy.

[1919, July 11. **Pay of warrant officers, Navy, for foreign shore duty.**] Warrant officers of the Navy on shore duty beyond the continental limits of the United States shall, while so serving and from the time of departure from and until the time of return to said limits under orders to or from such foreign-shore duty, receive the same pay as is now or may be authorized by law for warrant officers on sea duty: *Provided*, That this paragraph shall be effective from April 6, 1917.—(41 Stat., 140, chap. 9.)

See note to section 1556, Revised Statutes, as to pay of warrant officers.

[1919, July 11. **Enlisted men and warrant officers credited with reserve service; membership of reservists in Naval Militia.**] Any enlisted man of the Navy or Marine Corps who has been or may be discharged to enable him to accept appointment as a commissioned or warrant officer in the Naval Reserve Force or Marine Corps Reserve, and who reenlists in the Navy or Marine Corps after the termination of his reserve service, shall be entitled, in computing service for retirement, to credit for all active reserve service; and if he reenlists in the Navy or Marine Corps within four or three months, respectively, from the date of the termination of his service as an officer of the Reserve he shall be restored to the grade or rank held by him before being discharged to accept such commission or warrant, and his service in the Regular Navy or Marine Corps, including his active service in the Naval Reserve Force or Marine Corps Reserve, shall be regarded as continuous for purposes of continuous-service pay: *Provided*, That any warrant officer in the Navy or Marine Corps and any pay clerk in the Marine Corps who has accepted or who may hereafter accept appointment as a commissioned officer in the Naval Reserve Force or Marine Corps Reserve shall be entitled, upon the termination of his appointment as a commissioned officer in the Reserve, to revert to his former status as a warrant officer in the Navy or Marine Corps, or as a pay clerk in the Marine Corps, and shall be entitled to count all active reserve service for purposes of longevity pay and retirement: *Provided*, That no part or parts of any existing laws

shall be construed as having discharged from the Naval Militia of any State, Territory, or the District of Columbia, those members of the National Naval Volunteers who were transferred to the Naval Reserve Force by authority of the Act of Congress making appropriations for the Naval Service which became a law on July 1, 1918; nor to prevent members of the Naval Reserve Force from being or becoming members of the Naval Militia of any State, Territory, or the District of Columbia: *Provided*, That such membership in the Naval Militia shall not interfere with the discharge of duties by such members thereof who are in the Naval Reserve Force.—(41 Stat., 141, chap. 9.)

See notes to sections 1556, 1569, 1573, and 1612, Revised Statutes, as to pay of warrant officers and enlisted men of the Navy and Marine Corps. See sections 1443, Revised Statutes, and references thereunder, as to retirement of warrant officers in the Navy; see section 1622, Revised Statutes, and

note thereto, as to retirement of officers and enlisted men of the Marine Corps; see act of March 3, 1899, section 17 (30 Stat., 1008), and references thereunder as to retirement of enlisted men of the Navy; and see act of August 29, 1916 (39 Stat., 611), as to warrant officers in the Marine Corps.

[1919, July 11. Reinstatement of employees who served in war with Germany.] That all former Government employees who have entered the military or naval service of the United States in the war with the German Government shall be reinstated on application to their former positions if they have received an honorable discharge and are qualified to perform the duties of the position.—(41 Stat., 142, chap. 9.)

See note to section 416, Revised Statutes.

[1919, July 11. Appropriations for maintenance of training stations.] The appropriations "Maintenance, Bureau of Yards and Docks," and "Repairs and Preservation" shall be available for the maintenance of naval training stations where the regular appropriations for the maintenance thereof are found to be insufficient.—(41 Stat., 145, chap. 9.)

[1919, July 11. Supply Corps.] That hereafter the Pay Corps shall be called the Supply Corps.—(41 Stat., 147, chap. 9.)

[1919, July 11. Fuel for Navy in District of Columbia.] Hereafter the provisions of the Sundry Civil Act, approved July 1, 1918, providing for the establishment of a Government fuel yard in the District of Columbia, shall not apply to the fuel required for the Naval Establishment, except the naval hospital, in the District of Columbia.—(41 Stat., 148, chap. 9.)

See acts of July 1, 1918 (40 Stat., 672-673), and June 5, 1920 (41 Stat., 913).

[1919, July 11. Naval Academy Band.] The Naval Academy Band shall hereafter consist of one leader, with pay and allowances of first lieutenant in the Marine Corps; one second leader, with a base pay of \$81 per month; forty-five musicians, first class, with a base pay of \$51 per month; twenty-seven musicians, second class, with a base pay of \$44 per month; one drum major, with a base pay of \$57.20 per month; and the said leader of the band, second leader of the band, drum major of the band, and the enlisted musicians of the band shall be entitled to the same benefits in respect to pay, emoluments, and retirement arising from longevity, reenlistment, and length of service as are or may hereafter become applicable to other officers or enlisted men of the Navy.—(41 Stat., 152, chap. 9.)

See act of April 12, 1910 (36 Stat., 297), and references thereunder; and see note to sec-

tion 1569 Revised Statutes, as to temporary increases in pay of enlisted men.



[1919, July 11. **Women enlisted in naval service.**] That the words "enlisted men," as contained in prior appropriation Acts, shall not be construed to deprive women, enlisted or enrolled in the naval service, of the pay, allowances, gratuities, and other benefits granted by law to the enlisted personnel of the Navy and Marine Corps.—(41 Stat., 152, chap. 9.)

See section 1, Revised Statutes, as to "words imparting the masculine gender" being applied to females; and see act of October 6, 1917, section 22 (40 Stat., 401-402), under "Definitions."

By a temporary provision in this act (41 Stat., 138), it was required that "female members, except nurses, of the Naval Reserve Force

and the Marine Corps Reserve shall, as soon as practicable and in no event later than thirty days after the date of approval of this Act, be placed on inactive duty." See also act of June 4, 1920, section 2 (41 Stat., 834), forbidding enrollments in the Naval Reserve Force except for general service.

[1919, July 11. **Rations, Marine Corps.**] That hereafter, except when detached by the President of the United States for duty with the Army, enlisted men of the Marine Corps shall be entitled to the same allowance for rations as are enlisted men of the Navy, under such rules and regulations as may be prescribed by the Secretary of the Navy.—(41 Stat., 154, chap. 9.)

See notes to sections 1615 and 1621, Revised Statutes.

[1919, July 11. **Sale of uniforms to marine officers.**] That hereafter this appropriation shall be available for the purchase of uniforms, accouterments, and equipment for sale at cost price to officers under such regulations as the Secretary of the Navy may prescribe.—(41 Stat., 154, chap. 9.)

This was a proviso following appropriations under the title, "Clothing, Marine Corps." See note to section 1612, Revised Statutes,

under "Laws relating specifically to Marine Corps," subheading, "Sale of subsistence stores, etc."

[1919, July 11. **Receipts of post laundries, Marine Corps.**] That hereafter the funds received in payment for laundry work performed by post laundries shall be used to defray the cost of operation of said laundries and the receipts and expenditures shall be accounted for in accordance with the methods prescribed by law and any sums remaining at the end of the fiscal year after such cost of maintenance and operation have been defrayed shall be deposited in the Treasury to the credit of the appropriation from which the cost of operation of such plants is paid.—(41 Stat., 155-156, chap. 9.)

This was a proviso following appropriations for "Contingent, Marine Corps."

See section 3689, Revised Statutes, and note thereto.

[1919, July 19, sec. 3. **Transfer of printing equipment to Public Printer.**]

\* \* \* That any officer of the Government having machinery, material, equipment or supplies for printing, binding, and blank book work, including lithography, photolithography, and other processes of reproduction, which are no longer required or authorized for his service, shall submit a detailed report of the same to the Public Printer, and the Public Printer is hereby authorized, with the approval of the Joint Committee on Printing, to requisition such articles of the character herein described as are serviceable in the Government Printing Office, and the same shall be promptly delivered to that office.—(41 Stat., 233, chap. 24.)

This was a proviso following temporary provisions relating to sales of supplies by exec-

utive departments during the current fiscal year, and disposition of the proceeds thereof.

[1919, July 19, sec. 5. **Transfer of Army motor vehicles to other departments.**] The Secretary of War is authorized to transfer any unused and surplus motor-

propelled vehicles and motor equipment of any kind, the payment for same to be made as provided herein, to any branch of the Government service having appropriations available for the purchase of said vehicles and equipment: *Provided*, That in case of the transfers herein authorized a reasonable price not to exceed actual cost, and if the same have been used, at a reasonable price based upon length of usage, shall be determined upon and an equivalent amount of each appropriation available for said purchase shall be covered into the Treasury as a miscellaneous receipt, and the appropriation in each case reduced accordingly: *Provided further*, That it shall be the duty of each official of the Government having such purchases in charge to procure the same from any such unused or surplus stock if possible: *Provided further*, That hereafter no transfer of motor-propelled vehicles and motor equipment, unless specifically authorized by law, shall be made free of charge to any branch of the Government service.—(41 Stat., 233, chap. 24.)

See acts of July 11, 1919, section 5 (41 Stat., 67–68, chap. 6), and July 11, 1919 (41 Stat., 132, chap. 9), and references thereunder.

[1920, Feb. 25. Lease of naval petroleum reserves, etc.] That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities: *Provided*, That the United States reserves the right to extract helium from all gas produced from lands permitted, leased, or otherwise granted under the provisions of this Act, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further*, That in the extraction of helium from gas produced from such lands, it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof: *And provided further*, That citizens of another country, the laws, customs, or regulations of which, deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act.—(41 Stat., 437–438, chap. 85.)

SEC. 18. That upon relinquishment to the United States, filed in the General Land Office within six months after the approval of this Act, of all right, title, and interest claimed and possessed prior to July 3, 1910, and continuously since by the claimant or his predecessor in interest under the preexisting placer mining law to any oil or gas bearing land upon which there has been drilled one or more oil or gas wells to discovery embraced in the Executive order of withdrawal issued September 27, 1909, and not within any naval petroleum reserve, and upon payment as royalty to the United States of an amount equal to the value at the time of production of one-eighth of all the oil or gas already



produced except oil or gas used for production purposes on the claim, or unavoidably lost, from such land, the claimant, or his successor, if in possession of such land, undisputed by any other claimant prior to July 1, 1919, shall be entitled to a lease thereon from the United States for a period of twenty years, at a royalty of not less than  $12\frac{1}{2}$  per centum of all the oil or gas produced except oil or gas used for production purposes on the claim, or unavoidably lost \* \* \*.—(41 Stat., 443, chap. 85.)

All such leases shall be made and the amount of royalty to be paid for oil and gas produced, except oil or gas used for production purposes on the claim, or unavoidably lost, after the execution of such lease shall be fixed by the Secretary of the Interior under appropriate rules and regulations: *Provided, however,* That as to all like claims situate within any naval petroleum reserve the producing wells thereon only shall be leased, together with an area of land sufficient for the operation thereof, upon the terms and payment of royalties for past and future production as herein provided for in the leasing of claims. \* \* \*.—(41 Stat., 444, chap. 85.)

SEC. 35. \* \* \* That all moneys which may accrue to the United States under the provisions of this Act from lands within the naval petroleum reserves shall be deposited in the Treasury as "Miscellaneous receipts."—(41 Stat., 450-451, chap. 85.)

See acts of August 25, 1914 (38 Stat., 709), August 29, 1916 (39 Stat., 559-560), and June 4, 1920 (41 Stat., 813).

[1920, Mar. 6. Sale of naval supplies to personnel of Coast Guard and Public Health Service.] Officers and enlisted men of the Coast Guard shall be permitted to purchase quartermaster supplies from the Army, Navy, and Marine Corps at the same price as is charged the officers and enlisted men of the Army, Navy, and Marine Corps. \* \* \*.—(41 Stat., 506, chap. 94.)

Hereafter officers of the Public Health Service may purchase quartermaster supplies from the Army, Navy, and Marine Corps at the same price as is charged officers of the Army, Navy, and Marine Corps.—(41 Stat., 507, chap. 94.)

See act of March 4, 1913 (37 Stat., 909), and references thereunder.

[1920, Mar. 6. Naval service, etc., credited to officers of Public Health Service.] Officers of the Public Health Service shall be credited with service in the Army, Navy, Marine Corps, and the Coast Guard in computing longevity pay.—(41 Stat., 507, chap. 94.)

[1920, Mar. 9, sec. 10. Salvage by Government owned vessels.] That the United States, and the crew of any merchant vessel owned or operated by the United States, or such corporation, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its own benefit, and not for the benefit of the crew, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such corporation, having control of the possession or operation of such vessel.—(41 Stat., 528, chap. 95.)

See sections 1536 and 4642, Revised Statutes, and acts of August 1, 1912 (37 Stat., 242), and July 1, 1918 (40 Stat., 705).

[1920, May 18. Temporary increases in pay and allowances, naval personnel, etc.]

**This act provided as follows:**

"That commencing January 1, 1920, commissioned officers of the Army, Navy, and Marine Corps, and Public Health Service shall be paid, in addition to all pay and allowances now allowed by law, increases at rates per annum as follows: Colonels in the Army and Marine Corps, captains in the Navy, and assistant surgeons general in the Public Health Service, \$600; lieutenant colonels in the Army and Marine Corps, commanders in the Navy, and senior surgeons in the Public Health Service, \$600; majors in the Army and Marine Corps, lieutenant commanders in the Navy, and surgeons in the Public Health Service, \$840; captains in the Army and Marine Corps, lieutenants in the Navy, and passed assistant surgeons in the Public Health Service, \$720; first lieutenants in the Army and Marine Corps, lieutenants (junior grade), acting assistant surgeons and acting assistant dental surgeons in the Navy, and assistant surgeons in the Public Health Service, \$600; second lieutenants in the Army and Marine Corps, and ensigns in the Navy, \$420: *Provided*, That contract surgeons of the Army serving full time shall receive the pay of a second lieutenant.—(41 Stat., 601-602, chap. 190.)

"SEC. 2. That the rights and benefits prescribed under the Act of April 16, 1918, granting commutation of quarters, heat, and light during the present emergency to officers of the Army on duty in the field are hereby continued and made effective until June 30, 1922, and shall apply equally to officers of the Navy, Marine Corps, Coast Guard, and Public Health Service: *Provided*, That such rights and benefits as are prescribed for officers shall apply equally for enlisted men now entitled by regulations to quarters or to commutation therefor.

"SEC. 3. That, commencing January 1, 1920, warrant officers of the Navy shall be paid, in addition to all pay and allowances now allowed by law, an increase at the rate of \$240 per annum.

"SEC. 4. That, commencing January 1, 1920, the pay of all enlisted men of the Army and Marine Corps and of members of the female Nurse Corps of the Army and Navy is hereby increased 20 per centum: *Provided*, That such increase shall not apply to enlisted men whose initial pay, if it has already been permanently increased since April 6, 1917, is now less than \$33 per month.

"SEC. 5. That all noncommissioned officers of the Army of grade of color sergeant and above as fixed by existing Army Regulations and noncommissioned officers of the Marine Corps of corresponding grades shall be entitled to one ration or commutation therefor in addition to that to which they are now entitled. The commutation value shall be determined by the President on July 1 of each fiscal year, and for the current fiscal year the value shall be computed on the basis of 55 cents per ration: *Provided*, That Army field clerks and field clerks Quartermaster Corps, whose total pay and allowances do not exceed \$2,500 per

annum, shall be paid an increase at the rate of \$240 per annum: *Provided further*, That such Army field clerks and field clerks Quartermaster Corps, whose total pay and allowances exceed \$2,500 but do not exceed \$2,740 per annum, shall be paid such additional amount as will make their total pay and allowances not to exceed \$2,740 per annum: *Provided further*, That this section shall not be construed to reduce the pay and allowances of any Army field clerk or field clerk Quartermaster Corps.—(41 Stat., 602, chap. 190.)

"SEC. 6. That, commencing January 1, 1920, the following shall be the rate of base pay for for each enlisted rating: Chief petty officers with acting appointments, \$99 per month; chief petty officers with permanent appointments and mates, \$126 per month; petty officers, first class, \$84 per month; petty officers, second class, \$72 per month; petty officers, third class, \$60 per month; nonrated men, first class, \$54 per month; nonrated men, second class, \$48 per month; nonrated men, third class, \$33 per month: *Provided*, That the base pay of firemen, first class, shall be \$60 per month; firemen, second class, \$54 per month; firemen, third class, \$48 per month: *Provided further*, That the rate of base pay for each rating in the Naval Academy Band shall be as follows: Second leader, with acting appointment, \$99 per month, with permanent appointment, \$126 per month; drum major, \$84 per month; musicians, first class, \$72 per month; musicians, second class, \$60 per month: *Provided further*, That the base pay of cabin stewards and cabin cooks shall be \$84 per month; wardroom stewards and wardroom cooks, \$72 per month; steerage stewards and steerage cooks, \$72 per month; warrant officers' stewards and warrant officers' cooks, \$60 per month; mess attendants, first class, \$42 per month; mess attendants, second class, \$36 per month; mess attendants, third class, \$33 per month: *Provided further*, That the retainer pay of those members of the Fleet Naval Reserve who, pursuant to call, shall return to active duty within one month after the approval of this Act and shall continue on active duty until the Navy shall have been recruited up to its permanent authorized strength, or until the number in the grade to which they may be assigned is filled, but not beyond June 30, 1922, shall be computed upon the base pay they are receiving when retransferred to inactive duty, plus the additions or increases prescribed in the Naval Appropriation Act approved August 29, 1916, for members of the Fleet Naval Reserve: *Provided further*, That the rates of base pay herein fixed shall not be further increased 10 per centum as authorized by an Act approved May 13, 1908, nor by the temporary war increases as authorized by section 15 of the Act approved May 22, 1917, as amended by the Act approved July 11, 1919. \* \* \* —(41 Stat., 602-603, chap. 190.)

"SEC. 9. That nothing contained in this Act shall be construed as granting any back pay or allowances to any officer or enlisted man whose



active service shall have terminated subsequent to December 31, 1919, and prior to the approval of this Act, unless such officers or enlisted men shall have been recalled to active service or shall have been reenlisted prior to the approval of this Act.

"SEC. 10. That any enlisted man or apprentice seaman who shall reenlist in the Navy within one year from the date of his discharge therefrom shall, upon such reenlistment, be entitled to and shall receive the same benefits as are now authorized by law for reenlistment within four months from date of last discharge from the service: *Provided*, That this section shall become inoperative six months after the date of the approval of this Act. \* \* \*—(41 Stat., 603, chap. 190.)

"SEC. 13. That the provisions of sections 1, 3, 4, 5, and 6 of this Act shall remain effective until the close of the fiscal year ending June 30, 1922, unless sooner amended or repealed: *Provided*, That the rates of pay prescribed in sections 4 and 6 hereof shall be the rates of pay during the current enlistment of all men in active service on the date of the approval of this Act, and for those who enlist, reenlist, or extend their enlistment prior to July 1, 1922, for the term of such enlistment, reenlistment, or extended enlistment: *Provided further*, That the increases provided in this Act shall not enter into the computation of the retired pay of officers or enlisted men who may be retired prior to July 1, 1922: *And provided further*, That a special committee, to be composed of five Members of the Senate, to be appointed by the Vice President, and five Members of the House of Representatives, to be appointed by the

Speaker of the House of Representatives, shall make an investigation and report recommendations to their respective Houses not later than the first Monday in January, 1922, relative to the readjustment of the pay and allowances of the commissioned and enlisted personnel of the several services herein mentioned.

"SEC. 14. That nothing contained in this Act shall operate to reduce the pay or allowances of any officer or enlisted man on the active or retired list: *Provided*, That the allowances and gratuities now authorized by existing law are not changed hereby, except as otherwise specified in this Act.—(41 Stat., 604, chap. 190.)

"SEC. 15. That the appropriations 'Pay of the Navy, 1920,' and 'Pay, Marine Corps, 1920,' are hereby made available for any of the expenses authorized by this Act, and any part or all of the appropriations 'Provisions, Navy, 1920,' and 'Maintenance, Quartermaster's Department, Marine Corps, 1920,' not required for the objects of expenditure specified in said appropriations, may be transferred to the appropriations 'Pay of the Navy, 1920,' or 'Pay, Marine Corps, 1920,' respectively, as may be required."—(41 Stat., 604-605, chap. 190.)

Omitted portions of this act which contained permanent legislation relating to the Navy are set forth below; other omitted portions of the act related exclusively to the Coast Guard and Coast and Geodetic Survey.

As to pay of the Navy, Naval Reserve Force, and Marine Corps, see notes to sections 1556, 1569, 1573, and 1612, Revised Statutes; as to rations of Marine Corps, see note to section 1615, Revised Statutes.

[1920, May 18, sec. 7. Pay of civilian professors, Naval Academy.] That the Secretary of the Navy is authorized, in his discretion, to readjust the prevailing rates of pay of civilian professors and instructors at the United States Naval Academy: *Provided*, That said readjustment, which shall be effective from January 1, 1920, shall not involve an additional expenditure in excess of \$55,000 for the remainder of the current fiscal year.—(41 Stat., 603, chap. 190.)

See act of August 29, 1916 (39 Stat., 607), and note to section 1528, Revised Statutes.

[1920, May 18, sec. 11. Longevity pay, naval officers; service credited.] \* \* \* That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services.—(41 Stat., 604, chap. 190.)

See note to section 1556, Revised Statutes, under "39. Longevity pay."

[1920, May 18, sec. 12. Transportation to families of officers and enlisted men on permanent change of station; transportation of household effects.] That hereafter when any commissioned officer, noncommissioned officer of the grade of color sergeant and above, including any noncommissioned officer of the Marine Corps of corresponding grade, warrant officer, chief petty officer, or petty officer (first class) having a wife or dependent child or children, is ordered to make a permanent change of station, the United States shall fur-

nish transportation in kind from funds appropriated for the transportation of the Army, the Navy, the Marine Corps, the Coast Guard, the Coast and Geodetic Survey, and the Public Health Service to his new station for the wife and dependent child or children: *Provided*, That for persons in the naval service the term "permanent station," as used in this section, shall be interpreted to mean a shore station or the home yard of the vessel to which the person concerned may be ordered; and a duly authorized change in home yard or home port of such vessel shall be deemed a change of station: *Provided further*, That if the cost of such transportation exceeds that for transportation from the old to the new station the excess cost shall be paid to the United States by the officer concerned: *Provided further*, That transportation supplied the wife or dependent child or children of such officer, to or from stations beyond the continental limits of the United States, shall not be other than by Government transport, if such transportation is available: *And provided further*, That the personnel of the Navy shall have the benefit of all existing laws applying to the Army and the Marine Corps for the transportation of household effects.—(41 Stat., 604, chap. 190.)

[1920, May 21, sec. 7. Transfer of appropriations between bureaus and departments; supplies and services.] That whenever any Government bureau or department procures, by purchase or manufacture, stores or materials of any kind, or performs any service for another bureau or department, the funds of the bureau or department for which the stores or materials are to be procured or the service performed may be placed subject to the requisitions of the bureau or department making the procurement or performing the service for direct expenditure: *Provided*, That funds so placed with the procuring bureau shall remain available for a period of two years for the purposes for which the allocation was made unless sooner expended.—(41 Stat., 613, chap. 194.)

A similar provision, limited to the War and Navy Departments, was contained in act

of March 4, 1915 (38 Stat., 1084); see references under that act.

[1920, May 22. Retirement of civil employees; deductions from pay for retirement fund; etc.] That beginning at the expiration of ninety days next following the passage of this Act, all employees in the classified civil service of the United States who have on that date, or shall have on any date thereafter, reached the age of seventy years and rendered at least fifteen years of service computed as prescribed in section 3 of this Act, shall be eligible for retirement on an annuity as provided in section 2 hereof: *Provided*, That mechanics, city and rural letter carriers, and post-office clerks shall be eligible for retirement at sixty-five years of age, and railway postal clerks at sixty-two years of age, if said mechanics, city and rural letter carriers, post-office clerks, and railway postal clerks shall have rendered at least fifteen years of service computed as prescribed in section 3 of this Act.

The provisions of this Act shall include superintendents of United States national cemeteries, employees of the Superintendent of the United States Capitol Buildings and Grounds, the Library of Congress, and the Botanic Gardens, excepting persons appointed by the President and confirmed by the Senate, and may be extended by Executive order, upon recommendation of the Civil Service Commission, to include any employee or group of employees in the



civil service of the United States not classified at the time of the passage of this Act. The President shall have power, in his discretion, to exclude from the operation of this Act any employee or group of employees in the classified civil service whose tenure of office or employment is intermittent or of uncertain duration. \* \* \*

SEC. 2. [CLASSIFICATION AND RATES FOR ANNUITIES.] That for the purpose of determining the amount of annuity which retired employees shall receive, the following classifications and rates shall be established:

Class A shall include all employees to whom this Act applies who shall have served the United States for a total period of thirty years or more. The annuity to a retired employee in this class shall equal 60 per centum of such employee's average annual basic salary, pay, or compensation from the United States for the ten years next preceding the date on which he or she shall retire: *Provided*, That in no case shall an annuity in this class exceed \$720 per annum or be less than \$360 per annum.—(41 Stat., 614, chap. 195.)

Class B shall include all employees to whom this Act applies who shall have served the United States for a total period of twenty-seven years or more, but less than thirty years. The annuity to a retired employee in this class shall equal 54 per centum of such employee's average annual basic salary, pay, or compensation from the United States for the ten years next preceding the date on which he or she shall retire: *Provided*, That in no case shall an annuity in this class exceed \$648 per annum, or be less than \$324 per annum.

Class C shall include all employees to whom this Act applies who shall have served the United States for a total period of twenty-four years or more, but less than twenty-seven years. The annuity to a retired employee in this class shall equal 48 per centum of such employee's average annual basic salary, pay, or compensation from the United States for the ten years next preceding the date on which he or she shall retire: *Provided*, That in no case shall an annuity in this class exceed \$576 per annum, or be less than \$288 per annum.

Class D shall include all employees to whom this Act applies who shall have served the United States for a total period of twenty-one years or more, but less than twenty-four years. The annuity to a retired employee in this class shall equal 42 per centum of such employee's average annual basic salary, pay, or compensation from the United States for the ten years next preceding the date on which he or she shall retire: *Provided*, That in no case shall an annuity in this class exceed \$504 per annum, or be less than \$252 per annum.

Class E shall include all employees to whom this Act applies who shall have served the United States for a total period of eighteen years or more, but less than twenty-one years. The annuity to a retired employee in this class shall equal 36 per centum of such employee's average annual basic salary, pay, or compensation from the United States for the ten years next preceding the date on which he or she shall retire: *Provided*, That in no case shall an annuity in this class exceed \$432 per annum, or be less than \$216 per annum.

Class F shall include all employees to whom this Act applies who shall have served the United States for a total period of fifteen years or more, but less than eighteen years. The annuity to a retired employee in this class shall equal 30 per centum of such employee's average annual basic salary, pay, or compensation from the United States for the ten years next preceding the date on which

he or she shall retire: *Provided*, That in no case shall an annuity in this class exceed \$360 per annum, or be less than \$180 per annum.

The term "basic salary, pay, or compensation" wherever used in this Act shall be so construed as to exclude from the operation of the Act all bonuses, allowances, overtime pay, or salary, pay, or compensation given in addition to the base pay of the positions as fixed by law or regulation.—(41 Stat., 615, chap. 195.)

SEC. 3. [COMPUTATION OF SERVICE.] That for the purposes of this Act and subject to the provisions of section 10 hereof, the period of service shall be computed from the date of original employment, whether as a classified or unclassified employee in the civil service of the United States, and shall include periods of service at different times and services in one or more departments, branches, or independent offices of the Government, and shall also include service performed under authority of the United States beyond seas, and honorable service in the Army, Navy, Marine Corps, or Coast Guard of the United States: *Provided*, That in the case of an employee who is eligible for and elects to receive a pension under any law, or compensation under the War Risk Insurance Act, the period of his or her military or naval service upon which such pension or compensation is based shall not be included for the purpose of assignment to classes defined in section 2 hereof, but nothing contained in this Act shall be so construed as to affect in any manner his or her right to a pension, or to compensation under the War Risk Insurance Act, in addition to the annuity herein provided.—(41 Stat., 615–616, chap. 195.)

It is further provided that in computing length of service for the purposes of this Act all periods of separation from the service and so much of any period of leave of absence as may exceed six months shall be excluded, and that in the case of substitutes in the Postal Service only periods of active employment shall be included.

SEC. 4. [COMMISSIONER OF PENSIONS, JURISDICTION; APPEALS.] That for the purpose of administration, except as otherwise provided herein, the Commissioner of Pensions, under the direction of the Secretary of the Interior, be, and is hereby, authorized and directed to perform, or cause to be performed, any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect. An appeal to the Secretary of the Interior shall lie from the final action or order of the Commissioner of Pensions affecting the rights or interests of any person or of the United States under this Act, the procedure on appeal to be as prescribed by the Commissioner of Pensions, with the approval of the Secretary of the Interior.

SEC. 5. [DISABILITY RETIREMENT IN LIEU OF OTHER COMPENSATION.] That any employee to whom this Act applies who shall have served for a total period of not less than fifteen years, and who, before reaching the retirement age as fixed in section 1 hereof, becomes totally disabled for useful and efficient service by reason of disease or injury not due to vicious habits, intemperance; or willful misconduct on the part of the employee, shall upon his or her own application or upon the request or order of the head of the department, branch, or independent office concerned, be retired on an annuity under the provisions of section 2 hereof: *Provided, however*, That no employee shall be retired under



the provisions of this section until examined by a medical officer of the United States or a duly qualified physician or surgeon or board of physicians or surgeons designated by the Commissioner of Pensions for that purpose and found to be disabled in the degree and in the manner specified herein.

Every annuitant retired under the provisions of this section, unless the disability for which retired is permanent in character, shall, at the expiration of one year from the date of such retirement and annually thereafter until reaching the retirement age as defined in section 1 hereof, be examined under direction of the Commissioner of Pensions by a medical officer of the United States, or a duly qualified physician or surgeon or board of physicians or surgeons designated by the Commissioner of Pensions for that purpose, in order to ascertain the nature and degree of the annuitant's disability, if any; if the annuitant recovers and is restored to his or her former earning capacity before reaching the retirement age, payment of the annuity shall be discontinued from the date of the medical examination showing such recovery; if the annuitant fails to appear for examination as required under this section, payment of the annuity shall be suspended until continuance of the disability has been satisfactorily established. The Commissioner of Pensions is hereby authorized to order or direct at any time such medical or other examination as he shall deem necessary to determine the facts relative to the nature and degree of disability of any employee retired on an annuity under this section.

Fees for examinations made under the provisions of this section by physicians or surgeons who are not medical officers of the United States shall be fixed by the Commissioner of Pensions, and such fees, together with the employee's reasonable traveling and other expenses incurred in order to submit to such examinations, shall be paid out of the appropriations for the cost of administering this Act.—(41 Stat., 616, chap. 195.)

In all cases where the annuity is discontinued under the provisions of this section before the annuitant has received a sum equal to the total amount of his or her contributions with accrued interest, the difference shall be paid to the retired employee, or to his or her estate, upon application therefor in such form and manner as the Commissioner of Pensions may direct.

No person shall be entitled to receive an annuity under the provisions of this Act, and compensation under the provisions of the Act of September 7, 1916, entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," covering the same period of time; but this provision shall not be so construed as to bar the right of any claimant to the greater benefit conferred by either Act for any part of the same period of time.

SEC. 6. [RETENTION IN SERVICE BEYOND RETIRING AGE.] That all employees to whom this Act applies shall, upon the expiration of ninety days next succeeding its passage, if of retirement age, or thereafter on arriving at retirement age as defined in section 1 hereof, be automatically separated from the service, and all salary, pay, or compensation shall cease from that date, and it shall be the duty of the head of each department, branch, or independent office of the Government to notify such employees under his direction of the date of such separation from the service at least sixty days in advance thereof:

*Provided*, That no person employed in the executive departments within the District of Columbia, retired under the provisions of this Act during the fiscal year ending June 30, 1921, shall be replaced by additional employees, but if the exigencies of the service so require, places made vacant by such retirement may be filled by promotion or transfer of eligible employees already in the service: *Provided*, That if within sixty days after the passage of this Act or not less than thirty days before the arrival of an employee at the age of retirement, the head of the department, branch, or independent office of the Government in which he or she is employed certifies to the Civil Service Commission that by reason of his or her efficiency and willingness to remain in the civil service of the United States the continuance of such employee therein would be advantageous to the public service, such employee may be retained for a term not exceeding two years upon approval and certification by the Civil Service Commission, and at the end of the two years he or she may, by similar approval and certification, be continued for an additional term not exceeding two years, and so on: *Provided, however*, That at the end of ten years after this act becomes effective no employee shall be continued in the civil service of the United States beyond the age of retirement defined in section 1 hereof for more than four years.—(41 Stat., 617, chap. 195.)

SEC. 7. [APPLICATION; CERTIFICATE OF HEAD OF DEPARTMENT.] That every employee who is or hereafter becomes eligible for retirement because of age as provided in this Act, shall, within sixty days after its passage or thirty days before reaching the retirement age, or at any time thereafter, file with the Commissioner of Pensions, in such form as he may prescribe, an application for an annuity, supported by a certificate from the head of the department, branch, or independent office of the Government in which the applicant has been employed, stating the age and period or periods of service of the applicant and salary, pay, or compensation received during such periods, as shown by the official records: *Provided, however*, That in the case of an employee who is to be continued in the civil service of the United States beyond the retirement age as provided in section 6 hereof, he or she may make application for retirement at any time within such period of continuance in the service; but nothing contained in this Act shall be construed to prevent the compulsory retirement of such employee when in the judgment of the head of the department, branch, or independent office in which he or she is employed such retirement would promote the best interests of the service.—(41 Stat., 617-618, chap. 195.)

Upon receipt of satisfactory evidence the Commissioner of Pensions shall forthwith adjudicate the claim of the applicant, and if title to annuity be established, a proper certificate shall be issued to the annuitant under the seal of the Department of the Interior.

Annuities granted under this Act for retirement on account of age shall commence from the date of separation from the service on or after the date this Act shall take effect, and shall continue during the life of the annuitant. Annuities granted for disability under the provisions of section 5 hereof shall be subject to the limitations specified in said section.

SEC. 8. [DEDUCTIONS FROM SALARIES; DONATIONS, ETC.] That beginning on the first day of the third month next following the passage of this Act and



monthly thereafter there shall be deducted and withheld from the basic salary, pay, or compensation of each employee to whom this Act applies a sum equal to  $2\frac{1}{2}$  per centum of such employee's basic salary, pay, or compensation. The Secretary of the Treasury shall cause the said deductions to be withheld from all specific appropriations for the particular salaries or compensation from which the deductions are made and from all allotments out of lump-sum appropriations for payments of such salaries or compensation for each fiscal year, and said sums shall be transferred on the books of the Treasury Department to the credit of a special fund to be known as "the civil-service retirement and disability fund," and said fund is hereby appropriated for the payment of annuities, refunds, and allowances as provided in this Act.

The Secretary of the Treasury is hereby directed to invest from time to time, in interest-bearing securities of the United States, such portions of the "civil-service retirement and disability fund" hereby created as in his judgment may not be immediately required for the payment of annuities, refunds, and allowances as herein provided, and the income derived from such investments shall constitute a part of said fund for the purpose of paying annuities and of carrying out the provisions of section 11 of this Act.

The Secretary of the Treasury is hereby authorized and empowered in carrying out the provisions of this Act to supplement the individual contributions of employees with moneys received in the form of donations, gifts, legacies, bequests, or otherwise, and to receive, invest, and disburse for the purposes of this Act all moneys which may be contributed by private individuals or corporations or organizations for the benefit of civil-service employees generally or any special class of employees.

SEC. 9. [DEDUCTIONS COMPULSORY.] That every employee coming within the provisions of this Act shall be deemed to consent and agree to the deductions from salary, pay, or compensation as provided in section 8 hereof, and payment less such deductions shall be a full and complete discharge and acquittance of all claims and demands whatsoever for all regular services rendered by such employee during the period covered by such payment, except the right to the benefits to which he or she shall be entitled under the provisions of this Act, notwithstanding the provisions of sections 167, 168, and 169 of the Revised Statutes of the United States, and of any other law, rule, or regulation affecting the salary, pay, or compensation of any person or persons employed in the civil service to whom this Act applies.—(41 Stat., 618, chap. 195.)

SEC. 10. [EMPLOYEES REINSTATED, ETC.] That upon the transfer of any employee from an unclassified to a classified status, or upon the reinstatement of a former employee, credit for past service rendered subsequent to the date this Act shall take effect, or for any part thereof, shall be granted only upon deposit with the Treasurer of the United States of the amount of such deductions with interest as provided in this Act as would have been made for the periods of actual service, or part thereof, for which credit is to be given, but such interest shall not be computed for periods of separation from the service: *Provided*, That failure to make such deposit shall not deprive the employee of credit for any past service rendered prior to the date this Act shall become operative, and to which he or she would otherwise be entitled.—(41 Stat., 618-619, chap. 195.)

SEC. 11. [PAYMENT OF DEDUCTIONS ON SEPARATION FROM SERVICE, ETC.] That in the case of an employee in the classified civil service of the United States who shall be transferred to an unclassified position, and in the case of any employee to whom this Act applies who shall become absolutely separated from the service before becoming eligible for retirement on an annuity, the total amount of deductions of salary, pay, or compensation with accrued interest computed at the rate of 4 per centum per annum, compounded on June 30 of each fiscal year, shall, upon application, be returned to such employee: *Provided*, That all money so returned to an employee must be redeposited with interest before such employee may derive any benefit under the provisions of this Act, upon reinstatement or retransfer to a classified position; and in case an annuitant shall die without having received in annuities an amount equal to the total amount of the deductions from his or her salary, pay, or compensation, together with interest thereon at 4 per centum per annum compounded as herein provided up to the time of his or her death, the excess of the said accumulated deductions over the said annuity payments shall be paid in one sum to his or her legal representatives upon the establishment of a valid claim therefor; and in case an employee shall die without having reached the retirement age or without having established a valid claim for annuity, the total amount of deductions with accrued interest as herein provided shall be paid to the legal representatives of such employee: *Provided*, That if in case of death the amount of deductions to be paid under the provisions of this section does not exceed \$300, and if there has been no demand upon the Commissioner of Pensions by a duly appointed executor or administrator, the payment may be made, after the expiration of three months from date of death, to such person or persons as may appear in the judgment of the Commissioner of Pensions to be legally entitled to the proceeds of the estate, and such payment shall be a bar to recovery by any other person.

SEC. 12. [MONTHLY PAYMENT OF ANNUITIES.] That annuities granted under the terms of this Act shall be due and payable monthly on the first business day of the month following the month or other period for which the annuity shall have accrued, and payment of all annuities, refunds, and allowances granted hereunder shall be made by checks drawn and issued by the disbursing clerk for the payment of pensions in such form and manner and with such safeguards as shall be prescribed by the Secretary of the Interior in accordance with the laws, rules, and regulations governing accounting that may be found applicable to such payments.—(41 Stat., 619, chap. 195.)

SEC. 13. [REPORTS TO BE MADE BY DEPARTMENTS, ETC.] That it shall be the duty of the head of each executive department and the head of each independent establishment of the Government not within the jurisdiction of any executive department to report to the Civil Service Commission in such manner as said commission may prescribe, the name and grade of each employee to whom this Act applies in or under said department or establishment who shall be at any time in a nonpay status, showing the dates such employee was in a nonpay status, and the amount of salary, pay, or compensation lost by the employee by reason of such absence. The Civil Service Commission shall keep a record of appointments, transfers, changes in grade, separations from the service, reinstatements, loss of pay, and such other information



concerning individual service as may be deemed essential to a proper determination of rights under this Act, and shall furnish the Commissioner of Pensions such reports therefrom as he shall from time to time request as necessary to the proper adjustment of any claim hereunder, and shall prepare and keep all needful tables and records required for carrying out the provisions of this Act, including data showing the mortality experience of the employees in the service, and the percentage of withdrawal from such service, and any other information that may serve as a guide for future valuations and adjustments of the plan for the retirement of employees under this Act.—(41 Stat., 619–620, chap. 195.)

The Commissioner of Pensions shall make a detailed comparative report annually showing all receipts and disbursements on account of refunds, allowances, and annuities, together with the total number of persons receiving annuities and the amounts paid them.

SEC. 14. [MONEYS NOT SUBJECT TO ATTACHMENT, ETC.] That none of the moneys mentioned in this Act shall be assignable, either in law or equity, or be subject to execution, levy, or attachment, garnishment, or other legal process.—(41 Stat., 620, chap. 195.)

[1920, May 29. Receipts from publications, Hydrographic Office.] All sums received from the sale of maps, charts, and other publications issued by the Hydrographic Office after June 30, 1921, shall be covered into the Treasury of the United States as miscellaneous receipts.—(41 Stat., 665, chap. 214.)

See section 443, Revised Statutes, and note thereto.

[1920, May 29, Sec. 4. Typewriters, sale or exchange restricted.] \* \* \* That hereafter no typewriter that has been used less than three years shall be sold, exchanged, or given as part payment for another typewriter.—(41 Stat., 689, chap., 214.)

A somewhat different provision on the same subject is contained in act of June 5, 1920, section 7 (41 Stat., 947).

[1920, May 29, sec. 7. Statement of buildings rented, District of Columbia.] That hereafter the statement of buildings rented within the District of Columbia for the use of the Government, required by the Act of July 16, 1892, shall indicate, in addition to the data required by section 3 of the Act of May 1, 1913, the cost of the care, maintenance, and operation of each building per square foot of floor space of the building or portion of building rented.—(41 Stat., 691, chap. 214.)

See acts of July 16, 1892 (27 Stat., 199), and May 1, 1913, section 3 (38 Stat., 3).

As to annual report concerning Government-owned buildings in the District of Columbia, see act of June 5, 1920, section 3 (41 Stat., 945).

[1920, June 4. Passports, Government officers and employees.] That no fee shall be collected for passports issued to officers or employees of the United States proceeding abroad in the discharge of their official duties, or to members of their immediate families, or to seamen, or to widows, children, parents, brothers, and sisters of American soldiers, sailors, or marines, buried abroad whose journey is undertaken for the purpose and with the intent of visiting the graves of such soldiers, sailors, or marines, which facts shall be made a part of the application for the passport.—(41 Stat., 750, chap. 223.)

[1920, June 4. Articles of War.] \* \* \* ART. 2. PERSONS SUBJECT TO MILITARY LAW.—The following persons are subject to these articles and shall be understood as included in the term “any person subject to military law,” or “persons subject to military law,” whenever used in these articles: *Provided*, That nothing contained in this Act, except as specifically provided in Article 2, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction unless otherwise specifically provided by law.

(a) All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft or order to obey the same;

(b) Cadets;

(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: *Provided*, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases;

(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

(e) All persons under sentence adjudged by courts-martial;

(f) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia. \* \* \*.—(41 Stat., 787, chap. 227.)

ART. 4. WHO MAY SERVE ON COURTS-MARTIAL.—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial. \* \* \*.—(41 Stat., 788, chap. 227.)

ART. 60. ENTERTAINING A DESERTER.—Any officer who, after having discovered that a soldier in his command is a deserter from the military or naval service or from the Marine Corps, retains such deserter in his command without informing superior authority or the commander of the organization to which the deserter belongs, shall be punished as a court-martial may direct. \* \* \*.—(41 Stat., 800, chap. 227.)

ART. 120. COMMAND WHEN DIFFERENT CORPS OR COMMANDS HAPPEN TO JOIN.—When different corps or commands of the military forces of the United States happen to join or do duty together, the officer highest in rank of the line of the Regular Army, Marine Corps, forces drafted or called into the service of the United States, or Volunteers, there on duty, shall, subject to the provisions of the last preceding article, command the whole and give orders



for what is needful in the service, unless otherwise directed by the President \* \* \*.—(41 Stat., 811, chap. 227.)

See note to section 1342, Revised Statutes.

[1920, June 4. **Special allowances to naval personnel.**] That this appropriation and the appropriation "Pay, Marine Corps," shall be available for special allowances for maintenance to officers and enlisted men of the Navy and Marine Corps serving under unusual conditions.—(41 Stat., 813, chap. 228.)

This was a proviso following appropriations for the naval service under the caption "Pay, Miscellaneous."

See note to section 1558, Revised Statutes.

[1920, June 4. **Naval petroleum reserves.**] That the Secretary of the Navy is directed to take possession of all properties within the naval petroleum reserves as are or may become subject to the control and use by the United States for naval purposes, and on which there are no pending claims or applications for permits or leases under the provisions of an Act of Congress approved February 25, 1920, entitled "An Act to provide for the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," or pending applications for United States patent under any law; to conserve, develop, use, and operate the same in his discretion, directly or by contract, lease, or otherwise, and to use, store, exchange, or sell the oil and gas products thereof, and those from all royalty oil from lands in the naval reserves, for the benefit of the United States: *And provided further*, That the rights of any claimant under said Act of February 25, 1920, are not affected adversely thereby: *And provided further*, That such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the naval petroleum reserves prior to July 1, 1921, not to exceed \$500,000, are hereby made available for this purpose until July 1, 1922: *Provided further*, That this appropriation shall be reimbursed from the proper appropriations on account of the oil and gas products from said properties used by the United States at such rate, not in excess of the market value of the oil, as the Secretary of the Navy may direct.—(41 Stat., 813-814, chap. 228.)

See act of February 25, 1920 (41 Stat., 437-451); see also acts of August 25, 1914 (38 Stat., 709) and August 29, 1916 (39 Stat., 559-560).

[1920, June 4. **Claims for damage caused by naval aircraft.**] That the Secretary of the Navy is hereby authorized to consider, ascertain, adjust, determine, and pay out of this appropriation the amounts due on claims for damages which have occurred or may occur to private property growing out of the operations of naval aircraft, where such claim does not exceed the sum of \$500: *Provided further*, That all claims adjusted under this authority during any fiscal year shall be reported in detail to the Congress by the Secretary of the Navy.—(41 Stat., 814, chap. 228.)

Similar provision was contained in act of July 11, 1919 (41 Stat., 133); see also act of June 24, 1910 (36 Stat., 607), and references thereunder.

[1920, June 4. **Hydrographic Office, naval officers detailed to.**] That the Secretary of the Navy is authorized to detail such naval officers as may be necessary to the Hydrographic Office.—(41 Stat., 816, chap. 228.)

Similar provision was contained in acts of July 1, 1918 (40 Stat., 708), and July 11, 1919 (41 Stat., 135).

See section 431, Revised Statutes, and note thereto.

**[1920, June 4. Summer schools for boys; enrollments in Naval Reserve Force.]**

The Secretary of the Navy is hereby authorized, in his direction, to establish at two of the permanent naval training stations experimental summer schools for boys between the ages of sixteen and twenty years. For this purpose he is authorized to use such buildings, or other accommodations, at such training stations; to loan any naval equipment necessary for such purposes, and to give instructions which will fit them for service in the Navy of the United States. He is empowered to establish and enforce such rules within the camp as may be necessary and to detail such members of the naval personnel as may be required in order to encourage and execute the spirit of this Act. The Secretary of the Navy is further authorized to loan the necessary naval uniforms during the period of training and to furnish subsistence, medical attendance, and other necessary incidental expenses for those attending these schools: *Provided*, That those under instruction, with the consent of their parents or their guardians, shall enroll in the Naval Reserve Force for not less than three months, and no person not so enrolled shall be admitted to said training schools. For carrying out the provisions of this paragraph the sum of \$200,000 is appropriated.—(41 Stat., 817, chap. 228.)

See act of August 29, 1916 (39 Stat., 587), as to enrollments in Naval Reserve Force.

**[1920, June 4. Naval militia made part of Naval Reserve Force.]**

**This provision read as follows:**

"That, until June 30, 1922, of the Organized Militia as provided by law, such part as may be duly prescribed in any State, Territory, or the District of Columbia shall constitute a Naval Militia; and, until June 30, 1922, such of the Naval Militia as now is in existence, and as now organized and prescribed by the Secretary of the Navy under authority of the Act of Congress approved February 16, 1914, shall be a part of the Naval Reserve Force, and the Secretary of the Navy is authorized to maintain and provide for said Naval Militia as provided in said Act: *Provided further*, That upon their enrollment in the Naval Reserve Force, and not otherwise, until June 30, 1922, the members of said Naval Militia shall have all the benefits, gratuities, privileges, and emoluments provided by law for other members of the Naval Reserve Force; and that, with the approval of

the Secretary of the Navy, duty performed in the Naval Militia may be counted as active service for the maintenance of efficiency required by law for members of the Naval Reserve Force: *And provided further*, That all moneys appropriated for the Naval Reserve Force or for the Naval Militia shall constitute one fund and hereby are made available, under the direction of the Secretary of the Navy, for both." (41 Stat., 817-818, chap. 228.)

**It temporarily modified** the act of July 1, 1918 (40 Stat., 708), which repealed all laws relating to the Naval Militia. The act of February 16, 1914 (38 Stat., 283-290), referred to above, is omitted from this compilation, in so far as relates to the Naval Militia, because of the repealing act of July 1, 1918, above cited, and the temporary character of this provision in the act of June 4, 1920.

**[1920, June 4. Automobiles, quarterly reports.]** Quarterly reports on all gasoline passenger and freight automobiles shall be made on Form number 124, and one copy of each report shall be filed in the Bureau of Yards and Docks.—(41 Stat., 819, chap. 228.)

**[1920, June 4. Retainer pay, Naval Reserve Force, withheld for cause.]** That retainer pay provided by existing law shall not be paid to any member of the Naval Reserve Force who fails to train as provided by law during the year for which he fails to train.—(41 Stat., 824, chap. 228.)

See note to section 1556, Revised Statutes, as to pay of Naval Reserve Force; see also section 9 of this act (41 Stat., 837), set forth below.

**[1920, June 4. Death gratuity, six months' pay.]** That hereafter, immediately upon official notification of the death from wounds or disease, not the result



of his or her own misconduct, of any officer, enlisted man, or nurse on the active list of the Regular Navy or Regular Marine Corps, or on the retired list when on active duty, the Paymaster General of the Navy shall cause to be paid to the widow, and if there be no widow to the child or children, and if there be no widow or child, to any other dependent relative of such officer, enlisted man, or nurse previously designated by him or her, an amount equal to six months' pay at the rate received by such officer, enlisted man, or nurse at the date of his or her death. The Secretary of the Navy shall establish regulations requiring each officer and enlisted man or nurse having no wife or child to designate the proper dependent relative to whom this amount shall be paid in case of his or her death. Said amount shall be paid from funds appropriated for the pay of the Navy and pay of the Marine Corps, respectively: *Provided*, That nothing in this section or in other existing legislation shall be construed as making the provisions of this section applicable to officers, enlisted men, or nurses of any forces of the Navy of the United States other than those of the regular Navy and Marine Corps, and nothing in this section shall be construed to apply in commissioned grades to any officers except those holding permanent or probationary appointments in the Regular Navy or Marine Corps: *Provided*, That the provisions of this section shall apply to the officers and enlisted men of the Coast Guard, and the Secretary of the Treasury will cause payment to be made accordingly.—(41 Stat., 824-825, chap. 228.)

**Prior legislation.**—An allowance of six months' pay in cases of death occurring in line of duty was first authorized in the Navy by act of May 13, 1903 (35 Stat., 128-129). The provision of that act was expressly amended and reenacted by act of August 22, 1912 (37 Stat., 329), and further amendments were made by acts of March 3, 1915 (38 Stat., 938), and August 29, 1916 (39 Stat., 572), relating to deductions from the gratuity on account of funeral expenses.

By the same act of March 3, 1915 (38 Stat., 939), provision was made for allowance of one year's pay, in the cases of officers and enlisted men whose death resulted from aviation accidents.

By act of October 6, 1917 (40 Stat., 392, chap. 89), it was provided that the enactment of August 22, 1912, as amended by act of March 3, 1915, both above cited, "be, and the same is hereby, amended by inserting after the words 'on the active list of the Navy or Marine Corps' a comma and the words 'or of any retired officer or enlisted man serving on active duty during the continuance of the present war,'" thereby extending the prior legislation on this subject to include retired

officers on active duty, having previously been limited to officers of the active list.

On the same day another act (War Risk Insurance amendment of Oct. 6, 1917, sec. 312, chap. 105) enacted that "the laws providing for gratuities or payments in the event of death in the service and existing pension laws shall not be applicable after the enactment of this amendment to persons now in or hereafter entering the military or naval service, or to their widows, children, or their dependents, except in so far as rights under any such law shall have heretofore accrued." It was held by the Attorney General (31 Op. Atty. Gen., 205) that the enactment last quoted (sec. 312 of the act of Oct. 6, 1917, 40 Stat., 408), repealed the act of October 6, 1917 (40 Stat., 392), providing for payment of gratuities.

Section 312 of the act of October 6, 1917 (40 Stat., 408), was amended and reenacted by act of June 25, 1918, section 17 (40 Stat., 613), so as to render prior gratuity and pension laws inapplicable to persons "in the active military or naval service" on October 6, 1917, or who thereafter entered the "active military or naval service," or to their widows, etc.

[1920, June 4. Mining coal in Alaska.] That \$1,000,000 of this appropriation shall be available for use, in the discretion of the Secretary of the Navy, in mining coal or contracting for the same in Alaska, the transportation of the same, and the construction of coal bunkers and the necessary docks for use in supplying ships therewith; and the Secretary of the Navy is hereby authorized to select from the public coal lands in Alaska such areas as may be

necessary for use by him for the purposes stated herein.—(41 Stat., 826, chap. 228.)

This was a proviso following appropriations for the naval service under the caption "Fuel and transportation"; similar provision was contained in acts of July 1, 1918

(40 Stat., 730), and July 11, 1919 (41 Stat., 148).

See act of October 20, 1914, section 2 (38 Stat., 742).

[1920, June 4. Change in name of bureau.] The Bureau of Steam Engineering hereafter shall be designated the "Bureau of Engineering."—(41 Stat., 828, chap. 228.)

See section 419, Revised Statutes.

[1920, June 4. Enlisted strength, Marine Corps.] The authorized enlisted strength of the active list of the Marine Corps is hereby permanently established at twenty-seven thousand four hundred, distribution in the various grades to be made in the same proportion as provided under existing law.—(41 Stat., 830, chap. 228.)

See note to section 1596, Revised Statutes.

[1920, June 4. Temporary and reserve officers, Marine Corps; transfer to permanent service.]

This provision read as follows:

"That all officers serving temporarily in the grades of captain and below upon the date of the passage of this Act shall be eligible to fill existing vacancies and those hereby created in the permanent authorized strength in said grades by transfer to or reappointment in the permanent Marine Corps in the grades not above that of captain. Transfers so made shall be without regard to age, and if found not qualified for transfer to the same grade as that held by them on the date of transfer then to lower grades after qualification. All officers so transferred shall establish to the satisfaction of the Secretary of the Navy, under such rules as he may prescribe, their mental, moral, professional, and physical qualifications to perform the duties of the grade to which transferred or reappointed and shall take precedence with each other and with other officers of the Marine Corps in such order as may be recommended by a board of marine officers and approved by the Secretary of the Navy: *Provided*, That all persons who served honorably as officers in the Marine Corps or Marine Corps Reserve on active duty at any time between April 6, 1917, and the date of the passage of this Act and who have been honorably discharged or assigned to

inactive duty shall be eligible for permanent appointment in the same or a lower rank than that held on discharge or assignment to inactive duty, but not above the rank of captain, to fill vacancies existing or hereby created in the permanent authorized strength of the Marine Corps under the same conditions as those above prescribed for officers now in the service: *Provided further*, That officers now holding temporary commissions in the Marine Corps and who have had more than ten years' service therein, if not found qualified for permanent commissions, and who are recommended by the board herein provided for, may be appointed warrant officers in the Marine Corps; and the authorized number of warrant officers is hereby increased by a number not to exceed fifty to provide for the appointment of the aforesaid officers: *Provided further*, That all transfers and appointments made in accordance with the provisions of this section shall be accomplished by June 30, 1921: *Provided further*, That the officers now holding temporary appointments as commissioned officers in the Marine Corps may retain their temporary commissions until the permanent appointments provided for in the foregoing section shall have been made." (41 Stat., 830, chap. 228.)

[1920, June 4, sec. 2. Naval reservists, active duty authorized; enrollments restricted; commissioned strength of Navy.] That the Secretary of the Navy is hereby authorized to employ on active duty, with their own consent, members of the Naval Reserve Force in enlisted ratings, the number so employed not to exceed during any fiscal year the average of twenty thousand men: *Provided*, That the number of naval reservists, so employed on active duty, together with the total number of enlisted men in the Regular Navy, shall not exceed the total enlisted strength of the Navy as authorized by law: *Provided further*, That such members of the Naval Reserve Force so employed shall serve on active duty for not less than twelve nor more than eighteen months



unless sooner released: *Provided further*, That hereafter no person shall be enrolled in the Naval Reserve Force except for general service: *And provided further*, That the number of commissioned officers of the line, permanent, temporary, and reserve on active duty shall not exceed 4 per centum of the total authorized enlisted strength of the Regular Navy, and the number of staff officers on active duty of whatever kind shall be in the same proportions as authorized by existing law: *Provided further*, That five hundred reserve officers are also authorized to be employed in the aviation and auxiliary service.—(41 Stat., 834, chap. 228.)

See act of August 29, 1916 (39 Stat., 587-593), as to the Naval Reserve Force; see note to section 1417, Revised Statutes, as to authorized enlisted strength of the Navy;

see act of August 29, 1916 (39 Stat., 576-577), as to authorized commissioned strength of the Navy.

**[1920, June 4, sec. 2. Temporary and reserve officers continued on duty.]**

**This provision read as follows:**

"That, until December 31, 1921, temporary appointments now existing may be continued in force in any grade or rank, not to exceed the number allowed in any grade or rank based upon the total permanent authorized commissioned strength of the line or of any staff corps; and, within the limitations herein

prescribed, officers of the Naval Reserve Force may, with their own consent, be continued on active duty ashore or afloat, including three on shore duty in the Historical Section of the Office of Naval Intelligence, who may be retained on active duty beyond the age of disenrollment but not beyond June 30, 1922.—(41 Stat., 834, chap. 228.)

**[1920, June 4, sec. 2. Permanent Navy not reduced.]** That nothing herein shall be construed as reducing the permanent commissioned or enlisted strength of the Regular Navy as authorized by existing law.—(41 Stat., 834, chap. 228.)

**[1920, June 4, sec. 2. Retirement of reserve and temporary officers.]** That all officers of the Naval Reserve Force and temporary officers of the Navy who have heretofore incurred or may hereafter incur physical disability in line of duty shall be eligible for retirement under the same conditions as now provided by law for officers of the Regular Navy who have incurred physical disability in line of duty.—(41 Stat., 834, chap. 228.)

Retirement of officers of the Regular Navy for physical disability is provided for by sections 1448-1457, Revised Statutes; retirement of temporary officers was previously authorized by act of May 22, 1917, section 9 (40 Stat., 86); retirement of enrolled members of the Naval Reserve Force after 20 years' service, and of transferred members of the Fleet Naval Reserve after 30

years' service, was authorized by act of August 29, 1916 (39 Stat., 588 and 591), as amended by act of July 1, 1918 (40 Stat., 710).

By act of July 1, 1918 (40 Stat., 710), it was provided "that no member of the Naval Reserve Force shall be eligible for retirement other than for physical disability incurred in line of duty."

**[1920, June 4, sec. 3. Transfer to permanent Navy of temporary, reserve, and Coast Guard officers; naval personnel credited with Coast Guard service.]** That officers holding temporary commissioned and warrant ranks in the Navy and members of the Naval Reserve Force of commissioned and warrant ranks shall be eligible for transfer to an appointment in the permanent grades or ranks in the Navy for which they may be found qualified not above that held by them on the date of transfer, but not to exceed a total of one thousand two hundred commissioned officers in the line, of which number five hundred may be appointed from class five, Naval Reserve Flying Corps, with proportionate number in all Staff Corps as now authorized by law, except that the Medical, Dental, and Supply Corps shall be entitled to such additional numbers as are necessary to make up the full quota of officers in those corps, as now authorized by law:

*Provided*, That officers so appointed to the line of the Navy shall take rank in accordance with their precedence while holding temporary rank, and members of the Naval Reserve Force of commissioned and warrant ranks found qualified for a given rank shall be arranged according to their precedence among themselves and commissioned in the permanent service next after the lowest temporary officer who qualifies for the same rank and is appointed in accordance with the provisions of this Act.

*Provided further*, That included in the number of transfers and appointments hereinbefore allowed, commissioned officers of the Coast Guard, who have served creditably under the Navy Department in the War with the German Government, upon suitable application approved by the Secretary of the Navy and the Secretary of the Treasury, may be appointed to a permanent rank or grade in the Navy for which found qualified by a board of naval officers under the provisions of existing law, but not above the rank of lieutenant commander, and shall take such precedence therein as the Secretary of the Navy may determine: *Provided further*, That for the purposes of computing longevity pay and retirement privileges of officers and enlisted men of the Navy, all creditable service in the Coast Guard and former Revenue-Cutter Service shall be counted.—(41 Stat., 834–835, chap. 228.)

Temporary appointments were to terminate not later than December 31, 1921, in accordance with section 2 of this act (41 Stat., 834), set forth above.

Precedence of all officers transferred under this section to the staff corps was to be fixed upon recommendation of a board of naval officers in accordance with section 4 of this act, set forth below, which also limited transfers to rank of lieutenant.

Coast Guard Service was credited to naval officers for pay purposes by act of May 18, 1920, section 11 (41 Stat., 604).

**Qualifications for transfer and appointment.**—No transfer or appointment can be made under this provision unless the appointee, at the time of such appointment, holds a temporary commissioned or warrant rank in the Navy or is a member of the Naval Reserve Force. (File 26521–473, Oct. 24, 1921.)

As all temporary appointments, if not sooner revoked, will automatically terminate on December 31, 1921, under section 2 of this act (set forth above), that date would be the latest on which temporary officers could be appointed to the Navy under section 3. (File 26521–473, Oct. 24, 1921.)

[1920, June 4, sec. 4. Commissioned warrant officers with war service, promotion of; precedence of transferred officers; restriction on permanent rank; reversion to former status on professional failure.] That in addition to the number of transfers and appointments hereinbefore allowed, commissioned warrant officers of more than fifteen years' service since date of warrant or date of first appointment as paymaster's clerk, pharmacist or mate, who have creditably served in the war with the German Government in temporary commissioned ranks or grades in the regular Navy, shall be appointed to a permanent rank or grade for which they may be qualified as established and shown by their records of service during their term of service not above the temporary rank or grade held by them at the time of transfer: *Provided*, That officers so transferred to the line of the Navy shall take rank therein in accordance with their precedence while holding temporary rank: *Provided further*, That all officers so transferred in accordance with sections 3 and 4 of this Act to the staff corps of the Navy shall take precedence with each other and with other officers in the Navy in such order as may be recommended by a board of naval officers and approved by the Secretary of the Navy: *Provided further*, That no transfers or appointments made in accordance with sections 3 and 4 of this Act shall be to a higher grade or rank than lieutenant in the Navy: *And provided further*, That officers



appointed to the permanent Navy in accordance with the foregoing sections who now hold permanent warrant or permanent commissioned warrant rank in the United States Navy shall, if they thereafter fail professionally on examination for promotion, revert to such permanent warrant or permanent commissioned warrant status.—(41 Stat., 835, chap. 228.)

[1920, June 4, sec. 5. Age limits for appointments under preceding sections.] That officers appointed under any of the foregoing provisions shall be not more than thirty-five years of age when so appointed to the line of the Navy, Construction Corps, or Supply Corps, and not more than forty-three years of age when so appointed to the Corps of Chaplains, or to the Medical, Dental, or Civil Engineering Corps: *Provided*, That said age limits shall be increased in the cases of officers who have rendered prior service as paymaster's clerks, or as mates, or as warrant or commissioned officers in the naval service to the extent of all prior naval service: *Provided further*, That officers originally appointed to the Dental Corps above the said age limits shall be eligible for appointment and promotion under this act irrespective of age.—(41 Stat., 835-836, chap. 228.)

[1920, June 4, sec. 5. Statutory requirements for promotion temporarily suspended.] That officers of the line of the Navy who are appointed thereto pursuant to this Act from sources other than the Naval Academy shall not be ineligible for promotion by reason of age as prescribed by the Act of August 29, 1916 (Thirty-ninth Statutes, page 579), until they have rendered ten years' service in the grade of lieutenant commander, six years' service in the grade of commander, or eight years' service in the grade of captain, respectively, upon the completion of which service such officers, if then ineligible for promotion by reason of age, shall be retired in accordance with said Act: *And provided further*, That until June 30, 1923, promotions to lieutenant (junior grade) and lieutenant may be made without regard to length of service: *And provided further*, That until June 30, 1923, officers of the permanent Navy who have served satisfactorily during the war with the German Government in a temporary grade or rank shall be eligible under the provisions of existing law for selection for promotion or for promotion to the same permanent grade or rank without regard to statutory requirements other than age and professional and physical examination.—(41 Stats., 836, chap. 228.)

[1920, June 4, sec. 5. Temporary appointments in lower grades; precedence.]

This provision read as follows:

"That in making reductions in rank as may be required by this Act, officers holding temporary appointments may be given temporary appointments in lower grades, and officers so appointed shall take precedence from the dates of their original appointments in such lower grades." (41 Stat., 836, chap. 228.)

[1920, June 4, sec. 6. Bonus and travel pay on extension of enlistment or transfer to another branch of naval service.] That in case any enlisted man or enrolled man who, since the 11th day of November, 1918, has been or hereafter shall be discharged from any branch or class of the naval service for the purpose of reenlisting in the Navy or Marine Corps or heretofore has extended or hereafter shall extend his enlistment therein, he shall be entitled to the payment of the \$60 bonus provided in section 1406 of the Act entitled "An Act to provide revenue, and for other purposes," approved February 24, 1919, and to travel

pay as authorized in section 3 of the Act entitled "An Act permitting any person who has served in the United States Army, Navy, or Marine Corps in the present war to retain his uniform and personal equipment and to wear the same under certain conditions," approved February 28, 1919: *Provided*, That only one bonus shall be paid to the same person.—(41 Stat., 836, chap. 228.)

The act of February 24, 1919, section 1406 (40 Stat., 1151), was temporary legislation, providing for payment of \$60 bonus to men discharged from the military or naval forces or, in the case of reservists, released from active duty. See note to section 1569, Revised Statutes, under "24. Sixty dollar bonus on discharge."

The act of February 28, 1919, section 3 (40 Stat., 1203), reenacted with amendments, section 126 of an act approved June 3, 1916

(39 Stat., 217). See the latter act and note thereto; see also note to section 1569, Revised Statutes, under "20. Mileage and transportation on discharge."

**Above section construed as temporary.**

—Section 6 of the act of June 4, 1920, above set forth, was held by the Comptroller of the Treasury to apply only to men who were in the Navy or Marine Corps on November 11, 1918, and to be inapplicable to any enlistment accomplished after that date. (27 Comp. Dec., 32, 39, 305.)

**[1920, June 4, sec. 7. Term of enlistment; grades and ratings established.]**

That hereafter enlistments in the Navy and in the Marine Corps may be for terms of two, three, or four years, and all laws now applicable to four-year enlistments shall apply, under such regulations as may be prescribed by the Secretary of the Navy, to enlistments for a shorter period with proportionate benefits upon discharge and reenlistment: *Provided*, That hereafter the Secretary of the Navy is authorized, in his discretion, to establish such grades and ratings as may be necessary for the proper administration of the enlisted personnel of the Navy and Marine Corps.—(41 Stat., 836, chap. 228.)

See notes to sections 1418, 1569, 1573, and 1608, Revised Statutes.

**[1920, June 4, sec. 8. Unauthorized wearing of uniform.]**

That section 125 of the Act entitled "An Act for making further and more effectual provisions for the national defense, and for other purposes," approved June 3, 1916, shall hereafter be in full force and effect as originally enacted, notwithstanding anything contained in the Act entitled "An Act permitting any person who has served in the United States Army, Navy, or Marine Corps in the present war to retain his uniform and personal equipment and to wear the same under certain conditions," approved February 28, 1918: *Provided*, That the words "or the Secretary of the Navy" shall be inserted immediately after the words "the Secretary of War" wherever those words appear in section 125 of the Act approved June 3, 1916, hereinbefore referred to.—(41 Stat., 836, chap. 228.)

See act of June 3, 1916, section 125 (39 Stat., 216-217), and note thereto.

The reference in the above section to the act of

"February 28, 1918," was apparently intended to mean the act of February 28, 1919 (40 Stat., 1202-1203).

**[1920, June 4, sec. 9. Naval Reserve Force, withholding retainer pay for cause; active service requirements, Fleet Naval Reserve.]** That hereafter the Secretary of the Navy may, in his discretion, withhold any part or all of the retainer pay which may be due a member of the Naval Reserve Force where such members fail to perform such duty as may be prescribed by law for the maintenance of the efficiency of the Naval Reserve Force: *Provided*, That any money so withheld shall be credited to the appropriation for organizing and administering the Naval Reserve Force to be used for any purpose that the Secretary of the Navy may consider proper to increase the efficiency of the Naval Reserve Force: *Provided further*, That hereafter the minimum amount of active service required for the maintenance of the efficiency of the Fleet Naval Reserve shall be the same as for the Naval Reserve.—(41 Stat., 837, chap. 228.)



See act of August 29, 1916 (39 Stat., 587-593), and note to section 1556, Revised Statutes, under "37. Naval Reserve Force"; see also

provision in this act (41 Stat., 824) set forth above, as to withholding retainer pay.

**[1920, June 4, sec. 10. Age limits for promotion temporarily deferred.]**

**This section read as follows:**

"That the age limits for promotion by selection, which, under existing law, will become effective on June 30, 1920, are hereby deferred until June 30, 1921, in the cases only of those

officers who may request such deferment." (41 Stat., 837, Chap. 228.)

**It temporarily modified** the act of August 29, 1916 (39 Stat., 579).

**[1920, June 5. Titles of Coast Guard Officers.]** Titles of commissioned officers of the Coast Guard are hereby changed as follows: Senior captain to commander, captain to lieutenant commander, first lieutenant to lieutenant, second lieutenant to lieutenant junior grade, third lieutenant to ensign, captain of engineers to lieutenant commander (engineering), first lieutenant of engineers to lieutenant (engineering), second lieutenant of engineers to lieutenant, junior grade (engineering), and third lieutenant of engineers to ensign (engineering): *Provided*, That all laws applicable to the titles hereby abolished in the Coast Guard shall apply to the titles hereby established.—(41 Stat., 879, chap. 235.)

See note to section 1492, Revised Statutes.

**[1920, June 5. Hauling for Government in District of Columbia.]** Hereafter the Secretary of the Interior may have sand, gravel, stone, and other material hauled for the municipal government of the District of Columbia and for branches of the Federal service in the District of Columbia, whenever it may be practicable and economical to have such work performed by using trucks of the Government fuel yards not needed at the time for the hauling of fuel. Payment for such work shall be made on the basis of the actual cost to the Government fuel yards.—(41 Stat., 913, chap. 235.)

**[1920, June 5. Advance deliveries of Government fuel, District of Columbia.]** Hereafter the Secretary of the Interior is authorized to deliver, during the months of April, May, and June of each year, to all branches of the Federal service and the municipal government in the District of Columbia, such quantities of fuel for their use during the following fiscal year as it may be practicable to store at the points of consumption, payment therefor to be made by these branches of the Federal service and municipal government from their applicable appropriations for such fiscal year.—(41 Stat., 913, chap. 235.)

See acts of July 1, 1918 (40 Stat., 672-673), and July 11, 1919 (41 Stat., 148).

**[1920, June 5, sec. 3. Annual report, Government buildings, District of Columbia.]** That hereafter it shall be the duty of the head of each department and independent establishment of the Government to submit to Congress annually in the Book of Estimates, a statement giving for each of the Government-owned buildings in the District of Columbia under their respective jurisdiction the following information for the preceding fiscal year: The location and valuation of each building, the purpose or purposes for which used, and the cost of care, maintenance, upkeep, and operation thereof per square foot of floor space.—(41 Stat., 945, chap. 235.)

See notes to sections 429-430, Revised Statutes. As to buildings rented in District of Columbia, see acts of July 16, 1892 (27 Stat., 199),

May 1, 1913, section 3 (38 Stat., 3), and May 29, 1920, section 7 (41 Stat., 691).

[1920, June 5, sec. 7. **Typewriters, restriction on sale or exchange.**] Hereafter no department or other Government establishment shall dispose of any typewriting machines by sale, exchange, or as part payment for another typewriter, that has been used less than three years.—(41 Stat., 947, chap. 235.)

A somewhat different provision on this subject was contained in act of May 29, 1920, section 4 (41 Stat., 689); see also act of

March 3, 1921 (41 Stat., 1265-1266).

See act of March 4, 1915, section 5 (38 Stat., 1161).

[1920, June 5. **Aerial operations, jurisdiction of Army and Navy defined.**] That hereafter the Army Air Service shall control all aerial operations from land bases, and Naval Aviation shall have control of all aerial operations attached to a fleet, including shore stations whose maintenance is necessary for operation connected with the fleet, for construction and experimentation and for the training of personnel.—(41 Stat., 954, chap. 240.)

See act of August 29, 1916 (39 Stat., 582).

[1920, June 5. **Transportation of disabled sailors, marines, etc., on furlough; reduced rates.**] The Secretary of War and the Secretary of the Navy, under such regulations and restrictions as they may provide, are hereby authorized to issue to all wounded and otherwise disabled soldiers, sailors, or marines under treatment in any Army, Navy, or other hospital, who are given furloughs at any time, a furlough certificate, which certificate shall be signed by the commanding officer at such hospital. This furlough certificate when presented by such furloughed soldier, sailor, or marine to the agent of any railroad or steamship company over whose lines said soldier, sailor, or marine may travel to and from his home during the furlough period shall entitle said soldier, sailor, or marine to purchase a ticket from the point of departure to point of destination and return at the rate of 1 cent per mile, and on presentation of such certificate on which such ticket has been issued the railroad or steamship company issuing such ticket shall be entitled to receive from the Treasury of the United States the difference between the amount paid for such ticket at the rate of 1 cent per mile and the regular scheduled rate for such ticket. The sum of \$250,000, or so much thereof as may be necessary, is hereby appropriated, out of any funds in the Treasury not otherwise appropriated, for the purpose of carrying out the provisions of this paragraph.—(41 Stat., 975-976, chap. 240.)

[1920, June 5. **Sale of subsistence stores, etc., to discharged persons under Public Health treatment.**] That hereafter honorably discharged officers and enlisted men of the Army, Navy, or Marine Corps who are being cared for and are receiving medical treatment from the Public Health Service shall, while undergoing such care and treatment, be permitted to purchase subsistence stores and articles of other authorized supplies, except articles of the uniform, from the Army, Navy, and Marine Corps at the same price as charged the officers and enlisted men of the Army, Navy, and Marine Corps.—(41 Stat., 976, chap. 240.)

See act of March 4, 1913 (37 Stat., 909), and references thereunder.

[1920, June 5. **Development of merchant marine for service as a naval auxiliary.**] That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a mer-



chant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, in so far as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained.—(41 Stat., 988, chap. 250.)

See act of March 3, 1891, section 4 (26 Stat., 831), as to construction of ocean mail vessels with particular reference to their prompt conversion into auxiliary cruisers; see also section 7 of the same act (26 Stat., 832), as to detail of naval officers for duty on ocean

mail vessels, and section 9 (26 Stat., 832), as to the taking of such vessels for use by the United States; see also acts of September 7, 1916, section 10 (39 Stat., 731), and March 4, 1917 (39 Stat., 1192-1193).

[1920, June 5, sec. 17. Transfer of docks, etc., from Shipping Board to Navy Department, etc.] That the board is authorized and directed to take over on January 1, 1921, the possession and control of, and to maintain and develop, all docks, piers, warehouses, wharves and terminal equipment and facilities, including all leasehold easements, rights of way, riparian rights and other rights, estates and interests therein or appurtenant thereto, acquired by the President by or under the Act entitled "An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year ending June 30, 1918, and prior fiscal years, on account of war expenses, and for other purposes," approved March 28, 1918.

The possession and control of such other docks, piers, warehouses, wharves and terminal equipment and facilities or parts thereof, including all leasehold easements, rights of way, riparian rights and other rights, estates or interests therein or appurtenant thereto which were acquired by the War Department or the Navy Department for military or naval purposes during the war emergency may be transferred by the President to the board whenever the President deems such transfer to be for the best interests of the United States.

The President may at any time he deems it necessary, by order setting out the need therefor and fixing the period of such need, permit or transfer the possession and control of any part of the property taken over by or transferred to the board under this section to the War Department or the Navy Department for their needs, and when in the opinion of the President such need therefor ceases the possession and control of such property shall revert to the board. None of such property shall be sold except as may be hereafter provided by law.—(41 Stat., 994, chap. 250.)

[1920, June 5. Deficient midshipmen, reexamination and special instruction required.] That until otherwise provided by law no midshipman found deficient at the close of the last and succeeding academic terms shall be involuntarily discontinued at the Naval Academy or in the service unless he shall fail upon reexamination in the subjects in which found deficient at an examination to be held at the beginning of the next and succeeding academic terms, and the Secretary of the Navy shall provide for the special instruction of such mid-

shipmen in the subjects in which found deficient during the period between academic terms.—(41 Stat., 1028, chap. 253.)

See note to section 1519, Revised Statutes, under "Act of June 5, 1920, construed."

[1920, June 5, Annual report of Government publications.] Hereafter the head of each department and independent establishment of the Government shall on the first day of each regular session submit in writing a report to the Congress giving the aggregate number of the various publications it has issued during the preceding fiscal year giving same in detail, and shall also report the cost of paper used for such publications, cost of printing and the cost of preparation of each publication, and the number of each which has been distributed.—(41 Stat., 1037, chap. 253.)

See act of January 12, 1895, section 19 (28 Stat., 603); see also notes to sections 429–430, Revised Statutes.

[1920, June 5. Naval officers authorized to accept offices in South America.] That the President of the United States be, and he is hereby, authorized, upon application from the foreign Governments concerned, and whenever in his discretion the public interests require, to detail officers of the United States naval service to assist the Governments of the Republics of South America in naval matters: *Provided*, That the officers so detailed be, and they are hereby, authorized to accept offices from the Government to which detailed with such compensation and emoluments therefor as may be first approved by the Secretary of the Navy: *Provided further*, That while so detailed such officers shall receive, in addition to the compensation and emoluments allowed them by such Governments, the pay and allowances of their rank in the United States naval service, and they shall be entitled to the same credit while so detailed for longevity, retirement, and for all other purposes that they would receive if they were serving with the United States naval service.—(41 Stat., 1056, chap. 261.)

See joint resolution of October 13, 1914 (38 Stat., 780), and references thereunder.

[1920, June 5. Operation of Government radio stations.] That all land, ship, and airship radio stations, and all apparatus therein owned by the United States may be used by it for receiving and transmitting messages relating to Government business, compass reports, and the safety of ships. \* \* \*

SEC. 3. That all stations owned and operated by the Government, except as herein otherwise provided, shall be used and operated in accordance with the provisions of the Act of Congress entitled "An Act to regulate radio communication," approved August 13, 1912.—(41 Stat., 1061, chap. 269, Pub. Res. No. 48.)

Section 2 of this resolution provided as follows:

"That the Secretary of the Navy is hereby authorized, under terms and conditions and at rates prescribed by him, which rates shall be just and reasonable, and which, upon complaint, shall be subject to review and revision by the Interstate Commerce Commission, to use all radio stations and apparatus, wherever located, owned by the United States and under the control of the Navy Department—(a) for the reception and transmission of press messages offered by any newspaper published in the United States, its Territories

or possessions, or published by citizens of the United States in foreign countries, or by any press association of the United States, and (b) for the reception and transmission of private commercial messages: *Provided*, That the rates fixed for the reception and transmission of commercial messages, other than press messages, shall not be less than the rates charged by privately owned and operated stations for like messages and service: *Provided further*, That the right to use such stations for any of the purposes named in this section shall terminate and cease as be-



tween countries or localities or between any locality and privately operated ships, whenever privately owned and operated stations are capable of meeting the normal communication requirements between such countries or localities or between any locality and privately operated ships, and

the Secretary of Commerce shall have notified the Secretary of the Navy thereof, and all rights conferred by this section shall terminate and cease in any event two years from the date this resolution takes effect."

See act of August 13, 1912 (37 Stat., 302-308).

[1921, Mar. 1. **Naval supply account fund established.**] That deficiencies under appropriations for the naval establishment for the fiscal year 1920 and prior years shall be charged to a naval supply account fund, which is hereby established and to which shall be transferred the unexpended balances of annual appropriations for the naval establishment for the fiscal years 1919 and 1920, after two years from the expiration of the fiscal year for which made, and, out of any funds in the Treasury not otherwise appropriated, an amount equal to the value of all stores in the naval supply account on March 31, 1921, preliminary adjustments on account of stores to be made upon the certificate of the Secretary of the Navy that stores to the value certified are on hand; and from and after said date the naval supply account fund shall be charged with the cost of all stores procured for and credited with the value of all issues or sales made from the naval supply account, necessary adjustments being made on account of outstanding contracts or orders.—(41 Stat., 1169, chap. 89.)

See act of March 4, 1911 (36 Stat., 1279), and note thereto, as to the naval supply account.

[1921, Mar. 1. **Naval supply account; prices of material; losses; specific appropriations.**] The prices at which material is to be expended from the naval-supply-account shall be fixed by the Paymaster General of the Navy, subject to the approval of the Secretary of the Navy, and materials purchased during the war shall be issued at reduced prices in all cases appropriate, such differences in values and losses to be charged to the respective funds; and hereafter no charges on this account shall be made to naval appropriations.—(41 Stat., 1170, chap. 89.)

See Act of March 4, 1911 (36 Stat., 1279), and note thereto.

[1921, Mar. 3. **Typewriters and computing machines, issued for exchange; repairs in District of Columbia.**] That typewriters and computing machines transferred to the General Supply Committee as surplus, where such machines have become unfit for further use, may, in the discretion of the Secretary of the Treasury, be issued to other Government departments and establishments at exchange prices quoted in the current general schedule of supplies or sold commercially provided the price obtained is in excess of the exchange prices.—(41 Stat., 1265-1266, chap. 124.)

Repairs to typewriting machines (except bookkeeping and billing machines) in the Government service in the District of Columbia may be made at cost by the General Supply Committee, payment therefor to be effected by transfer and counter warrant, charging the proper appropriation and crediting the appropriation "General Supply Committee, Transfer of Office Material, Supplies, and Equipment."—(41 Stat., 1266, chap. 124.)

See Acts of June 5, 1920, section 7 (41 Stat., 947), and March 4, 1915, section 5 (38 Stat., 1161).

[1921, Mar. 3. **War with Germany and Austria Hungary, date of termination for certain purposes.**] That in the interpretation of any provision relating to the duration or date of the termination of the present war or of the present

or existing emergency, meaning thereby the war between the Imperial German Government and the Imperial and Royal Austro-Hungarian Government and the Government and people of the United States, in any Acts of Congress, joint resolutions, or proclamations of the President containing provisions contingent upon the duration or the date of the termination of such war or of such present or existing emergency, the date when this resolution becomes effective shall be construed and treated as the date of the termination of the war or of the present or existing emergency, notwithstanding any provision in any Act of Congress or joint resolution providing any other mode of determining the date of such termination. And any Act of Congress, or any provision of any such Act, that by its terms is in force only during the existence of a state of war, or during such state of war and a limited period of time thereafter, shall be construed and administered as if such war between the Governments and people aforesaid terminated on the date when this resolution becomes effective, any provision of such law to the contrary notwithstanding; excepting, however, from the operation and effect of this resolution the following Acts and proclamations, to wit: Title 2 of the Act entitled "The Food Control and District of Columbia Rents Act," approved October 22, 1919 (Forty-first Statutes, page 297), the Act known as the Trading with the Enemy Act, approved October 6, 1917 (Fortieth Statutes, page 411), and all amendments thereto, and the First, Second, Third, and Fourth Liberty Bond Acts, the Supplement to the Second Liberty Bond Act, and the Victory Liberty Loan Act; titles 1 and 3 of the War Finance Corporation Act (Fortieth Statutes, page 506) as amended by the Act approved March 3, 1919 (Fortieth Statutes, page 1313), and Public Resolution Numbered 55, Sixty-sixth Congress, entitled "Joint resolution directing the War Finance Corporation to take certain action for the relief of the present depression in the agricultural sections of the country, and for other purposes," passed January 4, 1921; also the proclamations issued under the authority conferred by the Acts herein excepted from the effect and operation of this resolution: *Provided, however,* That nothing herein contained shall be construed as effective to terminate the military status of any person now in desertion from the military or naval service of the United States, nor to terminate the liability to prosecution and punishment under the selective service law, approved May 18, 1917 (Fortieth Statutes, page 76), of any person who failed to comply with the provisions of said Act, or of Acts amendatory thereof: *Provided further,* That the Act entitled "An Act to amend section 3, title 1, of the Act entitled 'An Act to punish acts of interference with foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,'" approved June 15, 1917 (Fortieth Statutes, page 217), and for other purposes," approved May 16, 1918 (Fortieth Statutes, page 553), be, and the same is hereby, repealed, and that said section 3 of said Act approved June 15, 1917, is hereby revived and restored with the same force and effect as originally enacted.

Nothing herein contained shall be held to exempt from prosecution or to relieve from punishment any offense heretofore committed in violation of any Act hereby repealed or which may be committed while it remains in force as herein provided.—(41 Stat., 1359-1360, chap. 136, Pub. Res. No. 64.)



Navy statutes affected by resolution terminating war-time legislation.—This resolution affects statutory provisions relating to the Navy which in general terms apply to any emergency or national emergency and which included, without specific reference thereto, the emergency incident to the war with Germany. (32 Op. Atty. Gen., 505.)

Said resolution likewise affects statutory provisions relating to the Navy which relate in

terms to "time of peace." (32 Op. Atty. Gen., 505.)

By said resolution Congress meant to declare a condition of peace to exist as to the laws of and governing the United States; hence all laws and regulations depending for their force upon a state of war or emergency thereby ceased to be of further force. (32 Op. Atty. Gen., 505, listing certain acts relating to the Navy which were affected by the above resolution.)

[1921, Mar. 4. Transfer of lands, etc., to the Public Health Service.] In carrying out the purposes herein authorized the President is authorized and empowered, in his discretion, to assign for use of the Public Health Service, under the jurisdiction of the Secretary of the Treasury, such lands or buildings now owned or leased by the United States, not including property under the jurisdiction of the National Home for Disabled Volunteer Soldiers, which, in his judgment, can be used more efficiently for the care of patients of the Bureau of War Risk Insurance \* \* \*.—(41 Stat., 1365, chap. 156.)

See act of March 3, 1919, section 3 (40 Stat., 1303.)

[1921, Mar. 4. Arlington Memorial Amphitheater, memorials and entombments in.] That a commission is hereby created, to be composed of the Secretary of War and the Secretary of the Navy, which shall submit annually to the President, who shall transmit the same to Congress by the first Monday in December, recommendations as to what, if any, inscriptions, tablets, busts, or other memorials shall be erected, and what, if any, bodies of deceased members of the Army, Navy, and Marine Corps shall be entombed during the next ensuing year within the Arlington Memorial Amphitheater, in the Arlington National Cemetery, Virginia: *Provided*, That no memorial shall be placed and no body shall be interred in the grounds about the Arlington Memorial Amphitheater within a distance of two hundred and fifty feet from the said memorial.

SEC. 2. That the Secretary of War shall be the chairman of the said commission and the depot quartermaster of the Army in Washington shall be its executive and disbursing officer.

SEC. 3. That no inscription, tablet, bust, or other memorial shall be erected nor shall any body be entombed within the Arlington Memorial Amphitheater unless specifically authorized in each case by Act of the Congress.

SEC. 4. That no inscription, tablet, bust, or other memorial as herein provided for shall be erected to commemorate any person who shall not have rendered conspicuously distinguished service in the United States Army, Navy, or Marine Corps, nor shall the body of any such person be entombed in the Arlington Memorial Amphitheater; nor shall any such memorial be erected or any body be entombed therein within ten years after the date of the death of the person so to be commemorated, except as heretofore or hereafter authorized by Congress.

SEC. 5. That the character, design, and location of any such inscriptions, tablets, busts, or other memorials when authorized as herein provided shall be subject to the approval of the commission herein created, which shall in each case obtain the advice of the Commission of Fine Arts.—(41 Stat., 1440, chap. 169.)

See section 4878, Revised Statutes, as to burials in national cemeteries; and see act

of March 3, 1909 (35 Stat., 773), as to memorials in Naval Academy chapel.

The Commission of Fine Arts was created by act of May 17, 1910 (36 Stat., 371), which read as follows:

"That a permanent Commission of Fine Arts is hereby created to be composed of seven well-qualified judges of the fine arts, who shall be appointed by the President, and shall serve for a period of four years each, and until their successors are appointed and qualified. The President shall have authority to fill all vacancies. It shall be the duty of such commission to advise upon the location of statues, fountains, and monuments in the public squares, streets, and parks of the District of Columbia, and upon the selection of models for statues, fountains, and monuments erected under the authority of the United States and upon the selection of artists for the execution of the same. It shall be the duty of the officers charged by law to determine such questions in each case to call for such advice. The foregoing provisions of this act shall not apply to the Capitol building of the United States and the building of the Library of Congress. The commission shall also advise generally upon questions of art when required to do so by the President, or by any committee of

either House of Congress. Said commission shall have a secretary and such other assistance as the commission may authorize, and the members of the commission shall each be paid actual expenses in going to and returning from Washington to attend the meetings of said commission and while attending the same.

"SEC. 2. That to meet the expenses made necessary by this Act an expenditure of not exceeding ten thousand dollars a year is hereby authorized."

By Executive Order of July 28, 1921 (No. 3524), it was provided as follows:

"It is hereby ordered that essential matters relating to the design of medals, insignia and coins, produced by the executive departments, also the designs of statues, fountains and monuments, and all important plans for parks and all public buildings, constructed by executive departments or the District of Columbia, which in any essential way affect the appearance of the city of Washington, or the District of Columbia, shall be submitted to the Commission of Fine Arts for advice as to the merits of such designs before the executive officer having charge of the same shall approve thereof."



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